EMPLOYMENT TRIBUNALS

Claimant: Ms L Tudorica

Respondent: Once Upon a Time Day Nurseries Limited

Heard at: Watford Employment Tribunal by CVP

On: 13-15 September 2023

Before: Employment Judge Annand
Mrs C Bailey
Mrs C Smith

Representation

Claimant: Ms Tudorica
Respondent: Ms Hodson, Legal Representative

RESERVED JUDGMENT

1. The Claimant's claim for detriments on grounds of having made a protected disclosure under section 47B of the Employment Rights Act 1996 is not well-founded and is dismissed.

2. The Claimant's claim for automatically unfair dismissal on grounds of having made a protected disclosure under section 103A of the Employment Rights Act 1996 is not well-founded and is dismissed.

3. The Claimant's claim for an unauthorised deduction from wages regarding £276.49 taken from her wages in March 2022 is well-founded and succeeds. The Respondent is ordered to pay the Claimant the sum of £276.49.

4. The Claimant's claim for wrongful dismissal was withdrawn, as the Claimant accepted that she had been paid her notice pay. The claim is dismissed on withdrawal.

REASONS

Introduction

1. The Claimant was employed by the Respondent as a Nursery Chef working in the Respondent's West Drayton nursery setting. Her employment commenced on 2 August 2021, and her employment ended on 15 June 2022. On 4 May 2022, the Claimant was informed she was being dismissed with notice, and her notice period ended on 15 June 2022.

2. By Claim Form presented to the Tribunal on 28 May 2022, the Claimant brought claims of unfair dismissal, wrongful dismissal, and unauthorised deductions from wages. She noted that her claim for unfair dismissal related to whistleblowing. On 21 July 2022, the Respondent submitted a Response Form denying the claims.

3. On 25 August 2022, the Tribunal wrote to the Claimant asking her to clarify the protected disclosures which she relied upon. She replied and set out five protected disclosures.

4. On 20 January 2022, a preliminary hearing by telephone was held by Employment Judge Burge. A List of Issues was finalised and included in the Judge's Case Management Order. The Claimant relied upon five protected disclosures, alleged she had been subjected to three whistle-blowing detriments, and claimed automatic unfair dismissal on grounds of having made a protected disclosure. She also brought a claim of unauthorised deduction from wages. It was clarified this related to a deduction from her wages for nursery fees which she owed to the nursery.

5. On 14 March 2023, Employment Judge Quill permitted the Claimant to amend her claim to rely on a further protected disclosure.

6. The Tribunal heard the Claimant's claims on 13, 14 and 15 September 2023 by CVP. The Tribunal was provided with a bundle of 540 pages and four witness statements, two for the Claimant and two for the Respondent. Within the three days, we were able to hear evidence from the Claimant, and her partner, Mr Barrett, and Ms Emma Long and Ms Lorna Hackland-Crowther for the Respondent. The parties made submissions on the morning of the third day, and the Tribunal reserved its judgment.

7. At the start of the hearing, I had a discussion with the Claimant about her claims. The Claimant accepted that she had been paid her notice pay and

therefore accepted that she did not have a claim for wrongful dismissal. She agreed to withdraw her claim and I said I would dismiss her claim on withdrawal.

8. Throughout the hearing, it was apparent that the Claimant was having some difficulties with the process followed in the Tribunal. For example, when she was being cross-examined, she found it very difficult to not repeatedly interrupt Ms Hodson before she had finished asking the question. There were several occasions when the Claimant appeared to be upset or exasperated. The Tribunal were mindful that she was unrepresented and was conducting the hearing in her second language and so made several adjustments to the process to try to assist the Claimant, including:

a) finishing earlier on the first day to allow the Claimant to write down her questions for the Respondent's witnesses overnight, rather than asking her to start her cross examination without having prepared written questions.
b) offering the Claimant a number of additional short breaks when she appeared to need them, some of which she accepted, and some of which she declined on the basis that it was her preference to continue.
c) taking an early lunch break on the second day in order to allow the Claimant additional time to gather her thoughts and review her questions before continuing with her cross-examination of Emma Long.
d) advising the Claimant after the lunch break on the second day that if she would prefer her partner could ask the Respondent's witnesses the questions she had written down.
e) assisting the Claimant when she struggled to turn the points she wanted to make into a question. When this happened, I asked her to explain to me what point she wanted to make or what she disagreed with, and I then assisted her by breaking down her argument into separate points, formulating the point into a question, and putting it to the witness to respond to.
f) giving the Claimant additional time for cross examination. The Claimant was asked to complete her cross examination of the Respondent's two witnesses in one day (the second day) but was given additional time on the morning of the third day to ask questions of Ms Hackland-Crowther regarding her unauthorised deduction from wages claim.
g) allowing the Claimant to take a break before being asked to make her submissions to the Tribunal.

9. Despite these adjustments, it was apparent to the Tribunal that the Claimant continued to find the process to be frustrating and she had to be repeatedly reminded to let the witnesses finish giving their answers to her questions, and also to not interrupt myself as judge when I was speaking.

Findings of fact

10. On 2 August 2021, the Claimant started working for the Respondent as a Nursery Chef in the Respondent's West Drayton setting. Her daughter also attended the Respondent's nursery for childcare purposes. The Claimant's daughter required some additional support with her speech and language development. The Respondent met 70% of the cost of the childcare fees as the Claimant was a member of staff. Emma Long was the Nursery Manager at the West Drayton setting and Lorna Hackland-Crowther was the Registered Manager.

11. After the Claimant started working for the Respondent, her relationship with some of the other members of staff in the nursery began to deteriorate. The Tribunal accepted Emma Long's evidence that the Claimant approached the early years practitioners on a regular basis to speak with them about certain nursery practices and the education of her daughter. Emma Long said that from February to April 2022, the Claimant initiated a number of arguments. The Claimant accepted that there had been several discussions over this period that had become heated.

12. In around October 2021, the Claimant became concerned about the application of a three-warning rule. The Claimant understood that the nursery had a practice of giving a child three warnings before taking action with regards to their behaviour. The Claimant said she believed this policy was in place because she had been told this by several members of staff. The Claimant was concerned that this policy taught a child that they could ignore the first two warnings, as they knew action would only be taken after the third warning. As the Claimant wrote in her witness statement, she feared this could do 'permanent or life changing' damage to a child. For example, a child might ignore the first warning not to run into a road.

13. It was the Claimant's case that in around October 2021, she said to members of the Respondent's staff, Ruby Ayyub and Leigh-Anne Allen, and to her Manager, Emma Long, that she believed the application of the three-warning rule to the Claimant's daughter and other children might have life threatening consequences.

14. On 22 October 2021, Emma Long wrote to the Claimant setting out that the Nursery did not have a three-warning rule policy.

15. In around November 2021, the Claimant was working in the kitchen. She heard two of the children in the nursery room, who were twins, crying. When Ruby Ayyub entered the kitchen, the Claimant said that she could hear the twins crying but that she could not hear anyone shushing them. By shushing, she meant comforting. Ruby Ayyub replied in a joking manner, something to the effect of, "it's the twins". A few moments later, Ruby Ayyub left the kitchen

and then returned to tell the Claimant that Emma Long wanted to speak to her. The Claimant went to Emma Long's office. Emma Long told the Claimant that her comment had offended the staff. She said the Claimant had no knowledge of what went on in the nursery room and it was not her place to make judgements.

16. On a different occasion, in around late January 2022, the Claimant raised with Leigh-Anne Allen that another child was crying in their cot while the children were eating lunch. The Claimant said she questioned Leigh-Anne Allen about this and was told the child had special needs and did not like to be touched but needed to nap. The Claimant said she considered the other children were visibly upset and that her daughter had been shouted at for wanting to leave her seat, which the Claimant considered was the result of the frustrating environment caused by the child crying. She said she wanted the situation explained to her daughter, rather than her being shouted at.

17. On 1 February 2022, the Claimant had a heated discussion with Leigh-Anne Allen and another member of staff, Ciara Inkpen. The Claimant had attended the nursery with her daughter in a costume for Chinese New Year. The costume had some separate wings. The Claimant's daughter had become upset when the wings had been placed on a rack in the changing room, rather than being put on and worn for the day. The Claimant was upset because she had asked Leigh-Anne Allen to help her daughter into the wings, and she believed she had heard Leigh-Anne Allen agree to that request, but instead Leigh-Anne Allen had put the wings on the rack. The Claimant could hear that her daughter was upset when being taken into the nursery room. The Claimant then challenged Leigh-Anne Allen as to why she had not done as she had asked and helped her daughter into her wings. The Claimant said she was told that her daughter might get distressed if they were touched by other children. The Claimant was also told that children were not allowed to take toys into the nursery room as they could get broken and because the children often did not want to share. It was evident to the Tribunal that the Claimant did not consider this to be a reasonable explanation for her daughter not being allowed to take her wings into the nursery room and questioned the explanation. This conversation turned into a heated discussion in the hallway, which was overheard by Emma Long, who asked the Claimant and Leigh-Anne Allen to come into her office.

18. Shortly after the incident, Emma Long made a note of what occurred in the meeting in her office (p183-184). The Tribunal accepted this note was an accurate contemporaneous record of what was said in that meeting. The notes recorded that the discussion started about the wings and recorded that the Claimant was upset. The notes also recorded that the Claimant spoke over Leigh-Anne Allen when she was trying to explain what occurred. The Claimant said she could sew the wings on to the costume tomorrow and then there would be nothing the staff could do about it, became angry, and walked

out of the office. She then returned and said she was not happy about the three-warning rule. Emma Long responded that they did not have a three-warning rule. The Claimant said she had been told it was policy. The Claimant said that she knew that they did have such a rule as she could tell by her daughter's behaviour that the nursery was too lenient with her. The Claimant asked that rather than give her daughter three warnings, she wanted her daughter to be stopped on the first go. Emma Long explained to the Claimant that the staff would use their initiative and if her daughter was doing something dangerous, she would be stopped straight away. Emma Long gave the example of the Claimant's daughter drawing on the table. The staff would demonstrate and show her to draw on paper, rather than stopping her from drawing altogether. If she continued to draw on the table, then this could lead to more warnings. The Claimant said she had been told by two members of staff, Matilda and Kitana Fiddes, that the nursery had a three-warning rule. Emma Long wrote in her meeting note that she had spoken to Matilda and Kitana Fiddes who had said that they had tried to explain to the Claimant that they would stop her daughter doing something dangerous straight away, but they had found the Claimant to be reluctant to listen.

19. The Claimant's evidence regarding the meeting was that she proposed to Emma Long that a social experiment should be carried out to test the pros and cons of the three-warning rule. The Claimant said this suggestion was immediately rejected and she was told she had misunderstood and that the three-warning rule was not their policy. The Claimant's evidence to the Tribunal was she did not believe she had misunderstood, and she felt she had been told something different by Kitana Fiddes and Matilda.

