Case No: 3314482/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss S Evans	v	Sandwell Children's Trust

Heard at: Cambridge Employment Tribunal via CVP

On: 10, 11th and 12th June 2024

Before: Employment Judge King

Members: Ms Elizabeth
Ms Williams

Appearances

For the Claimant: In person
For the Respondent: Mr Carr (counsel)

JUDGMENT having been sent to the parties on 5th August 2024 (signed 15th June 2024) and written reasons having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided.

REASONS

1. The claimant was unrepresented. The respondent was represented by Mr. Carr of counsel. We heard evidence from the claimant and a witness, Anne-Marie McDonnell on her behalf. We heard evidence from Kathryn Mullinder (Kate Mullinder) and Steven Gauntley on behalf of the respondent.

2. The hearing was conducted over CVP and the bundle ran to 579 pages. The parties had exchanged witness statements in advance but the respondent's witness statements lacked sufficient detail to be cover all the issues and it was necessary to take that evidence orally. At the outset of the hearing, we discussed adjustments that the claimant may require, both for her dyslexia and her anxiety. We took additional breaks as required and took additional care with page numbers references and reference to documents, for the parties. There was, however, some difficulty because our electronic pagination did not match the hard copy pagination that the witnesses were referring to when giving their evidence.

3. During the course of the hearing on day two, additional emails were referred to on behalf of the respondent. These were not permitted to be added to the bundle, as they had not been dealt with in disclosure and did not materially influence the issues upon which we had to decide. There was no reason why they had not previously been disclosed in compliance with the orders given that the respondent was represented by their legal department throughout and the bundle had been finalised and the witness statements exchanged.

The Issues

4. At the outset of the hearing, we discussed the issues as per the case management orders on the 9th of August 2023, and there were some variations to those at the outset of the hearing. The claimant accepted she was not an employee, so the claim for automatic unfair dismissal was withdrawn and is dismissed upon withdrawal.

5. We removed issue 10.3 on the case management order concerning employment status as the claimant accepted at the outset she was not an employee and that also led to a removal of issue 10.5 as if she was not an employee there could be no automatic unfair dismissal. These are not in the list of issues below accordingly.

6. Under the protected disclosures elements of the claim, the respondent accepted that the claimant had made the disclosures at 10.8 of the case management order as a matter of fact and that they amounted to protected disclosures. This was in respect of disclosures A to H below. They are all conceded to be protected disclosures. The three detriments pleaded by the claimant were also admitted by the respondent at the outset of the hearing so the only issue for the Tribunal was the reason for the detriments and time highlighted below.

7. At the outset we confirmed we would deal with liability only at this stage and issues as to liability were clarified at the outset of the hearing taking into account the amendments made at the start of the hearing to be as follows:

8. Were all of the Claimant's detriments complaints presented within the time limits set out in sections 48(3)(a) & (b) of the Employment Rights Act 1996?

9. If any of the detriment complaints have been brought out of time has the Claimant established that it was not reasonably practicable for her claim to be presented in time (sections 48(3)(b)). If so was the claim presented within such further period as the tribunal considers reasonable?

10. Did the Claimant make one or more protected disclosures under section 43B Employment Rights Act 1996 as set out below. The Claimant relies on subsections (a)(b) and (d) of section 43B(1).

11. Did the Respondent subject the Claimant to any detriments as set out below? Included within this issue are the questions of what happened as a mater of fact and whether what happened was a detriment to the Claimant as a matter

of law.

12. If so was this done on the ground that she made one or more protected disclosures?

13. The alleged disclosures that the Claimant relies on are as follows:

A: On 11th May 2022 the Claimant spoke to Sue Applegate (Line Manager) and Anne Marie McDonnell (Line Manager) and said that she was unable to sleep and was upset as because on 5th May 2022 Louise Wright (Head of Service) had instructed her to falsify a supervision record on a child's file and said that this instruction have come (stet) from a director, Steven Gauntley.

B On 13th May 2022 the Claimant had a conversation with Steven Gauntley (Director) and told him about Louise Wright instructing heron 5th May 2022 to falsify a supervision record on a child's file which was said to be under his instruction.

C: On 13th May 2022 during a telephone call with Chris Kent (Head of HR) the Claimant repeated the fact of, and content of disclosures A & B. The Claimant also told him that she was feeling unwell, having panic attacks and was fearful for her job.

D: On 13th May 2022 and 20th May 2022 the Claimant repeated disclosures A, B And C in an email to Chris Kent as well as enclosing a screenshot of the falsified record from the child's file.

E: On 11th May 2022 during the same conversation within which disclosure A took place, the Claimant told Sue Applegate and Anne Marie McDonnell that Kate Mullinder (Head of Service) had removed information from two children's records, specifically records the Claimant had made and entered on the records about conversations the Claimant had had with a parent and step parent of those children which had the effect of placing the children at risk and that Kate Mullinder had removed the same records emails that the Claimant had sent to key professionals in order to ensure protection of the children.

F: On 13th May 2022 during the same conversation as disclosure B, the Claimant repeated those matters set out in disclosure E to Steven Gauntley.

G: On 13th May 2022 during the same conversation as disclosure C, the Claimant repeated those matters set out in disclosure E to Chris Kent.

H: On 18th May 2022 the Claimant telephone and emailed the information governance team, specifically David Molineux and Leone Bennett and told them the contents of disclosure E.

As set out above the respondent accepted that all of the protected disclosures A-H were both made as a matter of fact and that they amounted to protected disclosures as a matter of law.

14. The alleged detriments that the Claimant relies on are as follows:

A: A reduction in the Claimant's hours from 37 hours to 14 hours per week. The Claimant says Kate Mullinder had a conversation with her on or around 15/16 June 2022 when she says that her hours would be reduced with effect from 20th June 2022.

B: A reduction in the Claimant's hours from 14 hours to 7 hours per week. The Claimant says that on 8th July 2022Steven Gauntley emailed her telling her that her hours would be reduced.

C: A delay in approval of the Claimant's timesheets. The Claimant says that prior to making protected disclosures her timesheets were approved weekly and by Sue Applegate or Anne Marie McDonnell (her line managers). In June 2022on 2 or 3 occasions the approval of the Claimant's time sheets was delayed by Kate Mullinder in her unjustifiably challenging the validity of the days worked.

The respondent accepted that the Claimant's hours were reduced but did not accept that this was on the grounds that the Claimant alleged. The Respondent accepted that the timesheets were scrutinised and their approval delayed but not for the reasons stated.

15. The additional remaining issues related to remedy and as we decided to deal with liability only at this hearing these are not repeated here save to confirm that at remedy the only relevant issues from the case management order will be 10.10 – 10.14 on the case management order. Issues 10.15-10.18 will fall away as the Claimant conceded she was not an employee as set out above.

The Law

16. We had regard to the case that the respondent referred us to in its skeleton argument *Mr Brian Ikejiaku v British Institute of Technology Ltd* UKEAT/0243/19/VP.

17. The relevant law is contained of the Employment Rights Act. The law as relevant to this case is set out in s43 ERA which states as follows:

s43A Meaning of "protected disclosure".

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

s43B Disclosures qualifying for protection.

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

(a) 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.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

s43C Disclosure to employer or other responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure

(a)to his employer, or

(b)……

18. The right not to suffer a detriment is found in s47B as follows:

s47B 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)……

(2) This section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, " worker ", " worker's contract ", " employment " and " employer " have the extended meaning given by section 43K.

19. Under s48(3) Employment Rights Act 1996 complaints must be brought within the time limits set out in that Act:

s48 Complaints to Employment Tribunals .

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

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

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

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

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

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

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

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

20. We also discussed the case law around time and connection between the series of acts in case law namely *Arthur v London Eastern Railway [2006] EWCA Civ 1358* and *Oxfordshire County Council v Meade UKEAT/0410/14* and the test for detriment cases namely in *NHS Manchester and Fecitt and others [2012] IRLR 64.*

Findings of Fact

21. The claimant commenced work on 5th February 2021 with the respondent and was engaged by an agency and was an agency worker. Her contract provided that she was permitted to work up to 37 hours and this was agreed but we have not seen a copy of the actual contract in question in the bundle.

22. Around September 2021, the claimant commenced another role with Warwickshire County Council and worked predominantly Mondays, Tuesdays, and Wednesdays. This is not the respondent but it is relevant as we saw later in the chronology.

23. We have seen via the invoice dates in the bundle that from 19th January 2022, the claimant worked 37 hours every week except the weeks of the 13th April 2022, 27th April 2022, and 4th May 2022. These are references to invoice dates rather than specific dates worked.

24. The claimant did reduced hours on those weeks of 30, 22, and 17 hours respectively, all other weeks up to and including the Ofsted inspection were invoiced at 37 hours. In April 2022, the claimant's contract was extended for six months to November 2022. For the period approximately 2nd - 20th of May 2022, the respondent had an Ofsted inspection with the Ofsted feedback coming back on 20th May 2022.

25. On 8th May 2022, the claimant informed Kate Mullinder, Sue Applegate and Anne Marie McDonnell by email that she had done 55.3 hours that week. We know from an email dated 5th May 2022 that the claimant sent to her agency, that she had not worked any hours for Warwickshire Council that week. Kate Mullinder replied to the email the next day, "Thanks, Sonia." The claimant says in that email that she would claim for 37 hours, which was the maximum hours under the contract that could be paid and take 18 hours of TOIL (time off in lieu). We are told that this was customary for the respondent’s staff as a social work function could not fit into a standard 9-5 role. This was clearly not the first time as nobody queried the claimant on this practice.

26. The respondent allowed the claimant this benefit as well to use TOIL. The respondent did not challenge the hours that had been worked, raised with her that they were excessive, or query the customary arrangement of TOIL at that stage. Kate Mullinder's evidence was that the claimant worked two days a week and she allowed additional hours during Ofstead as they were needed. She had no idea this was a regular arrangement as she believed the claimant had another role and from those discussions were that the claimant worked Thursdays and Fridays for the respondent and on Monday, Tuesday, Wednesday elsewhere.

27. Kate Mullinder also accepted in evidence that in December 2021, she knew that the claimant had these two jobs. The claimant's evidence was that everybody knew about the arrangement. Anne-Marie MsDonnell (her line

manager), knew, Sue Applegate knew and Kate Mullinder knew from the discussions.

28. Around that time in May 2022, the respondent had 400 children who were unallocated and Steven Gauntley's oral evidence was that it was in effect an extraordinary scenario such there was no need for the usual business case for staffing with no budget as such. There was plenty of work. Kate Mullinder started signing off the claimant's time sheets in around May - June 2022. It is clear that Anne Marie McDonnell and Sue Applegate knew the claimant was working those hours.

29. It was not a problem at that time. Children were not allocated and there was a need to put in management time to resolve the issues as this was a concern. Steven Gauntley gave evidence that the budget was not really fixed at that time as it was an extraordinary event and they needed to get the children allocated. Effectively it was all hands to the pumps to sort out the issue at that time.

30. The claimant was a clearly valued member of staff and the respondent relied on her to get the job done. They had no concerns over the actual work she was doing and no issues with signing off the time or any question that the claimant was in any way dishonest in making these claims for hours worked. Kate Mullinder had access to budgets, but her evidence was that she did not see the detail, but Kate Mullinder went to great lengths in her witness evidence to express concerns about the spending of public money. We do not accept that evidence and we find as a fact that Kate Mullinder was aware that the claimant was working 37 hours both during and before the Ofsted inspection.

31. Sue Applegate and Anne Marie McDonell argued over the priority of the claimant's time over email and that Kate Mullinder was copied into these emails. This was unchallenged evidence from Anne Marie McDonnell so whilst we have not seen those emails in the bundle, we accept that evidence. We are told that Kate Mullinder was also copied into other emails, and we can see from the bundle that the claimant would often respond to emails either late at night or over weekend. Indeed, this is the evidence before us that this was customary given the huge workload.

32. We also note from the emails referred to that there must have been a discussion prior to the 8th May around TOIL and what could happen. There was a suggestion in the emails referred to above that the claimant sent to say that she would claim for so many hours and then take so many hours TOIL suggests either this is done before or that it is so customary that it happens that Anne Marie McDonnell, and Kate Mullinder knew that the claimant had been working in excess of 37 hours on occasion.

33. On 11th May 2022, the claimant made disclosures A and E. On 12th May 2022, there was a Teams meeting and the claimant sets out the details of this in her witness statement at paragraph 12.9, which we accept. In summary Kate Mullinder apologised but stood by her actions as being correct.

34. On 13th May 2022, the claimant made disclosures B, C, D, F, and G. On the 13th May 2022 at 11.57am Kate Mullinder sent an email to the claimant, the contents of that email make it clear that she knew that she had raised complaints about issues involving her. She knew that Steven Gauntley was looking into it, and that those disclosures did involve both the conduct of her and Steven Gauntley. She expressed that she was eager to resolve matters relating to her and that she wanted to ensure transparent oversight and escalation of the other matters. She reiterated that the claimant was valued for the support she had given and was happy to discuss the matter.

35. On 18th May 2022, the claimant made disclosure H, and also on the same day, Kate Mullinder told the claimant that she had spoken to Steven Gauntley and he would discuss the disclosures with the claimant. The claimant felt anxious about the discussion.

36. On 20th May 2022, there was the outcome from Ofsted and we know that the 2nd or 3rd June 2022 was an abnormal bank holiday, being two days on the Thursday and Friday. On 6th June 2022, Detriment C took place. Kate Mullinder queried the time sheet for the first time relating to the week before. The claimant had claimed 12 hours, but the time sheet was rejected and then it was resubmitted after a delay. The claimant raised concerns about why her hours were now being queried as she had since 2nd September 2021 worked beyond her “official 2 days”.

37. Kate Mullinder cannot have examined the detail of this timesheet because it is clear from the email evidence that she thought the claimant was claiming for 37 hours that week when actually the claimant had, in fact, only claimed for 12. Also, on 6th June 2022, a meeting took place between the claimant and Kate Mullinder. The detail of that meeting is set out in an email from the claimant setting out what she says happened at that meeting which we accept. The claimant sent the email that same evening and set out that the discussion centered around Kate Mullinder’s concern about her working two contracts. The claimant challenged this and why it was only being raised now and that the budget was discussed at length as there was said to be budgetary concerns. Kate Mullinder said that she would speak to HR.

38. What is not clear to us is why Kate Mullinder was signing off the time sheets on 6th June 2022 as normally this was done by Anne Marie McDonell. There was a period of transition within this time as Anne Marie McDonell says that she had resigned directly in response to the disclosures. We heard evidence that Anne Marie McDonnell was instructed not to sign off the timesheets at this time and we know that Sue Applegate, was on and leave around this time. The timesheets in the bundle show that Kate Mullinder started to sign them off from May 2022 onwards. We heard some evidence that the spreadsheet the respondent produced as 1st approver to 2nd and 3rd approver was not a sign off but to whom they were sent which complicates matters. It is however clear from the timeline that it was Kate Mullinder as the respondent concedes that she started to scrutinise the claimant’s time sheets in this period.

39. On 7th June 2022, Selina Francois of HR emailed Kate Mullinder and told her not to have any further contract/ hours discussions with the claimant and she was instructed to not reply to the claimant's email until HR could fully review matters and provide advice. Kate Mullinder had however, drafted a response to HR which we saw in the chain where she raised concerns over the 37-hour contract and how this had been agreed. Kate Mullinder also makes reference in that email to the disclosures as she makes reference to being aware of the complaints and the need to tread carefully and that she had overall responsibility for budget and that she did not want to agree a contract for more hours when the claimant had another contract with Warwickshire Council and that she has an obligation to consider this as it is her responsibility to the claimant.

