Case Number: 1302672/2021

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Miss Nicola Leigh	-v-	**Bright Eyes Day Care Nursery Ltd.**

FINAL MERITS HEARING

Heard at: **Centre City Tower, Birmingham** On: **20-23 February 2023**

Before: **Employment Judge Perry, Mrs J Keene & Mr I Morrison**

Appearances

For the Claimant: **In Person**

For the Respondent: **Mr S Mountford (director)**

REASONS

References below thus "[...] are to the document number (we did not have a paginated bundle) and thus "(…)" as the context suggests to the paragraph of a witness statement or these reasons.

1. Oral reasons were given to the parties at the conclusion of the hearing on both liability and remedy. A Judgment, the text of which for the assistance of the parties is repeated below was sent to the parties on 24 February 2023:-

    1. *The claimant was dismissed in breach of contract on 22 February 2021. The respondent is ordered to pay **£383.68** (gross) as damages to the claimant.*
    2. *The claimant did not make disclosures that qualify for protection pursuant to Part IVA and/or s.103A Employment Rights Act 1996.*
    3. *The claimant's complaint that she was unfairly dismissed by the respondent on 22 February 2021 is well founded. The respondent is ordered to pay to the claimant as compensation for unfair dismissal the sum of **£575.52.** That is calculated as follows:-*

Basic Award *(2 weeks pay at £191.84)*	*£383.68*
Compensatory Award	
Loss of statutory rights	*£191.84*
TOTAL	***£575.52***

*4. Regulation 4 paragraphs (3) to (7) of the Employment Protection (Recoupment of Jobseekers Allowance & Income Support) Regulations 1996 **do not apply** by virtue of paragraph (8) of regulation 4, no part of the award falling within the prescribed element.*

THE HISTORY TO THIS CLAIM AND THE EVENTS LEADING TO IT

Before we address the evidence, applications, issues and the law we first set out the background to this claim.

2. Miss Leigh was born in July 1995 [exact date redacted for version to be posted on internet]. Her mother started working at the Respondent's Nursery ("the Nursery") on the 2nd February 2016 or thereabouts. Miss Leigh started working there on the 2nd April 2018 or thereabouts. Miss Leigh enrolled on a Level 3 Apprenticeship in October 2018.

3. Miss Leigh finished her apprenticeship in March 2020 around the same time as the start of the first national COVID lockdown (on the 23rd March).

4. The Respondent told us it was its practice when staff had finished an apprenticeship not to work to them for a week and so she started working as a bank member of staff in April 2020.

5. Notwithstanding that Miss Leigh was paid furlough pay.

6. On 24th April 2020, Miss Leigh's Mother resigned. Her mother started early conciliation against the Respondent on 29th July 2020. Her mother's early conciliation concluded on 10th August 2020 and her mother brought a claim against the Respondent on 15th August 2020 in relation to notice pay. We return to that at (15 below).

7. By Autumn 2020, Miss Leigh told us that from her perspective, relations between her and Mr Mountford had broken down. Despite that, she started as a permanent member of staff on or about 1st December 2020; at least that is what the contract that we have been provided recorded. We will return to continuity of employment points at (41 below to 42 below).

8. On 6th January 2021, England entered its third national lockdown. That is relevant because on 8th January there was an alleged incident at the Nursery between a CCTV Engineer and Mrs Clayton, the Manager of the Nursery, who was also Miss Leigh's aunt. We will return to what that alleged incident involved from the issues at (44.1 below) and our findings at (72 below). Miss Leigh in the narrative attached to her claim form [1] refers to another member of staff, who was a witness to some of the events Miss Leigh states occurred that day, but does not mention her by name. We now know that person to be Miss Flaherty.

9. In her witness statement (55) Miss Leigh said that she wrote down the events of the 8th January on Sunday 10th. Unfortunately her note of that has not been retained.

10. The following week (commencing Monday 11th) it appears from the rotas before us that Mrs Clayton was only present in the Nursery on Wednesday 13th.

11. On Tuesday 12th, Miss Leigh states that she made a disclosure to Ms Mowbray, the Nursery's assistant manager, about the event she witnessed on 8th January between the CCTV Engineer and Mrs Clayton. We return to what her alleged disclosure from the issues at (44 below) and our findings at (73 below)

12. Miss Leigh told us she subsequently mentioned the contents of her disclosure to Mrs Mosley, who she describes as being third in command at the Nursery. Following the discussion with Mrs Mosley she tells us she made a disclosure to the NSPCC on the evening of the 12th. Those matters are referenced in her witness statement (58 to 60). At (58) she also references the breakdown in relations between her and Mr Mountford that had occurred by then and the Tribunal claim that her Mother was pursuing.

13. Ms Mowbray told us that she had been tasked in investigating those incidents by Mr Mountford on the 15 January 2021 and she prepared a report [30]. Two other documents are relevant [29 and 31].

14. On 18th January OFSTED carried out a visit to the Nursery. We relay what Mr Mountford told us the matters OFSTED wanted to investigate at (75.5.1 below). He told us that during the visit the matters that are the subject of the disclosure were thoroughly investigated and CCTV footage was viewed.

15. On Wednesday 20th January 2021 , Miss Leigh's Mother's Tribunal claim was heard by CVP.

16. On Thursday 28th, two things occurred;

    16.1. a fire incident and

    16.2. a staff meeting in relation to hours of work.

    We will return to both in due course.

17. The following week (Monday 1st to Friday 5th February) all staff at the Nursery had to self-isolate. During that week Miss Leigh signed and returned her contract on the 2nd February and the Respondent stamped Miss Leigh's contract [13] on the 3rd.

18. Also, on 3rd February Ms Mowbray lodged a complaint about the fire [15 & 16] (although we should record that whilst only one of those documents was dated 3rd February we find it is more likely than not they were created at the same time).

19. Following an apparent request to do so on 6th February, Miss Leigh sent an email to the Respondent concerning her version of the events concerning the fire [18].

