EMPLOYMENT TRIBUNALS

Claimant: Mr G Jikeme

Respondent: Seva Childcare Ltd

Heard at: Watford Employment Tribunal (In Public; In Person)

On: **1, 4 and 5 March 2024**

Before: Employment Judge Quill; Mr D Sagar; Ms N Duncan

Appearances
For the Claimant: Mr D Welch, counsel
For the respondent: Mr M Kotecha, chief executive of the Respondent

JUDGMENT and reasons having been given orally on 5 March 2024, and written reasons having been requested at the hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided

LIABILITY REASONS

Introduction

1. This is a claim brought by an employee against his former employer in which the allegations are of unfair dismissal because of protected disclosure and of detriment because of protected disclosure. The employee did not have two years service at the time of the termination of his employment.

Hearing and Evidence

2. This hearing took place entirely in person. We had a bundle of 201 pages, which had been prepared by the claimant's side taking into account any documents disclosed to the claimant by the respondent.

3. To this was added pages 202 to 205, being the respondent's whistleblowing procedure and page 206 being a document about the terminology "bystander" which the respondent had printed from the Internet about a week prior to this final

hearing, and which was not part of any of its policies, or taken into account prior to the Claimant's dismissal.

4. There were three witnesses in total. The claimant was the only witness on his side. On the respondent side's, it was Mark Kotecha, the respondent's Chief Executive, and Sai Guttikonda an employee of the respondent's in the role of deputy manager.

5. The respondent's statements, which were unsigned and undated (and in the case of Mr Kotecha did not contain his name) had been sent to the claimant some time before the hearing and long enough so that they could be, and were, included in the hearing bundle.

6. The claimant's witness statement was sent to the respondent around 28 February 2024; in other words two working days before the start of the hearing. The claimant's explanation for the lateness of his own witness statement was contained in correspondence sent by his solicitors to the tribunal and the respondent in the run-up to the hearing.

7. The claimant had applied for a postponement of the hearing and had alleged that been a failure by the respondent to comply with previous case management orders and said that this was the reason he did not been able to do his own witness statement. The postponement applications had been refused. The initial application was refused by Employment Judge R Lewis. The renewed application was refused (coincidentally) by the judge on this panel, namely Employment Judge Quill. The claimant's witness statement had been sent to the respondent prior to the parties receiving the second refusal.

8. Neither side made any oral application during the hearing for postponement or for the opponent to be struck out, or to be debarred from relying on witness evidence. Sensibly, the parties agreed that now that we had a bundle and some versions of witness statements at the start of the three day hearing and we should deal with the case on its merits and that is what we have done.

9. Each of the witnesses swore to the accuracy of their written statement and answered questions from the panel and the other side.

10. The respondent's two witnesses both gave evidence on Day 1. The weekend intervened between Day 1 and Day 2, and the claimant gave his evidence on Day 2. The planned start time for the hearing that day was 11am (as the parties had been told on Day 1), and actually commenced about 11:20 AM.

Disclosure Issues

11. During Mr Kotecha's evidence on Day 1, he had expressed that he had done his best to look for relevant documents and that it was possible that some relevant

documents might have been retained by a former employee Nisha Patel. He said that she had refused to return a company laptop when she left.

12. Another relevant former employee was Kimberly Bennett.

13. No copies of any correspondence from the respondent to either Ms Bennett or Ms Patel requesting that they release any documents to the respondent. Mr Kotecha, confirmed that there has been no report to any regulator such as OFSTED or the Information Commissioner, and no report to its client, the local authority, reporting any belief or opinion that the Respondent might have lost any data and/or that any of its former employees might have retained documents or information that properly belonged to the respondent.

14. During the course of his cross-examination, Mr Kotecha was challenged on his assertions about the claimant's conduct during his employment, and it was suggested to him that there were no documents to support what he said. Prior to lunch, Mr Kotecha did not dispute that assertion, subject to saying that Ms Bennett or Ms Patel might have had such documents, but he did not. After lunch he stated that he believed that there might be some supervision records for the claimant that might be relevant.

15. Both Mr Kotecha and Ms Patel had attended a telephone hearing in June 2023, at which orders for disclosure were made and so both of them were aware of the existence of those orders.

16. On Day 1, Mr Kotecha was reminded that the respondent was under an ongoing duty to disclose documents. He was told on Day 1 that if there were any documents which he now believed should have been disclosed in accordance with those orders, but which had not been, then the respondent should disclose those to the claimant immediately and it would then be a separate matter as to whether or not such documents might be admitted to the hearing bundle. We advised the parties that if both of them were in agreement that the documents should be added, then we would be unlikely to disagree, but if one side wanted them in and the other did not, then we would have to make a decision as a panel.

17. No further documents were disclosed to the claimant, either on Day 1, or during the intervening weekend, or on the morning of Day 2. Not only were they not disclosed prior to the parties being called into the hearing room (slightly behind schedule), but they were not disclosed in the hearing room either.

18. The cross-examination of the claimant took up the whole morning of Day 2, until around 1pm and resumed at around 2pm.

19. Early into the afternoon session, the respondent stated that it had obtained copies of the Claimant’s supervision records and wished to make an application for them to be admitted to the bundle. It was claimed that Mr Kotecha had made a search

on the previous Saturday (so after Day 1 of the hearing) and found paper copies. He said it had not been possible to send electronic versions of these documents to the claimant's side over the weekend because the respondent did not have facilities to scan these records and email them to the claimant's solicitors.

20. It was claimed that it had not occurred to Mr Kotecha to bring photocopies and hand them to the claimant's barrister prior to the start on Day 2. It was claimed that it had not occurred to him to photocopy them over the lunch break (either for the claimant representative or for the tribunal).

21. For the reasons which we gave at the time, we refused the application and we have therefore not seen the documents in question.

22. There was only a small selection of the claimant payslips in the bundle. These are documents which, in principle, ought to have been in both sides' possession or control. In the respondent's case, even if it did not possess them directly, it would have been able to have obtained copies from its payroll provider, namely its accountants. In the claimant's case, we accept his evidence on oath that he still has the emails which sent payslips to him; he has attempted to download copies of each attachment and the items in the bundle are the only items he was successfully able to download.

23. On Day 1, it emerged that there was an email to the claimant which was not in the bundle. It was a relevant email dated 6 September 2022 and which attached his P45. This is a document which ought to have been in both sides' possession. As we have already mentioned, Nisha Patel still employed by the respondent as of June 2023 and attended the preliminary hearing. She was the sender of the 6 September 2022 email.

24. The Claimant was able to locate the email on his phone, and we ordered that it be supplied to us. It was added to the bundle at page 115A.

25. During the course of the claimant's cross-examination, he was challenged about what he claimed to have said to Kimberly Bennett on 1 August 2022 when he telephoned her. It was this telephone call which was said to have included one of the alleged protected disclosures. In response to Mr Kotecha's question, the Claimant claimed to have a voice recording of what he said. Although this was potentially relevant evidence, given that it had not previously been disclosed to the respondent, we did not listen to it.

Claims and Issues

26. The hearing on June 2023, drew up a list of issues which appears in the bundle at page 43 through to 45.

27. The original stated the actual names of two people that we are referring to as TO and GA respectively.

1. Whistleblowing

Protected Disclosures

1.1 Did the Claimant make protected disclosures within the meaning of S.43A of the ERA 1996 as follows:

1.1.1 On the 1 August 2022, he informed Kimberley Bennett (Registered Manager) that [TO] (Residential Support Worker) had left his shift early and as a result residents were potentially being put at risk, giving rise to a safeguarding issue.

1.1.2 On the 2 August 2022, he informed Ms Bennett that [GA] (Residential Support Worker) had previously witnessed [TO] and another member of staff physically abusing residents.

1.2 Whether the protected disclosures were disclosures of information which, in the Claimant's reasonable belief showed that there was a failure to comply with a legal obligation to which the Respondent was subject, namely, to have in place procedures/measures to protect the residents.

1.3 Whether the protected disclosures were disclosures of information which, in the Claimant's reasonable belief, showed that the health or safety of an individual (in this case the residents) has been, is being, or is likely to be endangered.

1.4 Whether the Claimant reasonably believed that the disclosures were necessary in the public interest, in that there was a risk to health and safety.

Detriments

1.5 Whether the Claimant suffered the following detriments as a result of making the above protected disclosures (S47B of the ERA 1996):

1.5.1 Being suspended with effect from the 2 August 2022.

1.5.2 Being suspended without pay.

1.5.3 The Respondent's failure to follow its own disciplinary and dismissal procedures.

Dismissal

1.6 Whether the reason or principal reason for the Claimant's dismissal on the 2 August 2022 was the protected disclosures made on 1 and 2 August 2022.

1.7 Whether the Claimant's dismissal is automatically unfair under s103A of the ERA 1996.

2. Breach of Contract/ Unauthorised Deduction from Wages

2.1 Whether the failure to pay the Claimant's salary for the 2 August 2022, amounts to an unauthorised deduction from wages and/ or a breach of contract.

2.2 Whether the failure to pay the Claimant 1 months' notice pay amounts to an unauthorised deduction from wages and/ or a breach of contract.

3. Holiday Pay

3.1 Whether the Claimant at the date of dismissal was entitled to 30 days holiday pay.

3.2 Whether the failure to pay holiday pay amounts to a breach of the Working Time Regulations 1998 and/ or an unauthorised deduction from wages and/ or a breach of the Claimant's contract of employment.

4. Remedy

4.1 If any of the Claimant's claim is considered to be well founded, is he entitled to a remedy, namely:

4.1.1 Declarations

4.1.2 Compensation

4.1.3 Injury to feelings

4.1.4 Notice Pay

4.1.5 Holiday Pay

4.1.6 ACAS uplift

4.1.7 Interest

4.2 Whether any award of compensation should be reduced by virtue of S.49(6A) of the ERA 1996.

4.3 Whether the Claimant has taken reasonable steps to mitigate his loss.

Time Limits

28. The earliest allegation refers to the events of 2 August 2022, which is when the claimant was suspended. The claim form was presented on 9 January 2023.

29. ACAS conciliation lasted from 29 October to 10 December. Therefore, the period from the day after Day A, (30 October) to Day B (10 December) was 42 days.

30. But for the early conciliation extension, the time limit to bring complaints about the events of 2 August 2022 would have expired on 1 December 2022. Adding 42 days to take account of early conciliation moves the deadline to later than 9 January 2023. Therefore all of the complaints have been presented in time.

Claimant’s dismissal date

31. It is common ground that the Claimant was an employee and that he was dismissed.

32. The grounds of resistance stated that the claimant was dismissed for gross misconduct on 2 August 2022.

33. In the claim form - at box 5 - the claimant had written that his dismissal date was 2 August 2022.

34. The grounds of complaint, however, at paragraph 12 had also set out that the claimant had received a P45 on 6 September and made the allegation that that was the first time he was aware that he had been dismissed.

35. We informed the parties, when discussing the list of issues on Day 1, that we would have to make a decision (as part of our analysis and conclusions after the evidence) about which person or persons took the decision to dismiss the claimant, and about when they made up their mind to do so. We had to do this in order to properly consider the allegations that the claimant had been dismissed because of protected disclosure. We needed to make findings about whether the person who took the decision to dismiss knew about the (alleged) protected disclosures at the time they made the decision.

36. Furthermore, for the breach of contract claim, it was clear that the claim form and the Grounds of Complaint did not contain any admission by the claimant that he had been told on 2 August 2022 that he was dismissed. Rather, the claimant's claim form and the Grounds of Complaint as a whole made clear that he had relied on the date in the P45 when reaching the conclusion that his employment had ended 2 August; his claim documents made expressly clear that he had not been made aware of the termination of his employment any earlier than 6 September.

37. During these preliminary discussions, the Claimant confirmed that he had read the 6 September email, and read the attached P45, and noted the date of 2 August in the P45, on 6 September (not later).

The Respondent's response and Further Information

38. The contents of the grounds of complaint at [Bundle 21 to 26] closely matched the contents of the list of issues drawn up in June 2023.

39. After the claim was presented the grounds of resistance attached to the response form was [Bundle 35].

40. In paragraph 14 of the grounds of complaint, the claimant had alleged he made 2 protected disclosures (and they match what is set out in the list of issues).

41. The grounds of resistance made no attempt to address the first of those.

42. The second was not met head-on. Whereas the allegation in the grounds of complaint was that the claimant had informed Ms Bennett that GA had witnessed

physical abuse by two members of staff, the grounds of resistance simply said that the claimant made some allegations about other staff.

43. Omitting the final two paragraphs, the Grounds of Resistance said:

> Mr Jikeme was immediately dismissed for gross misconduct on 2nd August
>
> He worked as a residential support worker for [Person 2]. The child was required to have two support workers beside her, at all times, day and night for her own safety due to risk of self-harm and dangers.
>
> On the night of 2nd August Mr Jikeme made some allegations about other staff, his long-term colleagues. Thus, the Registered Manager and the MD come to the children's home during the middle of the night as outlined by Mr Jikeme.
>
> Given the seriousness of Mr Jikeme's allegations, which included physical abuse of children, the MD had no hesitation in calling the police. The police took statements throughout the night. In Mr Jikeme's statement he stated that these allegations had been going on for a year.
>
> Following this Seva Childcare Ltd took professional advice on the matter and also with local safeguarding authorities. The responsibility on deciding issues in terms of the safeguarding of young children in each local authority is with the LADO-the Local Authority Designated Officer, in Barnet, where the home is based.
>
> The advice of the LADO was that the role Mr Jikeme played in this situation was not that of a whistleblower, but since he did not act for over a year, he was in fact a 'bystander' in this matter. Thus for over a year he was aware of the physical and emotional abuse of children and had taken no action prior to the night of the 2nd August when the police were called.
>
> This was a matter of gross misconduct and he was paid all outstanding monies and dismissed immediately.

44. Having received this, in March 2023, the Claimant's representative requested further information including:

44.1 Who dismissed the Claimant, and when

44.2 Was there a dismissal letter, and what did it say

44.3 Was there an investigation

44.4 Was there a suspension; if so, who by, and when, and whether it was with pay?

44.5 full details of the allegations made by the Claimant about other staff

44.6 When was the "professional advice" the Respondent claimed to have received

44.7 Full details of what LADO said and when

45. The Respondent had not answered this by the time of the preliminary hearing in June 2023 which was attended by Mr Kotecha and Ms Patel. The summary of the hearing noted that the Respondent had agreed to provide the information.

