EMPLOYMENT TRIBUNALS

Claimant: **Ms Laura Pagnello**

Respondent: **Barrow Hill Pre-School**

Heard at: **London Central Tribunal**

On: **11 February 2025 – 21 February 2025 (excluding the weekends)**

Before: **Employment Judge G Smart**
Mrs S Aslett
Ms L Jones
in public in person

Representation
Claimant: Mrs L Dingley – HR Consultant
Respondent: Mr. R Downey (Counsel)

RESERVED JUDGMENT

The Judgment of the Tribunal is:

1. The Claimant made a protected disclosure on 27 June 2023 as admitted by the Respondent.

2. The disclosures of information made to the Local Authority Designated Officer (LADO), OFSTED and the Charity Commission were not protected disclosures.

3. The Claimant was not dismissed, she resigned. Consequently, her unfair dismissal claims both for ordinary unfair dismissal in accordance with s98, and automatic unfair dismissal under s103A of the Employment Rights Act 1996 are not well founded and are dismissed.

4. The Claimant was not subjected to any detriment on grounds of making a protected disclosure. Her detriment claims are not well founded and are dismissed.

5. Consequently, all of the Claimant's claims fail and are dismissed.

REASONS

THE HEARING AND THE EVIDENCE

1. The Claimant in this case was represented by an HR consultant Mrs Dingley. Neither were legally qualified and therefore the Tribunal, with reference to the Equal Treatment Bench Book, did what it could to level the playing field with the Respondent who was represented by counsel.

2. The assistance the Tribunal gave manifested itself in explaining both the procedure undertaken in the Tribunal and any legal points. At all times we reminded ourselves that it was not for us to run any positive arguments for points on the Claimant's behalf, which she had not already raised herself either in the pleadings, in questions or in her witness statements where relevant to the pleaded case and list of issues.

3. The Claimant also said that she had dyslexia and anxiety. She therefore requested more processing time to read documents and respond to questions, as well as regular breaks.

4. Mrs Rogan, who was a witness for the Respondent, also had a medical condition whereby she may need regular breaks or to leave the Tribunal room at short notice.

5. All the above adjustments for both sides were implemented by the Tribunal by consent.

6. We are content that both sides to this claim were given a fair and reasonable opportunity to present their cases as best they could. We are also concerned that the Claimant was given as fair a chance as we could give her to present her case fully.

7. At the commencement of the hearing, we have the following documents:

    7.1. Witness statement of the Claimant
    7.2. Witness statement of Bianca Pagnello – Boyce, the Claimant's daughter
    7.3. Witness statement of Mandy Rogan
    7.4. Witness statement of Kelly Shailer
    7.5. Witness statement of Karen McKenna
    7.6. Witness statement of Naba Madani
    7.7. Witness statement of Anissa Messis
    7.8. Chronology of the Claimant
    7.9. Chronology of the Respondent
    7.10. Cast list
    7.11. A bundle of 985 pages excluding the index (997 including it).

8. The Claimant initially had some concerns about the bundle of documents the Respondent had collated indexed and provided. She was concerned that some

documents had been disclosed to the Respondent's solicitor but had not been included in the bundle.

9. There was a similar impasse about the chronology. Two versions of the chronology were provided. The Claimant's version was substantial and, in our view, included detail that was not neutral or indeed necessary. This made the Claimant's version of the chronology a cumbersome document.

10. The parties were asked to work together about the issues to do with the bundle and chronology, whilst the Tribunal commenced its reading time for the remainder of day one off the hearing after that any preliminary issues have been discussed.

11. By day two, the bundle had still not been agreed but the parties were still going through all of the documents to try to come to a solution and we're sounding positive about the situation.

12. Additional documents were inserted into the bundle by consent at the end of day 2 and were numbered as pages 986 to 992.

13. All document issues were therefore fixed by 15.00 on day two.

14. The remainder of day two was timetabling the case, which was obviously short listed and we had already lost two days of hearing time dealing with preliminary issues. Consequently, the parties chose not to postpone the case to a longer listing but accepted pragmatically that guillotines might need to be used to at least hear the case to the point of submissions so a reserved decision could be given.

15. The parties were asked if anything else was outstanding and both sides confirmed nothing else needed to be decided before we could start hearing evidence.

16. We heard submission on day 6. AT the start of those submissions, counsel for the Respondent noticed that there had been an application to amend the claim that had not be dealt with by the Tribunal.

17. This was news to us, because the Judge had considered the electronic case file before the hearing had commenced, and there was nothing in there to indicate any outstanding applications to amend the claim. It turned out the case file had not been kept up to date, so documents were missing.

18. The claims had already been included in the list of issues and the Respondent took no issue with amendment. The new claims were added to the Claimant's ET1 by consent. The holiday pay issue had been pleaded as a working Time Regulations claim in the amended ET1. However, this was now being pursued in the claim as a whistleblowing detriment claim.

19. Due to these items being included in the list of issues, the only issues that would be affected by the late inclusion of the claims officially, would be time limits. The Judge did his best to try to explain the effect on time to the Claimant and her representative. In any event, it turned out that time was not an issue of the essence in this case.

20. There was no time for deliberations, but luckily the Tribunal panel could deliberate for the remaining three days of the week (19 – 21 February 2025) to come to a decision and Judgment would then be reserved.

THE ISSUES

21. The final agreed list of issues is attached to this Judgment as annex one.

22. The issues were revisited, and some minor adjustments made to them, at the start of the hearing mainly to identify the specific legal sections relied upon for the protected disclosures alleged and to name any perpetrators who were missing from the allegations. This was done by consent.

23. The final list of issues was available from the middle of day two onwards before evidence was heard.

THE LAW

CONSTRUCTIVE DISMISSAL

24. For a resignation to amount to a dismissal under section 95 employment rights act 1996, the following must be answered following the case of **Kaur v Leeds Teaching Hospitals [2018] EWCA Civ 978:**

    24.1. What was the most recent act on the part of the employer which the Claimant alleges caused her resignation?

    24.2. Has the contract been affirmed since that date?

    24.3. If not, was it a repudiatory breach of contract?

    24.4. If not, was it part of a sequence of events that collectively breached trust and confidence?

    24.5. Did the employee resign in response to that breach within a reasonable time?

25. **Humby V Barts Health NHS Trust [2024] EAT 17:** Need to consider both breaches of implied and express terms for determining whether a repudiatory breach has happened.

26. There is an implied term of mutual trust and confidence that exists in every employment contract **Malik v BCCI SA (in Liquidation) [1998] AC 20.**

27. Neither party to the contract of employment should behave in a way that either destroys or seriously damages the implied term **Claridge v Daler Rowney Limited [2008] ICR 1267.**

28. In a case where the breach of the implied term of mutual trust and confidence is alleged, this clause will only be breached where, following the case of **Gogay v Hertfordshire County Council [2000] IRLR 703:**

    28.1. A party behaves in a way that has the purpose and/or effect of breaching mutual trust between the parties; and

    28.2. That behaviour was without reasonable and proper cause.

29. A series of events, which may amount to minor issues may amount to a cumulative breach of the implied term when looked at as a whole and the employee has resigned in response to the last act or "last straw" **Lewis v Motorworld Garages limited [1986] ICR 157.**

30. The last straw must be at least part of the reason for the resignation **Omilaju v Waltham Forest London Borough Council [2004] EWCA Civ 1493.**

PROTECTED DISCLOSURES

31. Section 43A Employment Rights Act 1996 defines what a protected disclosure is. It says:

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

Qualifying disclosures

32. First, there must be a qualifying disclosure. This is defined in section 43B, which says where relevant to this case:

    "43B Disclosures qualifying for protection.

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

    (a) …

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

    (c) …

    (d) that the health or safety of any individual has been, is being or is likely to be endangered,

    (e) … 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)."

The relevant tests

33. In **Williams v Michelle Brown UKEAT/044/19,** when a Tribunal is deciding whether a disclosure is protected it must follow five tests as described by HHJ Auerbach at paragraph 9 (with bullet points added to make the paragraph more readily digestible):

"It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements.

1. *First, there must be a disclosure of information.*

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

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

4. *Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paras (a) to (f).*

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

34. The Tribunal must take a structured approach to the tests and go through them one by one.

35. The Tribunal must not conflate the test for a qualifying disclosure with the test for a protected disclosure and must always revert to the statutory language rather than paraphrasing it following **Kealy v Westfield Community Development Association [2023] EAT 96.**

First Test – disclosure of information

36. It is not sufficient that the Claimant has simply made *allegations* about the wrongdoer, especially where the claimed whistleblowing occurs within the Claimant's own employment, as part of a dispute with his or her employer **Cavendish Munro Professional Risks Management v Geduld [2010] IRLR 38**.

37. The question is whether there is sufficient information to satisfy section 43B. This will be very much a matter of fact for the Tribunal. The more the statement consists of unsupported allegations, the less likely it will be to qualify, but this is as a question of fact, not because of a rigid information/allegation divide - **Kilraine v London Borough of Wandsworth [2018] ICR 1850**.

38. For a statement to be a qualifying disclosure, there must be sufficient factual content and specificity to show that one of the listed matters in section 43B(1) is engaged.

39. We make no findings about whether a disclosure of information has taken place for any disclosures, because the Respondent has conceded this part of the legal test for all the alleged disclosures.

Second and Third tests – belief the disclosure was in the public interest and that belief was a reasonable one to hold.

Reasonable belief

40. This is a two-stage test after **Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979.**The first is subjective, the second objective:

    40.1. did the worker genuinely believe at the time that the disclosure was in the public interest; and

    40.2. if so, was it reasonable for them to have done so?

41. The motivation for why they made the disclosure is not the correct test, at this stage, in determining whether a qualifying disclosure has been made, **Ibrahil v HCA International [2019] EWCA Civ 2007.**

42. However, the purpose behind a disclosure is relevant to the manner in which the disclosure is made in some circumstances (see later).

43. It is also important to establish the source of the information for the disclosure. If the employee discloses information they have received from other people or sources they cannot readily verify, this may have an impact on how reasonable the belief is, especially if it is from sources that are not credible or legitimate sources: **Soh v Imperial College of Science, Technology and Medicine UKEAT/0350/14.**

In the public interest

44. It is then necessary to determine that the worker has a *reasonable belief* that the disclosure *is in the public interest*.

45. Disputes that are essentially personal contractual disputes are unlikely to qualify **Millbank Financial Services Ltd v Crawford [2014] IRLR 18, EAT.**

46. Further guidance was provided in **Dobbie v Felton (t/a Feltons Solicitors) UKEAT/0130/20/OO** at para 27:

"There are a number of key points I consider it is worth extracting from Underhill LJ's reasoning, and re-emphasising:

(1) the necessary belief is that the disclosure is made in the public interest. The particular reasons why the worker believes that to be so are not of the essence

(2) while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it – Underhill LJ doubted whether it need be any part of the worker's motivation

(3) the exercise requires the Tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest

(4) a disclosure which was made in the reasonable belief that it was in the public interest might nevertheless be made in bad faith

(5) there is not much value in trying to provide any general gloss on the phrase 'in the public interest'. Parliament has chosen not to define it, and the intention must have been to leave it to employment Tribunals to apply it as a matter of educated impression

(6) the statutory criterion of what is 'in the public interest' does not lend itself to absolute rules

(7) the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest

(8) the broad statutory intention of introducing the public interest requirement was that 'workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers'

(9) Mr Laddie's fourfold classification of relevant factors may be a useful tool to assist in the analysis:

i. the numbers in the group whose interests the disclosure served

ii. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed

iii. the nature of the wrongdoing disclosed

iv. the identity of the alleged wrongdoer

(10) where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard the disclosure as being in the public interest."

47. Qualification can still occur if the employee's belief is mistaken, but it was reasonable for them to have been mistaken **Darnton v University of Surrey [2003] IRLR 133.**

48. Reasonable belief is to be considered in context of the personal circumstances of the individual, what they knew, what they should know and whether they have any qualification or specific technical knowledge that puts any reasonable belief in doubt **Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT**.

49. Consequently, the belief and the reasonableness of it will differ for example between a doctor, a nurse and a care worker. They might all make the same disclosure, but only one of the job roles may hold the reasonable belief.

50. It was also held in this case that where there are multiple disclosures, the requirement is that the individual reasonably believed each of them. It is not enough that they believed in the general gist of the disclosures.

Tests Four and Five – belief that the disclosure tends to show a relevant failure has occurred, is occurring or is likely to occur and that belief is reasonable.

51. The relevant failure committed by a person, can be about others who are not the employer of the person making the disclosure. The disclosure does not have to be limited to an employer failing to comply with a legal obligation for it to qualify **Hibbins v Hester Way Neighbourhood project [2009] IRLR 198.**

Breach of a legal obligation generally

52. The word 'legal' must be given its natural meaning. The fact that the individual making the disclosure thought that the employer's actions were morally wrong, professionally wrong or contrary to its own internal rules may not be sufficient **Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT**.

53. 'Likely' means probable or more probable than not. It is not sufficient that the Claimant reasonably believed that the relevant disclosure of information tended to show that a person 'could' fail to comply with a legal obligation, or that there was a possibility or risk of non-compliance **Kraus v Penna Plc [2004] IRLR 260**.

54. The legal obligation should be identified, at least in lay person terms, when the worker makes the disclosure after **Fincham v HM Prison Service UKEAT/0925/01.**

55. The source of the legal obligation should also be identifiable by the hearing of the claim after **Blackbay.**

56. The **Blackbay** requirement is judged when the case is pleaded i.e. an employee need only identify a legal obligation in lay terms when they make the disclosure, but must plead the specific legal obligation relied upon in the pleadings before the Tribunal, after **Arjomand-Sissan v East Sussex Healthcare NHS Trust UKEAT/0122/17**.

57. Under paragraph 43B (1) (b) there must be an actual or likely breach of the relevant obligation by the employer **Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540, EAT**. A low risk of a possible breach is not enough.

58. In **Williams v Michelle Brown AM [2019] UKEAT/0044/19** the EAT stated:

'If the Tribunal properly concludes that the factual content of the Claimant's disclosure cannot reasonably be construed as tending to show a criminal offence [or other relevant breach of section 43B(1)] then that conclusion will by itself be fatal to the proposition that there was a qualifying disclosure relying on section 43B (1). That will be so regardless of what the Claimant subjectively believed, and regardless of whether or the other elements are shown'.

59. In **Simpson v Cantor Fitzgerald Europe [2021] IRLR 238** an individual presented whistle blowing claims based on the assertion that he had made protected disclosures in respect of traders engaging in an illegal practise that is known as 'front running'.

60. The Tribunal rejected the allegation that there was any causal link between these matters and the treatment of the Claimant. It did so on the basis that the communications contained ambiguity and the Claimant had not, as had been his duty as an FCA approved professional, reported his concerns to Compliance.

61. The Court of Appeal, Bean LJ stated at paragraph 59: '*But it was open to them to find that his failure to make any explicit report to Compliance indicated that he did not "genuinely and conscientiously believe that there had been such breaches".*

Qualifying disclosures that obtain protection - The manner of the disclosure and who it is made to.

62. A qualifying disclosure only then becomes protected if it is made to the right person in the right way as prescribed by s43C – s43H of the Employment Rights Act 1996.

63. The relevant sections relied upon by the Claimant state as follows where relevant:

"43F Disclosure to prescribed person.

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

(a) makes the disclosure to a person prescribed by an order made by the Secretary of State for the purposes of this section, and

(b) reasonably believes—

(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and

(ii) that the information disclosed, and any allegation contained in it, are substantially true.

(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed.

43G Disclosure in other cases.

(1) A qualifying disclosure is made in accordance with this section if—

(a). . . . . .

(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information—

(i)to his employer, or

(ii)in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

43H Disclosure of exceptionally serious failure.

(1) A qualifying disclosure is made in accordance with this section if—

(a). . . . . .

(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) the relevant failure is of an exceptionally serious nature, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made."

64. Generally, before the Tribunal can conclude whether the qualifying disclosure has been made in the correct way and to the correct person to become protected, there usually must first be a determination of whether there has been a qualifying disclosure after **Kealy** above.

65. We say usually, because for example under s43G or 43H, it strikes us that if it is clearly proven that a disclosure has been made for the purposes of personal gain, even if it is assumed that all other elements of the qualifying disclosure and ss43G and 43H are made out, the disclosure will still fail to be a protected one.

Prescribed persons s43F

The prescribed persons list

66. The first part of this test is whether the disclosure was made to a prescribed person.

67. The LADO disclosure is the easiest to deal with on the facts because the LADO is not a prescribed person in accordance with the prescribed person statutory instrument SI 2418/2014. The Claimant conceded that fact.

68. Consequently, the email to LADO was not a protected disclosure under s43F.

69. The Respondent conceded that OFSTED is essentially the office of a prescribed person and that the Charity Commission of England and Wales is a prescribed person expressly.