40. On 13th June 2022, Sue Applegate was on extended leave and the time sheet was left for her to do on the return. This relates to Detriment C, which is a delay in the signing of the time sheet. The claimant emailed Sue Applegate and Kate Mullinder and the agency querying when her time sheet would be authorised as Kate wanted more details of what the claimant did from Sue Applegate. The claimant queried why her work or working hours was now under question and she was not sure why. She asked to be paid for the work she had done. It is clear that the time sheets were now being scrutinised and that the claimant did experience delays, albeit they were authorised in the end. The respondent accepts this happened as a matter of fact in any event.

41. On 15th June 2022, Kate Mullinder sent an email to HR which sets out the need to speak to Steven Gauntley around the contract and the need to understand where the organisation stood on a full-time contract when they know somebody also had a contract with another local authority. Kate Mullinder went on to confirm that if the claimant had a full time contract and regardless of her work with someone else we could use her full time as there was work to be done but concerns were expressed about her working remotely. It was accepted that she was recruited on this basis during Covid times. She confirmed that she could find work for her to do if she was remote, but they needed to understand the HR implications. We find that it was this discussion on the 15th/16th June 2022 (taken as the earliest on 15th June 2022) between Steven Gauntley and Kate Mullinder where the decision to reduce the claimant's hours with effect from 20th June 2022 was taken and the respondent concedes by Kate Mullinder but we find it was not done without Steven Gauntley's input at the very least and instruction or permission at the most.

42. On 17th June 2022, the claimant had a meeting for her grievance, which was a stage two meeting. We do not have a copy of the original grievance within the bundle, but we understand that this related to both the delay in the time sheets (detriment C), and also an unrelated second issue, which does not form part of this claim around confidentiality in an open plan office. We also know that there were two prior meetings in relation to what is termed as the grievance or whistleblowing on 13th May and 20th May and on 20th May 2022, the claimant's complaints, which must be the whistleblowing complaints at this point, were treated formally.

43. On 20th June 2022, Detriment A took effect and that there was a reduction in the hours from 37 to 14. We know from the evidence that Steven Gauntley was involved in that discussion with HR. What is not clear to us is exactly when the decision was made as we know that the 20th June 2022 is when it took effect not when the decision was made. No evidence was advanced to confirm the date of the decision but the claimant asserts that this was communicated by Kate Mullinder in a meeting on 15/16 June 2022 and we accept that as it was not challenged and it was conceded by the respondent that this was the date and it has not advanced any evidence of an earlier date. Kate Mullinder did contradict this in her evidence to say no such meeting took place. The respondent conceded the detriment as pleaded but says that it is out of time as set out below.

44. The reason for the reduction in hours given by the respondent has changed over time. In the response the respondent's response the reason given for the reduction was that there was a lack of work for the claimant to do at this time. This has shifted in the witness evidence to be more focused on concerns about the claimant's welfare and it was a matter of health and safety. Whilst this was raised in the response at the time it was submitted to the Tribunal, the respondent asserted that the increase to 37 hours was temporary to assist with Ofsted and ad hoc to assist with work pressures and that a review took place which no longer required her to do these hours. In fact as found above the claimant worked 37 weeks from January 2022 consistently save for only three weeks.

45. The respondent's evidence and case was at times contradictory. The response presented to the Tribunal was contradicted by the respondent's own witnesses and this leaves the Tribunal preferring the evidence of the claimant and her witness when there is a dispute as the evidence of the respondent was inconsistent with their own case.

46. The respondent confirmed that it did not seek occupational health advice to support its now alleged health and safety concerns. Anne Marie McDonnell was asked by the panel in her evidence about health and safety concerns. Her evidence was that there were no obvious signs to have any health and safety concerns at that particular point. Her evidence was that there was no drop in performance and that had the claimant missed deadlines or had there been something else to alert her to an issue she may have carried out a risk assessment. It was not in dispute that no risk assessment was done. We have already found as a fact that the respondent had known about both jobs for a significant period of time by this point. The respondent is asking the Tribunal to accept that it was not an issue at that time but now was and we do not accept that.

47. On 20th June 2022, the claimant went off sick from Warwickshire County Council role citing her stomach and lower back is bad on and off. On 21st June, she provided the respondent with a fit note signing her off sick until 4th July 2022, which was provided in the bundle and confirmed that she had been signed off with work related stress.

48. On 8th July 2022, Steven Gauntley sent an email to the claimant, making reference to the stop the clock meeting, which had until now been a virtual meeting, which had been converted into an in-person meeting. The claimant was told that she needed to come into the office now for these meetings. He told the claimant that he "met with all Heads of Service a few weeks ago and there being a need for the stop the clock days to support social workers and managers timely completion of work." Set days had been agreed (and in her case Thursday's) in which "all managers are physically in the office with all of the social workers in order to maximise the benefits of the process."