46. The Respondent had not done it by 6 November 2023, when the following order, amongst others, was made by EJ Quill [Bundle 143]:

> Employment Judge Manley's orders noted that the Respondent had agreed to provide the further information The Respondent is now ordered by the Tribunal to do so. This must be done by 20 November 2023. I am not making an Unless Order at this stage; however, it is important for the Respondent to note that the response might be struck out if it breaches this order, or any of the other orders mentioned below.

47. The Respondent did not, by 20 November 2023, provide answers to the March 2023 document. Instead, on 17 November 2023, it provided a commentary on the list of issues stating:

> 1.1, 1.2, 1.3
>
> This is not considered a protected disclosure due to the nature in which it occurred and the Claimant identified and admitting that he was a bystander to the abuse for almost a year. Nisha Patel, the Managing Director at the time, took the statement who in discussion identified had known about the abuse occurring to the children for a long period of time and did not disclose this previously to management.
>
> Furthermore, it was identified by the LADO, police, OFSTED and independent visitor (IRO) the concerns around Godwin not reporting the concerns earlier and actively allowing others to abuse the children.
>
> There is no evidence of Godwin following the safeguarding policy and procedure and therefore it is not considered that protective disclosure was applicable in this situation.
>
> 1.4
>
> There is evidence to claim Claimant made disclosure to be malicious towards other staff due to personal vendetta against other staff and their rota. This was an ongoing issue prior to the disclosure being made and there is evidence to suggest that the claimants goal of reporting staff was not to safeguard the children but to gain additional shifts.
>
> This is another reason why it was not felt that the member of staff adhered to whistleblowing policies and again played an active role in the abuse of children within the children's home.
>
> 1.5.2-Suspended without pay-due to the nature of the allegation and the police involvement the organisation deemed it appropriate to suspend without pay in line with their policy.
>
> 1.5.3-The respondents failure to follow tier own disciplinary and dismissal procedures
>
> Due to the severity of the actions and gross misconduct including being a bystander whilst children are abused, gross misconduct in malicious behaviour towards colleagues, the Claimant was dismissed immediately under gross misconduct. The

> Claimant received is P45 on 28th of August to inform him he was no longer working for the organisation. In Godwin's own statement he informed the home that he was aware of the abuse for over one year and therefore was aware that this behaviour and practise was not acceptable in line with the homes safeguarding and gross misconduct policy and procedure. LADO, police, OFSTED and independent visitor all confirmed that the member of staff had played an active role in the potential abuse of children and therefore he should not return to the home.
>
> …
>
> 2.2 Claimant did not fail to pay one months notice as during this time the member of staff was suspended without pay and therefore not entitled to one months notice. This again was due to the severity of the allegations made against the member of staff and the member of staff actively admitting to Nisha Patel, the Managing Director, that he was aware of abuse against children for almost one year.
>
> Holiday Pay
>
> The deadline for claiming any outstanding holiday pay we understand is within 3 months of the date of employment ending. This claim was not made and thus the Respondent is not required to pay this claim.
>
> However the Respondent has agreed to pay the holiday pay that was outstanding for the year to August 2022 once all matters relating to this Tribunal have been completed.

48. Thus, the Grounds of Resistance claimed that the LADO (local authority designated officer) had determined that the claimant had been aware of physical and emotional abuse of children for a year and had taken no action. The additional information asserted that the LADO (as well as police and other external bodies) had determined that the Claimant had played an "active role" and "should not return".

49. The Respondent has provided no evidence that the Claimant received P45 on 28 August 2022, and Mr Kotecha has not been able to explain why that assertion was made.

50. The additional information asserts that the there is evidence that the claimant made the disclosures to be malicious towards other staff due to a personal vendetta over the rota. It did not state the source of these allegations, or the date when they were first made. This document was produced over a year after the dismissal and about 9 months after the Grounds of Resistance, and it is the first time the Claimant was made aware of these allegations. No contemporaneous documents to support them have been made.

51. The additional information contained an admission that the Claimant had been dismissed without following a procedure, and that he had not been paid during any period of suspension, but was ambiguous about dates of dismissal and suspension.

52. The Grounds of Resistance (written 6 months after the Claimant's last shift) asserted that there might be grounds to investigate the Claimant for a matter which was unrelated to the content of his own disclosures. The additional information (written 15 months after the last shift) claimed that the Claimant had been notified that he was under such investigation. In fact, the Claimant has never been notified of any such investigation. Mr Kotecha admitted, during the tribunal hearing, that, while he had made an allegation about the Claimant to the local authority, the local authority had told him that they would not be taking any action.

The Facts

53. The claimant's employment commenced around 6 July 2021. Both parties accept that the document at [Bundle 50 to 59] accurately matches the written contract sent to the claimant around the start of his employment, even though the document in the bundle is not signed by the claimant at all and is only signed by the respondent on 4 April 2022.

54. Kimberly Bennett was the registered manager of Greenview House throughout the entire period of the claimant's employment. We note the handwritten comment attributed to her at page 59 of the bundle but neither side has raised any issues about that.

55. The respondent currently operates three homes. Children (that is, people under 18) are placed into these homes by the local authority and the respondent is responsible for providing care and support to these young people.

56. As of around July and August 2022, the respondent was in the process of opening its second home, and did not yet have the third. We are only concerned with Greenview House, which was the first.

57. As well as that being the location at which the claimant worked, Greenview House was also where Kimberly Bennett was based. She worked office hours Monday to Friday from 9am to 4pm in her role as manager. Sometimes she also did shifts as a care worker in the home, and so was sometimes present outside those hours.

58. Mr Kotecha is the chief executive and he was also often on site. When he was on site, he shared the office which Ms Bennett used in her role as manager. It was common, during the day, that they were both in the office, sharing it at the same time. There were times when one of them was in the office and the other was not.

59. The claimant's job title was residential support worker waking night full-time.

59.1 As per clause 6.1 his contract. He was contracted to work 40 hours a week. His hourly pay was £12. He was to be paid monthly, on the seventh day of each month.

59.2 Clause 6.3 of his contract stated that if he was prevented from attending employment as a result of police bail conditions or because of an order or direction given by a court or regulator, then he would not be entitled to be paid during that period; "that period" meant the period during which he was prevented from attending work by the circumstances mentioned in clause 6.3.

59.3 His hours of work were set out at clause 7 which, consistent with clause 6.1, stated that his normal hours of work per week were 40.

59.4 As per clause 8, he was entitled to 28 days paid holiday per year, including bank holidays.

59.5 This would be pro-rata if he worked part-time. But we are satisfied that he did not, and that he is entitled to 28 days per year.

59.6 The holiday year was 1 January to 31 December.

59.7 Clause 8.8 required written requests for holiday and approval.

59.8 Clause 8.12 contained a general ban on carry over of holiday from one year to the next. We have seen no evidence that the claimant received any approval to carry over any holiday from 2021 into 2022.

59.9 Clause 8.15 asserted the right to pay only the statutory minimum obligation in cases where the dismissal was for gross misconduct.

59.10 Clause 8.6 made assertions about holiday ceasing to accrue during certain absences.

59.11 Clause 12 of the contract dealt with notice requirements and - as per clause 12.3 - the claimant (who had completed probation successfully, but had not had five years employment by August 2022) would have been entitled to receive one month's notice.

59.12 Clause 12.4 referred to the right to terminate without notice in certain circumstances and cross-referenced the employee handbook and disciplinary policy. Neither such item has been disclosed by the respondent during the course of this litigation, or put in evidence to the employment tribunal hearing.

59.13 The contract contains no payment in lieu of notice clause but, at clause 12.5, there is what might be called a garden leave clause. In other words, the claimant could be required to stay at home during his period of notice.

59.14 Clause 13 refers to disciplinary rules and procedure. It cross-references a disciplinary policy, but no such policy has been disclosed to the claimant during this litigation.

59.15 Clauses 13.2 and 13.3 deal with suspension. Clause 13.2 refers to the right to suspend pending investigation. 13.3 states that any such period of suspension will continue to be at full pay.

60. Nothing in the contract cross-references any's alleged suspension policy and procedure. In this the Tribunal's assessment of the facts, that is surprising if, as the Respondent alleges, it did in fact have a separate suspension policy and procedure; at least one which purported to be relevant to pay entitlement. Clause 13.3, for example, that the suspension will be at full pay, subject to the suspension policy.

61. The respondent has included, at [Bundle 89 to 97], a document which it says is its suspension policy and procedure.

61.1 It is an undated document and the claimant had never seen it prior to its disclosure during the course of this litigation.

61.2 Unlike the safeguarding policy, which starts at [Bundle 60] and states - in the footer of each page – "reviewed December 2022", there is no similar footer, and no indication - within the document itself – of when it was created, or when it was reviewed.

61.3 Unlike both the safeguarding policy and the whistleblowing policy and procedure, this document is not on headed paper.

62. We are not satisfied on the evidence presented to us that this document was a policy that was in force either at the start of the claimant's employment or during the period of his employment. Regardless of when the document itself was created (about which we have no evidence), there is no evidence that it was ever supplied to any employee or drawn to any employee's attention, or cross-referenced in any document that was supplied or drawn to their attention.

63. Even if we are wrong about that, we are satisfied by the claimant's evidence that he had never seen it or been told about it. This document does not vary the claimant's contract of employment.

64. We are satisfied by the claimant's evidence that during his employment. He was often asked to do extra shifts, including daytime shifts. We accept the Claimant's evidence that, rather than – as alleged by Mr Kotecha - the Claimant pushing the respondent to give him additional work, the Claimant expressed the opinion to Ms Bennett that the respondent should potentially hire more staff and should not rely on him as much as they did to do these extra shifts.

65. We reject the respondent's argument that actually the claimant was clamouring for additional shifts and that he became resentful of the respondent - or any

employees working for the respondent - because he did not get as many shifts as he wanted.

66. At the time is relevant to this dispute, There were two residents of Greenview House. They were both under 18. We will refer to them as Person One and Person Two.

67. We will refer to some of the claimant's colleagues by initials only.

68. First of all, there is SS and TO. In each case, allegations of mistreating residents were made against those individuals and since they have not given evidence at the tribunal, and since we have been told that the allegations were not substantiated and did not result in any prosecution or conviction, it is not appropriate to mention their full names in this document. Their full names are known to the parties, and were mentioned in evidence during the hearing, but their actual names are not relevant to decisions that we have to make about the claims brought by the Claimant against the Respondent.

69. Secondly, there is another employee that we will refer to only by initials: GA. No allegations that GA mistreated any resident have been made. However, allegations about GA's conduct have been made by the Respondent (and GA was dismissed by the Respondent). GA has also not given evidence and we also think it is not appropriate to name them, and GA's actual name is not relevant to decisions that we have to make about the claims brought by the Claimant against the Respondent.

70. Each of Person One and Person Two had a ratio of 2 to 1 during daytime. This meant that each of them required 2 staff members to be dedicated to providing care and support to them (and not to any other resident) during day time.

71. In the respondent's grounds of resistance (at page 35 of the bundle), the Respondent asserted that Person Two required 2 support workers at all times, day and night for her own safety due to risk of self-harm and dangers.

72. Mr Kotecha' oral evidence was that, in fact, the 2 to 1 requirement was only during daytime. We accept that his oral evidence is accurate and that the Grounds of Resistance was not. The 2 to 1 requirement applied until the resident was settled down in the room for the night, but, after that, even if they woke up, the Respondent's obligations would potentially be satisfied by having one member of staff attend to them.

73. The staffing ratios were set by the local authority's social workers. The social workers did take into account the feedback from the Respondent, and no doubt placed a lot of weight on it, but, ultimately, it was the local authority and not the Respondent who fixed the required staffing ratio, and the Respondent's legal obligations to the Respondent included having to maintain that ratio.

74. At night time, the Respondent had staff on duty.

74.1 At least one member of staff would always be “waking night”. That meant that they were on duty all night, and awake and paying attention. The claimant often performed that role (as reflected in his job title). The “waking night” shift was from 8pm to 8am.

74.2 In addition, there would be at least one person who was “sleeping night”. Once the residents were settled in their rooms, the “sleeping night” staff were obliged to remain on the premises, but were not obliged to be awake and paying attention at all times. Rather, if they were needed, they could be called for by the waking night staff, for example if there was some incident which potentially required a 2 to 1 staff ratio to provide care to the young person, or if there was some type of emergency.

75. Our finding is that for the night period which started around 8pm on 1 August 2022 and which was due to finish around 8am on 2 August 2022, the Respondent had a legal obligation (owing to its arrangements with the Respondent) to have three members of staff at Greenview House and that it intended to meet that obligation by having the Claimant on duty as waking night, with TO and GA as sleeping night.

75.1 We have seen no documentary evidence to help resolve the difference of opinion between the grounds of resistance and the oral evidence of Mr Kotecha about whether the 2-to-1 requirement was at night. We have seen no documents at all about what specific staffing requirements the Respondent was obliged to have.

75.2 During his oral evidence, Mr Kotecha accepted that paying for staff at night came at a cost to the respondent.

75.3 We are satisfied from the contemporaneous documents that the respondent, on the night of 1 August and 2 August 2022, had arranged for three staff to be on duty. There is no dispute that the claimant was scheduled to be waking night. We are satisfied that the Respondent had arranged for TO and GA to be there too; neither side has suggested that they were obliged to be “waking night”, and thus, we accept, they were both supposed to be “sleeping night”.

75.4 We are satisfied that the reason that the respondent arranged for three people to be on duty that night is that it believed that that was the minimum necessary in order to fulfil its contractual obligations to the local authority and/or to provide an appropriate level of cover for the health and safety of its staff and the young people. There would have been no reason for the Respondent to have three people present and being paid if it was only obliged to have two, and the Respondent has produced no documents to show that it was only obliged to have two.

76. In any event, even if we are wrong about the obligation to have three people present, the Claimant did, in fact, believe that there was an obligation for all three, including TO, to be present.

77. Shortly after the claimant's employment commenced (so around July or August 2021, and about 12 months prior to the shift commencing 8pm on 1 August 2022), the Claimant believed that he had witnessed TO speak inappropriately to Person Two. He saw no physical abuse, either on that occasion or any other occasion. However, he thought it was appropriate to report what he had seen to Ms Bennett, in her role as the registered manager. He did so at by attending her office to speak to her. She did not ask him to put anything in writing and she said she would deal with it. He believed that she did so. TO had not been present at the time of the Claimant's report, but the Claimant he was aware that Ms Bennett asked to speak to TO shortly afterwards and the Claimant was satisfied that Ms Bennett had dealt with the matter appropriately and there was no need for any further action on his part. Thereafter he did not witness any further inappropriate verbal interaction between TO and any resident, and he never witnessed any inappropriate verbal or physical interaction between any staff member and any resident.