Reasonable belief that the relevant failure falls within any description of matters in respect of which that person is so prescribed

70. Relevant to this case the relevant matters are as follows in SI:2418/2014 as amended:

OFSTED

"Matters relating to—

(a) the regulation and inspection of establishments and agencies under Part 2 of the Care Standards Act 2000(66);

(b) the inspection of the functions of local authorities in England referred to in section 135 (c) to (e) of the Education and Inspections Act 2006(67);

(c) the inspection of children's services under section 20 of the Children Act 2004(68);

(d) the review of Local Safeguarding Children Boards under section 15A of the Children Act 2004;

(e) the inspection, under section 87 of the Children Act 1989(69), of the welfare of children provided with accommodation by boarding schools and further education colleges;

(f) the inspection of the Children and Family Court Advisory and Support Service under section 143 of the Education and Inspections Act 2006; and

(g) any other activities falling within the remit of the Chief Inspector as defined in section 117(6) of the Education and Inspections Act 2006 and any other functions which may be assigned to the Chief Inspector under section 118(4) of that Act but only in so far as they relate to one of the functions set out in (a) to (f) above."

Charity commission

"Matters relating to the proper administration of charities and of funds given or held for charitable purposes."

71. Consequently, when looking at the reasonable belief tests for qualifying disclosures, given there is no direct authority that we were taken to or could identify on this point, it struck us that the correct test for section 43F was as follows:

71.1. Did the Claimant believe the relevant failure fell within any of the matters in (a) – (g) above?

71.2. If so, was that belief reasonable?

Reasonable belief in the information and allegations within it being substantially true

72. Again, the test for this is clear not least because of guidance in **Kealy**:

72.1. Did the Claimant believe that the information disclosed and any allegation contained in the information was substantially true?

72.2. If so, was that belief reasonable?

Manner of the disclosure

73. If illicit means are used to obtain the information to form the reasonable belief, then the disclosure will not be protected if the employee is then disciplined for the illicit means rather than the disclosure itself **Bolton School v Evans [2006] IRLR 500.**

74. Similarly, obsessive complaining rather than the content of the complaints has been upheld as a legitimate reason for dismissing an employee which did not

breach whistleblowing protection in **Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500.**

75. The combination of the guidance in **Evans** and **Panayiotou** means that if the manner and in which the disclosure took place and the disclosure itself are properly separable, then if detriment or dismissal occurs because of the manner or way in which it was done, that is permissible if proven.

Causation

76. Like in discrimination law, the key question is: what was the *real reason why* the decision maker treated the person making the disclosure in an adverse way, after **Kong v Gulf International Bank UK Ltd [2022] EWCA Civ 941.** Here the court of appeal said at paragraphs 59 and 60:

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

*60 All that said, if a whistle-blower's conduct is blameless, or does not go beyond ordinary unreasonableness, it is less likely that it will be found to be the real reason for an employer's detrimental treatment of the whistle-blower. The detrimental treatment of an innocent whistle-blower will be a powerful basis for particularly close scrutiny of an argument that the real reason for adverse treatment was not the protected disclosure. It will "cry out" for an explanation from the employer, as Elias LJ observed in [**Fecitt v NHS Manchester [2011] EWCA Civ 1190, [2012] IRLR 64, [2012] ICR 372],** and Tribunals will need to examine such explanations with particular care."*

Knowledge of the protected disclosure

77. For a person to be liable for detriment or dismissal as a result of a worker making a protected disclosure, they need to know not only of the fact of the disclosure but also at least some of the content of it following **Nicol v World Travel and Tourism Council and others [2024] EAT 42.**

78. It is also the case that if a decision maker is kept deliberately in the dark about the content of a disclosure and a reason for dismissal is invented, then the Tribunal can penetrate through the invention after **Juthi v Royal Mail Group Limited [2020] ICR 731.**

79. After **Wiliam v Lewisham and Greenwich NHS Trust [2024] EAT 58,** the person responsible for any detriment has to have known of the protected disclosure for a

detriment claim to be made out. Knowledge can only be imputed for unfair dismissal cases.

DETRIMENTS

Initial burden

80. It is for the Claimant to show that he was subjected to a detriment by an act or a deliberate failure to act by his employer or co-worker. The claim would only be made out if the Claimant was subjected to the detriment on the ground that he had made the protected disclosure.

81. The Court of Appeal decision in **Jesudason v Alder Hay Childrens NHS Foundation Trust [2020] IRLR 374** stated '*It is now well established that the concept of a detriment is very broad, and must be judged from the viewpoint of the worker. There was a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment*'.

82. Detriment has been held to mean placed at a disadvantage after **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2019] ICR 230** albeit under the Equality Act instead of the Employment rights Act.

83. So, summing these cases up, an employee is subjected to a detriment if a reasonable employee might consider the relevant treatment to place them at a disadvantage from their viewpoint.

84. The detriment in question must have arisen in an employment context. This is shown clearly by the decision of the Court of Appeal in **Tiplady v City of Bradford MDC [2019] EWCA Civ 2180, [2020] IRLR 230.** Here the detriments related to a private housing dispute unrelated to the employment of the Claimant.

The shifted burden

85. Section 48(2) of the Act states that the onus is then on the employer to show the ground on which the act or deliberate failure to act is done. The 'on the ground that' test focuses on the relevant decision-makers mental processes. The test is not satisfied merely because there was some relationship between the protected disclosure and the detriment complained of, or because the detriment would not have been imposed but for the disclosure (**London Borough of Harrow v Knight [2003] IRLR 140**).

86. If a detriment is made out it is for the employer to show that the reason for the treatment was in no way whatsoever materially influenced by the protected disclosure. The relevant test is whether the protected disclosure materially influenced, in the sense of being more than a trivial influence, the treatment of the Claimant (**Fecitt & Others v NHS Manchester [2011] IRLR 111**).

AUTOMATIC UNFAIR DISMISSAL

87. Section 103A of the Employment Rights Act 1996 states '*an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason or, if more than one, the principal reason for the dismissal is that the employee made a protected disclosure*'.

88. The statutory question is what motivated a particular decision maker to act as they did thereby providing the real reason why they made that decision after **Kong** above.

89. The reason or principal reason for the dismissal means the employer's reason.

90. This can be the reason of the dismissing officer, but the inquiry may be a broader one (**Royal Mail v Jhuti** [2019] UKSC 55). It is a matter to be explored in evidence:

'*It might be appropriate for a Tribunal to attribute to the employer knowledge held otherwise than by the decision-maker. He [Underhill LJ] was referring to the knowledge of a manager who, alongside the decision-maker, had some responsibility for the conduct of the disciplinary inquiry. … 'Counsel accepted that in such a case the motivation of the manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation and for my part, I think that must be correct'. I respectfully agree that in the situation there identified by Underhill LJ it might well be necessary for the Tribunal to attribute to the employer the knowledge of the manipulator*'.

91. On the issue of the burden of proof the Court of Appeal stated in **Kuzel v Roche Products Limited** [2008] IRLR 530:

'The Employment Tribunal must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the Tribunal that the reason was what he asserted it was, it is open for the Tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that if the reason was not that asserted by the employer, that it must have been for the reason asserted by the employee. That may often be the outcome in practise but it is not necessarily so. It may be open to the Tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for the dismissal was not that advanced by either side. In brief an employer may fail in its case for fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason'.

92. A case of whistleblowing dismissal is not made out simply by a 'coincidence of timing' between the making of disclosures and termination (**Parsons v Airplus International Ltd [2017] UKEAT/0111/17**).

FINDINGS OF FACT

93. We take a moment to say that it became apparent that Mrs Rogan's mother had passed away last year. We offer our sincere condolences to everyone affected by her death in this case.

The backdrop to this case

94. The Respondent is a charitable trust that provides pre-school services to children aged 2 to 4.

95. It is registered with OFSTED and the Charities Commission as well as with the relevant local authority safeguarding team. It has a designated Local Authority Designated Officer or LADO where child safeguarding issues are reported.

96. The key witnesses involved in this case were as follows:

    96.1. Ms Karen McKenna – a qualified practitioner;

    96.2. Ms Kelly Shailer – a qualified practitioner;

    96.3. The Claimant the Deputy Manager;

    96.4. Mrs Mandy Rogan the Manager;

    96.5. Ms Naba Madani the Chair of the trustees;

    96.6. Ms Nissa Messis the treasurer and trustee;

    96.7. Ms Bianca Pagnello Boyce – the Claimant's Daughter, trustee and the secretary of the trust.

97. The Trustees are volunteers and all the trustees were also parents of children at the preschool.

98. The fact they were volunteers is important. They received no remuneration for their roles and we believe that they were doing the best they could do when attempting to run the trust.

99. It is also significant to note that Ms Pagnello-Boyce was a fully qualified accountant, which was not in dispute.

100. Before 27 June 2023, the following facts are important:

    100.1. Ms Mckenna and Mrs Rogan are very good friends having known each other for over 20 years and Mrs Rogan having mutual friends and worked together for a lot of that time.

100.2. Ms McKenna and the Claimant were, what they described as, good friends with the Claimant having been the pre-school practitioner for Ms McKenna's daughter.

100.3. All the managers and practitioners involved in this case were very experienced practitioners having either been working in or managing similar settings for many years.

100.4. The Claimant's job role was that of deputy manager, and it was therefore a fundamental part of her role to step up into the manager's position if Mrs Rogan was not present on site.

100.5. It was common ground that the pre-school is situated as part and parcel of a block of apartments. It is surrounded by other blocks of apartments with a communal garden for all the blocks located relatively centrally. The entrance to the pre-school and the exit to the garden is on the ground floor. The preschool itself and all other offices and the classroom are located on the first floor.

100.6. The communal garden is used by the pre-school and all other residents of the four blocks of apartments and has four entrance/exits to it leading to the various apartment blocks. It is therefore accessible by the public and their pets. It sometimes has, what has unfortunately come to be pretty usual, antisocial paraphernalia distributed within it such as rubbish, broken glass, dog faeces and no doubt other waste of a less than pleasant nature.

100.7. The garden consists of patches of grass, a few shrubs and paved areas. It is a city garden rather than an ornamental one.

100.8. Consequently, more supervision of the children was needed when they were playing outside in the garden because of the additional hazards identified above.

100.9. The classroom had only two exits, one to the stairs down to the foyer and entrance of the pre-school. The other is an emergency exit in case of fire etc. Consequently, because the children were in a purposely fitted out classroom, with fewer exits, in an enclosed space and less likely to come across hazardous people or materials, the classroom was a safer space for the children than outside, especially when staff numbers were low.

100.10. Mrs Rogan lives in a separate apartment above the pre-school.

100.11. Ms Shailer had similar long standing relationships with both Ms McKenna, the Claimant and Mrs Rogan and considered them all to be friends as well as colleagues.

100.12. The Claimant and Mrs Rogan are effectively sisters in law with each other because the Claimant's husband is the brother of Mrs Rogan's husband.

100.13. It is therefore significant that, not only is there a workplace dynamic relevant to this case, but there is also a significant family dynamic, which has undoubtedly affected the behaviour of Mrs Rogan, the Claimant and Ms Pagnello-Boyce.

100.14. Curiously, the family relationships were not widely publicised and indeed Ms Madani and Ms Messis both stated, and we believe, that until the events of this case started to take place, they were completely unaware that the Claimant and Mrs Rogan were related by marriage to their respective husbands in any way.

100.15. In addition, in the case of Ms Madani, she did not know that Ms Pagnello-Boyce was the Claimant's daughter until after the events of 27 June 2023.

100.16. The preschool had a WhatsApp group called the "A-Team". The members of the group were the Claimant, Mrs Rogan, Ms McKenna and Ms Shailer. Other practitioners were not part of this group.

100.17. In our judgment, the A-Team WhatsApp group was a perfect example of how to unprofessionally blur the boundaries between the workplace and personal relationships. The things spoken about on the group were both about day to day running of the setting, personal issues involving the members of the group, jokes, photos of holidays and sometimes included inappropriate language and chit-chat.

100.18. Crucial to this case, was how the Respondent viewed the professionalism of the Claimant. However, it struck us that the setting was not run professionally in a number of ways, which we believe need to be said to set the scene for this case.

100.19. First, the trustees did not seem to be actively involved in the running of the trust. There did not appear to be regular trustee meetings and indeed the trustees failed to maintain relationships with each other to the extent that they did not know who each other were.

100.20. For example, despite being trustees of the trust together for some time, Ms Pagnello-Boyce and Ms Madani had never met, to the extent that when the incident on 27 June 2023 took place and Ms Pagnello-Boyce was involved in what was being said and done, Ms Madani didn't know who Ms Pagnello - Boyce was or why she was involving herself in those conversations.

100.21. Secondly, there was an almost complete blurring of personal and professional boundaries. Clearly, this had not affected the quality of the care and education the children were receiving at the pre-school. Indeed, OFSTED had no concerns with that. However, when it came to the relationships between the employees, those who were practitioners and those who were management, the approach of everyone involved appeared to us to be far too relaxed.

100.22. The reason we comment about this is because, in our judgment, this created an environment at the Respondent that was no doubt incredibly enjoyable generally whilst it worked and things were "hunky dory" to coin a phrase. However, it also created the perfect tinderbox for emotional flare ups, falling out and external workplace factors such as family dynamics and friendships, to unprofessionally and disproportionately influence the behaviour of those working at the Respondent, the trustees and its management if people started to argue or not get along. This is exactly what happened here.

100.23. We were disappointed to hear that a simple issue of a ratio going one child over for a couple of hours, resulted effectively in the following:

100.23.1. a family feud;

100.23.2. the Claimant and her daughter, who was at the time a trustee, publicly criticising the pre-school and its management in front of parents;

100.23.3. inappropriate calls to the police about what appear to us to be unfounded allegations of criminal harassment;

100.23.4. A dubious late referral to LADO about the incident by Mrs Rogan;

100.23.5. childish comments describing team members using potentially offensive terms such as referring to a colleague as "witchypoo";

100.23.6. an allegation that Mrs Rogan's husband had physically threatened Ms Pagnello-Boyce;

100.23.7. long standing friendships effectively breaking up; and

100.23.8. the resignation of every single trustee from the trust's board including Ms Madani, Ms Messis and Ms Pagnello-Boyce within three weeks of the incident.

100.24. It is in *this* backdrop and general context that these proceedings were being decided, and neither side has painted itself in glory in this case.

The incident on 27 June 2023

101. The watershed moment for all the material issues in this case, was an incident that occurred on 27 June 2023.

102. The Respondent admits that during the conversation between the Claimant, Ms Messis and Ms Madani, the Claimant made a protected disclosure where the subject matter was, essentially, that the permitted ratio of pre-school staff/adults to children ratio was out by one child. The Claimant said this was in breach of the law and disclosed this to the trustees of the Pre-School.

103. For reasons that will become clear later on in this judgment, we need to consider what happened in the run up to and during the 27 June 2023 incident in some detail, and we make the following findings about it:

103.1. On 13 June 2023, after well known and long running issues with her back, Mrs Rogan had collapsed and could not get back to her feet. This necessitated the need for an ambulance to be called, as per paragraph 6 of Mrs Rogan's statement.

103.2. It was not in dispute that Mrs Rogan had a degenerative back condition where the discs in her back had degenerated causing issues with the nerves in her spine and at this time she was awaiting spinal surgery to fuse the vertebrae in her back.

103.3. It was therefore organised with Ms Madani as Chair of the Trustees, that Mrs Rogan would work from home for part of her time when her back was particularly bad, but that she would come into the Pre-School some of the time where she felt able to.

103.4. The Claimant was initially supportive of this approach and said, for example by text message to Mrs Rogan on 12 June 2023 at page 144 in the bundle:

"Mandy: So sorry girls I don't know what to do can't take it getting too dangerous.

Claimant: It's fine no worries. Maybe you need to think about working from home until we break up
Only 6 weeks

Mandy: Laura there so much going on feel so bad on you guys
That has just scared the life out of me

Claimant: We can manage fine"

103.5. From these messages we believe that Mrs Rogan was genuinely concerned that she was letting the staff team down and the Claimant was reassuring her and stating that the team would be able to cope without any major issue.

103.6. On 27 June 2023, those who were on shift that that day were the Claimant as deputy manager, Ms McKenna as a practitioner and Ms Shailer as a practitioner.

103.7. Mrs Rogan was at work but not on the premises, because she was working at home as a result of her back condition.

103.8. Mrs Rogan was available by telephone and text message. She was at work, simply not on site.

103.9. The Claimant was running the Preschool in Mrs Rogan's absence as Deputy Manager.

103.10. The ratio of adults to children was acceptable in the morning and at lunchtime, which was common ground between the parties.

103.11. An unexpected incident occurred at about 10.30 that morning, involving Ms Shailer's adult daughter. She had taken a fall and had a suspected broken leg.

103.12. Consequently, Ms Shailer asked permission to leave work to attend to her daughter. This was granted and that left two people working in the setting, Ms McKenna and the Claimant, with Mrs Rogan working from home.

103.13. Mrs Rogan and the Claimant were also messaging privately, via text, keeping up communication about how the day was going.

103.14. Apart from Ms Shailer needing to leave in an emergency, the day was running smoothly.

103.15. By 12.56, in response to Mrs Rogan seeing how things were going, the Claimant was texting Mrs Rogan stating *"Yes ok no lunch break but that's ok. Will take extra tom when your back. Kids are being good just having ice pop".*

103.16. Then at 13.34, Mrs Rogan has let the Claimant know that one child will be running late for the afternoon session and asking if the numbers were ok. The Claimant responded *"Yes. Were still in our ratio 4 2 yrs and 8 3 to 4 yrs."*

103.17. After lunch, which is between 11.30 and 12.30, there were initially going to be four children aged 2 at the pre-school that afternoon. However, one child arrived late and that tipped the ratio into a potentially illegal one.

