EMPLOYMENT TRIBUNALS

Claimant: Miss N Murray

Respondent: Rosehill Day Nursery Limited

Heard at: Manchester (by CVP) **On:** 26-30 January 2026

Before: Employment Judge McDonald
Mr G Pennie
Ms S Moores

REPRESENTATION:

Claimant: Ms A Kaura (Counsel)
Respondent: Miss S English (Litigation Consultant)

WRITTEN REASONS

JUDGMENT having been sent to the parties on 24 March 2026 and written reasons having been requested in accordance with Rule 60 of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

Introduction

1. By a claim form received by the Tribunal on the 14 March 2024 the claimant brought complaints of disability discrimination, whistleblowing and health and safety detriments and automatically unfair dismissal.

2. The final hearing took place over 5 days at Manchester Employment Tribunal. The parties attended remotely by CVP videolink.

3. The parties agreed that we would first hear evidence and submissions on liability and give our judgment on liability. If required, and if time allowed, we would

then hear the case on remedy. We gave our judgment on liability but there was no time to deal with remedy. Part of the claim succeeded, so a remedy hearing is required. It has been listed for 21 April 2026 and directions given as to preparation for that hearing.

The Issues

4. The Bundle included a List of Issues prepared on 25 September 2024 for the case management preliminary hearing on 2 October 2024. That list needed refining during this hearing. It was produced before the claimant's Further Particulars of Claim dated 25 October 2024 and did not specify relevant matters such as the "something arising" for the purpose of the s.15 Equality Act 2010 complaint or the relevant PCPs for the reasonable adjustment complaint.

5. At lunchtime on Day 3 of the hearing we sent the parties a revised List of Issues based on our understanding of the case as pleaded. We discussed the list on the morning of Day 4.

6. The parties agreed the draft list we circulated subject to one issue from the claimant. In our draft list there was only 1 whistleblowing detriment (D1 – refusal to extend time for the appeal). That had been identified on Day 1 of the hearing. In her amended version of that list Ms Kaura added 4 further detriments. They were:

> "**D2 Failure to suspend or protect the Claimant following the protected disclosure.**
>
> **D3 Subjecting the Claimant to a disciplinary process tainted by the disclosure.**
>
> **D4 Escalation of allegations shortly after the disclosure.**
>
> **D5 Procedural handling of the appeal which itself constituted a detriment."**

7. We decided that the addition of those detriments amounted to an application to amend. We considered that application to amend on the morning of Day 4. We refused it, giving ora reasons for doing so. In summary, we decided the hardship and injustice to the respondent if we granted the application outweighed that to the claimant of not granting it. Neither party requested the reasons for our decision in writing.

8. The final List of Issues is included as an Annex to this judgment.

Preliminary Matters

<u>Concession of disability</u>

9. The claimant says she was at all relevant times a disabled person by reason of a mental health condition. By a letter dated 27 February 2025 the respondent's representative confirmed that the respondent conceded that the claimant had a disability at the relevant time.

10. By an email of 6 October 2025, the respondent's representative applied to withdraw that concession on the basis that the writer of the letter of 27 February 2025 had misunderstood the respondent's instructions as to the extent of the

concession. it said the respondent's position was that it conceded that the claimant had a disability but not at the relevant time.

11. On 17 November 2025 Employment Judge Batten rejected that application. She decided that the respondent's concession as set out in the letter of 27 February 2025 stood and could not be withdrawn. There was no appeal against that decision.

12. As a result, we decided the case on the basis that the claimant was a disabled person at the relevant time by reason of her mental health condition.

Reasonable Adjustments

13. At the start of the hearing, we discussed with the parties whether we needed to make any adjustments to the way we conducted the hearing to take into account the claimant's disability or any mobility or other difficulties faced by any of the respondent's witnesses. It was agreed that no adjustments were required other than possibly needing additional breaks.

Potential strike out application relating to alleged fabricated documents

14. At the start of the hearing, Miss English indicated the respondent wished to apply to strike out the claimant's claim. That application was based on an allegation that the claimant had fabricated 2 documents. They were the typed version of investigatory meeting notes with the claimant on 17 October 2023 (p.169-171) and a "Formal Whistleblowing Statement" signed by the claimant and dated 5 October 2023 (p.194).

15. We decided that to understand the nature and context of those documents and make any findings about whether they were "fabricated" by the claimant we would need to hear evidence about them. It was agreed that we would hear the claimant's oral evidence and then the respondent would decide whether it wished to pursue the strike out application.

16. During that evidence it became clear that the notes at p.169-171 (including the additional section at its end) was a document produced by the respondent rather than the claimant. Having heard the evidence, Miss English confirmed that the respondent would not be pursuing the strike out application.

Evidence

17. The hearing bundle consisted of an index and pages numbered 1-337 ("the Bundle"). References in this Judgment to page numbers are to page numbers in the Bundle.

18. We heard oral evidence from the claimant in support of her case. She had provided a Disability Impact Statement dated 9 December 2024 and a Written Witness Statement dated 22 January 2026.

19. Emma Clegg had provided a written witness statement in support of the claimant's case. She is the owner of a nursery in Carlisle and the claimant's current employer. She was available to give oral evidence but did not do so because Miss English confirmed she did not intend to cross-examine her.

20. For the respondent we heard oral evidence from the following witnesses:

- Rosie Hart ("Mrs Hart") – a shareholder and director of the respondent.
- Samantha Budden ("Mrs Budden") - a shareholder and director of the respondent and Mrs Hart's sister. Mrs Budden also used the surname "Ward" during the events in this case.
- Nicola Little ("Mrs Little") – a nursery manager.
- Jodie Matthews-Richards ("Mrs Matthews-Richards") – a nursery manager

21. Each of those witnesses had provided a written witness statement. They were all cross examined by Ms Kaura, answered questions from the Tribunal and were re-examined by Miss English.

22. In addition to the Bundle, we had a helpful Chronology and Cast list.

The Hearing

23. On Day 1 of the hearing we dealt with the preliminary matters referred to above. Having read the witness statements and the relevant documents in the morning we heard the claimant's oral evidence in the afternoon.

24. On Day 2 we heard oral evidence from Mrs Hart and Mrs Budden.

25. On Day 3 we heard oral evidence from Mrs Little and Mrs Matthews-Richards.

26. On the morning of Day 4 we heard and refused the claimant's application to amend to add detriments D2-D5.

27. Both representatives provided written closing submissions. After an extended break at lunchtime on Day 4 to allow the Tribunal to read those submissions and to allow counsel to finalise their oral submissions we heard those oral submissions.

28. We deliberated in chambers and gave oral judgment on the afternoon of Day 5.

Findings of Fact

29. In this section we set out our narrative findings about the events in the case. Where relevant we set out our detailed findings of fact about specific issues in the List of Issues in our "discussion and conclusion" section. The respondent is a children's nursery, and the claimant was employed from 16 May 2022 until her dismissal on 20 October 2023. At the time of her dismissal, she was employed as the Team Leader for Red Robins Room. She had been promoted to that role from her original role of Nursery Practitioner around the end of 2022.

<u>The "disclosure" on 28 September 2023</u>

30. The disclosure which the claimant characterises as both a protected disclosure for whistleblowing purposes and raising health and safety concerns for the

purposes of s.44(1)(c)(i), that happened on 28 September 2023. Factually there is no dispute that on that date the claimant told Mrs Matthews Richards, one of the managers at the nursery, that she believed that one of the other staff called Chloe had been vaping in the disabled toilet.

31. We find that the respondent's staff used that toilet because it was convenient, especially for those working in Red Robins. We find that what the claimant told Mrs Matthews Richards was that she had smelt a fruity vape smell in the toilet and that Chloe had been using the toilet on a more regular basis than she would have expected. She also said that there was a vape mist in the air when she went to the toilet after Chloe. The respondent did not dispute that the claimant had raised these matters verbally. There was also no dispute that following her raising it the respondent's managers, Mrs Matthews Richards and Mrs Little, had carried out a brief investigation. They checked the toilet and concluded that there was no vape smell. They spoke to Chloe who denied the allegation.

32. There is a dispute about what the claimant did next. The claimant's evidence was that she was asked to and did handwrite a note of the allegations on that same day. Her evidence was that Mrs Matthews Richards asked her to do that and that she handed the handwritten document to Mrs Matthews Richards. The claimant's evidence was that she did not have a copy of her handwritten document.

33. The respondent's witnesses denied that that ever happened. We therefore have to make a finding of fact where there is a clear dispute between the witnesses. We prefer the claimant's evidence that she was asked to and did handwrite a note of the allegations on the day. We find her recollection of events was clearer than that of Mrs Little or Mrs Matthews-Richards. On a number of occasions during their evidence they said they could not recollect matters. In contrast, we find that the claimant's recollection of the incident was clear.

34. We also find the claimant's version supported by the fact that the respondent's approach was in general to commit things to writing when there was an incident at the nursery. There were records of the claimant's allegation in writing both in Mrs Hart's work diary and in a note created by Mrs Hart after the investigation carried out by Mrs Little and/or Mrs Matthews-Richards. We find that it was the respondent's practice to log concerns that were raised. There was a log of staff concerns in the Bundle. Given that that was the respondent's practice we find it more plausible than not that the claimant would have been asked to put the allegation in writing.

35. The respondent submitted strongly that the document at p.94 of the Bundle supported a finding that the claimant was being dishonest in her evidence about the disclosure and acting in what they referred to as a fraudulent manner. That document was a typed document headed "Formal Whistleblowing Statement" signed by the claimant and dated 5 October 2023.