20. In the meeting on 1 February 2022, the Claimant raised again that the week before she had heard a child in the nursery crying during mealtime. She said she had spoken to Leigh-Anne Allen about putting the child down later, so they did not become distressed at mealtimes. Emma Long explained to the Claimant that the staff knew the children very well and were aware of their needs. She said that the Claimant should not comment to the staff on their practices, as this was not being well received by the staff but should come to Emma Long if there was something that she was upset about.

21. In her witness statement, Emma Long said that the Claimant also raised the issue of the twins crying. Emma Long's evidence to the Tribunal was that the twins had particular needs, and a plan of action had been agreed with the staff, which the Claimant in her role of chef was not aware of. The Claimant had said in the meeting with Ms Long that the twins crying had upset her daughter, and the staff had not tried to alleviate her daughter's distress. The Claimant had not seen the incident occurring, but had heard it through the hatch, which connected the nursery and the kitchen. The Claimant wanted the staff to take her daughter to one side when a child was distressed to explain

to her why the child was unhappy. Emma Long explained to the Claimant that this was impractical.

22. In the meeting, Emma Long told the Claimant that the Respondent had a policy whereby if a child and parent being in the same setting caused problems then it would not be able to continue. She said she did not want to hear any further disagreements in the hallway and that the Claimant should come to her in the future to prevent that from happening.

23. On the same day, 1 February 2022, Ciara Inkpen completed a Statement of Events regarding the conversation that had taken place that day between the Claimant, Ciara Inkpen, and Leigh-Anne Allen. In the Statement of Events, Ciara Inkpen described the Claimant as being abrupt and argumentative. Ciara Inkpen wrote that she could see Leigh-Anne Allen was becoming uncomfortable and so tried to diffuse the situation, but that the Claimant had become aggressive in the conversation in ear shot of the children (p185).

24. The following day, 2 February 2022, Leigh-Anne Allen completed a Statement of Events form regarding the conversation which took place on 1 February 2022. She described the Claimant as arguing with her in an aggressive manner and described her coming across as rude and persistent. She described the Claimant as talking over her which made her feel intimidated. Leigh-Anne Allen described that in the nursery office, the Claimant called her a liar and referred to Leigh-Anne Allen throughout the conversation as “she”. She also said that the Claimant spoke over her when she tried to speak in the office (p191-192).

25. After the meeting between Emma Long and the Claimant on 1 February 2022, Emma Long sent the Claimant an email regarding what they had discussed (p186-187). In that email she wrote, “I would also like to clarify with you that the setting does not operate a ‘three warning rule’. This was explained previously and I had messaged on 22/10/2021. At the setting the staff will use their own judgements on this depending on how serious the behaviour is. For example, if a child was to do anything dangerous to themselves or others it would be stopped immediately. If a child was to draw on the table a member of staff would first ask them to draw on the paper and would demonstrate this to them. As this is not a dangerous behaviour, they would not necessarily be stopped from taking part in a drawing activity however a member of staff to demonstrate and support them with drawing on the paper rather than the table.”

26. In the email, Emma long also noted: “As requested, I have spoken to all staff who were in today and explained that you will be dropping and collecting [the Claimant’s daughter] from the door. You will ring the bell and wait for a member of staff to collect. This will give you the opportunity to pass on any messages or information to the staff. On collection you will again ring the bell

and wait for the staff to get [the Claimant's daughter] ready to go home and they will be able to pass on any messages or information. All conversations needed to be either at the beginning or end of the day." (p187)

27. In her witness statement, Emma Long explained: "I instructed the Claimant that she should not ask about her daughter's wellbeing during the working day, as she was becoming overly disruptive to other members of staff. I believed it was reasonable to instruct the Claimant to do this to only raise complaints with me directly. Again, this was done in order to mitigate the level of disruption the Claimant was causing to other members of staff." (para 10).

28. The Tribunal accepted Emma Long's explanation for why she asked the Claimant to only have conversations with staff about her daughter at the beginning and end of the day. The Tribunal accepted that the events of 1 February 2022 had been disruptive. The Claimant herself admitted in her evidence that the conversation on 1 February 2022 had become heated.

29. The Tribunal also accepted the evidence of Emma Long, which was supported by the Statement of Events documents completed by Ciara Inkpen and Leigh-Anne Allen, that when the Claimant disagreed with the staff, she would talk over them, and that this would come across as rude and aggressive. The Tribunal also found that the Claimant would raise issues with the staff in a persistent manner. When the Claimant was not happy with any explanation she was given, she would repeatedly raise the issue again. The Tribunal noticed that during the cross examination of the Respondent's witnesses, she would find it hard when they disagreed with her about what had happened. She said to the Tribunal, "I find it hard when our versions of reality do not match", and she would often have to be moved on to a different topic as she had exhausted the different ways in which she could put her point of view across.

30. On 22 February 2022, the Claimant had a discussion with Emma Long. In that discussion the Claimant said to Emma Long that her partner wanted to come into the nursery to ask the staff why they were liars. Emma Long explained that was not permitted and she would not allow her staff to be put in that position. Emma Long said that if her partner wanted to speak to someone, he should arrange a meeting to speak to Emma Long (p195).

31. On 24 February 2022, the Claimant's daughter was due to attend an Attention Hillingdon session at the nursery. The purpose of the sessions was to develop natural and spontaneous communication skills in children. The Claimant and her daughter arrived late. The next session, a PALS session, was in progress. PALS was a separate programme for speech and language therapy. The Claimant asked Ciara Inkpen why her daughter could not attend the PALS session. Ciara Inkpen responded that for that term, the Claimant's daughter had been put in the Attention Hillingdon sessions as the practitioners felt this

was best for her development. The Claimant did not accept this and said she could not understand why her daughter could not join the PALS session.

32. After the conversation ended, Ciara Inkpen wrote a note about the discussion and described the Claimant as having been abrupt and aggressive. Ciara wrote that she left the conversation with the Claimant and went to the office to look for support from Emma Long. She said the Claimant continued to question her and talk over her. Ciara Inkpen said to the Claimant that the professionals in the room had analysed the children's development and used their professional judgement to decide which session would be more beneficial to each child. The Claimant had responded, "What professionals? As in you guys?". At this point Emma Long overheard the conversation, but the phone rang, so Ciara Inkpen asked Leigh-Anne Allen to support her. Leigh-Anne Allen asked the Claimant to move to another room to have the discussion. At this point, Emma Long had completed her phone call and came out of the office.

33. Emma Long wrote a note about the events of 24 February 2022 that day (p203). In her note she recorded that she could hear the Claimant having a heated discussion in the hallway, and overheard the comments set out above. The phone then rang and after she had completed the call, she went outside and called the Claimant and Ciara Inkpen into the office. She wrote that the Claimant was reluctant to let her daughter attend the Attention Hillingdon sessions. Ciara Inkpen and Emma Long explained the benefits of the programme to the Claimant, and she then agreed her daughter would attend. Emma Long then told the Claimant that this was the second time a disagreement had taken place in the hallway and that she had been told previously that this was unacceptable. She said the Claimant was to come to Emma Long to raise issues and that she did not want the Claimant speaking to the staff in the way that she did.

34. Emma Long recorded in her note that the Claimant then raised that she was unhappy that no information had been given to her about her daughter's toilet training (p203). She said there had been no conversations with the staff about this since October. Emma Long noted she had witnessed a previous conversation in which Leigh-Anne Allen had suggested that the Claimant or her partner bring in knickers for the Claimant's daughter but that the Claimant's partner had said no as it was too cold. The Claimant said she had asked Kitana Fiddes to put her daughter on the toilet at nappy changing time but complained this was not being done. It was suggested again that the Claimant bring in knickers for her daughter and they would work on toilet training with her. The Claimant was against this and wanted to know why Kitana Fiddes had not given her any feedback. Emma Long said she would look into this for the Claimant.

35. After the meeting, Emma Long sent the Claimant an email setting out what had been agreed regarding the Claimant's daughter's attendance at the Attention Hillingdon sessions (p198). She then noted: "After the last disagreement that happened between you and a practitioner, I asked you to come to speak with me instead of debating in the hallway where the children can hear. This is not acceptable and I do not want debates to happen when the children are present. Again, today you and a practitioner were having a heated debate in the hallway. Myself and my deputy Leigh-Anne could hear and you did come across very argumentative during this discussion. As explained to you today I do not under any circumstances want this to happen again, if there is something you wish to discuss please come to myself or Leigh-Anne in my absence." (p198). The email referred to the staff having been upset by some of the comments the Claimant had made. It also referred to some of the staff having qualifications in childcare and referred again to the policy which stated that if having a parent working as a member of staff in the same setting as their child caused issues then the parent may be asked to find alternative childcare. The email referred to having arranged a meeting on 28 February 2022 to allow the Claimant to discuss her various concerns.

36. Early in the morning on 28 February 2022, the Claimant sent an email setting out her concerns about the wings incident on 1 February 2022. She remained of the view that "it was hard to understand why she wasn't given the wings" (p217). She also raised other issues, including concerns about the Claimant's goals for her daughter, which included potty training, not being communicated to all staff. She said she felt no one had started a potty-training routine with her, although she also noted no one had told her the point of putting her daughter on the potty at nappy change time (p217-218).

37. On 28 February 2022, the Claimant attended a meeting with Emma Long to discuss her concerns. Lorna Hackland-Crowther was present to take notes (p206-207). At the meeting, the Claimant raised her concern about the use of the word "no". She said she wanted the use of the word "no" limited to life threatening situations and that as a positive setting, the use of the word "no" in the nursery should be limited as much as possible. The Claimant later clarified in an email that if it was not a life-threatening situation then the warnings given to a child should ideally not include the word "no".

38. In the meeting, Emma Long said that it would not be possible to limit the use of the word "no". She explained that some children needed to be given clear boundaries and that especially for children who needed speech and language development therapy, they were advised to use simple phrases such as "no hitting" rather than longer more complicated sentences. She advised that her staff use their judgement to decide if "no" was appropriate in the circumstances.

39. In the meeting the Claimant also raised her concern about her daughter's potty training. She explained she had raised that toilet training was one of her daughter's development goals in October and again in January and she had not received an update on it. The Claimant said she had recently been told that Kitana Fiddes did put her daughter on the toilet at every nappy change, but the Claimant felt aggrieved as she had not been told this previously. The Claimant said she was left in "a state of disbelief" that she had been told different things by different people and she was very concerned that Emma Long and Lorna Hackland-Crowther were not more concerned about this. The Claimant said she did not believe that Kitana Fiddes was putting her daughter on the toilet at every nappy change. The Tribunal found that the Claimant frequently took a very black and white approach to matters. If she was told two different things by two members of staff then in her view, she had been lied to. She did not appear to be able to entertain the idea that someone was just mistaken. This appeared to be the case in respect of a number of issues where the Claimant believed she had been lied to, although the Tribunal did not see any evidence to support this belief.

40. In the meeting it was reiterated that there was not a three-warning rule in place, that practitioners used their judgement, and it was reiterated the Claimant was to speak to Emma Long if she had an issue.

