Case Number: 1401853/2022

EMPLOYMENT TRIBUNALS

Claimant: Ms S Jones

Respondent: St Mark's Pre-School

Heard at: Southampton **On:** 2, 3, 4 October 2023

Before: Employment Judge Dawson, Ms Ratnayake, Mr Shah MBE

Appearances
For the claimant: Representing herself
For the respondent: Mr Wyeth, counsel

JUDGMENT

The claimant's claims are dismissed.

REASONS

1. By her claim form presented on 8 June 2022 the claimant presented claims of disability discrimination and being subjected to detriment because of making a protected disclosure and being dismissed because of making a protected disclosure.

2. The claimant was employed as a practitioner within the respondent's pre-school. She worked within the Blue Dragons room which had a room leader, Meri Sutton, who was supported by a senior practitioner, Fay Harris.

3. The claimant says that she made a number of protected disclosures while she worked in the pre-school and as a consequence she was subjected to a number of detriments and dismissed. Although the respondent accepts that the claimant was dismissed, it denies that she made any protected disclosures and denies that she was treated detrimentally. It also denies that the sole or principal reason for her dismissal was the alleged disclosures.

Issues

4. At a hearing on 21 March 2023 the claimant withdrew her claim of disability discrimination and it was dismissed. The issues in respect of the protected disclosure claim were identified as follows:

1 Time limits

1.1 The claim form was presented on 8 June 2022. The Claimant commenced the Early Conciliation process with ACAS on 27 April 2022 (Day A). Accordingly, any act or omission which took place before 28 January 2022 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

1.2 In relation to each detriment (and in particular the allegation relating to breach of data protection) was the detriment complaint made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?

1.2.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.2.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.2.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Protected disclosure ('whistle blowing')

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

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

2.1.1.1 11 November 2021 (to the Respondent)

2.1.1.2 6 December 2021 (to the Respondent)

2.1.1.3 16 December 2021 (to the Respondent)

2.1.1.4 13 January 2022 (to Ofsted).

2.1.2 Were the disclosures, whether any together or separately, disclosures of 'information'?

2.1.3 Did the Claimant believe the disclosure of information was made in the public interest?

2.1.4 Was that belief reasonable?

2.1.5 Did she believe the disclosure of information tended to show that the health or safety of any individual had been, was being or was likely to be endangered.

2.1.6 Was that belief reasonable?

2.2 If the Claimant made a qualifying disclosure, was a protected disclosure because it was made to;

2.2.1 to the Claimant's employer?

2.2.2 Ofsted:

2.2.2.1 Is Ofsted a "prescribed person" within the meaning of section 43F of the Employment Rights Act 1996? 2.2.2.2 If so, did the Claimant reasonably believe that the alleged failure fell within any description of matters in respect of which Ofsted is prescribed?

2.2.2.3 Did the Claimant reasonably believe that the information disclosed, and any allegation contained in it, are substantially true?

3. Detriment (Employment Rights Act 1996 section 47B)

3.1 Did the Respondent do the following things:

3.1.1 Give the Claimant's personal email address to a solicitor. The Claimant alleges that this was done by a colleague, who gave her (the colleague's) solicitor the Claimant's email address, and then the Claimant received a threatening legal letter from the colleague's solicitor. The Respondent denies vicarious liability, which the Tribunal will need to determine.

3.1.2 Shout / scream at the Claimant during grievance hearing on 28 February 2022 (which included dealing with whistleblowing issues);

3.1.3 Not carry out the grievance process (in relation to the grievance raised on 5 February 2022) impartially or effectively;

3.1.4 Reject the concerns raised by the Claimant in her grievance of 5 February 2022.

3.1.5 Not allow the Claimant to appeal her dismissal.

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

3.3 If so, was it done on the ground that she had made the protected disclosure(s) set out above?

4. Unfair dismissal

4.1 It is accepted that the Claimant was dismissed. Was the reason or principal reason for the Claimant's dismissal that she made a protected disclosure?

5. At the outset of the hearings the Judge went through the issues with the parties and it was confirmed that they remained the same except that the claimant also changed the date of the first disclosure to the 18 November 2021, the respondent did not object to that.

6. During the course of the hearing of the issues were narrowed in that the respondent accepted that a disclosure to Ofsted would be a disclosure to a prescribed person and clarified that it did not accept that the disclosures were of information which in the reasonable belief of the claimant tended to show that the health or safety of an individual had been, was being or is likely to be endangered.

7. Given the way that the evidence has been presented and the submissions that we have heard, it might be helpful to set out what the case is not about. We are not deciding in this case:

    a. whether children were being adequately safeguarded by the pre-school,

    b. who was at fault for the difficult relationship in the Blue Dragon room,

    c. whether the claimant was fairly or unfairly dismissed (except to the extent of whether any protected disclosure was the sole or principal reason for the dismissal).