36. We accept that that document was not provided by the claimant to Mrs Matthews-Richards at the time of the disclosure. The claimant in her evidence did not suggest that it was. Her evidence was that it was a document created after the event to record what happened when she reported her allegation to her managers. We accept her evidence that she was advised to record the incident in writing by ACAS.

37. On a fair reading of the document at p.194 we find it plainly reads like a statement of evidence. It refers to matters in the past tense. It says, "this is when I informed Jodie". That does not seem to us to be something the claimant would have put in any handwritten note that she would have handed to Mrs Matthews Richards on 28 September 2023. The respondent suggested that p.194 was an attempt by the claimant to reproduce the handwritten note that she had handed in Mrs Matthews Richards. We find that it was not and accept the claimant's evidence that it was instead her statement produced to capture what had been disclosed on 28 September 2023. We find the creation of such a statement to be in line with what we would plausibly expect an advisor would tell a claimant to do if she contacted them about a whistleblowing incident.

38. To be fair to the respondent we will deal with the two aspects of the document that raised concerns. The respondent submitted both supported a finding that p.194 was an attempt to, in their words, fabricate a document and mislead the Tribunal.

39. The first is that the document is dated 5 October 2023 but was obviously created after that date. The claimant's own evidence was that it was created after she was dismissed and after she had spoken to ACAS. That means that it was created at least some weeks after the event when disclosure took place and certainly alter than 5 October. The second was that the claimant had never provided the original of that document during the disclosure process. The document at p.194 is a photograph of a hard copy of the document.

40. When it comes to the wrong date the claimant was unable to explain why the statement was dated 5 October. She accepted that the statement also contains an error about the actual date of disclosure. It says the disclosure was in the week of 2 October when it is accepted that it was on 28 September. The claimant's evidence was that at the time she was wrote the statement she was not yet back on her antidepressant medication and that this would have led her to overthink matters and make mistakes when it came to details. We found the claimant a credible witness and her evidence on this point reliable. We accept her evidence and find that that explains the inaccuracies in the dates.

41. When it comes to the failure to disclose the original of the document it does not seem to us that we have sufficient evidence about the disclosure process to be able to make clear findings as to why there was no such disclosure. When it comes to the suggestion that the failure to disclose was suspicious or an attempt to mislead the Tribunal, the claimant has never asserted in the Tribunal hearing that p.194 was a document handed to the respondent at the time she made the disclosure. She accepted in her written witness evidence that that was not the case. There is also no dispute between the parties that the vaping disclosure happened on 28 September 2023. The respondent accepts the disclosure recorded in the statement at p.194 did happen, perhaps not in the exact terms set out in that statement and not on the date stated in it. Except to the extent that the respondent drew our attention to it, p.194 was not a significant influence on our decision when it came to the facts of the case.

42. As we have said, we have found that the document at p.194 was created on the advice of ACAS at a point when the claimant was not thinking clearly. It is not to our mind a reliable document which we can rely on in making our findings of fact. We accept that although there were aspects of the claimant's evidence about the document that were confused, p.194 was not an attempt by her to "fabricate" a

version of the document handed to Mrs Matthews-Richards on 28 September. We do not accept that there was any dishonesty or any attempt to mislead the Tribunal on the claimant's part in creating it.

Investigation and dismissal

43. Moving on to the other findings of fact there is no dispute that on the 12 October 2023 the colleague called Chloe resigned and sent an email making various allegations about the claimant's conduct. That was in an email at pages 191 and 192. Those allegations related both to the way that the claimant spoke to colleagues and to the way that she treated children. On 13 October the respondent held a meeting with Chloe. There were then investigatory meetings held with other members of staff on 13 October and 16 October.

44. The other relevant event which happened around this time was that the members of staff were asked to sign an updated disciplinary policy. Significantly for the purposes of this case the disciplinary policy included a new clause which said that the respondent had a discretion not to apply the full disciplinary procedure in the event of short service. The claimant signed that document on 17 October 2023.

45. On 17 October 2023 the respondent held an investigatory meeting with the claimant. Mrs Hart, Mrs Budden and Mrs Little attended for the respondent. Mrs Little accepted that when she invited the claimant into the meeting she did no more than say "I need to show you something". Her explanation for that was that she didn't want to make matters formal or alert other members of staff in the room that the claimant was being called into a formal meeting. Regardless of Mrs Little's intent, her actions meant the claimant had no notice that what she was being called into was an investigatory meeting at which serious allegations of misconduct were going to be made against her. She denied the allegations made against her of being intimidating to staff, emotionally cold to the children and having favourites. She also denied giving false information to parents about their child regarding toothbrushing. We find the claimant was shocked by the allegations put to her and was not able to fully respond during the meeting. Her response was recorded in the investigatory meeting note at p.169-171. We find that having had time to get over her shock she went to the office the following day to respond more fully to the allegations. Those additional comments were recorded by the respondent at pp.170-171. They included suggesting that the complaint against her may have been from Chloe because the claimant had raised the vape issue about her.

46. The next significant event was on 20 October 2023. On that date a meeting which is referred to as a disciplinary meeting was held. Again, Mrs Little invited the claimant her to come into the office "to conclude everything". The claimant had no notice of what the meeting was about or, more significantly, that it could be a meeting resulting in her dismissal.

47. For the respondent, the meeting was attended by Mrs Hart, Mrs Budden, Mrs Matthews-Richards and Mrs Little.

48. We find it was a brief meeting consisting of little more than the claimant being handed her dismissal letter (p.96). It said that she was dismissed with effect from 20 October 2023 and paid one week's notice in lieu. The grounds for dismissal were said to be:

"1. Intimidating behaviour

2. Bullying and controlling behaviour

3. Not being a positive role model to staff and children."

49. We will return to our findings of fact about the process followed in our discussion and conclusion section. However, in brief it is fair to say that we find that there was an almost complete failure to adhere to the core principles in the ACAS Code of Practice on Disciplinary and Grievance procedures 2015 ("the ACAS Code") in the way that the claimant's disciplinary process was handled.

Appeal

50. The termination letter which the claimant was handed did not refer to a right of appeal. On 21 October, the day after her dismissal, the claimant requested a copy of the appeal procedure. On 26 October the claimant lodged her appeal against dismissal by way of a letter (pp.102-104). She confirmed that was a letter that she herself had written without legal advice. It was set out over 3 pages the aspects of the decision and process which she disagreed. That included the process adopted, the harshness of the sanction applied and an allegation that the dismissal was automatically unfair because the true reason for it was her whistleblowing disclosure about Chloe vaping.

51. On 1 November the respondent confirmed receipt of the appeal and asked the claimant who should chair the appeal. At that point no date for the appeal hearing was set. The claimant responded on 8 November 2023 to request that a member of the Carlisle National Day Nursery Association chair the appeal meeting. At that point the claimant also notified the respondent that she was experiencing worsening mental health and said that she was "putting the meeting on hold for 4 weeks" (p.109-110).

52. On 6 December the claimant emailed again to say that she wanted to stay the process for a further four weeks. She said that was due to her "anxiety and depression still affecting me greatly" (p.111).

53. On 8 December Mrs Budden, one of the co-owners of the respondent and one of the four people who attended the disciplinary hearing, responded by email (pp.112-113). She refused the request for a further extension of time. She said that there had already been a delay in the appeal hearing and "from a business perspective it is important your concerns are investigated in a timely manner". She said that the hearing of the appeal needed to take place by no later than 15 December 2023 either in person or by written submission. She also confirmed the hearing could take place by Teams if the claimant felt unable to attend in person. She concluded her email by saying that if the respondent did not hear from the claimant by 15 December 2023 she would assume that the claimant had accepted the original decision for her dismissal.

54. On 14 December the claimant emailed again requesting that there be a postponement of the appeal until after New Year), specifically citing reasonable adjustments being required because of her mental health. She said the adjustment was to give her time to put together a written statement for the hearing.

55. Mrs Budden responded by email on 14 December to reject the claimant's request. She confirmed the appeal hearing was scheduled for the 15 December and would go ahead at 9am. She said that if the claimant was unable to attend "all previous communications you have made will be used" (p.115).

56. On 15 December the claimant notified the respondent by email that she was unable to attend the appeal hearing (p.117-118). The appeal meeting then went ahead. Attending were Mrs Budden and Mrs Matthews-Richards, both of who had been present at the disciplinary hearing. The appeal hearing was also attended by the respondent's legal advisors by phone. The appeal was unsuccessful. We find based on the evidence that the appeal that took place by way of a paper exercise despite the fact that the grounds of appeal had raised specific issues of fact such as what Mrs Little had told the claimant prior to the 17 October and 20 October meetings. We find there was no attempt to find out whether the factual basis for the claimant's appeal was correct. For example, Mrs Little was never asked about these issues.

57. Following the appeal decision the claimant notified ACAS to begin early conciliation on 4 January 2024. She then filed her Tribunal claim on 14 March 2024.

Relevant Law

The complaints under the Equality Act 2010

58. S.39 of the Equality Act 2010 prohibits discrimination. So far as material to this case it provides as follows:

> **39 Employees and applicants**
>
> **(2) An employer (A) must not discriminate against an employee of A's (B)—**
> **(a) as to B's terms of employment;**
> **(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
> **(c) by dismissing B;**
> **(d) by subjecting B to any other detriment."**

The Burden of Proof

59. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

60. This means that it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Equality Act 2010. If the claimant establishes those facts, the burden shifts to the respondent to

show that there has been no contravention by, for example, identifying a different reason for the treatment.

