EMPLOYMENT TRIBUNALS

Claimant:	**Mrs J Stephens**	
Respondent:	**Rainbow Therapeutic Limited**	
Heard at:	**Cardiff**	**On: 2nd and 3rd July 2019**
Before:	**Employment Judge Harfield (sitting alone)**	

Representation:
Claimant: In person
Respondent: Mr Graham (counsel)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that:

(a) the claimant's complaint that she was dismissed by reason of making protected disclosures is not well founded and is dismissed; and

(b) the claimant's complaint of "ordinary" unfair dismissal is not well founded and is dismissed.

REASONS

Introduction and clarification of the issues in the case

1. The respondent is a care provider with two care homes in South Wales offering specialist care for "looked after" children. The claimant was employed by the respondent from 20 December 2015 until her dismissal on 13 December 2017. She worked as a Therapeutic or Residential Childcare Practitioner. On the face of it the claimant therefore had just less than 2 years continuous service at the date of her dismissal.

2. By way of a claim form presented on 18 April 2018 the claimant claimed unfair dismissal, both on ordinary principles of unfairness and alternatively that her dismissal was automatically unfair on the basis that the reason for dismissal were protected disclosures she had made. On 13 June 2018 the respondent presented its response, resisting the claim and asserting that the claimant was fairly dismissed for her conduct.

3. A case management preliminary hearing took place before Judge Vernon on 21 September 2018. The issues to be determined by the tribunal were identified as:

a. *Does the claimant have the necessary period of continuous service in order to be able to pursue a claim of (ordinary) unfair dismissal under sections 94 and 98 ERA 1996?*

b. *Did the claimant make one or more protected disclosures, relying on subsection 43B(1)(d) ERA?*

c. *Did the claimant reasonably believe that the disclosures were made in the public interest?*

d. *What was the principal reason for dismissal?*

e. *Was the reason for dismissal that the claimant had made one or more protected disclosures?*

f. *If not, was the reason for dismissal a potentially fair one in accordance with sections 98(1) and (2) ERA? The respondent asserts that it was a reason relating to the claimant's conduct. The respondent must prove it had a genuine belief in misconduct and this was the reason for dismissal.*

g. *Did the respondent hold that belief in misconduct on reasonable grounds following a reasonable investigation? The burden of proof is neutral but it helps to know the challenges to fairness. The claimant identifies:*
i. the respondent did not have reasonable grounds for any belief in her guilt;
ii. the respondent failed to properly investigate;
iii. the procedure followed by the respondent was not fair or reasonable.

h. *Was the dismissal fair or unfair in accordance with section 98(4) ERA? Was the decision to dismiss a sanction within the "band of reasonable responses" for a reasonable employer?*

i. *If the claimant was unfairly dismissed and the remedy is compensation, what compensation should be awarded? In particular:*

i. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed?

ii. Would it be just and equitable to reduce the amount of the claimant's basic award or compensatory award if any blameworthy or culpable actions caused or contributed to the dismissal, and if so to what extent? [section 122(2) and 123(6) ERA]?

4. At the start of the hearing I heard an application by the respondent to rely upon an additional witness, Lindsay Doyle, who took the decision to dismiss the claimant. The claimant opposed the application. I allowed the application and gave oral reasons at the time. In particular, I held that as a key issue this case is what was in the mind of the decision maker when deciding to dismiss the claimant it was in the interests of justice for Mr Doyle to give evidence. The claimant had been in

receipt of his statement since February 2019 and I was satisfied that she had adequate time to prepare. She would be permitted to adduce herself any additional evidence she wished to in response to Mr Doyle's statement, such that she would not be prejudiced if the application were granted.

5. I heard from Sian Paul Stephens for the claimant whose evidence was interposed at the start of the evidential part of the hearing because she could only give evidence that morning. I then heard from Jan Hill, Scott Hicks, Lindsay Doyle and Mike Davies for the respondent before hearing from the claimant herself. I received oral closing submissions from both parties. I also had a bundle of documents extending to 207 pages. In this Judgment numbers in paragraphs [ ] refer to the page number in the bundle.

Protected Disclosures – the issues in dispute

6. The case management order of 21 September 2019 identifies that the claimant relies upon two protected disclosures:

   a. That in late January/ early February 2017 she allegedly reported to a senior colleague (Sian Paul Stephens) that a colleague had poured water over a service user's head ("Child A").

   b. That on 10 July 2017 she allegedly reported to Sian Paul Stephens that another colleague had assaulted a service user ("Child B").

7. At the start of the case I identified with the respondent whether it was accepted that either of these were protected disclosures. Mr Graham took instructions and confirmed the respondent accepts that the first disclosure did happen and was a protected disclosure but that causation was in dispute. In respect of the second disclosure, the respondent disputes the disclosure was ever made. However, the respondent accepts that if I find that it did occur then it would constitute a protected disclosure. If so, causation is in dispute.

Findings of Fact

8. In light of the issues in the case set out above I make the following findings of fact, on the balance of probabilities.

The first claimed Protected Disclosure

9. On the evening of 25 January 2017 Child A was behaving in an aggressive and challenging manner and had to be restrained. The claimant was not present at the incident itself as she came on shift later that evening. On attending work, the claimant was told by a colleague, DS, that she had poured water over Child A. The claimant considered that was inappropriate and she reported it to a more senior member of staff Sian Paul Stephens (who is also the claimant's sister in law). Ms Stephens informed a more senior colleague again who informed Jan Hill. The claimant met with Ms Hill and the other senior colleague and told them of her concerns. As set out above, the respondent accepts that the claimant made a protected disclosure in relation to child A.

10. The incident report, which the claimant was not involved in completing is at [128] and [129]. It details that the staff involved were RhS and JN. DS is RhS's mother. Whilst the incident report records restraint of Child A, it does not record the water incident. The water incident is likewise not recorded in the log at [130 – 132].

