EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss K. Watson	v	United Synagogue

Heard at: Bury St Edmunds on 11th March 2024 and Norwich on 12th to 15th March 2024 (Heard remotely via video link using CVP)

Before: Employment Judge: Mr. A Spencer
Mr. R. Allan (non-legal member)
Mr. D. Hart (non-legal member)

Appearances:
For the Claimant: In person
For the Respondent: Mr. S. McHugh (counsel)

JUDGMENT having been sent to the parties on 21 March 2024. and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The respondent is a synagogue in Golder's Green, London which operated "Little Goldies" nursery until the nursery closed in January 2022.

2. The claimant was employed at the nursery as a nursery practitioner from 14 September 2020. There is a dispute between the parties as to whether the claimant's employment ended on 11 January 2022 by dismissal (the claimant's case) or by resignation on 17 December 2021 (the respondent's case).

3. By a claim form presented to the tribunal on 23 March 2022 following a referral to ACAS for early conciliation from 23 February 2022 to 23 March 2022 the claimant brought complaints of: –

   3.1 Automatic unfair dismissal (dismissal for whistleblowing);
   3.2 Whistleblowing detriment; and
   3.3 Unlawful deduction from wages for non-payment of holiday pay.

4. The claimant withdrew her complaint about holiday pay at the outset of the hearing. She agreed to the complaint being dismissed upon withdrawal.

5. The issues for us to determine were confirmed at a preliminary hearing on 17 November 2022. There have been two minor corrections to that list of issues. The revised list of issues begins at page 534 of the hearing bundle and already incorporates the first correction. The second is that the date of the claimant's sixth alleged Protected Disclosure was corrected to 13 January 2022. The issues had not been narrowed before the hearing.

6. These reasons relate to the issues concerning liability only. We confirmed at the outset of the hearing that we would consider remedy (if applicable) after giving judgment on liability.

Witnesses

7. For the claimant, we heard evidence only from the claimant herself. The claimant confirmed the truth of her witness statement. That statement gave no evidence concerning the events that the claimant said amounted to whistleblowing. The claimant confirmed those events by confirming that the information set out on pages 535 to 536 of the hearing bundle was true.

8. For the respondent we heard evidence from the following witnesses:

   8.1 Lali Virdee, the respondent's Property Director
   8.2 Victoria Louise Wiltshire, the respondent's HR Director;
   8.3 Julia Sarah Chain, the respondent's Vice Chair;

9. The witnesses all gave evidence under affirmation and confirmed the truth of their written statements. We had the benefit of seeing the evidence of each witness tested under cross examination and the opportunity to put questions to the witnesses ourselves.

Documentary Evidence / Submissions

10. We considered the contents of an agreed hearing bundle (which was supplemented by a few further documents provided during the hearing), written submissions from the respondent's counsel, a chronology and cast list.

11. We also heard oral closing submissions from the claimant and the respondent's counsel.

Findings of Fact

12. We begin with our observations of the witnesses. We did not find the claimant to be a reliable witness. She was prone to exaggeration and to using extreme language to describe events. Her evidence was inconsistent. She was also unwilling to make concessions where it was reasonable to do so. In contrast, the respondent's witnesses were more reliable. However, there were limitations to the respondent's evidence. We did not hear evidence from some of the main protagonists such as Alison Mazin (nursery manager) or Yvonne Bonsu (the HR business partner who supported Ms. Mazin).

13. The claimant's witness statement did not contain evidence relating to many of the important events that give rise to this claim. As a result of this we have had to draw extensively from the contemporaneous documents.

14. Having heard the evidence our findings of fact are as follows:

15. The respondent is a synagogue in Golders Green. The respondent ran "Little Goldies" nursery until it closed in January 2022. The claimant was employed as a nursery practitioner.

16. The nursery was a small part of the respondent's organisation which included fifty-seven member synagogues, five other nurseries, forty schools of Hebrew language and Jewish studies, several cemeteries, a Jewish court of law and a head office. The respondent had a substantial HR resource which served the nursery and the rest of the respondent's organisation. The HR team included an HR director, Head of HR and three HR Business Partners who provided HR advice and guidance.

17. The Executive Committee of the synagogue is responsible for the day to day running of the synagogue (including managing employees). The Executive Committee comprised of a Chair, Vice Chair and a financial representative.

18. "Little Goldies" nursery opened in 2017. Alison Mazin was employed as nursery manager and was managed by the Executive Committee.

19. The nursery employed an average of five staff and had about twenty children enrolled.

20. The claimant worked at the nursery via an agency from November 2019 until February 2020 just before the pandemic hit. The claimant later returned to the nursery and was directly employed by the respondent from 14 September 2020. The claimant's terms and conditions of employment were recorded in writing in an offer letter from the respondent dated 5 October 2020 and a statement of main terms and conditions.

21. The claimant signed the offer letter to confirm she had read and understood the respondent's policies and procedures. These included the respondent's whistleblowing policy. The whistleblowing policy provided for concerns to be raised to a director (or to a higher level if the concerns related to a director).

22. The claimant was not subject to any disciplinary or performance warnings or procedures during her employment.

23. In 2021 the claimant suggested to Alison Mazin that she was considering resigning as she was unhappy at work. For example:

    23.1 In an email dated 8 April 2021 the claimant said, "*if the atmosphere within the setting doesn't change I will have to hand in my notice….*". She also confirmed that this was a feeling on her part that "*has been building since I returned*."

    23.2 In a further email to Ms. Mazin on 23 June 2023 the claimant said

that she felt undervalued and expressed thoughts about setting what she described as a "*timescale on my position within the setting…another full year and then leave with good memories*".