61. As for what is required to discharge the burden at the first stage, that must be something more than a difference in the relevant protected characteristic and a difference in treatment; see **Madarassy v Nomura International plc [2007] ICR 867, CA**. That said, the something more required at the first stage need not be a great deal; see **Deman v EHRC [2010] EWCA Civ 1279**.

62. A finding that an employer has behaved unreasonably, or treated an employee badly, will not, however, be sufficient, of itself, to cause the burden of proof to shift; **Glasgow City Council v Zafar [1998] ICR 120**.

63. The guidance in **Igen Ltd v Wong [2005] ICR 931, CA** states when the burden has passed, not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. However, that explanation need not be "adequate" in the sense of providing a reason which satisfies some objective standard of reasonableness or acceptability – it does not matter if the employer has acted for an unfair or discreditable reason provided that the reason had nothing to do with the protected characteristic (**Royal Mail Group v Efobi [2021] UKSC 33** at para 29).

Direct discrimination

64. The definition of direct discrimination appears in section 13 of the 2010 Act and so far as material reads as follows:

> **"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".**

65. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

> 66. **"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".**

Discrimination arising from disability ("a s.15 claim")

67. S 15 of the Equality Act 2010 states:

> **15 Discrimination arising from disability**
> **(1) A person (A) discriminates against a disabled person (B) if:**
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

68. The courts have said that there is little to be gained by seeking to draw a distinction between “unfavourable treatment” and “detriment”. The Supreme Court has confirmed that the relevant question is whether the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to their detriment? An unjustified sense of grievance cannot amount to "detriment" (**Shamoon v. Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11**).

69. There is a need to identify two separate causative steps in order for a s.15 claim to be made out (**Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT**):

(1) the disability had the consequence of ‘something’;

(2) the claimant was treated unfavourably because of that ‘something’.

70. In **Basildon** the EAT said it does not matter in which order the tribunal approaches these two steps: ‘It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by “in consequence of”, and thus find out what the “something” is, and then proceed to ask if it is “because of” that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B’s disability’.

71. In **Pnaiser v NHS England and anor 2016 IRLR 170, EAT**, the EAT summarised the proper approach to establishing causation under S.15:

- First, the tribunal has to identify whether the claimant was treated unfavourably and by whom.
- It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant.
- The tribunal must then determine whether the reason was ‘something arising in consequence of the claimant’s disability’, which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

72. For a s.15 claim to succeed the ‘something arising in consequence of the disability’ must be part of the employer’s reason for the unfavourable treatment. The key question is whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, consciously or unconsciously, to a significant extent (**T-Systems Ltd v Lewis EAT 0042/15**). “Significant extent” means a more than trivial part of the reason for the unfavourable treatment **(Sheikholeslami v The University of Edinburgh [2018] IRLR 1090)**. In **Sheikholeslami** the EAT also said that the connection with the disability may involve more than one link in the chain of consequences**.**

73. A s.15 claim will only succeed if the employer (or other person against whom the allegation is made) is unable to show that the unfavourable treatment to which

the claimant has been subjected is objectively justified as a proportionate means of achieving a legitimate aim.

74. The EHRC Code sets out guidance on objective justification. In summary, the aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. Although business needs and economic efficiency may be legitimate aims, the EHRC Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (see para 4.29). As to proportionality, the EHRC Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31).

75. A failure to make a reasonable adjustment will make it very difficult for the employer to argue that unfavourable treatment was nonetheless justified. The converse is not necessarily true. Just because an employer has implemented reasonable adjustments does not guarantee that unfavourable treatment of the claimant will be justified, e.g. if the particular adjustment is unrelated to the unfavourable treatment complained of or only goes part way towards dealing with the matter.

76. The burden of proof provisions apply to s.15 claims. Based on **Pnaiser**, in the context of a S.15 claim, in order to prove a prima facie case of discrimination and shift the burden to the employer to disprove his or her case, the claimant will need to show:

- that he or she has been subjected to unfavourable treatment
- that he or she is disabled and that the employer had actual or constructive knowledge of this
- a link between the disability and the ‘something’ that is said to be the ground for the unfavourable treatment
- some evidence from which it could be inferred that the ‘something’ was the reason for the treatment.

77. If the prima facie case is established and the burden then shifts, the employer can defeat the claim by proving either:

- that the reason or reasons for the unfavourable treatment was/were not in fact the ‘something’ that is relied upon as arising in consequence of the claimant’s disability, or
- that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

<u>Failure to make reasonable adjustments</u>

78. The duty to make reasonable adjustments appears in Section 20 Equality Act 2010 as having 3 requirements. The requirement of relevance in this case is the first requirement in Section 20(3). That is as follows:-

> **"the first requirement is a requirement, where a provision, criterion or practice ["the PCP"] of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".**

79. The EHRC Code of Practice at para 6.10 says that the term PCP "should be construed widely so as to include, for example, any form or informal policies, rules, practices, arrangements, criteria, conditions, qualifications or provisions." In para 4.10 it says that a PCP "may include decisions to do something in the future as well as a one off or discretionary decision".

80. While a one-off act can amount to a practice there has to be some indication that it would be repeated were similar circumstances to arise in the future. This issue was considered in the case of **Ishola v Transport for London 2020 ICR 1204** by the Court of Appeal. The Court of Appeal said that having regard to the function and purpose of the PCP all three words carry the connotation of a state of affairs indicating how similar cases are generally treated or, how a similar case would be treated if it occurred again. "Practice" connoted some form of continuum in the sense that it is the way in which things generally are or will be done. That did not mean that it was necessary for the PCP or practice to have been applied to anyone else in fact. Something may be a practice or done in practice if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises.

81. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in **The Royal Bank of Scotland –v- Ashton [2011] ICR 632** (approved by the Court of Appeal in **Newham Sixth Form College v Sanders [2014]**). A Tribunal must identify:

a) the provision, criterion or practice applied by or on behalf of an employer, or
b) [where relevant] the physical feature of premises occupied by the employer,
c) the identity of non-disabled comparators (where appropriate) and
d) the nature and extent of the substantial disadvantage suffered by the Claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of an employer' and (where relevant) the, 'physical feature of premises' so it would be necessary to look at the overall picture.

The EAT added that although it will not always be necessary to identify all four of the above, (a) and (d) must certainly be identified in every case.

82. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the EHRC Code provides considerable assistance. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the

employer's financial or other resources and the type and size of the employer. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards

83. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) of the 2010 Act defines "substantial" as being "more than minor or trivial".

84. Paragraph 20(1) of Schedule 8 to the 2010 Act provides that:

> **"a person is not subject to the duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know:**
>
> **(a) in the case of an applicant or potential applicant for work, that an interested disabled person is or may be an applicant for the work in question;**
>
> **(b) in any other case referred to in Part 2 of the Schedule, that an interested disabled person has a disability and is likely to be placed at a disadvantage by [the employer's provision, criterion or practice (PCP), the physical features of the workplace, or a failure to provide an auxiliary aid]"**

85. The employer's knowledge can be actual or "constructive". A Tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:

- first, did the employer know both that the employee was disabled and that the disability was liable to disadvantage the employee substantially?

- if not, ought the employer to have known both that the employee was disabled and that the disability was liable to disadvantage the employee substantially? **Secretary of State for Work and Pensions v Alam 2010 ICR 665, EAT**, and **McCubbin v Perth and Kinross Council EATS 0025/13**.

86. In **Smith v Churchills Stairlifts plc 2006 ICR 524, CA**, the Court of Appeal confirmed that the test of reasonableness in the context of what is now S.20 of the Equality Act 2010 is an objective one and it is ultimately the employment tribunal's view of what is reasonable that matters.

87. The question of whether there was a failure to make reasonable adjustments must be considered by reference to the position during the entirety of the period to which the claim relates. A Tribunal should not find that an employer had acted reasonably by reference to matters that were not known by the employer at the relevant time (confirmed in **Hindmarch**).

88. If the steps that it is suggested that a Respondent should have taken by way of reasonable adjustment (whether in the form of the provision of an auxiliary aid or otherwise) would have no real chance of avoiding or reducing the disadvantage, then the Respondent is under no duty to take those steps. It cannot be reasonable to require a party to make an adjustment that has no prospect of achieving the desired

effect (**Hindmarch v North-East Ambulance NHS Foundation Trust [2025] EAT 87**).

89. However, it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage. **Cumbria Probation Board v Collingwood [2008] All ER (D) 04**.

90. The burden of proof also applies in reasonable adjustment claims. The burden is on the employee, initially, to show (if disputed) that the PCP was applied and that it placed the employee at the substantial disadvantage asserted. They also need to put forward and identify some at least potentially or apparently reasonable adjustment which could be made. But, if they do, then the burden may pass to the employer to show that it would not have been reasonable to expect them to make that adjustment (**Rentokil Initial UK Ltd v Miller [2024] EAT 37, para 43; Project Management Institute v Latif [2007] IRLR 579).**

Time limits for Equality Act 2010 claims

91. The time limit for bringing a claim under the Equality Act 2010 appears in section 123 as follows:-

> **"(1) subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> (b) **such other period as the Employment Tribunal thinks just and equitable**.
>
> **(2) …**
>
> **(3) for the purposes of this section –**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it."**

92. In **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** the Court of Appeal confirmed that in deciding whether there was conduct extending over a period of time (commonly referred to as a "continuing act"):

> 'The focus should be on the substance of the complaints … was there an ongoing situation or a continuing state of affairs in which [officers] … were treated less favourably? The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts'.