11. The allegation was investigated and a summary of the interview with DS, completed by Jan Hill, is at [133]. DS had to attend a disciplinary hearing on 16 February 2017 where she was given a verbal warning by Mr Doyle [140]. DS explained she had used the water as a de-escalation technique. DS was told this was not an approved restraint procedure. A plan was put in place to ask Child A if she would agree to the technique as a planned intervention and, if so, she could be involved in buying her own bowl and flannel to cool her down when heightened. JN and RhS were also interviewed ([134] and [135]). JN gave an account of the water incident but RhS did not. RhS does not appear to have been challenged about this. There is also no evidence to suggest that any action was taken against DS or RhS for not completing a full incident report that included the water.

12. The claimant said that the impression DS gave her was *not* that the water was used as a de-escalation technique and that she considered DS to be bragging about it. The claimant says that as DS was not suspended it left the working relationship with DS difficult. She felt she was being punished for raising the allegation as she was tasked with going out and buying the bowl and flannel for Child A.

13. On 9 February 2017 the claimant emailed Lindsay Doyle setting out some concerns that she had [137a – 137d]. She complained that the respondent's whistleblowing policy had not been followed as she had not been provided in writing with details of the course of action that the respondent intended to take following her disclosure about DS. She expressed concerns that the situation had been difficult, with DS confronting the claimant as to why she had reported her without discussing it with DS first and that DS had been allowed to continue to work with Child A. She expressed other concerns about DS not fulfilling all her duties and lacking in leadership. The claimant also set out wider concerns about RhS' attitude and performance and the general atmosphere in the home. The claimant states that she was told in response that her report had not been treated as whistleblowing but as her reporting concerns in line with her duty and therefore the whistleblowing policy did not apply.

The second claimed Protected Disclosure

14. On 10 July 2017 there was an incident involving Child B. The incident report is at [142 to 144]. The incident report notes that staff member JC restrained the child in an "approved safe hold". It records that Child B was then released from the hold "as it was not safe" and instead was placed in an approved two person seated safe hold undertaken by JC and the claimant. [148] shows the incident report for Child B being sent to Children's Services on 11 July 2017 by Scott Hicks. The daily log is at [146 -147] and does not record the first hold being placed by JC. It simply states that Child B was guided to the bedroom by JC. It then refers to a safe hold being applied by the claimant and JC.

15. The claimant was concerned about the manner in which Child B had been initially restrained by JC. She states after her shift she spoke with Sian Paul Stephens who, the claimant states, said that the matter had to be escalated and that Sian Paul Stephens telephoned Jan Hill. Sian Paul Stephens records in her statement, in particular at paragraph 3, the claimant telling her the details of Child B being placed in a single person restraint and that she telephoned her own manager who was on annual leave who told her to report it to Ms Hill. Sian Paul Stephens said that she met with Ms Hill in person as she already had a meeting with her that afternoon and that Ms Hill stated that she would in turn contact Scott Hicks.

16. Ms Hill's witness statement states that she has no recollection of either the claimant or Sian Paul Stephens reporting the matter to her and that she has checked her notes for July 2017 and she has no record of a meeting or telephone conversation with Sian Paul Stephens which records the incident being discussed. In cross examination she accepted that she may have had a meeting with Sian Paul Stephens on 13 July 2017 but she did not recall it covering any complaint about an incident with Child B.

17. On the evidence of the claimant and Sian Paul Stephens I find it likely the claimant did inform Sian Paul Stephens of her concerns and the gist of those concerns is reflected in paragraph 3 of Sian Paul Stephens' statement. I draw support from the fact that the incident report does appear to record JC placing Child B in a single person hold and that "it was not safe" (albeit somewhat contradictorily it also records it as being an "approved safe hold").

18. It is in dispute what, if anything, was said by Sian Paul Stephens or the claimant thereafter to other managers in the Home. The claimant states that on 13 July she tried to discuss it with Ms Hill but that Ms Hill stated she was late for a meeting and would contact the claimant another time to discuss it. The claimant states that she also told a senior member of staff, LF, about it on a date in July 2017 and LF told her she should not have gone over the manager's head and to speak to Mr Hicks about it on his return from honeymoon. The claimant states she spoke to Mr Hicks about it at the end of August 2017 but that she heard no more and she felt her concerns were ignored. She admitted that she did not record her concerns in writing in any way and that she likewise did not log her concerns that the incident report was, from her perspective, incorrect. The claimant's evidence in her witness statement as to what exactly she states she said to these individuals about JC and Child B is not very clear or detailed. As stated, Ms Hill could not recall being told about the incident and stated that if she had been she would have treated it seriously. I did not hear from LF. Mr Hicks states he was there for part of the incident and did not see an inappropriate restraint being used and that he had no knowledge of the claimant making a whistleblowing report about the incident.

19. On the balance of probabilities I consider it likely that Sian Paul Stephens did have some discussion with Ms Hill, although potentially it could have been a few days later on the 13th July at a meeting in which various matters would have been discussed. Likewise I accept that the claimant did raise some concerns in general with LF and Mr Hicks which is likely to have included some expression of concern about the general incident with Child B. However, I do not find it likely that Ms Hill, or LF or Mr Hicks appreciated the exact seriousness of the nature of the complaint

that the claimant was making about JC and Child B. I accept that otherwise the respondent would have taken action, as was done in respect of Child A.

23 September 2017

20. On 23 September 2017 the claimant was working a night shift with a colleague, DR, and was involved in an incident with Child C when the staff were trying to settle Child C for the night. The claimant's account that she provided at the time is set out in the subsequent investigation meeting at [150 – 151] and disciplinary hearing at [174-175].

21. On the night in question the claimant states that Child C accused her of pushing her and that at the time DR told Child C that he had seen what happened and that the claimant did not push her. She states that later on DR reiterated to her that he knew she had not pushed Child C and that he would "back her."