20. Following the return of the Nursery's staff to work on Monday 8th February there was a staff meeting in relation to COVID. Miss Leigh states in her witness statement (59 & 75) that two colleagues Miss Flaherty and Miss Ball were commenting about the OFSTED site visit. Miss Leigh also states that she was told by another colleague, Mrs Arshad, that Mrs Arshad had been told by Ms

Ball, that in turn Ms Mowbray had told Miss Flaherty to *"keep her mouth shut re the CCTV man".* Two points arise from that:-

20.1. There is a gap in that sequence about how what Ms Mowbray apparently told Miss Flaherty got to Miss Ball.

20.2. What was it that Miss Flaherty was being told to keep quiet about. Did that comment :-

20.2.1. refer to the incident on the 8th January with the CCTV man and/or

20.2.2. the viewing of the CCTV footage of that incident on 10th January?

We return to that at (73.1 below).

21. The following day, 9th February 2021, Miss Leigh accepts that what the Respondent describes as a probation meeting took place, although she disputes that what occurred fits the description the respondent applied to it. It was not in dispute that she was warned in relation to her hours of work. Her witness statement (77 & 78) refer. She states Mr Mountford said *"if you can't do the hours, you can't work here".*

22. On 10th February Ms Flaherty complained to Mrs Clayton [23] about Miss Leigh referencing a number of issues including Miss Leigh making comments about Miss Leigh's mother's Tribunal claim, about confidentiality, about Miss Leigh making derogatory remarks about management and Miss Leigh also referencing the attendance on site by OFSTED.

23. On Monday 15th February, Ms Mowbray made a note recording that Mrs Arshad had complained about a breach of her confidentiality [24].

24. By Thursday 18th February Mrs Clayton apparently completed an investigation about the fire incident [20]. Miss Leigh refers to that in her witness statement at (82) following. We say apparently because there is an issue over when that

was competed. Mr Mountford in a subsequent document dated 22nd February refers to the fire investigation report as being still under "investigation" [42]. Given that report was dated 15th February he was asked to explain that contradiction. He said, *"it hadn't been typed up"*. How that fits with the report being completed or not, is a separate matter. Mr Mountford also created a separate undated note in relation to the fire investigation titled *"Findings of investigation into the Fire"* [21].

25. On Friday 19th February a meeting took place between Miss Leigh and Mrs Clayton, with Miss Mosley as the notetaker [25]. The respondent states that was to address matters concerning the conduct of Miss Leigh to other members of staff. Specifically it referred to a breach of confidentiality. We now know that related to Mrs Arshad but at the time despite Miss Leigh stated she did not understand what the issue concerned. Mrs Clayton responded by asking if there was anything Miss Leigh was aware of that could have related to her relaying confidential information concerning other staff. Mrs Clayton also raised a number of other matters including Miss Leigh undermining management and the running of the nursery and making negative comments about staff members. Thereafter Mrs Clayton and Miss Mosley had a discussion [26].

26. Also, on 19th February Miss Leigh emailed Mrs. Clayton in relation to her hours of work at 6:59pm [40]. Mrs Clayton did not respond until 1:54pm the following Monday 22nd February [40] where Mrs Clayton stated that she would refer Miss Leigh's response to Mr Mountford when he got into the office. That suggests that Mr Mountford had not seen Miss Leigh's email by 2:00pm on the 22nd.

27. Her timesheet for that day shows that Miss Leigh attended the Nursery premises at 9.30am for a meeting between 10:00am and 12 noon, was rostered to work between 12 noon and 2:00pm and she left at 2:25pm. When she got home, Miss Leigh acknowledges in her witness statement (96) that she received the respondent's email [42] indicating that she had not successfully completed her probationary period and her employment would terminate on 1st March 2021. She disputes receiving the respondent's other email [41].

28. Thus, on the date Miss Leigh was dismissed she was 25 years old.

29. For context the roadmap for the exit of the third National Lockdown was published on 19th February. Amongst other matters that roadmap included a plan for the re-opening of primary and secondary schools. That occurred on 8th March for students in England. Whether that was known to the parties at the point that the emails were exchanged on the 22nd February between Mr Mountford and Miss Leigh, no one has addressed.

30. On 15th March 2021 Miss Leigh started early conciliation. That concluded on the 13th April. Miss Leigh discovered that she was pregnant with her second child sometime in April or May (Miss Leigh told us *"I worked out this morning it was May*"). She commenced this Tribunal claim on the 24th May 2021. Her second child was born on the 3th February 2022.

THE EVIDENCE AND APPLICATIONS.

31. At a case management hearing on the 3rd March 2022 [70] Judge Faulkner gave clear case management directions to the parties. Despite that and the respondent's involvement in the earlier claim by Miss Leigh's mother we had before us a bundle that was not only not paginated but the documents were neither in a bundle or otherwise tied together; instead they were separately and individually numbered. There were 82 numbered documents in total. They equated to approximately 300 pages of documents and a further 75 pages or so of witness statements, although they included a number of witnesses the parties did not intend to call (40 below).

32. A number of other documents that we would normally have expected to have provided, were not present. We asked for those omissions to be remedied. They included the rotas for the for the period 1st December to 28th February and a number of the Respondent's internal procedures, for example, fire evacuation.

33. At the start of the Hearing, there was also an application before us by Miss Leigh to use various audio recordings (see (40 & 41) below). We identified that

for the most part, what this case concerns is what was in the mind of the dismissing officer at the time of her dismissal and therefore what was said on a recording or was not said as the case may be, was not the critical issue and instead the issue revolved around whether that recording had been heard, and if not then the question arises, if that was not heard, why was that?

34. Within the bundle was a series of transcripts [65] of voice notes from one of Miss Leigh's colleagues, that Miss Leigh had partially transcribed. The voice recordings were again available. The panel identified to have listened to such a considerable number of voice notes would have taken a considerable amount of the time and the time allocated for this Hearing was tight as it was (as can be demonstrated by judgment being delivered (with a remedy to be addressed) after 1.15pm on the final day (4) of the Trial).