41. Later that day, 28 February 2022, after the meeting, the Claimant overheard two members of staff saying to her daughter, "no". The Claimant said this was "yelled multiple times." The Respondent's explanation was that the Claimant's daughter went to take some garlic bread from a table which had food on it for the younger children. One of the members of staff said to the Claimant's daughter, "no [daughter's name] we need to ask before we take." The Claimant overheard this and spoke to Emma Long because she wanted to know why her daughter had been told "no". Emma Long said she would find out. She then emailed the Claimant to explain. In the email, Emma Long noted, "In this situation the practitioners within the room acted accordingly. I would ask that you trust the practitioners' judgements as we cannot continue to question practitioners everytime. In the kitchen you are unable to see and hear everything within the rooms so I do hope that you can trust that the practitioners are using their best guidments with regards to situations that arise." (p215-216). The Claimant was unhappy with the email she received and wrote a response setting out what she would have preferred the practitioners to have said to her daughter in that situation rather than using the word "no".

42. Later that day, the Claimant was told that her daughter had hit an upset child with a racket. The member of staff who told the Claimant this, Sam, had not been present when it occurred but had been asked to relay a message. Sam also said this was not the first time it had happened. The Claimant wanted to know when it had happened previously and why she had not been told.

43. On 1 March 2022, the Claimant sent an email to Emma Long regarding the fact her daughter had thrown a racket at a crying child the day before. The email subject was “A issue that could have been avoided” (p229). The Claimant reiterated that she had asked that when another child was upset for someone to explain this to her daughter. She said she had believed her wishes would be taken into account, but she felt there had been a lot of “reoccurring misleading” and that she hoped her wishes would be taken into account going forward (p229).

44. On the same day, Emma Long sent the Claimant a letter. She set out that after the meeting on 28 February 2022 the Claimant had seemed to be happy with the outcome. However, the same concerns kept arising. She explained they were able to adapt somethings to her wishes but others they could not adapt. Since the meeting, the Claimant had expressed she was still not happy. She noted, “We now feel that we are not able to offer such targeted care to an individual child” and noted they were unable to meet her expectations. They noted they would continue to offer care to the Claimant’s daughter until 1 April 2022, but that after that she would need to secure alternative childcare (p230).

45. Emma Long also met with the Claimant and explained the Respondent’s position to her in person. In the meeting, the Claimant said that Emma Long was a liar and that other members of staff were liars too. When asked why she was saying Emma Long was a liar, the Claimant said it was because she had said “she would do things and then changed it”. She said that she felt Kitana Fiddes had lied and that she did not sit her daughter on the toilet at nappy changing time. The Claimant said she would appeal the decision to move her daughter. When asked why if she was so unhappy with the staff and the nursery, she wanted her daughter to stay, the Claimant said she wanted the nursery to change its approach.

46. On 2 March 2022, Lorna Hackland-Crowther met with the Claimant to discuss the racket throwing incident. Leigh-Anne Allen was also present. Lorna noted that the Claimant’s daughter gets upset when other children are crying, and she had spoken to the team about this. It was agreed that if another child was crying, and the Claimant’s daughter took notice, they would explain to the Claimant’s daughter why the other child was upset. However, they would not do this if the Claimant’s daughter had not shown any interest in the situation. The Claimant said she was happy with this outcome.

47. The Claimant then went on to say she was not happy about not getting feedback about the toilet training, that Kitana Fiddes had lied to her, and that she did not want staff saying “no” to her daughter unless it was a life-threatening situation.

48. On 10 March 2022, the Claimant attended another meeting with Lorna Hackland-Crowther to discuss her appeal regarding the decision that the Respondent would no longer offer a childcare place to her daughter. In the notes from the meeting, it was recorded that Lorna explained the Respondent's behaviour policy and said that the staff would use the word "no" (p239). It was explained that they would use key words so that children would understand what was expected of them. It was recorded the Claimant said that she could not trust the judgement of the practitioners as long as it was seemingly completely opposite to her wishes. Lorna explained that the Respondent felt the relationship between the Claimant as a parent and the nursery had broken down and that they believed the Claimant's expectations were unrealistic and they would not be able to meet them. When asked why she wanted to keep her daughter in the nursery if she did not agree with the practice, she was recorded as replying, "it's convenient". Lorna decided that the original decision would stand, and that the Claimant's daughter would need to move to a different childcare setting as of 1 April 2022.

49. On 11 March 2022, the Claimant sent an email to Lorna Hackland-Crowther (p240). She stated that she believed the minutes of the meeting on 10 March 2022 were vague and polished. She noted she could not understand why her desire that the word "no" be used as little as possible in situations that were not life threatening was "unrealistic". The Tribunal found that this was another example of the Claimant being very persistent when she disagreed with members of staff. The Claimant had been told several times why it was impractical for the staff to reduce the use of the word "no". The Claimant did not however agree with the explanation she had been given, and so she continued to raise the same point repeatedly. The Tribunal accepted that the Claimant's tendency to repeatedly raise the same issues was disruptive and difficult for the staff to manage, and accepted that it was for this reason that the Respondent concluded it was not viable for the Claimant to work in the same nursery that her daughter attended for childcare purposes.

50. In the email of 11 March 2022, the Claimant clarified that she did not say "I cannot trust the practitioner's judgement as long as it is seemingly completely opposite to my wishes" She noted, "In actuality as I have been misquoted I said the following: 'I cannot trust the Practitioners judgement as long as it is seemingly completely opposite to my wishes and no effort was made since October for the issue to be rectified although I did specify that if it continues, it will escalate to [her daughter] not listening to my warning in a life threatening situation, which actually nearly happened, luckily we were near a small street not a busy one. Knowingly you chose to do something that could have caused (and still can cause) a lot of harm to a child by refusing to change the way you use the word no, as I asked you to. What is worse than that is that you actually led me to believe that you will do as requested in the discussion from October.' This is one instance where I was misled/lied to which instigated the failing of the trust between myself and the nursery." (p240). She also wrote that she

had been told “multiple lies” about her daughter’s goals. She said they had searched for a written copy of the goals in the meeting and could not find them written down. She noted she was still being misled and had been told the practitioners had worked on her desired goals for her daughter.

51. The Tribunal found that the Respondent was entitled to conclude the relationship of trust had broken down between the Claimant as a parent and the nursery, given the repeated allegations made by the Claimant that she had been lied to. The Tribunal accepted that this was another reason why the Respondent considered it was not viable for the Claimant to work in the same nursery that her daughter attended for childcare purposes.

52. On 11 March 2022, the Claimant also sent an email to Emma Long informing her that she had notified Ofsted who she was confident would be able to ‘mitigate the whole thing’ and that she would not need to find alternative childcare for her daughter (p243).

53. Throughout March 2022, there was further email correspondence between the Claimant and Emma Long in which each both reiterated their own respective positions regarding the various issues.

54. On 22 March 2022, the Claimant went to speak to Emma Long. Kitana Fiddes was on her break in the office and so was also present. The Claimant said she would like to arrange a meeting, which her partner could also attend, to discuss her daughter’s goals. There was a discussion about the meeting and when it could take place and what the Claimant wanted to discuss. Emma wrote a note about what happened in the meeting afterwards. Emma Long recorded in her note that the Claimant abruptly addressed Kitana Fiddes, called her a liar several times, and referred to her as “she” which Emma Long felt was rude. Emma Long noted she intervened and asked the Claimant to stop name calling, and to refer to Kitana Fiddes by her name. Emma Long explained the way the Claimant was coming across was very rude, and she noted that the Claimant raised her voice such that other staff and the children could hear her.

55. On 23 March 2022, Ruby Ayyub filled in a Statement of Events regarding an interaction she had with the Claimant. The Claimant had wanted to know what was wrong with her daughter and was asking Ruby Ayyub questions about this when Ruby was in the kitchen. The Claimant was told she would be updated about the day at pick up. Ruby Ayyub recorded that at pick up the Claimant was not able to read her handwriting from a sheet she had been handed so Ruby had read it to her. She noted that the Claimant kept interrupting her as she was reading it. She noted when she left the Claimant slammed the door behind her (p279-280).

56. On 25 March 2022, the Claimant's partner, Mr Barrett, wrote a lengthy email to Emma Long (p286-287). The email was critical of the staff regarding the failure to update the Claimant and Mr Barrett about their daughter's development goals. The email alleged that the staff did not know his daughter at all (p285-286). Emma Long send a lengthy email in response setting out what discussions had been had and when (p284-286). Mr Barrett then wrote a lengthy reply in which he was again critical of the nursery (p301-302). Again, Emma Long sent a lengthy reply setting out various examples of the Claimant's daughter's actions and behaviour being recorded on EYLog, which was a computerised system the Respondent used (p306).

57. At the end of March 2022, the Claimant was notified she would be paid in cash. The Claimant sent an email saying she was not happy about this but also that it caused her to look at her contract which originally was for longer hours than she had been working.

58. At the end of March 2022, the Claimant owed the nursery outstanding fees for her daughter's childcare. She owed £276.49. The Respondent deducted this from the Claimant's wages for March 2022 (p409). She was owed £585 in wages but as £276.49 was deducted for outstanding fees, she was paid £308.51. The Respondent's position was that as the Claimant's daughter was finishing at the West Drayton setting, the outstanding fees needed to be paid before she started at the new setting, which was also run by the Respondent.

59. On 11 April 2022, there was a discussion between the Claimant and Emma Long about the Claimant's hours. The Claimant wanted to change her finish time to give her more time to travel to collect her daughter. There was a disagreement about whether the Claimant would have time to clean up after serving lunch if she left at 12.45pm, rather than 1pm. The Claimant was exasperated that they would not agree to allow her to try this suggestion and said "for fuck's sake". She said she immediately apologised afterwards. Emma Long made a note of the meeting and recorded that they had discussed the reduced hours the Claimant would work in the interview. The Claimant was offered a good will gesture of 34 hours pay to cover the period from February 2022 onwards which is when the nursery had become busier (p311). The Claimant said she would speak to her partner.

60. On 11 April 2022, the nursery filled in a form as requested by an NHS Child Development Centre (CDC) regarding the Claimant's daughter. The Claimant considered that a part of what was written in the form contradicted what Emma Long had written in an email to her partner. In the CDC form Emma Long had written that the Claimant preferred solitary play, and had not ticked the box indicating she engaged in pretend play. In an email sent to the Claimant's partner on 5 April 2022, Emma Long had set out a number of examples of the Claimant having engaged in pretend or imaginary play. Emma Long explained in cross examination that they would not tick the box on the CDC form if the

activity was something the child did occasionally or was something the child was not confident in doing. Emma Long explained that while the Claimant's daughter was able to engage in pretend play, she did not do it very often which is why it was not ticked on the CDC form. The Tribunal accepted this explanation and did not see any contradiction between what Emma Long had written in the email on 5 April 2022, and what she had written in the CDC form. When the Claimant was asking Emma Long questions about this issue during cross examination, the Claimant became very exasperated. She wanted Emma Long to accept this was clearly contradictory. The Tribunal found this to be another example of the Claimant finding it difficult to accept an explanation that she did not agree was correct.