103.18. The Claimant did not seem to be alarmed by the situation. She texted Mrs Rogan at 13.41 and stated, *"…We have 5 2 yr olds not 4 just to let you know. Speak later."*

103.19. In response, when she read the text message, Mrs Rogan attempted to call her Auntie, Lorraine, who occasionally covered at the pre-school to come in to help with the numbers.

103.20. Unfortunately, Lorraine could not assist and, in order to obtain agency staff, Mrs Rogan's evidence was that the terms of engagement needed 4 hours' notice and therefore no agency staff could be found.

103.21. By 13.41 in the afternoon, there was only approximately 1 hour 30 minutes left of the afternoon session, which essentially ended with the last children being picked up by their parents at approximately 15.30 each day.

103.22. We are unanimous that Mrs Rogan's evidence on this point matches with our industrial experience of utilising agency workers in settings not too dissimilar to the pre-school.

103.23. There is no evidence that the Claimant, as Deputy Manager responsible for the children, took any steps to correct the ratio herself. In our view, it was partly her responsibility to do so.

103.24. The children are playing outside at this point. In our view, this was an unwise decision for the Claimant to make given the increased hazards of being outside we identified earlier.

103.25. At approximately 15.15, Ms McKenna and the Claimant were outside in the communal garden with the children and a number of parents were generally in the vicinity, who had started to arrive to collect their children. Ms Pagnello - Boyce was also present to collect her daughter from the pre-school.

103.26. Both Ms McKenna and the Claimant were tidying away the outdoor toys into a nearby storage area, as well as gradually handing children back to their parents/guardians as and when the parents started to arrive.

103.27. Ms Messis and Ms Madani then arrived at the pre-school together, because Ms Messis was collecting her son from the pre-school.

103.28. There are then varying accounts of what happened next.

103.29. Some accounts such as that of Ms Madani are exaggerated and largely unreliable when considering what happened. For example, Ms Madani described the Claimant "charging" up to her and in a later document said the Claimant was "shouting and screaming". However, when asked questions about this, Ms Madani significantly recanted from that position instead stating that the Claimant had simply walked over to her and had raised her voice.

103.30. Consequently, for the most part when considering tone and demeanor of the Claimant during that event, we have discounted Ms Madani's evidence, although we note that this is the version of events she would have provided to Mrs Rogan and others at the time during the investigation into this issue and that may well have caused Mrs Rogan and others to reasonably view the incident at the time, as being more serious than it actually was.

103.31. The Claimant's evidence, that of Ms Pagnello Boyce, Ms McKenna and Ms Messis appeared to be more balanced.

103.32. Ms Mckenna stated she was only aware of parts of the conversation because she was going backward and forwards with toys to the storage area and with children to their parents. She says she heard the Claimant speaking to Ms Madani with a raised voice and was aggressive in her manner and body language during the conversation. She remembered the Claimant saying that the Respondent had broken the law and that it wasn't

fair because she hadn't had a lunch break that day. Ms Mckenna then stated that she walked away because she felt the situation was embarrassing and uncomfortable because of the way the Claimant was handling the situation.

103.33. Ms Messis, in our judgment was the most independent and trustworthy statement. She came across very genuinely whilst giving evidence, was straightforward and in our view reliable. She stated:

"2. On 27 June 2023, Naba Madani (former Chair of the Respondent) and I were on our way to pick up my son from nursery when we saw the Claimant. We asked how her day was, only to notice her visibly upset and angry. It became apparent that she was unhappy as she started to raise her voice and said she was breaking the law due to staff ratio since Kelly Shailer had to leave due to an emergency.

3. The Claimant then started to question what Amanda Rogan's (Manager of the Respondent) employment status was, whether she worked part-time or full-time and what she was doing [working][sic.] from home on full pay. Ms Madani said she would speak with Ms Rogan and coordinate a meeting among all of us to reach a mutual agreement on how to move forward.

4. Ms Madani questioned why the Claimant hadn't reached out to us earlier regarding the issue, and the Claimant's reply was that it wasn't her responsibility to do so and that she doesn't want a managerial role."

103.34. The only part of this statement we believe has been misunderstood by Ms Messis is the last sentence about a managerial role. We believe what the Claimant meant was "the manager role" not a managerial role more generally. We come onto this later.

103.35. Ms Pagnello-Boyce stated as follows:

"1.2 On 27 June 2023 at 3pm, I attended Barrow Hill pre-school to collect my daughter and arrived in the outside area, I could see Karen and Laura looking stressed, so I asked them where everyone else was, Laura told me that Kelly had to leave as she had an emergency with one of her children. I then helped them carry the toys to the shed.

1.3 Anissa was a parent at the time and Naba wasn't, but they turned up together to collect Anissa's son. They asked if everything was ok, and Laura said no not really as they have been under ratio. Naba said why did you not tell me, Laura said that she had told her manager (Amanda). Naba said that Amanda didn't know what she was doing in terms of work as she was having problems with her mum. Laura explained the dangers of being under ratio and Naba said that she would speak to Amanda, both agreed that there should have been a back-up plan, that was it."

103.36. In answers to questions, Ms Pagnello-Boyce suggested that voices were hushed. We reject that evidence. We believe that both the Claimant, Ms Pagnello-Boyce and Ms Madani raised their voices when discussing these issues.

103.37. We say this because the Claimant and Ms Pagnello-Boyce were both angry about the situation and Ms Madani was taken by surprise with a manager she did not know well, approaching her in a clearly angry way. In our view, human nature would have meant that both sides to that conversation would have raised their voices to a volume louder than they would ordinarily have spoken.

103.38. The Claimant's statement is vague about the content of the conversation and how things were discussed. In answer to questions, the Claimant said she was upset and overworked at the time of this conversation. She denied raising her voice, although we do not believe her for reasons we have just mentioned. The Claimant also conceded that it would have been better to have had the conversation with Ms Messis and Ms Madani in private, which was a reasonable concession to make.

103.39. Additionally, the Claimant said she had not discussed Mrs Rogan's status about working from home or whether she was getting paid during that conversation. She also said that she did not recall talking about not getting a lunch break because the conversation was a long time ago. However, the Claimant was clear about other aspects of the conversation.

103.40. Overall, the Claimant's evidence did not sound convincing to us about the way this conversation happened.

103.41. Also, in her statement at paragraph 2.3, the Claimant stated that she was "deeply concerned" about being out of ratio. We are not persuaded the Claimant was deeply concerned about being out of ratio at all. What she was most concerned about was two-fold, first that she hadn't had a lunch break meaning that, in her view, she was being overworked and, secondly, it is clear that the Claimant resented the fact that Mrs Rogan was working from home for some of the time and receiving full pay for it. In our judgment, that meant the Claimant felt hard done by and in her view there was an unfair workload taking place between her and Mrs Rogan. None of the text messages sent on that day from the Claimant suggest any deep concern about the ratio itself.

103.42. Consequently, we believe all those involved spoke more loudly than they ordinarily would have.

103.43. The Claimant raised issues about the ratio, her not having a lunch break, Mrs Rogan's pay and working from home and the Claimant was angry and upset during this conversation.

103.44. In response, Ms Madani said she would speak to Mrs Rogan to see if there was a plan that could be put in place to help with the situation.

103.45. We also find, on balance, that parents in the vicinity would have been able to hear the conversation because of the raised voices and the public location of the conversation.

103.46. In coming to this conclusion, we have taken into account the witness statements, the investigation statements and other documentary evidence in the bundle as well as the answers to questions during the hearing.

The aftermath of the 27 June 2023 incident

104. On the evening of 27 June 2023, the Claimant made a telephone call to Mrs Rogan.

105. During that call, the incident was discussed and the Claimant said words to the effect of Ms Madani not caring about the staff at the Respondent and only caring about Mrs Rogan.

106. A couple of days later, Ms Madani called Mrs Rogan back after Mrs Rogan had left a message for her to call her to get her version of events about 27 June 2023.

107. The incident was discussed and Ms Madani kept to her word to discuss what could be done to help with the number of people physically present at the setting whilst Mrs Rogan was needing to work from home.

108. Also, as a result of the information received from both the Claimant and Ms Madani, Mrs Rogan asked for statements about what happened to be provided by all who witnessed the incident.

109. On 29 June 2023, after the phone call with Ms Madani that day, Mrs Rogan emailed the Claimant to set out what was expected of her and what the plan was going to be to try to help with the staffing situation. The email is at pages 162 – 163 in the bundle.

110. In it, Mrs Rogan provided the deputy manager's responsibilities from her job description, so the Claimant was clear about what is expected of her.

111. Mrs Rogan then set out a plan to recruit a level two trained assistant practitioner and the process for that would commence in September 2023, when the new academic year started. Mrs Rogan also stated that if anyone had any queries they were to contact her.

112. Consequently, by 29 June 2023, the Claimant knew there was a plan in place to recruit an additional temporary staff member to assist her.

The meeting of 5 July 2023 and the aftermath of it

113. By 3 July 2023, Mrs Rogan had received statements about the incident from Ms Messis, Ms Madani, Ms Pagnello Boyce and Ms McKenna.

114. It is fair to say that the statement of Ms Madani was exaggerated somewhat. However, in our judgment the statement was simply saying what happened from Ms Madani's point of view, even if that was not in reality how it happened.

115. Ms Madani commented about how she felt intimidated and shaken after the incident, because of the Claimant's behaviour. She also used indirect language to describe the Claimant's behaviour.

116. Having heard her evidence, we have interpreted the behaviour Ms Madani was referring to, to be the Claimant' tone of voice, her being dismissive, disrespectful, aggressive and because internal nursery matters were being discussed in public.

117. It is also fair to say that Ms Messis' statement was also what she believed to be a factual account of what happened during the incident on 27 June 2023. In her statement she accuses the Claimant of being unprofessional and disrespectful because the conversation was had in front of parents.

118. Mrs Rogan was not present for the incident and, at all times after these statements were submitted, in our judgment she was simply following up about the concerns raised by others. Mrs Rogan made no allegations about the incident herself. She simply reiterated allegations made by others when discussing what had happened.

119. Consequently, an email was sent to the Claimant, Ms Messis and Mrs Rogan by Ms Madani requesting a meeting. The meeting was organised to take place on 5 July 2023 and, despite not expressly stating so, was to be an investigatory meeting about the incident on 27 June 2023.

120. The email doesn't mention anything about being an investigatory meeting. However, Mrs Rogan gave evidence that before the meeting was organised, she had taken legal advice, and she had been advised to have a "fact finder" meeting.

121. Consequently, we believe Mrs Rogan relayed that information to Ms Madani, because she was effectively Mrs Rogan's line manager, and that triggered the invite email.

122. Mrs Rogan and Ms Madani were also clear that the meeting was also to discuss the plans for September 2023 to consider the Claimant's concerns about how things would work with Mrs Rogan working from home.

123. The meeting was therefore to be both an investigation meeting and a meeting to discuss future plans given Mrs Rogan's ill-health.

124. The Claimant was suspicious of the meeting and wanted an agenda and to be accompanied at the meeting.

125. In our view, it was not ideal that the Claimant wasn't warned this was an investigatory meeting even if she had guessed that it was. However, the Claimant was not taken by surprise about the content of the meeting as shown by the email at page 169 where Ms Madani responded to the Claimant's queries by informing

her that the meeting was to discuss the incident of 27 June 2023 and the plan for September 2023 at page 169 in the bundle.

126. The meeting was going to be recorded. However, the Claimant did not consent to the meeting being recorded at page 172 in the bundle.

127. Before the meeting of 5 July 2023 took place, statements had been written by all those people who witnessed or were involved in the incident on 27 June 2023. This included the Claimant, her daughter, Ms Madani, Ms Messis and Ms McKenna.

128. It must also be noted that before the meeting took place, Mrs Rogan had taken legal advice, and she had been advised that she should not include the statement of Ms Pagnello – Boyce in this meeting because of a conflict of interest. Mrs Rogan informed Ms Madani of that advice and the advice was followed.

129. In our judgment, this advice no doubt contributed to the heated nature of the meeting when the Claimant realised that her daughter's statement had been excluded. The Claimant clearly thought Ms Madani and others were behaving in an untrustworthy or underhanded way.

130. Indeed, Ms Pagnello-Boyce was also unhappy at this decision as confirmed by emails at pages 209.

131. At page 209, Mrs Rogan confirmed the advice she had received about excluding Ms Pagnello-Boyce's statement. Ms Pagnello-Boyce responded saying she doesn't agree to that decision and then stated that Ms Madani and Ms Messis were friends and therefore they had a conflict of interest too.

132. The email chain ends with Mrs Rogan making Ms Madani and Ms Messis aware of Ms Pagnello-Boyce's concerns.

133. The meeting took place, and it is fair to say it did not go well. It was common ground that on at least three occasions the Claimant threatened to leave the meeting, doing so on the final attempt.

134. Both sides said the meeting was chaotic. Mrs Rogan, Ms Madani and the Claimant were all upset and emotional. In our view, it was certainly not a professional meeting.

135. Ms Messis took the notes. Noone else attended.

136. One version of the notes of the meeting were taken by Ms Messis and appear in the bundle at page 186. The notes are brief and, given the fraught nature of the meeting, we are persuaded they do not contain everything that was said or done at the meeting. They are not a verbatim record and they were provided some weeks after the meeting took place.

137. A second version of the meeting is in the bundle at page 187 and is Mrs Rogan's version of how the meeting went.

138. Of the two accounts, Ms Messis' note is the most balanced and unemotional.

139. Having taken the witness evidence, answers to questions at the hearing and the relevant documents into account, we believe the following happened at this meeting in the below order:

    139.1. The Claimant unnecessarily questioned the agenda for the meeting when, effectively, an agenda had been provided by Ms Madani, just not labelled as such and both Mrs Rogan and the Claimant allowed their emotions to get in the way of progressing things constructively at the meeting.

    139.2. Mrs Rogan had an accusatory tone at the meeting and mentioned that allegations had been made against the Claimant. This annoyed the Claimant and she no doubt felt taken aback because, in her mind, this was the first time accusations were being made.

    139.3. The Claimant apologised for being angry at the meeting and that apology was accepted. However, the Claimant then became defensive, no doubt because she thought that she was under attack.

    139.4. The statements were discussed, with the exception of Ms Pagnello Boyce's, and this may well have added to the Claimant's escalating emotions. However, the Claimant was, in all likelihood, prewarned by her daughter that Ms Pagnello – Boyce's statement would be excluded.

    139.5. The flash point during that meeting, appeared to be when Mrs Rogan stated that the Claimant was the safeguarding lead that day. The Claimant had the view that it was not for her to have called around to find cover on 27 June 2023, it should have been Mrs Rogan and this caused the conflict to start. Both Mrs Rogan and the Claimant then became stubborn and entrenched in our view.

    139.6. There was then a heated exchange between the Claimant and Mrs Rogan, the content of which is not noted down in any detail. However, the Claimant made it clear that she did not want to take on a full management role but also did not want to step down as deputy manager.

    139.7. When the Claimant left the meeting the final time, Ms Messis followed the Claimant upstairs to where the classroom and offices were, which was where the Claimant had gone to.

    139.8. When Ms Messis asked the Claimant if she would come back to the meeting, the Claimant responded with words to the effect of *"how the fuck is she getting paid? I can take them to court"* referring to Mrs Rogan. Incidentally, we believe that the Claimant was clearly bothered by Mrs Rogan's pay whilst she was working from home because she has also mentioned this in correspondence such as her text message to Ms Madani at page 173 in the bundle sent on 4 July 2023, before the meeting took place.

139.9. This shocked Ms Messis and upset her because this was said and done with the classroom door open so the children could have overheard the Claimant's bad language. In our view, it also gives an insight into the purposes of the Claimant's behaviour.

139.10. Ms Messis managed to convince the Claimant to return to the meeting.

139.11. There was then an exchange between Ms Madani and the Claimant where Ms Madani took the view that, for reasons unknown, the Claimant appeared to dislike her and the Claimant took issue with that believing it to be an unfounded accusation.

139.12. Somehow, which is not documented, the meeting managed to calm down and become more constructive and a discussion was had about the plans for September 2023 given that Mrs Rogan was working from home a lot.

139.13. The plan discussed was to recruit a level 2 practitioner and an acting manager to cover and keep the ratio of adults to children within legal limits to avoid a repeat of 27 June 2023.

139.14. Despite the chaotic and ill-tempered nature of the meeting, it was common ground that the meeting ended with people hugging each other and saying no hard feelings.

139.15. At this point, all sides behaved as if the issues had been aired and resolved. The meeting came to an end with everyone knowing what the plan was for September and the incident of the 27 June 2023 having been put to bed.

140. However, we believe the only person at that meeting who actually believed that everything had been resolved was Ms Messis.

141. Everyone else was behaving as if it had been resolved, but in their thoughts and feelings, clearly did not believe that and tailored their future decisions and behaviour accordingly.

142. Essentially, everyone became disingenuous at that point apart from Ms Messis. We say this because:

142.1. On the same day as the meeting, Ms Madani resigned by letter at page 190 in the bundle. Clearly, if matters were amicably resolved, this resignation would not have happened.

142.2. Also on the same date, the Claimant contacted ACAS about the way the meeting was handled as per her statement at paragraph 4.8. Again, if the meeting was "hugged out" and amicably resolved, then there would have been no need to contact ACAS because, as the Claimant knew, ACAS was the prelude to litigation and court was in the Claimant's contemplation because of her conversation with Ms Messis where taking he Respondent to court was suggested.

142.3. Mrs Rogan took steps after the meeting to continue with the disciplinary process, we believe triggered by Mrs Rogan having had time to think about the way she perceived the Claimant to have behaved in the meeting on 5 July 2023 and also because Ms Madani had resigned and Mrs Rogan believed the Claimant to be responsible for that. Again, if it had been put to bed, then disciplinary action would not be needed, and the situation would have been dealt with informally.

143. It was only after Ms Messis perceived further hostile behaviour to have taken place from the Claimant and her daughter in the days after the meeting had concluded that Ms Messis considered resigning.

144. We believe Ms Messis truly thought the incident of 27 June 2023 had been resolved at that meeting by the time it had concluded, despite the angry and volatile nature of the meeting.

145. It was, however, clear that Ms Messis did not think that swearing within earshot of the children was acceptable behaviour (see later).

146. Another fallout from the meeting on 5 July 2023 was a change in stance from Mrs Rogan. When being questioned about Ms Madani's resignation, Mrs Rogan said the following *"Then I received Naba's email and she resigned and then I thought this wasn't on and I thought about Laura's conduct in the meeting and this showed no respect for me and I thought it wasn't on and I needed to report it. I asked for help and people advised me this was an HR issue."*

147. There was then also a report to LADO made by Mrs Rogan on 10 July 2023. In this report, which was essentially raising a safeguarding concern about the Claimant, there are a number of key facts:

147.1. The form has a box called "category of abuse". Mrs Rogan has ticked "concerning behaviour".

147.2. In the box where the details of an incident are to be provided, Mrs Rogan wrote *"on the 27th June 2023 I was messaged by my deputy manager (Deputy Designated Lead) we had 4 2 year olds and 8 ¾ year old that was at 13: 34 at 13: 41 I was messaged again stating we had 5 2 year olds and 8 ¾ year olds. I was aware of this and tried to get cover for one hour and 19 mins which is impossible. The deputy manager later stated in front of parents/children staff that we were out of ratio and it's against the law and that I was the manager who was working from home on full pay etc. I have confronted her about her job role and she stated it's not my responsibility however I do believe it is and she could have closed the group or contacted LADDO. There were two members of Level 3 staff the other Level 3 had to leave as her son was taken into A&E. Ofsted have been notified of this."*

147.3. It has clearly been at 2 weeks since the incident on 27 June 2023 before this report was submitted.

148. Our first observation is that this has clearly been categorized as abuse. In our view, there is simply no way that the Claimant's behaviour can be categorized as abuse of any sort on 27 June 2023. No children were harmed, the fact that Ms Shailer had to leave because of an emergency was extraordinary and the setting coped well despite being out of ratio by one child.

149. Secondly, if Mrs Rogan truly thought this was an incident of abuse, she would have been in the picture enough through the statements of others several days before the 10 July 2023 and, indeed before the meeting of 5 July 2023, to have triggered a concern being raised to LADO if it really was perceived as being abuse.

150. We therefore conclude that this referral to LADO was made in anger. Mrs Rogan was angry at the Claimant's behaviour because it had triggered Ms Madani's resignation after the meeting on 5 July 2023 and Mrs Rogan had then reflected about the whole situation and changed her stance from trying to appease the Claimant to trying to manage the Claimant, so that she was held to account for her behaviour and actions.

151. Had the meeting on 5 July been constructive, even tempered and professional and had Ms Madani consequently remained in her trustee post, we are sure that the LADO referral on 10 July 2023 would not have been made by Mrs Rogan. Either way, the 27 June 2023 disclosure didn't cause these things. The Claimant's behaviour and Ms Madani's resignation did.

Ms Shailer's temporary promotion

152. On 9 July 2023, Mrs Rogan had asked Ms McKenna and Ms Shailer whether they wanted to be acting manager in her absence because of her back condition.

153. Ms Shailer had ran similar settings before as manager and had said yes.

154. The Claimant took issue with two things to do with that decision. First she took issue with the fact that she was not asked to be acting manager. The second was that she perceived Ms Shailer's temporary promotion as somehow demoting her.

155. Whilst questioned about this, the Claimant was far from clear about what she meant by demotion. What it essentially boiled down to was that the Claimant was annoyed because she wasn't asked to be the acting manager.

156. We make a number of observations about this:

    156.1. First, the Claimant should have agreed to automatically take up the acting manager's post because that was a requirement of her deputy manager position. However, she failed to do this and stated categorically that she did not want to be the manager both on 27 June 2023 and on 5 July 2023. We believe this is why Mrs Rogan did not ask the Claimant to take on being acting manager, which given the Claimant's statements was reasonable.

156.2. Secondly, the Claimant's behaviour here was unreasonable because she knew this was the plan from the meeting on 5 July 2023. If the Claimant was bothered by there being an acting manager role and, if as the Claimant would have us believe she was concerned that she should have been the first person to be asked to do that role, then it does not make sense that no one's account (including the Claimant's) mentioned any concern coming from the Claimant about the plan to have an acting manager at the time.

156.3. Thirdly, when asked whether her job role, pay and job title changed on 9 July 2023, the Claimant confirmed that it hadn't.

157. Consequently, no demotion of the Claimant happened at all.

158. <u>As a result, allegation 30 d of the list of issues fails on the facts and is dismissed.</u>

Ms McKenna's and Ms Shailer's behaviour after 5 July 2023

159. The Claimant alleges that both Ms Shailer and Ms McKenna ignored the Claimant whilst at work, citing a specific time when Ms McKenna allegedly did not respond to being asked what the time was and about organising the Pre-School Summer fair.

160. It is significant that it was common ground that, at the time these allegations were said to have taken place, Ms Shailer did not know the content of the conversation that had taken place on 27 June 2023. None of her behaviours, therefore, could have been because of that protected disclosure.

161. Ms McKenna knew of the content of the disclosure because she overheard it.

162. In addition, we think it likely at this point that when in the workplace following 27 June 2023, the Claimant was less helpful, less positive, less flexible and less friendly than she used to be.

163. In response, we also believe on balance that both Ms McKenna and Ms Shailer became less friendly, less helpful and less positive towards the Claimant. In the case of Ms Shailer, she became sarcastic and in one example about a social media message, childish. We come onto that later.

164. Consequently, the reason why the Claimant perceived Ms McKenna and Ms Shailer as ignoring her or changing their behaviour towards her was because of a change in the Claimant's behaviour and demeanor towards them.

165. One example of this occurred when the Claimant was leaving shift the day before the summer fair. The Claimant stated that she would not be helping out at the summer fair to the surprise of those working with her.

166. Luckily, the Respondent was able to recruit some parents who attended the fair to assist. However, in our view, to leave the Respondent potentially without cover for the fair, which would be an unusually busy event needing lots of adults present to supervise the children as well as supervise the activities and food

being served, without giving them any warning that this the Claimant's intention was deliberate and intended to cause her team difficulty.

167. There is no doubt in our minds that the Claimant had helped out at previous summer fairs, that everyone had a legitimate expectation that the Claimant would be helping at the summer fair, assumed she would be, and the Claimant knew that. Therefore, by informing the Respondent last minute that she would not be helping out, in our judgment, was a deliberate attempt by the Claimant to be difficult and disruptive to the Respondent and her colleagues.

168. Consequently, we have no doubt that, on occasion, Ms Shailer and Ms McKenna were at times abrupt and dismissive of the Claimant in the same way the Claimant was at times abrupt and dismissive of the rest of her team. The same is true of the Claimant and Mrs Rogan and vice versa.

169. When Ms Shailer started in the position of Acting Manager, she naturally ran the pre-school how she thought was best, in accordance with her managerial discretion.

170. Ms Shailer stated in evidence, and we believe her, that she wanted all members of the staff team to undertake a range of different duties including opening the doors to parents and inviting the children into the setting when they arrived. She said this would mean that the staff could build better relationships with the parents.

171. In addition, it was not in dispute that on 10 July 2023, Mrs Rogan made a managerial decision applied to all staff, that their lunch breaks should be taken on the Pre-School premises and could be either in the office or in the lobby. She said in her email this was due to ratios at lunch time.

172. In our judgment, Mrs Rogan made this decision to respond to the concerns about ratios raised by the Claimant. She believed that given this was a paid lunch break it should not have been a problem, as per page 240 in the bundle.

173. The Claimant was not happy with this because it meant that she was unable to check in on her pet dogs which she usually did during the break. That was understandable.

174. However, Mrs Rogan was within her rights to manage the Respondent how she thought fit and her decision was on the right side of the law, because workers taking a break away from their workstation does not mean they have the right to take the break off work premises. It could be that an employer says, for example, that all breaks must be taken in a canteen or other specific break areas for a variety of sector or employer specific reasons.

175. In the end, the Claimant and Respondent compromised by allowing the Claimant to take half her break at 11.30 – 12 noon away from the setting and the remainder of it at the setting. That way she could check on her dogs.

176. On 19 July 2023, the Claimant alleges that Ms McKenna undermined her in front of the children.

177. Ms McKenna doesn't recall any specific incident. The Claimant said that it was snack time, and one child was given cucumber slices as a snack. However, another child wanted to take cucumber from the other child's plate. The Claimant was going to give both the children cucumber, but she alleged Ms McKenna told the second child they could have grapes instead.

178. There is no reason to disbelieve the Claimant about what she says here, but even if it had have happened in this way, it is fair to say that this is such a trivial matter we fail to see how the Claimant was undermined or why she thought this was an issue serious enough to be a part of legal proceedings. In our judgment, both the Claimant and Ms McKenna were simply trying to manage the situation as it happened as they saw fit.

The last day of term 2023

179. By 20 July 2023, it was the last day of term.

180. There was left over food from the end of term graduation day and it was common ground that any perishable left over food was usually distributed amongst the staff and parents to take home with them because, otherwise, it would go to waste and wouldn't keep over the 6 week summer holiday period.

181. The Claimant had been given some gifts to say thank you by the children. These were described by the Claimant as being chocolates and little soap gift sets. They were in gift bags.

182. The Claimant alleged that Ms McKenna and Ms Shailer deliberately placed food from the graduation party into her gift bags to ruin the gifts the children had given to her. The Claimant explained that some of the moisture from the food items had caused the gifts to become damp and some of the gifts had become a little bit squashed under the weight of the food.

183. Ms Shailer and Ms McKenna were alleged to have done this and then as they left for the day, giggled down the stairs because of it.

184. Ms McKenna and Ms Shailer, simply stated they distributed the food in the same way they had done in previous years and that was it.

185. We are not persuaded that Ms Shailer or Ms McKenna had done anything other than distribute the food amongst the staff as they usually would have done and simply reused the gift bags from the children to package the food distributed to the Claimant.

186. In the case of Ms Shailer, at this time she did not know that any protected disclosure had taken place, and there is insufficient evidence other than the Claimant's impression of the situation to prove that Ms McKenna had done this because of the disclosure made on 27 June 2023.

187. We believe Ms McKenna's explanation about this being an ordinary last day of the year and the food being distributed as per previous occasions.

The witcheypoo message

188. Also, on the last day of term, when Ms Shailer had finished her shift she sent a message on the A-Team WhatsApp group. There then followed a sequence of messages involving the Claimant, Ms Shailer, Ms McKenna and Mrs Rogan.

189. The pre-school had closed early.

190. Ms McKenna stated in answer to questions that she had a lunch voucher and that she had taken Mrs Rogan out to a late lunch with bottomless prosecco after the pre-school had closed.

191. Ms Shailer had finished and left to go straight to the beach to start her summer holidays.

192. The relevant messages are at page 278 and various other places in the bundle.

193. By the time they were sent, Ms Shailer was had arrived at the beach. She had sent the group a picture of the beach and sea saying, "I'm here". Mrs Rogan had replied *"Lovely".* Ms Shailer had then enquired whether she was still out, we infer this meant still out with Ms McKenna at the prosecco lunch. Mrs Rogan had responded *"No hun at home".*

194. Ms Shailer then said *"Hope you had a nice day. Xx"* It was by now 16.28.

195. Ms Shailer then sent a second message. The offending message said *"Left witcheypoo mopping coz Mandy said she has to do her work lol [crying laughing emoji]"* also sent at 16.28.

196. The Claimant took a screenshot of the message.

197. Ms Shailer then deleted the message and Mrs Rogan Respondent *"Enjoy hun".* It was now 16.39.

198. When the message was deleted, the Claimant responded to the group *"Little to late".* Ms Shaiker responded *"Lol left Karen didn't you see the previous picture [sideways crying laughing emoji]"* she then resent the picture of the beach and added to that picture *"Soz pissed on the beach".* It was now 16.42.

199. Ms Mckenna replied by message saying that she might be the witch, but Ms Shailer was the bitch.

200. When asked about who the message was about, Ms Mckenna and Ms Shailer were far from reliable witnesses and both smiled whilst giving evidence, which showed in our view that they were not being straightforward during this part of their evidence.

201. Ms Shailer claimed she was by this point very drunk when sending the message as a method of trying to explain the texts and deletion. We reject that evidence entirely. Ms Shailer's messages were coherent with no spelling difficulties when considering normal text speech. She was not drunk when sending these messages.

202. Ms Shailer tried to delete the message. This doesn't fit with it being about Ms Mckenna, because they had a very good relationship at this time, and it would have been perceived as a joke meaning there was no need to delete it. Consequently, the text was clearly aimed at the Claimant.

203. Any subsequent message from Ms McKenna and Ms Shailer were designed as a cover to try to explain away Ms Shailer's blunder in sending this message to the wrong WhatsApp thread when in all likelihood it was meant for Mrs Rogan alone.

204. The difficulty here for the Claimant is, Ms Shailer didn't know about the protected disclosure of 27 June 2023 at this time.

The diaries kept by Ms Shailer from 10 July 2023 and discussed in September 2023

205. Ms Shailer gave evidence that on 5 July 2023, she was asked by Ms Messis to do a diary about any occasions where the Claimant was unhelpful, obstructive or difficult and not working well with the team.

206. Ms Shailer stated she didn't know why she was being asked to do this but simply complied with the request and then handed the diaries into Mrs Rogan at the start of the next academic year on 6 September 2023.

207. In our view, it was when these diaries were being discussed in September 2023, that Ms Shailer was briefed about what happened on 27 June 2023 by Mrs Rogan as part of needing to make Ms Shailer aware of any employee relations issues in her acting manager role.

208. The diary entries started on 10 July 2023 when Ms Shailer commenced her role as acting manager.

209. On 4 September 2023, the Claimant was signed off as unfit for work by her GP. The reasons for this were said to be work related stress and anxiety.

210. Each entry was reviewed by Mrs Rogan on 6 September 2023, as confirmed by her signature on the page and a handwritten date next to each signature.

211. Mrs Rogan stated, when asked, that nothing happened with these diaries and they were simply filed away. We believe her because, at this point, the Claimant was absent on sick leave and Mrs Rogan was not leading the investigation into the incident on 27 June 2023.

212. We do not believe the fact that Ms Shailer was asked by the Respondent to write this diary infers any detrimental treatment because of making a protected disclosure.

213. We believe the reason why Ms Shailer was asked to keep this diary by Ms Messis, with Mrs Rogan's knowledge, was because of the Claimant's unprofessional behaviour at the meeting of 5 July 2023.

214. For example, it was entirely unprofessional for the Claimant to have sworn in the workplace at all, where there was a risk of her being overheard by young children.

215. We also cannot understand why the Claimant was so bothered by Mrs Rogan's pay when, according to her own case before us, the fact Mrs Rogan had a serious spinal condition that caused her to randomly have falls meaning she had to work from home after medical advice, was apparently not in dispute.

216. We believe that Ms Messis and Mrs Rogan were concerned by the Claimant's behaviour during that meeting, rightly so, and that was the real reason why these diaries were asked for even though they are an unusual way of dealing with the situation, which could appear to be behaviour of a deceitful nature.

217. However, really, this was a case of six of one and half a dozen of the other. The Claimant was also keeping diary entries about things that happened in the Respondent, and they too are in the bundle at pages 794 - 806.

218. The diary entries made by the Claimant, whilst alleged to be detailing detriments to the Claimant, really identify matters where she makes allegations of poor childcare by Ms McKenna and Ms Shailer or they are matters where, if they were true, the Claimant as deputy manager should have taken action herself to correct them.

219. Ms Mckenna was asked about some of these allegations, for example a child grazing their knees and Ms McKenna allegedly not offering first aid or putting it in the accident book. She denies them.

220. Ms Shailer was also asked about some of these incidents such as the Claimant being prevented from opening the door to parents and children arriving and leaving the pre-school. We have already discussed her explanation above.

221. Both sides therefore clearly didn't trust each other, and each had the other under surveillance and have tried to raise issues as evidence that aren't really relevant to the list of issues.

222. We are not persuaded that there is sufficient evidence that these alleged bullying incidents happened in the way the Claimant described.

223. Neither side knew of the other's diary entries until, in the case of the Claimant, she received the response to her SAR request or, in the case of the Respondent, until disclosure in these proceedings in 2024.

Conclusions – whistleblowing detriments in the list of issues at paragraphs 30c – 30k

224. The only relevant protected disclosure is that of 27 June 2023 to all the allegations of detrimental treatment alleged on or before 20 July 2023.