22. The claimant states that on 24 September as she was finishing the shift Child C hugged her and apologised for her behaviour. The claimant's case is that the apology was witnessed by an agency member of staff, NR, and that she asked NR to log it.

23. Mr Hicks became aware of the incident with Child C when he received a telephone call from DR on 24 September 2017. He says that DR was upset and expressed concerns about events the night before. Mr Hicks made arrangements for DR to work from the other home and asked him to put his concerns in writing. DR then sent Mr Hicks an email with a "whistleblower report form" [163 – 165]. Mr Hicks explained, and I accept, that this was not a report form generated by the respondent for the purpose of facilitating whistleblowing reports and that it was a blank proforma that DR had gone away, found on line and filled in.

24. In the whistleblower report form DR alleged, amongst other things, that the claimant "rushed through the living room and stated enough was enough and that the whole situation was ridiculous." He alleges that the claimant "proceeded to place her hand on [Child C's] back ushering her up the stairs" and that Child C lashed out at the claimant and began shouting and the claimant "continued to push [Child C]. DR reported that he could see Child C was unsteady and offered her his hand and he walked her to her room. He states that the claimant told Child C to stay in her room and that Child C shouted at the claimant stating she would hit her. He alleges that the claimant rushed towards Child C and "placing her face level and almost nose to nose with that of [Child C] yelled aggressively, you're going to hit me are you? Well go on then, no I didn't think so." He states that as he slept in the staff room he reflected on the evening "coming to the un-nerving conclusion that gross misconduct had been conducted."

Disciplinary investigation and proceedings

25. On 26 September 2017 the claimant was told by telephone that she was being suspended due to her actions in an incident. She states Mr Hicks gave her a letter confirming this and that he then commenced an investigation.

26. Mr Hicks was intending to speak with Child C and attended the Home on the afternoon of 26 September so that he could speak with her on her return from school. In fact, before he could seek out Child C she came in to his office and asked him if he was going to fire the claimant. Mr Hicks states that Child C then gave her account which he recorded at [149]. He engaged in a role play with Child C in which she played the part of the claimant and he played the role of Child C. He records that Child C (when playing the part of the claimant) "started to push me from behind and told me to get upstairs." He says "I asked her was this what happened and she explained yes Jen pushed me."

27. The allegation led to a referral being made to Childrens' Services and to the police as well as the respondent's internal investigation. On 28 September 2017 the claimant attended an investigation meeting. The notes are at [150 - 151] They record the claimant being told that an allegation had been made that she had pushed a child rather than guided them. The claimant was not given the detail of DR's account. The claimant gave her own account which differed in some respects to that of DR. The claimant also stated that initially another colleague, JP, had been present but had left roughly half way through.

28. On 9 October 2017 the claimant received an update from Mr Hicks who stated that a statement had been taken from Child C by the police and that he had a meeting the next day. The claimant states she asked Mr Hicks if DR had been spoken to and that he said "no, I don't think so."

29. On 10 October 2017 Mr Hicks told the claimant that he had been to a multi strategy meeting. On 11 October 2017 the claimant was contacted by the police and she was asked to attend a voluntary interview. The police interview took place on 19 October 2017. She states that she was told the evidence was based solely on the testimony of the child.

30. On 11 October 2017 the claimant's social worker, Mr Burns, provided a report summarising an exchange he had with Child C. It is at [152]. It includes an allegation that the claimant had pushed Child C "for no reason and gave me a panic attack" and that Child C conducted a role play with toys in which she said "We were in the kitchen and she grabbed me from behind and I had a panic attack. Jen pushed me for no reason, I didn't hit her and I was just stood there and she said either way I will get paid naughty or not."

31. On 20 October 2017 the claimant attended a disciplinary hearing relating to other allegations. As I understand it, the allegation was the claimant had looked at another member of staff's payslip, had been contacting members of staff when asked not to do so and had attended an investigation meeting to accompany Sian Paul Stephens. The notes are at [152A – 152B]. The notes include a comment that the claimant had been told by Mr Hicks that DR was off sick and she had texted him to ask him if he was ok and had also asked him to come forward to the police.

32. On 24 October 2017 the police told the claimant there would be no further action against her due to insufficient information and it not being in the public interest to proceed.

33. On 28 October 2017 the claimant received a letter from Mr Doyle stating there would be no disciplinary finding against her regarding the other allegations.

34. On 10 November 2017 there was a Cwm Taf Safeguarding Children Board, Professional Abuse Strategy Meeting [153 – 150] (referred to as a "MASH" meeting). The record is signed off on 8 December 2017 but it would appear from the footnote of the document that the meeting itself took place on 10 November. It was attended by Mr Hicks together with the claimant's social worker, the police and representatives from the safeguarding team. I will return to the content of the report further below. However, amongst other things the report notes Mr Hicks confirming that the respondent had been awaiting the outcome of that meeting and the criminal investigation, before making a decision and that the claimant would be subject to the organisation's disciplinary policy and procedures. DS Dallyn confirmed the police investigation had been concluded with no further action and the police's view that the best way forward would be for the matter to be dealt with via disciplinary procedures. As the meeting was an outcome meeting one of four boxes (substantiated, unsubstantiated, unfounded or deliberately invented or malicious) had to be selected. "Substantiated" was selected. The summary section of the report also states: "All agencies present at today's meeting concluded that as the incident was witnessed, and accounts of the event have been consistently reported, based on the threshold of the balance of probability, the allegation is felt to be substantiated." The further action identified was for the respondent to follow its internal disciplinary process.