61. On 14 April 2022, the Claimant and Emma Long had a further discussion about the Claimant's hours. By this time, the Claimant's daughter had started in a different nursery which was also owned by the Respondent. It was agreed the Claimant's daughter could stay for an additional 30 minutes in the new setting free of charge to give the Claimant time to travel to the location to collect her.

62. On the same day, the Claimant was given a letter by Emma Long inviting her to a disciplinary meeting the following week (p313). The letter stated that the purpose of the meeting was to discuss the manner in which the Claimant had been speaking to members of staff and approaching them on their breaks to discuss concerns she had. Various other issues were mentioned including the Claimant being late for work several times and a failure to wear the correct uniform.

63. With the letter the Claimant was provided with a copy of two formal complaints made by members of staff, and various other emails the Claimant had been sent previously, along with some other documents. One of the complaints was from Kitana Fiddes, who in her complaint referred to the way she had been spoken to by the Claimant. She noted, "I feel Laura is very overpowering when she speaks, she can become very loud, abrupt and will not back down." (p314). The other formal complaint was from Ciara Inkpen who also complained about the Claimant's abrupt and confrontational manner (p315).

64. Emma Long recorded in a note of the meeting that when the Claimant was given the letter, she became very angry and raised her voice. The Claimant left the office and then returned asking who she could complain to. Emma Long responded the Claimant could set out any complaints she had to her. The Claimant said she wanted to complain about Emma Long. Emma Long said she could email Lorna Hackland-Crowther directly. Emma Long recorded in her notes that the Claimant wanted to complain about the fact that Emma Long had not handed her a tablet that morning which allowed her to sign in to work. Emma Long recorded the Claimant as being rude to Kitana Fiddes,

including turning and pointing to her and saying, “the person who made up lies, complained about me.” (p312).

65. On 15 April 2022, Kitana Fiddes submitted a further complaint against the Claimant regarding the way she had spoken to her the day before (p331-332). However, as this was sent after the Claimant had been informed of the disciplinary process commencing, Emma Long did not add it to the allegations already made. She did not discuss it with the Claimant or take it into account in the disciplinary process.

66. On 19 April 2022, Emma Long held a disciplinary meeting with the Claimant. Lorna Hackland-Crowther was present as a minute taker. The Claimant had a companion, Mr Ernest, who also took notes (p350-368). Emma Long’s evidence regarding the meeting was that the Claimant was angry, did not allow her to speak, and kept speaking over her.

67. In the meeting, the Claimant and Emma Long discussed the complaints made by the two members of staff. The Claimant put forward her version of events. Emma Long noted in her witness statement that in the meeting the Claimant agreed she had come across aggressively and agreed that some of her behaviour towards staff was not acceptable (para 39). In Mr Ernest’s notes from the meeting, he recorded that the Claimant “acknowledges she came across aggressive” (p352). The Claimant was read Lorna Hackland-Crowther’s minutes at the end of the meeting and said she wished to make some comments. She therefore wrote up her own recollection of what she said afterwards. In her notes, she accepted she sometimes came across as abrupt, but this was because she was thinking in Romanian and then she directly translates it into English (p395-396).

68. On 29 April 2022, the Claimant emailed Lorna Hackland-Crowther to complain about the negative impact that the nursery setting was having on her life (p385). She wrote that she had raised concerns about her daughter, but she had been treated as if she was the problem, rather than the other staff. She referred to her daughter’s development having been hindered for a year and half by the staff at the setting. She set out the difficulty she faced having to take her daughter to a different setting and how this left her with less time each day. She asked for Kitana Fiddes and Emma Long to be held accountable, additional time at the new setting to pick up her daughter, a formal apology for the fake accusations made against her, and asked for any discussion about her losing her role due to be lateness “to be forgotten”.

69. On 4 May 2022, Emma Long sent the Claimant a letter regarding her decision to dismiss her (p404-408). The delay in sending the letter was based on an agreement that the Claimant could review and comment on the minutes of the meeting first and this took some time given the length of the minutes. In the dismissal letter the main reason given was the Claimant’s unacceptable

behaviour towards other members of staff. The Claimant was given 6 weeks' notice but was informed she would not need to work her notice period. She was informed her last day of employment with the nursery would be 15 June 2022.

70. On 4 May 2022, the Claimant appealed the decision to dismiss her. She also wrote that she contested the ruling that she had not been misinformed about her daughter's development (p410). Lorna Hackland-Crowther treated these two issues as separate matters. She sent the Claimant a lengthy letter setting out that regarding her daughter's development, she had spoken to Emma Long, read the relevant emails, and spoken to the nursery practitioners, and she set out her findings (p413-414). She noted that Emma Long had already accepted that more could have been added to the EYLog but that feedback about the Claimant's daughter had been given verbally.

71. On 12 May 2022, the Claimant sent an email to Lorna Hackland-Crowther setting out the basis for her appeal in more detail. Regarding speaking to practitioners on their break, the Claimant noted, "The first instance involved Ruby, but that was not from employee to employee, it was as a concerned mother to the current manager as she was replacing Emma that day. Please tell me why you believe it wrong (and thusly hold it against me) for any parent to raise their concerns (especially after seeing their child distressed and upset continuously over much too long of a period) of their child's wellbeing and the care they're being given to the most senior (or truthfully ANY) member of staff available, and receiving the answer to such concerns only at the time of pick up is fundamentally cruel and near torture for any parent" (p415). In the email she set out she felt she had been treated too harshly compared to other staff, who were treated better than her, and this amounted to favouritism.

72. On 13 May 2022, the Claimant was invited to an appeal hearing on 17 May 2022.

73. On 17 May 2022, the Claimant attended the appeal meeting held by Lorna Hackland-Crowther. The Claimant was again accompanied by Mr Ernest, who took notes.

74. On 24 May 2022, the Claimant was sent the appeal outcome letter (p474-276). The Claimant's appeal was not upheld. The reason given was the fact that the manner in which the Claimant had spoken to her colleagues was rude and abrupt and she had offended people. This was behaviour which the Respondent could not tolerate.

Issues for the Tribunal to decide

75. The issues to be decided were as follows:

Protected disclosures

1. Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996?

2. The Tribunal will decide: What did the Claimant say or write? When? To whom? The Claimant says she made disclosures on these occasions:

   a) **Protected disclosure 1**: In around October 2021, the Claimant said to Ruby Ayyub, Leigh-Anne Allen and Emma Long that she believed the application of the 3 warning rule to the Claimant's daughter and other children might have life threatening consequences.

   b) **Protected disclosure 2**: In around November 2021 the Claimant said to Ruby Ayyub, whilst she was in the kitchen with her that she could hear the twins crying but no-one shushing (comforting) them. Immediately after this, Ruby returned to the kitchen to inform the Claimant that Emma Long wanted to speak to her. Ms Long told the Claimant that they are professionals and the Claimant had offended them with what she said and what happens in the rooms is not for the Claimant to know/make judgments on.

   c) **Protected disclosure 3**: In late January 2022 a child cried for a long period in his cot whilst the other children were having pudding yet seemingly distressed. The Claimant mentioned this through the hatch in the kitchen to Leigh-Anne Allen on 1st Feb 2022 and on 28th Feb 2022 she mentioned it to Emma Long, Lorna Hackland-Crowther and Leigh-Anne Allen.

   d) **Protected disclosure 4**: The Claimant raised concerns over being misled by her daughter's key-worker (Kitana Fiddes) concerning her established goals and their methods of achieving them (there was no written plan anywhere for her daughter's goals for the period of October 2021 till January 2022). The disclosures were (1) to Emma Long, Lorna Hackland on 28th Feb 2022, (2) at a meeting on 10th March 2022 between Lorna, Karling and Claimant, (3) 10th May 2022 when the Claimant raised a formal complaint about being misled (and was continuously mentioned at every opportunity since).

   e) **Protected disclosure 5**: The Claimant said that Emma is not fit to be Management because her decisions are one-sided and she warps the reality of situations, she knowingly conceals bad practices, she doesn't have the children's best interest at heart by not following proper procedures, not following proper procedures regarding whistle-blowing. The Claimant raised this concern with Lorna Hackland on 29th April 2022, 17th May 2022 by email to which no

reply was received on 29th Apr '22 and another Email in response to her raising on 17th May, saying they're dismissed.

f) **Protected disclosure 6**: The Respondent had serious concerns for 8 months regarding the Claimant's daughter's behaviour and didn't notify the Claimant at any point regarding them. She found out when it was stated on a medical form in mid March 2022 and raised her complaint afterwards verbally. The Claimant also says she told Lorna Hackland, Sophie (Feltham manager) on 17th May 2022 and at the dismissal meeting.

3. Did she disclose information?

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

5. Was that belief reasonable?

6. Did she believe it tended to show that:

   (i) a person had failed, was failing or was likely to fail to comply with any legal obligation;
   (ii) the health or safety of any individual had been, was being or was likely to be endangered;
   (iii) information tending to show any of these things had been, was being or was likely to be deliberately concealed.

7. Was that belief reasonable?

8. If the Claimant made a qualifying disclosure, it was a protected disclosure because it was made to the Claimant's employer.

Detriments

9. Did the Respondent do the following things:

   a) Did Emma Long tell the Claimant she was not allowed to ask about the well being of her daughter during the day;
   b) Did Emma Long tell the Claimant that she could not ask a nursery worker about her daughter at the end of the day - she could only ask Emma Long;
   c) By notice on 1 March 2022 to commence on 1 April 2022, make the Claimant move the nursery provision for her daughter which necessitated a longer trip before she started work without increasing the Claimant's hours and saying she would need to pay if the Claimant was late collecting her daughter.

10. By doing so, did it subject the Claimant to detriment?

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

Automatic Unfair dismissal

12. Was the Claimant dismissed?

13. Was the reason or principal reason for dismissal that the Claimant made a protected disclosure?

14. If so, the Claimant will be regarded as unfairly dismissed.

Unauthorised deductions

15. Were the wages paid to the Claimant on less than the wages she should have been paid?

16. Was any deduction required or authorised by statute?

17. Was any deduction required or authorised by a written term of the contract?

18. Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

19. Did the Claimant agree in writing to the deduction before it was made?

20. How much is the Claimant owed?

The relevant law

76. The Employment Rights Act 1996 (ERA) sets out the circumstances in which a worker who makes a protected disclosure is protected from detrimental treatment and/or dismissal. Part IVA of the ERA defines the meaning and scope of 'protected disclosures'. Section 47B ERA confers a right on workers not to be subjected to any detriment on the ground that they have made a protected disclosure. Section 103A ERA stipulates that an employee will be regarded as having been unfairly dismissed if the principal reason for his or her dismissal is that he or she made a protected disclosure.

Protected disclosure

77. In order for a disclosure to be covered by the Employment Rights Act, it has to constitute a 'protected disclosure'. This means that it must satisfy three

conditions 1) it must be a 'disclosure of information', 2) it must be a 'qualifying' disclosure - one that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of six 'relevant failures' has occurred or is likely to occur, and 3) it must be made in accordance with one of six specified methods of disclosure.