93. In considering whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents' **Aziz v FDA 2010 EWCA Civ 304, CA**.

94. Acts which the Tribunal finds are not established on the facts or are found not to be discriminatory cannot form part of the continuing act: **South Western Ambulance Service NHS Foundation Trust v King EAT 0056/19**.

Protected Disclosures ("Whistleblowing")

95. Protected disclosures are governed by Part IVA of the ERA of which the relevant sections are as follows:-

> **"s43A: in this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of Sections 43C to 43H.**
>
> **s43B(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:**
>
> **……..**
>
> **(d) that the health or safety of any individual has been, is being or is likely to be endangered..."**

96. The Employment Appeal Tribunal ("EAT") summarised the case law on section 43B(1) as follows in **Parsons v Airplus International Ltd UKEAT/0111/17**:

> **"23. As to whether or not a disclosure is a protected disclosure, the following points can be made:**
>
> **23.1. This is a matter to be determined objectively; see paragraph 80, Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA.**
>
> **23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.**
>
> **23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT."**

97. **Cavendish** should not be understood to introduce into s.43B(1) a rigid dichotomy between "information" on the one hand and "allegations" on the other. In The question in each case is whether a particular statement or disclosure is a " disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in paragraphs (a) to (f)]" . However, in order for a statement or disclosure to be a qualifying disclosure, it has to have a " sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection 43B(1) ". The question of whether or not a particular statement or disclosure does contain sufficient content or specificity is a matter for evaluative judgment by the Tribunal in light of all the facts of the case (**Kilraine** quoted by the EAT in **Simpson v Cantor Fitzgerald Europe (UKEAT/0016/18/DA)**).

98. The worker need only have a reasonable belief that the information tends to show the matter required by Section 43B(1) and that the disclosure is made in the public interest. A subjective belief may be objectively reasonable even if it is wrong or formed for the wrong reasons. **Babula v Waltham Forest College [2007] ICR 1026**.

99. In **Chesterton Global Ltd and anor v Nurmohamed [2017] IRLR 837** the Court of Appeal approved a suggestion from counsel that the following factors would normally be relevant to the question of whether there was a reasonable belief that the disclosure was made in the public interest:

(a) the numbers in the group whose interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

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

(d) the identity of the alleged wrongdoer.

100. In **Chesterton** Underhill LJ addressed the question of the motivation for the disclosure in paragraph 30, saying that:

> "… **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: otherwise, as pointed out at paragraph 17 above, the new ss.49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase 'in the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."**

Detriment for making a Public Interest Disclosure

101. If a protected disclosure has been made, the right not to be subjected to a detriment by the worker's employer appears in Section 47B(1) which reads as follows:

> **"A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure."**

102. The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in **Shamoon v The Royal Ulster Constabulary [2003] ICR 337**: the test is whether a reasonable employee would or might take the view that they had been disadvantaged in circumstances in which they had to work. An unjustified sense of grievance cannot amount to a detriment.

103. The right to go to a Tribunal appears in Section 48 and is subject to Section 48(2), which says this:

"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".

104. In **Ibekwe v Sussex Partnership EAT/0072/14** the EAT confirmed that does not mean that the claimant wins by default if the respondent fails to establish a reason for any detrimental treatment. It is a question of fact for the Employment Tribunal whether or not any alleged detrimental treatment was on the ground that the claimant made a protected disclosure.

105. In **International Petroleum Ltd and ors v Osipov and ors UKEAT /0058/17/DA** the EAT (Simler P) summarised the causation test as follows:

> **"...I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:**
>
> **(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.**
>
> **(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v. Knight [[2003] IRLR 140]at paragraph 20.**
>
> **(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."**

106. The time limit provision appears in section 48(3). A complaint presented more than three months after the act or failure to act is out of time unless it formed part of a series of similar acts or failures ending less than three months before presentation, failing which the claimant has to show that it was not reasonably practicable for him to have presented the claim within time and that it was presented within a further reasonable period.

107. Something is "reasonably practicable" if it is "reasonably feasible" (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372,** Court of Appeal). The court approved the statement in **Bodha v Hampshire Area Health Authority [1982] ICR 200** that the existence of a pending internal appeal does not of itself justify a finding that it was not reasonably practicable to bring a claim.

108. Ignorance of one's rights can make it not reasonably practicable to present a claim within time as long as that ignorance is itself reasonable. An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits: **Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488** Employment Appeal Tribunal.

109. The fact an internal appeal process is continuing and even where that internal process is delayed for a reason is not in itself a sufficient reason to justify a finding that it was not reasonably practicable to present a complaint within the statutory time period (**Palmer v Southend on Sea Borough Council [1984] 1 WLR 1129).**

110. In **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293** the Court of Appeal reviewed some of the authorities and confirmed in paragraph 20 that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

Detriment for raising health and safety concerns

111. S.44(1)(c) ERA provides that:

> "**44 Health and safety cases.**
>
> **(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—**
>
> **(c)being an employee at a place where—**
>
> **(i)there was no such [health and safety] representative or safety committee, or**
>
> **(ii)there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,**
>
> **he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.**"

112. In **Von Goetz v St George's Healthcare NHS Trust (No.1)EAT 1395/97** the EAT saw no reason to limit the ambit of S.100 (and, in particular, subsections 1(c) and 1(e)) to harm — or the possibility of harm — to fellow employees, or to harm occurring in the workplace. It held that those sub-paragraphs could cover situations where the employee is concerned for non-employees and/or people outside the workplace.

113. The time limit provision in section 48(3) ERA applies to a complaint that an employee has been subjected to a detriment in breach of s.44(1)(c).

Unfair Dismissal

"Whistleblowing" and unfair dismissal

114. Section 103A of the ERA deals with protected disclosures and reads as follows:-

> **"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".**

115. The reason or principal reason is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

116. That requires the Tribunal to make a finding about who took the decision to dismiss.

117. In **Ross v Eddie Stobart Ltd [UKEAT/0068/13/RN)** the EAT confirmed that the principle in **Smith v Hayle Town Council** remains good law. The burden of proving the 'whistleblowing' reason for dismissal under s.103A Employment Rights Act 1996 lies on the employee where they have insufficient continuous service to bring a claim.

118. When the employee contests the reason for dismissal put forward by the employer there is no burden on the employee to disprove it. However, where an employee is positively asserting a different reason he must produce some evidence to support the positive case as having made protected disclosures.

Raising Health and Safety concerns and unfair dismissal

119. Section 100(1)(c) of ERA provides that an employee is unfairly dismissed if the reason, or where there is more than one reason, the principal reason why he was dismissed, was for bringing to the employer's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

120. If the reason for dismissal is an automatically unfair reason under s.100(1)(c) or s.103A the employee does not require two years' continuous service to bring an unfair dismissal claim.

Failure to comply with the ACAS Code on Disciplinary and Grievance procedures

121. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("s.207A") gives the Tribunal a power to adjust compensation where there has been an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. Compensation can be increased where it is just and equitable but by no more than 25%.

Discussion and Conclusions

122. We now apply the relevant law to the findings of fact we have made. We have used the issues identified in the List of Issues as the framework for setting out our discussion conclusions.

Whether the claimant made protected disclosures (Issue 1)

123. Turning to the list of issues then, the first question for us is whether the claimant did make protected disclosures.

124. The respondent's position is that while they accept factually that the did verbally tell Mrs Matthews-Richards on 28 September 2023 that there was a fruity vape smell in the downstairs toilet and that she thought that Chloe had been vaping in there. The respondent does not accept that that amounts to disclosure of information (Issue 1.a.(ii)), nor that it meets the other elements of the definition of a qualifying disclosure in Section 43B (Issues 1.a.(iii to vi)).

125. In her submissions for the respondent Miss English relied on **Cavendish** and **Kilraine** and submitted that what the claimant did on 28 September 2023 was to simply raise allegations rather than disclosing "information". It seems to us that **Kilraine** has made clear that there is no rigid dichotomy between "information" on the one hand and "allegations" on the other hand. An allegation can include a disclosure of information. What was said in **Kilraine** was that in order to be a disclosure of "information" the disclosure has to have sufficient factual content and specificity such as is capable of tending to show one of the matters set out in subsection (1) of Section 43B.

126. When it comes to the disclosure in this case we find that there was sufficient factual content and specificity. There was a disclosure that there was a smell of vape and indeed vape mist in the toilet and that Chloe was using the toilet more regularly than the claimant would have expected. Those are matters of fact and they are specific. The fact that it is then couched in an allegation that Chloe was vaping does not seem to us to undermine that. We therefore do find that there was a disclosure of information (Issue 1.a.(ii)). That applies both to the verbal disclosure PD1 and to the written disclosure PD2. As we explained in our findings of fact above, we found that the claimant did confirm her disclosure in writing at Mrs Matthew-Richards request.

127. The next element we needed to decide is whether the claimant reasonably believed that that information tended to show that the health or safety of an individual had been, was being or was likely to be endangered (Issue 1.a.v). On this point Misss English submitted that the claimant could not have had that reasonable belief. She referred to the evidence of the respondent's witnesses which was that the staff toilet was not in close enough proximity to the children to cause them any risk, even if there was vaping taking place. She referred to the case of **Babula -v- Waltham Forest College**. The two points particularly emphasised in that case are that the definition of a protected disclosure has both a subjective and an objective element. The subjective element is that the worker must believe that the information disclosed tended to show (in this case) the risk to health and safety. The objective element is that that belief must be reasonable. Pausing there, we accept the claimant's evidence that she did genuinely believe that the information she was disclosing tended to show a risk to the health and safety of the children. That subjective element was present.