24. On 16 June 2021, the claimant was absent from work and contacted her GP by telephone. The claimant relies on the conversation as her first protected disclosure. We find that the claimant disclosed to her GP that she was having problems at work and was stressed at work. The claimant did not make disclosures about any specific matters. She merely referred to problems at work in a general sense. This is consistent with the claimant's own description of the conversation and her GP's written record of the conversation.

25. In November 2021, the manager of the nursery, Alison Mazin, sought advice from the respondent's HR team regarding the claimant's attendance and reliability. Ms. Mazin reported that the claimant had numerous absences and often attended work late. She said that the claimant would often not report in sick until several hours after her shift had started or she would say she was on her way in and then not turn up. Ms. Mazin and the respondent saw these absences as problematic given the need to maintain the strict staff/children ratios required by Ofsted. We need not make any specific finding as to whether the claimant was unreliable. However, we find that the respondent (and Ms. Mazin in particular) genuinely held this view and sought HR advice about this. This prompted Ms. Wiltshire and Yvonne Bonsu to discuss the problem. They agreed that an Occupational Health review was required.

26. On 18 November 2021, the claimant telephoned Alison Mazin after a staff meeting. The claimant relies on this conversation as her second protected disclosure. The claimant says that during this conversation, she raised two matters which she says amounted to whistleblowing. They were:

    26.1 concerns about hygiene and cross contamination of sudacrem which was being used on children; and

    26.2 a disclosure that the claimant had not taken the bedsheets at the nursery home in months to be washed and that no one else had taken it upon themselves to take them home to wash them.

27. We find that these disclosures were not made during this conversation. A conversation did take place between the two women on this date. However, the contemporaneous documents are not consistent with the claimant making these disclosures during the conversation. For example:

    27.1 A message from the claimant to Ms. Mazin the previous day on 17th November 2021 includes a request for a chat with Ms. Mazin and refers to this as "*nothing serious I spoke with the ladies today and I think it's better to speak directly to you. nothing awful but I love my job just feel like more can be achieved within my time there*.";

    27.2 Ms. Mazin followed up the conversation the following day on 19th November. Her response is not consistent with the claimant having raised concerns. It is more consistent with the claimant having disclosed personal problems. Ms. Mazin's email shows that she was concerned about the claimant's wellbeing because of those personal

problems. For example, she said to the claimant: "*following our conversation yesterday I just want you to know I'm always here if you want to talk. our conversation was between us and I have not discussed with the staff. I hope over the next few days you can have some kind of rest and think about what we talked about. I will have a chat with you sometime on Monday morning*…." Further, a note made by Ms. Mazin refers to the conversation the previous day and notes: "*I did chat with her, where she got very upset as misses her mum*." These messages are not consistent with the claimant "calling out" poor hygiene practice at the nursery during the call on 18 November.

28. Furthermore, when cross examined about the conversation, it was put to the claimant that she did not raise any whistleblowing disclosures during the call. The claimant's response was that whilst she wanted to "*get things off my chest - in the end it wasn't worth it - she* [Alison Mazin] *wasn't in the right frame of mind to have conversation with her.*"

29. During the conversation, the claimant referred, once again, to the possibility of leaving the nursery. In cross examination, the claimant said that during the conversation she said that she "*wasn't' going to stay for ever*" and that there was "*no room for progression and I don't like the way the nursery is run*."

30. An email from Alison Mazin to Yvonne Bonsu dated 24 November 2021 shows that Ms. Mazin was concerned about the claimant's state of mind at the time. It records a conversation Ms. Mazin had with the claimant that day and refers to the claimant being "*very upset and feels she is not coping with life*." It refers to the claimant feeling "*overwhelmed*" and feeling that "*if she was hit by a bus it would make her happy*." Ms. Mazin was sufficiently concerned about the claimant's wellbeing to raise this with Ms. Bonsu who again suggested that the claimant be referred for an Occupational Health assessment.

31. On 25 November 2021, the claimant again referred to the prospect of resigning. She announced this at snack time in front of staff and the children at the nursery and said "*when I hand in my notice I will only do it to Alison…*"

32. Yvonne Bonsu emailed the claimant on 25 November 2021 to ask her to complete consent forms for the referral to Occupational Health.

33. The claimant responded by email on 26 November 2021. She backtracked by downplaying what she had said previously. She said, "*I am not unwell*" and declined a referral to Occupational Health. The claimant backtracked by saying that she had not referred to suicidal thoughts and was merely referring to the need for bed rest. She referred to her doctor being aware that she had "*low days and I have days that I am ok but understands it doesn't require medication*." The claimant referred what she described as "*life situations*" which she would overcome. These included her work commitments, studying for a law degree, being a stepmother to two young children and conflict in her home life. The claimant confirmed that she was declining the offer of an Occupational Health referral for these reasons and because she had concerns about confidentiality and access to her medical records.

34. The claimant contacted the NSPCC by telephone on 6 December 2021. A

copy of the NSPCC's contemporaneous record appears in the hearing bundle. During the call, the claimant disclosed to the NSPCC the following:

34.1 The nursery had been accepting children that were younger than they were authorised to care for;

34.2 The nursery manager was physically abusive to and neglectful of children. The abuse included picking children up, throwing them onto chairs or across the room, force-feeding them, shouting and clapping in their faces, changing them on the floor and without wipes;

34.3 An incident had occurred three weeks earlier with a child who had been unwilling to eat and had been force fed. The nursery manager was said to have grabbed the child off the chair, thrown them across the floor, and thrown a plate at them. The claimant said that the child had nearly choked and died;

34.4 In April 2021, the manager had put her finger up the bottom of a child who had been constipated.

35. The claimant gave this information to the NSPCC anonymously and without giving the names of the manager and children involved.