35. On 17 November 2017 Mr Hicks completed a disciplinary investigation report [161 -162]. He records that Child C had been consistent in her accounts and that she had been involved in numerous physical interventions in the past without making an allegation about staff. He stated "following the whistleblowing procedure it is conclusive that DR has no grudges against Jennifer Stephens and I feel he was acting on what he seen and following his code of practice." He said "following the outcomes meeting with MASH it was stated that the allegation would not meet the threshold for legal action due to [Child C] and DR not wanting to go to court. However, it was agreed by all the parties that the evidence was substantial that Jennifer Stephens had carried out these actions. The local authorities have stated that they would not be happy with the child's placement at the home if Jen was to remain working at [the home]. Following the evidence and outcomes meeting I feel that Jennifer Stephens should undergo disciplinary action, this is due to the actions she carried out on the night of the 23/9/17."

36. On 27 November the claimant was sent a letter inviting her to a disciplinary hearing on 1 December 2017 [170]. The allegation set out was that "you were unprofessional when dealing with an incident at the home. The basis of this allegation is that you pushed a child in the back and also shouted in the child's face." The disciplinary hearing was rescheduled at the claimant's request to allow her more time to prepare. As part of the disciplinary papers the claimant was sent DR's whistleblowing report and the report from the multi-agency strategy outcome meeting.

37. On 4 December 2017 the claimant contacted the safeguarding team and was told that due to an administrative error she had not been told about the MASH meeting.

38. The disciplinary hearing took place on 7 December 2017 before Mr Doyle. The minutes are at [174 – 176]. On 12 December 2017 the claimant was notified of the outcome by letter [177- 178]. Mr Doyle stated "I have established to my reasonable satisfaction that you were unprofessional when dealing with an incident at the home and that your conduct towards a child in our care was not in line with our care standards. In view of the seriousness of this matter, it has been decided that your employment… should be terminated for gross misconduct without notice." The dismissal took effect on 13 December 2017. I am satisfied that the decision to dismiss was reached by Mr Doyle a the sole decision maker.

39. On 15 December 2017 the claimant gave notice that she wished to appeal stating that the respondent had not been upfront about the allegations, there had not been an adequate investigation and she had been treated more harshly than others in similar situations [179]. The minutes of the appeal hearing are at [183 – 186]. The appeal was heard by Mr Davies on 22 December 2017. The appeal was rejected on 4 January 2018. The appeal outcome letter is at [187 – 189].

40. At some point the claimant had a text conversation with a former colleague in which the former colleague reported that DR had "said he felt terrible about everything and they didn't give him any choice really" and "all he said was he felt awful having to give a statement, and that they didn't give him any choice." The text messages are at [190].

41. After the appeal hearing the claimant also had a text conversation with NR in which he stated that the respondent had not contacted him to obtain any account. When the claimant put it to NR that she had asked him to log the conversation with Child C the following day and that she had asked the respondent to speak to him. He said "I've no memory of that sorry. They didn't speak to me." [194 – 195].

The legal principles

Protected Disclosures

42. Under section 43A Employment Rights Act 1996 ("ERA"), a worker makes a protected disclosure in certain circumstances. To be a protected disclosure, it must be a qualifying disclosure. Qualifying disclosures are identified in section 43B ERA:

> (1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
> (e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

43. Section 103A ERA provides:

> **"**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."

"Ordinary" Unfair Dismissal

44. Section 94 ERA gives an employee the right not to be unfairly dismissed by their employer. Under Section 108(1), to be able to bring a claim of unfair dismissal under section 94, the employee must have been continuously employed for a period of not less than 2 years ending with the effective date of termination. (That 2 year qualifying period does not apply to a section 103A claim where the reason or principle reason for the dismissal is that the employee made a protected disclosure – section 108(3)(ff) ERA).

45. Section 86 ERA sets out the statutory rights of an employer and employee to a minimum notice period. The material parts provide:

> "(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more –
>
> (a) is not less than one week's notice if his period of continuous employment is less than two years…
>
> (4) This section does not affect the right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party."

46. The effective date of termination is governed by section 97. In particular, ordinarily section 97(1)(b) provides that the effective date of termination, in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect.

47. However, that is subject to section 97(2) which provides that:

> "Where –
>
> (a) the contract of employment is terminated by the employer, and
> (b) the notice required by section 86 to be given by the employer would, if duly given on the material date, expire on a date later than the effective date of terminate (as defined by subsection (1));
> for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

48. Under section 97(3), the "material date" means, where no notice was given, the date when the contract of employment was terminated by the employer.

49. The claimant's employment started on 20 December 2015 and was terminated, without notice, on 13 December 2017. On the face of it the claimant therefore did not have two years qualifying service. However, the net effect of the above provisions is that if the claimant had a statutory right under section 86 to a week's notice then the effective date of termination becomes the expiry of that notional week's notice period.

50. The respondent does not dispute that if this provision applies the claimant would achieve the 2 years' qualifying service needed to bring an ordinary unfair dismissal claim. However, the extension to the effective date of termination will not apply if the respondent had the right to treat the contract of employment as terminable without notice by reason of the conduct of the claimant.

51. If the claimant does have the right to bring an ordinary unfair dismissal claim, section 98 ERA provides, in so far as it is applicable:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it--
> …
> (b) relates to the conduct of the employee,
>
> (4) Where the employer has fulfilled the requirements of subsection (1), 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 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."

52. Under section 98(1)(a) of ERA it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden of showing the reason is on the respondent.

53. In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in British Home Stores v Burchell [1980] ICR 303. In particular, the employer must show that the employer believed that the employee was guilty of the conduct. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances.

54. In considering the fairness of the dismissal, the tribunal must have regard to the guidance set out in the case of Iceland Frozen Foods v Jones [1982] IRLR 439. The starting point should be the wording of section 98(4) of ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct; not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

55. The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.) I also take into account the decision of A v B [2003] IRLR 405 in which the Employment Appeal Tribunal reminded tribunals that in determining whether an employer has carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and the potential effect upon the employee. It was said:

> "Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carry out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."