49. Also on 8th July there are emails between Kate Mullinder and Sue Applegate about the claimant expressly working remotely and that she could work virtually. In response, Sue Applegate offers to reduce the claimant's hours to start at 1:00 PM so that she can attend the office. Although she would have missed the stop the clock meeting or initiative that morning if she did not start until 1pm. This issue involved the new requirement for the claimant to now attend the office. This is not a pleaded issue in the case but it is relevant as it forms part of the bigger picture and the catalyst for the last reduction in hours. The evidence was that Steven Gauntley gave the instruction that the claimant needed to be in that day on a Thursday. There was no attempt to discuss this with the claimant or make an exceptions, it was simply mandated. Whilst Sue could talk the claimant about this he made it clear his expectation was that all managers be in the office on that Thursday and not work remotely.

50. This relates to Detriment B and the respondent accepts that the Claimant's hours were cut from 14 to 7 hours. The decision was taken on 8th July 2022 and the respondent has not provided any evidence to support this being made earlier and accepts that this detriment is in time for the purposes of this claim.

51. The respondent's evidence was that this was a wider policy decision, however, there was no evidence in the bundle to show that there was any other email, commands or evidence of a wider decision to force people coming to the office save for the email to the claimant referenced above of 8th July 2022. There was an email chain between Sue, Kate and Steven over the coming days that referenced the change in policy but that the claimant had never attended in person and Sue simply updated her.

52. Kate Mullinder said that she could work remotely, and Sue Applegate had also said that she could work remotely, and she had previously been invited to the stop the clock meeting virtually, which was converted to an in-person meeting. It also makes little sense that the mandate was that she had to be in for the meeting when the respondent adjusted her hours so she could travel and that by not agreeing to work remotely on the Thursday this resulted in detriment B the further reduction in the hours from 14 to 7 hours.

53. On 12th July 2022, the claimant resigned in view of her reduced hours and the claimant offered to work one week's notice to tie up loose ends or to resign immediately as she was unable to attend the meetings or work on a Thursday as a result of the decision taken which would mean a 5/6 hour

drive for her. Steven Gauntley replied the same day expressing his sorrow that she had decided to resign and asking her to work a 4 week notice period remotely and ensure she can finish off tasks and leave in a more planned way. The 5th August 2022, was the claimant's last day and the claimant's evidence was that she agreed to work this period as she could do remotely and as she was concerned about the children if she simply left. Steven Gauntley's decision was that she could now in fact work fully remotely for the notice period and this sits at some contradiction to her being required to attend the office on Thursday's before although we appreciate that if he had required her to work in the office she would simply not have agreed to work an extended notice period.

54. On 4th October 2022, the claimant started ACAS early conciliation, and also received the outcome of the grievance stage two which was not upheld.

55. On 5th October 2022, the Claimant appealed against the outcome of the grievance.

56. On 7th November 2022, the Claimant was issued with the ACAS certificate, and the claim was submitted on 5th December 2022.

57. Just for completeness, the outcome of the whistleblowing complaint was received on 3rd April 2023 which found that the Professional Standards of Social Work England were not breached by employees of the trust and that in relation to the data breach, it was found that appropriate action was taken where an initial error of judgement was recognised by management. The investigation did however highlight some concerns and recommendations were made. That was the end of the internal process.

Conclusions

58. Turning to the list of issues, in order to reach our conclusions, we took the time point as a second point because, as Mr. Carr rightly pointed out, we need to make findings on the detriments first and when they were made and the reasons for them before we can then look at time.

<u>Did the Claimant make one or more protected disclosures under section 43B Employment Rights Act 1996 as set out below. The Claimant relies on subsections (a)(b) and (d) of section 43B(1).</u>

59. The respondent conceded that the claimant had made protected disclosures A-H both that they occurred as a matter of fact and that they amounted in law to protected disclosures. The protected disclosures related to the subsections identified in the list of issues namely that a criminal offence may have been/be committed, that the respondent was in breach of its legal obligations and that the health and safety of an individual (the allocated child) in this case was in danger. These are clearly serious allegations that fall within those categories but we make no finding as to whether they are true or correct as this is not the function of the Tribunal but we accept for the avoidance of doubt that the claimant had a reasonable belief that the disclosures were correct and that the

disclosures were made in the public interest. They are accepted to be protected disclosures and that they were made. Given the content and the fact that they accept that the disclosures happened as a matter of fact, we note this is a sensible position for the respondent to adopt.

<u>Did the Respondent subject the Claimant to any detriments as set out below? Included within this issue are the questions of what happened as a mater of fact and whether what happened was a detriment to the Claimant as a matter of law.</u>

60. Again, it not being in dispute that the claimant was subject to those detriments as a matter of fact and that they amounted to detriments as matter of law, the issue is whether they were done on the ground that the claimant made the admitted protected disclosures.

<u>If so was this done on the ground that she made one or more protected disclosures?</u>

61. The claimant has established that she was subject to detriment, the burden of proof is on the respondent to establish the reason for the treatment and that it was done for a reason other than the protected disclosures. If the respondent does not prove an admissible reason then the Tribunal is entitled (but not obliged) to infer that the detriment was on the ground that the claimant made a protected disclosure.