78. When the claimant reported that matter to Ms Bennett, she was in the office alone with the Claimant; nobody else, including Mr Kotecha was present. We reject Mr Kotecha's assertion that he was always present in the office whenever Ms Bennett was, and that (therefore) the Claimant must be lying about claiming to have reported the matter to Ms Bennett (at a time that she was in the office alone). We are satisfied by the Claimant's account that the report to Ms Bennett occurred, and about what the reasons for that report were, and about what he said to her, and about why he believed no follow up action on his part was required.

79. We are also satisfied that, on 2 August 2022, the Claimant gave an account to Ms Bennet and Ms Patel (about the report to Ms Bennett circa July 2021) that was similar to the account which he gave to the Tribunal.

80. The Respondent's own case is to dispute what the Claimant said on 2 August 2022, but it did not call Ms Bennett or Ms Patel to give evidence about that. It was aware, from the Grounds of Complaint and Additional Information, what the claimant was alleging/admitting that he said about abuse (namely that GA had witnessed it, not that the Claimant had). The Respondent called no witness to allege that the Claimant had claimed to witness abuse himself.

81. Furthermore, in its additional information, the Respondent denies that the Claimant followed safeguarding procedures. It did not call Ms Bennett to say she had received no reports from the Claimant. Further, on being asked whether the Respondent maintained records of safeguarding issues, Mr Kotecha said it did. On being asked if those records had been searched for documents relevant to this

tribunal case (on the basis that, even if there was nothing earlier, there would presumably have been documents from 2 August 2022 and immediately afterwards), Mr Kotecha said that these had only been on Ms Patel's laptop and she had not returned the laptop, or left copies, when she left the Respondent's employment. Ms Patel has not given evidence and has not had a chance to respond to this allegation; we have seen no documents to show that this allegation has been put to her by the Respondent and Mr Kotecha confirms that the Respondent has not contacted the Information Commissioner or any regulator about it.

82. It was put to the claimant by Mr Kotecha that the claimant received a verbal warning around three days after the start of his employment and this was administered in the office with Mr Kotecha, Ms Bennett and the claimant present.

82.1 We accept the claimant's denials that that happened.

82.2 The respondent has provided no documentary evidence of any description to support its allegation. Nor was this mentioned in the Respondent's Grounds of Resistance, or Additional Information, or written statements.

82.3 The allegation of the claimant receiving such a warning within three days of the start of employment seems to us to be impossibly inconsistent with paragraph 3 of Mr Kotecha' statement which says there was a "honeymoon period" for the first month or two of the claimant's employment (after which, according to Mr Kotecha, the Claimant started behaving badly).

83. Mr Kotecha suggested in his evidence that Ms Bennett had wanted to dismiss the claimant because of his conduct and/or because of friction between the Claimant and colleagues but had been scared to do so due to feeling intimidated by him.

83.1 We accept the claimant's evidence that his genuine opinion is that he and Ms Bennett got on fairly well and that she relied upon him to do extra shifts and he agreed to her requests to do so.

83.2 There is no evidence from Ms Bennett and there are no documents in the bundle to support Mr Kotecha's assertion

83.3 The grounds of resistance do not contain any assertions that there had been concerns about the claimant's conduct prior to 1 August 2022.

83.4 The additional information makes generalised comments about the Claimant's conduct, without supplying dates, times, details, etc. It says there is "evidence" about the Claimant's behaviour, but such "evidence" has not been produced.

84. Nisha Patel commenced employment with the Respondent as the respondent's director of operations sometime in around June or July 2022.

85. There was an occasion in July 2022 when the claimant had informed Ms Bennett that one of his colleagues, TO, was not performing the sleeping nights as he was supposed to but was absent from the home during his shifts. Ms Bennett told the claimant that if it happened again she he should call her.

86. On 1 August 2022, around 8pm, the claimant started a shift as "waking night". It was due to finish around 8am on 2 August 2022.

87. The respondent's witness, Sai Guttikonda, was employed as Deputy Manager. Until not long prior to 1 August 2022, he had been Deputy Manager for Greenview House. However, he had recently been allocated the role as Deputy Manager in the Respondent's second home. On the night of 1/2 August 2022, Mr Guttikonda was not on duty to work at Greenview House. His recollection is that he attended Greenview House to collect some clothes and while there, he spoke to the claimant and the claimant's colleague GA and asked them if everything was okay and they said that it was.

87.1 The first time this was mentioned was during Mr Kotecha's oral evidence on Day 1 of the hearing. It is not mentioned in any witness statement or any document in the bundle.

87.2 The claimant denies speaking to Mr Guttikonda that evening, or being aware of his presence. He suggests that if Mr Guttikonda actually did attend Greenview House then it must have been before the claimant came on shift, or else it must have been while the claimant was in a different part of the building.

87.3 We do not think anything in particular turns on this. We are not forced to conclude that whichever person is wrong (about whether Mr Guttikonda and the Claimant spoke, on the premises at Greenview House, on the evening of 1 August 2022) must be lying. It is possible that Mr Guttikonda is correct, but the Claimant honestly does not remember, given that it was never mentioned to him until 18 months later (in the hearing room at Watford ET). It is also possible that the Claimant is correct, and Mr Guttikonda is giving an honest recollection, but is mistaken that it was 1 August.

87.4 In any case, we accept that the claimant is telling the truth when he told us that has no recollection of speaking to Mr Guttikonda that evening.

87.5 We note that Mr Guttikonda's alleged presence that evening was not mentioned to the LADO on 4 August.

87.6 We note that the Respondent has produced no contemporaneous written statements or investigation report about the events of 1 to 2 August 2022.

87.7 To the extent that Mr Kotecha was seeking to imply that if the Claimant did not tell Mr Guttikonda that TO was absent, then that somehow undermines the Claimant's credibility and/or implies that TO was not absent and/or implies an improper motive for contacting Ms Bennett, we reject those suggestions. The undisputed evidence is that TO actually was absent from Greenview House when he was supposed to be on duty; far from claiming that he remained throughout his shift, the Respondent's position is that it later emerged that TO was called away because of a family emergency.

87.8 To the extent that Mr Kotecha was seeking to imply that if the Claimant did not tell Mr Guttikonda about staff (TO and SS) abusing residents, then that somehow undermines the Claimant's credibility and/or implies misconduct on the Claimant's part, we reject that argument. Even if, contrary to the Claimant's genuine recollection, he had a discussion with Mr Guttikonda shortly after his shift started, that does not contradict the Claimant's account that it was after he had telephoned Ms Bennett to report that TO had left Greenview House that GA first mentioned to the Claimant that GA had seen physical abuse by TO and SS.

88. Regardless of whether Mr Guttikonda was there at all that evening, what actually did happen is accurately summarised in paragraph 19 of the Claimant's statement.

88.1 At some point, the Claimant saw TO leave. The Claimant thinks it was around 8.30pm, but the exact time does not matter; if Mr Guttikonda's oral evidence is correct, that he was in Greenview House on 1 August and saw that all was well, then TO left after Mr Guttikonda left.

88.2 TO had not returned after a significant amount of time had elapsed. The Claimant called Ms Bennett. He specifies "10.18pm" in his witness statement, but the exact time does not matter. Our finding is that it was before midnight, and so was on 1 August 2022, but, even if it was after midnight, that would not affect our decisions about what was said in the phone call.

88.3 We accept the Claimant's oral evidence that, after he told Ms Bennett that TO had left, she asked him if TO was coming back. He told Ms Bennett that he had not questioned TO about his reasons for leaving, and so did not know, but that, based on previous experience, TO would not be returning. We accept that it is true that the Claimant said that to Ms Bennett on the phone, and true that that was the Claimant's genuine opinion on the subject.

88.4 Ms Bennett told the Claimant that she would come to Greenview House.

88.5 Either shortly before, or shortly after, 2 August began, Ms Bennett arrived at Greenview House, accompanied by deputy manager Arda Atan.

89. The claimant is not sure exactly what time they arrived because Ms Bennett had her own key, and they let themselves in. However, after she had arrived she asked him to come downstairs and speak to her and Mr Atan. He went to see them in the lounge. He believes this was probably after midnight and therefore was on 2 August, although the exact time does not particularly matter.

90. The claimant's account of his discussions with Ms Bennett is at paragraphs 20 through to 22 of his witness statement. We accept the claimant's account that the first time GA had mentioned abuse (by TO and SS) to the Claimant was on 1 August, after he had called Ms Bennett to speak to her about TO's absence, and after she had told him that she was going to come to Greenview House straight away. We accept the Claimant's account that he stated that fact (that he had only just been told about it by GA) to Ms Bennett at the time.

91. It is not relevant to our decisions whether GA was telling the truth, as he saw it. It is not relevant to our decision whether GA accurately assessed the situation, or was mistaken in his opinions. It was the Claimant's genuine belief that the Claimant needed to tell Ms Bennett to ask GA to repeat to her what GA had said to him. That is what he did, and that is what caused her to question GA on the subject.

92. As mentioned previously, we have been told by the respondent, and we have no reason to doubt it, that the subsequent investigation into whether TO or SS had abused the residents decided that there was insufficient evidence to take the matter further, and neither was prosecuted. However, that does not imply that, on 1 and 2 August 2022, the Claimant had reason to believe that GA was mistaken, still less that he had reason to believe that GA was lying, and still less to believe that he, the Claimant, should refrain from informing Ms Bennett that she needed to ask GA for details of what GA claimed to have witnessed.

93. It was put to Mr Kotecha during cross-examination that the claimant's only source of information about physical abuse was GA, and that the claimant had made that clear to Ms Bennett on 2 August. Mr Kotecha's response was that he and his colleagues had decided that this was the claimant's modus operandi; that is, they decided that the claimant was a stirrer and that rather than make the allegations directly himself he had persuaded GA to do so.

94. This would – if true – be misconduct, namely (a) being responsible for false allegations being made and (b) not only knowing the allegations were false, but also seeking to disguise his own part in making false allegations by pretending that GA was the witness. However, if true, this would be very different to actually having been aware of abuse and having failed to report it.

95. The allegation that the Claimant had persuaded GA to make false statements is not one which had been made in this litigation prior to Mr Kotecha's answers in cross-examination; it is not one which was put to the Claimant during his employment.

95.1 We are not satisfied that this was an opinion that was expressed by the respondent at the time to the relevant authorities.

95.2 As far as we are aware, from the evidence presented, it is not an allegation that appears in writing in any document.

96. After a discussion with the Claimant, and, as suggested by the Claimant, a discussion with GA, Ms Bennett telephoned Nisha Patel and Ms Patel came to Greenview House. We accept that the Claimant's account, as per paragraph 23 his witness statement, is accurate. Ms Patel arrived approximately between 1am and 1.30am (though the exact time does not matter). In response to questions from Ms Patel, the claimant mentioned the verbal abuse that he had seen a year earlier and which he had mentioned to Ms Bennett. During that discussion, Ms Bennett confirmed to Ms Patel that the claimant's account was accurate; that is, the Claimant had spoken to her a year earlier about that specific incident. Other than that incident, the Claimant had not witnessed anything else that might be called "abuse". Ms Patel made notes of what the Claimant said.

97. The claimant did not state to Ms Bennett or Ms Patel or to anybody else that he personally had seen any physical abuse at all, or that he had been aware of GA's opinions any earlier than 1 August, or that he, the Claimant, had witnessed any abuse at all other than the verbal abuse incident discussed above.

98. Ms Patel notes have not been disclosed by the respondent. Mr Kotecha claims not to have them, and that she might have handed them to the police (without keeping copies), but that, in any event, the Respondent has searched and not found them.

99. The police were called and arrived some time approximately between 2am and 3am. The claimant gave an account of the police, which was similar to that which had given to Ms Bennett and Ms Patel: that he had not witnessed any physical abuse at all, and that the only incident of note which he had seen was the verbal abuse which he had a reported to Ms Bennett a year earlier.

100. We are satisfied that neither on 2 August 2022, nor on any subsequent occasion was the claimant interviewed as a suspect. He spoke to the police once more by telephone a few weeks later, but on that occasion, as on 2 August, he was being interviewed as a witness to a possible crime, not as someone regarded as a possible perpetrator.

101. 2 August was the Claimant's last shift. The claimant never worked for the respondent again. After his shift had finished he went home. He was not informed during his shift that he was suspended or under any investigation.

102. At 20:41 that evening, 2 August, he received the message by text from Ms Patel [Bundle 98 and 99].

> Hi Godwin
>
> It is Nisha from Seva homes
>
> Following the allegations made yesterday, unfortunately I have to inform you that you will need to be suspended from home pending investigation.
>
> A formal letter will be sent to you shortly and will highlight the terms of your suspension.
>
> Please do not contact anyone except management to discuss this further.
>
> Thank you
>
> Nisha

103. There were no allegations made against the claimant "yesterday" (either on 1 August 2022, or in the early hours of 2 August). The only allegations made were by GA and were about TO and SS, not against the claimant.

104. There was no further contact from the respondent to the claimant until the email which appears [Bundle 109] and which is dated 16 August. It was sent by Ms Patel at 18:15. It reads:

> Dear Godwin
>
> Hope you are well
>
> I am writing to inform you that your period of suspension from employment with Seva Childcare Ltd will now be without payment. This is in line with the company's suspension policy which you accepted on beginning employment with the company.
>
> Furthermore, I have been informed by the Metropolitan Police that they have decided to pursue a criminal investigation on the matter for which you have been suspended. An officer has now been appointed, visited us last week and will be in touch with you directly very soon.
>
> Regards
>
> Kind Regards
>
> Nisha Patel
>
> Managing Director

105. The implication of that first sentence and the use of the word "now" is that previously it had been regarded as a paid suspension, and Ms Patel was intended to convey new and updated information to the Claimant, not merely confirm what

her text on 2 August had said. In any event, the claimant was never paid from 2 August onwards.

106. The second sentence in the first paragraph stated that this was in line with the company suspension policy, being a policy which the claimant had accepted on beginning employment with the company. As per our findings of fact above, we are not satisfied that there was such a policy in existence at the time the claimant's employment started and - in any event - the claimant had not been made aware of the existence or contents of such a policy. This 16 August email was the first time that it had been mentioned to the Claimant (and the panel has not been provided with reliable evidence that it existed prior to August 2022).

107. The next paragraph started with the word “Furthermore”. Thus the email does not assert that the reason that the claimant's pay was ceasing was that the police had decided to pursue a criminal investigation. Rather the email makes clear that the second paragraph is additional information being passed to the claimant which is separate to the information in the first paragraph about his pay being stopped.