56. I also remind myself of the decision in South West Trains v McDonnell [2003] EAT/0052/03/RH and in particular that:

> "Whilst not only unfair it is incumbent on an employer conducting an investigation followed by a disciplinary hearing both to seek out and take into account information which is exculpatory as well as information which

points towards guilt, it does not follow that an investigation is unfair overall because individual components of an investigation might have been dealt with differently, or were arguably unfair. Whilst, of course, an individual component on the facts of a particular case may vitiate the whole process the question which the Tribunal hearing a claim for unfair dismissal has to ask itself is: in all the circumstances was the investigation as a whole fair?"

Submissions

57. I received oral submissions from the respondent and the claimant which I have taken into account when reaching my conclusions below.

Discussion and Conclusions

58. Applying the legal principles outlined above to the relevant findings of fact made, I reach the following conclusions to determine the issues identified in the case.

Protected Disclosures

59. The respondent concedes that the claimant's first claimed disclosure about Child A amounted to a protected disclosure.

60. The respondent disputes that the second claimed protected disclosure to Sian Paul Stephens about Child B occurred but accepts that if it did occur as set out within the claimant and Sian Paul Stephens' respective witness statements (particularly paragraph 3 of Sian Paul Stephens' statement) then it would amount to a protected disclosure. I have set out above in my findings of fact that on the balance of probabilities I accept it is likely the claimant and Sian Paul Stephens had a discussion in which the claimant expressed concerns about the hold applied to child B, the gist of which is set out in paragraph 3 of Sian Paul Stephens' statement. It therefore amounted to a protected disclosure made to Sian Paul Stephens and therefore to the respondent as employer.

Was the reason or principal reason for the claimant's dismissal the protected disclosures?

61. I then have to consider whether the reason (or, if more than one, the principal reason) for the dismissal is that the claimant made a protected disclosure or disclosures. I have found that the decision to dismiss was made independently by Mr Doyle; he was the sole decision maker. Primarily, I therefore have to consider what was operating in the mind of Mr Doyle as that decision-maker.

62. I do not find that the reason or principal reason for the claimant's dismissal was one or both of the protected disclosures made. In relation to Child B, I do not find that Mr Doyle was aware of the claimant's protected disclosure to Sian Paul Stephens. The claimant's case is that Sian Paul Stephens spoke with Ms Hill and that she herself had a failed attempt to speak with Ms Hill. She states that she also spoke with LF and with Scott Hicks on his return from honeymoon. As set out in my findings of fact above, whilst I accept the claimant had some discussion with these individuals about general concerns she held, which included some reference to the incident with Child B, I do not find it likely that Jan Hill, or LF or

Scott Hicks understood the allegation involving Child B and JC to be as serious as set out within Sian Paul Stephens' witness statement. No further action was taken by the respondent. The incident as a whole had already been referred to Childrens' Services. The claimant conceded in evidence that she did not follow it up with any written report or complaint emphasising the seriousness of the allegation and she did not draw to anyone's attention that her version of events differed to that in the incident report.

63. The claimant also did not assert at either disciplinary hearing before Mr Doyle that she considered she was being singled out because of the protected disclosure about Child B. At best the claimant told Mr Doyle on 20 October 2017 that "a lot of things had been thrown back at her recently" and that "she had raised issues to Scott, [LF] and [JP] and has been ignored and sometimes shouted down" but there is not within the minutes at [152A – 152B] a direct reference to the incident with Child B. The claimant did not say at all on the 7 December 2017 that she considered the complaint and disciplinary process against her was due to make a protected disclosure.

64. The claimant's case is that she was viewed as a troublemaker, including her protected disclosure about Child B, and that it is likely that as a director Mr Doyle would have been involved in discussions about the claimant with other individuals such as Jan Hill and Scott Hicks. She also asserted that she had been set up by Mr Hicks because she was a troublemaker and that this set up had involved others that possibly included Mr Doyle. She further asserted that Mr Doyle may not have pursued the evidence or questions that she wanted answering at the disciplinary hearing as a means to ensure that she was dismissed; again because she was seen as a troublemaker. There is, however, no evidence before me of discussions including Mr Hicks and Mr Doyle in which the claimant and her protected disclosure about Child B were discussed in such terms. There is no other evidence on which I can sensibly infer that such discussions took place. I am satisfied that Mr Doyle's decisions about the evidence at the disciplinary hearing (which I discuss in more detail below) were made for reasons unrelated to the claimant's second protected disclosure and are therefore not a basis on which to infer that Mr Doyle did know about the claimant's second protected disclosure and was seeking to manipulate the evidence to secure her exit as result.

65. There is therefore no direct evidence before me or evidence from which I can infer that Mr Doyle was aware of the claimant's protected disclosure to Sian Paul Stephens about Child B such as to influence his decisions.

66. Mr Doyle was clearly aware of the earlier incident involving Child A as he conducted the disciplinary hearing involving DS on 16 February 2017 and gave DS a verbal warning. The claimant was not a witness before Mr Doyle and was not directly involved in the incident. Nonetheless Mr Doyle was aware that the claimant had initiated the complaint about DS's conduct as she sets that out in the concerns she emailed to Mr Doyle on 9 February 2017 [137a – 137d]. I do not find, however, that it had a bearing on Mr Doyle's conduct of the disciplinary hearing or his decision to dismiss the claimant. Mr Doyle found that DS was guilty of misconduct and gave her a sanction. Whilst the claimant felt the case against DS was downplayed, this was a disciplinary outcome that supported the initial complaint the claimant made. There is no evidence before me on which I could

find or infer that Mr Doyle bore a grudge against the claimant or saw her as a troublemaker for having raised the concern about DS's conduct. Mr Doyle denied in evidence, which I accept, that he saw the claimant as a troublemaker arising out of her having complained about DS.