36. On 7 December 2021, the claimant sent an email to Alison Mazin in which she discussed several mundane work-related matters. In the email the claimant also raised a concern about poor hygiene practice. She said staff were using the same container of sudocrem for all children (including using it for both the face and for nappy changes). The claimant said that she considered this to be unhygienic. She suggested that parents should be asked to bring in their own supply of sudocrem for their child if it was needed. This concern was part of a longer email raising several more mundane matters.

37. On 8 December 2021, the claimant sent an email to Yvonne Bonsu regarding the potential Occupational Health referral. Again, the claimant confirmed that she was declining the offer. She said that "*life is up and down for everyone including myself. My time off has merely been because of my health taking a dip since almost dying at the beginning of this year. Things have not helped with my mum immigrating back home to the Caribbean and several attempts of suicide by my daughter who is my priory [sic], all of this Alison knows. I've managed to persuade my daughter to accept help and so far so good. I am trying to do everything to shift this long covid (headaches, sleeping non-stop, loss of appetite)*"

38. There was an incident at work on 13th December 2021 in which the claimant described being "verbally attacked" by Ms. Mazin in front of children and staff. The claimant's account of the incident was given at her subsequent grievance meeting. She said the incident began when she had a private word in the kitchen with another member of staff who was upset. Alison Mazin came in and said to the two "*get out, you're not supposed to be in here. What are you talking about?*." After the claimant's work colleague sought to explain, Angela (the Deputy Manager) was said to have said to the work colleague "*get out you're not supposed to be in here. how dare you? You don't just walk in and think that you could do what you like*." After this, the claimant had altercation

with a work colleague, Natalie (another Nursery Practitioner) over the incident. The claimant then left the workplace and went to her car.

39. The claimant sent an e-mail to Alison Mazin. This was sent from the claimant's car after she left work. The e-mail was entitled "*Toxic work culture*" and began with the words "*I am still sitting in the car outside work very upset with this toxic work culture*." the e-mail went on to describe the incident that day. The claimant referred to the fact that she had "*been stressed at work for a while* ". She also referred to concerns she had about hygiene at the nursery. The concluding paragraphs included the words:

"*For a long time I have had major concerns but there is a culture within little goldies and I really do believe it starts from the top and filters down. I have already said that there is no growth and to be honest my mental health means so much more to me than having these battles at work. Nothing is confidential or private, and staff are not working as a team but against each other gossiping. this is toxic…."*

40. The claimant's email concluded with the words:

"*I'm still in the car so upset, and I will e-mail HR separately about leaving. I'm going to have a coffee and will be back at snack time. I will finish this week and then it will be my last. I do not wish to discuss this further as I am leaving."*

41. Despite saying in her email that she would return to work at snack time, the claimant did not return to work that day. Later that day the claimant telephoned Yvonne Bonsu to explain why she had declined the referral to Occupational Health and to check whether Ms. Bonsu had received her resignation email.

42. The claimant returned to work the following day on 14 December 2021. She worked until her lunch break.

43. Ms. Mazin plainly saw this as an end to her problems with the claimant. She replied to the claimant's email (copied to Yvonne Bonsu) on 14 December 2021 to say:

"*Thank you for your e-mail that you sent yesterday.*
I just want to acknowledge that you have decided that you are leaving Little Goldies.
As per your e-mail your last day is Friday 17th December.
We would like to thank you for all the love that you have given the children while working at Little Goldies.
We wish you well in your future."

44. The claimant saw Ms. Mazin's email while on her lunch break on 14 December. The claimant responded by sending a message to Alison Mazin in which she said "*rather than address the situation I get an e-mail. honestly unbelievable. I tried to deal with this amicably but honestly I'll have to get the union involved. I'm going to my doctor now as this really will stress me out again*."

45. The claimant left work around lunchtime on 14 December after seeing the email from Alison Mazin. She did not return. She did not seek to retract her resignation. She was signed off sick by her GP. In her discussion with her GP the claimant raised her concerns about the nursery. Her GP gave her a list of contact details for various organisations if she wanted to raise her concerns

more formally.

46. The claimant says that on 14 December 2021 she contacted the NSPCC, Ofsted and the Local Authority Designated Officer (LADO) by telephone. She says that she made disclosures to all three organisations that day. These are the third, fourth and fifth protected disclosures relied on by the claimant.

47. We find that the claimant did not in fact make any disclosures to the NSPCC that day. She is mistaken about that. The claimant disclosed the NSPCC's internal record of her complaints which show that she made disclosures to them on 6 December 2021 and did not contact them again until 4 January 2022. There is no record of the claimant contacting the NSPCC on 14 December.

48. We accept that the claimant contacted LADO and Ofsted to make extensive disclosures to them on 14 December 2021. The disclosures made by the claimant to both LADO and Ofsted included that:

48.1 she had witnessed physical, verbal and mental abuse of the children within the respondent's care and was unsure which route to take as the abusers were the respondent's designated safeguarding officers;

48.2 members of staff were not recording incidents in the incident book;

48.3 parents were not being informed when a child had an accident;

48.4 staff were working on false documents;

48.5 some staff could not speak, read, write or understand English;

48.6 the manager was not managing the nursery;

48.7 there were no policies and procedures in place;

48.8 staff were unprofessional. The claimant gave the example of personal phones being used by managers and two members of staff;

48.9 the manager of the nursery was neglecting the children and their well-being. Furthermore, managers spent much of their days doing online shopping, knitting, chatting and facetiming family abroad;

48.10 the required student to staff ratio was not maintained;

48.11 staff were made to take children down stairs which were unsafe as they had a huge gap in the spindle;

48.12 children were not permitted to tell parents about incidents or make a record of it. Parents would ask about bumps and bruises or why their child was not well;

48.13 toys were not age appropriate and this led to an incident with a little girl choking;

48.14 sharp broken toys would not be thrown away because the items had a sentimental value to the managers;

48.15 there was a staff member who could not speak read or write English and would often use antibacterial wipes on the children's bottoms, faces and hands;

48.16 staff had no idea of hygiene. Old food was often given to children to play with. The claimant said that there was no designated area for this and the children were allowed to play with it anywhere which would leave mould spores and that often the children and staff were absent with sickness.