35. Further as we say the transcripts [65] that Miss Leigh provided were snippets and therefore partial. Whilst it would have been open for the Respondent to have taken issue with them, on the basis that Mrs Arshad (the maker) was not called, then the weight that we would need to give to those notes is limited in any event.

36. Similarly, Miss Leigh sought disclosure of CCTV evidence from the Respondent and the Respondent that we view certain video footage in relation to the fire. That related to the CCTV footage we were told by the respondent had been viewed by OFSTED. As a result it had no longer been retained, whereas other CCTV footage, for instance, in relation to a fire incident had been retained, the respondent suggests had been retained because there was an ongoing investigation in relation to the fire.

37. Short of that evidence being shown to be untrue, we have accepted that in practical terms if the Respondent says that the evidence is not there, the Tribunal cannot if that is so. It is a significant issue if the Tribunal was being told untruths. If so inferences can be drawn. There was no evidence before us to suggest that that was the case here.

38. The same point applies to the video footage as the audio; it is not our role to determine that and that can actually detract from what our role is.

39. With regards to the bundle, Miss Leigh also made points about documents that were not provided, one of them was the respondent's staff handbook. The Respondent said that Miss Leigh could have come and collected it. We made clear at the outset that was not acceptable; the bundle should have been prepared including all the relevant documents and it should have included the handbook and any relevant procedures. The Respondent subsequently remedied that omission.

40. Within the bundle, there were also a number witness statements that had been taken for the most part some time after the events concerned and provided by individuals to whom Miss Leigh had relayed the alleged disclosures or who put her to the alleged detriments. We queried with the parties at the outset therefore why there was any need for us to hear from anybody else other than Miss Leigh, Mr Mountford, who took the decision to dismiss, Ms Mowbray, who was the recipient of one of the disclosures and Mrs Clayton, who was the person about whom one of the disclosures were made, but also the manager who investigated other matters and essentially was the investigating officer in relation to some of the other complaints other than Miss Mowbray. Neither party sought to challenge that proposition and it agreed by the parties that we should hear from those four witnesses only.

THE ISSUES, LAW AND MATTERS AGREED/THOSE IN DISPUTE

41. The Respondent accepts following a lengthy discussion on day 1 of the hearing that Miss Leigh had continuity of employment such that she was entitled to bring a claim for unfair dismissal. Given the matters at (3 above) to (5 above) we concluded there must have been a consensus and overarching agreement on the part of both parties that work would be offered at the end of that week, and that she was thus an employee at the time the lockdown started in order for furlough to be payable.

42. The Respondent accepted that her continuity of employment commenced on the date stated in her contract, 30th April 2018.

43. Therefore at the date that Miss Leigh was dismissed, had been employed for 2 complete years and therefore as a matter of law and absent any contract, she was entitled to 2 weeks' notice. Had Miss Leigh's probationary period been successfully completed she would have been required to give or to receive 1 months written notice. We found her probationary period at the point that she was dismissed was not completed and therefore her entitlement to statutory notice 2 weeks exceeded her contractual notice entitlement of 1 week pursuant to clause 4.1.

44. The remaining issues that we need to determine were identified by Judge Faulkner at the case management hearing on 3rd March 2022 [70]. He identified that 3 protected disclosures were argued; they are set out in (8.1) to (8.3) of his Order. In that regard Miss Leigh:-

44.1. corrected a typographical error with regards to the date that the first alleged disclosure was made, namely 8th January 2020, rather than 8th December 2020. That disclosure as relayed to Judge Faulkner was :-

> *"she had witnessed Mrs Clayton going into a small office (which she described as a cupboard) with a maintenance man who visited the nursery from time to time and twenty minutes or so later emerged from that room rearranging their clothes just as Miss Leigh and a colleague were about to enter it".*

44.2. the second was the same report as the first and she clarified before us this was made the same day as the first and

44.3. as to the third that the report was made to the National Society of the Prevention of Cruelty to Children (NSPCC) who in turn reported it to OFSTED and also told them

> *"… that Ms Mowbray had told her that she had walked in on Mrs Clayton and the maintenance man and interrupted "something*

physical" and also witnessed a flirtatious conversation and behaviour between the two of them".

45. The detriments were also set out by Judge Faulkner at (12.1) to (12.3) of his Order. They were threefold:-

    45.1. On 18 February 2021, Mrs Clayton blamed the Claimant for her part in responding to an incident which resulted in a fire at the nursery and said the Claimant and others would be charged for the resulting damage — the Claimant says she was later told by colleagues that this had not been said to them

    45.2. On 19 February 2021, Mrs Clayton indicated that colleagues were uncomfortable with the Claimant having made allegations against management, thus indicating that she and/or Ms Mowbray and/or Mrs Mosley had breached the confidentiality the Claimant had anticipated when making the alleged disclosures to the Respondent; and

    45.3. On or around 3 December 2021 (thus after the termination of her employment) she discovered that the Respondent was insinuating in a report prepared in relation to the fire referred to at paragraph 12.1 [of Judge Faulkner's Order i.e. (45.1 above)] that she was responsible for starting it.

46. The last of those detriments having occurred after the claim was presented was permitted as an amendment by Judge Faulkner on the basis Miss Leigh became aware of it as the result of the disclosure of documents.

47. The Respondent now accepts Miss Leigh's termination was a dismissal for the purposes of Section 95 of the Employment Rights Act 1996 and that she had qualifying service to bring an unfair dismissal claim.

48. As to the whistleblowing claim, to qualify for protection as a *"whistleblower",* a *worker* (that term includes employees) is required to make a *"protected*

disclosure". In order to be protected the disclosure must be a "*qualifying disclosure*", namely:-

> *"… 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 [what we will refer to for ease as the "states of affairs" listed in subsections (a)-(f)] …"* [1]

49. The use of the word "and" thus requires the worker to reasonably believe the disclosure is in the public interest and to reasonably believe the disclosure tends to show one of the states of affairs.