108. Ms Patel has not been called as a witness. Thus any findings that we make about her beliefs and opinions and motivations have to be made without the benefit of any written witness statement from her, her answers to cross-examination questions, and answers to the Tribunal’s questions. We have to make our findings based on the evidence we have heard from the Claimant, and from Mr Kotecha, and the documents in the bundle. Based on the available evidence, we are satisfied, on the balance of probabilities, that Ms Patel was aware at the time that she sent this email (18:15 on 16 August 2022) that the claimant was not the subject of the police investigation referred to in the final paragraph of her email. We are satisfied that she knew that TO and SS were the subjects of the police's investigation and that the claimant was to be interviewed as a witness, not a suspect.

109. The only document in the bundle between 2 August and 16 August is [Bundle 100 to 108]. This is the notes of a meeting held on 4 August. It was a meeting conducted by the local authority designated officer (“LADO”).

110. According to the document the LADO had received a referral form from Mr Atan. The exact date of the referral is not mentioned but it must have either been 2 August, 3 August or 4 August 2022.

110.1 The referral form is not a document disclosed by the Respondent in the course of this litigation. [Bundle 103] contains an extract, copied and pasted into LADO’s minutes.

110.2 The meeting was attended by Ms Bennett, Mr Kotecha, and Mr Atan. Ms Patel was not at the meeting.

110.3 Mr Kotecha's oral evidence was that Ms Bennett, Mr Kotecha, Mr Atan and Ms Patel had a number of discussions immediately after 2 August. He claims that these were not minuted and that there are no other written records, such as email traffic to reveal specifically what was said in such discussions.

110.4 We are satisfied that Ms Patel would have been made aware, by Mr Kotecha and Ms Bennett (and presumably Mr Atan) of what their recollections were about what was discussed at this meeting. Furthermore, since these minutes were disclosed by the Respondent in this litigation, she would have had access to them.

110.5 The documents refers to 2 people as being the subject of allegations, namely SS and TO.

110.6 We are satisfied that the information given to the LADO was inaccurate in that it suggested Mr Atan and Ms Bennett had arrived at the home to do a spot check. We are satisfied that, on the contrary, the claimant had called Ms Bennett reported TO's absence and that was the reason for their attendance. It may well have been a mistaken assumption by Mr Atan; in any event, Ms Bennett appears not to have corrected it during the meeting.

110.7 We are also satisfied that the reference to the claimant's having told Mr Atan and Ms Bennett and that there were things that "there were other things happening in the home that managers (KB and AA) were not aware of" is simply a reference to the fact that the Claimant told them that they needed to speak to GA to hear the things that GA had (in the time between the Claimant phoning Ms Bennett and her arrival) told the Claimant.

110.8 The referral is not accurate when it states or implies that the Claimant had also seen abuse by SS or TO and was, thus, able to provide corroboration. Further, the reference to the report having not been made sooner because "*they felt they needed evidence before they could disclose this information and said they could not speak out due to fear of repercussions from TO*" is inaccurate in its use of the word "*they*" to the extent that is intended to include the Claimant, and not just GA. It is an accurate representation of what GA said, but the Claimant himself was clear at all times, with Ms Bennett, Ms Patel and with police that he personally had only just found out about GA's opinions, and that he personally had not directly witnessed any abuse.

110.9 The respondent has not produced notes from Ms Patel (or Ms Bennett or Mr Atan) taken on 2 August, and has not called any of those three as a witness. As mentioned above, we accept the claimant's evidence on oath about what actually happened and what he actually said, and that Ms Bennett confirmed on 2 August 2022 to Ms Patel that the Claimant had reported the verbal abuse

about a year earlier; we also accept the Claimant's evidence that Ms Patel actually did take notes.

110.10 The LADO minutes state (and we accept that it is accurate) that police had decided that the criminal threshold had been met and that there should be an investigation. We are satisfied that the Respondent's three attendees at the meeting (Atan, Bennett, Kotecha) knew that this meant an investigation into TO and SS, not the Claimant. We are satisfied that Ms Patel would have known that after the meeting. The document is clear throughout that TO and SS are the subjects (for example, heading on [Bundle 104] referring to "Background of Alleged Perpetrator") whereas the Claimant and GA are referred to collectively as "the whistleblowers". It was clear at the meeting and in the minutes that no criminal investigation was being discussed against "the whistleblowers".

110.11 The document stated that the "whistleblowers" as well as the suspects had been suspended. In other words, GA was also suspended, as well as the Claimant and TO and SS. The document did not mention anybody else having been suspended

110.12 Mr Kotecha gave oral evidence that every member of staff working at Greenview House (other than Ms Bennett and Mr Atan) had been suspended. He pointed to Mr Guttikonda having been suspended in support of this assertion. This was the first time it had been mentioned that Mr Guttikonda (or anyone other than the Claimant, GA, TO and SS) had been suspended. Our finding is that no-one else, other than the Claimant, GA, TO and SS, was suspended as a result of what the Claimant and GA said about abuse. Mr Guttikonda was suspended, but for the slightly different issue of being suspected of having been aware that TO was not on shift when he was supposed to be, but authorising his timesheets anyway. (Mr Guttikonda had not, in fact, known that TO was not on shift when he was supposed to be, and was cleared after an investigation by the Respondent.)

110.13 We do take into account that Mr Kotecha was giving evidence more than 18 months later, but our finding is that, for such a major issue (suspending every staff member for some period of time, pending investigation, and then either dismissing them or allowing them to return to duty afterwards, and, presumably, having to make emergency arrangements to cover for all those absences in the meantime) would be an important and memorable event. We are not satisfied that he had a good faith basis for making the claim, in his oral evidence, that every staff member (not just those accused of abuse – TO and SS – plus the "whistleblowers" – the Claimant and GA - had been suspended). It seems more likely that he made this up on the spot, during oral evidence, to try to explain away the fact that one of the Respondent's assertions for the dismissal reason is that the Claimant had been aware of

abuse and not reported it, but the 4 August LADO minutes record that Ms Bennett had stated "*the team consists of 8 staff members who allegedly were aware*" of abuse by TO and SS.

110.14 The document did not mention anybody else having been suspended. Possibly Mr Guttikonda was suspended later, or possibly he was not mentioned because his suspension reason was not connected to any abuse allegations, and he was now allocated to a different home. Either way, the lack of mention of Mr Guttikonda's suspension does not imply there was any attempt to mislead LADO. However, if it were true that all the staff working at Greenview House (the entire team of 8 referred to by Ms Bennett) had been suspended, then the Respondent's information to LADO at the meeting was inaccurate. That is because LADO expressly highlighted that – based on what the Respondent was saying – the "whistleblowers" had been suspended after they had reported abuse, but other people who had been aware of abuse and not reported it were not suspended.

111. It is clear from these minutes that the LADO did not state that the Respondent had been correct to suspend the whistleblowers; the LADO did not express any opinion one way or the other on that particular matter other than to express concern that there was an inconsistency in suspending the two whistleblowers if it was the respondent's opinion that other staff were also aware of abuse and had not raised concerns.

112. The LADO stated that all staff should be retrained on whistleblowing. Our finding is that that included the Claimant and GA, and the LADO was not expressing an opinion that the Claimant and/or GA should be dismissed, or could not work with children in the future. The Respondent's assertions that the LADO recommended (or insisted upon) dismissal or made any decision that the Claimant had committed misconduct or made any decision that the Claimant was not a whistleblower are all false.

112.1 The only decisions and recommendations made by LADO are those shown on [Bundle 108]. We reject the Claimant's claim that LADO made other decisions or recommendations in the 4 August meeting but neglected to record them under the heading "Decisions". The Respondent has provided no evidence of any other discussions with, or advice or information from, the LADO other than the minutes of the 4 August meeting.

112.2 The recorded decision "Suspension to remain in place for staff until the investigation is concluded" potentially referred to the Claimant and GA as well as TO and SS. However, if it did, it is not an assertion that the Claimant should be dismissed, without investigation, and is not a recommendation that the Claimant should be dismissed at all. It is recorded as action for Mr Atan, Ms Bennett, and Mr Kotecha.

112.3 The recorded decision "Managers at Seva homes to explore with staff because whistleblowing didn't happen, what prevented them from escalating and safeguarding. Staff to be re-trained on whistleblowing" is, if anything, more consistent with an expectation from LADO that the Claimant and GA would return to duty and be retrained, rather than be dismissed. We take into account Mr Kotecha's observation that it would be for the employer, not LADO, to take a decision to dismiss, and we accept that; however, this was an action point for Mr Atan, Ms Bennett, and Mr Kotecha. We are not satisfied that any of those three, or Ms Patel when she learned about it, could have interpreted this advice from LADO as being advice that the Claimant should be terminated.

112.4 Furthermore, even if (which we do not accept) Mr Atan, Ms Bennett, and Mr Kotecha, or Ms Patel, interpreted LADO's advice as being to dismiss individuals who were aware of the (alleged) abuse and who had failed to report it, they must have been aware of the LADO's express comments that there was an inconsistency in singling out the Claimant and GA only (being the people had actually, even if belatedly in the Respondent's opinion, brought the matter to the Registered Manager's attention) and taking no action against the remainder of the team of 8 who had not blown the whistle at all, even belatedly.

113. We accept Mr Kotecha's evidence that it would be a matter for the employer rather than the LADO to make a decision about whether to dismiss the claimant but we observe that it is there is no evidence that the respondent was acting on the advice of the LADO or the police or any professional body or regulator when it made the decision that the claimant should be dismissed. (The same applies to GA's dismissal, but this tribunal is only dealing with the Claimant's).

114. The claimant's P45 appears at [Bundle 116]. We added at page 115A, the email sent to him by Ms Patel, and read by him, on 6 September 2022.

115. Ms Patel's covering email made no reference to any dismissal reason for the claimant and simply stated that his P45 was attached. The P45 itself was dated 6 September 2022, which means it was created that day. We accept that the instructions to prepare it might have been sent a few days earlier, but we have seen no specific evidence about who gave instructions to the accountants to create the P45 or when.

116. We note the contents of [Bundle 120].

> I have looked at the holiday dates of Mr Jikeme, as requested. I believe to be due if I have all the correct holiday dates then he would be owed £896.00.
>
> I only have 7 days taken, 2 in April and 5 in May

117. This is an email to Mr Kotecha from the Respondent's accountants. The contents of this bundle page should have been given by a witness statement from Jane Board, the author of the email. In any event, we have given it such weight as we see fit. We have seen no documents upon which Ms Board based this opinion. She could only have formed any opinion that the Claimant had taken holiday based on documents supplied to her by the Respondent. We have commented above on the contractual requirement to formally request leave and to only take leave after that request has been considered and approved. The Respondent has produced no contemporaneous documents that the Claimant requested annual leave, or had it approved, or that he took, and was paid for, time off.

118. Mr Kotecha claims that the payslips show "holiday pay" when holiday is taken, but none of the payslips in the bundle (and we are aware that they are not a full set) show "holiday pay".

119. We are not satisfied that the Claimant had any paid time off in 2022. He did take some time off, but it was (requested and approved as) unpaid.

120. We are not satisfied that the Respondent agreed that the Claimant could have any carry over from the leave year ending 31 December 2021 into the leave year commencing 1 January 2022.

The Law

121. The law which we have to take into account is as follows.

Protected Disclosures

122. As per section 43A ERA "protected disclosure" means a "qualifying disclosure" which is made by a worker in accordance with any of sections 43C to 43H

123. Section 43B defines "qualifying disclosure":

> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

124. In order for a communication to be a qualifying disclosure

124.1 Firstly, there must be a disclosure of information.

124.2 Secondly, the worker must believe that the disclosure is made in the public interest.

124.3 Thirdly, if the worker does hold such a belief, it must be reasonably held.

124.4 Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f) of section 43B(1).

124.5 Fifthly, if the worker does hold such a belief, it must be reasonably held.

Unless all five of these conditions are satisfied there will be not be a qualifying disclosure. See Williams v Michelle Brown AM UKEAT/0044/19/OO.

125. There must be a disclosure of information. A disclosure of information can be made as part of making an allegation, see for example Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436. The information disclosed has to have sufficient factual content and specificity such as to be capable of satisfying the requirements mentioned in the previous paragraph. However, the worker does not need to specifically use the words from the section in order for the disclosure to qualify.

126. The public interest parts of the requirement were considered in Chesterton Global Ltd v Nurmohamed. Neutral Citation Number: [2017] EWCA Civ 979. Some of the relevant points that were highlighted are:

126.1 The Tribunal has to ask whether the worker believed at the time that they were making it that the disclosure was in the public interest and whether, if so, that belief was reasonable.

126.2 The Tribunal must not substitute its own view of whether the disclosure was in the public interest for that of the worker. The Tribunal might need to form its own view on that question as part of its analysis of what (on the balance of probabilities) the employee, in fact, did believe at the time. However, it is not the Tribunal's view of the public interest that is determinative of this point.

126.3 The necessary belief is simply that the disclosure is in the public interest. The particular reason(s) that the worker believes that it is in the public interest are not of the essence. What matters is that the claimant's subjective belief was objectively reasonable.

126.4 While the worker must have a genuine and reasonable belief that the disclosure is in the public interest, that does not have to be the predominant motive for making the disclosure.

126.5 Parliament has deliberately chosen to not define the phrase "in the public interest" and the reason for that is that it is Parliament's intention to leave it to Employment Tribunals to apply that phrase as a matter of educated impression. There is, therefore, no "checklist" of factors that will determine whether it was reasonable for the worker to believe that the disclosure was in the public interest. However, the type of things that might often be relevant include:

126.5.1 the number in the group affected by the wrongdoing;

126.5.2 how the wrongdoing affected people and the extent to which they are affected;

126.5.3 the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

126.5.4 the identity of the alleged wrongdoer.

127. Where a qualifying disclosure is made to an employer, it is a protected disclosure. (Section 43C).

Dismissal because of protected disclosure

128. Within Part X of the Employment Rights Act, s.103A specifically deals with dismissal where the principal reason is that the employee has made a 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.

129. The dismissal reason in this sense is the set of facts known to the person taking the decision on behalf of the employer (or the set of beliefs held by that person) which cause the employer to dismiss the employee. See the court of appeal decision in Abernethy v Mott [1974] I.C.R. 323.

130. When an employee has less than two years' service, and presents a claim of unfair dismissal, the onus is on them to persuade the tribunal that the dismissal reason was one of the reasons for which two year's continuous employment is not required. That is the general rule, and, in Ross v Eddie Stobart Ltd UKEAT/0068/13/RN, the EAT specifically confirmed that it applied when the reason relied upon is that described in section 103A of the Employment Rights Act 1996.