62. We had regard how the detriments need to be more than trivial and more than just related to the disclosure. There must be a causative link between the protected disclosure and the reason for the treatment, the detriment and the protected disclosure needs to be the real or core reason. We have considered the Court of Appeal guidance of the test in detriment cases in Fecitt and whether the protected disclosure materially influenced the respondent's treatment of the claimant.

63. We take each detriment in turn to look at the reason for the detriment in the sense of whether it was done on the ground of one or more protected disclosures.

<u>Detriment A:</u>

<u>A reduction in the Claimant's hours from 37 hours to 14 hours per week. The Claimant says Kate Mullinder had a conversation with her on or around 15/16 June 2022 when she says that her hours would be reduced with effect from 20th June 2022.</u>

64. We do not accept the respondent's response accurately reflects the position. It is clear that the claimant was not merely doing 37 hours in the Ofsted period. She had been working this way for a prolonged period. As we have found as a fact Kate Mullinder knew the reality of the hours that the claimant was working. Her timesheets were signed off internally and paid accordingly (save for the three weeks with shorter hours) for a prolonged period and there is evidence before us that she worked not just on Thursday and Fridays as

alleged. Kate Mullinder raised issues with HR around the contracted hours. We also know there was plenty of work for the claimant and her colleagues as there was concern over the volume of 400 plus children who were unallocated.

65. We find that the respondent's response in connection with explanation for this detriment was inconsistent. There is very much an emphasis on the health and safety and the concern for the claimant's welfare during evidence at this tribunal. These were not concerns that it shared earlier on in the relationship. The respondent knew about the second job. Concerns were only raised after the protected disclosures. There needs to be more than a coincidental link in terms of time as it is fair to say that the reduction came within a matter of weeks of the disclosures but the Ofsted inspection had also finished during this time.

66. We have regard to Steven Gauntley's evidence on the budget, this was effectively an extraordinary time and there was no budget as such as the work had to be done and the number of children unallocated to a social worker simply had to be resolved. Money was not a reason for reducing the claimant's hours, nor in fact, contrary to the respondent's response, was there a lack of work for the claimant to do around this time. We know that whilst the number had been reducing, there were 400 unallocated children and the need effectively for all hands to the pumps to try and resolve the issue.

67. The respondent advanced the issue of health and safety concerns in its evidence, and we do not accept that this is the genuine reason for them reducing the claimant's hours at this time. There are a number of reasons for this which we set out in the conclusions here and we are troubled by the respondent's lack of consistency in its explanations for the reason for the reduction which evolves with time and the focus of which changes. The respondent did not consult with the claimant about its concerns that perhaps she was doing too much work. There was no risk assessment conducted. There were no performance concerns, missed deadlines or other indications. Yes Ofsted had finished but this was a short burst of activity and the claimant had consistently worked 37 hours long before this and that thought that whole period of these hours in 2022 it was known that she had two roles. The only thing that had in fact changed in the interim was that the claimant made numerous protected disclosures and against two of those who subjected the claimant to a detriments. This is more than a coincidence for the reasons set out below.

68. The respondent offered the claimant an extension to the contract when it knew there was a 3 day arrangement working elsewhere for another council from September 2021. Everybody knew about this, and there was no concerns raised. During the period of Ofstead, Kate Mullinder knew that the claimant worked 55.3 hours, including that week but was not concerned that this was over 60% higher than her contracted 37 hours or indeed as Kate Mullinder asserted the 14 hours she alleges she was doing as this was more than four times higher. The respondent rowed back from its position that there was no set 37 hour contract to a degree but it clearly was an established pattern of work for a prolonged period. Kate Mullinder did not have knowledge of what the claimant's working pattern was for Warwick so even if she thought this was

three days or 21 hours spread over three days, this would have equated to a 76.5-hour week as she would not have know what hours if any the claimant was working for Warwick on top. It was a long week and she did not raise any concerns at this point. Effectively, Kate Mullinder turned a blind eye to the excessive hours at this point because of the Ofsted inspection.

69. The respondent was inconsistent in their defence and their evidence was inconsistent with the emails at the time. Anne Marie McDonnell's evidence was that there was no obvious signs or indication to have any concerns at that particular point about the claimant or her welfare. She gave evidence that there was no drop in performance. Had the claimant missed deadlines, had there been something else then that would have alerted her further in order to do a risk assessment then she would have raised it. She did not share these concerns that Kate Mullinder relies on.

70. The respondent had no complaints until after the protected disclosures had been made. We therefore find that the reason that the claimant's hours were reduced was on the grounds that the claimant made those protected disclosures. There is no other logical explanation that bears any credibility to this tribunal, to the alternative position. The alternative advanced by the respondent in its response is simply not correct and contradicted by its own witnesses and the now health and safety angle is undermined by the lack of documentary evidence as well as the fact that they did not consult with the claimant and we do not accept it as genuine. Just like the reduction in work and budgetary concerns these reasons were not established by the respondent. They were a false narrative and we draw inferences from the lack of consistency in their evidence on this point. No budgetary or workload documentary evidence has been produced; only oral evidence from those that were the subject of the disclosures and their evidence contradicted each other and the response. We do not accept that all of a sudden the employer found it unpalatable for the claimant to be working 2 concurrent roles. We do not accept that is the real reason the hours were cut. Whilst there are references to the claimant only be on a 2 days a week basis this was clearly not the reality and clearly everyone knew about this for the reasons stated. It is inconsistent for the respondent’s submissions to assert that the respondent had a belief that she was meant to be engaged for only two days and there was no reduction as this was the contract anyway as they have conceded as a matter of fact her hours were so reduced from 37 to 14 hours.