50. Two relevant states of affairs are argued here:-

> *"(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, and*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered".*

51. As to the two states of affairs in turn Miss Leigh explained they respectively related to :-

51.1. safeguarding

51.2. the mental and emotional health of the children

52. Because information must be relayed, an allegation [2], an opinion or state of mind expressed [3] or a position stated for the purpose of negotiation [4] alone will not be sufficient for a disclosure to qualify for protection. Whilst that is so we have to take care to ensure we do not fall into the trap of thinking that an alleged disclosure has to be either allegation or information, when reality and experience teaches that it might well be both; they are often intertwined [5]. The

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[1] s. 43B(1) ERA
[2] Cavendish Munro v Geduld *[2010] IRLR 38, UKEAT/0195/09 [24]*
[3] Goode v Marks and Spencer *UKEAT/442/09 [36]*
[4] see *Cavendish Munro.* This approach was also applied in *Goode, Norbrook Laboratories v Shaw UKEAT/0150/13 and Millbank Financial Services v Crawford [2014] IRLR 18 EAT.*
[5] Langstaff P (EAT) in Kilraine v London Borough of Wandsworth *UKEAT/0260/15*

question is whether the statement or disclosure in question has *"a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in the subsection".* Thus, the words, *"The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around,"* relay information whereas *"You are not complying with health and safety requirements"* is the making of an allegation [6].

53. In addition to identifying the date and content of each disclosure, the claimant will ordinarily be expected to identify each alleged failure to comply with a legal requirement or health and safety matter (as the case may be), the basis on which it is alleged each disclosure is qualifying and protected and save in obvious cases, the source of the obligation by reference for example to a statute or regulation [7]. Each of the complaints should be looked at individually rather than collectively to see whether it identifies (not necessarily in strict legal language) the breach of obligation on which the employee relies. [8]

54. As to any of the alleged failures, the burden is upon the claimant to establish on the balance of probabilities that her employer was in fact and as a matter of law, under a legal (or other relevant) obligation and the information disclosed tends to show that that person has failed, is failing or is likely to fail to comply with that obligation [9].

55. It is also a necessary ingredient of a "*qualifying disclosure*" that a Claimant has a reasonable belief that the state of affairs exists. The EAT summarised the approach thus [10]:-

> *"(2)… the first question for the ET to consider is whether the worker actually believed that the information he was disclosing tended to show the state of affairs in question. The second*

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[6] see Lady Slade in *Cavendish Munro* where she explains the rationale for this and contrasts the statutory words in Part IVA ERA and the provisions in the Sex Discrimination Act 1975 and Race Relations Act 1976
[7] *Blackbay Ventures v Gahir [2014] ICR 747 (EAT)* [98] & *Eiger Securities v Korshunova [2017] IRLR 115 (EAT)*
[8] *Fincham v HM Prison Service UKEAT/0991/01*
[9] *Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4 EAT* at [24]
[10] Soh v Imperial College *UKEAT/0350/14* [42] approving the approach in Darnton v University of Surrey *[2002] UKEAT 882/01, [2003] IRLR 133*

question for the ET to consider is whether, objectively, that belief was reasonable (see Babula [11] *at paragraph 81).*

(3) If these two tests are satisfied, it does not matter whether the worker was right in his belief. ***A mistaken belief can still be a reasonable belief.***

(4) Whether the worker himself believes that the state of affairs existed may be an important tool for the ET in deciding whether he had a reasonable belief that the disclosure tended to show a relevant failure. Whether and to what extent this is the case will depend on the circumstances. In Darnton [12] *HHJ Serota QC explained the position in the following way:*

> *'29. … It is extremely difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knew or believed that the factual basis was false, unless there may somehow have been an honest mistake on his part. The relevance and extent of the employment tribunal's enquiry into the factual accuracy of the disclosure will, therefore, necessarily depend on the circumstances of each case. In many cases, it will be an important tool to decide whether the worker held the reasonable belief that is required by s.43B(1).' "*

56. The rationale that underlies our ***emphasis*** in (3) is that the policy of the legislation is to encourage responsible whistle-blowing [13].

57. While *"belief"* alone requires a subjective consideration of what was in the mind of the discloser, *"reasonable belief"* involves an objective test [14] and its application to the personal circumstances of the discloser, which are likely to include his/her knowledge of the employer's organisation as a well-informed insider and having regard to his/her qualifications. Thus, the reasonable belief of an experienced surgeon may be entirely different to that of a layperson [15].

58. The Court of Appeal has made clear that Parliament did not choose to define the phrase ***"in the public interest"*** and thus *"the intention must have been to*

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[11] Babula v Waltham Forest College *[2007] ICR 1026 CA [82]*
[12] (above)
[13] Babula *(above) at [80]*
[14] Babula *(above) at [82]*
[15] *Korashi (above)*

leave it to employment tribunals to apply it as a matter of educated impression". Whilst the necessary belief is that the disclosure is in the public interest, that does not have to be the worker's predominant motive in making it and there may be more than one reasonable view as to whether a particular disclosure was in the public interest; a Tribunal should be careful not to substitute its own view for that of the maker [16].

59. A worker will also ned to show that s/he has been put to a detriment. That has to be viewed objectively. That phrase has been given a wide interpretation by the courts [17] as not meaning anything more than essentially ***'putting under a disadvantage'***. That is a question of fact for the Tribunal to decide [18].

60. If the claimant shows all those things the burden will pass to the respondent to show the protected disclosure did not materially influence (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.

61. As to dismissal it is now accepted that the Respondent dismissed the claimant and she had qualifying service to bring a claim or unfair dismissal. That being so the Respondent has to show on balance that it dismissed for a potentially fair reason, here conduct, and in doing so its belief was a genuine one.

62. If a potentially fair reason is shown by the employer, the Tribunal must then go on to assess the fairness of the dismissal. The starting point for that determination is the words of s.98(4) Employment Rights Act 1996 ("ERA"). The burden of doing so is neutral:-

> *"…the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the*

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[16] *Nurmohamed* (above)
[17] Lord Hoffman in Khan at [53] and Brandon LJ in *Jeremiah*
[18] *adopted and approved by t*he HL in Shamoon v Chief Constable of the Royal Ulster Constabulary *[*2003] ICR 337 which in turn referred often to another HL decision Chief Constable of West Yorkshire Police v Khan [2001] IRLR 48

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

63. What that will entail in a case such as this is that the employer must

63.1. have reasonable grounds upon which to sustain that belief,

63.2. have carried out as much investigation into the matter as was reasonable in all the circumstances of the case, and

63.3. the sanction is a fair one.