67. There is also no evidence before me of discussions including Mr Hicks and Mr Doyle in which the claimant and her protected disclosure about Child A were discussed in terms that she was a troublemaker and/or that means should be found to exit her from the respondent's employment. There is no other evidence on which I can sensibly infer that such discussions took place. Again, I am satisfied that Mr Doyle's decisions about the evidence at the disciplinary hearing were made for reasons unrelated to the claimant's first protected disclosure and are therefore not a basis on which to infer that Mr Doyle was seeking to manipulate the evidence to secure the claimant's exit because of her first protected disclosure.

68. For completeness, I have considered whether Mr Doyle could have played an unwitting part in a disciplinary process engineered against the claimant by Mr Hicks. In Royal Mail Group Ltd v Jhuti [2016] ICR 1043 the Court of Appeal held that where there is a manager with some responsibility for the disciplinary investigation who influences or manipulates the decision maker because of protected disclosures made, the manager's motivation and knowledge may be potentially attributed to the employer, even if the motivation or knowledge were not shared by the decision maker. Again, applying the balance of probabilities, I consider that unlikely. Mr Hicks' knowledge of the first protected disclosure was not explored in evidence and it was Ms Hill that investigated the incident not Mr Hicks. Even, if I were to accept that he knew that the claimant had initiated the complaint against DS, for the reasons explored above in relation to Mr Doyle, there is no evidence before me that Mr Hicks bore a grudge against the claimant as a result or a reason to infer that he did.

69. Mr Hicks knew of the incident with Child B as he was present for part of the events and he submitted the report to Childrens' Services [148]. However, as above, I do not find that Mr Hicks knew that the claimant had complained to Sian Paul Stephens about the alleged restraint of Child B by JC in the detail set out in Sian Paul Stephen's witness statement. Sian Paul Stephens did not speak to Mr Hicks and there is no evidence that Ms Hill did. As above, whilst I accept there was some dialogue between the claimant and Mr Hicks on his return from honeymoon, I do not find that Mr Hicks appreciated the nature or the seriousness of the allegation that the claimant now makes about JC.

70. I therefore do not find it proven that in commencing the disciplinary process against the claimant or in continuing that process, or in his investigation methods, or his report writing or any other contact with Mr Doyle about the disciplinary proceedings that Mr Hicks was motivated by ill will to the claimant because she had made a protected disclosure or disclosures or that he was trying to set her up. As set out in my findings of fact, I accept that the disciplinary process started because Mr Hicks received the unsolicited telephone call from DR setting out his concerns, which DR then followed up with in writing, following a request from Mr Hicks. Mr Hicks therefore started the disciplinary investigation against the claimant because serious concerns had been raised. I do not find that Mr Hicks engineered DR to make the complaint. I do not find that Mr Hicks forced DR in some inappropriate

way to provide a statement. DR apparently stated to the claimant's colleague that he had "no choice" but I find it is likely that is a phrase he used (a) because he was in an awkward conversation with a colleague and (b) because he had been told by Mr Hicks that it was important to document his concerns and DR likewise understood his professional obligations; he sought out for himself online the particular form that he filled in. I also do not find that Mr Hicks engineered a complaint from Child C. I accept that she came to speak to him of her own initiative, albeit he had been intending to speak to her that afternoon.

71. Thereafter I am satisfied that Mr Hicks continued to investigate the matter, to make the referrals and engage with external agencies, to gather evidence and write his investigation report because he considered the complaint was genuine, was serious, and needed to be addressed, and not because of any protected disclosures made by the claimant, or because he was seeking to set her up and secure her exit because he saw her as a troublemaker.

72. Again, for completeness sake, turning to the claimant's appeal against dismissal, the claimant did not tell Mr Davies that she considered she had been dismissed because she had made protected disclosures. Again, there is no evidence before me on which I can conclude or infer that Mr Davies in turn did not uphold the claimant's appeal against dismissal because he was motivated or influenced in some way by the claimant's protected disclosures or indeed that he even knew about them.

73. I am therefore satisfied that the claimant's protected disclosure or disclosures was not the reason or principal reason for the claimant's dismissal. Instead the process was initiated because of a genuine concern about an allegation about the claimant's conduct and the claimant was dismissed because Mr Doyle had a genuine belief that misconduct had occurred. I return to this below when assessing the claimant's "ordinary" unfair dismissal claim.

Qualifying Service for Ordinary Unfair Dismissal claim

74. I have to consider as a preliminary point whether the respondent had the right to treat the contract of employment as terminable without notice by reason of the conduct of the claimant. This involves an assessment of whether, on the balance of probabilities, the claimant was herself in fundamental breach of contract by committing an act of gross misconduct in pushing Child C and/or shouting in Child C's face entitling the respondent to accept that breach and bring the contract to an end without notice. The burden of proof lies with the respondent.

75. In this regard I have not heard evidence directly from DR or from Child C as to the events of 23 September 2017. It is clear that the claimant disputes their accounts. In light of this I am not satisfied that it has been sufficiently evidentially established before me that the claimant did commit an act of gross misconduct such that the respondent was entitled to terminate the claimant's employment without notice. It follows that I accept the claimant was entitled to one week's statutory notice of the termination of her employment. This alters the effective date of termination so as to give the claimant sufficient qualifying service to bring an ordinary unfair dismissal claim.

76. To be clear, however, this finding simply opens the doorway to allow the claimant to bring her ordinary unfair dismissal claim. It does not mean that the claimant succeeds in that claim. It is not my role when considering the substance of the claimant's unfair dismissal claim to assess for myself what did or did not occur on 23 September 2017 or whether I would have dismissed the claimant. Instead, I must apply the legal principles summarised above.

Fairness of the dismissal

77. I find that Mr Doyle dismissed the claimant because he genuinely believed that the claimant had inappropriately pushed Child C. It was also alleged that the claimant had shouted in Child C's face. Having reviewed the documents and Mr Doyle's written and oral evidence before me, I consider that his decision to dismiss was in fact focussed upon the allegation of pushing which he considered genuine and proven before him on the balance of probabilities. I therefore find this was the reason for dismissal and it related to the conduct of the claimant.