49. In addition to disclosing these matters to Ofsted and LADO, the claimant also made additional disclosures to Ofsted. She said that:

49.1 when management at the nursery realised that she was not going to let the matter go they went online and copied and pasted policies and procedures from other nurseries;

49.2 the nursery manager then gave a new role of deputy manager and safeguarding officer to a member of staff thereby removing the manager from any liability;

49.3 a member of the respondent's staff had no access to her own child;

49.4 complaints had been made about a member of staff kissing children on the lips inappropriately. The claimant and parents had witnessed this;

49.5 the nursery manager had called a friend who worked for Ofsted (Maggie) to try to cover up all the wrongdoing. The claimant complained about Maggie's involvement in the alleged cover up.

50. The respondent was unaware at this time that the claimant had made these disclosures to Ofsted and LADO. They were also unaware of the claimant's earlier disclosures to the NSPCC.

51. The claimant's conduct in making so many serious allegations to both LADO and Ofsted almost immediately after she sent her email dated 13 December about leaving are entirely consistent with the claimant believing that she had resigned by this time. These were unlikely to be the actions of someone who believed that the employment relationship was ongoing.

52. On 15 December 2021, Yvonne Bonsu sent an email to the appropriate team within the respondent to escalate the concerns that the claimant had raised in her resignation email about hygiene. At this stage, these were the only concerns raised by the claimant that the respondent was aware of.

53. Yvonne Bonsu was asked to clarify with the claimant the date of her resignation. Ms. Bonsu went further than this and sent an e-mail to the claimant on 15 December 2021 in which she asked the claimant "*we need to understand whether you have resigned, and if yes, is it with immediate effect?*

Or at the end of the week/term, which is 17th December? please can you confirm this in writing to me?". The claimant relies on this as an example of detriment short of dismissal and says it was an invitation for her to resign. It was not. It was merely a request to confirm whether the claimant had resigned and, if so, to confirm the date on which her employment would end.

54. On 15 December, Ms. Wiltshire, in her capacity as Designated Safeguarding Lead, was provided with a series of emails which originated from Yvonne Bonsu. These related to the concerns raised by the claimant about hygiene at the nursery. Ms. Wiltshire was unaware at this time that it was the claimant who had raised the concerns.

55. Also, on 15 December 2021, Claudia Kitsberg, the respondent's Head of Safeguarding was contacted by a representative of Barnet Local Authority Multi Agency Safeguarding Hub (MASH) and told that allegations had been made about the nursery. A meeting was scheduled with Barnet LADO on 17 December to discuss the allegations. Ms. Kitsberg shared this information with Ms. Wiltshire. At this stage, no information was given to the respondent as to who had made the complaints.

56. Alison Mazin was also informed on 15 December that the complaints had been made. Alison Mazin suspected that it was the claimant who had made the complaints.

57. Ms. Wiltshire met with Yvonne Bonsu on 15 December 2021 to talk through what Ms. Bonsu knew about the employee who had recently resigned. Ms. Bonsu identified the employee as the claimant and talked Ms. Wiltshire through the background. This included showing Ms. Wiltshire the claimant's resignation email dated 13 December 2021 in which she had raised concerns about hygiene at the nursery.

58. The claimant responded to Ms. Bonsu by e-mail dated 16th December 2021. The claimant asserted for the first time that she had not resigned. For example, the e-mail concluded with the words "*Just to reiterate I have not resigned I have been signed off by my doctor for work related stress*."

59. The claimant says that on 16 December 2021 she made further disclosures to Yvonne Bonsu in an e-mail and a telephone call. However, no email was sent on this date. The claimant accepted in cross-examination that the email had been in her drafts folder and had not in fact been sent. A telephone conversation took place between the two women that day. The claimant recorded it. We have seen a transcript of the conversation. It does not support the claimant's case that she made the disclosures she alleges during that conversation. The claimant did not make the disclosures she alleges during the conversation.

60. Ms. Wiltshire attended a meeting with Barnet LADO on 17 December 2021. During that meeting she was made aware (for the first time) of the fact that allegations had been made to LADO by someone working at the nursery. Ms. Wilshire was informed that concerns had been raised about basic hygiene at the nursery and that there were seventeen other allegations, some of which were extremely concerning. The individual who made the allegations was not named by LADO. However, given the claimant's recent resignation and the

fact that her resignation email dated 13 December 2021 had included concerns about hygiene, Ms. Wiltshire suspected that it was the claimant who had made the allegations.

61. LADO asked the respondent to begin an internal investigation.

62. On 18 December 2021, David Collins, the respondent's Chief Programmes Officer was appointed as Investigating Officer. Divaughan Burnett, HR Business Partner, was appointed to support him. Between 21 and 31 December 2021 the two men interviewed the staff at the nursery about the allegations that had been made to LADO. As part of this investigation Mr. Collins interviewed the claimant via MS Teams on 30 December.