8. In very brief summary, we are concerned with the issues of whether the claimant made disclosures which, as a matter of law, amounted to protected disclosures and, if she did, whether she was treated detrimentally or dismissed as a result.

9. In that context, we observe that there was a tendency for the witnesses to use the concepts of safeguarding and whistleblowing interchangeably. However, in this respect, the relevant part of the legal test which we must apply is whether a disclosure was made which, in the reasonable belief of the maker, tended to show that the health or safety of an individual was being endangered (or had been, or was likely to be)

Conduct of the Hearing

10. At the hearing on 21 March 2023, a timetable had been set down for the hearing. Despite the tribunal being unable to start hearing on time, both sides were able to complete questioning well within the time allowed and without needing to ask for further time to do so. We are grateful to both parties for their cooperation.

11. For the claimant, we heard her give evidence and heard evidence from Meri Sutton, the deputy manager and Blue Dragon room lead (Blue Dragon was the classroom in which the claimant was based). For the respondent we heard from Ben Egan, then chair of the pre-school committee, Ms Schendel, manager of the pre-school and Fran Holmes, committee member for the pre-school.

12. Mr Egan gave evidence from Australia, the claimant had no objection to him doing so.

13. The creation of the hearing bundle had caused a significant amount of difficulty up to the hearing. A hearing had taken place on 18 August 2023 to attempt to resolve the difficulties. The tribunal at that hearing had required the bundle to be based on one which would be sent to the claimant by 23 August 2023. At this hearing the claimant believed that the final bundle was different to the one which had been sent to her following the case management hearing. Close analysis showed that the only differences were that

    a. at the front of the lever arch file the respondent had inserted the witness statements and

    b. the respondent had also inserted as pages “A” “B” etc additional pages which the claimant had sought to include.

    Once those points had been clarified the claimant was able to proceed but, in fact, in order to assist the claimant when giving evidence and asking questions, she used the bundle which had been sent to her by the respondent after the hearing on 18 August 2023.

14. At the hearing on 18 August 2023 a number of adjustments were identified for the claimant, those were all implemented and the claimant was asked to tell the tribunal if she felt the language being used was not sufficiently clear or straightforward or she did not understand. She raised no concerns during the hearing.

The Law

15. The following are the relevant statutory provisions under the Employment Rights Act 1996.

43A Meaning of “protected disclosure”

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

43B Disclosures qualifying for protection

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

(a) …

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

(c) …

47B Protected disclosures

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

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

48 Complaints to employment tribunals

…

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

…

(2) On a complaint under subsection (1), (1XA), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

...

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected do the failed act if it was to be done.

(4A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (3)(a).

103A Protected disclosure

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

16. In *Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436, t*he Court of Appeal held "The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The

statements in the solicitors' letter in *Cavendish Munro* did not meet that standard" (para 35).

17. As the EAT has set out in *Dray Simpson v Cantor Fitzgerald* [2020] I.C.R. 236 "the question in each case, as has now been made clear, is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in paragraphs (a) to (f)]". However, in order for a statement or disclosure to be a qualifying disclosure, it has to have a "sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)". The question of whether or not a particular statement or disclosure does contain sufficient content or specificity is a matter for evaluative judgment by the Tribunal in light of all the facts of the case (para 39).

18. In *Fecitt v NHS Manchester* [2012] ICR 372, the Court of Appeal held that the test of whether an employee has been subjected to a detriment on the ground that he had made a protected disclosure is satisfied if, "the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower"

19. In *Panayiotou v Kernaghan [2014] IRLR 500*, at para 49 and 52 the EAT held:

> ''[49] There is, in principle, a distinction between the disclosure of information and the manner or way in which the information is disclosed. An example would be the disclosing of information by using racist or otherwise abusive language. Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. An employer may be able to say that the fact that the employee disclosed particular information played no part in a decision to subject the employee to the detriment but the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable. Similarly, it is also possible, depending on the circumstances, for a distinction to be drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed.'
>
> …
>
> [52] Those authorities demonstrate that, in certain circumstances, it will be permissible to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself. The employment tribunal will, however, need to ensure that the factors relied upon are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did.'