Disclosure of information

78. Section 43B ERA defines a qualifying disclosure as 'any disclosure of information' relating to one of the specified categories of relevant failure. The statute provides that a disclosure of information can occur even where the person receiving the information is already aware of it.

79. In *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] ICR 325, the EAT said the ordinary meaning of giving 'information' is 'conveying facts'. In that case, the solicitor's letter had not conveyed any facts. It simply expressed dissatisfaction with the employee's treatment. For that reason, it did not amount to a disclosure of information and could not be a protected disclosure. The EAT commented that if a hospital employee were to say 'the wards have not been cleaned for the past two weeks' or 'yesterday, sharps were left lying around', that would convey information. In contrast, an employee who stated 'you are not complying with health and safety requirements' would merely be making an allegation.

80. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850, CA, the Court of Appeal held that 'information' is capable of covering statements which might also be characterised as allegations. Thus, 'information' and 'allegation' are not mutually exclusive categories of communication. The key point from *Cavendish Munro Professional Risks Management Ltd v Geduld* is that a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a relevant failure. The Court of Appeal adapted the example given in *Cavendish Munro* of a hospital worker informing his or her employer that sharps had been left lying around on a hospital ward. The Court explained that if instead the worker had brought his or her manager to the ward and pointed to the abandoned sharps, and then said 'you are not complying with health and safety requirements', the oral statement would derive force from the context in which it was made and would constitute a qualifying disclosure.

81. The communication of an expression of opinion can potentially constitute a disclosure of information. In *McDermott v Sellafield Ltd and ors* [2023] EAT 60, the claimant brought whistleblowing claims against the respondents relying, among other things, on her expression of her opinion that the respondent was taking the wrong approach in dealing with allegations of sexual harassment. The claimant was asked to conduct focus group interviews with members of a team with a view to flushing out any evidence

that might support the allegations. However, the claimant responded that, instead of this approach, there should be a formal investigation. An employment tribunal concluded, among other things, that the claimant's expression of her opinion was not a disclosure of information. On appeal, the EAT was satisfied that the tribunal had not made the principled error of assuming that, just because the claimant's communication conveyed an expression of opinion, it could not also have communicated information sufficient to fulfil the concept of a qualifying disclosure. Rather, the tribunal had concluded that it was 'no more than' an expression of opinion as well as not even being 'an allegation such that in an appropriate context it might nonetheless qualify for protection'. However, the EAT went on to hold that the tribunal had been particularly influenced by matters that were more pertinent to the question of whether the claimant reasonably believed that the information communicated tended to show a relevant wrongdoing. The tribunal needed as a starting point to engage with the claimant's case as to the nature of the information embedded in what she had said, in order to assess whether that was the sort of content that she could potentially regard as tending to show relevant wrongdoing, and, if so, whether she in fact so regarded it, and, if so, reasonably so regarded it. Further, the tribunal needed to judge whether the claimant was disclosing information at the point when she made the disclosure. The EAT concluded that the tribunal had erred in its consideration of whether this disclosure was a disclosure of information.

82. In *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540, the EAT held that two or more communications taken together can amount to a qualifying disclosure even if, taken on their own, each communication would not.

Public interest

83. Section 43B(1) ERA requires that, in order for any disclosure to qualify for protection, the person making it must have a 'reasonable belief' that the disclosure 'is made in the public interest'. A tribunal is not tasked with asking itself the objective questions of what the public interest is, and whether a disclosure served it. This section requires the Tribunal to gauge what the worker considered to be in the public interest, whether the worker believed that the disclosure served that interest, and whether that belief was held reasonably.

84. The case of *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening)* [2018] ICR 731 concerned a number of disclosures about accounting practices at a private company. An employee alleged that the Mayfair office was misstating costs and liabilities, and that this negatively affected the earnings of over 100 senior managers, including himself. An employment tribunal found that he had a reasonable belief that the disclosures were made in the interests of all senior managers and concluded that this was a sufficient group of the public for the matter to

engage the public interest. The EAT observed that the words 'in the public interest' were introduced to do no more than prevent a worker from relying on a breach of his or her own contract of employment where the breach is of a personal nature and there are no wider public interest implications. In the EAT's view, a relatively small group may be sufficient to satisfy the public interest test. This is a necessarily fact-sensitive question. The Court of Appeal dismissed the company's further appeal. In the Court's view, even where the disclosure relates to a breach of the worker's own contract of employment (or some other matter where the interest in question is personal in character) there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest, as well as in the personal interest of the worker. In this regard, the following factors might be relevant 1) the numbers in the group whose interests the disclosure served, 2) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed, 3) the nature of the wrongdoing disclosed (was it deliberate wrongdoing?), and 4) the identity of the alleged wrongdoer.

Qualifying disclosures - six categories

85. A qualifying disclosure is defined in section 43B as 'any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following':
    - that a criminal offence has been committed, is being committed or is likely to be committed — section 43B(1)(a)
    - that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject — section 43B(1)(b)
    - that a miscarriage of justice has occurred, is occurring or is likely to occur — section 43B(1)(c)
    - that the health or safety of any individual has been, is being or is likely to be endangered — section 43B(1)(d)
    - that the environment has been, is being or is likely to be damaged — section 43B(1)(e)
    - that information tending to show any matter falling within any one of the above has been, is being or is likely to be deliberately concealed — section 43B(1)(f).

Section 43B(1)(b) - Legal obligations

86. A disclosure which, in the reasonable belief of the worker making it, is made in the public interest and tends to show that a breach of a legal obligation has occurred (or is occurring or is likely to occur) amounts to a qualifying disclosure. This covers not only those obligations set down in statute and secondary legislation but also any obligation imposed under the common law and contractual obligations.

87. A worker need not always be precise about what legal obligation he or she envisages is being breached or is likely to be breached for the purpose of a qualifying disclosure. Where it is obvious that some legal obligation is engaged then the disclosure can potentially qualify for protection without specifics as to the legal obligation envisaged (*Bolton School v Evans* [2006] IRLR 500, EAT).

88. In less obvious cases however the worker will have to at least identify the nature of the legal wrong that he or she believes to be at issue, as opposed to setting out a moral or ethical objection. In *Eiger Securities LLP v Korshunova* [2017] ICR 561 EAT, a financial instruments trader claimed that she made a qualifying disclosure when she challenged her line manager about his practice of logging in to her computer and instant messaging account and conducting trades with clients without informing them that they were dealing with him instead of her. A tribunal accepted that this tended to show a breach of a legal obligation, but the EAT overturned that decision. It accepted the company's argument that the tribunal did not find that the trader reasonably believed that there had been a breach of a legal obligation. The tribunal had found that the trader reasonably believed that her line manager was breaking some industry guidance or rules but did not specifically consider whether she reasonably believed that such guidance or rules involved legal obligations. While the tribunal had stated that the trader reasonably believed that there must be a legal obligation on the company's employees not to mislead clients about who was conducting the communication, it did not identify any such legal obligation. It could not be said that not informing a client of the identity of the person with whom he or she is dealing where that person is trading from another person's computer is plainly a breach of a legal obligation. The EAT clarified that the identification of the legal obligation would not have to be detailed or precise but would have to be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation.

<u>Section 43B(1)(d) - Health or safety</u>

89. A disclosure which, in the reasonable belief of the worker, is made in the public interest and tends to show that the health or safety of any individual has been, is being or is likely to be endangered is a qualifying disclosure.

90. A worker will need to have provided sufficient details in the disclosure of the nature of the perceived threat to health and safety, but the threshold for this is not high. In *Fincham v HM Prison Service EAT* 0925/01, the employee wrote a letter containing the statement: 'I feel under constant pressure and stress awaiting the next incident.' The EAT said: 'We found it impossible to see how a statement that says in terms "I am under pressure and stress" is anything

other than a statement that [the employee's] health and safety is being or at least is likely to be endangered… [That] is not a matter which can take its gloss from the particular context in which the statement is made.'

91. The worker's belief must be reasonable. A wholly irrational belief will not acquire protection (*Smith and ors v Ministry of Defence* ET Case No.1401537/04).

Section 43B(1)(f) - Concealment of information

92. A disclosure which, in the reasonable belief of the worker, is made in the public interest and tends to show 'that information tending to show any matter falling within any one of the other five categories of relevant failure has been, or is likely to be deliberately concealed' is a qualifying disclosure. This category protects not only disclosures of substantive wrongdoing and malpractice but also information tending to show that there has been or is likely to be a cover-up or deliberate concealment of that information.

Method of disclosure

93. A qualifying disclosure that is made to the worker's employer will be a protected disclosure.

Detriment

94. Section 47B ERA provides that a worker has the right not to be subjected to any detriment by his or her employer on the ground that the worker made a protected disclosure. The term 'detriment' is not defined in the ERA, but it's meaning has been considered in a number of cases. In *Ministry of Defence v Jeremiah* [1980] ICR 13, CA, Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. This description was adopted by the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL. It is not necessary for there to be physical or economic consequences to the employer's act or inaction for it to amount to a detriment. What matters is that, compared with other workers (hypothetical or real), the complainant is shown to have suffered a disadvantage of some kind.

95. In *Tiplady v City of Bradford Metropolitan District Council* [2020] ICR 965, CA, the Court of Appeal expressed the view that for a detriment to come within the scope of section 47B, it must be a detriment to which the worker has been subjected in the 'employment field'. A council employee's whistleblowing detriment claim could not, therefore, cover detriments she alleged to have encountered in her capacity as a user of the council's services.

96. The test for causation was set out by Elias LJ in *Fecitt and ors v NHS Manchester (Public Concern at Work intervening)* [2012] ICR 372, CA. The question for the Tribunal is whether the protected disclosure materially influenced (more than trivially) the employer's treatment of the whistle-blower.

97. In any detriment claim under section 47B, it is for the employer to show the ground on which any act, or deliberate failure to act, was done (section 48(2) ERA). Once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant, namely that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment, then the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.

Dismissal

98. Section 103A ERA renders the dismissal of an employee automatically unfair where the reason, or, if more than one reason, the principal reason, for his or her dismissal is that he or she made a protected disclosure. Therefore, an employee will only succeed in a claim of unfair dismissal if the tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure. The principal reason is the reason that operated on the employer's mind at the time of the dismissal (*Abernethy v Mott, Hay and Anderson* [1974] ICR 323, CA). If the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim will not be made out.

99. Lord Justice Elias confirmed in *Fecitt and ors v NHS Manchester (Public Concern at Work intervening),* that the causation test for unfair dismissal is stricter than that for unlawful detriment under section 47B. A claim for a detriment may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker. Section 103A requires the disclosure to be the primary motivation for a dismissal.