63. We have seen a transcript of the meeting on 30 December 2021. The claimant asserted during the hearing that the transcript was incomplete. We asked her whether the missing sections contained disclosures that she relied on as whistleblowing. She accepted that they did not. She said that the missing sections showed that she was laughed at during the meeting and told how to do her job.

64. The claimant says that during the investigation meeting she made various disclosures that she relies on as her eighth protected disclosure . We accept this. During the meeting, the claimant repeated many of the disclosures that she had made to LADO and the NSPCC earlier that month. That is hardly surprising as Mr. Collins was investigating the same allegations and had planned the questions he was going to put to the claimant at the meeting. His questions were informed by the allegations that the claimant had made to LADO. Thus, in response to Mr. Collins questions, the claimant effectively repeated most, if not all, of the disclosures she had already made to LADO.

65. Alison Mazin sent an e-mail to the claimant on 4 January 2022 to ask her to send in her fit note. Ms. Mazin understood that the relevant fit note expired on 17 January. She stated, "*Without your fit note, your absence will be noted as unauthorized and you may not receive any sick pay*".

66. On 4 January 2022, the claimant made a further call to the NSPCC. The contemporaneous record of the call shows that the claimant made no new disclosures. However, she disclosed the name of Alison Mazin and the names of the children involved in the matters disclosed on 6 December 2021.

67. On 5 January 2022, two police officers attended the nursery unannounced and informed the staff of an anonymous call to the NSPCC. This was the first time the respondent was made aware of disclosures to the NSPCC. They were not informed at the time that it was the claimant who had made those disclosures.

68. On 6 January 2022 Alison Mazin was signed off sick. The recent events had taken a toll on her health.

69. Ofsted undertook an inspection of the nursery on 10 January 2022.

70. Yvonne Bonsu sent an e-mail to the claimant on 11 January 2022. Ms. Wiltshire assisted her in drafting the e-mail. Ms. Bonsu referred to the

claimant's e-mail dated 16 December in which the claimant had said that she had not resigned. Ms. Bonsu confirmed that:

"*The United Synagogue as your employer has reviewed the e-mail exchanges and we deem that you have resigned from your job role effective Friday 17th December. I am sorry that this response has taken some time to reach you, however we have been fully investigating the allegations you had raised in your resignation e-mail, and we want it to be clear on the order of events before responding*."

71. The e-mail concluded with a request for the claimant "*to hand in to your line manager your pass and any keys that you may hold*" and to wish the claimant best wishes the future. The e-mail also referred to the fact that although the claimant's resignation had been effective on Friday 17 December 2021 she had been paid for the whole of December. Ms. Bonsu confirmed that the respondent would write separately about the claimant repaying the overpayment of wages.

72. Ofsted suspended the respondent's registration to provide childcare at the nursery from 12 January 2022. The suspension was to last until 22 February 2022 and was to give Ofsted time to investigate.

73. On 12 January 2022, the respondent's central child protection team attended a further meeting with Barnet LADO and were informed that three of the allegations regarding the nursery might meet the threshold for criminal investigations. LADO confirmed that they would liaise with the Metropolitan Police.

74. The claimant visited the Police on 13 January 2022 and made a complaint. The claimant disclosed substantially the same information to the police that she had already disclosed to LADO and Ofsted on 14 December 2021 (see paragraph 48 above). The claimant relies on this as a protected disclosure (Protected Disclosure 6). The respondent was unaware at this point that the claimant had made these disclosures directly to the Police.

75. Ofsted produced their inspection report. The nursery was given an overall rating of "Inadequate." The reasons for this reflected some of the concerns that the claimant had raised and included:

    75.1 leadership not effectively supporting the staff to improve their teaching standards;

    75.2 some hygiene issues, including children's bedding being left out so that other children could access it;

    75.3 ineffective accident recording and reporting. Parents were not always given information about incidents.

76. On 13 January 2022, the police informed the respondent that three of the allegations concerning the nursery had met the criminal threshold. The respondent's central child protection team were told to cease further internal investigation until the police investigation had been concluded. By this time Mr. Collins had concluded his investigation. He had reached a decision in principle but did not write up his findings given the instruction from the police.

77. On 14 January 2021 Ms. Wiltshire spoke with Sharon Hart (another Nursery Practitioner at the nursery). Ms. Wiltshire discovered that Ms. Hart had been responsible for making some of the allegations that were being investigated (i.e., Ms. Hart was a second whistle-blower). Ms. Wiltshire reassured Miss Hart; telling her she had done the right thing and reiterating that the children always came first.

78. On 14 January 2021, the claimant wrote to Yvonne Bonsu to raise a formal grievance. Mr. Virdee was appointed to hear the claimant's grievance.

79. On 19 January 2022 one of the respondent's HR business partners wrote to the claimant regarding the overpayment of salary in December 2021. the claimant was asked to repay £588.97.

80. On 26 January, the respondent's CEO and executive committee decided to permanently close the nursery. The nursery closed that day. The nursery staff were made redundant. Ms. Hart (who, in addition to the claimant had made disclosures about poor practices at the nursery) was not dismissed. She was re-engaged by the respondent at a different nursery venue.

81. Mr. Virdee held a grievance hearing with the claimant on 31 January 2022. He wrote to the claimant on 18 February 2022 to confirm that he was not upholding the claimant's grievance. However, he confirmed that as a gesture of goodwill the respondent would waive the requirement for the claimant to repay the overpayment of salary and would make a further ex gratia payment of £630.