20. In *Kong v Gulf International Bank (UK) Ltd* [2022] I.C.R. 1513 it was held

> 57. Thus the "separability principle" is not a rule of law or a basis for deeming an employer's reason to be anything other than the facts disclose it to be. It is simply a label that identifies what may in a particular case be a necessary step in the process of determining what as a matter of fact was the real reason for impugned treatment. Once the reasons for particular treatment have been identified by the fact-finding tribunal, it must evaluate whether the reasons so identified are separate from the protected disclosure, or whether they are so closely connected with it that a distinction cannot fairly and sensibly be drawn. Were this exercise not permissible, the effect would be that whistleblowers would have immunity for behaviour or conduct related to the making of a protected disclosure no matter how bad, and employers would be obliged to ensure that they are not adversely treated, again no matter how bad the associated behaviour or conduct.

Findings of Fact

21. The claimant started working for the respondent in September 2021. By October 2021 the claimant was very unhappy in her work because of the way she felt she was being treated by her colleagues. In particular she felt that she was being subjected to constant humiliation by Fay Harris, a colleague who worked in the same room as her, as is evident, for instance, from her email of 18 November 2021 at pages 71A & B of the bundle. The claimant's witness statement states, and we have no reason to doubt, that throughout her performance of employment she felt that Fay Harris bullied her a lot, even prior to her employment. As we will go on to set out in more detail, problems with staff continued throughout the entirety of her employment.

22. It is apparent to us from the evidence of Ms Schendel that there were problems in the pre-school before the claimant joined. In her evidence she suggested that was because of the failures of the room manager.

23. On 11 October 2021 the claimant emailed Ms Schendel and Meri Sutton, talking about how she felt she was treated and said "I have put this down to losing dear colleagues, getting used to change et cetera however I feel the animosity continues." In the same email, however, she also stated "there seemed to be a huge power struggle for the team and lack of care/respect for each other for example "dictatorship style"".

24. On 21 October 2021 Ms Schendel, the respondent's manager, undertook an appraisal with Sophie Barker, a colleague of the claimant. Ms Barker stated that she felt like she could not work with the claimant as she did not trust her or feel comfortable with what she said. Ms Schendel also carried out an appraisal with Fay Harris who said that she had been working hard to show the claimant how to do things but that the claimant asked a lot of questions that suggested that things should be done differently. She said that she mentioned Ofsted a lot. She said that the claimant had said things about a previous manager which had upset the claimant.

25. Ms Schendel conducted an appraisal with the claimant on the same day and having noted the claimant's significant strengths, Ms Schendel stated that it was necessary for there to be better communication within the team which the claimant was in.

26. Ms Schendel says in her statement that by that stage she was concerned that the claimant, because of her experience, was coming across to other members of the team as undermining and intimidating and frequent references to Ofsted were not helping.

27. Ms Schendel held a meeting with the staff on 17th November 2021 in an attempt to clear the air but that meeting went badly wrong and several staff ended up crying. There is a dispute as to whose fault it was that the meeting went wrong, the claimant and Meri Sutton blame Ms Schendel; Ms Schendel blames Meri Sutton. We have not found it necessary to resolve that question for the purposes of our decision.

28. On 18 November 2021 the claimant wrote to Meri Sutton saying that she wished to raise a formal safeguarding concern around the emotional well-being of a child. The email is too long to replicate in full in this judgment but appears at page 73 of the bundle. It relates to an incident which the claimant had witnessed on 11 November 2021. In essence the claimant was concerned that a child (W), after lunch, was "somewhat disorientated" seeking their toy helicopter. The child was opening cupboard doors and looking for it. Another practitioner stated that she knew what he wanted but because he would not eat his lunch, the toy had been put into a different classroom. The claimant said that using distraction and other methods she helped the child as best she could in the situation and recommended that matters were investigated further to fully understand what had happened. The email did not suggest that the child's health or safety was being compromised. That is the first disclosure which the claimant relies upon in these proceedings.

29. During this period the claimant was taking time off work for medical investigations. The respondent takes no issue with that and did not do so at the time. Ms Schendel told us, and we accept, that one consequence of that was that the absences had a negative impact on team cohesion. We can understand why it would do so in a busy pre-school where the absence of any key member of staff is likely to have an impact on other staff, particularly those in the same room.

30. The second disclosure of which the claimant alleges is on 6 December 2021. The claimant's evidence was somewhat unclear as to what disclosure was being relied upon. Her witness statement, which was not expanded in her evidence in this respect, says that she highlighted that a child had a soiled nappy and Fay Harris then asked "who does she think she is". Fay Harris refused to change the nappy and Meri Sutton changed the nappy. The disclosure must, therefore, be stating that a child had a soiled nappy. There was no suggestion that the nappy had been left unchanged for a prolonged period.