Unauthorised deduction from wages

100. Section 13(1) ERA states, "An employer shall not make a deduction from wages of a worker employed by him unless— (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction." As a result, there are three types of authorised deduction: (i) Deductions made by virtue of a statutory provision: section 13(1)(a), (ii) Deductions made under a "relevant provision" of the worker's contract: section 13(1)(a), and (iii) Deductions to

which the worker has previously signified his or her agreement in writing: section 13(1)(b).

101. An employer must have authority to make a deduction from the worker's "wages" in order to satisfy section 13(1). In *Potter v Hunt Contracts Ltd* [1992] ICR 337, EAT, the claimant worked as a driver for the respondent, which agreed to pay the £545 cost of an HGV driving course on the understanding that the claimant would repay some or all of the cost on leaving. The claimant's employment was terminated just over a month later, with £523 still outstanding on the loan agreement. As this was more than the amount due to him in wages on his departure, he was paid nothing. The EAT held that section 13(1) requires a deduction of wages to be authorised in writing. The loan agreement was in writing, but it did not indicate with sufficient clarity that the repayment would or could be made by way of a deduction from wages. The employer had therefore made an unauthorised deduction.

The Tribunal's Conclusions

Protected disclosures

Protected disclosure 1

102. The Claimant alleges she made a protected disclosure when, in around October 2021, the Claimant said to Ruby Ayyub, Leigh-Anne Allen and Emma Long that she believed the application of the three-warning rule to the Claimant's daughter and other children might have life threatening consequences.

103. The Tribunal found that the Claimant did say to Ruby Ayyub, Leigh-Anne Allen and Emma Long that she believed the application of the three warning rule to the Claimant's daughter and other children might have life threatening consequences. The Respondent did not dispute that this conversation took place but argued that this was simply the Claimant voicing her concern and her view without sufficient factual content and specificity to be capable of showing a relevant failure. Emma Long accepted in cross-examination that this had been said to her.

104. The Tribunal did not however find that this amounted to a disclosure of information which conveyed facts. The Claimant was expressing her opinion about a rule which she believed the Respondent applied to the children, but the Tribunal could not identify any factual content. The Tribunal considered this carefully in light of the guidance from the case law set out above that both an expression of an opinion and an allegation can amount to a disclosure of information. In this case, however, the Tribunal found this a general statement of opinion which was devoid of specific factual content. This was merely a worker expressing her opinion.

105. In the event that we were wrong on this point, the Tribunal went on to consider if the Claimant believed her disclosure was in the public interest. The Tribunal concluded that she did. The Tribunal accepted the Claimant's oral evidence that she felt strongly that the three-warning rule was dangerous for her child and for the other children in the nursery. The Tribunal heard evidence from the Respondent that at one point the nursery had 10 children attending. While this is a small group, the Tribunal accepted that it was sufficient for the public interest to be engaged, given the context is a childcare provider looking after very young children. The Tribunal also concluded that it was reasonable for the Claimant to believe that her 'disclosure' was in the public interest, given she believed it could have "life threatening" consequences.

106. The Tribunal did not find that the Claimant believed her disclosure tended to show that the nursery had failed, was failing or was likely to fail to comply with any legal obligation. In the hearing, the Claimant referred to believing that the application of the three-warning rule was not consistent with the Respondent's wording on its website about the type of environment it fostered. The Tribunal accepted the Respondent's argument that the contents of the website, which was in effect a mission statement, did not amount to a legal obligation.

107. The Claimant also referred in her witness statement to the Respondent having a moral and contractual duty to protect the parents and children. A moral duty does not amount to a legal obligation and the Claimant did not refer to any specific contractual provisions.

108. The Tribunal did however accept that the Claimant believed her disclosure tended to show that the health or safety of any individual had been, was being, or was likely to be endangered. This is apparent from the wording of the disclosure itself. She clearly thought, and communicated, the rule could lead to children being harmed, and the Tribunal accepted that belief was reasonable.

109. As a result, the Tribunal concluded that the Claimant's alleged protected disclosure 1 did not amount to a protected disclosure because there was no disclosure of information. If we are wrong in that respect, it does not make any difference to the outcome of the Claimant's claim. As is explained below, the Tribunal did not find that the Claimant was subjected to any of her alleged detriments, or was dismissed, because she had raised any concerns about the three-warning rule.

<u>Protected disclosure 2</u>

110. The Claimant alleges she made a protected disclosure when, in around November 2021, the Claimant said to Ruby Ayyub, whilst she was in the kitchen with her that she could hear the twins crying but no-one shushing

(comforting) them. Immediately after this, Ruby returned to the kitchen to inform the Claimant that Emma Long wanted to speak to her. Ms Long told the Claimant that they are professionals and the Claimant had offended them with what she said and what happens in the room is not for the Claimant to know/make judgments on. The Respondent accepted that these events occurred.

111. The Tribunal found that the Claimant did make a disclosure of information which conveyed facts. She conveyed to Ruby Ayyub that when she was in the kitchen she could hear the twins crying but could not hear anyone shushing them. However, the Tribunal did not find that the Claimant believed that this disclosure was in the public interest. This disclosure related to a single incident that concerned just two children in the nursery. She did not allege this was a re-occurring issue or that all the children in the nursery were left to cry without being shushed. The Tribunal considered that at the time she said this, she was only concerned with the twins, and not whether by saying this, she was raising a matter that was relevant to the wider public.

112. If the Claimant did consider her disclosure was in the public interest, the Tribunal found that that belief was not reasonable. This related to a single event that concerned only two children. Furthermore, the Tribunal accepted the Respondent's argument that children crying in a nursery is a common occurrence. They cannot always be comforted immediately for one reason or another. There was no wider allegation of neglect or harm. Consequently, it was not reasonable for the Claimant to consider that this disclosure engaged the public interest.

113. The Tribunal did not find that the Claimant believed her disclosure tended to show that the nursery had failed, was failing or was likely to fail to comply with any legal obligation. In the hearing, the Claimant referred to believing that leaving the twins to cry without comforting them was not consistent with the Respondent's wording on its website about the type of environment it fostered. As noted above, the Tribunal did not find that the wording of the Respondent's website regarding the type of environment that they aimed to create, amounted to a legal obligation.

114. The Tribunal also did not find that the Claimant believed her disclosure tended to show that the health or safety of any individual had been, was being, or was likely to be endangered. The Claimant's disclosure indicated that she felt the twins should have been shushed or comforted when they were crying, but she did not go so far as to say that the twin's health and safety was at risk by the failure to comfort them.

115. Further, the Tribunal did not find that it was reasonable for the Claimant to believe her disclosure tended to show that the health or safety of any individual had been, was being, or was likely to be endangered for the same

reasons set out above. The disclosure was a single factual statement about what the Claimant had heard, and while it conveyed, she thought they should have been comforted, there was no other sentence which was linked to the twin's health or their safety.

116. As a result, the Tribunal concluded that the Claimant's alleged protected disclosure 2 did not amount to a protected disclosure.

Protected disclosure 3

117. The Claimant alleges she made a protected disclosure when, in late January 2022, a child cried for a long period in his cot whilst the other children were having pudding yet seemingly distressed. The Claimant mentioned this through the hatch in the kitchen to Leigh-Anne Allen on 1 February 2022 and on 28 February 2022 she mentioned it to Emma Long, Lorna Hackland-Crowther, and Leigh-Anne Allen.

118. The Respondent accepted that in the meeting on 28 February 2022 the Claimant had raised a concern with Emma Long about a child crying and said she had made suggestions to Leigh-Anne Allen about putting the child down later so as to avoid mealtimes. This was referred to in Emma Long's meeting notes (p184). It was also accepted that there were further discussions about the Claimant's daughter being caused distress by this, and the Claimant wanted an explanation to be given to her daughter when other children were crying. The Tribunal did not hear evidence from Leigh-Anne Allen about what happened on 1 February 2022. The Tribunal therefore accepted the Claimant's evidence in her witness statement that when she heard the child crying, she raised this with Leigh-Anne Allen, and Leigh-Anne Allen said the child needed a nap and did not like being touched. The Claimant said she pointed out that the other children were visibly distressed and gave the example of her daughter who had tried to leave her chair and was shouted at for doing so. She referred to the fact she believed her child tried to leave her seat because of the frustrating environment caused by the child crying.

119. The Tribunal found that the Claimant did make a disclosure of information which conveyed facts on both 1 and 28 February 2022. She conveyed the fact that she had heard a child crying during mealtimes. She also conveyed her belief that the other children, and her child, were distressed by this.

120. The Tribunal found however that the Claimant did not believe she was making a disclosure that was in the public interest. The Claimant clearly had a different view about how the practitioners should have dealt with the situation, but she was relaying information about one minor event which occurred for a limited period of time. She was not suggesting the children in the nursery were regularly distressed or even distressed for anything other than a brief period on one day.

121. Even if the Claimant did believe that her disclosure was in the public interest, then the Tribunal did not find it was reasonable for her to believe that. A child crying in a nursery is not uncommon, and other children finding that distressing, is also not uncommon. But what is being described is such a normal occurrence that the Tribunal did not find that the Claimant reasonably believed her disclosure was in the public interest. In the event that we were wrong in this respect, the Tribunal went on to consider the other aspects of the legal test.

122. The Tribunal did not find that the Claimant believed her disclosure tended to show that the nursery had failed, was failing or was likely to fail to comply with any legal obligation. In the hearing, the Claimant again relied on the Respondent's "mission statement" on its website. As noted above, the wording on the Respondent's website did not refer to or create a legal obligation.

123. The Tribunal also did not find that the Claimant believed her disclosure tended to show that the health or safety of any individual had been, was being, or was likely to be endangered. The Claimant's disclosure was that a child was crying, and other children were distressed. The reason for her disclosure was to suggest that the matter should have been handled differently by the staff, but she did not go so far as to say that either the health and safety of the child who was crying was at risk or that the other children's health and safety was at risk by virtue of their distress.

124. Further, the Tribunal did not find that it was reasonable for the Claimant to believe her disclosure tended to show that the health or safety of any individual had been, was being, or was likely to be endangered. Children cry very frequently when they are young, but each time they do that does not mean that their health is at risk. Nor their safety. The fact that children are momentarily distressed by a noise again does not mean that their health is at risk, nor their safety. Consequently, it was not reasonable for the Claimant to believe that by simply stating that one child was crying, and other children were distressed by this, she was making it clear she had health and safety concerns.

125. As a result, the Tribunal concluded that the Claimant's alleged protected disclosure 3 did not amount to a protected disclosure.

<u>Protected disclosure 4</u>

126. The Claimant alleges she made a protected disclosure when she raised concerns over being misled by her daughter's key-worker (Kitana Fiddes) concerning her established goals and their methods of achieving them (there was no written plan anywhere for her daughter's goals for the period of

October 2021 till January 2022). The Claimant alleged these disclosures were made (1) to Emma Long, Lorna Hackland-Crowther on 28 February 2022, (2) at a meeting on 10 March 2022 between Lorna, Karling and Claimant, and (3) on 10 May 2022 when the Claimant raised a formal complaint about being misled, and was continuously mentioned at every opportunity since.