82. Despite the respondent agreeing to waive the overpayment of salary, the claimant continued to receive weekly emails from the respondent chasing repayment. The claimant did not take any action about this until she raised it at a preliminary hearing in these proceedings which was attended by Ms. Wiltshire who then arranged for the chasers to cease. We accept the respondent's evidence that the reason this occurred was due to an error. One of the respondent's staff had set up their system to produce automatic weekly reminders before Mr. Virdee decided to waive the overpayment. That staff member had left and the automatic reminders had not been cancelled.

Conclusions and Applicable Law

83. Applying the law to the facts of this case, our conclusions on the various issues follow. We have addressed the issues in the list of issues. However, we have grouped some of them together so that this judgment is better understood.

Unfair Dismissal: Was the claimant dismissed?

84. An employee who wishes to claim unfair dismissal must first show that he or she has been dismissed within the meaning of section 95 Employment Rights Act 1995 (ERA). The claimant relies on section 95(1)(a) ERA. She says that her contract of employment was terminated by the respondent with immediate effect by the respondent's email to her on 11 January 2022.

85. The respondent disputes this. They say the claimant resigned by her email to Alison Mazin on 13 December 2021 giving notice to 17 December 2021. The claimant disputes this and says that her words were ambiguous and should not be interpreted as a resignation.

86. The general rule is that unambiguous words of dismissal or resignation may be taken at face value (i.e., taken as being intended) without the need to analyse the surrounding circumstances. Where the words used are ambiguous a tribunal must apply an objective test to consider whether ambiguous words amounted to a resignation. In such cases, we must consider all the surrounding circumstances. We should ask ourselves how a reasonable employer would have understood the words used at the time they were said in light of those circumstances. In other words - what would a reasonable bystander in the position of the employer have understood by the words used? This follows recent guidance from the Employment Appeal Tribunal in the case of *Omar v Epping Forest District Citizens Advice [2023] EAT 132.*

87. We concluded that the claimant's words in her email of 13 December 2021 were not ambiguous. She clearly stated that she was leaving at the end of that week. This coincided with the end of term and the start of the Christmas break. The claimant invited us to construe her words as saying nothing more than she was leaving work early that day. The claimant's words cannot reasonably be construed that way. They were clearly a reference to leaving her employment for good once the term ended later that week. That is clear from the fact that she uses the phrases "*I will finish this week and then it will be my last*" and "*I do not wish to discuss this further as I am leaving*." She also says she would confirm her decision to the respondent's HR team. The words used were not ambiguous. They were clear and plainly meant.

88. Even if we had decided that the claimant's words were ambiguous, our analysis of the circumstances would have led us to the same conclusion. We take into account that the claimant's email followed an altercation at work. To that extent it could be seen as being "in the heat of the moment." However, the context is important – the claimant's email followed her referring on several occasions to her dissatisfaction at work and her intention to resign. It had not come out of the blue. It is also significant that the claimant put her resignation in writing at the end of a long email that had plainly taken some time to write. It was not an off the cuff verbal comment made during a heated exchange. A reasonable bystander would have understood that the claimant's resignation was really intended at the time.

89. The claimant's resignation was effective. Her employment ended on 17 December after she gave notice of her resignation on 13 December 2021.

90. A dismissal or resignation, once given, is effective and cannot be withdrawn unilaterally by one party. The claimant did not seek to withdraw her resignation. Instead, she sought to argue that she had not resigned. She did so for the first time by email on 16 December 2021. This was not a direct invitation to the respondent to agree to retract or waive the resignation. However, the email can reasonably be seen as an invitation for the respondent to treat the claimant's employment as continuing. Had the respondent agreed to this, the claimant's resignation would have been waived

or retracted by agreement. However, we do not conclude that the respondent agreed to this. The respondent never expressly agreed to waive the claimant's resignation either in writing or orally. At its highest, the claimant's argument was that the respondent's conduct showed that they had agreed to treat any resignation as ineffective. The claimant sought to argue that the respondent's request for a "fit note" on 4 January 2022 was consistent with the respondent having agreed that her resignation would be treated as ineffective. We agree that the respondent's request is a puzzling one in circumstances where the claimant's employment had already ended. Most likely it reflects the confused situation that had arisen. However, our view is that something more was required of the respondent for their conduct to amount to an agreement to waive the claimant's resignation. The respondent did not do so. They made their position clear in their email on 11 January 2022 when they unequivocally confirmed that they considered that the claimant had resigned.

91. For those reasons, the claimant's unfair dismissal complaint fails at the first hurdle. She has not demonstrated that the respondent dismissed her.

92. However, the unfair dismissal claim would still have failed even if we had decided differently on this point (i.e., had we concluded that the claimant's employment continued until 11 January 2022 and that the respondent's email on that date had the effect of dismissing her). In those circumstances, we would have concluded that the claimant had gained protection as a whistle-blower by virtue of making protected disclosures. However, we would not have found that the sole reason, or principal reason, for the claimant's dismissal was her whistleblowing. The reason the respondent sent the email on 11 January 2022 was a combination of the respondent's genuine belief that the claimant had resigned, coupled with their perception that the claimant was an unreliable employee. The fact that the claimant had made protected disclosures was not a factor that materially influenced the respondent's action. On the evidence before us, the respondent is not an employer who would have subjected a whistleblowing employee to a detriment. Their positive treatment of the second whistle-blower, Ms. Hart, demonstrates this. They actively praised her for whistleblowing and re-engaged her elsewhere when the nursery closed. The difference in treatment of the two employees is explained by the respondent's genuine belief that the claimant had resigned and their perception that she was unreliable.

Whistleblowing Detriment: Did the claimant have protection as a whistle-blower?