64. As to the questions at (63 above) the Tribunal must not substitute its own subjective assessment of the reasonableness of the employer's conduct for that of the employer [19]; in many, (though not all) cases there is a "*band [or range] of reasonable responses"* within which one employer might take one view, and another might quite reasonably take another. The role of the Tribunal is to decide in the circumstances of each case whether the procedure adopted and decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If so the dismissal is fair. If outside the band, unfair [20].

65. Where an employer argues that the employee would or might have ceased to be employed in any event had a fair procedure been followed, the Tribunal must assess, using its common sense, experience and sense of justice if the employer could fairly have dismissed and, if so, what were the chances that the employer *would* have done so and when that would have been? Whilst the description is inexact it is usual to refer to this as the '*Polkey'* issue.

66. Given this is an argument advanced by an employer it is for the employer to advance that argument. The Tribunal must not judge this on the basis of what it

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[19] *Orr v Milton Keynes [2011] ICR 704 CA*
[20] *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT*

or a hypothetical fair employer would have done but the what the actual employer would have done, on the assumption that the employer would this time have acted fairly though it did not do so beforehand [21].

67. That is a hypothetical enquiry, owing more to assessment than it does to hard fact [22] and thus a degree of uncertainty is an inevitable feature of this exercise. There are limits to the extent to which a Tribunal can confidently predict what might have been. The fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. It may be that the evidence available to the Tribunal is so riddled with uncertainty and so unreliable that no sensible prediction can properly be made. That is a matter of impression and judgment for the Tribunal. A finding the employment would have continued indefinitely should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored [23].

68. In the alternative, or in addition, we have to consider whether the Respondent has shown on balance that Miss Leigh contributed to a dismissal by her conduct such that it is just and equitable to reduce any award that is made. There are different tests, for the basic and compensatory award.

69. It was agreed we would address the remaining issues relating to remedy separate to liability, '*Polkey'* and contribution. They include an issue of Miss Leigh's entitlement to notice pay.

OUR FURTHER FINDINGS AND CONCLUSIONS

The Disclosures

70. In her witness statement Miss Leigh relays the facts that from the basis of her complaints before going on to say that she first relayed her complaints to Miss Mowbray, then Mrs Mosley and then the NSPCC [59-60]. She gave no detail of what she asserts she said to Miss Mowbray, Mrs Mosley or the NSPCC other

[21] *Hill v Governing Body of Great Tey Primary School UKEAT 0237/12, [2013] IRLR 274* per Langstaff P
[22] *V. v Hertfordshire County Council UKEAT/0427/14 per Langstaff P at [1 & 21-25]*
[23] *Software 2000 as above*

than *"I reported it".* That is a reference back to the contents of her statement. We return to that at (72.2 below) & (76 below).

71. Having considered the evidence, Miss Leigh gave an inconsistent account about the alleged disclosures and their content. We say that for the following reasons.

72. As to what she witnessed:-

72.1. when asked to provide details to Employment Judge Faulkner [70] on 3rd March 2022, 12 months after the events concerned, Miss Leigh said *"she had witnessed Mrs Clayton going into a small office with the maintenance man on the 8th December (wrong date) and reemerging 20 minutes later".* She did not say that in the claim form, she made reference to *"a disturbing incident"* only.

72.2. The date issue aside and any points Miss Leigh makes about what she considered that she needed to provide us by way of detail, the content of that is fundamentally and wholly at odds with how she describes the events in her witness statement (53). There she describes that she went looking for Mrs Clayton and could not locate her. There is no mention of her going into the office or seeing Mrs Clayton going into the office with the maintenance man or in relation to the time period. Those differences embody a wider issue about how her case changed and information was provided and expanded as time elapsed.

73. As to how Miss Leigh reported the incident:-

73.1. in her claim form [1] she states that she reported it to Ms Mowbray and Ms Mowbray immediately told *another member of staff* who had witnessed it *"to keep her mouth shut".* In her claim form Miss Leigh does not say who the *other member of staff* was, but she did mention her at least on 2 occasions where she dealt with these incidents in the claim form. We now know that other member of staff was Miss Flaherty.

73.2. Ms Mowbray does not deny that that the conversation occurred. Essentially she considered the report to be “gossip”. We address the two issues that immediately arise from that at (20.2 above).

73.3. Miss Leigh alleges that only then did she tell Mrs Mosley. In the statement she provided sometime after the events, Mrs Mosley does not deny the conversation occurred, but she did deny what was said.

73.4. In contrast to what Miss Leigh described in her claim form, in her witness statement (59), Miss Leigh makes no mention that the other member of staff was present when Ms Mowbray viewed the footage. In her witness statement (61) Miss Leigh states she did not know if Miss Flaherty had witnessed it. When she was asked about the apparent conflict, Miss Leigh accepted her account in her ET1 claim form was misleading and incorrect. She told us that the three individuals concerned were not all there at the same time before going on to tell us that was an assumption that she had made, having been told what she had by way of the fourth hand evidence from Mrs Arshad that we describe at (20 above).

73.5. Miss Leigh’s failure to raise Miss Flaherty’s presence impacted on the investigation; the Respondent did not thus ask Miss Flaherty if she had been present when Miss Leigh had initially seen Mrs Clayton and the CCTV engineer in the office on 8th February despite it having asked questions of her concerning the viewing of the CCTV footage on 12th February [31].

74. Those matters emphasise how Miss Leigh’s account changed. That is despite her witness statement being 33 pages long and having gone into matters in considerable depth. Given the nature and breadth of those disparities relating to not only what she witnessed but how she reported it we do not accept her account.