131. We have to decide, on the balance of probabilities, whether the claimant was dismissed for the reason which the respondent is relying on, or the reason that the

claimant is relying on. We are not obliged to choose just between those two options only, and to decide which of those is more likely than the other. It is open to us to reject both proposed reasons. It is open to the Tribunal to decide that the dismissal was not for the reason asserted by the employer but was not because of the protected disclosure either (see Kuzel v Roche Products Ltd [2008] ICR 799).

132. A crucial part of deciding on the reason for dismissal is to decide which person or persons took the decision to dismiss.

133. If the Tribunal accepts the Respondent's case about the identity of the decision maker, and where that person attends the hearing and gives evidence, then the decision about the dismissal reason will be largely about whether that person's evidence on oath is believed, including an analysis of whether that evidence is consistent with the contemporaneous documents, and whether there was any unconscious motivation.

134. If the employer is found to have lied about the identity of the decision-maker, or claims not to know the identify the decision-maker, and/or if the decision-maker does not give evidence, then the Tribunal will have to decide whether or not to draw adverse inferences. However, it does not follow that the Claimant succeeds by default in any of these circumstances.

135. Where the decision-maker has been identified, and their subjective reason for deciding to terminate employment has been identified, the Supreme Court decision in Royal Mail Group Ltd v Jhuti [2019] UKSC 55 might be relevant in some cases. If an investigator or senior manager deceived the decision-maker about the true facts, and the dismissal decision was taken because the decision-maker believed that false version of the facts, and if that senior manager or investigator was motivated by a protected disclosure that the claimant had made, then the motivation can be attributed to the employer as the dismissal reason. In other words, that is a potential route for a claimant to succeed under s.103A.

136. However, the mere fact alone that a claimant has made a protected disclosure and one or more colleagues have been aggrieved by it and/or complained about it, is not necessarily enough for the claimant to succeed in showing that their later dismissal fell within section 103A.

137. In the absence of the Jhuti type scenario, the opinions or beliefs of people other than the dismissing officer are not necessarily relevant to the Tribunal's decision about what was the "real reason" for the dismissal.

138. It will be up to the Tribunal to analyse the actual decision maker's reasoning and to decide whether that decision maker made the decision to dismiss (for the reasons which they have asserted or for some other reason or) because of the protected disclosure.

Protected Disclosure Detriment

139. S.47B of the Employment Rights Act 1996 deals with protected disclosures and the right not to be subjected to detriments.

> **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.
>
> (1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—
>
> (a) from doing that thing, or
>
> (b) from doing anything of that description.

140. The test, in a detriment case, has been described by the court of appeal as being whether "the protected disclosure materially influences (in the sense of it being more than a trivial influence) the employer's treatment of the whistle-blower" – NHS Manchester v Fecitt and others [2012] IRLR 64.

141. Importantly, this is distinctly different from the test under Section 103A. S.103A requires the protected disclosure to be the principal reason for the dismissal but under s.47B the protected disclosure does not have to be the principal reason for the detriment.

142. As per s.48(2) ERA, it is for the employer to show the ground on which any act or deliberate failure to act was done. Thus, once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant, the burden may shift to the respondent to prove that the worker was not subjected to the detriment on the ground that they had made the protected disclosure. However, there needs to be some prima facie evidence that the protected disclosure might have been an influence. If an Employment Tribunal can find no evidence to indicate the ground on which a respondent subjected a claimant to a detriment, it does not follow that the claim succeeds by default (see Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14).

143. A detriment is something that a reasonable worker in the claimant's position might consider to be to their disadvantage. Something can be a detriment even if there are no physical or economic consequence for the claimant. However, an unjustified sense of grievance is not a detriment.

"Separability"

144. In both detriment cases and dismissal cases, the argument presented by the employer might be that the reason for its treatment of the worker was not the disclosure itself, but something else that was in some way associated with it.

145. Bolton School v Evans provided a comparatively clear cut distinction between the fact that the worker alleged wrongdoing (which was not the reason for the treatment complained of) and the fact that the worker took certain steps (which the employer deemed to be misconduct) to try to prove that he was right about the employer's wrongdoing. Since the employer's dismissal reason was the misconduct, not the fact that the employee had made a disclosure, section 103A was not engaged.

146. A tribunal might be more sceptical of this "separability" argument where it is the manner of the disclosure (the tone or language used, or the fact that the allegations are repeated after the employer has claimed to have investigated them) that is alleged to be separable from the disclosure itself. However, in principle, the distinction is a sound one.

147. As was said by the Court of Appeal in Kong v Gulf [2022] EWCA Civ 941

> 55. 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 whistle-blowers 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.
>
> 56. Likewise, what was said in *Martin*, about being slow to allow purported distinctions between a protected complaint and *ordinary* unreasonable behaviour, is also not a rule of law. There is no objective standard against which behaviour must be assessed to determine whether the separability principle applies in a particular case, nor any question of requiring behaviour to reach a particular threshold of seriousness before that behaviour or conduct can be distinguished as separable from the making of the protected disclosure itself. The phrases used in the authorities (in the context of trade union activities, victimisation and whistleblowing) capture the flavour of the distinction,

but were not intended to be treated as defining, and do not define, those cases where separability would or would not apply. They cannot properly be read in this way. In the wide spectrum of human conduct that might be relied on by decision-makers, each end of the spectrum is easy to identify as Phillips J observed in *Lyon*: gross misconduct or conduct that is "wholly unreasonable, extraneous or malicious" at one end; and wholly innocent, blameless conduct at the other. Between those two ends of the spectrum difficult questions of fact arise, and the conduct and circumstances of the particular case will require close consideration. But the authorities provide no factual precedent or objective standard against which to assess the conduct relied on in a particular case.

57. The statutory question to be determined in these cases is what motivated a particular decision-maker; in other words, what reason did he or she have for dismissing or treating the complainant in an adverse way. This factual question is easy to state; but it can be and frequently is difficult to decide because human motivation can be complex, difficult to discern and subtle distinctions might have to be considered. In a proper case, even where the conduct of the whistle-blower is found not to be unreasonable, a tribunal may be entitled to conclude that there is a separate feature of the claimant's conduct that is distinct from the protected disclosure and is the real reason for impugned treatment.

58. All that said, if a whistle-blower's conduct is blameless, or does not go beyond ordinary unreasonableness, it is less likely that it will be found to be the real reason for an employer's detrimental treatment of the whistle-blower. The detrimental treatment of an innocent whistle-blower will be a powerful basis for particularly close scrutiny of an argument that the real reason for adverse treatment was not the protected disclosure. It will "*cry out"* for an explanation from the employer, as Elias LJ observed in *Fecitt*, and tribunals will need to examine such explanations with particular care.

59. The legislation confers a high level of protection on whistle-blowers for sound reasons, and the distinction should not be allowed to undermine that important protection or deprive individuals of protection merely because their behaviour is challenging, unwelcome or resisted by colleagues. As Mr Laddie emphasised, whistleblowing by its nature, frequently involves an individual raising concerns about wrongdoing committed by individuals, frequently colleagues, commonly working in the same workplace. It is a natural human response to be defensive and resist criticism. Not only is it likely that the subject or content of a protected disclosure will be unwelcome, the manner in which it is made, repeated or explained, may also be unwelcome, leaving individuals feeling it necessary to restate their concerns, and increasing the prospect of being perceived as an irritant or thorn in the employer's side. Some things are necessarily inherent in the making of a protected disclosure and are unlikely to be properly viewed as distinct from it. The upset that a protected disclosure causes is one example because for all practical purposes it is a necessary part of blowing the whistle; inherent criticism is another. There are likely to be few cases where employers will be able to rely on upset or inherent criticism caused by whistleblowing as a separate and distinct reason for treatment from the protected disclosure itself, though I am reluctant to say that it could never occur. The way in which the protected disclosure is made is also, in general, part of the disclosure itself,

unless there is a particular feature of the way it is made (for example, accompanying racist abuse) that makes it genuinely separable.

Holiday Entitlement

148. In terms of holiday entitlement, the Working Time Regulations 1998 ("WTR") provide employees (and other workers) with a minimum statutory entitlement to paid time off.

149. Regulation 14 sets out the formula for calculating how much leave an employee has in the last leave year and what payment in lieu is to be made on termination.

150. The combined effect of Regulations 13(1) and 13A is that an employee is entitled to 5.6 weeks per year as paid time off (that includes any such paid time off on public holidays). This is subject to an overall maximum of 28 days per year.

151. As enacted, the legislation specified that leave to which the worker is entitled had to be taken in the leave year in respect on which it is accrued and cannot be replaced by a payment in lieu (other than on termination of employment). On 26 March 2020 amendments came into effect because of the coronavirus pandemic; they allow entitlement to be carried over from the year in which the leave accrued into a later year, in the circumstances set out in those new paragraphs.

152. As per Regulation 17, while WTR sets out minimum entitlements, if an employee's contract provides a right which is more beneficial to the employee, then the employee may enforce that right instead.

153. In terms of contractual entitlement to annual leave, it is not the case that Tribunals should assume that there is a right to carry over holiday entitlement from one year to the next, it is a matter of interpreting what the contract actually says.

154. If claiming holiday entitlement, or pay for holiday entitlement, in the Tribunal relying on the Tribunal's breach of contract jurisdiction, then the time limit for the claim is 3 months from the end of employment.

155. If claiming holiday pay rights based on WTR, rather than contract, then a claim for a failure to pay the correct amount for holiday actually taken, can potentially be brought as a claim under Part II of the Employment Rights Act; in other words a claim for unauthorised deduction from wages. If it is brought in that manner then the time limits which apply are those set out in sections 23(2), 23(3) and 23(4) of the Employment Rights and the restriction on how far back the claim can go in 23(4)(A) also applies.

156. However, if based specifically on of the Working Time Regulations 1998, the time limits are set out in Regulation 30 and subject to any early conciliation extension, the claim must be presented within 3 months of

156.1 the date on which the exercise of the right should have been permitted or, as the case may be,

156.2 the date on which the payment should have been made.

157. Those time limit may only be extended if the Tribunal is satisfied that it was not reasonably practicable to submit the claim in time.

Breach of Contract and Notice Pay

158. In terms of breach of contract and the Claimant's notice pay argument, the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 gives the Employment Tribunal jurisdiction to consider certain complaints of breach of contract.

159. In accordance with the ordinary principles for breach of contract claims, this jurisdiction allows the Tribunal to interpret the relevant contractual provisions and assess what the employee's contractual entitlement was to notice pay for example as well as holiday entitlement.

160. When a Tribunal is considering a wrongful dismissal claim (in other words a claim that the dismissal itself was in breach of contract) then the analysis is entirely different and separate to the analysis of whether the same dismissal was fair or unfair.

161. Where the employer terminates the contract without good cause, or without providing the employee with sufficient notice, the Claimant might have grounds to succeed in a claim for wrongful dismissal.

162. The amount of notice to which an employee is entitled is determined by the contract but subject to the statutory minimum. Again, in other words, if the contract allows the employee more notice than the statutory minimum then the employee is entitled to bring a claim for that period of notice but the contract cannot insist that the employee has less notice than the statute would allow, generally one week for every year up to a maximum of 12 years.

163. For the employer to prove that there has been conduct by the employee which entitles it to dismiss without notice then the conduct must be such that it must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment (see Neary v Dean of Westminster [1999] IRLR 288). The jargon phrases "gross misconduct" and "gross negligence" are sometimes used. There is no clear dividing line between them and, in any event, the decision is whether the contract has been breached and whether the employee has acted in such a way that they are deemed to be ignoring their contractual obligations, and/or showing that they do not acknowledge that they are bound by them. Gross

misconduct is often used to refer to things which an employee has done deliberately. Gross negligence, however, also includes serious failure to carry out their contractual duties even if that is because of an inability to comply with the contractual obligations.

164. In defending itself against a claim that it is required to pay damages for failure to give notice to an employee which it dismissed, the employer is entitled to rely upon facts not known at the time. In other words, the employer is not only entitled to rely on the reasons that caused it to dismiss the employee; it is entitled to rely on any other repudiatory breach that it later discovers.

Analysis and conclusions

165. Our decisions are as follows.

First alleged protected disclosure

> 1.1.1 On the 1 August 2022, he informed Kimberley Bennett (Registered Manager) that [TO] (Residential Support Worker) had left his shift early and as a result residents were potentially being put at risk, giving rise to a safeguarding issue.

166. What is in paragraph 1.1.1 the list of issues accurately describes the information which the claimant gave to Ms Bennett. He telephoned her on the evening of the 1 August 2022, before midnight and told her that TO was absent.

167. He did not purport to tell her that TO had not turned up for his shift, and Mr Guttikonda's recollection, even if accurate, that he had attended Greenview House on 1 August and had not been told that TO was not present does nothing to cast doubt on the Claimant's version of events.

168. The Claimant did not purport to tell Ms Bennett where TO had gone to. He told her – truthfully – that he did not know TO's intentions, and he did not know whether TO intended to return, but based on past experience, he believed that TO would stay away all night.

169. It was the claimant's genuine belief that this tended to show a breach of a legal obligation. The onus is not on the claimant to identify the precise and exact legal obligation in question. He was aware that the children in the home had care needs, and that the respondent was responsible for providing those. He was aware that the respondent had decided it would pay for three staff to be on duty that night. The Claimant genuinely believed that the needs of the residents had been assessed. It was his genuine belief that the respondent had provided the three staff to be on duty because that was the minimum that was needed.

170. It was reasonable for the claimant to have the belief that failing to provide the required minimum number of staff, at least, without reasonable excuse, was a

breach of a legal obligation by the Respondent. It was reasonable for him to believe that informing Ms Bennett that TO was not present tended to that the Respondent was in breach of a legal obligation to have the correct number of staff present at Greenview House at night.

171. Further, it was also the Claimant's belief that TO had a legal obligation (owed to the Respondent) to be present through his shift. It was reasonable for him to believe that informing Ms Bennett that TO was not present tended to show a belief that TO was in breach of a legal obligation.

172. The claimant believes that his disclosure was in the public interest. He believed that proper staffing ratios, even at night, should be maintained. The point of having the staff available on sleeping nights was in case something arose that required them to be awakened. The claimant believed it was in the public interest that the children in the home be properly cared for, and that disclosures about a shortfall in staffing levels was in the public interest.