128. The second element of **Babula** is the objective element – was that belief reasonable. A belief may be reasonable even if it is wrong. In **Babula** itself the employee had disclosed information about what they believed to be an act of criminal incitement where there was in fact at the time no such offence. It was held the disclosure nonetheless qualified because it was reasonable for the employee to believe that there was. In this case we have accepted the claimant's evidence that she did believe that the vape mist in the staff toilet was potentially a risk to the health and safety of children. We have to decide whether that belief was reasonable. The submissions from the respondent amount, it seems to us, to substituting the view of the respondent as to whether or not in fact there was a risk to children for the claimant's belief (even if wrong) that there was such a risk. We find that even if the belief was wrong, it was reasonable for a nursery worker in the respondent's relatively small nursery building to conclude that a staff member vaping in the staff toilets was sufficiently close to young children to potentially endanger their health

and safety. On issue (Issue 1.a.v) we find the claimant did reasonably believe the information tended to show the matter in s.43B(i)(d).

129. The next issue is whether the claimant reasonably believed that the disclosure of information was in the public interest (Issues 1.a.(iii) and (iv)). We accept the claimant's evidence that she did in fact believe the disclosure was in the public interest. When it comes to whether that belief was reasonable, it seems to us to be self-evident that a disclosure that a staff member at a nursery was vaping in the toilets is objectively capable of being a disclosure in the public interest. It affects the children, the parents who have children at the nursery as well as potentially other staff. When it comes both to the claimant's reasonable belief in public interest and also the reasonable belief in existence of a risk to health we also take into account the fact that the respondent's own health and safety policy included vaping on the premises as something which was prohibited. It seems to us that claimant was fully entitled to and did reasonably believe both that vaping in the toilets was a danger to the health and safety of the children, and that disclosure was in the public interest.

130. Our conclusion on this issue 1 then is that the claimant's disclosure verbally was a protected disclosure for the purposes of Section 43B. We have said that we prefer the claimant's account and accept that she also confirmed that disclosure in writing (PD2). For the avoidance of doubt, even had she not done so, we would have found that the verbal disclosure (PD1) was sufficient to amount to a protected disclosure.

Whether the claimant raised health and Safety Concerns within s.44(1)(c)(i) (Issue 2)

131. The same findings and the same logic seem to us to apply to the issue of whether the claimant raised health and safety concerns within s.44910(c)(1). It was not disputed that this was a workplace where there were no health and safety representatives or safety committee. We find that the claimant did bring circumstances connected to their work to the respondent's attention and that they were circumstances potentially harmful to health and safety. We find that her belief that those circumstances were potentially harmful was reasonable, and that she did bring the matter to the respondent's attention by reasonable means.

Conclusion on Issues 1 and 2

132. The starting point for our consideration of the remaining issues in the case therefore is that there were protected disclosures made and that the claimant did bring circumstances connected to health and safety to the respondent's attention.

133. By way of shorthand, we are going to use the phrase "the vaping disclosure" to cover both of those in the remainder of this section.

Automatically Unfair Dismissal (Issue 3)

134. The next issue in the List of Issues is automatically unfair dismissal. As we have said the claimant did worked for the respondent for less than 2 years so her claim of unfair dismissal can only succeed if the dismissal was for a prohibited reason. That can be either the protected disclosure or raising the health and safety concerns. It seems to us that there is no distinction between the two and that the one factual disclosure amounted both to a protected disclosure and to raising a health and safety concern.

135. Because this is a case where the claimant lacks 2 years' service she has to show an automatically unfair reason for her claim to succeed. **Ross -v- Eddie Stobart** confirms that in those circumstances the burden is on the employee to show that making the disclosures and or raising health and safety concern was the reason or principal reason for dismissal.

136. Since the burden is on the employee we turn first to the points made for the claimant by Ms Kaura. We find that the ultimate decision makers were Mrs Hart and Mrs Budden. She signed the dismissal letter and were the owners of the business.

137. The first submission made is that the process which led to the dismissal started from the vaping disclosure. The claimant's case is that it was that disclosure which led to Chloe making the allegations against her at the meeting on 12 October 2023. That in turn led to the investigation which in turn led to the claimant's dismissal. So, there is a chain linking the decision to dismiss back to the vaping disclosure.

138. It seems to us that that is in essence a "but for" argument. In other words, but for the original disclosure none of these things would have happened. However, it seems to us that even if (and we have heard no evidence about this and so can make no finding of fact) Chloe did raise her complaint on 12 October in response to the vaping disclosure, that does not support a finding that it was part of the decision maker's thinking on 17 or 20 October. It is merely the context for the decision and in the absence of anything else does not support a finding that the vaping disclosure itself was part of, not to mention the principal reason for the decision to dismiss.

139. The claimant also points to the revision of the disciplinary policy on 5 October 2023 and the insertion of the short service clause as somehow being triggered by the vaping disclosure and being an indication that the respondent already had in mind to dismiss her, prior to the complaint on 12 October 2023. On this point we accept Mrs Little's evidence that the respondent's policies were always reviewed by the respondent at the start of the term in September and that in this case the insertion of the short service exemption was one suggested by the respondent's advisors. We do accept that getting the staff to sign the amended policy on 16 or 17 October was probably done with the impending disciplinary process against the claimant in mind. Again, however, that does not to our mind point to the vaping disclosure being the reason or principal reason for dismissal, it just points to the respondents intending to use the short service clause when it came to dealing with the claimant's case and wanting to get their "ducks in a row" before doing so.

140. Next, Ms Kaura relied on the many flaws in the investigation and disciplinary process as pointing to the reason given by the respondent not being the true reason for dismissal. We accept that the process followed was rushed and would have been unfair had we been considering this as an ordinary unfair dismissal case. The claimant was given no proper notice of the allegations against her prior to the investigatory meeting. That meeting with her lasted ten minutes. She was given no notice of the subsequent disciplinary meeting on 20 October. She was not told of her right to be accompanied at either meeting nor was she given time to arrange a companion. She was not told the disciplinary meeting could result in her dismissal. The meeting itself was not a hearing of her response to the claim against her. We find it lasted some eight minutes in total which included time discussing arrangements for sorting out collection of the claimant's possessions. The meeting in

a sense started the end with Mrs Hart reading out the termination decision letter and handing it to the claimant then asking her if she had any questions. The termination letter made no reference to the right of appeal and when the appeal did happen it was conducted by two of the people who had been present at the disciplinary hearing. What is more, even the respondents' witnesses accepted that it could have been intimidating that there were 4 respondent representatives in the meeting as against the claimant by herself, especially as those 4 were the two owners of the business (Mrs Hart and Mrs Budden) and the two managers.

141. We accept the points made about flaws and inconsistencies in the process. We are satisfied that they arose from the respondent's view that they could utilise the short service procedure in this case with no risk of a Tribunal claim because the claimant had not been employed for two years. In passing, it does seem to us that this case vividly illustrates the fact that while an employer can currently conduct what is called a short service dismissal it does not mean that they should adopt that approach. That seems to us particularly the case where an employee has been employed for eighteen months and promoted during that time with a clean disciplinary record. It seems to us that when an employer does rush through a process giving scant regard to the claimant being given an opportunity to respond it simply raises questions in an employee's mind as to why a dismissal has taken place. It also seems to us that basic notions of fairness would have highlighted to a responsible employer the need to make sure that the claimant was aware of the case against her and had an opportunity to respond before dismissing her.

142. The respondent's witnesses made great play of the fact that they were not HR experts. We accept that that is the case, but it seems to us that a basic notion of fairness or a quick read of the ACAS code of practice would have given them a clear indication of what was expected of them as employers and managers. In addition, it is clear they had access to HR advice. Notwithstanding that, we find that the flaws in the process, however egregious, are not in themselves or with the other matters raised sufficient to pass the burden to prove the reason for dismissal to the employer. If in every case where an employer fails to follow a proper procedure there was a finding that the reason for dismissal given was not that put forward by the employer there would be far more successful automatically unfair dismissal cases than there are.

143. Ms Kaura also pointed out to the apparent inconsistency between the supervision meeting notes relating to the claimant (including the latest meeting which was held on 14 September a mere few weeks before the dismissal) and the picture of the claimant the respondent was now seeking to portray. We accept those supervision notes were overwhelmingly positive. Mrs Hart and Mrs Budden's explanation for this was unconvincing. They said the supervisions were intended to be positive. In essence it seemed to us they were suggesting that the supervisions were not really worth the paper they were written on when it came to being an accurate assessment of performance.

144. We found the evidence of the Nursery Managers more convincing. We accept Mrs Little's evidence that she was genuinely surprised by the evidence given about the claimant by her colleagues during the investigation. Although that does not perhaps speak well of the supervision of staff by managers and the extent to which they knew what was really going on in the rooms, we accept that her surprise was

genuine. That, it seems to us, does explain the inconsistency between the supervisions and the evidence provided during the investigation.