75. Those matters aside further issues arise as to the reasonableness of the belief’s Miss Leigh held:-

75.1. Miss Leigh repeatedly accepted before us that she drew conclusions as to what had happened, sometimes well after the event. When asked by us to explain her basis for doing so she told us they were based on assumptions she had made. In her witness statement (63) she told us, that *"she was not present"* when OFSTED visited before going on to speculate what footage had been viewed.

75.2. That is reinforced by the example we gave (73.4 above) about Miss Flaherty viewing the CCTV footage.

75.3. Those matters led us to conclude that Miss Leigh was prepared to speculate over matters where she was not present.

75.4. She also told us that the conclusions she reached were based on a negative view that she had formed of the Respondent.

75.5. She made an assumption that something was "going on" between Mrs Clayton and the CCTV engineer

75.5.1. This was not one of the matters that Miss Leigh identified as a disclosure before Judge Faulkner [70] but was one of the matters that Miss Leigh raised in her witness statement at (41) and was raised by OFSTED to Mr Mountford. Whilst we have no evidence by way of email or letter from OFSTED to confirm these, Mr Mountford's witness statement [79] relays them at thus:-

5. …

a) That the nursery manger had been seen in a compromising situation with an CCTV engineer on the 8th January 2021

b) The CCTV engineer had access to the CCTV cameras

c) Ratios of the rooms where not being kept

d) The manger and deputy manager" were leaving the nursery setting to have their nails and hair done in nursery time

75.5.2. In her statement (44) Miss Leigh asserted that sometime in

> *"… autumn/winter 2019 Mrs Clayton was texting the CCTV engineer as usual and I came in to say goodbye before leaving. … when Mrs Clayton said, 'how funny is this Nic, he has text me saying I was just in the office with a girl with blonde hair, holding an ASDA bag and a brown bear' (this description was of me)* ***'how did he guess that?****' Ms Mowbray said. Mrs Clayton just kept bursting out laughing and did not answer. Ms Mowbray and I looked at each other concerned and did not find it funny. ... The only explanation I could think of for that to have been possible would be that he was watching her in the office through the cameras and she realised what she had let slip."*

75.5.3. It is not for us to speculate on what explanations there could have been for the comment *"how did he guess that". S*uffice to say several explanations could arise. When we asked Miss Leigh to explain how she came to the view that she came to she merely repeated what had been said. From *that we* ***emphasise*** *above* Miss Leigh assumed that the CCTV Engineer had remote access to CCTV footage in the Nursery.

75.5.4. Apart from that being based on an assumption, the more significant issue in that regard is that occurred on Miss Leigh's account in the Autumn or Winter of 2019. Yet she did not report that to the NSPCC until 2021. If that really was as a serious matter as she thought, she should have reported it 18 months or so before she did.

75.6. The fire incident

75.6.1. Aside from whether Miss Leigh saw or smelled smoke, and if Ms Mowbray signal to her, Miss Leigh accepted that she had

identified that Ms Mowbray had an issue. Rather than checking with Miss Mowbray to see if she needed assistance and/or if steps were required, she made an assumption that everything was fine. Furthermore, she told a junior member of staff who was with her, Ms King, that there was not an issue.

75.6.2. Having identified Ms Mowbray had an issue, Miss Leigh should have checked if Ms Mowbray needed help, she did not do so and then to make matters worse set a bad example to a junior another member of staff.

75.6.3. Miss Leigh failed to identify there was a problem with her failure to check until it was explained to her what the issue with this was. That highlights a deeper concern, Miss Leigh could only see things from her own perspective, that is her subjective point of view rather than view things objectively.

76. The points about the assumptions Miss Leigh made aside, the way that she described the matters as being relayed to the NSPCC and to Ms Mowbray were references back to the events that she had relayed previously in her statement. They were set out as a stream of consciousness, a stream of the various events that had occurred. The narrative she gives concerning the alleged disclosures themselves did not identify in detail she alleges she relayed to the NSPCC as having occurred or the legal obligations alleged to have breached, but instead, as she accepted, she left it to the NSPCC to pick out the matters and for them to refer them to OFSTED.

77. Accordingly, we find in relaying those matters to us Miss Leigh did not identify what she had said her disclosures included or how they tended to show the state(s) of affairs or the legal obligations etc. that were breached as required by s43B(1). We will give examples of what we mean as to that lack of detail in the following paragraphs

78. We first turn to how the content of the disclosures differed between what Miss Leigh set out to Judge Faulkner, what OFSTED relayed to the respondent had been reported to it (by the NSPCC) and what Miss Leigh told us.

79. As to what was reported to OFSTED:-

79.1. We were told there was no letter or email from Ofsted to Mr Mountford relaying its concerns, the only evidence that we have is what he told us.

79.2. We know there is an absence of a negative finding by OFSTED in a letter, correspondence or indeed in the subsequent report [82] of 24th November. Had OFSTED identified something, that highlighted a wider concern, OFSTED would have been duty bound to have investigated that before the inspection 9 months later.

80. As to the detail of what was reported:-

80.1. We asked Miss Leigh to explain what it was about events that breached legal obligations etc. She gave a couple of examples

80.1.1. an issue about the CCTV Engineer and Mrs Clayton not wearing masks when he was on site and

80.1.2. the children walking in on them when the CCTV Engineer and Mrs Clayton were in the office together.

80.2. In relation to the issue of masks Miss Leigh did not detail precisely the context of that allegation, only when pressed did she explain in terms that as this was alleged to have occurred during was the third national lockdown; and thus the engineer should not have been in the building without lawful reasons. That might be able to be inferred reading across her witness statement and taking it as a whole, but she did not say that in terms or reference the obligation that was breached.

80.3. In relation to the second point, in her statement (54) Miss Leigh complained that *"she could have walked in on something inappropriate"*.

Whereas Judge Faulkner in paragraph (9) of his Case Management Order [70] relayed what Miss Leigh had told him that the risk that underlay the alleged disclosure *"… the room … being one that staff enter with children on a regular basis … that children would see the behaviour of the two people in question"*

80.4. Any issues aside as to how that would have occurred if they were properly being supervised, they are very different perspectives on the issue and if there was a risk of the children walking in unsupervised Miss Leigh does not address how so in her statement.