31. On 16 December 2021, the claimant sent an email to Meri Sutton to make her aware of conduct of other staff members which she considered inappropriate. She stated that a staff member had, whilst shaking a toy, suggested it looked rude (according to the claimant looking like a male masturbating) that while that happened children were "sat waiting – and many learning opportunities were missed". There was no suggestion that the children understood what was being said (or were even aware of it). The claimant also stated that staff were finding it amusing that potentially one of the older pre-schoolers might have a crush on a student. The email then referred to occasions when the claimant was being excluded and unkind remarks were being made and said that communication was minimal. The claimant stated that comments were made "we don't do this in front of Ofsted" and "just making it up" when referring to children's reflections which left the claimant feeling saddened. This is the third alleged disclosure.

32. The claimant was given a "child concern form" to fill out but declined to do so because she considered that it was the wrong type of form to use.

33. On about 6 January 2022 a Teams meeting was held with the claimant, Ms Schendel and Meri Sutton about how the claimant was. She was distressed in that meeting because of the way she felt she was being treated and the fact that there was lots of negativity. Mediation was suggested by Ms Schendel, if both the claimant and Fay Harris agreed. The claimant was then off work intermittently until 20 January 2022 when the claimant was signed off work and did not return.

34. In the meantime, on 12 January 2022, there was an unannounced Ofsted visit to the school. Ms Schendel sent an email to the staff about what had happened during that visit which appears at page 85 of the bundle. In the course of that email Ms Schendel said that she had confirmed to the inspector that they had had no whistleblowing or complaints received and that the local authority had told Ofsted that they did not have any concerns. She said that, as she hoped the readers would agree, she made herself visible to parents and practitioners at the beginning and end of the day and took any concern seriously and dealt with them in a confidential manner. She said that she was happy to discuss matters further if anyone wished.

35. That email appears to have prompted the claimant to write to Meri Sutton and Ofsted the next day (the fourth alleged disclosure) . The email is somewhat disjointed and has at least one other email copied into it. The email started off by saying that the claimant had raised concerns regarding bullying from senior staff members and inappropriate sexual behaviours displayed around the children. The pasted email referred to those matters set out in the email of 16 December 2021. The email then referred to the previous day's email stating "this email states Rachel is approachable – which I feel is very much untrue due to the lack of transparency and unhealthy friendships with some staff members. The email also is telling us that NO concerns have been raised – when we know this isn't strictly true." Reference is made to parents having felt the need to express minor upsets and the email goes on "MY Concern is the dishonesty from Rachel here "RED FLAG". Rachel sent this email saying no concerns have been raised with her when there was I, as do we all have a

duty to care in safeguarding these children. Concern was raised- with the committee being very much related and no transparent way to contact them- On going unaddressed Gas lighting within the daily provision and Rachel in my opinion not easily approachable." (Page 86 – 87).

36. Meri Sutton then sent that email on to Ms Schendel.

37. On 16 January 2022, the claimant sent a lengthy letter to Mr Egan raising a number of different matters; he categorised them as

    a. whether there were instances of whistleblowing,

    b. whether there were safeguarding issues and

    c. whether there was a positive and constructive working environment for the benefit of staff.

38. Mr Egan responded promptly, and at some length. He had clearly taken the time to read what the claimant had written. He suggested a meeting with the claimant and a meeting was provisionally fixed for 20 January 2022.

39. In the meantime, having considered the email that had been sent to Ofsted, Ms Schendel was somewhat upset. She states that while she regarded a lot of that email as inaccurate what really concerned her was that the email went on to accuse her of dishonesty. She states that she was troubled by that- she had been in early years education for 35 years and was well known within the community and proud of her reputation. She wrote to Mr Egan about it, and in the course of correspondence with him indicated that two valued members of the team were close to resigning and that she intended to send an email from a libel solicitor.

40. Ms Schendel was given outside legal advice that, given that the claimant had written to Meri Sutton and Ofsted using her personal email address, that email address could be used for the letter from the solicitors.

41. Ms Schendel instructed Trethowans solicitors who wrote to the claimant, at her home address and to her personal email address on 18 January 2022. The letter, at page 114 of the bundle states as follows

> We have been instructed to write to you in connection with a defamatory email that you have sent to Meri Sutton and Ofsted dated 13 January 2022.
>
> In that email you accused our client of dishonesty. That is highly defamatory of her. There is no justifiable basis for the allegation. In view of the fact that it was sent to Ofsted it is likely to cause our client serious harm as required by the Defamation Act 2012.
>
> At this stage our client has no particular wish to escalate this matter to a letter of claim pursuant to the Media and

> Communications Pre-Action Protocol. However, if that is to be avoided our client requires that you send an immediate email of retraction to Meri Sutton and Ofsted withdrawing the allegation of dishonesty and apologising for the distress and damage caused. Provided this is done by close of business on Wednesday 19 January 2022 our client will not pursue the matter further. If it is not, then we will send you a formal letter of claim pursuant to the Protocol
>
> On a more general note, whilst your email also contains other critical comments of our client which, whilst not necessarily defamatory, these are clearly unjustified and inappropriate and not conducive to a healthy working environment. We would therefore suggest that you desist from all such further comments in the future.