225. The Respondent admitted that was a protected disclosure.

226. After the cases of **Nicol** and **William,** Ms Shailer had no knowledge of the protected disclosure until September 2023. The disclosure therefore could not have influenced her mind until at least 6 September 2023. All allegations of detriment where Ms Shailer was the alleged perpetrator could not therefore be in any way because of the protected disclosure.

227. Consequently, allegations 30 f and h are dismissed because they only involved Ms Shailer.

228. For all other allegations under this heading involving Ms Shailer as the alleged perpetrator, those too are dismissed for the same reasons. Instead, we have focused on the allegations where Ms McKenna and/or Mrs Rogan were the alleged perpetrators.

229. When considering allegation 30 c in light of **Kong,** to the extent that Ms McKenna was ignoring the Claimant or being unhelpful when being asked the time, first we are not persuaded the incident about asking the time and being ignored took place. There is insufficient evidence to support it.

230. We now turn to the general ignoring alleged. When considering the burden in **Jesudason**, **Fecitt** and **Knight**, it is likely that, on occasion, Ms McKenna and the Claimant were ignoring each other or at least not being as friendly or helpful to each other as they once were.

231. However, again applying **Kong,** the real reason for why that happened was because their friendly working relationship had ceased and both the Claimant and Ms McKenna were effectively being “off” with each other generally, not because of any protected disclosure.

232. We also find that Ms McKenna was not happy at the way the Claimant handled the situation on 27 June 2023 believing the Claimant’s behaviour to have been un-professional and causing Ms McKenna significant embarrassment as she stated at paragraph 3 of her statement.

233. The only link to the disclosure is the manner in which the disclosure took place not the content of the disclosure itself. In our view, the way in which the conversation happened on 27 June 2023 is properly severable from the information and relevant failure disclosed namely a breach of legal requirements to be within set ratios that afternoon in accordance with the principles in **Evans** and **Patayioutou.**

234. In addition, as Ms McKenna stated at paragraph 10 in her statement, we are persuaded it was a busy time of the year generally so there would not have been much time for the Claimant and Ms McKenna to generally chat with each other, and indeed we find it unlikely that either person would have wanted to speak unless they had to.

235. The combination of the Claimant and Ms McKenna being off with each other and how busy it was, may have given the impression that Ms McKenna was ignoring the Claimant. However, we are in no doubt that the Claimant was ignoring her colleagues too. It was a "tit for tat" type of situation and was not reasonable for the Claimant to have considered that to be a detriment in all the circumstances when considering **Williams v Swansea** and **Jesudason.**

236. Consequently, allegation 30 c is dismissed.

237. Allegation 30 d was dismissed previously in this Judgment.

238. When considering allegation 30 e, and applying the test in **Williams v Swansea,** we believe the Claimant thought subjectively that the change in lunch break policy by Mrs Rogan was to her detriment.

239. However, in our view, it cannot have been reasonable for the Claimant to have considered this to be a detriment in all the circumstances. We say this because the decision to change lunch arrangements was to try to keep the ratios of staff to children within legal limits, which was the very issue the Claimant blew the whistle about. This reason was communicated to the Claimant at the time.

240. In the circumstances of this case and when considering the specific detriment of lunch breaks off site being changed or refused, it was not reasonable for the Claimant on the one hand to blow the whistle about ratios being illegal and then when the Company makes arrangements to try to prevent that happening again, complain those arrangements were a detriment. Indeed, this was a positive response to her disclosure.

241. After **Kong,** we also believe that the real reason why Mrs Rogan changed the lunch arrangements was not because of the Claimant's disclosure but was instead because she wanted to take steps to prevent a repeat of the ratio becoming illegal. It is true that but for the disclosure, the lunch break arrangements would not have changed. However, after **Knight** that is not the right test.

242. It is also not the case that the Respondent refused to allow the Claimant to take lunch breaks off site. In the end a compromise was reached as we previously identified above, and the Claimant still got to take at least half her lunchbreak on site.

243. Consequently, allegation 30 e is dismissed.

244. We now turn to allegation 30 g. We are not persuaded that Ms McKenna undermined the Claimant. Yes there may have been a difference of view in how

to handle the situation. However, it struck us that there was not much conversation about what to do between the Claimant and Ms McKenna and so both were simply trying to manage the situation was best they could without having the chance to communicate with one another during an incident that probably took place in seconds.

245. It also struck us that this was a trivial issue, so trivial in fact that, after **Jesudason** and **Williams v Swansea,** even if the Claimant thought subjectively this was detrimental or disadvantageous treatment, it wasn't reasonable for her to have thought it was in the circumstances.

246. Even if we are wrong in that, we are unanimous in our view that the real reason why Ms McKenna gave the second child grapes instead of cucumber, after **Kong,** was because she was trying to manage the situation with the children as it unfolded and was presented to her, not because of the Claimant's protected disclosure. We doubt the protected disclosure even crossed Ms McKenna's mind in that moment.

247. Consequently, allegation 30 g is dismissed.

248. During evidence the Claimant conceded that detriment allegation 30 k, namely *"The Respondent failed to follow the ACAS Code in respect of disciplinary hearing in respect of a delayed provision of the allegations to the Claimant, a delay in the investigation, a delay in the outcome of the disciplinary hearing and a failure to provide the relevant evidence to the Claimant ahead of the disciplinary hearing"* was not done because of any protected disclosure. These were general breaches of the ACAS Code only.

249. Also, during evidence, the Claimant conceded that the failure to hear her grievance was not because of protected disclosures. In any case, it was clear to us that the Claimant's grievances weren't heard because the Claimant failed to properly engage with either of the HR professionals (Ruth Lewin and Sam Bailey).

250. Consequently, allegations 30j and 30k are dismissed.

The Claimant's advice from Protect.

251. By 31 July 2023, the Claimant had contacted a free advice service from an organisation called Protect. The advice was detailed and is in the bundle at pages 279 – 281.

252. The Claimant relied on this advice in her claim and, even though it was clearly written in contemplation of litigation, the Claimant has clearly waived any privilege about it and disclosed this to the Respondent as part of her case.

253. The key points form the advice email are as follows:

253.1. The Advice is clearly geared towards the Claimant doing three possible things. First, submitting an employment Tribunal claim; secondly,

attempting to negotiate a settlement agreement; and thirdly escalating matters to regulators or externally to the Pre-school to build her case against the Respondent.

253.2. The advice pointed out that the Claimant might have been subjected to whistleblowing detriment. The advice is specifically tailored to this type of claim at page 279.

253.3. The advice included reference to a schedule of loss and compensation. The advice is tailored to the Claimant preparing figures at page 280.

The Claimant's grievance, the disciplinary investigation and the involvement of Ruth Lewin

254. By 2 August 2023, the Respondent had instructed an outside organisation called Nursery HR, to look into the disciplinary issues identified by the Respondent and investigate them.

255. Mrs Rogan stated in evidence that there were a number of reasons why she did this:

255.1. First, the incident on 27 June 2023 involved all the trustees of the Respondent, who were essentially her line manager.

255.2. Secondly, Mrs Rogan herself had also been involved in the aftermath of the incident even though she wasn't present on 27 June 2023, so she needed someone independent to look into it.

256. Once nursery HR were on board, they were advising Mrs Rogan what to do and she said she was following that advice.

257. On 2 August 2023, Mrs Rogan emailed the Claimant to forward on an invite letter from Ruth Lewin, inviting the Claimant to an investigation meeting. This was to investigate matters *"… further to the incident which occurred on Tuesday 27 June and discussion that were held in subsequent days".*

258. At this time, all the staff were deemed to be on annual leave because annual leave was deemed to be taken during half terms, end of terms and the summer break like many educational establishments. The Claimant was fully aware of this having worked for the Respondent for a number of years.

259. The investigation invites said the following:

"I am investigating a reported incident which is alleged to have occurred in the playground of the preschool on June 27th 2023. This incident is being investigated in accordance with the Preschools disciplinary policy and a copy is attached for your information.

It is alleged that you acted in a manner that was disrespectful and unprofessional whilst discussing preschool business in front of parents.

In order to fully investigate the matter, it is necessary to invite you to attend an investigatory meeting where you will have the opportunity to put forward your version of events.

It is proposed that this meeting will take place at 9.30am on Thursday 10th August remotely. A link for the meeting will be forwarded to you prior to the meeting.

As this is a formal meeting you may, if you wish, be accompanied by a work colleague or trade union representative.

Please can you confirm your attendance and your representatives details if you are being accompanied.

I would like to assure you that no decision has yet been taken on the validity of this alleged incident. The matter will be fully and impartially investigated before any decision is made as to what, if any, action needs to be taken.

Should you wish to clarify any points in relation to this meeting please do not hesitate to contact me on 07788852416 or via email at ruth@thenurseryhrpeople.co.uk"

260. On 3 August 2023, after a request from the Claimant, Mrs Rogan forwards the disciplinary policy to the Claimant as per page 291 in the bundle.

261. The Respondent also had a code of conduct, which the Claimant accepted applied to her and her job role. This contained standards of behaviour expected and included that employees must never for example *"…disclose or misuse confidential information".*

262. Additionally, it said that employees should ensure they *"adhere to the settings policies and procedures, statutory, regulatory or legal requirements, as they apply to their role and area of work; carry out any other duties which may reasonably be required of them in accordance with the needs of the setting; are flexible and adaptable with respect to their role"* at page 686 in the bundle.

263. It was also a requirement that all employees were expected to *"co-operate with managers and committee members and not to deceive, abuse or undermine management."*

264. The invite letter from Ms Lewin, was the first time the allegations had been articulated to the Claimant.

265. The disciplinary policy is in the bundle at pages 292 – 296. It reiterates that gross misconduct could include serious breaches of confidentiality, serious insubordination, serious failures to comply with policies. In our view, policies included the Code of Conduct.

266. On 4 August 2023, undoubtedly as a result of being invited to the investigation meeting, the Claimant submitted a counter grievance by emailed letter to Mrs Rogan at pages 301 and 297 and 298 in the bundle.

267. The grievance alleges bullying and victimisation by Mrs Rogan, Ms Shailer and Ms McKenna but doesn't go into detail about those allegations. The Claimant also alleged that legislation was not being complied with but did not specify what legislation.

268. The grievance itself is not relied upon as a protected disclosure.

269. It is noteworthy that at no point in this grievance does the Claimant complain about a demotion. That supports our findings earlier in the judgment that this is because at that time, the Claimant did not believe that she had been demoted, or she would have said so in the grievance.

270. It is also noteworthy that any allegations in this grievance about Ms Shailer could not have been because of the protected disclosure made on 27 June 2023 because Ms Shailer had no knowledge of that disclosure, which the Claimant readily admitted when giving evidence.

271. The grievance had also been sent to Ms Lewin on the same date as for Mrs Rogan. However, the Claimant had asked that the grievance be put on hold as shown by Ms Lewin's response to the Claimant at page 304 in the bundle.

272. On 7 August 2023, Mrs Rogan responds to the Claimant's email asking for details of the bullying allegations against her. Mrs Rogan mentioned that she believed the Respondent had been brought into disrepute, which is why the trustees had all resigned and she would read the concerns, respond to those that were about Ms Shailer and Ms McKenna and, because she had no committee to act as her line management to investigate the concerns about her, she offered to respond to them herself.

273. On 14 August 2023, the Claimant responded to Mrs Rogan's email. After usual email pleasantries (even if we do not believe they were meant), the Claimant said as follows *"Unfortunately, I do not feel that I am able to, nor that it is appropriate for me to send my grievance to you. I also do not understand what the second sentence in your email means regarding, the pre-school being brought into disrepute."*

274. The next day, Mrs Rogan emailed the Claimant again. She proposes to do the following:

    274.1. Once she is in receipt of full details of the issues involving Ms Shailer and Ms McKenna, she will look into those as their line manager.

    274.2. For the grievances against Mrs Rogan she offers to undertake to respond to these herself or get an external mediator to explore the grievance and find a way forward.

275. On 16 August 2023, the Claimant responded. She says that Mrs Rogan has a conflict of interest with Ms Shailer and Ms McKenna because of their personal friendship together so the Claimant refuses to send the details of the grievance to her. The Claimant also alleged that when she had raised workplace concerns before she had suffered reprisals and that had attributed to her work-related anxiety that she was receiving treatment for.

276. The Claimant then requested that the grievance was outsourced to an external person to look into it, who wasn't associated with the pre-school. She would then send the detail of her grievances to them. The Claimant said that she would prefer it not to be Ms Lewin, because she had some concerns about her regarding impartiality.

277. We have no idea what these concerns were, the Claimant does not state what these concerns were in that email or in her witness statement and the Claimant makes no claims about Ms Lewin. We conclude that this was said and done by the Claimant to be difficult.

278. Ms Lewin had also emailed the Claimant on 16 August 2023, asking for her availability on 4 and 5 September 2023 for a meeting when she was back at work at the start of term.

279. The Claimant responded by asking that Ms Lewin not to contact her at all during her annual leave period over the summer break and stated that the reason for this request was because the emails she was receiving were hindering her mental health recovery after the incident of 27 June 2023.

280. Consequently, any delay in the investigation process from 5 July 2023 to the start of term in early September 2023 was caused by a few things. These were the lack of any Trustees to look into matters, time needed to appoint an external HR investigator, the Claimant's ill health and the Claimant's request that she not be contacted at all during the summer break because her mental health was allegedly suffering.

281. In the meantime, Ms Lewin continued with the investigation meetings with other witnesses.

282. However, not three days after stating that she was too unwell to respond to Ms Lewin about this incident, the Claimant was well enough to send three emails alleged to be protected disclosures containing numerous allegations of unlawful activity to LADO, the Charity Commission and OFSTED.

283. We have not been able to reconcile how the Claimant could not be well enough to engage with Ms Lewin, but was well enough to discuss the matters that were apparently stressing her out with three separate regulators. We therefore conclude that the Claimant was not struggling with her mental health as much as she claimed she was.

The disclosure to OFSTED

284. It was not in dispute that the Claimant had taken advice about what to do based on information provided by the Claimant that if she felt she wasn't getting anywhere after she had already complained to the Respondent. That advice suggested she could raise the issue with OFSTED as per page 322 in the bundle.

285. The disclosure said as follows:

"From: Laura Pagnello <laurapagnello@btinternet.com>
Date: 19 August 2023 at 16:57:02 BST
To: whistleblowing@ofsted.gov.uk
Subject: Barrow Hill Pre- school (Charity number: 1150984 and URN: RP532552).

Date: 19.08.2023
Name: Laura Pagnello
Email: laurapagello@btinternet.com

I am sending this email to make a disclosure regarding concerns I have about the management and staff at Barrow Hill Pre- school (Charity number: 1150984 and URN: RP532552).

I have been employed as the Deputy Manager at Barrow Hill Pre-School, Allitsen Road, since the 2nd September 2019 (coming up for 4 years continued service).

Unfortunately, a recent event on the 27th June 2023 occurred where the pre-school was understaffed and were not abiding by the legislative adult: child ratio numbers for 2-year-olds of 1:4. I raised this issue with two members of the committee, Anissa Messis and Naba Madani. The Manager was aware of this on the day but decided to stay open as she had allowed one of the members of staff, a Level 3 practitioner, to leave the setting early and when the afternoon children arrived the setting went out of ratio.

As a result of raising this concern I have been bullied, victimized and harassed. This leads me to reasonably believe that my three colleagues, Amanda Rogan (Manager), Kelly Shailer (Acting Manager) and Karen McKenna (Practitioner) are colluding to constructively dismiss me.

Legislation and procedures are not being followed, resulting in the pre-school and the children being put at risk due to legislation and safeguarding not being adhered to.

I wish to raise low-level concern allegations (I reasonably believe have occurred), which fall under the Keeping Children Safe in Education 2022. In addition, I also believe that breaches of data protection, GDPR and health and safety legislation have taken place. These allegations involve both Kelly Shailer and Karen McKenna and examples are as follows:

1. Staff use their personal phones to take photographs of children outside and

inside of the setting.

2. Staff having their personal phone on them at all times within the workplace.

3. Incident where two members of staff shouted at a child inappropriately when child was not listening, so they then excluded the child from the classroom and outside area twice on the same day as a form of punishment.

4. Other staff members frequently raised their voices at children.

5. Staff talk about parents and children inappropriately and in cases have made derogatory comments about parents directly to their children.

6. Staff do not adhere to policies e.g., they do not document accidents in the accident record book or do not call parents when a child has a head injury.

7. Staff openly undermine me in my role as a Deputy Manager. This uses the child as vessel and as a result the children are negatively impacted.

I also wish to raise concerns regarding the gross misconduct of Amanda Rogan, Early Years Manager (I reasonably believe have occurred), where she has not acted in the best interests of the setting and has not adhered to legislation, policies and procedures.

1. Manager allowed 2 members of staff to openly drink alcohol and get intoxicated in front of parents and children on a summer school trip to South End on sea (Friday 15th July 2022).

2. Not adhering to the legal ratios within the setting on 27th June 2023; allowing staff member to leave work, leaving only 2 staff members on site. This not only put the children at risk but also the staff left at the setting.

3. Inadequately staffed due to Manager working from home full time since 13th June 2023 due to long term illness, but who is still being counted as part of our ratio. This impacted the ability for staff to take lunch breaks.

4. Ofsted not notified of significant changes to Managers health - long term illness (severe back issues which requires taking multiple prescription medication on a daily basis and waiting for major back surgery/falling over in the setting/needing to use a wheelchair) and unable to fulfil their duties.

5. When concerns are raised to the Manager, both during a supervision and informally, Manager tells member of staff "I told you if you don't like it, you can go and find another job", whilst getting the staff members employment contract and highlighting the notice period. This happened on more than one occasion.

6. The Manger fails to ensure that the setting is adequately staffed and on occasions has sent bank staff away.

7. The Manager closed the setting on 24th April 2023 and informed the parents

that it was due to staff training, however this was a lie as she closed the setting because she would be at the London marathon which her husband was running on the previous day, Sunday 23rd April 2023.
There was no staff training.

As such, I reasonably believe that all of the above concerns leave the pre-school making legislative breaches and therefore at risk of litigation.

Unfortunately, when I raised my concern to the committee members on the 27th June 2023, they were not taken seriously. Instead, I have been victimised, bullied, humiliated and unfairly treated by the three named individuals in a toxic work environment. This has resulted in work-related anxiety and stress and recently having seen my GP, have begun a programme of therapy.

As a direct result of their actions, this has also meant that I was reluctant to raise my concerns regarding the actions of Amanda Rogan, Kelly Shailer and Karen McKenna breaching the Keeping children safe in education (KCSIE) policy and other legislation, as I felt anything I raised, would be ignored and I would be targeted for further abuse.

In addition, I am unable to take my concerns to committee members, as all have now resigned.

I am requesting that my identity is to be kept anonymous, as I am fearful of further repercussions against me as I am already being bullied and victimized within the workplace.

Laura Pagnello"

286. We make the following observations about the alleged disclosure:

286.1. Up to the paragraph about being bullied, victimized and harassed, the information provided there is factually correct and the Respondent has already conceded that the disclosure of information about the incident on 27 June 2023, was a disclosure of information that tended to show a relevant failure in the Claimant's reasonable belief and was reasonably believed by the Claimant to be in the public interest. There is no reason to treat this part of the email any differently.

286.2. The remainder of the allegations made were disclosures of information because they provided the names of people involved and brief details of who was involved and why they were said to have behaved as they did.

286.3. The description of events on 27 June 2023 excludes a number of key pieces of information that make the statement misleading. It is true that for about 1.5 hours the Respondent was out of ratio. However, the Claimant entirely fails, and we find deliberately so, to explain that the service was only understaffed after Ms Shailer had to leave in an emergency and only then when an unexpected child arrived in the afternoon. It was not understaffed at any point before that time.

286.4. It is incorrect to state that Mrs Rogan had let the school stay open. The Claimant had allowed the school to stay open, and she was the responsible person for safeguarding purposes on that day because she was present at and in control of the setting.

286.5. The Claimant also fails to state that the manager of the setting was working from home because of a serious spinal condition and wasn't present at the setting that day, but was in communication with the Claimant only by telephone or text message.

286.6. None of these points, with the exception of the child to staff ratio issue on 27 June 2023, had been raised with the Respondent previously. In our view, if the Claimant believed these were breaches of the law, she could and would have raised them earlier.

286.7. Some of the allegations were historic having happened over a year ago at the point the email was sent to OFSTED.

286.8. The Claimant described the first set of allegations in 1 – 7 as low-level concerns.

286.9. The disclosure was only submitted once the disciplinary procedure had been commenced. We believe it was a retaliatory disclosure.

286.10. The disclosure was submitted after the Claimant had already received legal advice about an employment Tribunal claim, after she had already verbally threatened the Respondent with court action via her verbal outburst with Ms Messis on 5 July 2023 and in circumstances where the Claimant had an unreasonable and inexplicable resentment of Mrs Rogan working from home when the Claimant knew she had a pre-existing serious back problem that had caused her to need to work from home after a number of falls on stairs.

286.11. The disclosure had also been sent contemporaneously with advice from protect that advised the Claimant that the best option for her would be to try to negotiate a settlement agreement.

286.12. The trigger for why the Claimant submitted the disclosure was fairly obvious in our judgment. She wasn't happy about the disciplinary situation or Mrs Rogan working from home on full pay. The Claimant also wasn't happy about not having a break on occasions despite saying it was ok at the times she did not have one and she was by then involved in a family feud with her daughter against Mrs Rogan and vice versa.

287. We also note here that there is no evidence at all that the Claimant turned her mind to the list of matters the Chief Inspector via OFSTED contained within the statutory instrument cited earlier.

288. It was also part of the Claimant's case that she was somehow fearful that if she raised these additional allegations mentioned in the OFSTED disclosure that she would be subjected to detrimental treatment.

289. As an example, predating the 27 June 2023, was the Claimant's contract of employment dated 2 September 2019. The Claimant alleged that she raised concerns about workplace issues and was either ignored or had a paragraph about her notice period highlighted and given to her in a way she says was a threat.

290. Upon reviewing the various versions of the contract the parties disclosed, it is true that there were some irregularities with the signature. It looked to us that the signature for the older contract version had been cut and pasted into the new contract using the original signature from the old contract. The Claimant alleged she didn't know this had been done and the Respondent denied what was fairly obviously a reused signature.

291. We do not know why the signature was apparently cut and pasted from one document into another because there is insufficient evidence to form a conclusion on balance. It looks dubious yes, but that isn't evidence in itself that is relevant to the points raised in these proceedings.

292. We have considered the argument and all the evidence we were taken to where the Claimant says she was put off raising concerns because of a perceived risk of detrimental treatment and we reject it.

293. We are not persuaded the Claimant was fearful of speaking her mind about perceived issues at work either during the incident of 27 June 2023 or afterwards on 5 July 2023. The Claimant's daughter wasn't fearful either because she raised numerous issues about invoices after the incident on 27 June 2023 as one example.

294. Taken in the round, it is therefore clear that the Claimant had no fear of raising concerns and it is objectively clear that the Respondent was not perceived by either the Claimant to the extent suggested or her daughter that the Respondent was likely to treat them on that way given that a number of the allegations raised in the OFSTED disclosure date from before June 2023.

295. This allegation also does not fit comfortably with the combined evidence of all the witnesses of both parties, namely that everything was working well, and the witnesses were very friendly with each other until the incident on 27 June 2023. That is not evidence supportive of the Claimant's allegation that she was essentially working in a culture of fear and repression if she had any concern she wanted to raise before 27 June 2023.

Conclusions about the OFSTED disclosure

296. In our view, a lest the part of the disclosure that spoke about the 27 June 2023 incident was a qualifying disclosure. We say this because it is essentially a

repeat of the disclosure made on 27 June 2023 verbally to Ms Messis and Ms Madani about the ratio being out.

297. The verbal disclosure was accepted by the Respondent as believed by the Claimant as tending to show a relevant failure and being made in the public interest. Those beliefs were also conceded as being reasonable.

298. Where the Claimant has difficulty is when considering s43F, s 43G and s43H.

299. We deal with the easiest first, that of s43H. We are not persuaded that this disclosure disclosed an exceptionally serious failure. The ratio was out by one child. No harm occurred to anyone, and it was in exceptional circumstances where the staff ratio was not complied with primarily because Ms Shailer had to leave work to attend a family emergency.

300. In our view, there is nothing exceptional or serious about the ratio occasionally, and, indeed in the case of the Respondent this happened only once, being out because of staff sickness absence for example for a time period of at most a couple of hours.

301. Consequently, the allegation that the OFSTED disclosure was protected in accordance with s43H is dismissed.

302. Then we look at s43G and indeed this would also be relevant as an alternative finding for s43H.

303. We are persuaded that this email was submitted for the purposes of personal gain. We find those purposes to be as we found above, namely:

    303.1. To obtain a financial settlement from the Respondent;

    303.2. To firm up her position in this Employment Tribunal claim;

    303.3. To satisfy her need to target Mrs Rogan because she resented the fact that Mrs Rogan was working from home on full pay and because she resented that she did not always get a break.

304. These purposes tainted all of the disclosures and allegations made in the OFSTED disclosure email.

305. Consequently, the allegation that the OFSTED disclosure was a protected disclosure in accordance with section 43G is dismissed.

306. The we move onto section 43F.

307. The Respondent admitted that OFSTED was a prescribed person via the Chief Inspector.

308. We must then consider whether the Claimant believed that the disclosures in the email she was making fell within any description of matters in respect of which that person was so prescribed and if so if that belief was reasonable.

309. It is true that the Claimant had not addressed her mind to those matters. During the hearing when identifying the issues, neither she nor her representative knew of the statutory instrument detaining the relevant matters of the prescribed persons to make a disclosure too.

310. We agree with the submission of the Respondent that the Claimant has also led no evidence supporting that she had such a belief or why such a belief had it existed was a reasonable one to have. We say this because there is no evidence that the Claimant turned her mind to any of the relevant matters in the prescribed list for her to be able to form any belief about them.

311. The Claimant has therefore failed to meet her burden of proof with this being a protected disclosure under section 43F.

312. Consequently, the allegation that the OFSTED disclosure is protected in accordance with s43F is dismissed.

313. In any case, even if this email was a protected disclosure, we are not persuaded that the Claimant was fearful of detrimental treatment had she raised the allegations directly with the Respondent, she had not raised the concerns previously with any prescribed person and they did not cause any of the detriments alleged (see later).

The Charity Commission disclosure

314. Also on 19 August 2023, an email was sent to the Charity Commission as below:

"Name of Charity: Barrowhill preschool

Charity number: 1150984

My name: Laura Pagnello

My role: Deputy manager

Are you a charity employee: Yes, I am employed as Deputy manager

My concerns are:

1. Not adhering to statuary guidance in relation to adult to child ratios (June 2023) – there have been several occasions where the setting stayed open whilst being out of ratio, despite raising this to the Managers attention. This is a safeguarding issue.

2. Since 15th July, the preschool has no acting committee members as the Chairperson, Treasurer and Secretary have all resigned and there is now no one governing the Charity, therefore leaving it vulnerable.

3. The Chairperson currently noted as active on the Charity Commission website resigned on 16th March 2023 (appointed on 27th November 2014). This date of resignation can be confirmed on the Companies House website.

4. In addition to the above point, as per the AoA, a Board Member should only serve for a maximum of 6 years. This is a breach.

5. The current Manager of the preschool is a Trustee but this is not declared on the Charity Commission website, only on Companies House. Both websites, Charity Commission and Companies House, should be updated to reflect correct and accurate information regarding Trustees.

6. Annual General Meeting (AGM) not held on a yearly basis as required per the Articles of Association – I reasonably believe this has not taken place since at least 2019 when I started my role. This is a breach.

7. 11.3 requirements of AoA not met – less than 60% of the Committee Members were family members. This is a breach.

8. Board members were not elected or re-elected as per the requirements of the AoA. They were just selected by the Manager of the setting. This is a breach.

9. Manager successfully requested a pay rise for themselves, but not all the staff (December 2022). Requested to only two committee member not all members who should be making the decision per the Articles of Association. Inconsistent and unfair approach for all staff members.

10. The Committee members are responsible for salaries – The Manager asked the Treasurer to leave the room so that they could discuss the salary alone with the Chairperson.

11. Signing off end of year accounts without all committee members permission or knowledge.

12. Not setting a reflective budget to analyse true and reflective losses or to manage the settings income and expenditure. Loss of revenue due to low numbers of children attending the setting by not managing effectively.

13. Fundraising monies have not been declared in full on Company Accounts.

14. Paying decorating costs and cover staff cash and not declaring this to HMRC, whilst putting this through the accounts using fraudulent invoices.

15. Staff under the influence of alcohol and openly drinking on school day trip, whilst working in front of parents and children.

16. Not adhering to policies, procedures, and legislation.

17. Parents fees invoices frequently incorrect.

18. Countersigned a passport for a parent. Was given £50 in cash and took it for personal use.

19. Preschool bank account card in Managers personal name.

20. Recruitment conducted in an inappropriate manner and with no fair recruitment process:

21. The Manager employs friends which is a conflict of interest and by themself. Interviews are not conducted with the Committee.

22. Internal roles not advertised to all members of staff for Acting Managers role.

Impact:

As the Charity does not have any acting committee members as required, there is no one to govern the management of the setting and ensure that the setting is being managed correctly, safely, in line with government policies (EYFS framework) and any risks mitigated.

Due to the mismanagement of the setting and not properly advertising for available places, there is a known negative impact to the finances of the setting. This poses a threat to the longevity of the setting being able to operate and this potentially poses risk to the charity staying open; this would affect families and children and staff would lose their jobs or face redundancy.

I have previously spoken to the Manager of the setting (also the Charity Director) regarding under occupancy of the setting and having a budget, as well as holding regular meetings, but this does not happen.

Reputation:

The reputation of the setting is greatly impacted by the Committee not adhering to the Constitution that they should be and the gross mismanagement of the setting. This is partly due to the Committee members not being provided with enough information to them when they take up the position as committee member.

Permission to reveal identity:

I do not give the charity commission permission to reveal my identity to the trustees as I am still employed at the charity and am concerned that there could be repercussions to me whistleblowing my concerns.

Laura Pagnello”

315. It was not in dispute that Ms Pagnello – Boyce had also submitted a disclosure to the Charity Commission herself at a similar time to the Claimant's alleged disclosure to them.

316. Both the Claimant and Ms Pagnello – Boyce denied speaking with each other about their respective disclosures. We do not believe them.

317. It is clear to us that both the Claimant and her daughter were working together to raise concerns and allegations with or about the Respondent such as about invoicing and their respective disclosures to the Charity Commission.

318. We say this also because Mrs Pagnello - Boyce is a qualified accountant and there is no evidence that the Claimant turned her mind to the Respondent's articles of association. When asked what she considered to make this disclosure to the charity Commission the Claimant's memory failed her and she said she did not recall.

319. Consequently, we believe that for the charity commission disclosure, due to its technical nature, the Claimant was led by her daughter in what wording to use in that disclosure.

Conclusions about the Charity Commission disclosure

320. For the same reasons as we rejected the OFSTED disclosure being protected under section 43F, 43G and 43H, we reject the Charity Commission disclosure as being protected.

321. This disclosure was made for the same purposes of personal gain as the OFSTED disclosure.

322. In addition, the Claimant had not addressed her mind to the list of relevant matters the Charity Commission was prescribed to deal with and so she did not hold any belief that the relevant failure fell within those matters.

323. In any case, it doesn't really matter if this disclosure was protected for reasons we go into below.

The LADO disclosure

324. The LADO disclosure was sent by email on the same date and using almost identical wording as the OFSTED disclosure.

Conclusions about the LADO disclosure

325. The Claimant conceded that the LADO was not a prescribed person under s43F, leaving this disclosure as allegedly being protected in accordance with s43G and s43H.

326. We make identical conclusions about sections 43G and 43H as for the OFSTED disclosure.

327. Consequently, the allegation that this disclosure is protected under sections 43F, 43G and/or 43H is dismissed.

The start of the new academic year 6 September 2023 onwards

328. On 6 September 2023, the Claimant sent a fit note to the Respondent confirming that she was unfit for work because of work related stress and anxiety until 3 October 2023 as per page 334 in the bundle.

329. The Claimant did not return to work again for the Respondent.

330. On 12 September 2023, the Claimant requested that the Respondent make contact with her on a biweekly basis whilst she was absent due to her anxiety. She also informed Mrs Rogan that she was commencing cognitive behavioural therapy on 14 September 2023 for a duration of six weeks and requested updates from Mrs Rogan via e-mail. Further, the Claimant asked when a new committee was likely to be reinstated so that her grievance could be heard because she alleged that was the main cause of her anxiety at page 336 in the bundle.

331. Throughout October 2023, the Respondent made attempts to resolve the Claimant's grievance. These attempts included Ms Lewin sending the Claimant questions to answer via e-mail instead of at a meeting and Ms Shailer providing the client with an opportunity to visit the preschool.

332. The Claimant did not answer the questions provided by Ms Lewin until 9 November 2023 and also responded to Ms Shailer, that she did not feel able to attend work to discuss her grievance and a possible way forward.

333. In mid-October 2023, Mrs Rogan had her spinal surgery. While she was still in hospital a new chair of the trustees was appointed, namely, Adrienn Peto. From hospital Mrs Rogan emailed the Claimant to inform her of the appointment of the new chair as per page 406 in the bundle.

334. On 23 October 2023, the Claimant resubmitted her grievance to Ms Peto by email as at page 407 in the bundle.

335. This version of the grievance included allegations about further intimidation from Ms Shailer and alleged breaches of the grievance policy at page 408 in the bundle.

336. It is also noteworthy that the revised grievance also raised some of the concerns, in less detailed terms, raised in the disclosure to OFSTED and LADO.

337. On 31 October 2023, the Claimant queried whether Ms Peto had received her grievance because the Claimant had heard nothing further from Ms Peto at page 419.

338. Ms Peto responded the same day, and explained that she had received the e-mail and before the grievance proceeded further, it was essential that Ms Peto Speak to Mrs Rogan to gather more information and that she wished to include a second committee member to discuss the situation with at page 420 in the bundle.

339. The Claimant responded, stating that she was concerned that Ms Peto was choosing to speak to Mrs Rogan before speaking to the Claimant especially as the Claimant was making allegations against Mrs Rogan at page 420 in the bundle.

340. The Claimant was also concerned, that the second committee member was Jessica Aristide, who she believed was personal family friends of Mrs Rogan's and indeed the Claimant too knew her outside of the Pre-school so the Claimant was also worried that this put Ms Aristide in a difficult situation.

341. Mrs Rogan stated that she did not have a personal relationship with Ms Aristide but knew her mother well.

342. Ms Peto responded as follows:

"Good afternoon Laura,
I wanted to inform you that all matters related to the disciplinary hearing are being handled by HR, OFSTED and LADO. After discussions with early years, it has been confirmed that there are no safeguarding issues, as Amanda has been in contact with them since the beginning of this process.

Jessica and I are prepared to address your grievances concerning staff members. However, in order to proceed, we require specific evidence, including dates, times, and additional details related to your concerns. This will help me thoroughly investigate the matter.

I have reviewed your grievance via e-mail, and I will be conducting individual interviews with the staff members involved. Once you provide the necessary evidence to support your grievance, we can arrange a meeting to discuss the issue further. Alternatively, we can continue our communication via e-mail, and I will provide updates once all staff members have been interviewed.

Kind regards,"

343. Until this point, There is no evidence that Ms Peto was involved in the disciplinary process at all, and the Claimant was concerned therefore that because this had been mentioned and because the grievance investigation had not yet been completed the outcome of these procedures was going to be pre-determined. She confirmed this by email on 3 November 2023 at page 422.

344. It was therefore clear and indeed accepted by Mrs Rogan in her evidence, that she was advising the committee about both the disciplinary and grievance procedures after she had received advice from Ruth Lewin or solicitors. She would obtain the advice and then relay that advice back to the committee so that

they could then decide in liaison with her what to do in response to the Claimant's grievance and correspondence.

345. The reference to OFSTED is also significant in Ms Peto's email, because the time period that this e-mail was sent overlaps with when Mrs Rogan was discussing the allegations made against her in August 2023 as confirmed by the e-mail that page is 432 to 433 in the bundle.

346. Consequently, it was clear to us that Mrs Rogan knew of the allegations made in the OFSTED and LADO disclosure by 30 October 2023 and we believe she had discussed these with Ms Peto when briefing her about the situation involving the Claimant.

347. On 1 November 2023, in response to the Claimant's e-mail of concern of 31 October 2023, Mrs Rogan confirmed why she believed that she needed to become involved again and seek advice. She emailed Ms Lewin, explaining that Ms Peto Was feeling a little overwhelmed by the emails and felt like she had walked into a war zone. Mrs Rogan was there for asking for advice about what to do next from Ms Lewin at page 425 in the bundle.

348. On 6 November 2023, Mrs Rogan reaches out to the early years team at the local authority, to see if they can offer assistance to hear the Claimant's grievances as per the email at page 437 in the bundle.

349. That request was denied because the Respondent was not affiliated with the local authority, but they did suggest using an independent HR consultant and contact an organisation called Early Years Alliance or one called the NDNA to see if they could help at page 436.

350. Eventually, the Respondent decided to outsource the grievance to an external consultant. Indeed, this is eventually what the Claimant asked for via email.

351. On 8 November 2023, the Claimant suggested that she was happy with Ms Peto to hear the grievance so there was no need to outsource so long as Ms Peto looked into the grievance impartially and fairly at page 453.

352. However, we are not persuaded the Claimant really meant what she said given she had already alleged that any outcome from Ms Peto would be predetermined and had requested that an external consultant be appointed. The Respondent didn't have a choice but to outsource in the circumstances, given the Claimant's repeated concerns about the process and who was involved.

353. On 20 November 2023, Ms Bailey the consultant engaged to look into the Claimants grievance, sent the Claimant an invitation to a grievance meeting via e-mail at page 468 in the bundle.

354. The meeting was going to be via zoom and the Claimant was requested to bring along any supporting documentary evidence to assist in resolving the grievance. The right of accompaniment was provided and indeed extended due to the

circumstances to allow the Claimant to be accompanied by either a family member or friend as per the letter page 468.

355. There was then further correspondence between Ms Bailey and the Claimant about the grievance. The outcome of that correspondence was that the Claimant stated that she had passed the matter over to ACAS to move forward with her concerns as per page 471 in the bundle.

356. Ms Bailey offered the Claimant a further grievance meeting on 29 November 2023 at page 474 in the bundle.

357. By email of 28 November 2023, the Claimant refused to attend the grievance meeting because the matter had been escalated to ACAS also at page 474.

The disciplinary meeting and outcome

358. On 22 November 2023, Ms Lewin completed the disciplinary investigation report. It is in the bundle at pages 477 – 484 and had 17 appendices.

359. The allegation the investigation report focused on was that *"Concerns were raised that LP acted in a manner that was disrespectful and unprofessional whilst discussing preschool business in front of parents on 27th June 2023."*

360. The report found that there was a case to answer for potential gross misconduct after interviewing all witnesses to the incident on 27 June 2023.

361. The report is detailed and reasonably thorough. The Claimant raises no claims or concerns in her claim about Ms Lewin's role in the disciplinary investigation.

362. The Claimant took issue with one of the allegations that Ms Madani made and that was that she felt the Claimant and her daughter were targeting her because of her race.

363. The Claimant fairly accepted that this discrimination allegation did not lead to the investigation that commenced 3 July 2023 because the allegation hadn't been made at that time.

364. In any case, it struck us that Ms Madani was simply stating her perception of what had happened and the way she was being treated by the Claimant and Ms Pagnello-Boyce. We do not consider that the Claimant or her daughter were motivated by race in the way they behaved. However, we do not find it was a false allegation either. In our view, Ms Madani believed that the way the Claimant and her daughter had interacted with her was possibly because of race.

365. On 30 November 2023, the Claimant was invited to attend a disciplinary meeting by letter at page 594 – 595.

366. The letter was drafted by Ms Lewin and contained three allegations as follows:

"…that you: -

- *Acted in a manner that was disrespectful under unprofessional whilst discussing preschool business in front of parents on 27th June 2023.*

- *Breached the disciplinary policy regarding confidentiality.*

- *Did not take responsibility in the manager's absence which is a potential breach under the pre-schools disciplinary policy."*

367. The Claimant was warned that if proven, these allegations could constitute gross misconduct offences and could result in her summary dismissal. The Claimant was also informed that the meeting would be chaired by Ms Peto and Ms Aristide.

368. The Claimant was given the right to be accompanied by a work colleague or trade union representative and was also given the right to submit a written statement for consideration in advance of the hearing. She was warned that if she failed to attend the hearing then a decision could be made in her absence.

369. At the hearing, the Claimant provided significant written representations, was allowed to be supported by Ms Dingley who was not a fellow worker or trade union representative.

370. Before the disciplinary meeting, the Claimant made numerous requests for evidence to be provided to her from Ms Lewin's report. Ultimately, we find that the Claimant had the investigation report drafted by Ms Lewin, and the appendices with a few omissions.

371. By email of 6 December 2023 at page 575 in the bundle the Claimant requested the following documents:

    371.1. The meeting minutes of 5 July 2023;

    371.2. The original statements discussed at the 5 July 2023 meeting;

    371.3. The minutes of Ms McKenna's, Mrs Rogan's and Ms Shailer's meeting with Ruth Lewin;

    371.4. Ms Messis and Ms Pagnello-Boyce's resignation documents.

372. Some of the above documents were sent to the Claimant by Ms Peto by email dated 7 December 2023, except for Ms Messis resignation, the original statements from the 5 July meeting and the minutes of that meeting.

373. By the 15 December 2023, the Claimant must have had the original statements and the minutes of 5 July 2023, the only items she did not have were minutes of phone calls made to Mrs Rogan, Ms McKenna and Ms Shailer.

374. The Claimant submitted a significant and detailed written submission for the hearing which provided detailed responses to all the allegations and also new evidence. It was 9 pages long excluding the enclosures attached to it.

375. The Claimant alleges that these conversations were crucial evidence for the investigation and therefore the investigation was flawed.

376. We have considered this and, in our view, the conversation involving Mrs Rogan would only be indirectly relevant because she wasn't present for the incident of 27 June 2023. The relevant parts of Ms Lewin's conversations with Ms McKenna and Ms Shailer are quoted verbatim in the investigation report. Consequently, the Claimant was at no disadvantage because the notes of those phone calls were not provided. Finally, Ms Peto confirmed that notes of phone calls rather than the investigation meetings themselves, did not exist. We are persuaded that no other notes of phone conversations existed because they were not present in the bundle or in any SAR response documents sent to the Claimant after her SAR request that we were aware of.

377. The Claimant was allowed a substantial opportunity to present her case to the disciplinary hearing both verbally and in her written submission. The hearing lasted one hour and five minutes.

Conclusions detriment allegations 30 a and b

378. The Claimant alleges that Ms Madani, Ms Messis and Mrs Rogan made false allegations against the Claimant.

379. In our view, we do not believe that any of the allegations made by the Respondent were false for the following reasons:

    379.1. It was fairly obvious that the Claimant had discussed confidential matters about the Pre-School and Mrs Rogan loudly and in public, within earshot of parents and children. Mrs Rogan's health situation was discussed without her consent and discussing the Respondent going out of ratio so publicly significantly risked a detrimental impact on the Respondent's business.

    379.2. It was also clear that the Claimant's demeanour was angry and that the way she had discussed matters was disrespectful to Ms Madani.

    379.3. It is also true that on 27 June 2023, the Claimant did not take steps that it would have been appropriate for her to have taken as deputy manager to try to resolve the child situation.

    379.4. The Claimant fairly accepted that it would have been better to have had the discussion privately. We believe she said this because she knows that it was unprofessional to have behaved in the way she did on 27 June 2023, regardless of the circumstances behind it.

    379.5. Clearly, the fact that confidential information about both Mrs Rogan and the ratio issue were being discussed publicly was in breach of confidentiality and, in addition, discussing Mrs Rogan's private situation about working from home and her pay for doing so was clearly inappropriate, unnecessary and a misuse of Mrs Rogan's private information.

379.6. We are persuaded that this breached the Respondent's polices and procedures.

379.7. It is also clear that the Claimant did not properly fulfill her role as deputy manager that day, because she failed to take any steps to try to rectify the ratio issue herself.

380. It is also clear that Ms Lewin drafted the allegations in the invite letter.

381. The only allegation Ms Messis made was of unprofessional conduct on 27 June 2023.

382. The only allegations Ms Madani made were the unprofessional conduct allegation and the race discrimination allegation, neither of which can be reasonably classified as false.

383. Mrs Rogan made no allegations at all. She simply had to manage the allegations made by others.

384. Consequently, allegation 30 a in the list of issues is dismissed because none of the allegations were false ones.

385. When considering allegation 30 b, we are not persuaded that the time from the incident to the fact finder meeting, namely 27 June 2023 – 5 July 2023 (just over a week) was a significant delay. By that time, Mrs Rogan had received statements from everyone involved or at least discussed the incident with everyone involved and assisted in organizing the fact finder meeting with the Claimant.

386. After that meeting, because of the behaviour of Mrs Rogan and the Claimant, the investigation stalled because the Respondent needed to engage an external HR consultant, the Claimant then refused to properly engage with her and then the Claimant was absent on sick leave.

387. None of these reasons were anything to do with the Claimant's protected disclosure from 27 June 2023.

388. Consequently, allegation 30 b in the list of issues is dismissed.

The final written warning and afterwards

389. On 11 January 2024, the Claimant presented her claim form to the Employment Tribunal.

390. The outcome of the disciplinary hearing was that the Claimant was issued with a final written warning on 23 January 2024.

391. In our view, that was a reasonable sanction to apply in the circumstances. We say that because the evidence about what happened during the incident on 23

June 2023 was reasonably clear and many employers could have come to the same decision based on the evidence being reviewed. Some employers may have been more lenient and issued a first warning, others could have dismissed the Claimant for her conduct.

392. The Claimant took issue with one section of the letter. The letter read as follows:

"Dear Laura,

We are sorry for the delay in getting back to you however, we were waiting on Ruth Lewins answer to your questions which are attached.

You attended a disciplinary hearing on 15th December 2023. I am writing to inform you that Barrow Hill Pre-School have come to a decision that a final written warning is the outcome.

This warning will be placed in your personal file but will be disregarded for disciplinary purposes after 12 months provided your conduct improves over this period. Any further misconduct will result in dismissal with appropriate notice.

Barrow Hill would like to invite you back to work w/c Monday 5th February 2024 at 7.45 am.

You have the right to appeal against this decision in writing to myself within 5 working days of receiving this disciplinary decision.

If you do not wish to return to your workplace then please can you put this in writing within 5 working days.

Yours Sincerely,
Adrienn Peto
Chair
Barrow Hill Pre-School"

393. The Claimant claims at paragraph 30 m that the letter is alleged to have requested the Claimant's resignation within 5 working days should she not wish to return to work.

394. Looking at the wording of the letter in the context of the Claimant being off sick at that time and her having documented that part of the reason for why she was absent was the grievance and disciplinary procedures remaining unfinished, the letter clearly does not invite the Claimant's resignation.

395. In addition, the reason why the final warning letter was issued is clear from the disciplinary procedure documents and the letter itself. The final warning as issued because Ms Peto believed the Claimant was guilty of the allegations made against her.

396. On 30 January 2024, the Claimant wrote to Mrs Rogan to appeal the outcome of the disciplinary process at page 731 in the bundle. The letter is substantial and

attaches numerous appendices. The length of the appeal documents was 33 pages.

397. On 2 February 2024, the Claimant provided another fit note stating she was unfit for work.

398. After receipt of the appeal, on 6 February 2024, Mrs Rogan sought advice from Croner and entered into a contract with them at page 956. Croner then provided advice to the Respondent via Millie Jenkins, a paralegal as shown at page 958 in the bundle.

399. Mrs Rogan was taking advice with a view to setting up the Claimant's appeal meeting.

400. On 22 February 2024, Mrs Rogan emailed the Claimant about her February pay. In that email she stated at page 773:

"Good Morning Laura,

Please find attached February pay slip having spoken to Sally there will be a couple of weeks in March which will also include your holiday pay up to date.

Many thanks, Mandy"

401. The Claimant claims this is an act of detrimental treatment because she raised a protected disclosure. She claims that she did not ask for any holiday pay to be paid to her and this *"distressed her".*

402. We cannot think why this would have distressed the Claimant as she alleges. Ultimately, the Claimant's contract of employment stated that no annual leave would automatically carry over at page 671 and therefore there was a chance that if she wasn't paid this in February and didn't take it in March she might lose the holiday pay altogether.

403. In addition, the email only suggests to the Claimant what would happen in March and in fact did not then actually happen because the Claimant's SSP was coming to an end on 6 March 2024.

404. On the same date, after a period of ill health, Mrs Rogan's mother was very seriously ill. The hospice she was living at called Mrs Rogan to say her mother only had another couple of hours to live and unfortunately she died later on 22 February 2024.

405. Mrs Rogan was then on bereavement leave from 22 February 2024 until 5 March 2024 as per her statement at paragraphs 64 and 65.

406. On 5 March 2024, the date her SSP ran out and the date that Mrs Rogan returned to work, the Claimant resigned with immediate effect. Her letter read as below:

"Dear Amanda

I am writing to inform you that I feel I have been left no option, but to resign from my position as Deputy Manager in accordance with my contract dated 2nd September 2019 at Barrow Hill Preschool as of immediate effect from 5th March 2024 . Please arrange for my final payslip and P45, together with any other materials such as my certificates to be sent to my home address.

You should be aware that I am resigning in response to repudiatory breach of my contract by my employer and therefore I consider myself constructively dismissed.

The reason for my decision is that following the letter from the Chair of Trustees, Adrienn Peto on the 23rd January 2024, I was advised that I was being issued a final written warning for raising an internal disclose to the trustee committee who were in place at the time. It was also stated in the letter, that should I not wish to return to work, that I resign within 5working days.

I lodged my wish to appeal against the final written warning in a letter, and this was sent to you on the 30th January 2024. I am yet to receive a response. Therefore, I assume that you do not intend to give me my statutory right to appeal, or to hear it.

This is further supported in your email to me on the 22nd February 2024, in which you state that you will be paying my holiday pay up to date in March payroll. I have not requested this to happen.

As you know, I have been signed off as unfit to work, due to work-related stress, anxiety and reactive depression since the 4th September 2023, following the detriment I was subjected to after raising the disclosure on the 27th June 2023. Rather than my mental health recovering, the detriment I have received from the 3rd July 2023, to now, from the preschool has exacerbated my symptoms. It saddens me that my employment has ended this way, as I truly loved my role at Barrowhill, but I have reached a point where I cannot take anymore.

Yours sincerely"

407. It is likely the Claimant knew Mrs Rogan's mother was unwell, she was a member of the extended family herself. We also conclude that the Claimant knew of Mrs Rogan's mother's death given Mrs Rogan's email sent on 6 March 2024 at pages 775 – 776 in the bundle.

408. In that email Mrs Rogan stated *"I do sincerely apologise for the delay in contacting you, as you know I have been preoccupied recently due to unfortunate events."* Those events being her recent bereavement.

409. The email then offers a welfare meeting and then an appeal meeting afterwards. Mrs Rogan stated that Croner would conduct the welfare meting with the Claimant. The Claimant is also informed that Mrs Rogan only returned to work that day, 6 March 2024.

410. The Claimant then responded by email of the same date stating on the one hand that shew as sorry to hear of Mrs Rogan's loss, yet on the other complaining that the delay, which the Claimant knew was because of the loss of Mrs Rogan's mother, was the last straw for her.

411. It is surprising to read that the Claimant believed a delay in contacting her about her appeal was being used as justification for the Claimant's resignation, when she knew that at least a significant part of that delay was caused by Mrs Rogan's mother passing away.

412. The Claimant then goes on to refuse to attend any appeal meeting or welfare meeting and instead wants her resignation processed with her P45 and final pay being forwarded to her.

Detriments 30 l – o - conclusions

413. When considering detriment 30 l, applying **Kong,** it was clear that the real reason why the Claimant was issued with a final written warning was because of her conduct on 27 June 2023 and not the fact that she had raised the points she had in her protected disclosure.

414. Applying the guidance in **Evans** and **Patayioutou,** in our judgment the manner in which the protected disclosure of 27 June 2023 was communicated and the poorly chosen location of the conversation including the aggressive way in which the disclosure was made are all properly severable from the information and alleged relevant failures within it.

415. The final warning was issued because of these separable features, not the disclosure and its content.

416. Consequently, allegation 30 l is dismissed.

417. Allegation 30 m also fails on the facts. The outcome letter did not ask the Claimant to resign within 5 days and cannot reasonably be read as such.

418. When considering allegation 30 n, it is correct that the Respondent did not organise an appeal meeting or consider the appeal in any detail.

419. However, after **Kong,** the real reason why that happened is because the Claimant was offered an appeal and declined it because she had already resigned and wanted to pursue her Tribunal claim. It was therefore the Claimant who caused the appeal process to fail, not the Respondent.

420. Consequently allegation 30 n is dismissed.

421. Then we come onto the final detriment claim allegation 30 o. When considering the test for detriment in **Williams v Swansea** and **Jesudason,** we are not persuaded that it was reasonable for the Claimant to view an email as stating that she might be paid some annual leave in March as putting her at a

disadvantage. No harm actually resulted, and she could have queried this and discussed it with the Respondent.

422. In our view, the Claimant had an unjustified sense of grievance about this issue.

423. In any case, Mrs Rogan sent the 22 February 2024 email to the Claimant because she had been advised to by the accountant and not because of anything to do with a protected disclosure.

424. Consequently, for either reason above, allegation 30 o fails and is dismissed.

425. Additionally, none of the above allegations of detriment alleged to have taken place after 19 August 2023 and proven factually to have taken place. happened because of any of the content of the emails to LADO, OFSTED or the Charity Commission.

Constructive dismissal – conclusions

426. We first consider **Humby.** The Claimant relied on the breach of the implied term of mutual term of trust and confidence that exists after **Malik**. She did not rely on any other clause. No breaches of express clauses were relevant to this case.

427. We then considered the guidance in **Claridge** and **Gogay.** The Respondent would be running the argument that if any of the factual allegations alleged to be either individual or part of the cumulative breach of contract relied upon for constructive dismissal.

428. We then turn to the sequence of questions in **Kaur.** The first question we need to answer, is what the most recent act on the part of the employer that the Claimant argues amounted to a breach of contract was.

429. Here the Claimant relies upon a last straw situation as envisaged in **Lewis.** She says that by 5 March 2024, she had not had a response to her appeal against final written warning.

430. It is clear from the Claimant's resignation letter that the February 2024 email that the last straw relied upon was at least part of the reason for the resignation as required by **Omilaju.**

431. We then looked at the second question in **Kaur** about whether the contract had been affirmed since the alleged last straw. It is clear that it has not been affirmed. The Claimant resigned with immediate effect on 5 March 2024 the point at which she said she had waited long enough for a response to her appeal just over a month.

432. Then we turn to the third question, which is whether the last straw conduct on its own was a repudiatory breach of contract. We find that it was not. There is no condition in the contract of employment that makes any specific appeal response time a clause that goes to the heart of the contract of employment and, indeed,

the Claimant has not relied on any individual repudiatory breach, but a cumulative one.

433. We then turn to the fourth question in **Kaur,** namely whether the last straw was part of a sequence of events that collectively breached trust and confidence.

434. The Claimant relied on similar allegations as for her detriment claims. We consider each in turn.

435. When considering paragraph 6a of the list of issues, we have already found that the allegations made by Ms Madani, Ms Messis and the Respondent were not false allegations. The Claimant has failed to prove this conduct happened.

436. When considering 6b, it is correct that Mrs Rogan failed to hear the Claimant's grievance. However, that failure was done with reasonable and proper cause.

437. The reasonable and proper cause was made up of the fact that Mrs Rogan was a named perpetrator in the grievances so it wasn't proper for her to deal with those complaints, the Claimant did not think it appropriate for Mrs Rogan to hear the grievance which Mrs Rogan accepted, she then tried to organise for a consultant to deal with the grievance. All of those reasons were, in our view, legitimate and reasonable ones.

438. The Claimant then refused to properly engage with Ms Bailey about the grievance. That was because of the Claimant and not anything to do with the Respondent.

439. We then consider 6c:

439.1. First the Claimant alleged that there was a delayed provision of the allegations. That is true, there was a significant delay in the allegations being presented to the Claimant in full, from 27 June 2023 to 30 November 2023. However, those delays were caused by a number of things such as for example the Claimant initially refusing to engage with Mrs Rogan about the grievance, then the Respondent needing to recruit an external HR consultant, then the Claimant refusing to engage with Ms Lewin, then only wanting to answer questions in writing with those answers being provided on 9 November 2023 at page 761 in the bundle.

439.2. Secondly, the Claimant alleged there had not been a fair, thorough or impartial investigation. We fairly easily reject that argument. The investigation was eventually conducted by Ms Lewin who was an independent and impartial external consultant. He investigation interviewed all relevant witnesses and looked at a substantial amount of documentary information and evidence. The investigation from start to finish was thorough, fair and impartial.

439.3. Thirdly, the Claimant argued that there was an unreasonable delay in providing the disciplinary outcome letter. What happened was that the disciplinary meeting took place on 15 December 2023. The Respondent

was then closed for Christmas until 8 January 2024. The outcome letter was provided 23 January 2024. It effectively therefore took 12 working days to finalise the decision and send the outcome letter. That was neither an unreasonable timeframe, nor a breach of contract or indeed the ACAS code in our view.

439.4. Finally, there was the pint made about a failure to provide *"the relevant evidence ahead of the disciplinary hearing"*. We are not persuaded that the Respondent failed to provide that evidence. The Claimant had everything she needed to be able to fairly defend herself at the disciplinary hearing including all the statements, the investigation report and the investigation appendices as well as the relevant policy documents. By the disciplinary meeting the Claimant had nearly all her requests for further information responded to positively with the provision of documents.

440. Consequently, 6c is not made out on the facts either.

441. The there is paragraph 6d and the issue of the final written warning. It is correct that Ms Peto did issues the Claimant with a final written warning. However, in our view that sanction was within the band of reasonable responses given the Claimant's conduct on 27 June 2023. Ms Peto had reasonable and proper cause for issuing that final warning.

442. Allegation 6e did not happen. The Claimant was not asked to resign within 5 working days if she did not wish to return to work.

443. Allegation 6f did take place – Mrs Rogan did advise the Claimant that in the next month's pay this would include accrued but untaken annual leave, and it didn't mention the Claimant's appeal in that email. However, the payment for annual leave was not underhand or in any way improper. Mrs Rogan was simply being transparent about what her accountant had advised her to pay the Claimant in March 2024, given her SSP was about to run out and the leave year would be coming to an end.

444. Allegation 6g asks if the 22 February 2024 email about holiday pay was the last straw. We are not persuaded it was. The lack of response to the appeal by 5 March 2024 was the last straw.

445. Finally, at 6h, the Claimant argues that Mrs Rogan failing to arrange an appeal hearing or consider the appeal was part of the breach of trust and confidence.

446. It is true that Mrs Rogan did not consider the appeal in any detail or organise an appeal meeting before the Claimant resigned. However, the reasons for that were because Mrs Rogan was engaging and external company to advise about and deal with the grievance and then on 22 February 2024, her mother died leading to a period of bereavement leave.

447. Given the Claimant had already sued the Respondent, it was reasonable for Mrs Rogan to seek legal advice about the appeal. It was also reasonable for Mrs Rogan to take some time off work because her mother had just died. She was

absent for 10 days from 22 February 2024, which was not an extensive period of time.

448. Consequently, the Claimant has failed to meet the burden of proving that there was a cumulative breach of the implied term of trust and confidence. None of the behaviour of the Respondent, proven to have actually taken place, was calculated or likely to destroy trust and confidence. In any event for all proven conduct, the Respondent had reasonable and proper cause for behaving how it did, or the issue was a result of the Claimant's own behaviour.

449. The Claimant resigned and consequently all of her unfair dismissal claims fail. There was no dismissal.

Time

450. Due to us deciding that none of the alleged detriments were in fact detrimental treatment on grounds of any of the Claimant's protected disclosures, the time limit point is moot.

Outcome of the case

451. Consequently, having taken into account all the evidence we were referred to, the submissions of both parties, the law and the claims and defenses made, the Claimant was not dismissed, she was not subjected to detrimental treatment because of making a protected disclosure, her contract of employment was not breached in any way, and she was not unfairly dismissed.

452. All the Claimant's claims fail, and they are dismissed. That concludes these proceedings.

Reasons approved by:

Employment Judge G Smart

On: 11 April 2025

REASONS SENT TO THE PARTIES ON

....16 April 2025.....

.....

FOR THE TRIBUNAL OFFICE

ANNEX ONE – AGREED LIST OF ISSUES

IN THE LONDON CENTRAL EMPLOYMENT TRIBUNAL **CLAIM NO: 2200448/2024**

B E T W E E N :

MS LAURA PAGNELLO

Claimant

- and -

BARROW HILL PRESCHOOL

Respondent

AGREED LIST OF ISSUES

Jurisdiction

1. The Claimant started ACAS Early Conciliation on **12 November 2023** and her certificate was issued on **19 December 2023**.

2. The Claimant issued her claim with the Tribunal on **11 January 2024**.

3. The Respondent therefore contends that the Claimant has issued her claim in time only for conduct which occurred, or ongoing conduct which continued, after **13 August 2023.**

4. Was the detriment complaint made within time? The Tribunal will decide:

    a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?
    b. If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
    c. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
    d. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Constructive unfair dismissal

5. Was the Claimant constructively unfairly dismissed contrary to sections 95 or 98 of the Employment Rights Act 1996 ('ERA')? The Claimant relies on the implied term of mutual trust and confidence.

6. Did the incidents the Claimant alleges to have experienced as set out below occur as alleged or at all:

    a. Naba Madani, Anissa Messis, and Amanda Rogan made false allegations against the Claimant that led to an investigation commencing on **3 July 2023** and resulting in disciplinary proceedings that commenced on **15 December 2023,** being:

        i. Acted in a manner that was disrespectful and unprofessional whilst discussing preschool business in front of parents on 27 June 2023;

        ii. Breached the disciplinary policy regarding confidentiality; and

        iii. Did not take responsibility in the manager's absence which is a potential breach under the Preschool's disciplinary policy.

    b. Amanda Rogan on behalf of the Respondent failed to hear the Claimants grievance dated **3 August 2023** that was resubmitted on **23 October 2023**.

    c. Failed to follow the ACAS Code in respect of the disciplinary process, in that there was a delayed provision of the allegations, a delay in the investigation, complete a fair, thorough and impartial investigation, a delay in the outcome of the disciplinary hearing and a failure to provide the relevant evidence ahead of the disciplinary hearing.

    d. On **23 January 2024** the Respondent issuing the Claimant with a final written warning.

    e. State in the outcome letter that should the Claimant not wish to return to work she should resign within 5 working days.

    f. On **22 February 2024** Amanda Rogan writing to the Claimant advising that she would be paid her accrued holiday for the current holiday year, without it being requested and without reference to her appeal.

    g. Was Amanda Rogan's email on the 22 February 2024,the final straw for the Claimant resulting in them resigning citing constructive dismissal.

h. Amanda Rogan failed to arrange an appeal hearing or consider the Claimant's appeal after it was lodged in writing on **30 January 2024** but delayed any reference to this until **6 March 2024**.

7. If the Respondent acted or failed to act as set out above, in so acting or failing to act did the Respondent behave without reasonable or proper cause in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent?

8. Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

    a. whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

    b. whether it had reasonable and proper cause for doing so.

9. Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

10. Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

11. Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

12. If the Claimant was dismissed, what was the reason or principal reason for dismissal?

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

14. If so, the Claimant will be regarded as unfairly dismissed. If not, was it a potentially fair reason?

15. Did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the Claimant?

16. The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

Remedy for unfair dismissal

17. The Claimant does not wish to be reinstated or reneged to her previous employment.

18. If there is a compensatory award, how much should it be? The Tribunal will decide:

    a. What financial losses has the dismissal caused the Claimant?

    b. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

    c. If not, for what period of loss should the Claimant be compensated?

    d. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

    e. If so, should the Claimant's compensation be reduced? By how much?

    f. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

    g. Did the Respondent or the Claimant unreasonably fail to comply with it

    h. If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

    i. If the Claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

    j. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

    k. Does the statutory cap of fifty-two weeks' pay or £105,707 apply?

19. What basic award is payable to the Claimant, if any?

20. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

Protected Disclosure

21. Did the Claimant make a qualifying disclosure as defined in section 43B of the Employment Rights Act 1996 ("ERA")?

22. The Claimant relies on the following disclosure(s):

    a. On **27 June 2023** she informed Naba Madani, Chair of the Trustees, and Anissa Messis, Treasurer that the Respondent was under ratio;

        i. The Respondent accepts that the disclosure on **27 June 2023** to Ms Madani and Ms Messis amounted to a protected disclosure.

b. Email dated **19 August 2023** to the Charity Commission

c. Email dated **19 August 2023** to the Office for Standards in Education, Children's Services and Skills ("OFSTED")

d. Email dated **19 August 2023** to the Local Authority Designated Officer ("LADO")

23. Did the emails on **19 August 2023** disclose information?

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

25. Was that belief reasonable?

26. Did she believe it tended to show that:

a. a person had failed, was failing or was likely to fail to comply with any legal obligation;
b. the health or safety of any individual had been, was being or was likely to be endangered;
c. in respect of the disclosure to the charity commission only information tending to show any of these things had been, was being or was likely to be deliberately concealed.

27. Was that belief reasonable?

28. If the Claimant made a qualifying disclosure on 19 August 2023, was it made:

a. Under sections 43F, 43G2a, 43G1d, or 43H ERA 1996 If so, it was a protected disclosure.

Detriment

29. Was the Claimant subjected to detriment(s) on the grounds of having made a protected disclosure pursuant to s.47B ERA?

30. The Claimant relies upon the following alleged acts as detriments on behalf of the Respondent:

a. Ms Madani, Ms Messis and Amanda Rogan made false allegations that led to an investigation that commenced on **3 July 2023** and then resulted in disciplinary proceedings that commenced on **15 December 2023**;

b. Ms Rogan failed to carry out the investigation in a timely manner;

c. Colleagues, Ms Shailer and Ms McKenna ignoring the Claimant from **5 July 2023**, for example in respect of the organisation of a fair on **14 July 2023** and by failing to respond to questions, such as what is the time?

d. On **9 July 2023** Ms Rogan demoted the Claimant;

e. On or around **10 July 2023** the Claimant's lunchbreaks offsite were refused or changed by Ms Rogan

f. From on or around **5 July 2023** duties form the Claimant including opening the door for the children in the morning and helping with the children's lunches with withdrawn by Ms Shailer.

g. On or around **19 July 2023** Ms McKenna undermined the Claimant in front of the children in respect of sharing food/cucumber.

h. At 16:28 on **20 July 2023** Ms Shailer post a message in the "A- Team" group chat stating:

    i. "Left witchypoo mopping Coz Mandy said she has to do her work lol"

i. Around **20 July 2023** Ms Shailer and/or Ms McKenna put left over food in a gift bag meant for the Claimant;

j. The Respondent failed to hear the Claimant's grievance dated originally **3 August 2023** (that was resubmitted on a later date being the **23 October 2023**);

k. The Respondent failed to follow the ACAS Code in respect of disciplinary hearing in respect of a delayed provision of the allegations to the Claimant, a delay in the investigation, a delay in the outcome of the disciplinary hearing and a failure to provide the relevant evidence to the Claimant ahead of the disciplinary hearing;

l. Issue a final written warning on **23 January 2023;**

m. On **23 January 2024** did the Respondent state in the outcome letter that should the Claimant not wish to return to work she should resign within 5 working days.

n. Fail to arrange an appeal hearing or consider the Claimant's appeal after it was lodged in writing on **30 January 2024**;

o. On **22 February 2024** the Respondent writing to the Claimant advising that she would be paid her accrued holiday for the current holiday year, without it being requested and without reference to her appeal

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

32. If so, was it done on the grounds that they made a protected disclosure?

Remedy for Protected Disclosure Detriment

33. What financial losses has the detrimental treatment caused the Claimant?

34. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

35. If not, for what period of loss should the Claimant be compensated?

36. What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded for that? The Claimant contends that the detrimental treatment had an impact on her mental health.

37. Is it just and equitable to award the Claimant other compensation?

38. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

39. Did the Respondent or the Claimant unreasonably fail to comply with it?

40. If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

41. Did the Claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the Claimant's compensation? By what proportion?

Remedy

42. If the Claimant's claims are upheld, what financial remedy is appropriate in all of the circumstances?

END