93. To be protected as a whistle-blower the claimant must first show that she made one or more "protected disclosures" (i.e., she "blew the whistle" in a way that gives her protection under the law). In this context a "protected disclosure" is defined in section 43A Employment Rights Act 1996 (ERA) as being a "qualifying disclosure". This, in turn, is defined in section 43B ERA.

94. To be a "qualifying disclosure" all the conditions set out in Part IVA of the ERA must be met. These were helpfully broken down into five elements in the guidance given by the EAT in *Williams v Brown [2019]* as follows:

    94.1 First, there must be a disclosure of information;

94.2 Secondly, the worker must believe that the disclosure is made in the public interest;

94.3 Thirdly, if the worker does hold such a belief, it must be reasonably held;

94.4 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);

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

95. Unless all five conditions are satisfied there will not be a qualifying disclosure.

96. Furthermore, it is not enough for all five conditions to be satisfied. To gain the necessary protection, s43A also requires that the disclosure be made by one of the methods in s43C to 43H of the ERA.

97. The claimant relied on eight potential protected disclosures. Taking each in turn, our conclusions are:

Protected Disclosure 1 (16 June 2021):

98. On 16 June 2021, the claimant telephoned her GP and disclosed to her GP that she was having problems at work and was stressed at work. The claimant did not raise any specific allegation of wrongdoing or make any disclosures about specific matters. She merely referred to problems at work in a general sense.

99. This was not a Protected Disclosure (as defined) and therefore did not give the claimant protection as a whistle-blower. No disclosure of information was made that tended to suggest that any the things set out in section 43B(1) ERA had happened (or will happen).

Protected Disclosure 2 (18 November 2021)

100. We conclude that the claimant made no disclosure about hygiene / bedsheets at the nursery on this date. We refer to our findings of fact (see paragraphs 26 to 29). No protected disclosure was made. No disclosure of information was made which tended to suggest that any the things set out in section 43B(1) ERA had happened (or will happen).

Protected Disclosure 3 (to the NSPCC on 14 December 2021)

101. We found that the claimant did not make any disclosures to NSPCC on 14 December 2021. She is mistaken about the date. She did however make disclosures to the NSPCC on 6 December 2021 of the matters referred to in our findings of fact (see paragraph 34 above).

102. In relation to those disclosures, all the five required conditions are met:

102.1 There was a disclosure of information;

102.2 The claimant believed that the disclosure was made in the public interest;

102.3 That was plainly a reasonably held belief;

102.4 The claimant believed that the disclosures tended to show one or more of the matters listed in sub-paragraphs (a) to (f) of section 43B(1). They tended to show that a criminal offence had been committed and/or that the respondent had failed to comply with its legal obligations to safeguard the children in their care and/or the health and safety of the children had been endangered.

102.5 The claimant's belief in these matters was plainly reasonably held.

103. However, the claimant does not gain protection as a whistle-blower unless the disclosure was also made in the correct manner. It must be made by one of the methods set out in sections 43C to 43H ERA.

104. In this case sections 43C to 43E do not apply because the disclosures were not made either:

104.1 to the claimant's employer or other responsible person in the circumstances set out in s43C ERA; or

104.2 in the course of obtaining legal advice in the circumstances set out in s43D ERA; or

104.3 to a minister of the crown in the circumstances set out in s43E ERA.

105. However, section 43F applies as the NSPCC are one of the "prescribed persons" for the purposes of s43F. They are one of the persons or bodies listed in in Schedule 1 to the Public Interest (Prescribed Persons) Order 2014 SI 2014/2418 ("Schedule 1"). Further, the claimant meets the two additional conditions which are required for s43F to apply. Namely, we are satisfied that the claimant reasonably believed that:

105.1 the failures on the part of the respondent fell within the remit of the NSPCC. That remit is defined in Schedule 1 as "matters relating to child welfare and protection;" and

105.2 the information she disclosed and the allegations contained within those disclosures were substantially true.

106. For these reasons we conclude that the claimant's disclosure to the NSPCC on 6 December 2021 was a protected disclosure and therefore gave the claimant protection as a whistle-blower.

Protected Disclosure 4 (to Ofsted on 14 December 2021)

107. We refer to our findings of fact concerning the matters disclosed by the claimant to Ofsted on this date (see paragraph 46 to 49 above)

108. We conclude that these disclosures were also "protected disclosures" and afforded the claimant protection as a whistle-blower for the same reasons as with the disclosures to the NSPCC. The only difference being that the "prescribed person" in this case is identified in Schedule 1 as "Her Majesty's Chief Inspector of Education, Children's Services and Skills" (i.e., the head of Ofsted). Further, the remit of Ofsted is different to that of the NSPCC as defined in Schedule 1.

Protected Disclosure 5 (to LADO on 14 December 2021)

109. We refer to our findings of fact concerning the matters disclosed by the claimant to LADO on this date (see paragraphs 46 to 48 above).

110. We conclude that these disclosures were also "protected disclosures" and afforded the claimant protection as a whistle-blower for substantially the same reasons as with her disclosures to the NSPCC and Ofsted. The difference is that, for these purposes LADO is not a "prescribed person" as defined in Schedule 1. The relevant "prescribed person" for the purposes of Schedule1 is the Local Authority responsible for the enforcement of health and safety legislation. Their remit is defined in Schedule 1 as "*Matters which may affect the health or safety of any individual at work; matters, which may affect the health and safety of any member of the public, arising out of or in connection with the activities of persons at work..*" It may be argued that by making the disclosure to LADO rather than the Local Authority's designated Health and Safety officer the claimant did not make a disclosure to the correct "prescribed person." However, the claimant plainly made the disclosure to the Local Authority and in our view, taking a purposive approach it matters not whether it could have been dealt with by a different department or officer at the Local Authority.