81. What those examples embody in our judgment are how Miss Leigh's account changed over time and when issues were pointed out to Miss Leigh that she had not addressed despite the length of her statement raised that she sought to explain them by expanding yet further.

82. Those changes in turn cast doubt on what precisely she said to the NSPCC and thus disclosed.

83. That leads back to what was it that was actually said at the time and what the disclosures included. As to the breach of the legal obligations and health and safety being endangered we have already referred to the inconsistencies between the evidence identified before us and before Judge Faulkner (80.3 above).

84. There was also an absence of the necessary detail to show what legal obligation etc. was being breached that underlay that. We referenced above the issue about masks (80 above). When asked to identify what the breach concerning the wearing of masks was, it was only then that Miss Leigh explained that the incident had occurred during the third national lockdown. Similarly in relation to the lack of detail concerning the CCTV engineer having remote access.

85. Beyond that, Miss Leigh did not identify in her claim form or when reporting the incident to the respondent that Miss Flaherty was a witness to the incident on 8th February as well as that on 10th February and thus she was not spoken to in the investigation concerning the former. That again demonstrates a failure on Miss Leigh's part, and thus a further concern about the consistency and thus the content of her disclosure.

86. Accordingly, for those reasons, we find that Miss Leigh's complaints do not quality for protection and thus were not protected disclosures.

The reason for dismissal

87. Whilst we found that the disclosures did not qualify for protection, we find in any event that they were not the reason or principle reason for Miss Leigh's dismissal. As we have already identified, Miss Leigh asserted relations with Mr Mountford had soured long before (7 above). She also told us in her witness statement (56) that Mr Mountford was not speaking to her as a result of the claim by her Mother. Those were well before the disclosures were made.

88. Mr Mountford directed references to the alleged disclosure as one of the 4 matters he raised in the letter terminating Miss Leigh's employment of 19th February [42] (three numbered matters and the narrative in relation to the hours). We thus considered what was actually motivating the Respondent in relation to the terminating her employment. We noted that if the disclosure was indeed the motivation or the principle motivation for Miss Leigh's dismissal, that seems at odds with the fact that Mrs Clayton was, as Miss Leigh says "pressing her" to complete her contract after the Respondent had known the complaints had been made by Miss Leigh.

89. We find the Respondent knew that the involvement of OFSTED was as a result of her complaint. Miss Leigh had not only told Ms Mowbray and Mrs Mosley (the Deputy Manager and third in charge) about that but we find it was common knowledge across the nursery.

90. When that was put to her, Miss Leigh said the Respondent was trying to use loopholes in the contract as a mechanism to dismiss. We pointed out to Miss Leigh that there were certain elements in the contract that were to her benefit. We accept there were elements that were otherwise, in particular the hours she was required to work although Miss Leigh raised other matters.

91. Those loophole points in our judgment are at odds with Miss Leigh's own account. She told us that she had been pressing for a contract from the respondent and wanted that because of her Mother's claim. By the 9th February Miss Leigh had signed and returned her contract. She accepts that by then the Respondent had been pressing her to comply with the hours in the contract. She does not explain if she was concerned about that why she signed the contract.

92. Whilst Miss Leigh explained to us how the hours the contract required her to be available for made it uneconomic for her to work unless wraparound childcare was available for her (and it was not, at that point of that lockdown) that does not explain why she signed the contract if that was so. Miss Leigh having accepted before us that some of the views that she now has about matters only came to her after the event and we find the loophole point was not a concern she had at the time.

93. The explanations the Respondent give for requiring Miss Leigh to work those hours include staffing shortages, it needing more staff to fully re-open its preschool to existing children and because of pressure from parents to admit new children onto roll. Schools opening up would have potentially brought to an end the issues Miss Leigh was encountering with her undertaking her hours at the Nursery because of the wraparound childcare they provided.

94. The issue was that the Respondent wanted those extra hours from staff straight away. Whilst it was unclear from what Mr Mountford told us orally, if he was planning to open up the pre-school straight away or later (and nor was he able to tell us the date that that had occurred) in both the letter that Miss Leigh disputed she had received [41], and the letter she accepted she had received

[42] Mr Mountford made those points to her. Miss Leigh's acceptance that the Respondent was putting her under pressure in relation to the hours at that point in time, all suggest to us that that was the Respondent's motivation in requiring her to work her contractual hours at that point, that it wanted to open the pre-school fully and it had that intention from about 22nd February.

95. Both letters at [42] and [41] also make clear that Mr Mountford had repeatedly informed Miss Leigh that she was refusing to comply with her contractual hours, albeit also referring to other matters including the pre-emptive view that Mr Mountford had formed in relation to the fire (see as to background (24 above) & specifically as to our findings (99.2 below)).

96. Notwithstanding the errors the Respondent made in relation to its conclusions concerning confidentiality issues (see as to background (25 above) and as to our findings (99.7 below)) and the complaint to OFSTED that Mr Mountford considered was unfounded and vindictive [42], we find Mr Mountford formed the view he came to not to continue her employment beyond her probationary period because of Miss Leigh's refusal to work her contractual hours. We find that any other matters only reinforced that view.

97. We find that Mr Mountford genuinely did not consider his decision as a dismissal; he considered that Miss Leigh was not satisfactorily completing her probationary period at the time. The law having been explained to him, he accepts he was wrong in that.

98. Accordingly, in our judgment the reason or principle reason for Miss Leigh's dismissal was her refusal to undertake her contractual hours.

Fairness

99. As to the dismissal itself, the errors on the Respondent's part range from the process it conducted, to the substance. These include but were not limited to:-

99.1. the Respondent's note keeping, some were undated, others incorrectly dated, other notes were unclear as to who was saying what, who created what and when,

99.2. In Miss Leigh's letter of dismissal dated 22nd February [42] Mr Mountford said he had checked the files in depth, yet in that that letter stated the fire incident was still "under investigation". Yet the investigation report into that incident [20] was dated 15th February, seven days prior. The explanation he provided - it had not been typed up at that point - was not tenable, he had not considered the file in depth or if he had he had not relayed the contents correctly. That being so we find he had formed a view before the investigation had concluded.