71. After the protected disclosures, we find that Kate Mullinder decided to unilaterally reduce the claimant’s hours to 14 hours on the grounds of the protected disclosures made. This was communicated prior to the 20th of June because this is when it took effect. We have dealt with the dates of the acts of detriments below.

Detriment B:
A reduction in the Claimant’s hours from 14 hours to 7 hours per week. The Claimant says that on 8th July 2022 Steven Gauntley emailed her telling her that her hours would be reduced.

72. Turning now to Detriment B, which is a reduction in hours and a detriment by Steven Gauntley. Again the fact the detriment took place is conceded. The respondent bears the burden of proof to establish the reason why the detriment occurred, and to advance an alternative reason. In this case it is a decision by Steven Gauntley around attendance in the office on a Thursday. We have seen no policy and no emails to anybody else in the wider team, no other communications about the stop the clock meetings or anything else to signify that it was a change in policy. Effectively, it was a refusal to allow the claimant to work from home on the Thursday, and that she must come in. That effectively meant her hours were therefore reduced by seven hours to half the time that she could work from 14 hours to 7 hours.

73. The detriment has accepted as having taken place, and it follows on quickly in time from Detriment A of which we have already made findings and reached a conclusion upon. We know there was plenty of work for the claimant to do. We know that Kate Mullinder and Sue Applegate felt that that the claimant was remote and that she could still do her work remotely.

74. The only person that felt she needed to be in on a Thursday was Steven Gauntley. We have considered his inflexibility to make an exception in her case, given the working hours she was by this time doing and the fact that she was recruited during Covid as a remote worker and indeed was not an employee. There was no conversation around this, only the mandate. It was not discussed with her and was not done for monetary reasons. It was not done for a lack of work indeed she was asked to work a longer notice period. It was simply removed from her without consultation or discussing with her other ways around that she could make up the hours remotely.

75. We consider that had the claimant not made the protected disclosure, she may well have had the flexibility because she was clearly a valued member of staff, and we find that the decision was on grounds which were influenced by the protected disclosure.

76. We cannot separate out the reason why she had to reduce her hours to allow for travel to the office to the fact she was being told that she must now attend the office on a Thursday. If Steve Gauntley had not mandated her to attend then there would have been no reduction. He was the only one who felt the claimant needed to come in. We find that there was no genuine reason for this request. The claimant was not an employee, had been recruited remotely and everyone felt she did not need to actually attend so we find that Steven's Gauntley's insistence otherwise was materially influenced by the protected disclosures made. He was the only one who felt this was necessary and there was no genuine reason for mandating the claimant in this way.

77. We do not find that the reasons for the reduction in hours (due to the mandate to attend the office) are separate from the protected disclosures but are so closely connected with it that a distinction cannot be fairly or sensibly drawn between them. Had Steven Gauntley not insisted on the request in the face of everyone else saying it was not necessary; there would have been no such reduction in hours. We therefore conclude that Steven Gauntley reduced the claimant's hours further on the grounds of the protected disclosures.

<u>Detriment C:</u>
<u>A delay in approval of the Claimant's timesheets. The Claimant says that prior to making protected disclosures her timesheets were approved weekly and by Sue Applegate or Anne Marie McDonnell (her line managers). In June 2022 on 2 or 3 occasions the approval of the Claimant's time sheets was delayed by Kate Mullinder in her unjustifiably challenging the validity of the days worked.</u>

78. Turning now to the time sheets and Detriment C, this occupied a significant amount of the tribunal's deliberation time. We were concerned about the first rejection of the timesheets by Kate Mullinder without any investigation so that she simply rejected the time sheet. Clearly she had not looked at it in any detail, otherwise she would have realised it was 12 hours submitted not 37.

79. The respondent has confirmed that there were no concerns about dishonesty or that the claimant was in any way submitting fraudulent time sheets. So that was not an issue. We had regard to the time sheets spreadsheet in the bundle that show that the timesheets were effectively signed off by Kate Mullinder from around May onwards. The panel on this point had a split and we could not reach a unanimous decision on the point of time sheets. We find that the bank holiday being an unusual one is a plausible reason for the query to have been raised in the first instance. Further, given the transitional period at that time in that Anne Marie McDonnell was leaving and it was around this time that Sue Applegate was also on extended leave.

80. We were aware that Anne Marie McDonnell was given instruction not to authorise the time sheets around this time. This could have been in respect of the protected disclosures but we find it was more likely on balance as a majority (rather than a unanimous decision) that the respondent does satisfy the burden of proof because there is an alternative explanation in respect of the time sheets that is credible and the majority have accepted.

81. It is not enough to say that the detriment is coincidental in terms of the timing. The burden is on the respondent in this case but we accept that with the bank holiday being abnormally both two days and on a Thursday and Friday in May and not the Monday that the respondent could have assumed the claimant would not be working as much and challenge the timesheet. This explains the first instance of the challenge of the time sheets.