111. Had we decided differently on this point (i.e., had we decided that s43F did not apply) we would have found that s43H applied as all the conditions set out in sections 43H(1)(b) to (e) are present.

Protected Disclosure 6 (to the Police on 13.01.2022)

112. We also concluded that this was a protected disclosure. Again, the five conditions were met for the disclosures to amount to "protected disclosures."

113. Regarding the method of disclosure – this was not disclosed in accordance with sections 43C (employer), 43D (legal adviser), 43E (minister of the crown). Further, it was not made pursuant to s43F (prescribed person) as the Police do not appear on the list of prescribed persons in Schedule 1. However, we consider that the disclosure was made in accordance with s43G (disclosure in other cases) as all the necessary further conditions for that section to apply are met. Namely:

    113.1 The claimant reasonably believed that the information she disclosed and the allegations were true ;

    113.2 The claimant did not make the disclosures for personal gain;

    113.3 One of the conditions referred to in subsection 43G(2) was met. The

claimant had previously made a disclosure of substantially the same information to a "prescribed person" in accordance with s43F;

113.4 In all the circumstances, it was reasonable for the claimant to have made the disclosure to the Police given the seriousness and criminal nature of some of the disclosures, the fact that the Police were plainly the appropriate entity to receive complaints of criminal conduct and the potential for such conduct to continue if no complaint was made.

Protected Disclosure 7 (email and phone call to Yvonne Bonsu 16 December 2021)

114. We refer to our findings of fact at paragraph 59 above. We concluded that this was not a protected disclosure for the following reasons:

114.1 No email was sent on this date and so there can have been no protected disclosure made by email; and

114.2 Although a telephone call took place on that date between the two women the claimant made no disclosure of information capable of amounting to a protected disclosure during the call.

Protected Disclosure 8 (Investigation Meeting on 30 December 2021)

115. The disclosures made by the claimant during this meeting were protected disclosures and gave her protection as a whistle-blower.

116. We refer to our findings of fact as to what was disclosed by the claimant at the meeting (see paragraph 64 above).

117. In relation to those disclosures, all the five required conditions are met:

117.1 There was a disclosure of information;

117.2 The claimant believed that the disclosure was made in the public interest;

117.3 That was plainly a reasonably held belief;

117.4 The claimant believed that the disclosure tended to show one or more of the matters listed in sub-paragraphs (a) to (f) of section 43B(1). It tended to show that a criminal offence had been committed and/or the respondent had failed to comply with its legal obligations to safeguard the children in their care and/or the health and safety of the children had been endangered;

117.5 The claimant's belief in these matters was plainly reasonably held.

118. Furthermore, the claimant made the disclosures to the respondent as her employer for the purposes of s43C.

119. In conclusion, we find that the claimant had protection as a whistle-blower as Protected Disclosures 3 (NSPCC), 4 (Ofsted), 5 (LADO), 6 (Police) and 8

(David Collins/Divaughan Burnett) were all Protected Disclosures (as defined).

Whistleblowing claim: Was the claimant subjected to a detriment for whistleblowing?

120. We have concluded that the claimant's complaint of unfair dismissal failed for the reasons already given. However, the claimant also brought a complaint that she was subjected to detriments short of dismissal because of her whistleblowing.

121. It follows from the conclusions set out above that the claimant did have the relevant protection has a whistle-blower.

122. We considered whether the respondent breached the claimant's right under section 47B ERA. This gives a worker the right not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done on the ground that the worker has made a protected disclosure.

123. The claimant relied on three detriments for the purposes of this complaint. taking each in turn our conclusions are:

Detriment 1: On 15th December 2021 Yvonne Bonsu asked the claimant to resign.

124. We reject this claim. The simple reason for this is that the claimant was not subjected to the detriment concerned. Ms. Bonsu did not ask the claimant to resign. She simply asked the claimant to confirm whether she had resigned and if so the date on which her employment ended.

Detriment 2: on 11 January 2022, the claimant was dismissed.

125. We reject this claim. The simple reason for this is that the claimant was not subjected to the detriment concerned. She was not dismissed on this date for the reasons we have already given.

126. In any event this complaint could not have succeeded under section 47B ERA. The EAT recently re-affirmed in the case of *Wicked Vision v Rice [2024]* that an employee could not bring a claim of whistleblowing detriment against her employer under s47B where the act of detriment relied upon was her dismissal. Such a claim is barred by s47B(2) ERA In such circumstances, the appropriate claim would be for unfair dismissal under s103A ERA. The claimant brought such a claim before us but that claim has been rejected for the reasons given.

Detriment 3: Weekly requests for repayment of the overpayment of wages

127. Mr. Virdee waived the requirement for the claimant to repay the overpayment of wages as part of the grievance outcome. Notwithstanding this, the respondent continued to send weekly reminders to the claimant to repay the sums concerned. We find that this was a detriment. It would certainly have been a nuisance to receive such weekly reminders and would pray on the mind of any reasonable person causing anxiety. It was, in our view, a

detriment even though it is perhaps at the lower end of the spectrum. However, the claimant was not subjected to that detriment on the ground that she had made a protected disclosure. The reason for the reminders was merely an administrative error caused by the automated system and the departure of the relevant HR business partner without correcting the system. It was in no sense whatsoever a detriment that was meted out to the claimant because she had blown the whistle.

128. For these reasons, the claimant's complaints are all unsuccessful.

Employment Judge: Mr. A Spencer

Date: 13 May 2024

Written Reasons sent to the parties on
16 May 2024

For the Tribunal office