173. The residents at the home had particular needs and that was why they were at Greenview House in the first place. Taking account of the public interest that the local authority's duties to children (which were being performed on its behalf by the respondent) were properly performed, it was reasonable for the claimant to have the belief that that the disclosure was in the public interest.

174. A worker's motivation is not something which prevents a protected disclosure satisfying all conditions to be a protected disclosure. In any event, the Claimant did not report TO's absence because of ill-will towards TO but because of a genuine opinion that the registered manager needed to be aware of TO's absence.

175. The claimant also genuinely believed that the disclosure tended to show that health and safety was endangered. He believed that having less than the required number of staff on duty could potentially be a danger to the health and safety of the residents and potentially a danger to the health and safety of the staff, including himself. It was reasonable for him to have the belief that the disclosure tended to show that. The claimant also believed that the disclosure was in the public interest because of the danger to health and safety, as well as the revelation of a breach of a legal obligation. It was reasonable for the claimant to have that belief.

176. Thus our decision is that the disclosure described in paragraph 1.1.1 the list of issues did occur and was a protected disclosure. We will call this "PID1".

<u>Second alleged protected disclosure</u>

1.1.2 On the 2 August 2022, he informed Ms Bennett that [GA] (Residential Support Worker) had previously witnessed [TO] and another member of staff physically abusing residents.

177. The information which the claimant conveyed to Ms Bennett after midnight, in the early hours of the morning of 2 August 2022, is accurately described by paragraph 1.1.2 the list of issues.

178. This disclosure was during the same shift as PID1. On balance of probabilities, it was after midnight, and therefore on 2 August 2022, but it would not make any substantive difference to our analysis if it had been shortly prior to midnight and therefore on 1 August.

179. Whereas PID1 was by telephone, this disclosure was face-to-face. It was to Ms Bennett in the lounge at Greenview House after she had arrived in response to his earlier call (that is, to PID1).

180. He repeated the same information to other people, in particular, Ms Patel and the police, in the early hours of 2 August, after he had first made the disclosure to Ms Bennett. It was the Claimant's disclosure to Ms Bennett that GA had some information which caused Ms Bennett to speak to GA. Later on, when the Claimant spoke to Ms Patel and the police, it was after GA had stated GA's opinions about physical abuse. The Claimant did not claim to have witnessed physical abuse; he repeated that GA was the source of the Claimant's information about physical abuse. He also commented that he had witnessed one (alleged) incident of verbal abuse about a year earlier and that he had, at the time, reported that to the registered manager.

181. The claimant did believe that the disclosure described in paragraph 1.1.2 of the list of issues tended to show breach of a legal obligation. This was a legal obligation owed by TO and SS and the Respondent to take appropriate care of the young people in the home and not subject them to physical abuse.

182. It was reasonable for the claimant to hold the belief that his disclosure might show that a legal obligation was being breached and that GA, if asked questions by Ms Bennett, would give information which (if true) would reveal breach of a legal obligation.

183. It is not necessary, for this part of the analysis, for the claimant to show that he believed that TO was abusing any residents. It is sufficient for him to believe that the information that GA was claiming to have (that GA had seen such abuse) did tend to show that the legal obligation was being breached. The Claimant had that belief and it was a reasonable one.

184. The claimant did believe that the disclosure (telling Ms Bennett that GA had important information about TO's conduct) was in the public interest. The Claimant believed he had a duty to disclose this information once he came into possession of it, and that it was in the public interest that he do so. The Claimant believed that it was in the public interest that anyone in his line of work, who became aware that

a colleague was claiming to have seen abuse by one or more other colleagues, should promptly pass the information on to the registered manager.

185. It was reasonable for the claimant believe that the disclosure was in the public interest.

186. The claimant also believed that the information disclosed tended to show that the health and safety of the residents of the home was endangered. It was reasonable for him to hold that belief too.

187. Thus our decision is that the disclosure described in paragraph 1.1.2 the list of issues did occur and was a protected disclosure. We will call this "PID2".

Detriments

1.5.1 Being suspended with effect from the 2 August 2022.

188. The claimant was suspended by text message described in the findings of fact [Bundle 98 to 99].

189. The text message says that will be followed up in writing, but it never was. There was a later email (16 August), but, as mentioned in the findings of fact, that was purporting to report a change to the terms of the suspension (and to give new information about the police's intentions to speak to the Claimant again); it was not the letter, promised by the text message, supplying the reasons for, and details of, the Claimant's 2 August initial suspension.

190. This suspension was less than 24 hours after PID1 and PID2. The reference in the text to "allegations made yesterday" is a reference to PID1 and PID2, notwithstanding that PID2 had actually been earlier the same day (2 August).

191. However, PID1 and PID2 were each allegations made by the Claimant, not against him. Furthermore, there was nothing else that matched "allegations made yesterday" which was an allegation against the Claimant. Furthermore, the allegations made by GA on 2 August were not allegations made against the Claimant.

192. To the extent that the Respondent argues that the Claimant was not suspended on 2 August but was dismissed on that date, that is plainly wrong. During the hearing, Mr Kotecha seemed to accept that, but, in any event, it is our decision.

193. A suspension (even with pay) is a detriment. It carries with it the implication that the employee is suspected of some form of wrongdoing, and that there will potentially be further actions. It carries with it the implication that there is some good reason that the employee should not work as normal.

194. During the litigation, the arguments that have potentially being raised that the suspension was because of something other than protected disclosures and/or something properly "separable" appear to be as follows. The Respondent has not necessarily been clear and consistent as to which, but each of the following appear to have been mentioned at some point.

194.1 The Claimant was not suspended because of anything that he revealed about TO's wrongdoing, or anything that he said about GA having information of alleged wrongdoing, but because of his own, the Claimant's, suspected misconduct, namely being aware of physical abuse by TO or SS and failing to report it promptly / failing to follow the Respondent's safeguarding policy. This is the "bystander" allegation, in other words.

194.2 The Claimant was suspended on LADO advice (or police advice, or some other third party's advice).

194.3 The Claimant was suspended because the things the Claimant said on 1 and/or 2 August 2022 were untrue.

194.4 The Claimant was suspended because he arranged for GA to make false allegations (because, the theory goes, this was his modus operandi, and part of being an individual who was disliked and distrusted by colleagues and managers, and, according to the theory, the Claimant did this because he thought allegations made by him might not be believed, but allegations made by GA might carry some weight).

195. In closing submissions the main line of argument was to the effect that the claimant's allegations had been an attempt to retaliate against people who had made complaints against him and, furthermore, that the allegations were false and by implication the claimant knew that they were false.

196. Prior to the hearing, the respondent had sought to suggest that the claimant was believed to have known about the state of affairs, namely the alleged physical abuse. for a long period of time and perhaps as long as a year.

197. Mr Kotecha's witness statement included the following assertions:

> [the Claimant] was constantly saying things about his colleagues, which did not tally with the reality and the impression that we got from working with those colleagues.
>
> ...
>
> He never seemed to have a positive word to say about his colleagues and also seemed to be manipulating situations to gain his advantage. Often trying to say things about people in order to try and make himself look better.
>
> As this increased over time, the feeling in the home was that he was a real 'stirrer' and I am aware the manager, Kimberley, had in mind to fire him a few months earlier.

> However, since she was due to leave in August herself, I feel she was almost 'afraid' of him and his pressurising tactics and did not go ahead and dismiss him.
>
> On the morning of 1st August I had a call from my then MD, Nisha Patel and was briefly briefed about the events of the previous night. I came in immediately at 8am and met all my managers: Nisha, Kim, Arda and Sai.
>
> They explained what had happened in some detail. Then I asked them all individually whether they felt there was any truth in this. Every manager (apart from Nisha, since she was new and hadn't joined the company fully yet and did not know the staff well enough to make a comment), said it was Godwin doing his usual 'stirring' things up.
>
> I asked why he would do that and they said that person who he was accusing (and was subsequently cleared by the police of all charges), [TO], and Godwin had a rivalry with each other. Godwin felt that [TO] was allocating shifts and was not giving him enough shifts. … thus begrudged him, having a more senior role. [TO] worked in the daytime and had significantly more responsibilities.
>
> I asked them if they were absolutely sure of this, since it was a very serious matter. They all confirmed this. For me, this chimed with my observations of Godwin and his comments about [TO] did not ring true. ...
>
> However, given the seriousness of the allegations, after consulting with LADO (Local Authority District Officer) and the Police, the Police decided they felt that there was enough evidence to warrant a full enquiry. ...
>
> The Police advised that the two accused and the two accusers should immediately be suspended and have no further contact with [the residents]. The reason for suspending the two accusers was that they claimed to have known about the 'abuse' for over a year and thus by doing nothing, they had acted as 'bystanders' and were also deemed responsible for letting the supposed allegations happen.
>
> Thus Ms Patel wrote to Godwin and the other 3 individuals and informed them by email that he would be suspended. Ms Patel had only joined the company a few weeks prior to these events.
>
> Ms Patel informed him that his suspension would be 'with' pay.

198. During Mr Kotecha's cross-examination, it was put to him that GA had made the allegations of physical abuse, rather than the claimant. Mr Kotecha's reply was that this was well known to be the claimant's modus operandi and it simply meant that the claimant had coerced or deceived GA into making the allegations. Implicit in this the assertion that the allegations were false, and the Claimant and GA knew that they were false.

199. There are of course some very important differences between these "separability" arguments. Some rely on the Claimant actually having seen abuse, but not reported it. Some rely on the Claimant having made up the allegations. Some rely on the Claimant having claimed to have witnessed abuse; some rely on the Claimant having manipulated GA to make false allegations, with the Claimant not personally making the claims.

200. There is also the problem that, according to Mr Kotecha's witness evidence, he was fully involved with, and fully aware of, the Respondent's decision to suspend the claimant. However, both the Grounds of Resistance and additional information asserted a dismissal, rather than suspension, on 2 August.

201. We do not believe that Mr Kotecha (who we have heard from) or Ms Patel or Ms Bennett (who we have not heard from) actually believed on 2 August that the Claimant was claiming that the Claimant had witnessed abuse (over a long period of time, or at all) or that the Claimant had stated or implied that he had been aware from any other party (such as GA) for a long period of time about abuse.

202. We do not believe that the police advised the Respondent to suspend the Claimant. We are not satisfied by the evidence presented that Mr Kotecha or Ms Patel believed that the police had advised this.

203. The Claimant had made an allegation about TO which was true, namely that TO had left work during the shift. Mr Kotecha, Ms Bennett, and Ms Patel were all aware that TO had not returned during the hours that elapsed. Thus, to the extent that there were discussions about the Claimant being a "stirrer" and bearing ill-will towards TO, in part that was a discussion about what had motivated the Claimant to make the truthful report about TO's absence.

204. PID1 was part of the motivation for suspending the Claimant. There was nothing connected with PID1 that was even arguably "separable" from PID1.

    204.1 The Respondent treated the Claimant as a troublemaker, in relation to PID1, simply because he had not been willing to keep quiet about his colleague's absence, but had contacted the registered manager about it.

    204.2 The insinuation, in the tribunal hearing, that there was something underhand about contacting Ms Bennett when he could have mentioned the absence to Mr Guttikonda is a continuation of that attitude.

    204.3 The repeated reference to the fact that the Respondent had later decided that, in fact, TO's reasons for being absent were because of a medical emergency involving a close family member were also used to insinuate unreasonableness on the Claimant's part in getting the registered manager involved without being aware of why TO had left his shift.

205. PID2 was part of the motivation for suspending the Claimant. We are not satisfied that the actual reason for the suspension was something separate from PID2. We are satisfied that the Respondent knew that the extent of PID2 was the Claimant had said that GA had information (not that the Claimant had witnessed anything), and so there was no basis for any conclusion either (i) that the Claimant had made false accusations of witnessing abuse or (ii) that the Claimant had genuinely witnessed abuse, but failed to report it promptly. Further, the Respondent did not

have a genuine but mistaken belief in either one of those things; rather the Respondent has chopped and changed between various different alleged suggested beliefs without settling on one consistent assertion for its belief.

206. The respondent has not persuaded us that the reason the claimant was suspended on 2 August was because the respondent believed that he had made false allegations against his colleagues whether it was to retaliate against them for making complaints against him or otherwise.

207. The respondent has not persuaded us that Nisha Patel suspended the claimant so that his involvement in any abuse or witnessing of abuse or failure to report could be fairly investigated. The text message sent to the claimant sent said that there would be a follow-up letter, but there was no such follow-up.

208. Furthermore, if it were the respondent's intention to suspend the claimant as a precaution, pending further investigation, then there would have been some further investigation. The respondent has not satisfied us that it originally had a genuine intention to investigate the Claimant, but then something else happened to change its mind. Instead, the Claimant was simply suspended, and there was no investigation. No letter to him confirmed the suspension, or the start of an investigation, or explained any misconduct that he was accused of.

209. Our decision is that the reason the respondent suspended the claimant is that it was unhappy at the claimant's conduct on 1 and 2 August in first of all, reporting TO's absence, meaning that the registered manager had to attend the premises to investigate, and second of all that once she was there, the Claimant insisted that she speak to GA because GA had apparently witnessed some abuse.

1.5.2 Being suspended without pay

210. As mentioned in the findings of fact, the first paragraph of the 16 August email deals with the reasons the claimant was given for the decision that his suspension would "now" be without pay.

211. The email says that the reason that his suspension would "now" be without pay was because of the respondent's suspension policy. Mr Kotecha seeks to argue that Ms Patel made a mistake, due to being new, on 2 August, by failing to specify that the suspension would be without pay (because of the suspension policy). However, we are not persuaded by the respondent that the suspension policy was the reason for this detriment.

211.1 We are not persuaded that the suspension policy was actually in existence at the time.

211.2 Further, it did not, in our judgment, over-ride the contractual right to pay during suspension.

211.3 Clause 6 of the contract did not deny the Claimant the right to payment. He was not subject to any bail conditions etc which prevented his attendance at work.

212. On the evidence presented, Mr Kotecha believed that Ms Patel had informed the Claimant that the suspension was with pay, but, in actual fact, the text made no comment either way. The reason he inferred that Ms Patel had originally decided that the suspension was to be with pay is that that was the usual arrangement.

213. No new intervening event happened between 2 August and 16 August. The Claimant did not become the subject of a police investigation, or LADO advice to dismiss, and the Respondent did not believe that either of those things had happened.

214. No investigation by the Respondent had commenced, and no disciplinary allegations had been notified to him.

215. The 16 August email was written as part and parcel of the claimant' suspension. The same reasons that led the Respondent to suspend the Claimant on 2 August motivated it to decide that the suspension would be without pay. The Claimant was not paid for any portion of the period of suspension.

216. Thus both the first and second alleged detriments were on the grounds of protected disclosures (and not because of anything separable from them)

217. We will address the third alleged detriment after we have dealt with dismissal.

Dismissal Date

218. The claimant's dismissal took effect on 6 September 2022 when he received an email attaching a P45.

219. That email was intended to communicate to the claimant that he had been dismissed and the claimant understood that that is what it meant.

220. The claimant noted that the last day of employment was stated as 2 August 2022. He took that to mean that the respondent's decision was that his employment had ended from that date. The claimant is not an employment lawyer and he was unaware of the fact that it is not possible to backdate a dismissal date. Nothing in the legislation, nor in the Claimant's contract of employment, allowed backdating of the termination of the contract of employment.

221. Both the 2 August text message and 16 August email talk about suspension, not termination. In particular, the 16 August email is completely and utterly inconsistent with Ms Patel believing that the respondent had already communicated to the claimant (on 2 August, or at all) that he had been dismissed.

222. The respondent's decision to terminate the claimant's employment occurred on or shortly before 6 September 2022 when the respondent instructed its accountants to prepare a P45 for the claimant. The first the Claimant knew about the decision was when he read the 6 September email and attachment.

223. We are not bound to accept the dismissal date as being 2 August just because the Claimant stated that date in the ET1 form. As a matter of law, the dismissal date was 6 September 2022.

Dismissal Reason

224. We reject Mr Kotecha's attempts to argue that the Respondent had been contemplating dismissing the Claimant prior to 1 August 2022, but had decided not to (whether because Ms Bennett was too scared to do it, otherwise).

225. Our decision is that a change in respondent's attitude to the claimant occurred after he made the protected disclosures. Previously the respondent had been keen for the claimant to do as many shifts as possible, but once he made these protected disclosures the respondent decided that he was a troublemaker.

226. During the Claimant's suspension, from 2 August 2022 to Ms Patel's email (attaching P45) on 6 September 2022, there was no investigation. No allegations were put to the Claimant in writing or orally, and no questions were put to him, and no further information was sought from him.

227. The Respondent claims (as one of its several arguments about the real dismissal reason) to believe that he had actually witnessed abuse, and failed to report it. However, no questions were put to him (after the suspension) about (a) what he had seen and when or (b) why he had not reported it sooner. As stated in the findings of fact, in the early hours of 2 August he had (a) made clear that he personally had NOT witnessed physical abuse and (b) had, in fact, promptly reported the one and only incident of (verbal) abuse that he had seen.

228. The respondent has not persuaded us that Nisha Patel (or anyone else) took the decision to dismiss because the claimant was believed to have failed to report anything more promptly. Had that been the genuine belief of Ms Patel (or of whoever took the decision to dismiss) then it would have been simple for the Respondent to say that in writing to the claimant but it did not do so. Nor did anybody say it to him orally.

229. The respondent has not persuaded us that Nisha Patel believed that the claimant had coerced GA into making false allegations against TO. Had she believed that that was the case, it would have been something she could have put in writing (and/or stated orally) to the claimant quite easily. There is the additional point that if it was the Respondent's genuine belief on 2 August that the claimant had

encouraged false allegations to be made then its attendees could and should have raised that in the meeting with LADO on 4 August. None of them did so.

230. As we discussed in our analysis of the suspension on 2 August, the Respondent has been inconsistent about the dismissal reason. Mr Kotecha's witness statement claims that there was a feeling amongst the relevant managers that the Claimant was making false allegations, his oral evidence was that the Claimant had persuaded GA to make false allegations, but the earlier documents submitted in this litigation asserted that the Claimant was a "bystander" ie that he had known about abuse and failed to report it. No contemporaneous documentation about the Respondent's managers' discussions has been disclosed, and Mr Kotecha's explanations for that veered between being indignant at the suggestion that the Respondent should have documented such matters, and the assertion that Ms Patel had failed to return the laptop which might have contained relevant documents about any safeguarding investigations/decisions.

231. We have not heard from Ms Patel. None of the documents produced by the Respondent prior to the Tribunal hearing (the Grounds of Resistance, additional information, witness statements) named her as the decision-maker for dismissal. Mr Kotecha's statement said:

> Thus Ms Patel wrote to Godwin and the other 3 individuals and informed them by email that he would be suspended. Ms Patel had only joined the company a few weeks prior to these events.
>
> Ms Patel informed him that his suspension would be 'with' pay. However subsequently we were informed by the Police that they intended to proceed with criminal investigations against Godwin. Thus, she subsequently emailed Godwin on 16th August and informed him that his suspension would be without pay. This was inline with the company's Suspension Policy that in very serious situations 'such as' where an employee has been charged or 'under suspicion of criminal investigation of a criminal offence' suspension would be without pay. Paragraph 1.2.2 of the Suspension Policy.
>
> At the end of August Godwin's employment with the company was terminated and he was issued a P45 as the manager had originally intended to do so.
>
> The police investigation continued for several months. …

232. An incorrect but unreasonable belief that the Claimant had actually known about abuse and had failed to comply with the safeguarding policy would not be a dismissal reason that fell within section 103A. The Respondent has not produced notes taken by Ms Patel on 2 August, and so has not proven that she did have that incorrect belief about what the Claimant had said. Furthermore, Mr Kotecha's evidence is that the focus of the managers' internal discussion was that the Claimant was a "stirrer" and/or had personal disputes/jealousy with TO.

233. On the evidence which we have heard, we are satisfied that the Claimant has discharged his burden of proof. He has shown that the principal reason for his dismissal was the respondent's annoyance with the claimant for making the protected disclosures. The Respondent regarded him as a “stirrer” because of the disclosures.

233.1 For PID1, the Respondent came to the view that TO had an acceptable reason for leaving his shift, and came to the view that the Claimant unreasonably escalated that matter.

233.2 For PID2, we are not satisfied that the Respondent ever came to a coherent and rational conclusion as to what led GA to make the allegations which he did. If, as the Respondent argued in the tribunal hearing, there was a view that (i) GA made deliberately false statements because (ii) the Claimant persuaded him to do so, we are not satisfied that they ever actually put that allegation to GA (and they certainly never put it to the Claimant). In any case, in the Grounds of Resistance and Additional Information, the focus was not on GA’s allegations being false, but on an assertion that the Claimant had witnessed abuse should have reported it sooner. No documents showing the specific dates on which the abuse was alleged to have occurred have been disclosed. We are not satisfied that the Respondent ever sought to analyse what the Claimant knew, and when he knew it. On 4 August, Ms Bennett expressed the opinion that all 8 staff members were aware of the abuse. As well as this being inconsistent with a claim that the Claimant invented the allegations, it does not explain why GA and the Claimant were dismissed, (along with TO and SS), but the others were not dismissed as “bystanders”.

234. This dismissal was not due to any aspect of the Claimant’s conduct when making the disclosures which was truly separable from those disclosures themselves.

235. The dismissal reason fell within the definition in section 103A and the dismissal was therefor unfair.

Third alleged detriment

236. After the Claimant made the protected disclosures, the Respondent decided that he was a troublemaker and they would like to get rid of him and get rid of him without any chance for him to comment on the matter.

237. The respondent decided it did not wish to have any formal process at which the claimant would have the opportunity to specify exactly what the situation was in relation to any abuse had had seen. The Respondent did not want there to be a documentary record about the precise nature of his disclosures on 1 and 2 August, but just wanted to be rid of him. They did not want to write a letter specifying any allegations, either before or after the dismissal.

238. The respondent did not wish there to be any further discussion about whether the claimant had been justified in reporting TO's absence or asking for Ms Bennett to speak to GA.

239. The Respondent dismissed the claimant because of his protected disclosure and part and parcel of the decision to dismiss him (because of the protected disclosures) was the decision that there would be no disciplinary procedure of any description.

240. Detriment three does not succeed in its own right, because it is too closely connected to the dismissal and is therefore excluded by Section 47B(2) ERA.

Breach of Contract

241. The claimant was entitled to pay while he was suspended. Clause 13.3 entitled him to "full basic pay"

242. For the period 2 August to 6 September 2022, there has been both a deduction from his wages and a breach of contract in the failure to pay him from 2 August until the termination date. (For the reasons mentioned above, the fact that the Claimant was unpaid was also a financial loss flowing from the protected disclosure detriments; but for the detriments he would have been working normally and being paid).

243. The termination date was 6 September 2022.

244. The claimant was also entitled to be given notice, rather than dismissed without notice. The claimant had not committed any conduct which justified summary dismissal.

Holiday Pay

245. The claimant is entitled to payment in lieu of holiday entitlement in accordance with the contract (Clause 8.14) and the working Time regulations.

246. The Respondent's assertion that the claim is out of time is not correct.

247. As stated in the findings of fact, the Claimant had not used any of his 2022 entitlement, but cannot carry over any of his 2021 entitlement.

REMEDY REASONS

Law

248. The purpose of compensation is to provide proper compensation for the wrong which we found the Respondent to have committed. The purpose is not to provide an additional windfall for the Claimant and is not to punish the Respondent.

249. For financial losses, we must identify the financial losses which actually flow from complaints which we upheld. We must take care not to include financial losses caused by any other events, or losses that would have occurred any way.

250. Financial loss can be awarded for the complaints of detriment on the grounds of protected disclosure and for the unfair dismissal.

251. Injury to feelings can be awarded for the detriment complaints only, not the unfair dismissal.

252. Interest is not available for any of the complaints which we upheld.

253. For injury to feelings, we must not simply assume that injury to feelings inevitably flows from each and every unlawful act of detriment. In each case it is a question of considering the facts carefully to determine what, if any, injury has been sustained.

254. When making an award for injury to feeling, the tribunal should have regard to the guidance issued in Vento v Chief Constable of West Yorkshire Police (No 2) [2003] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318, CA, and taking out of the changes and updates to that guidance to take account of inflation, and other matters. Three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, were identified:

254.1 The top band. Sums in the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment.

254.2 The middle band is to be used for serious cases, which do not merit an award in the highest band.

254.3 The lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. Awards in this band must not be so low as to fail to be a proper recognition of injury to feelings.

255. In Da'Bell v NSPCC (2009) UKEAT/0227/09, [2010] IRLR 19 the Employment Appeal Tribunal revisited the bands and uprated them for inflation. In a separate development in Simmons v Castle [2012] EWCA Civ 1039 and 1288, [2013] 1 WLR 1239, the Court of Appeal declared that - with effect from 1 April 2013 - the proper level of general damages in all civil claims for pain and suffering, would be 10% higher than previously. In De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879, the Court of Appeal ruled that the 10% uplift provided for in Simmons v Castle should also apply to Employment Tribunal awards of compensation for injury to feelings and psychiatric injury.

256. There is presidential guidance which takes account of the above, and which is updated from time to time. The relevant guidance applicable to this claim states:

> In respect of claims presented on or after 6 April 2022, the Vento bands shall be as follows: a lower band of £990 to £9,900 (less serious cases); a middle band of £9,900 to £29,600 (cases that do not merit an award in the upper band); and an upper band of £29,600 to £49,300 (the most serious cases), with the most exceptional cases capable of exceeding £49,300

257. Section 123 of the Employment Rights Act 1996 ("ERA") provides tribunals with a broad discretion to award such amount as is considered just and equitable in all the circumstances, having regard to the loss sustained by the claimant because of the unfair dismissal. However, compensation for unfair dismissal under s.123(1) cannot include awards for non-economic loss such as injury to feelings (see the House of Lords decision in Dunnachie v Kingston upon Hull).

258. As part of the assessment, the tribunal might decide that it just and equitable to make a reduction following the guidance of the House of Lords in Polkey v AE Dayton Services [1987] IRLR 503. For example, the tribunal might decide that, if the unfair dismissal had not occurred, the employer could or would have dismissed fairly; if so, the tribunal might decide that it is just and equitable to take that into account when deciding what was the claimant's loss flowing from the unfair dismissal.

259. In making such an assessment the tribunal, there are a broad range of possible approaches to the exercise.

260. In some cases, it might be just and equitable to restrict compensatory loss to a specific period of time, because the tribunal has concluded that that was the period of time after which, following a fair process, a fair dismissal (or some other fair termination) would have inevitably taken place.

261. In other cases, the tribunal might decide to reduce compensation on a percentage basis, to reflect the percentage chance that there would have been a dismissal had a fair process been followed (and acknowledging that a fair process might have led to an outcome other than termination).

262. If a tribunal thinks that it is just and equitable to do so, then it might combine both of these: eg award 100% loss for a certain period of time, followed by a percentage of the losses after the end of that period.

263. There is no one single "one size fits all" method of carrying out the task. The tribunal must act rationally and judicially, but its approach will always need to be tailored specifically to the circumstances of the case in front of it. When performing the exercise, the tribunal must also bear in mind that when asking itself questions of the type "what are the chances that the claimant have been dismissed if the

process had been fair?", it is not asking itself "would a hypothetical reasonable employer have dismissed"? It must instead analyse what this particular respondent would have done (including what are the chances of this particular respondent deciding to dismiss) had the unfair dismissal not taken place, and had the respondent acted fairly and reasonably instead.

264. Section 123(4) ERA requires that tribunals apply 'the same rule concerning the duty of a person to mitigate his loss as to damages recoverable under the common law'. Where the employee has mitigated, a tribunal should give credit for sums earned.

265. When assessing the amount of deduction for the employee's failure to mitigate their loss, the tribunal does not reduce the compensatory award that it would otherwise make by a percentage factor. The correct approach is to make a decision about the date on which the Claimant would have found work had they been acting reasonably to seek to mitigate their losses, and then make an assessment of what income they would have had from such work.

266. So the approach is:

266.1 Consider what steps it would have been reasonable for the claimant to have had to take to mitigate their loss;

266.2 Ask if the claimant failed to take reasonable steps to mitigate their loss;

266.3 Decide to what extent would the claimant have mitigated their loss had they taken those steps

267. It is for the Respondent to prove that the Claimant has unreasonably failed to take appropriate steps, and that – on balance of probabilities - had those steps been taken, then the losses would have been mitigated.

ACAS

268. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides.

> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
>
> (b) the employer has failed to comply with that Code in relation to that matter, and
>
> (c) that failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

269. So, a failure to comply with a Code has to be an unreasonable failure for this provision to have effect. Some failures might not be unreasonable, and so that is one of the decisions the Tribunal has to make.

270. The ACAS Code of Practice on Disciplinary and Grievance Procedures is a Code to which section 207A(2) potentially applies.

270.1 The grievance provisions might be relevant, but only where there has been a written grievance.

270.2 The disciplinary provisions might be relevant based on the Respondent's purported reasons for its actions. Thus an uplift could potentially be awarded where an employed claimed to have dismissed for conduct, even if the Tribunal decided that the real reason was that the claimant had made protected disclosure. Spi Spirits (UK) Ltd v Zabelin [2023] EAT 147

271. The correct approach is to first consider if there was an applicable code, and if so, decide if the party (in this case, the Respondent) had obligations under the code, and, if so, if it breached them. Then decide if that breach was unreasonable. If so, then decide if there should be an uplift, and fix the amount.

272. The maximum is 25%, and that might be – but is not necessarily – appropriate in cases where there is a complete failure. However, taking into account whether there was partial compliance, and other relevant factors, including the Respondent's size and resources, and the reasons for the default, then the uplift (if any) can be fixed at any appropriate figure which does not exceed 25%.

273. The award must be proportionate. If the amount produced by the (provisionally) appropriate percentage would lead to an uplift which was disproportionately high, the Tribunal must reduce the award to an amount which is proportionate, so as to ensure that, in the words of the statute, the award is actually "just and equitable".

Agreement

274. After the liability decision, the parties agreed the amount to be paid by the Respondent in lieu of the Claimant's unused holiday entitlement. All other remedy issues remained in dispute.

Decisions

275. For pre-dismissal earnings, the best evidence was payslip at [Bundle 114]. It was process date of 5 August 2022, and had "year to date" figures.

276. The period covered by those "year to date" figures was 6 April 2022 to 31 July 2022. That is 117 days.

277. The gross earnings in those 117 days was £12,028. The daily gross average over the 117 days was therefore a little over £102.80.

278. The period of the suspension was 2 August to 6 September 2022. The Claimant was entitled to be compensated for that period as unauthorised deduction from wages, and as breach of contract, and as compensation for detriment on the grounds of protected disclosure, but was not entitled to "double recovery" for that period. We awarded 36 times the daily gross average as unauthorised deduction, and this was £3700.93.

279. To arrive at the net figure for pre-dismissal earnings, we took account of tax paid in year to date (£1637.20), national insurance (£1127.70) and employee pension contributions of £397.20. So net earnings were £8865.18 in year to date and (dividing by 117 and multiply by 7) gave net average weekly earnings of £530.40.

280. Over the same period, year to date for employer pension was £298.44. So per week that £17.46 per week.

281. We used simplified loss approach to the pension calculations (as suggested by the Claimant, and as we decided was appropriate). Therefore, to calculate the Claimant's loss from the termination of employment, we used £530.40 plus £17.46, which added to £548.16 weekly, as the pre-dismissal figures.

282. From 17 July 2023 onwards, the Claimant's income can be shown by the payslip presented today, which has year to date figures on it. We accept the Claimant's evidence and submissions that it includes zero for the period 6 April 2023 to 16 July 2023. Thus the earnings, deductions, etc shown as "year to date" on that payslip are all for 17 July 2023 to 29 February 2024, which is 228 days.

Earnings:	£25,117.50 gross
Tax:	£2717.20
Employee NI:	£1324.42
Employee Pension:	£431.50

283. These give net average earnings from 17 July 2023 of £633.82 per week. So from 17 July 2023 onwards, the Claimant has completely mitigated his weekly losses, and no award of compensation is made for the period 17 July 2023 onwards.

284. The Respondent's position was that the Claimant had acted unreasonably and had failed to do enough to mitigate his losses sooner than 17 July 2023.

285. For basic award for unfair dismissal, the Claimant's gross weekly pre-dismissal earnings exceeded the statutory cap of £571. The Claimant had worked for the employer for more than one year, and less than two. Taking his age into account,

the correct multiplier was 1.5. So he was entitled to 1.5 x the statutory cap, which is 1.5 x £571, which is £856.50.

286. We asked the Claimant and his representative to tell us if they wanted the notice period (7 September 2022 to 6 October 2022) to form part of the period for which we awarded unfair dismissal compensation, or whether they wanted us to deal with period as damages for breach of contract, with the unfair dismissal compensation period (therefore) starting from 7 October 2022. The Claimant asked us to take the latter approach.

287. We accept the Respondent's argument that, if the Respondent had given notice of dismissal on 6 September 2022, then it could have used the "garden leave" provisions of the contract, and/or not offered the Claimant any overtime, and simply paid him £480 per week gross for the notice period.

288. Immediately prior to the dismissal, the Claimant's net income was approximately 72.8% of the gross. Converting £480 per week to monthly (£2080 gross per month), and awarding 72.8% of the resulting figure, the breach of contract award for 7 September to 6 October 2022 is £1515.24.

289. For injury to feelings, the Claimant is entitled to compensation for the injury caused by the two detriments which we upheld (suspension; fact that suspension was without pay) and not for anything else; in particular, not for the dismissal or the fact that the dismissal was in the absence of any procedure.

290. The suspension was for 36 days. That is an important factor when assessing the injury to feelings, but it does not follow the injury to feelings, caused by the detriments that we upheld, only lasted 36 days. Just because the Claimant was dismissed on 6 September 2022, it does not follow that there was, from that point forward, no injury to feelings as a result of the detriment; we just need to make sure not to take account of any additional injury to feelings which flowed from the dismissal decision on that date.

291. The Claimant says that during the suspension period, he became concerned about being barred from the sector. However, our decision is that that possible consequence might have flowed from a dismissal, but would not have flowed just from the suspension itself, without further decision by employer (or other body), and so we have attempted to discount that part of the injury to feelings when making our assessment.

292. In this case, having heard the evidence, we are satisfied that the injury to feelings from the detriments did last longer than 6 September 2022. The Claimant suffered a significant injury to feelings as a result of the fact that the reaction to his bringing, to the employer's attention, information which he thought was important and relevant, rather than thank him, or, at the least, acknowledge that he had done

what he was required to do, the Respondent started treating him as if he had done something wrong, and as if he could not be trusted to perform his duties.

293. From the Claimant's point of view, he had had no choice but to make the disclosures to the Respondent. Refraining from doing so, would have been a breach of his obligations. Thus, the reaction of the Respondent caused a significant injury to his feelings.

294. Apart from the mere fact alone that he was not allowed to work, which was significant in itself, the fact that the Respondent was not going to pay him for the suspension also caused a significant injury, as it left the Claimant wondering how he was going to help support his family. (We do take into account that his wife's earnings made a large contribution to the joint household earnings, but that does not persuade us that the Claimant was unconcerned about the unexpected drop in the household income caused by the Respondent's bad treatment of him because he had blown the whistle.)

295. The Claimant was very upset by the Respondent's decision to suspend him on 2 August, and to not contact him again until the 16 August email telling him that he was "now" not going to be paid.

296. The Claimant has argued that for an award in the lower Vento band. For the year in question, that band was £990 to £9900.

297. The Respondent has not argued, of course, for a higher band, but rather has invited us to decide that the Claimant's evidence about injury to feelings should be disbelieved and we should decide to make no award on the basis that there was no such injury.

298. Our decision is that an award in the lower band Vento band is appropriate.

299. The Claimant has put forward a suggested figure of £7500, which is higher than the mid-point of that (and a bit more than 70% of the way up from £990 to £9900). Our decision is that that is an appropriate award to reflect the significant injury to the Claimant. The Claimant has recovered from the injury by the time of this hearing, but it was not fleeting; it lasted several months.

300. No interest is payable on this injury to feelings award (or any of the other awards we make today).

301. For the compensatory award, the maximum period, for the reasons mentioned already, would be from 7 October (immediately after the period which has been awarded as damages for breach of contract) to 16 July 2023 (immediately before the Claimant obtained a job which fully mitigated his losses).

302. We have to decide if the Claimant failed to mitigate. The duty on him was to look just as hard for jobs, or agency work, etc, to fully replace the earnings he had with the Respondent as he would have looked if he had had no expectation of a tribunal award of compensation for lost earnings.

303. It is up to the Respondent to show that the Claimant has not made reasonable efforts to do so. If the Respondent does that, we will decide what the Claimant's income, in the period 7 October to 16 July, would have been had he acted reasonably to attempt to mitigate the losses.

304. We have taken account of the employment history from HMRC [Bundle 198] and of the job vacancies [Bundle 170 onwards]. We accept that the Claimant did apply for those jobs.

305. The Claimant did have some work in the weeks immediately following the termination. The Claimant did not voluntarily give up any of those agency work assignments, and that he did his best to achieve as much income as he could from those assignments, and from the agencies with which he was registered.

306. The Respondent has not persuaded us that the Claimant could have done more to find better paid work, or more work, in the relevant period.

307. We take into account that for part of the period, the Claimant had been notified that there had been a DBS referral, and he was awaiting the outcome, and he believed he was obliged declare that to agencies and prospective employers. We acknowledge Mr Kotecha's submission that the Claimant could simply have kept quiet about it; however, regardless of whether the Claimant had a legal obligation to make the declaration (the Claimant said he did, and Mr Kotecha said he did not), it was not an unreasonable failure to mitigate his losses by being transparent and honest about this issue.

308. Furthermore, and in any event, in the Claimant's industry, he could not omit, in responses to questions on an application form, that he had actually worked for the Respondent, and the dates of employment. If asked, he could not fail to state that he had been dismissed by the Respondent, without notice.

309. By letter dated 12 April 2023 [Bundle 199 to 201], the Claimant was informed that DBS had decided that his dismissal by the Respondent would not lead to his being barred (by them, at least) from working with children.

310. The Claimant was able to commence work in a permanent job within a reasonable period of time after that, taking into account the need for the application to be processed, references checked, etc.

311. The Claimant made a large number of applications, and we do not accept the Respondent's submissions that he unreasonably confined himself to too narrow a geographical area.

312. We do accept that there were a large number of vacancies in that industry in that period. However, we also accept that there were a large number of applicants for those vacancies. The Claimant is not responsible for the fact that the recruiting employer decided to hire one or more of the other applicants instead of him.

313. The Claimant did, in any event, successfully obtain some work.

314. The period 7 October 2022 to 16 July 2023 is 283 days.

315. The lost pre-dismissal earnings plus pension was £548.16 per week. So, that would have been £22,161.33 for the period 7 October 2022 to 16 July 2023.

316. As per his schedule of loss (original plus updated), the Claimant gives a round estimate of actual income for the period as being £14,000. He is not obliged to give any credit for sums he would have earned from other employers that he would have earned in any event, even if not dismissed by the Respondent. Taking account of that fact, and of the HMRC information, we do not regard £14,000 as an underestimate of the sum for which the Claimant is obliged to give credit.

317. Therefore, the difference between what the Claimant would have earned, and what he did earn, is £8,161.33 and that is the sum which we award as the compensatory award for unfair dismissal.

318. There is no Polkey reduction because the Respondent did not have reasonable grounds to believe that (i) the Claimant had witnessed abuse and failed to report it or (ii) the Claimant had not witnessed any abuse, but had made a false claim that he had or (iii) the Claimant had not witnessed any abuse, and not made a false claim that he had, but had coerced or persuaded GA to make false allegations. We are satisfied that Ms Bennett and Ms Patel did know that the Claimant had not claimed to see abuse, and so that rules out the first two. The Respondent has not shown that it had any evidence for the third, or that there is a realistic chance that evidence would have been found had there been an investigation.

ACAS

319. The Respondent's arguments about its purported reasons for dismissal have not been clear and consistent. However, regardless of whether the Claimant was accused of knowing about abuse, and failing to report it, or of making false statements about witnessing abuse, or coercing/persuading a colleague to make false allegations, those would have been "conduct" reasons, and the type of dismissal reason to which the "disciplinary" part of the ACAS code would apply.

320. The fact that we have decided that the Respondent actually dismissed the Claimant because he made protected disclosure does not, in itself, prevent us from deciding that section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 applies.

321. In this case, taking into account the legislation, and the guidance in Spi Spirits (UK) Ltd v Zabelin our decision is that the ACAS Code was applicable.

322. The Respondent failed to give the Claimant clear information about the allegations at all, and it failed to do so in writing. It failed to invite him to any meeting prior to the dismissal (whether separate investigation meeting and disciplinary meeting, or, as the Code would allow, a single meeting). It failed to give him details of any evidence that might be taken into account. It failed to give him the opportunity to comment on allegations or evidence, or to submit evidence of his own. The dismissal decision was not clearly explained to the Claimant (in writing or at all) and he was not offered any right of appeal. The identity of the person who decided to dismiss him was not supplied.

323. There was, in summary, no part whatsoever of the ACAS code that was actually followed.

324. We have to decide if the failure was unreasonable. If it was not unreasonable, then there is no uplift. If it was unreasonable, then we have to decide whether to make an uplift and, if so, what size of uplift to apply. For all those questions, the Respondent's size and resources are relevant issues.

325. We take into account that it was a small employer (between 10 and 20 employees at the relevant time) and had no dedicated in-house HR expertise. Managers (such as Ms Bennett, Mr Kotecha and Ms Patel) who made HR decisions were responsible for other operational activities, and were not, primarily, HR experts.

326. That being said, it is an employer that works in a regulated industry. It carries out important work on behalf of the local authority. It is subject to OFSTED inspection. In Mr Kotecha's oral evidence, he stated that one of the things OFSTED checked was that the Respondent had employment policies in place, and he claimed that the Respondent did have such polices, and OFSTED was satisfied that it did.

327. Furthermore, in the Grounds of Resistance, for example, the Respondent had claimed to have taken professional advice.

328. Our decision is that the failure to comply with the ACAS code was unreasonable. Furthermore, there was a complete failure. The fact that Ms Patel was a fairly new employee is not relevant in the circumstances given that Mr Kotecha has claimed that all the senior managers were involved in the decision making and that, in the Respondent's additional information, it made a positive assertion that a dismissal without following any procedure was correct.

329. This is a case in which the only appropriate decision is to award the 25% maximum as a result of the complete failure to follow the Code, and the lack of any mitigation.

330. The two elements which are uplifted by 25% are the breach of contract award and the compensatory award for unfair dismissal, and only those two.

331. The injury to feelings is not uplifted (and nor is the compensation for the suspension period) because those are not awards based on the dismissal, or failure to follow the disciplinary part of the code. There was no written grievance and therefore no alternative basis for any uplift.

332. The basic award is excluded from the uplift provisions by of the Employment Rights Act 1996.

Employment Judge Quill

Date: 25 March 2024

WRITTEN REASONS SENT TO THE PARTIES ON
3 April 2024

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FOR EMPLOYMENT TRIBUNALS