145. We accept Ms Kaura's submission that the respondents' witnesses' evidence about the reasons for dismissal given at the Tribunal were not consistent. Mrs Budden in particular suggested that there were clear safeguarding issues relating to the claimant and that she would not want the claimant looking after her children. We find it surprising if the concerns were so serious that no reference to LADO was made and that the claimant was not suspended between 17 and 20 October but instead allowed to continue working. Mrs Little confirmed that consideration was given to reporting to LADO so it was clearly something that the respondent was aware of and had in mind. Despite the alleged safeguarding concerns, however, a decision was taken not to refer. That to our mind supports a finding that the safeguarding concerns were not as serious as suggested by the evidence given by the respondent's witnesses at the Tribunal.

146. It was evident to us that there was an element of personal dislike from Mrs Budden towards the claimant. She referred to her in evidence as an unpleasant person. Mrs Hart described her as bolshy. We find that for Mrs Hart and Mrs Budden part of the reason for dismissing the claimant was that they found her rude to them as owners of the business. The summary of concerns document which was produced recorded a number of incidents, particularly between Mrs Budden and the claimant. When it came to Mrs Little and Mrs Matthews-Richards, they were more balanced in their assessment. They both recognised that there were positive aspects of the claimant's practice. We have said that we have found that the allegations of safeguarding concerns were overplayed. We accept, however, that there were aspects of the claimant's practice which were raised by her colleagues which did cause Mrs Hart and Mrs Budden concern. We are very mindful that the claimant did not have the chance to answer those allegations because of the way the investigation and disciplinary process was conducted. The question for us is not whether the allegations were true but what part they played in the minds of Mrs Hart and Mrs Budden in deciding to dismiss the claimant.

147. We remind ourselves that the reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. Taking into account all the evidence we have heard based on that in particular given by the respondent's witnesses we find that the reasons operating on Mrs Hart and Mrs Budden as joint decision makers were as follows:-

(i) The evidence from the investigation that at times the claimant could be stern, blunt or intimidating with colleagues;

(ii) The more limited evidence from the investigation that the claimant could, on occasion be stern or harsh with the children;

(iii) The claimant's bolshy or rude behaviour towards the owners of the business and in particular towards Mrs Budden.

148. Ultimately, we do accept that the vaping disclosure did not play a part in the reasons for dismissal. We remind ourselves that when it comes to the unfair dismissal claim the test is whether the protected disclosures or the claimant raising health and safety concerns was the reason or principal reason for the dismissal.

149. The evidence given by the respondent's witnesses was that the vaping disclosure incident was, to their minds, done and dusted on 28th itself. After the two managers had checked out the toilet and concluded that there was no smell of vaping and after they had spoken to Chloe they considered the matter closed. We accept that evidence as genuine. We find that they really thought no more about it and certainly it was not something that they considered when deciding whether to dismiss.

150. To be clear, we are not saying that the reasons given by the respondent for dismissing are reasons which would have been fair reasons had this been an ordinary unfair dismissal claim. Our finding is that the respondent's reason or principal for dismissal was neither the claimant making protected disclosures, nor her raising health and safety concerns. That means that the complaints of automatically unfair dismissal under s.103A and/or under 100(1)(c) of the ERA both fail.

The unlawful detriment complaints (Issue 4)

151. The only detriment relied on is the refusal to extend the time for appeal. In refusing the claimant's application to amend we refused the application to add further detriments. This then relates to the decisions made by Mrs Budden not to further extend time as requested by the claimant.

152. We remind ourselves of the guidance in **Ibekwe v Sussex Partnership** on the burden of proof in whistleblowing detriment cases. The proper approach is that the burden of proof lies on the claimant to show that a ground or reason for detrimental treatment to which he or she was subjected was a protected disclosure. Inferences about the reason for any detriment have to be based and justified by the facts as found.

153. We have already said in dealing with the unfair dismissal claim that we accept the respondent's witnesses' evidence that for them the vaping disclosure incident was done and dusted on 28 September. There was no direct evidence to support a finding that it was part of Mrs Budden's decision making when she refused to extend the time for appeal further on 14 December 2023. Even accepting that the relevant test is whether the disclosure had a material influence on the detriment (in the sense of more than minor or trivial in the influence, we find that the claimant has not discharged the burden of proof in this case. We find that the reason that the respondent did not extend the time in this case was that they wanted the process done and over with rather than extend it further by postponing the appeal. The claimant's vaping disclosure played no part in that decision. That means that the complaints of unlawful detriment fail both in relation to the whistleblowing and the raising of health and safety concerns.

Direct disability discrimination (Issue 5)

154. For this claim to succeed the claimant has to show that she was treated less favourably than a hypothetical comparator in the same circumstances who is not disabled. We find that the appropriate hypothetical comparator is a non-disabled employee with less than 2 years' service subject to the same allegations as the claimant.

155. The burden of proof is initially on the claimant. When it came to this complaint we did not hear evidence which was sufficient to pass the burden of proof. There was no evidence from which we could conclude that a non-disabled employee with short service would have been treated any better when it came to the process leading up to and including dismissal. Equally, there was no evidence from which we could conclude that Mrs Budden's decision to refuse to stay the appeal process would have been any different had the claimant not been a disabled person in the same material circumstances. Because the burden is initially on the claimant to prove facts to pass the burden and she has failed to do so this complaint fails.

<u>The complaints of discrimination arising from disability (s.15 of the Equality Act 2010)(Issue 6)</u>

156. There were two acts of unfavourable treatment relied on. We will take in each turn but in relation to both the first question is whether the respondent knew or could reasonably have been expected to know that the claimant had the disability. If so, the question is from what date (Issue 6.a.).

157. In relation to this the respondent's submission relied primarily on the fact that the claimant did not appear to suffer any ill effects from the disability during the period working for the respondent. It seems to us that that is the wrong question. The relevant question for this issue is whether the respondent was aware that the claimant had the disability. We find that it did. The claimant had disclosed in her pre-appointment health questionnaire that she was at that point still taking Sertraline. She had also said "Yes" to the question whether or not she had suffered from anxiety and depression.

158. In addition to that, Mrs Matthews-Richards confirmed that in July 2023 there was an open discussion which involved the claimant and herself and another member of staff, during which the claimant said that she was coming off Sertraline. Mrs Matthews-Richards confirmed that she understood that Sertraline was medication for anxiety and depression. At the point when the claimant had that discussion she had been working for the respondent for more than a year. In relation to the issue of knowledge our finding is that the respondent did have actual knowledge that the claimant had the disability and that it had that knowledge from the start of her employment when she completed the health questionnaire to indicate that she did.

<u>Unfavourable treatment b(i) - dismissal</u>

159. Separating out the two acts of unfavourable treatment the first question is whether the respondent treated the claimant unfavourably by dismissing her (Issue 6.b.(i)). There was not much dispute that it did and we find that the dismissal did amount to unfavourable treatment.

160. The key issue in relation to this complaint was whether that dismissal was because of something arising in consequence of the claimant's disability (Issue 6.d).

161. For the claimant the "something arising" was pleaded to be her conduct/ perceived performance or behaviour. We heard very limited evidence about this. The claimant's own evidence was that she was happy while working at the respondent. Her medical records confirmed that there were no issues relating to

anxiety and depression reported in the period May 2022 until 27 October 2023 i.e. after she was dismissed. There is no evidence of the anxiety and depression affecting the claimant during her employment. In July 2023 as we have said the claimant confirmed that she was coming off Sertraline. Based on that, we find that although the claimant was a disabled person by reason of anxiety and depression and the respondent had knowledge of that, her disability did not materially affect her whilst she was working at the nursery at least until the point of the dismissal.

162. We do take into account that the claimant in her disability impact statement suggested that coming off her medication might have affected her mood during the period July to October 2023. Her evidence was that she had suggested to her manager that it might make her appear irritable or withdrawn. We did not hear evidence about how long the tapering period was or how long any effects might last. The claimant did not in her Disability Impact Statement suggest that she had raised with the respondent any actual symptoms of her tapering from her medication during the period July to October 2023. She did not refer to her disability at all in her messages on 18 October, the day after the investigation meeting, nor is her disability referred to in her appeal against dismissal.

163. In the absence of that evidence our conclusion is that there was insufficient evidence for us to find that any conduct, performance or behaviour leading to the claimant's dismissal was something arising from her disability.

164. The claimant's complaint relating to this act of unfavourable treatment therefore fails because she has not satisfied us that any performance issues arose from her disability.

165. Had we found that the performance issues did arise from her disability then the claim would have succeeded. That is because we have found that the reasons for the decision to dismiss included (and so was materially influenced by) her conduct/performance or behaviour.

166. Because this complaint has failed, we will only deal very briefly with the legitimate aim put forward by the respondent. We accept that the aim set out at Issue 6.f.i in the list of issues is a legitimate one.

167. However, we do not accept that dismissing the claimant was a proportionate means of achieving the aim. The respondent submitted that dismissal was the only possible response to her conduct. We do not accept that. We have already said that that it seems to us that there was an exaggeration of the safeguarding aspects of the claimant's behaviour in the evidence given at this hearing. When the investigatory notes are scrutinised there were concerns from colleagues that the claimant could be is stern with the children and could be rude to other staff members. There are some concerns about some of her actions in relation to children, specifically in relation to taking comforters off them. Those allegations have to be set against her record as shown in the supervisions which refer to her as a valued member of staff. The evidence from Mrs Little and Mrs Matthews-Richards was that there were aspects of her practice which were positive. In those circumstances, it does not seem to us that dismissal was the only proportionate response. The respondent's own disciplinary policy contemplates warnings, demotion or suspension as alternatives to dismissal. There was no consideration given to any of those. It seems to us that the decision of

the respondent in this case was rushed through without consideration being given to proper alternatives because this had been labelled a short service dismissal.

168. To summarise, the s.15 complaint relating to the dismissal fails because of the lack of evidence to support a finding that the pleaded "something arising" did indeed arise from the claimant's disability. Had that element of the s.15 complaint succeeded we would have found that the respondent failed to establish the objective justification defence so the complaint would have succeeded.

Unfavourable treatment b(ii) – failure to stay the proceedings

169. The second act of unfavourable treatment which was the refusal to stay the proceedings until the claimant was sufficiently well to put in written representations. This applies to the appeal process.

170. Miss English in her submissions said that this did not amount to a detriment She relied on the claimant's evidence in cross examination where, Miss English submitted, the claimant had accepted that it would have made no difference if the proceedings had been stayed. We prefer Ms Kaura's submission that that was not a concession that there was no detriment in this case. Instead, we have to decide whether the treatment amounted to a detriment applying the tests set out in the relevant case law. That case law makes it clear that unfavourable treatment is assessed from the point of view of a reasonable worker. There is unfavourable treatment if a reasonable worker would or might find the refusal to stay the appeal proceedings to be a disadvantage. Given the low bar for unfavourable treatment imported by that test we find that this was unfavourable treatment. The denial of a stay meant that the claimant was not given a further opportunity to put in written representations or (if she felt better) to attend the hearing. We find that the refusal was an act of unfavourable treatment. The fact that the outcome might well have been the same does not prevent it being so.

171. For the complaint to succeed the unfavourable treatment has to be because of something arising from the claimant's disability. In this case the something arising is said to be the symptoms of her mental health which meant that the claimant had an inability to comply with the appeal timetable provided.

172. We have considered the evidence about the claimant's state of mind during the post-dismissal period. We note in particular that the medical records show that as of 27 October 2023 the claimant was recorded as experiencing low mood and a resurgence of her anxiety and depression. The GP records say that she was teary at times and specifically linked that to her dismissal. We accept that there is some evidence that the claimant was able to engage with the appeal process. She initiated the process on 21 October by asking for the appeal procedure and then on 26 October put in her appeal which was clear and cogent and spread over three pages. We accept that was based on advice from ACAS and Citizens Advice, albeit that it was the claimant herself who wrote the letter. The claimant continued to engage with the process on 3 November and was actively engaged until 8 November. It is at that point, according to her case that her anxiety and depressive disorder heightened to the extent that she could not longer engage with the appeal process. We find that consistent with the fact that that is when she first emailed asking for a 4 weeks postponement.

173. In terms of other evidence, we accept that the payslips in the bundle showed that by November the claimant was working 30 hours per week at another nursery and that she continued to do so. We accept there is also evidence that she was continuing to run her bounce classes at the same time. When it comes to assessing whether there was something arising from the claimant's disability we take into account the evidence of her other activities. However, on balance, we have concluded that her inability to deal with the appeal was something arising from her disability. We do not accept that an ability to function in one part or domain of life means that a disability is not having an impact on another aspect of a person's life. Going to a happy workplace to do a job you love is very different from engaging in correspondence with your former employer who has dismissed you because of something at least partly related to inter-personal relationships and your behaviour. It seems to us the same applies to the claimant continuing her bounce classes. That she was able to do some things does not mean that she could do everything. We remind ourselves that the question for us is whether there was some impact on the claimant's ability to respond to the appeal from on or around 8 November. On balance, particularly taking into account the medical evidence, we find that there was. We accept the claimant's case that by then the symptoms of her mental health meant she was not able to comply with the appeal timetable provided (Issue 6.c.(ii)).

174. The next issue is whether the claimant can show that the decision not to stay the appeal process was "because of" something arising from her disability (Issue 6.d). On this point we find that the claimant's case fails. We do not think that logically it can be said that Mrs Budden's decision not to extend time further was "because of" the claimant's inability to engage with the process arising from her anxiety and depression. Rather, the decision was <u>despite it</u> and that is why it seems to us that the correct way to approach this complaint is as a failure to make reasonable adjustments. We cannot see that it fits the wording of the legislation to say that the failure to extend time was because of the claimant's mental health issues. This claim fails at that point therefore.

175. Again, if we are wrong about that we would not have accepted that the proposed objective justification was made out. The legitimate aim relied on in ensuring the safety and wellbeing of children, maintaining appropriate and consistent standards of childcare and maintaining a harmonious work environment. We cannot see logically how not allowing the claimant an additional four weeks to appeal would be a proportionate means of achieving that aim. The claimant was no longer on the respondent's premises, so it is hard to see how denying a further extension of the appeal helped ensure the safety and wellbeing of the children, maintained consistent standards or maintained a harmonious working environment. The claimant was simply not present in the environment to have an impact on those things.

176. As we have said, this complaint fails because the unfavourable treatment was not "because of" something arising from the claimant's disability. If we are wrong about that, we would have found the complaint succeeded because the proposed objective justification defence was not made out.

<u>The reasonable adjustment complaints (Issue 7)</u>

177. The final element of the claim we are considering is two complaints of a failure to make reasonable adjustments. This relies on two separate PCP's, one relating to

the disciplinary process and one relating to the appeal so we will take them separately.

178. We have already decided that the respondent did know of the claimant's disability from the date when she was employed.

The complaint relating to PCP1 -applying the short-service disciplinary process

179. PCP 1 is applying the short service disciplinary process to the claimant. It was not disputed that the short service process was applied to the claimant. Miss English's submissions said there was discretion to apply it but also confirmed it was applied uniformly, i.e. the decision to apply it was not influenced by the claimant's disability. It does not seem to us that the discretion to apply it means that this was not a PCP. Rather it suggests that there was the ability to vary it and potentially make reasonable adjustments. We find therefore that applying the short service disciplinary process was a PCP (Issue 7.b.i).

180. The next question is whether the application of that, i.e. subjecting the claimant to the short service disciplinary process rather than the full disciplinary procedure, put the claimant at a substantial disadvantage compared to someone without the claimant's disability (issue 7.c..i). "Substantial disadvantage" in this context means "more than minor or trivial". The question for us is whether the application of the short service provision put the claimant at a substantial disadvantage compared to someone without the claimant's disability.

181. The burden is on the claimant initially to prove that was the case. We are not in any way diminishing the impact of the claimant's disability, but we cannot assume that just because she is a disabled person by reason of anxiety and depression she was substantially disadvantaged compared to a non-disabled person.

182. It seems to us that being called into what was thought to be an informal meeting only to be presented with a number of serious allegations for the first time would put any employee at a substantial disadvantage. The same applies to being called into a disciplinary meeting without notice and dismissed 3 days after the investigatory meeting. We must have evidence on which to base a finding that the claimant's disadvantage was comparatively worse. The claimant has not satisfied us on this point. Her medical evidence refers to her anxiety and depression being worse post her dismissal, it does not refer to the period prior to dismissal. Her messages prior to dismissal on 18 October and the grounds of appeal as we have already said do not refer to any inability to respond linked to her disability.

183. We find that the claimant has not discharged the factual burden of establishing that the application of PCP1 meant she suffered a substantial disadvantage compared to a non-disabled person. This complaint fails therefore on that basis.

184. Again, in case we are wrong about that we have gone on to consider the other elements of the complaint. The first is whether the respondent knew or could reasonably have been expected to know that the claimant was likely to be placed at a comparative disadvantage by being subjected to the short service procedure (Issue 7.d). The respondent's knowledge of the claimant's disability per se is not enough. The knowledge which is required is knowledge (actual or constructive) that

imposing the short service policy would place the claimant at a substantial disadvantage compared to a non-disabled person. We find that the respondent did not have that knowledge. We find it could not reasonably be expected to know that the claimant would be placed at that disadvantage. That is because during her period of working at the respondent (as we have already said) the claimant was on her own evidence happy and the medical records confirm that. We find the respondent could not reasonably be expected to know based simply on knowing the claimant was disabled due to anxiety and depression that she would be comparatively substantially disadvantaged by applying the short service provision to her.

185. Very briefly, had the claimant successfully shown that the duty to make reasonable adjustments arose we would have found that the respondent failed to make a reasonable adjustment by failing to apply the full procedure to the claimant (Issue 7.e.). Miss English confirmed there was discretion to vary the application of the policy and, viewed objectively, doing so would have been reasonable had the duty arisen. As we have already said, however, our decision is that the duty did not arise in relation to PCP1.

The complaint relating to PCP2 – refusing to stay the appeal proceedings pending written representations

186. PCP2 was refusing to stay the appeal proceedings pending written representations. In her submissions Ms English said that this PCP did not amount to a PCP as recognised in law. It was the exercise of a decision on a particular case. based on the EHRC Code of Practice and what was said in **Ishola** we find that although a one-off decision can be a practice it is not necessarily one. There has to be some indication that a hypothetical comparator would in future be treated in the same way.

187. We are satisfied in this case that although the decision a one off one (in the sense that it had not actually been applied to anyone else) the respondent would have applied the same practice in future to a hypothetical comparator in the same circumstances. In this case the reasons given for the refusal of an extension of time by Mrs Budden was the need from a business perspective to investigate matters in a timely manner. We find that supports a finding that a hypothetical comparator would be treated in the same way. That is not a factor specific to the claimant. The decision in the claimant's case was a one off but only in the sense that the issue had not arisen before. We find that had it arisen again the respondent's approach would have been the same. Based on that we do find that the refusal to stay proceedings to allow written representations was a PCP (Issue 7.b.ii).

188. The next issue (Issue 7.c.ii). is whether PCP2 put the claimant at a substantial disadvantage compared to someone without her disability. The disadvantage was said to be that she could not prepare her written appeals submission within the time extension proposed due to her ill health. Again, we remind ourselves that "substantial disadvantage" means "more than minor or trivial". Our finding on this is that the PCP did put the claimant at a substantial disadvantage. We have already explained our reasons for that in dealing with the unfavourable treatment complaint. In brief, the medical records confirmed that the claimant's anxiety and depression got worse from 27 October onwards and significantly worse from 8 November 2023. We have explained above why we found that the evidence of her undertaking other

activities (working elsewhere and bounce classes) was not such as to undermine our finding that the claimant's anxiety and depression were having a substantial impact on her ability to engage with the appeal process. We find that the application of PCP2 did put the claimant at a substantial disadvantage compared with a non-disabled person.

189. The next issue is whether the respondent knew or could reasonably have been expected to know that the claimant was likely to be placed at that disadvantage (Issue 7.d). The relevant disadvantage in this case is being unable to prepare her written appeal within the time extension set by Mrs Budden. On this point we find that the respondent did have the requisite knowledge. That is because the claimant expressly set out the impact of her anxiety and depression on her ability to comply in her emails to Mrs Budden. What we find therefore is that the duty to make reasonable adjustments did arise in relation to the extension of the appeal time frame. We find it arose by 8 November 2023 when the claimant notified the respondent of the impact of her mental health issues on her ability to engage with the appeal process. if we are wrong about that, we find it arose at the latest by the 14 December 2023 when the claimant emailed specifically referring to the requirement for a reasonable adjustment to allow her to put a written statement together for the hearing.

190. The next issue is whether the respondent failed in its duty to make reasonable adjustments (Issue 7.e.(ii)). The burden of proof in reasonable adjustments complaints is initially on the employee to show that a PCP was applied and that it placed the employee at a substantial disadvantage asserted. The claimant has done so. They also need to put forward and identify some at least potentially or apparently reasonable adjustment which could be made. In this case the claimant had put forward in email (p.114) the proposal of a further stay until the New Year (whether that is viewed as 4 weeks from her request on 6 December or "after the New Year" which she request on 14 December). In the List of Issues the reasonable adjustment identified was to allow more than the 7 days (i.e. from 8 December) and/or making enquiries as to the claimant's ability to respond.

191. We do find that in this case the burden has passed to the employer to show why the proposed adjustment was not reasonable. The reason given for not allowing an extension of time for written submissions beyond 15 December was the need to investigate in a timely manner.

192. Mrs Budden's evidence was that the respondent had already granted extensions amounting to 7 weeks in total. We find that is a slight distortion of the position. 7 weeks was the period from the date of the claimant's appeal document to the date the appeal hearing was held. The actual extension which it had previously granted was 4 weeks and then a further 7 days, the extension the claimant was seeking was a stay of a further 4 weeks from 6 December 2023 (and in essence the same extension to the New Year in her email of 14 December) which would have taken matters to 4 January 2024. That would have been some 10 weeks from the date the claimant lodged her appeal.

193. While accepting that there is a need to deal with matters without delay it does not seem to us that it was unreasonable to extend the period of appeal at least until 4 January 2024. It would have been reasonable to extend until that point and then review whether the claimant was in a position to engage with the process and if not,

to assess when she would be. The evidence given about why the adjustment was not reasonable was very limited. There was a suggestion that memories fade but in this case the events being dealt with were not that far in the past and in any event, the majority of the claimant's appeal was to do with the procedure followed which was documented. There was no other real reason put forward why the extension or further enquiries into the appropriate length of an extension would not be appropriate. The respondent accepted they were no longer paying for the claimant's wages so there was no financial implication to them of extending time. The claimant was, as we said, no longer at the workplace and so there was no question of any impact on the childcare or on a harmonious working relationship as put forward in the legitimate aim of the Section 15 claim.

194. Our conclusion on this complaint is that the duty to make reasonable adjustments in relation to PCP2 did arise in relation to extending the appeal process. The respondent has not satisfied us that that adjustment of extending for a further 4 weeks from 6 December 2023 before then assessing whether the claimant was in a position to attend was not reasonable. In relation to this complaint then we find that the claimant's case does succeed.

Summary of conclusions

195. In summary, our judgment is that the claimant's complaints all fail except for the claim that there was a failure to make a reasonable adjustment to PCP2 by extending time for making written representations in her appeal against dismissal until 4 January 2024 and to at that pint assess the claimant's ability to engage with the process.

196. Although we did not expressly deal with the issue of time limits in our oral judgment we confirm (for the avoidance of doubt) that the one successful complaint was brought in time. The failure to comply with the duty was by Mrs Budden's emailed decision on 15 December 2023. The claim was issued on 14 March 2024, within 3 months of that failure allowing for the extension of time for complying with the ACAS early conciliation process.

Next Steps

197. The case will be listed for a remedy hearing to decide the appropriate compensation for the claimant's successful claims. That will include submissions on the impact of the failures to comply with the ACAS Code. It will also include submissions about what would have happened if the breach of the duty to make reasonable adjustments had not taken place.

Approved by Employment Judge McDonald
Date: 15 April 2026

WRITTEN REASONS SENT TO THE PARTIES ON
Date: 15 April 2026

FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any full written reasons for the judgments are published, in full, online at https://www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found at www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

ANNEX
List of Issues

1. Protected disclosures

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

   i. What did the claimant say or write? When? To whom? The claimant says she made disclosures on these occasions:

      PD1 Verbally to Jodie (Mrs Matthews-Richards) on 28 September 2023 about Chloe vaping in the disabled toilet

      PD2 In writing to Jodie (Mrs Matthews-Richards) on 28 September 2023 about Chloe vaping in the disabled toilet

   ii. Did she disclose information?

   iii. Did she believe the disclosure of information was made in the public interest?

   iv. Was that belief reasonable?

   v. Did she believe it tended to show that the health or safety of any individual had been, was being or was likely to be endangered (s.43B(i)(d) ERA [para 7];

   vi. Was that belief reasonable?

b. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

2. Raising Health and Safety concerns Section 44(1)c(i) ERA 96

a. Did the Claimant bring circumstances connected to their work to the Respondent's attention?

b. Were these circumstances potentially harmful to health and safety?

c. Was the belief that these circumstances were potentially harmful reasonable?

d. Was the risk brought to the Respondent's attention by reasonable means?

3. Automatically Unfair dismissal

a. Was the Protected Disclosure the reason or principal reason for the dismissal.

b. Was the raising of health and safety concerns the reason or principal reason or dismissal.

4. Unlawful detriment

a. What are the facts in relation to the following alleged acts or deliberate failures to act by the respondent?

D1 Refusal to extend the time for appeal.

a. Did the claimant reasonably see that act or deliberate failure to act as subjecting her to a detriment?

b. If so, was it done on the ground that:

i. she made a protected disclosure
ii. she raised health and safety concerns

5. Direct disability discrimination (Equality Act 2010 section 13)

a. The alleged less favourable treatment is:

i. Dismissing the claimant [Paras 38-39 PoC]
ii. Refusing to stay the appeal process and refusing to notify the claimant of the venue for the adjourned hearing [paras 55-56 PoC].

b. Is the fact that the treatment occurred or that it amounted to a detriment disputed?

c. What are the material circumstances in constructing a hypothetical comparator - the claimant says that it would be someone who like the claimant had passed her probationary period.

d. Has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances without a disability was or would have been treated? The claimant relies on a hypothetical comparison.

e. If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of disability?

f. If so, has the respondent shown that there was no less favourable treatment because of disability?

6. Discrimination arising from disability (Equality Act 2010 section 15)

a. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

b. If so, did the respondent treat the claimant unfavourably by

   i. dismissing the claimant?
   ii. refusing to stay the proceedings until the claimant was sufficiently well to put in written representations.

c. Did the following things arise in consequence of the claimant's disability:

   i. The claimant's conduct/ perceived performance or behaviour at work [para33]
   ii. The symptoms of her mental health [para 46] meaning her inability to comply with the appeal timetable provided.

d. Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?

e. If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

f. If not, was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

   i. Dismissal was a proportionate means of achieving a legitimate aim: Ensuring the safety and wellbeing of the children; maintaining appropriate and consistent standards of childcare; and maintaining a harmonious work environment.

g. The Tribunal will decide in particular:

   i. was the treatment an appropriate and reasonably necessary way to achieve those aims;

   ii. could something less discriminatory have been done instead;

   iii. how should the needs of the claimant and the respondent be balanced?

7. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

a. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

b. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

   i. PCP1: Applying the short-service disciplinary process where an employee had less than 2 years' service.
   ii. PCP2: refusing to stay the appeal proceedings pending written representations

c. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that

   i. PCP1: The use of the short-service policy created a disadvantage because it did not allow the claimant to fully understand, respond to or provide mitigation evidence to reply to the allegations of misconduct.[para 26]
   ii. PCP2; The Claimant could not prepare her written appeal submission within the time extension proposed, due to her ill health [para 52]

d. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at each of those disadvantages?

e. Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

   i. PCp1: To vary the short service Policy [para 28] by applying the full disciplinary procedure to the claimant
   ii. PCP2: Allowing more than 7 days and/or making enquiries to check when the claimant could respond.

f. By what date should the respondent reasonably have taken those steps?