82. We are entitled to draw inferences from the conduct of the respondent in this case and had this detriment come last we may well have reached a different decision but as the timesheets issue came first in time and immediately after the abnormal bank holiday, we accept that explanation as the response to this issue has not been inconsistent. We therefore do not find that on the occasion relied upon the querying of the timesheets was on the grounds of having made a protected disclosure. The second time there was a delay in the timesheets there was a period of change with Sue Applegate on extended leave and Anne Marie McDonnell having resigned and then left which caused delays as the usual people were not in work. We do not find that these detriments were materially influenced by the protected disclosures merely the circumstances at

the time in the abnormal bank holiday falling on a Thursday/Friday and then the manager's absence.

Were all of the Claimant's detriments complaints presented within the time limits set out in sections 48(3)(a) & (b) of the Employment Rights Act 1996?

If any of the detriment complaints have been brought out of time has the Claimant established that it was not reasonably practicable for her claim to be presented in time (sections 48(3)(b)). If so was the claim presented within such further period as the tribunal considers reasonable?

83. The respondent raises that detriments A and C are out of time but detriment B is accepted to be in time. We remind ourselves of s48(3) that the complaints must be presented within three months beginning with the act or failure to act or where the act or failure to act is part of a series of similar acts or failings, the last of them.

84. We must first conclude as to the date the act took place. With regard to detriment A what we cannot say for certainty is when this was communicated, but it must have been in the period between the 6th and 20th June based on the documentary evidence and that the respondent's evidence does not deal with when the decision was taken.

85. However, the detriment in the list of issues is conceded on that basis that there was a conversation on 15th or 16th June 2022 that hours would be reduced. We note that Kate Mullinder disputed this in evidence and said there had been no meeting contrary to the concession but this is another contradiction in the respondent's evidence. We find as a matter of fact that the detriment may have taken effect on 20th June but that the decision was taken on 15th June 2022 by Kate Mullinder.

86. Turning to detriment B again a reduction in hours this time by Steven Gauntley this was made on 8th July 2022. We do not need to consider detriment C as we do not find that this was done on the grounds of the claimant having made a protected disclosure.

87. We take into account Mr. Carr's submissions in respect of when the decision is made and it is not when it takes effect. For time limit purposes, a distinction is to be drawn between an act extending over a period and a single distinct act with an effect that extends over a period (*Mr Brian Ikejiaku v British Institute of Technology Ltd* UKEAT/0243/19/VP). So, although the reduction in hours carried on after 5th July 2022, the act making the reduction in hours starts the clock running for limitation purposes, it is not the ongoing effects, it is the decision. The same can be said for the first reduction in hours as the act took place on 15th June 2022 although the effect extended over the period from 20th June 2022 to when the claimant left.

88. We note that on the face of it the reductions in hours Detriment A (15th June 2022) is out of time and Detriment B (8th July 2022) is in time. The ACAS EC process commenced on 4th October 2022 so events prior to 5th July 2022 are

out of time. The claim was presented within one month of the ACAS EC certificate being obtained.

89. Given both detriments relate to reductions in hours on the ground that the claimant made a protected disclosures, we have gone onto consider whether the two acts are isolated or a series of similar acts to mean that if so detriment A would be in time. We raised this point with counsel for the respondent in submissions as his written submissions did not cover this issue. Mr Carr submitted that we should consider these are two separate acts as they are two separate decisions by two separate individuals.

90. We do not accept that submission. Steven Gauntley was not working in isolation and they are not isolated acts. There are a number of reasons why we consider them to be linked and to form part of a series of similar acts in that Steven Gauntley was involved in the discussions with HR around the first reduction in hours (detriment A). We see this from the documentary evidence and our findings of fact. We found that Steven Gauntley was also involved in the first decision at the very least even if Kate Mullinder put her name to it.

91. We consider that cumulatively taken together, they amounted to approximately an 80% reduction in the claimant's hours within a matter of weeks. The second decision was very closely linked, and on the back of the first decision because if there had been a simple reduction of seven hours in the claimant's working hours from 37 to 30, it would perhaps not have had the same effect as having already reduced it to 14 and then reducing it again to seven, effectively removing 30 hours from her working week.

92. They are close in time. The people who subjected the claimants to detriments worked together in the management structure and both were involved in the protected disclosures in that the claimant accused both of them of wrongdoing in breach of legal obligations, putting a child’s health and safety at risk and criminality. The nature of the acts are the same in that there is a detriment to reduce hours and Steven Gauntley was more senior to Kate Mullinder who subjected the claimant to the first detriment and there is clear evidence that he was involved in those discussions with HR. We conclude that there is a clear link with the perpetrators of the detriments.

93. We conclude that both acts are close enough in proximity and the nature of these matters, in that they both involve a reduction in hours. They are not isolated unrelated one off acts by different unconnected individuals. As such we consider detriments A and B to be a series of similar acts under s48(3) Employment Rights Act 1996.

94. As detriment B is the last of the acts in time and it is within the primary limitation period and we have concluded that detriment A was part of a series of similar events, the claimant is entitled to a remedy in respect of detriment A and B and the Tribunal has jurisdiction to hear both complaints.

95. This tribunal has set directions and listed the matter for a remedy hearing in due course.

Employment Judge S King

Date: ………………14.11.24……….

Judgment sent to the parties on

15 November 2024

For the Tribunal office