127. The Respondent did not dispute that the Claimant repeatedly raised her concern that she had been misled by Kitana Fiddes regarding her daughter's established goals. It was also accepted that she raised that the goals were not written down in a plan between October 2021 and January 2022.

128. The Tribunal accepted that the Claimant made a disclosure of information to Emma Long, Lorna Hackland-Crowther on 28 February 2022, at a meeting on 10 March 2022, and on 10 May 2022, when the Claimant raised a formal complaint. She disclosed her belief she had been misled and factually alleged that there was no written plan anywhere.

129. The Tribunal did not find that the Claimant believed her disclosure was in the public interest. The disclosure related only to the allegation that Kitana Fiddes had lied to her about her daughter. The allegation was not that Kitana Fiddes lied to her and lied to other parents about their children. The allegation also related only to her daughter's goals and did not relate in any way to the goals for the other children in the nursery. The Tribunal concluded the Claimant was only raising these matters out of her concern for her own child. If the Claimant did believe her disclosure was in the public interest, then the Tribunal found it was not reasonable for the Claimant to have believed that, given the issue was clearly confined to her daughter's goals, and not a matter of broader public significance or interest. However, the Tribunal went on to consider the other aspects of the legal test in the event that we were wrong in this respect.

130. The Tribunal did not find that the Claimant believed her disclosure tended to show that the nursery had failed, was failing or was likely to fail to comply with any legal obligation. The Claimant did not suggest that any legal obligation was being breached other than the wording on the website. As set out above, the wording on the Respondent's website was not describing a legal obligation it was under, and the aims set out on the website did not create a legal obligation.

131. The Tribunal also did not find that the Claimant believed her disclosure tended to show that the health or safety of any individual had been, was being, or was likely to be endangered. The Claimant was claiming she had been misled by Kitana Feddes in two respects. Firstly, she alleged that Kitana had not given her an update on her daughter's progress with her potty training, whereas Kitana said she had updated the Claimant about her daughter's progress. Secondly, she was alleging that Kitana was misleading her because she said she was putting her daughter on the potty at nappy change time, and

the Claimant did not believe that was occurring. Finally, she was aggrieved about the fact that her goals for her daughter had not been written down. Raising that she was being misled by Kitana is not the same as alleging that Kitana was endangering her daughter's health or safety. There was nothing in what the Claimant was alleging about Kitana, or the lack of written goals, that related to her daughter's health or safety.

132. As a result, the Tribunal concluded that the Claimant's alleged protected disclosure 4 did not amount to a protected disclosure.

Protected disclosure 5

133. The Claimant alleges she made a protected disclosure when the Claimant said that Emma Long is not fit to be Management because her decisions are one-sided and she warps the reality of situations, she knowingly conceals bad practices, she does not have the children's best interests at heart by not following proper procedures, and did not follow proper procedures regarding whistleblowing. The Claimant claimed she raised these concerns with Lorna Hackland-Crowther on 29 April 2022 and by email on 17 May 2022.

134. The Tribunal found the Claimant did not raise these concerns on 29 April 2022. The email sent by the Claimant to Lorna Hackland-Crowther on 29 April 2022 made no mention of Emma Long not being fit to be a manager, did not refer to her decisions being one-sided, did not say she warps the reality of situations, did not say she knowingly conceals bad practices, and did not say she did not have the children's best interests at heart. There is no reference to Emma Long not following proper procedures and/or not following proper procedures regarding whistleblowing.

135. The email stated that Emma Long had coerced the Claimant into finding an alternative setting for the Claimant's daughter, and alleged she did this because the Claimant had raised concerns about her daughter, which were then poorly followed up by Emma Long. She alleged Emma Long made light of her concerns and was not concerned about the consequences of her daughter's development. She said Emma Long made a "quick and uninformed decision" that the Claimant and her daughter being in the same setting had led to tension and conflict and had quickly dismissed the suggestion that the reason for this was the poor performance of the staff. These allegations are materially different from those set out in the Claimant's alleged protected disclosure 5.

136. The Claimant did go on to make the allegations about Emma Long set out in protected disclosure 5 on 17 May 2022, in her appeal meeting with Lorna Hackland-Crowther and in writing that day (p487-490). However, this occurred after the Claimant had been dismissed and after the three alleged detriments had occurred. Therefore, the Tribunal found that the complaints about Emma

Long, made on 17 May 2022, could not in any way have influenced the alleged detriments or the Claimant's dismissal.

137. The Tribunal went on to consider if the allegations the Claimant made about Emma Long in her email on 29 April 2022 could amount to a protected disclosure, even though the allegations were different to those set out in her alleged protected disclosure 5.

138. The Tribunal found the allegations made in the email of 29 April 2022 did amount to a disclosure of information which contained facts. The Claimant's disclosure contained complaints about Emma Long but also contained the factual information that out that Emma Long had decided that the Claimant needed to find a new childcare setting for her daughter.

139. The Tribunal did not find that the Claimant believed the disclosure was in the public interest. The allegations set out in the email of 29 April 2022 are much more specific than those alleged in protected disclosure 5. The criticisms in the email relate to Emma Long's decision regarding her daughter's childcare, a failure to follow up the Claimant's concerns, and the fact she had made a quick and uninformed decision that the Claimant's daughter would need to find an alternative nursery to attend. The allegations did not, at this stage, allege poor performance by Emma Long more broadly. Therefore, the Tribunal concluded that the Claimant was really only concerned with this one issue and her situation, and did not believe she was making a disclosure in the public interest. If the Claimant did believe that her disclosure was in the public interest, then the Tribunal did not find that it was reasonable for her to believe that. What the Claimant was raising was so specific to her circumstances, and the decision to not offer her daughter a place in the nursery anymore, that it was not reasonable for the Claimant to believe that there was any broader public interest in this personal childcare issue.

140. Further, the Tribunal also did not find that the Claimant reasonably believed that her disclosure tended to show that Emma Long had failed, was failing or was likely to fail to comply with any legal obligation or that her disclosure tended to show that the health or safety of any individual had been, was being, or was likely to be endangered. The allegations related to a decision that Emma Long made but there was no suggestion or even hint that Emma Long was acting contrary to any legal obligation she was under. The Claimant has not identified any legal obligation which would be applicable.

141. The only possible indication of a health and safety concern was the Claimant's complaint that Emma Long had made light of her concerns and was not concerned about the consequences for her daughter's development. The Tribunal did not find that this amounted to a concern that the Claimant's daughter's health and safety was being endangered. Raising a lack of concern about something is not the same as saying that someone's actions

are putting her daughter's health and safety at risk. If the Claimant had gone on to say that Emma Long's lack of concern about her daughter's development put her daughter at risk, she may have had a stronger argument. However, the Tribunal kept in mind that the Claimant was primarily concerned with her daughter's potty training, and any lack of development in this area does not give rise to any obvious health and safety issue.

142. As a result, the Tribunal concluded that the Claimant's alleged protected disclosure 5 did not amount to a protected disclosure.

Protected disclosure 6

143. The Claimant alleges she made a protected disclosure when the Respondent had serious concerns for 8 months regarding the Claimant's daughter's behaviour and didn't notify the Claimant at any point regarding them. She found out when it was stated on a medical form in mid March 2022 and raised her complaint afterwards verbally. The Claimant also says she told Lorna Hackland-Crowther and Sophie (the manager at Feltham) on 17 May 2022 and at the dismissal meeting.

144. The Respondent's failure to tell the Claimant something over a period of 8 months cannot amount to a disclosure that the Claimant made. Therefore, the only part of protected disclosure 6 which could amount to a disclosure is the complaint made by the Claimant to the Respondent after March 2022, and again in May 2022.

145. The medical forms the Claimant was referring to are the CDC forms, which the Respondent completed on 11 April 2022 (p252). Therefore, the complaint which the Claimant made about this must have occurred after this date. Although the Claimant set out in her witness statement that when she received the CDC forms, she was upset to see information on there that she was not aware of, she did not describe the conversation that took place about the forms in any detail. She noted, "I raised the problem that these concerns should have been raised, as soon as they were noticed not be hidden/withheld from parent. Such practices can harm a child's development permanently and presents a real danger for any child under such care. It was like talking to walls." It was not clear from her witness statement when she said she raised this issue and what exactly she said.

146. The Tribunal reviewed the emails from the Claimant to the Respondent after 11 April 2022 and the notes from the meetings after 11 April 2022. The only reference the Tribunal could find to this issue (before the Claimant's dismissal on 4 May 2022) was in the disciplinary hearing on 19 April 2022. The Claimant's note-taker, Mr Ernest, wrote in his notes: "The Claimant says email contradicts what doctor's form says" (p351). After the Claimant reviewed the notes taken by Lorna Hacker-Crowther, she made some of her own notes

about what she recalled being said in the meeting. In her own notes she recorded: "[The Claimant] says she didn't call [Kitana] a liar, said she lied and has emails from the nursery which contradict doctor's forms completed by them also. Both can't be true at the same time. [Kitana] should not be offended by [the Claimant] stating it." (p372).

147. The Tribunal therefore concluded that the Claimant had raised a concern that she felt that the information set out in the CDC forms contradicted information she had been given about her daughter in emails before her dismissal. The Tribunal did not however find that she provided any greater explanation that this. The Tribunal concluded the Claimant's comment in her witness statement, "Such practices can harm a child's development permanently and presents a real danger for any child" was not said orally at the time of the alleged disclosure.

148. The Tribunal therefore considered if what was said at the disciplinary hearing (which was that she had been sent emails about her daughter's development which contradicted what was set out in the medical/CDC forms) was a disclosure of information. The Tribunal concluded that it was, as it conveyed the fact that she had received emails regarding her daughter's development, and that the Respondent had completed a medical form about her daughter's development, and these are both facts. Her disclosure also contained the allegation that the information in the two documents were contradictory.

149. The Tribunal did not however find that the Claimant believed her disclosure was in the public interest. The Tribunal concluded the Claimant was only interested in raising her concern about her daughter's development. She did not say she was concerned that the nursery was being misleading about the development of the other children, or anything else which could make the matter of interest to the wider public. If the Claimant did believe her disclosure was in the public interest, then the Tribunal concluded that it was not reasonable for her to have believed that. The disclosure was so purely focused on her situation, and the situation of her daughter, that there was no link to any broader public interest point.

150. Further, the Tribunal also did not find that the Claimant reasonably believed that her disclosure tended to show that the Respondent had failed, was failing or was likely to fail to comply with any legal obligation or that her disclosure tended to show that the health or safety of any individual had been, was being, or was likely to be endangered. The Claimant did not identify any applicable legal obligation. While the comment the Claimant made in her witness statement ("Such practices can harm a child's development permanently and presents a real danger for any child") raised a health and safety concern, the Tribunal did not find that there was any evidence from which they could conclude that this was said at the time.

151. The Tribunal also considered if the Claimant reasonably believed her disclosure tended to show that information which showed any matter falling within any one of the above categories (namely a breach of a legal obligation or the endangerment of an individual's health and safety), had been, is being or is likely to be deliberately concealed. As the Tribunal found that all the Claimant said at the time was that she had received emails which she believed contained information that contradicted what was written on the medical/CDC forms, the allegation did not in any way suggest "deliberate concealment". Therefore, even if the Claimant believed her disclosure tended to show deliberate concealment, the Tribunal did not consider that was reasonable. There was nothing in what was said which could arguably have been understood as alleging a concealment.

152. Consequently, the Tribunal concluded that the Claimant's alleged protected disclosure 6 did not amount to a protected disclosure.

Detriments

153. The Claimant complained about three detriments:

a) **Detriment 1**: Emma Long told the Claimant she was not allowed to ask about the well being of her daughter during the day.

b) **Detriment 2**: Emma Long told the Claimant that she could not ask a nursery worker about her daughter at the end of the day - she could only ask Emma Long.

c) **Detriment 3**: On 1 March 2022 the Claimant was given notice that with effect from 1 April 2022, she would need to move the nursery provision for her daughter. This necessitated a longer trip before she started work without increasing the Claimant's hours and saying she would need to pay if the Claimant was late collecting her daughter.

Detriment 1

154. The Respondent did not dispute that Emma Long told the Claimant she was not allowed to ask about the well being of her daughter during the day.

155. The Tribunal considered if this amounted to a detriment. The other parents could not ask about their children throughout the day, and therefore the Claimant was only being put in the same position as the other parents. However, the Tribunal concluded that as the Claimant had previously been able to ask about her daughter during the day, it was reasonable for her to feel that she was being put at a detriment when she was told she had to wait until pick up time.

156. The Tribunal also considered if this was a detriment which arose in the context of the Claimant's work, or whether this arose in the context of the Claimant being a parent who used the nursery service i.e., a service-user. The Tribunal concluded that in these specific circumstances, there was not such a clear delineation between the Claimant's role as a member of staff and as a parent, such that this could be categorised as being a non-work-related detriment. She had been told not to ask certain questions *when she was working.*

157. As the Tribunal has not found that any of the Claimant's six alleged disclosures amounted to a protected disclosure, the Claimant's claim that she was subjected to this detriment because of a protected disclosure necessarily fails. However, in the event that we were wrong to conclude the Claimant did not make any protected disclosures, we considered why Emma Long told the Claimant she was not allowed to ask about the well being of her daughter during the day.

158. The Tribunal found that the reason for Emma Long's request was to minimise disruption in the nursery. Emma Long made this request immediately after the heated discussion in the hallway on 1 February 2022 when the Claimant had raised her concerns about her daughter not being given the wings for her costume. The Tribunal accepted Emma Long's evidence that the Claimant's behaviour that day was disruptive and was causing the staff offence. As noted above, the Tribunal found that on 1 February 2022, the Claimant was unhappy with the explanation she was given about why her daughter could not have the wings in the nursery room. The Tribunal found that the Claimant could be particularly persistent when given an explanation that she did not agree with. The Tribunal concluded the Respondent reasonably believed that there would be fewer issues if the Claimant was not permitted to ask about her daughter's welfare throughout the day while she was working.

159. The Tribunal accepted that while the staff no doubt found it irritating when the Claimant raised the concerns in her disclosures (such as the fact that the twins were crying or that she did not approve of the three warning rule), the discussions between the Claimant and other members of staff only became heated when they related to matters concerning her daughter. The Tribunal concluded that this was why the Claimant was told she was not permitted to ask about her daughter's welfare throughout the day while she was working. The aim was to stop heated discussions occurring in the hallway. The Tribunal did not find that any of the Claimant's disclosures had a material influence on the Respondent's decision to request the Claimant not to ask about her daughter's welfare until pick up.

160. The Tribunal did not uphold the Claimant's claim that she was subjected to this detriment because she made a protected disclosure.

Detriment 2

161. The Respondent did not dispute that Emma Long told the Claimant that she could not ask a nursery worker about her daughter at the end of the day, and that she could only ask Emma Long.

162. The Tribunal considered if this amounted to a detriment. The Claimant was not prevented from asking about her daughter at all, she was just directed to a specific person. However, the Tribunal concluded that as the Claimant had previously been able to ask the members of staff who had looked after her daughter during the day about her daughter, it was reasonable for her to feel that she was being put at a detriment when she was told she could only speak to Emma Long, who was not the person who was actually looking after her daughter.

163. As with the previous detriment, the Tribunal then considered why Emma Long took this action. The Claimant was given this instruction immediately after the further heated discussion took place on 24 February 2022 in the hallway regarding why the Claimant's daughter could not attend the PALS session. The Tribunal found that Emma Long gave the Claimant this instruction because she wanted to protect the staff from the Claimant's unreasonable, persistent, and at times, aggressive, behaviour.

164. The Claimant had by this time started two heated discussions with the staff, the first when she was upset her daughter had not been given her costume wings, and the second when she was unhappy with the explanation she was given about why her daughter could not attend the PALS session. She had also accused the staff of lying to her by this point and said to Emma Long that her partner wanted to come into ask the staff directly why they were liars (p195). The Tribunal therefore found that Emma Long was motivated by a desire to protect her staff from disruptive behaviour when she asked the Claimant to ask only her about her daughter at the end of the day. The Tribunal did not find that any of the Claimant's disclosures had a material influence on the Respondent's decision.

165. The Tribunal did not uphold the Claimant's claim that she was subjected to this detriment because she made a protected disclosure.

Detriment 3

166. The parties were agreed that on 1 March 2022 the Claimant was given notice that with effect from 1 April 2022, she would need to move the nursery provision for her daughter. The parties also agreed that this necessitated a longer trip for the Claimant before she started work.

167. The Tribunal found that this did amount to a detriment, even though the Respondent did adjust the Claimant's hours and the time at which she could collect her daughter from the other nursery. It was clearly considerably more convenient for the Claimant to work in the same place at which her daughter was also based.

168. Even though the Tribunal has not found that any of the Claimant's six alleged disclosures amounted to a protected disclosure, the Claimant still considered the Respondent's motivation for taking this action.

169. In the letter Emma Long sent to the Claimant on 1 March 2022 advising the Claimant of her decision that the Claimant's daughter would need to move to a different childcare setting, she noted that after the meeting on 28 February 2022, where Emma Long had met with the Claimant to discuss her various concerns, the Claimant had seemed to be happy with the outcome, but the same concerns kept arising (p230).

170. After that meeting on 28 February 2022, the Claimant had again raised her displeasure at the use of the word "no" towards her daughter (p228), again requested that her daughter be given an explanation when another child cried (p229) and had again alleged that she was being misled by staff (p229). In the letter of 1 March 2022, Emma Long explained they were able to adapt some matters to suit her wishes, but others they could not change. She noted, "We now feel that we are not able to offer such targeted care to an individual child" and noted they were unable to meet the Claimant's expectations (p230).

171. The Tribunal concluded that the reasons set out in the letter dated 1 March 2022 from Emma Long were the reasons why the Claimant was asked to find alternative childcare for her daughter. The Tribunal concluded that Emma Long reasonably believed that the nursery could not meet the Claimant's expectations regarding her daughter's care and reasonably believed that the Claimant would continue to regularly and persistently complain if she continued to work in the same setting where her daughter was receiving child care. The Tribunal reached this conclusion based on the number of times the Claimant repeatedly raised issues she was unhappy with, whether in email or in person. The Tribunal also took into account the number of times the Claimant suggested to the Respondent that she was being lied to and misled by the nursery staff. The Tribunal accepted that in these circumstances the Respondent concluded that the relationship between the Claimant as a parent and the nursery had broken down. The Tribunal found that the Claimant's disclosures did not influence this decision at all.

172. The Tribunal did not uphold the Claimant's claim that she was subjected to this detriment because she made a protected disclosure.

The Claimant's dismissal

173. As the Tribunal has found that none of the Claimant's six alleged disclosures amounted to a protected disclosure, her claim for automatic unfair dismissal on grounds of having made a protected disclosure necessarily fails. However, the Tribunal still examined the reason for the Claimant's dismissal.

174. The Tribunal found the reason for the Claimant's dismissal was her conduct. The Tribunal accepted the Respondent's explanation that they took disciplinary action against the Claimant when two members of staff made formal complaints about her rude and aggressive behaviour towards them. The Tribunal saw evidence of numerous notes being made by the Respondent's staff after various interactions with the Claimant in which they set out their unhappiness regarding the way they had been spoken to. The Tribunal also took into account the Claimant's own admission in the disciplinary hearing that she could come across as aggressive and abrupt. The Tribunal did take into account the Claimant's explanation, which she gave at the time, that her abruptness was the result of the fact that she was translating from Romanian. However, the Tribunal accepted that the Respondent reasonably rejected that explanation, as that would not account for slamming a door, swearing, and repeatedly accusing her colleagues of lying to her. Finally, the Tribunal took into account the two heated conversations which stemmed on both occasions from the Claimant's refusal to accept an explanation which she did not agree with. The Tribunal did not find that any of the Claimant's disclosures were the main reason, or even played a part, in her dismissal.

175. For these reasons, the Tribunal accepted the Respondent's evidence that the only reason for the Claimant's dismissal was her conduct.

Unauthorised deduction from wages

176. The parties were agreed that at the end of March 2022, the Respondent deducted £276.49 from the Claimant's wages for outstanding nursery fees.

177. The deduction was made at the end of March 2022. The Claimant contacted ACAS for early conciliation purposes on 25 May 2022 and the certificate was issued on 26 May 2022. The Claimant's claim form was presented to the Tribunal on 28 May 2022. The Claimant's claim for unauthorised deduction from wages was therefore brought within the three months less one day time limit.

178. The Claimant did not dispute that these fees were owed, but said she planned to pay them a few weeks later, as for cash flow reasons she needed her full income to pay her rent. She argued that her contract of employment did not say that the Respondent could deduct outstanding nursery fees from her wages.

179. The Respondent's position was that the fees were owed, they were late, and the Respondent had authorisation in writing to make deductions from the Claimant. In the Respondent's employment handbook it noted, "We reserve the right to recoup any losses the nursery incurs in the circumstances listed below from your wages or any other monies owing to you (e.g., commission, bonuses, accrued holiday pay at termination of employment.)" However, none of the circumstances listed covered the situation where the nursery was owed childcare fees. There was also no reference to deducting outstanding fees in the Claimant's contract of employment.

180. Consequently, the deduction made by the Respondent was not authorised by statute, contract, and the Claimant had not consented to it in writing before the deduction was made. The Respondent therefore made an unauthorised deduction of £276.49 from the Claimant's wages.

181. The fact that the Claimant owed this money to the Respondent does not prevent the deduction from being unauthorised as per the case of *Potter v Hunt Contracts Ltd* set out above. The Tribunal therefore orders the Respondent to make a payment of £276.49 to the Claimant for the unlawful deduction from her wages in March 2022.

_____

Employment Judge Annand

Date: 23 October 2023

JUDGMENT SENT TO THE PARTIES ON

24October2023

.....

.....

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.