78. I further conclude that Mr Doyle had reasonable grounds to sustain that belief which was based upon a reasonable investigation.

79. The claimant has never disputed that she placed her hand on Child C's back; she denies pushing her. Mr Doyle had before him the accounts of Child C taken by Mr Hicks and Mr Burns that the claimant had pushed her. He had the account of DR that the claimant had placed her hand on Child C's back ushering her up the stairs, and that when Child C lashed out at the claimant and began shouting that the claimant had "continued to push" Child C.

80. The claimant states that DR's evidence should not have been preferred or used to corroborate Child C's in preference to the claimant's own account given the alleged inaccuracies and inconsistencies in DR's account compared to her own. Further, that it was important that DR be spoken to and evidential disputes and inconsistencies put to him before any decision was made whose version should be preferred. The claimant summarised her claimed inconsistencies in the disciplinary hearing [174 – 176] which include that DR did not record that JP was present for the first part of the difficulties with Child C (or that JP, the claimant says, was herself shouting at Child C), that DR had the sequence of events very different to her own account and had, for example, the claimant placing the Child C in a hold that she denies, and that he asserts the claimant said things which she denies. The claimant informed Mr Doyle that DR had failed to mention that they both carried Child C upstairs and that DR may be motivated in making the allegations against her because he was scared of the repercussions from the stair carry. She also pointed out that DR had failed to record telling Child C that she had not been pushed and telling the claimant not to worry, and that he would back her. The claimant also told Mr Doyle that the version of events did not match up as DR had said the claimant pushed Child C on the stairs when Child C had said to Mr Burns that she was pushed in the kitchen.

81. Mr Doyle's account is that he reviewed the evidence but was satisfied that, notwithstanding a different level of detail throughout the recollection of those involved, the evidence showed a consistent account of the nature of the events that had occurred. He considered that the evidence was consistent in alleging that

the claimant had pushed Child C "towards the stairs" and continued to push her "up the stairs." Mr Doyle's evidence was that he relied on the evidence of both DR and Child C that there had been pushing. He further comments in his witness statement that on the claimant's own account Child C had accused the claimant to her face of pushing her, which he felt showed further that Child C had been consistent throughout the evidence. Mr Doyle stated that he did discuss with Mr Hicks whether DR could be spoken to and that Mr Hicks told him he had tried to arrange a meeting but that DR was unwell and was unable to attend. He said in his oral evidence that he ultimately accepted DR's account as he saw no reason why DR would provide an account that was not factually correct. He said he considered the evidence on the pushing allegation was sufficient that he did not need to take other matters further.

82. The claimant states that DR's evidence should not have been seen as credible, which was further supported by the fact DR had been unwilling to help with further enquiries by the respondent or outside agencies. She stated that DR was initially in work before he went on sick leave and could therefore have been spoken to. She also complains that DR was forced or given no choice to provide an account, referring to the text message at [190].

83. In the particular circumstances I do not find it was outside the range of a reasonable investigation not to speak further to DR in circumstances in which he was unwell and declining to assist for that reason. The claimant states he could have been spoken to before he went on sick leave but the respondent would not have known that was going to happen and they already had DR's written report. The claimant herself knew that DR was unwell as she had tried to contact him.

84. It followed that the claimant's concerns about DR's account could not be put to him. Child C was not spoken to again and bearing in mind that she was a vulnerable child of 10 who had already provided an account to Mr Hicks, Mr Burns and the police I do not consider it was outside the range of a reasonable investigation not to speak to her further to clarify any points.

85. Mr Doyle therefore had to decide how to proceed and how to weigh up the evidence that was before him. On the core allegation of the alleged push of Child C he concluded that there were consistencies in the account of DR, and Child C that a push had occurred. Notwithstanding the concerns about discrepancies in accounts identified by the claimant I conclude that Mr Doyle did form a genuine belief on the balance of probabilities that the claimant had pushed Child C and that he had reasonable grounds to sustain that belief based the evidence that he did have available before him, which was obtained having followed a reasonable investigation.

86. I have also taken into account the claimant's complaint that JP was not spoken to, who was apparently present for the first part of the evening when the behavioural issues with Child C first started to arise. The claimant states that this could have helped demonstrate that the sequence of events described by DR was incorrect and therefore his account should not be viewed as credible. I do not consider that it was outside the range of a reasonable investigation for the respondent not to have taken an account from JP. It was reasonably open to the respondent to

conclude that her account would not be likely to affect Mr Doyle's conclusion that it was likely the push had occurred.

87. The claimant also complains that the investigation did not examine the logbook to examine whether NR, an agency member of staff, had recorded the alleged apology by Child C and that NR had not been spoken to, to confirm Child C's apology. She contacted NR herself after her appeal [194-195] in a text exchange in which he was unable to remember the event. The claimant considers if he had been spoken to at an earlier stage he may have remembered. Mr Doyle's evidence was that the logbook was checked and no entry had been recorded. I accept that evidence. I do not consider that it was outside the range of a reasonable investigation open to the respondent not to contact NR for an account. The claimant stated in the disciplinary meeting simply that Child C had been hugging her and apologising as the claimant went off shift. The claimant did not say that Child C had apologised for making up an allegation of pushing. Child C had been involved in a long behavioural incident on the night in question and it was reasonably open for the respondent to conclude that even if NR recalled Child C apologising for her behaviour it did not follow that the push had not occurred.