42. Because of the matters which had been raised, the school undertook a safeguarding investigation. That was carried out by Julia Brown, a committee member responsible for health and safety matters. The resulting report is in the bundle at pages 182 –183. This is relevant since it shows that the school was not seeking to sweep matters under the carpet. We also note, in passing, that on 10 March 2022 a further inspection by Ofsted rated the pre-school as good.

43. On 19 January 2022, the claimant sent a grievance to Mr Egan, as chair of the pre-school committee referring to personal data being misused by employees at the pre-school.

44. The claimant then pulled out of the meeting which had been arranged for the Thursday stating that she had family commitments and needed to seek advice before the meeting could take place (page 117). Mr Egan then progressed the grievance.

45. On 19 January 2022 Mr Egan invited the claimant to a meeting to discuss both the grievance in relation to data misuse and also the ongoing investigations regarding the safeguarding of children. It is clear that the respondent was neither seeking to avoid the allegations that the claimant was making in relation to the care of children nor seeking to avoid talking to the claimant about them.

46. Having received the solicitor's letter, on 20 January 2022 the claimant wrote to the committee of the pre-school stating, amongst other things, "to highlight "dishonesty" was a poor choice wording on my part again I apologise" (page 130)

47. The grievance meeting took place on 25 January 2022. Although the list of issues states that the claimant was shouted and screamed at in that meeting, her statement is silent on that point as is the witness statement of Ms Sutton. Mr Egan denies it.

48. Following the meeting Mr Egan sent a lengthy summary to the claimant in which he summarised the concerns which the claimant had raised and set out what the next steps would be, namely an investigation into the matters raised. The

meeting had fallen into two parts, the claimant's grievance and the issues raised in relation to children. Part of his summary was that "all attendees agreed that these issues are created by team member conflict and disagreements and there is not currently an effective way to resolve these conflicts within the working environment." Although the claimant challenged parts of the summary created by Mr Egan, she did not challenge that part.

49. Julia Brown continued to investigate those matters raised by the claimant which might be described as safeguarding issues and Mr Egan set about resolving the grievance. He upheld the claimant's grievance and decided that there had been a breach of GDPR when the claimant's email was given to Ms Schendel's solicitors. We express no view on the correctness of that decision. Having made that decision, Mr Egan then disciplined Ms Schendel giving her a verbal warning.

50. On 27 January 2022, Ms Schendel emailed the claimant stating that she would like to reassure her that the focus of a return to work meeting would be about her well-being and that they would discuss any adjustments needed to facilitate a successful return to the pre-school. On 28 January 2022 the claimant replied to state that due to the continued work-related stress she was extending her self-certified sickness.

51. For reasons which are unclear, even though the grievance had been upheld, the claimant sought to appeal the decision of Mr Egan. The claimant insisted that the appeal be dealt with by an external body which was not acceptable to the respondent and the appeal was not pursued.

52. On 5 February 2022 the claimant raised a second grievance. It appears at page 219 of the bundle and is largely around the conduct of the claimant's colleagues.

53. Another grievance meeting took place on the 28 February 2022 and the minutes show that a number of things were discussed (page 237).

54. Following the meeting Mr Egan considered statements which had already been taken from staff members as part of the safeguarding investigation and also spoke to Julia Brown about matters. It is apparent that he was already aware of what had been going on because of briefings that Ms Schendel had given to him previously.

55. The claimant criticises the grievance process because, she says, Fay Harris and other staff lived on the same street as, or close to, Mr Egan. She suggests that, therefore, he could not have been impartial. In answer to that Mr Egan told us that those things did not cause him any concern. He states that he has line manager responsibility in his workplace and regularly has to deal with issues such as those raised in this grievance which affect relationships which are much closer to him than those of people who live in his street. He stated that he would not consider himself friends with those people who the claimant made allegations against and that he would not have been afraid to make the decision which he thought was right. We accept that evidence. We note that he was

willing to uphold the original grievance against Ms Schendel and were impressed with his explanation.

56. He concluded, in his outcome letter dated 3 March 2022, that although there were poor behaviours within the pre-school setting and there was evidence that staff had not been effectively managed he did not see sufficient to categorise the situation as bullying, harassment or discrimination. He recommended ways for improvement.

57. The claimant remained off work and because of the period she had been off work her probationary period was extended twice, at the suggestion of Ms Schendel. Those extensions were on 16 February 2022 and 24 March 2022. Ms Schendel told us, and we accept, that the reason for extending the probationary periods was because the claimant had been off sick and therefore there had not been enough time to properly observe her capabilities. It is clear, therefore, that the respondent was not seeking to quickly terminate the claimant's employment, which provides some insight into whether it was hostile to her as a result of the alleged disclosures. There is no evidence that it was.

58. Mr Egan was, by April 2022, aware that there were major problems with morale within the pre-school and conscious that it was necessary to find a way forward. The report into safeguarding had been published in February and, thereafter, Julia Brown had reported to him on 9 February 2022 that employees felt like they were walking on egg shells and he had received an email in similar terms from Fay Harris. On 4 March 2023 Ms Schendel had emailed Mr Egan stating that another member of staff had experienced significant difficulties with her emotional well-being which, in part, related to the situation within the team in which the claimant worked. On 29th of March 2022, Fran Holmes, who was also a committee member, emailed him stating that she had spoken to a different employee who had raised poor staff morale as a result of "all the goings on". On 14 March 2022 Ms Schendel emailed Mr Egan stating that without resolving the matter, Fay Harris would be lost to the team. She was also concerned about staff having to pick up extra work and feeling the strain in the claimant's continued absence.

59. The claimant appealed the grievance and the appeal was not upheld by Ms Holmes on 5 April 2022.

60. After the grievance appeal had been determined, Mr Egan decided that there was no sign of a return to work on the part of the claimant and he felt that she did not appear to be prepared to engage with the respondent in a return to work. He told us, and we accept, that he was becoming acutely aware that the staff were very unsettled and that decisions needed to be made about future staffing. He took the view that the pre-school could not continue in its current staffing levels indefinitely and there was to be a fresh intake of children for the final term of the year. He concluded that without the claimant engaging and with major problems of morale and concerns about her return to work the situation was not sustainable and therefore he decided to terminate her employment.

61. He notified other committee members who did not disagree with him and he produced the letter of termination which appears at page 345 of the bundle.

That letter of termination did not give the claimant a right of appeal which the claimant was entitled to under the staff handbook. We have heard Mr Egan give evidence and read his witness statement in which he explains that he had taken legal advice and was told that he did not need to include a right of appeal within the letter. Whether that advice was right or wrong, we see no reason to doubt Mr Egan's explanation. He struck us as somebody who had acted carefully throughout. He had taken legal advice at every stage, as set out in his statement. He is clearly a man who deals with matters methodically and we think it is more likely than not that he would have followed legal advice on the day in question. That is the explanation which we accept as to why no reference to a right of appeal was made within the dismissal letter.

Conclusions

62. In respect of the disclosure allegedly made on 11 November 2021, but in fact made on 18 November 2021, we find that there was a disclosure of information. The information disclosed was that child W was somewhat disorientated because he was looking for his helicopter which had been removed from him.

63. The claimant was not challenged on the basis that she did not reasonably believe the disclosure was in the public interest and having heard the claimant it seems to us that she was motivated by her concern for the welfare of children. Thus we accept that she did believe that the disclosure was in the public interest. However, it is less clear that belief was reasonable. Taking a toy from a child as a sanction because they will not eat dinner is not a particularly unusual parental tool. Views may differ as to whether it is the best type of parenting. Of course a pre-school setting is different, and again views may differ as to the best way of dealing with such a situation. On balance, we accept that it may be in the public interest for such views to be raised by way of sending an email to the deputy manager of the pre-school and the claimant could reasonably believe that was so.

64. We do not, however, think that the claimant could have reasonably held the belief that the health or safety of an individual had been, was being or is likely to be endangered. This is an example of where the claimant has confused what she considers to be best practice with the requirements of the legislation. The requirements of the legislation should not be watered down. In our judgement, on the basis of the evidence in this case, it was not reasonable to hold a belief that because a child was denied a toy for a period his health and safety was being, or had been, or was likely to be, endangered.

65. Thus we do not find that this was a protected disclosure.

66. In respect of the disclosure on 6 December 2021, again, we are willing to accept that such a statement was a disclosure of information and that the claimant reasonably thought it was in the public interest to highlight that a child had a soiled nappy. However, it is not suggested that the child had been in a soiled nappy for a prolonged period or was otherwise being neglected.

67. In those circumstances there was no evidence that the health or safety of the child had been or was being or was likely to be endangered and nor do we think that the claimant could reasonably have believed that it was.

68. Again, therefore, we do not find that this was a protected disclosure.

69. In respect of the disclosure on 16 December 2021, again there was a disclosure of information namely that adults were behaving in inappropriate ways in front of children. Again we accept that the claimant could reasonably have believed that it was in the public interest to raise the subject matter.

70. However, again, close analysis does not reveal a disclosure that any child's health or safety was being or is likely to be endangered. The email states that children appeared confused and that learning opportunities were being missed, but it does not reveal an endangerment of health or safety. The fact that it is type of behaviour about which parents might justifiably have complained or the fact that the children may not have learned as much as they otherwise would have done, does not amount to an endangerment of health and safety. The claimant could not have reasonably believed otherwise.

71. The email also refers to the claimant feeling excluded and unkind remarks being made to her as well as communication being minimal. However she has not suggested in her evidence in this case, that that behaviour had any adverse impact on her mental health or that she believed it was likely to do so. Thus we have no basis for concluding that the claimant reasonably believed that the disclosure, in this respect, was of information which tended to show that the health or safety of an individual had been, or was being or is likely to be endangered.

72. Thus we do not find that this amounted to a protected disclosure.

73. The disclosure to Ofsted on 13 January 2022 has caused us the most difficulty. The email refers to a unhealthy working environment within the St Marks nursery setting and states that the claimant has raised her concerns regarding bullying from the staff members and inappropriate sexual behaviours. It then copies and pastes a previous email which makes the same allegations that had been made in the email of 16 December 2021. It makes an allegation that Ms Schendel is not unapproachable due to lack of transparency and unhealthy friendships, says that it is not true that no concerns have been raised and accuses Ms Schendel of being dishonest. She says that she feels those matters need to be immediately highlighted Ofsted.

74. Again, we accept that there is a disclosure of some information, amongst a number of straightforward allegations.

75. Given that the claimant immediately retracted the allegation of dishonesty when she was challenged by Ms Schendel's solicitors, it is a little difficult for us to be satisfied that she reasonably believed that allegation was made in the public interest, but we are satisfied that she reasonably believed that the other allegations were so made.

76. Again, however, there is no information in the email that tends to show that the health or safety of any individual was being endangered. The email is a complaint about how the nursery is run and how staff behave within the nursery, but it does not reveal any information that anybody's health or safety has been, is being or is likely to be endangered. The claimant could not have reasonably believed that it did. The claimant did not argue that there was a disclosure of information tending to show that a matter relating to the health and safety of an individual was being or was likely to be deliberately concealed, but in any event the email did not disclose any such information.

77. Again, therefore, we find that this email did not amount to a protected disclosure.

78. Strictly speaking, that would be sufficient to dispense with this claim but in case the matter goes further and because we have heard evidence and argument on the other issues we go on, where possible, to set out our findings of fact in respect of those issues.

79. In respect of whether the claimant's personal email address was given to a solicitor, there is no doubt that it was - because a solicitor wrote to the claimant. In the course of the hearing, this allegation largely focused on the fact of the solicitor's letter rather than the simple giving of the email address and Mr Wyeth does not object to the tribunal considering the allegation as a whole, including what was written by Ms Schendel's solicitors.

80. The solicitor's letter makes clear that if the claimant does not retract the allegation of dishonesty it will be escalated and she will be sent a formal letter of complaint. In that respect it is undoubtedly an intimidating letter for somebody to receive. No one likes to be threatened with legal action. We have no doubt that a reasonable employee in the position of the claimant would feel that she had been subjected to a detriment if she received that letter.

81. The letter did not simply refer to the allegation of dishonesty it also went on to say in relation to other critical comments by the claimant, that they were unjustified and inappropriate and not conducive to healthy working environment and it was suggested she should desist from all such further comments in the future.

82. Again, using a solicitor to make such a statement is bound to be seen by a reasonable employee as an act to their detriment. It would be intimidating.

83. The more difficult question is whether the letter was sent because the claimant had made the disclosures. This requires us to consider a hypothetical situation since we have not found that the claimant made any protected disclosures in this email.

84. We are satisfied that the only reason that Ms Schendel caused her solicitors to send that letter was because of the email sent on 13 January 2022. The other alleged disclosures made between 11 November 2021 and 16 December 2021 were not in any way influencing Ms Schendel at the time. Ms Schendel had displayed no hostility towards the claimant as a result those emails and was

content to extend her probationary period on two occasions and was working to try and resolve the tension within the room. She did not seek to blame the claimant expressly for those tensions (although she may have done so privately).

85. Thus we must consider whether the solicitor's letter was sent because of the disclosures contained within the email of 13 January 2022. The respondent urges upon us that there is a distinction between any disclosures in that letter and the unnecessary and gratuitous insults about Ms Schendel which is what caused the solicitor's letter to be sent.

86. The difficulty we have had in analysing this argument is that it requires us not only to assume that we are wrong in our view that the letter does not contain any protected disclosures but also to decide in what way we are wrong. But doing so leads to a myriad of possibilities. Should we assume that only the first part of the email of 13 January 2022 includes a disclosure but not the latter part? Should we conclude that part of the latter part of the email contains a disclosure but not all of it? There are so many possibilities that, in fact, the exercise becomes impossible to do. Therefore we have not been able to reach a conclusion on this argument.

87. The list of issues also states that the respondent denies vicarious liability for the claimant's actions. That is not a point which was explored in evidence and not one upon which we were addressed on in closing submissions. We assume, therefore, that it is not a point which is pursued by the respondent but, if it is, we would be willing to hear further argument on the point, since we did not clarify the point before giving this judgment.

88. In respect of the allegation that the claimant was shouted at and screamed at during the grievance hearing on 28 February 2022, as we have said neither the claimant's witness statement nor that of Meri Sutton repeats that allegation. Mr Egan expressly denies the allegation. The claimant did not challenge him on that point (although we do not assume that because she did not challenge him she accepts the allegation is true). There simply is no evidence from which we could find that this allegation is factually made out. Thus the claimant was not subjected to a detriment in this respect.

89. As we have said, we find that the grievance process was carried out impartially and effectively. The first grievance upheld the claimant's complaints and Mr Egan disciplined Ms Schendel. The second grievance, whilst not upholding the actual complaint of bullying, thoroughly considered those matters and gave recommendations going forward. There is no evidence from which we could find that Mr Egan had any hostility towards the claimant or any partiality towards other staff, whether they lived on his street or not. This we do not find that there was a detriment in this respect.

90. Moreover, we are entirely satisfied that the conclusions which Mr Egan came to were the ones which he felt were right and he would have come to them regardless of whether the claimant had made the disclosures alleged or not. Those emails which the claimant had sent simply had no influence on his thinking.

91. Accordingly, the fact that Mr Egan rejected the claimant's concerns, whilst amounting to a detriment (because no employee likes having their concerns rejected) was not because of any of the emails which the claimant had sent. It was because that was the genuine view of Mr Egan.

92. Mr Egan has explained that his failure to offer the claimant a right of appeal in his dismissal letter was because of legal advice. That was not challenged in cross examination by the claimant (and again we do not assume it is true simply for that reason). There is no evidence which would lead us to doubt the credibility of Mr Egan. He was able to give full and frank answers to all of the questions asked of him and appeared to us to be giving an honest account of the conclusions he reached in a difficult situation.

93. Thus we do not find that the claimant was subjected to any acts of detriment as a result of the emails which she sent.

94. We also accept the account given by Mr Egan as to why he chose to dismiss the claimant. The claimant may consider that the dismissal was unfair. She might take the view that it would have been better for Fay Harris to be dismissed rather than her since she considers Fay Harris to be the cause of the problems within the nursery. The claimant might consider it unfair that her absence was taken into account. But, as we have said, we are not determining an unfair dismissal claim. The only question is whether the sole or principal reason for the claimants dismissal was the alleged disclosures. We are entirely satisfied that they were not.

95. Thus the claim for unfair dismissal fails.

96. We also address the issue of time in respect of the solicitor's letter. We do not address it in relation to subsequent events given our clear findings that they were not influenced by the claimant's disclosures.

97. The solicitor's letter was sent on 18 January 2022. Thus any claim in that respect should have been made by 17 April 2022. The claimant notified ACAS of her claim on 27 April 2022 and the claim was presented on 8 June 2022.

98. Thus if the only detriment which was found to be proved by the claimant was the solicitor's letter of 18 January 2022 it was not presented within the primary time limit of three months.

99. The claimant has given no evidence as to why it was not reasonably practicable for the claim to be presented within three months and we note that in that period she was able to present her second grievance and appeal against the decision in that respect. She was also able to put in fairly lengthy submissions on 7 March 2022 which referred to seeking legal advice.

100. In those circumstances there is no basis on which we could find that it was not reasonably practicable for the claim to be presented in time and we would, therefore, lack jurisdiction to consider that claim unless it formed part of a continuing act. However given our other findings, it did not do so.

101. Thus the claim in respect of the solicitor's letter would fail on that basis.

102. In those circumstances this claim fails. It fails because we do not find that the claimant made protected disclosures but if she did we are entirely satisfied that all of the acts that the claimant complains of, apart from the letter from a solicitor, were not influenced, even to a trivial extent, by the disclosures which she had made. Even if the solicitor's letter was influenced by the disclosure, on which we make no finding, the claim in that respect is out of time.

Employment Judge Dawson
Date: 4 October 2023

Judgment sent to the Parties: 27 October 2023

FOR THE TRIBUNAL OFFICE

Notes

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.

Recoupment

The recoupment provisions do not apply to this judgment.