99.3. Documents were not retained. Whilst that was also the case for Miss Leigh (she had not retained her notes of what she had sketched out before she spoke to the NSPCC) examples of the Respondent not keeping documents are the covering emails apparently sent in relation to the letters sent and/or alleged to be sent, on 22nd February, and the appeal outcome letter that Miss Leigh said that she did not receive. Given the existence of two of those letters were in dispute and it would have been a simple matter for the Respondent to have provided the covering emails.

99.4. The failure to give Miss Leigh an opportunity to see the evidence and respond to the charges against her before dismissing. Whilst we found that Mr Mountford genuinely did not consider his decision as a dismissal (97 above) that does not excuse the Respondent's failure to invite Miss Leigh to a meeting to discuss those conduct matters or to send her documents, so she knew the charges and the basis for them. That is a breach of natural justice and also the ACAS Code.

99.5. An issue about junior staff (Ms Mowbray), investigating senior staff (Mrs Clayton).

99.6. Confusion over roles during investigations; who was the decision maker, Mr Mountford, Mrs Clayton or Ms Mowbray?

99.7. The quality and absence of a rationale concerning investigations;

99.7.1. had the respondent investigated matters properly it would have identified that the confidentiality complaint from Mrs Arshad had not emanated from what was a confidential meeting because Miss Leigh and Mrs Arshad were not in that confidential meeting together.

99.7.2. The failure to speak to all the witnesses in relation to investigations. This was not only limited to Miss Leigh but also for instance Mrs Clayton's views were not sought in relation to the allegation concerning her and the CCTV engineer.

99.7.3. we heard no disciplinary action was taken concerning Ms King, who was present with Miss Leigh in relation to the fire incident. We accept she was a student but the Respondent gives no rationale as to why it took no steps to discipline her at all.

99.8. Contrary to Mr Mountford's repeated oral assertions that he had not prejudged anything, he and other staff formed views before investigations had been concluded and before all staff concerned including the claimant had been spoken to.

99.9. Mr Mountford refusing [45] (albeit Miss Leigh disputed that letter was sent) and therefore determining, her appeal [44] without holding a hearing. That is at odds with the ACAS code.

100. For all of those reasons, the investigation was out with the band of reasonable responses, was not fair and accordingly the dismissal was unfair.

Polkey

101. We therefore have to consider first if a fair procedure had been followed, would the Respondent have dismissed Miss Leigh in any event? In short, we answer "yes".

102. We have decided as we have already said, the principle reason for that was because of the hours, but there was a wider theme about Miss Leigh's attitude and the other matters that Mr Mountford relayed [42].

103. The Respondent in our judgment had formed the view Miss Leigh could no longer continue to work for it. Miss Leigh had not identified the concerns the respondent had in relation to the fire, various issues were raised about her colleagues willingness to work with her (and her with them) including the confidentiality issue and negative comments that were attributed to Miss Leigh creating a negative atmosphere within the business. As we state above Miss Leigh was warned by Mr Mountford that on the 9th February, *"if you can't do the hours, you can't work here".* That was an imperative for the Respondent to resolve because it was opening up the Nursery.

104. In turn Miss Leigh had made it clear she would not undertake her contractual because she could not afford to. Both parties' had formed a view and their positions were fixed. In our judgment this is one of those rare occasions where that was a certainty. Hence we say it is 100% chance.

105. We next turn to how long that would taken to have been undertaken.

106. When Miss Leigh was dismissed on the 22nd February the Respondent knew her probationary period was ending, technically that was on the 28th February, not the 1st March. Had the respondent been well advised it would have identified that if it did had not dismissed her with immediate effect with a payment in lieu of notice on 28th February she would have been entitled to a month's notice rather than the 2 weeks we found she was statutorily entitled to (or the one week the respondent considered she was entitled to). We have to consider what this employer would have done had a fair procedure been

followed. We find it would have dismissed on or before 28 February with immediate effect with a payment in lieu of her two weeks statutory notice.

107. If the respondent had followed a fair procedure, it would have been required to invite Miss Leigh to a Disciplinary/Probation review Meeting, provided her with any evidence related to the conduct/probation issues that was going to consider and to identify the matters it wished to discuss in relation to her hours.

108. It would have been reasonable for the Respondent to give Miss Leigh a few days notice. That could have been done by arranging the meeting on Friday 26th February. That would have given her a reasonable opportunity to consider the information it supplied.

Contribution

109. The basic and the compensatory awards can be reduced by contributory conduct. We do not consider it just and equitable to reduce the basic or compensatory awards, they exist as a statutory protection against unfair dismissal and in our judgment the circumstances here do not warrant us exercising our discretion in that way.

Remedy

110. The basic award will thus be awarded. That will be calculated on the basis of Miss Leigh's gross weekly pay, that she was 25 at the termination date and had completed 2 full years. She will thus be entitled to 2 weeks gross pay as a basic award. In addition she will awarded compensation from the 28 February of two weeks pay and a loss of rights award for which we would normally make an award of equivalent to a week's pay.

111. Having given judgment we sought to clarify the remaining issues for remedy. Our findings in relation to the *Polkey* issue address for the most part damages payable in relation to the compensatory award; 2 weeks pay. The basic award will be calculated based on Miss Leigh having worked for the Respondent for 2 years.

112. The claimant had been in receipt of benefits and so it was possible recoupment would apply. We thus adjourned for a short while to give the parties an opportunity to resolve matters if they wished.

113. On their return the parties indicated they were unable or unwilling to agree.

114. We thus heard from them as to remedy. It was agreed Miss Leigh was paid £8.72 gross per hour and worked 22 hours per week. That equates to £191.00 per week. Having clarified in relation to the date she had been paid to we awarded £383.68 gross for notice, £383.68 gross for the basic award and £191.84 for a loss of rights award.

115. We also clarified the correct title for the respondent as above.

Employment Judge Perry
Dated: 27 March 2023