88. The respondent is a relatively small employer, running two homes. On the other hand the allegation against the claimant was a serious one. Balancing all the factors, I am satisfied that overall the disciplinary procedure followed was within the reasonable range. The claimant was called to an investigation meeting, she was given the evidence and details of the allegations she was facing in advance of the disciplinary hearing and given additional time to prepare when she asked. Mr Doyle adjourned the disciplinary hearing before reaching a conclusion to consider the points the claimant had raised. The claimant was given the right of appeal. The claimant was offered the right to be accompanied at the disciplinary hearing and appeal hearing. Whilst it took until 12 December 2017 for there to be a disciplinary outcome the respondent was waiting for the criminal investigation and the outcome of the multi-agency meeting to take place before the claimant attended a disciplinary hearing, which was not an unreasonable approach.

89. The claimant complains that Mr Hicks downplayed the nature of the investigation meeting by stating that it was informal and that he was not upfront with her that a complaint had been made by DR or that it related to shouting at Child C as well as pushing her. The claimant also complains she was not given the right to be accompanied when she herself had accompanied Sian Paul Stephens to an informal meeting. I do not accept that such criticisms rendered the process procedurally unfair. The claimant confirmed in evidence she understood she was attending an investigation meeting and that a disciplinary process could follow. She therefore understood the potential seriousness of the situation. She was told of the central allegation of pushing and I do not consider it procedurally unfair for an employer to seek to obtain an unsullied account from an employee at an investigation meeting without at that stage putting the detail of other accounts to the employee. By the time of the disciplinary hearing the claimant had access to DR's allegations and was able to respond. She had been given and understood the allegations she was facing. The claimant had no right at law or under the respondent's disciplinary policy to be accompanied to an investigation meeting and the fact another manager may have allowed it to occur in other circumstances does not mean that the respondent should provide the right in every case.

90. The claimant was not informed of or invited to the Multi-agency meeting on 10 November 2017 at which various negative comments were made about her, including by external agencies. However, the claimant's own evidence is that the fault for that lay with the external safeguarding board and not with the respondent. Mr Hicks explained in evidence that this was the first of such meetings that he himself had attended and it was not a process he was experienced in.

91. I have carefully considered whether Mr Doyle fairly assessed for himself whether the allegations against the claimant were well founded. In particular, I held concerns about the impact on Mr Doyle of the opinions expressed at the multi-agency meeting at which the claimant had not been able to attend. The comments include Detective Sergeant Dallyn commenting that he felt the allegation was substantiated as both Child C and DR had independently said it happened and as Child C had never made a complaint of overuse of force previously despite being involved in numerous behavioural incidents. Mr Burns and Mr Hicks agreed with that assessment, with Mr Hicks apparently commenting "for [Child C] to have complained, it must have been inappropriate." The Board chair also commented that Child C "is to remain in placement providing Ms Stephens is not employed on the same premises." The minutes also show Mr Hicks expressing his unhappiness that the other disciplinary procedure against the claimant had not been upheld and that he was trying to appeal it and which appears to have led to Mr Burns commenting that the claimant had shown a "complete disregard" for the disciplinary process.

92. In turn the disciplinary investigation report completed by Mr Hicks on 17 November 2017 comments that Child C's "numerous accounts" have been very consistent, that despite being in numerous physical interventions Child C had never before followed up with allegations about staff, and that "following the whistleblowing procedure it is conclusive that DR has no grudges against [the claimant]. He further commented that at the multi-agency outcomes meeting "It was agreed by all parties that the evidence was substantial that Jennifer Stephens had carried out these actions. The local authorities have stated that they would not be happy with the child's placement at the home if Jen was to remain working [there]."

93. Mr Hicks accepted in evidence that the comments made at the multi-agency meeting could be seen as inflammatory but that he was simply reporting as a matter of fact what had been said and decided. He said, which I accept, that his own comments reflected his own genuinely held belief. He stated that if the outcome of the disciplinary hearing had not been one of dismissal then the respondent would have looked at whether they could accommodate the claimant in employment elsewhere, particularly at their other home.

94. In light of these comments it was plainly correct that the disciplinary hearing be heard by someone other than Mr Hicks. Mr Doyle said that notwithstanding the content of the reports he did consider and decide for himself that he considered it likely the claimant had pushed Child C but that the conclusions at the multi-agency meeting gave him confidence he had reached the right decision. He agreed with Mr Hicks that if the claimant had not been dismissed the directors would have looked at how to manage the situation of her future employment with Childrens' Services.

95. Whilst I consider it regretful that such strident opinions were before Mr Doyle and that they are opinions which flowed from a meeting at which the claimant was not able to attend or have representation, on balance I do not conclude that the disciplinary case against the claimant was pre-judged or that she did not have a fair hearing. I accept that Mr Doyle did consider the matter for himself and that he had a genuinely held belief in the claimant's guilt that was based on reasonable grounds having followed a reasonable investigation. Likewise, I find that the procedure followed by the respondent fell within that of a reasonable employer, bearing in mind the size and administrative resources of the respondent.

96. Finally, I find that the decision to summarily dismiss the claimant was within the band of reasonable responses open to the respondent as employer. The claimant submitted that other individuals such as DS had not been dismissed. However, I do not consider that other circumstances were on fours with that of the claimant and given the nature of the specific allegation upheld in the circumstances of a children's home caring for vulnerable children I do not consider that the sanction of dismissal, notwithstanding the claimant's otherwise unblemished service, was outside of band of reasonable responses.

97. In conclusion, the claimant's complaints of unfair dismissal and that the reason or principal reason for her dismissal was that she made a protected disclosure or disclosures are unsuccessful and her claim is dismissed. I reiterate that in reaching these conclusions I have not myself concluded that the claimant did push Child C, simply that the respondent's investigation, finding and outcome were within the band of reasonable responses open to the respondent as a employer and that the claimant was dismissed by the respondent because of a genuine belief on their part that misconduct had occurred.

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Employment Judge Harfield
Dated: 10 October 2019

JUDGMENT SENT TO THE PARTIES ON

……12 October 2019……..

…….
FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS