



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Margarita Damova

v

Swimming Nature UK Limited

Heard at: Watford

On: 4 to 6 and 8 January 2021; and
29 March; 12-13 April 2021 (in Chambers)

Before: Employment Judge Bedeau

Members: Ms J Baird
Ms M Castro

Appearances

For the Claimant: In person

For the Respondent: Mr P Smith, Counsel

RESERVED JUDGMENT

1. The public interest detriments claims are not well-founded and are dismissed.
2. The public interest dismissal claim is not well-founded and is dismissed.
3. The provisional remedy hearing listed on 1 June 2021, is vacated.

REASONS

1. By a claim form presented to the tribunal on 21 August 2018, the claimant made claims of public interest detriment, public interest disclosure dismissal under s.103A Employment Rights Act 1996 and constructive unfair dismissal.
2. In the response presented on 1 May 2019, it is denied that the claimant made public interest disclosures, and that she had suffered detriments as the result of making any alleged protected disclosures. Further, the respondent did not engage in conduct entitling the claimant to resign claiming that she had been constructively dismissed for making protected disclosures.

3. At the open preliminary hearing held on 13 January 2020, before Employment Judge Hyams, the Judge deferred the issue of whether the claimant made protected interest disclosures for this tribunal to hear and determine after considering all of the evidence in the case.

The issues

4. The issues for this tribunal to hear and determine are as follows:
 - 4.1 Whether the claimant, in accordance with s.43B Employment Rights Act 1996, made qualifying disclosures under s.43B(1)(a)(b) and (d)?
 - 4.2 Whether the claimant reasonably believed that the alleged disclosures were made in the public interest?
 - 4.3 Whether the alleged detriments were causally connected to the qualifying disclosures and/or protected disclosures?
 - 4.4 Whether there had a been a fundamental breach of the claimant's terms and conditions of employment entitling her to resign?
 - 4.5 Whether the principal reason for the claimant's constructive dismissal was that she had made protected interest disclosures?

The evidence

5. The tribunal heard evidence from the claimant who called Mr Nikola Akrabov, former Swimming Instructor.
6. On behalf of the respondent evidence was given by Mr Tim Hutton, former Regional Manager; Ms Eliza Jaiswal, General Manager, Head of HR and Recruitment; and Mr Gary Young, former Operations Director.
7. The claimant invited the tribunal to take into consideration the witness statements produced for the preliminary hearing on 13 January 2020 from her, Mr Hutton and Mr Akrabov.
8. In addition to the oral evidence, the tribunal was referred to a joint bundle of documents comprising of 302 pages. References will be made to the documents as numbered in the joint bundle.

Findings of fact

9. The respondent is the largest independent provider of swimming tuition in the United Kingdom and provides swimming lessons to babies and adults at several venues, one of which is the Marriott Regents Park Hotel, London.
10. It has several policy documents. Its Whistleblowing Policy, provides for the worker to disclose information, including criminal activity; failure to comply with any legal obligation; and endangerment to health and safety. In the first instance, the disclosure should be to the worker's manager or,

alternatively another manager or director. It informs the worker that all disclosures would be treated seriously and would be promptly and fairly investigated, and that the worker will be interviewed and asked to provide a written witness statement. Once the investigation has been completed the worker would be informed in writing of the outcome together with conclusions and a decision in a timely manner.

11. The worker is informed that if, upon conclusion, he or she reasonably believes that appropriate action has still not been taken, they may report the matter to the proper authority in good faith. The policy gives a list of prescribed bodies. (pages 84-86 in the bundle)

12. The Disciplinary Policy gives a non-exhaustive list of examples of gross misconduct. It includes:

“Actual or threatened physical violence, behaviour which deliberately provokes violence, wilfully causing harm or injury.”.

“serious or repeated failure to follow reasonable instructions and other serious acts of insubordination”.

“Act or omissions that could bring the company into serious disrepute.” (91-92 of the bundle)

13. The policy states that allegations of gross misconduct will be dealt with under the formal disciplinary procedure and would normally lead to dismissal without notice or pay in lieu of notice. (91).

14. In the respondent’s Grievance Policy and Procedures, it states that the objective is:

“To provide an employee who considers that they have a grievance with an opportunity to have it examined quickly and effectively, and where a grievance is deemed to exist, to have it resolved, if possible, at the earliest practicable opportunity.”

15. The first stage is to try to resolve the grievance informally with the relevant manager and, if that fails, the grievance should be raised formally in writing and addressed to the employee’s manager making it clear they wish to raise a formal grievance in accordance with the procedure. Where the grievance involves the employee’s manager, it should be raised with a different manager or director. The manager would then invite the employee to a grievance meeting to discuss the grievance. The employee would be informed of his or her right to be accompanied at the meeting. At the meeting the employee will be permitted to explain their grievance and how they think it should be resolved.

16. Following the meeting the respondent would endeavour to respond to the grievance as soon as possible and, in any case, within five working days of the grievance meeting. If it is not possible to respond within that timeframe, the employee will be provided with an explanation for the delay and would

be told when a response can be expected. The decision would be in writing and the employee would be notified of their right of appeal.

17. The Grievance Policy and Procedure do not provide for any documentary evidence to be disclosed to the employee who had lodged a grievance. (95-96)
18. On 11 July 2017, the claimant commenced employment with the respondent as a Swimming Instructor. She worked 22½ hours a week. She taught children at the Marriott Regents Park Hotel on Saturdays. She is a well-qualified swimming instructor with a bachelor's degree in Swimming Coach and Teacher Specialist; Sports Journalism; Swimming Coach Level 1, Swim England; and various other swimming qualifications.
19. She was born in Bulgaria and arrived in the UK in November 2015.
20. The claimant also worked at the RFC Centre, which is another venue, as well as the Marriott Regents Park Hotel. This case concerns events at the Marriott Regents Park Hotel.
21. The claimant, along with her fellow Swimming Instructors, taught children at the Marriott Regents Park Hotel swimming pool on Saturdays. The person coordinating the instructors in May 2018, was Mr Dennis Smirnovs, Swimming Coordinator. We find that in his absence Ms Sarah Aiello, Swimming Instructor, took on the role of Swimming Coordinator.
22. On the walls around the pool there were "No diving" signs. The pool is a shallow pool throughout of a depth of 1.2 meters.

Saturday 26 May 2018

23. On Saturday 26 May 2018, Mr Smirnovs was not on duty, Ms Aiello took on the role of the Swimming Coordinator and was responsible for supervising the instructors on duty that day. The claimant was also on duty. It appears from the evidence that Ms Aiello and the claimant did not have a good working relationship. Ms Aiello spoke to the claimant in the afternoon about merging two teaching sessions into one. The children concerned were of different abilities and she felt that the claimant wanted to do this to give herself an extra half hour break as the sessions were at different times. When she spoke to the claimant about it an argument ensued between them in front of the children and parents. According to the claimant, merging the children in one session was to avoid one of them having to wait in the cold on the poolside for their session. The claimant said that to get away from Ms Aiello, she dived into the pool twice. She told the tribunal that these were permitted knee dives. However, from the evidence we find that they were not knee dives but full body dives into the pool which was not allowed. She was spoken to again by Ms Aiello who pointed to the 'No Diving' notices. The claimant responded by waving her hand in a dismissive fashion. She said that she dived in because Ms Aiello was abusive to her. They were facing each other and at the poolside, arguing in front of the children and their parents.

24. At the end of their shifts, both made their way to the shower cubicles. Precisely what happened while they were there is the subject of some dispute. According to the claimant, while she was taking a shower, the Ms Aiello banged on her shower door and when she, the claimant, opened it she was punched in the face by Ms Aiello. The claimant said that she was completely naked and helpless and tried to hold Ms Aiello's hands to block any further punches, but Ms Aiello continued to attack her, was shouting and verbally abusive. She pushed Ms Aiello away, who then fell onto the floor, was screaming, asking the claimant to stop. Afterwards they left the shower area with no further physical contact between them.
25. Ms Aiello did not give evidence before us. From her written account she initially wrote that in the changing room they were arguing and "we slapped each other". This was in her email dated 27 May 2018, to Mr Dennis Smirnovs and to Mr Tim Hutton, Regional Manager. (103)
26. On 4 June 2018, in another email, she stated that the claimant, while they were in the shower, slapped her face and was shouting at her. She slapped the claimant back in defence, whereupon the claimant pushed her, and she fell on her back and bottom against the toilet bowl. (115)
27. In Mr Hutton's account of his telephone conversation with Ms Aiello following the incident, Ms Aiello admitted to throwing the first punch but said that she should not have done it. (124)
28. During Ms Aiello's grievance hearing on 5 June 2018, she stated that it was the claimant who had slapped her in the face first and that she retaliated. She then made reference to having been pushed on to the toilet bowl. (143)
29. On 26 May 2018, Mr Tim Hutton was on-call duty and not engaged in carrying out his normal contractual duties. He received a call at 14:55 in the afternoon from the claimant which lasted three minutes and three seconds. The claimant told him that she had been verbally abused by Ms Aiello earlier that day and that when they were in the changing rooms, in their separate cubicles, she was assaulted by Ms Aiello. It was an unprovoked attack on her during which she told Ms Aiello to stop but she was punched in the face several times and kicked. She tried to calm Ms Aiello down, but Ms Aiello kept on kicking, was shouting and verbally abusive to her. During the attack she was able to push Ms Aiello back and may have hit her once or twice trying to defend herself. Ms Aiello then fell onto the floor. The claimant shouted at her to stop. At that point they both got dressed.
30. Before the incident in the cubicle, she told Mr Hutton that Ms Aiello had referred to her as "rubbish, idiot, miserable". Her response was, this is highly inappropriate and not good that it happens in front of everyone children, parents, and colleagues. She asked her to stop but Ms Aiello continued. She used words such as, "fuck you, die bitch, go away and find another job because I don't want you here". She said she told Mr Hutton that Ms Aiello was unstable and was dangerous to children. She was scared for her own safety and was reluctant to return to work at that venue. She said that what happened to her was a criminal act as she had been attacked physically and that she

was on her way to the nearest Police Station to report it. Mr Hutton's response was to say that he would be in touch.

31. About approximately 15 to 30 minutes later, while the claimant was on her way to the Police Station, she received a call from Ms Aiello who was crying. She was trying to persuade her, the claimant, to return to work to speak to have a discussion, and then decide whether she would still like to report the matter to the police. According to the claimant, Ms Aiello told her that she wanted to confess. They arranged to meet in a park close to their workplace. This was a public area with many people around. At the time the claimant was concerned for her safety. According to the claimant, Ms Aiello was nervous and upset and said that the reason was that she had requested on more than one occasion, time off but her requests had been refused. She stated that her father behaved in a similar way and that she was the same. She begged the claimant not to tell the claimant's friend and colleague, Mr Nikola Akrabov, because he worked at the same venue. The claimant said that Ms Aiello had told her that she had informed Mr Hutton, Mr Smirnovs, and her friend, Kasia, the receptionist. According to the claimant, Ms Aiello's biggest concern was what could happen to her and insisted that she should call Mr Hutton, and to put him on speaker phone.
32. Mr Hutton was called at 4:14pm that afternoon and, according to the claimant, during the conversation, Ms Aiello said that she was sorry and that she should not have behaved in the way she did. She was exhausted and nervous. She only wanted to finish the school term, take a break, and decide what she wanted to do, such as, whether she should return to Italy to teach English or stay in this country. The claimant asked Mr Hutton about the possible consequences for Ms Aiello, and he responded by saying that he did not know but suggested that the claimant should write an email setting out her account and he would deal with it. According to the claimant he said that it was possible that Ms Aiello may receive a final written warning, or it could be worse. She said that she told him that she was aware that he was leaving the company very soon and that she did not want to cause him any trouble. At that point Ms Aiello intervened and said, "Don't worry Tim it is just small misunderstanding and we will figure it out..."
33. According to the claimant, she said that she was really shocked and scared and needed to chill and think about what to do next. She wanted to go home. She said goodbye to Mr Hutton. Ms Aiello said, "We will figure it out Tim" and ended the call. That was the last time they both saw each other.
34. According to Mr Hutton, after speaking to the claimant, Ms Aiello contacted him by telephone to report the incident. He typed up details of the conversation and sent it in an email to Ms Eliza Jaiswal, General Manager and Head of Human Resources and Recruitment.
35. We find as fact that during his discussion with Ms Aiello, Ms Aiello seemed embarrassed that she had allowed the claimant to get in "her head". She was talking about her emotions getting the better of her. Although she said that she acted in self-defence, in Mr Hutton's email to Ms Jaiswal, dated 4 June, Ms Aiello said to him that:

“She shouldn’t have ‘went for’ Margarita. She admitted she had thrown the hit during the incident and that she shouldn’t have done it.”

36. In relation to the tri-partite conversation, he said that both parties were accepting that they were victims and there was an emotional outpouring. It was a heart-to-heart conversation during which they told him that he should not tell anyone and that they had sorted it out and agreed to meet up, as they were worried that Mr Hutton was going to escalate the matter to Head Office. He said that they were very jovial and jolly, like kids in a playground. It was just a misunderstanding they said to him.
37. He denied saying to Ms Aiello earlier in their earlier conversation that Saturday afternoon, that the claimant was on her way to the Police Station. He insisted that although it was not stated in his email of 4 June 2018, Ms Aiello told him that she acted in self-defence. He had missed out a lot of what she said to him about the various incidents in the pool on poolside (124).
38. We find as fact that Ms Aiello and the claimant informed Mr Hutton they had agreed to meet, mand that they did meet to discuss the incident and came to the conclusion that there was a misunderstanding and that the matter had been sorted out. We, therefore, do not accept the claimant’s evidence that she had agreed to think about the next course of action as she had told Mr Hutton that it had been resolved.
39. The claimant spoke to Mr Akrabov, while she was at Harrow Underground Station, later that evening, Saturday 26 May 2018, at 6:54pm. She told him that she had met with Ms Aiello and gave an account of the incident. According to Mr Akrabov, the claimant told him that Ms Aiello was crying, begging, and threatening. He told her that if it had happened to him, he might have gone to the police. She then replied by saying that she would go to the police.
40. The claimant and Mr Akrabov are good friends. He viewed the alleged conduct involving Ms Aiello as a criminal act and that she should have been dismissed.
41. Insofar as his evidence is concerned, he told the tribunal that he last worked with Ms Aiello on 31 May 2018. At that time, he did not appear to be concerned that she was still working with children. He said as a routine, before entering the pool, they would put on it what he described as a long black suit. This covered the upper body and legs. He said that before entering the pool Ms Aiello was taking a shower. He glanced at her and did not see any bruises. We find that he only had what could be described as a fleeting glance at Ms Aiello and with her black suit on, he would not have been in a position to see any bruises on her body.
42. The following day, 27 May 2018, the claimant reported the incident to Chingford Police Station after having spoken to Ms Akrabov. In summary, she said that she had been the victim of an unprovoked attack by Ms Aiello

who tried to dissuade her from reporting the matter to the police. She was given a Victim Care Card with a crime incident number (page 105).

43. At 09:25, 27 May 2018, Ms Aiello emailed Mr Smirnovs and Mr Hutton setting out her account of events on Saturday 26 May 2018. She wrote the following:

“Hi Deniss and Tim,

I’m texting you to report you what happened yesterday. As I’m the responsible of the weekend, as previous agreement with you and the manager, I have to communicate you if teachers have bad behaviours at work or something regarding the venue happened. As I told you many times, Margarita Damova is not following the rules at all. Today she dived standing up (even if its written no diving). I told her not doing this... and she did it again. Just check the cameras to verify. She started to scream against me in front of the parents, telling me that she does what she wants and I don’t have the right to say her anything. She had a lesson at 1 o clock with one seal and one turtle together. The turtle should had the lesson at work 1.30... when I asked her explanations she told me that if its her decisions and I didn’t have to tell her anything, screaming so loud that the mum of the child told her off.

In the changing room we argued a lot and we slapped each other. I’ll go to the police after work to tell them everything.

Sarah” (103)

44. On 28 May 2018, at 10:15am, the claimant emailed Mr Hutton setting out her account of events on 26 May. She wrote:

“I am writing to you to report a shocking accident at Marriott Regents Park that happened to me on 26 May 2018 (Saturday) between 2pm and 2.30pm.

After I finished my working/teaching day, I was brutally attacked, physically abused and hurt by my colleague (and your employee) Sarah Aiello.

While I was taking a shower, she banged on the door on my shower cubicle in a very aggressive way which instantly made me think there must be an emergency situation of some kind. I instantly opened the door to see if she was ok. Before I could even react, I felt incredible pain in my face (nose and mouth in particular) and a moment later I realised that Sarah Aiello had punched me in the face.

It took me a few seconds to realise what has just happened. I tried to defend myself, while completely naked and helpless sin the shower cubicle. I tried to hold her hands and to block more punches, while Sarah Aiello continuously attacked me aiming to hit me anywhere she could, shouting and verbally abusing me too.

Earlier that day at poolside, I felt that she was not mentally and emotionally stable because she was aggressive towards me for most of the working hours. I did not however expect or provoke in any way a physical attack.

I am still in absolute shock. I cannot sleep and shaking from the trauma.

I am expecting Swimming Nature to take immediate disciplinary actions and outline to me the company's grievance procedure. I am scared for my health and safety. I am not feeling comfortable and I am scared to work at Marriott Regent Park on Wednesdays and Saturdays.

The incident has been reported to the police and all details logged for their investigation.

I got the details of a good lawyer and will talk to her tomorrow." (110)

45. Upon receipt of the email Mr Hutton said that he was surprised that the claimant wanted to raise a grievance. She tried, unsuccessfully, to call him at 21:19 in the evening. He then responded by text. He then spoke to her the following day, 29 May, at 9:51am. During the call she repeated the information she had given him in previous conversations, and complained about Ms Jaiswal, as she, the claimant, felt that nothing had been done. There was then a further conversation the following day, 30 May at 9:48am. He responded to the claimant's email at 11:38am, asking her to send more information to human resources in order that the matter could be investigated. (111).
46. Ms Jaiswal was on annual leave during the week commencing Monday 28 May 2018 but would often check her emails, periodically, while away from work as she was the only human resources. She received an email from Mr Hutton on 28 May forwarding an email from Ms Aiello setting out her account of the incident on 26 May.
47. In evidence the claimant said that by 1 June she had sent her second official email to the respondent copying Ms Jaiswal and Mr Eduardo Ferre, the owner of the company. In her email she expressed disappointment at their lack of interest in what had happened. She asserted it was total neglect in that they had done nothing and demonstrated a lack of care for their employees. She also sent eight photographs of her injuries taken at the police station. Mr Hutton later that evening, acknowledged the email and wrote that Ms Jaiswal had been on leave.
48. We find that the respondent had not neglected the claimant's concerns but was faced with two complaints which had to be investigated. The human resources person, Ms Jaiswal, was on leave and the matter could only properly be addressed by her when she returned to work. The claimant had lodged her formal concerns on 28 May and to expect a resolution or enquiry by 1 June was, unrealistic.
49. On 4 June 2018, Mr Hutton emailed Ms Jaiswal at 3:57 in the afternoon. This email has been referred to briefly earlier in the judgment. In respect of the incident on 26 June. He stated the following:

"On the weekend of 2 June I received a phone call from Margarita following an incident of assault at Marriott Regents Park. She was very distressed and stated that she was going to the police. This call took place at 2:45pm on 2 June.

Shortly after this at 2:55pm Sarah called to notify me that there was an incident and that she shouldn't have 'went for' Margarita. She admitted she had thrown

the hit during the incident and that she shouldn't have done it. Following this incident I received a call at 5:30pm Saturday 2 June from Margarita to say that she was with Sarah and that everything had been smoothed over and she didn't want her to get in trouble. Both girls seemed happy and described the incident as a 'misunderstanding'.

The next morning I received a call from Margarita to say that she had been to the police as she felt that she had sufficient time to reflect on the situation. She had told Sarah that she was doing so as well. I phoned Sarah that afternoon who said she was going to the police at her earliest convenience." (124)

50. Much has been made of the wording of this email by Mr Hutton. The claimant has referred to it as evidence of Ms Aiello's inconsistent account of the incident. If Mr Hutton's account of his conversation with her is correct, she seemed to have admitted that she threw the first punch at the claimant and that she should not have done it. She also said, according to Mr Hutton, that she "went for" the claimant.
51. It is clear to this tribunal that the incident was not on 2 June as stated by Mr Hutton. The evidence given was that Ms Aiello's command of the English language is not very good. This is clear from reading her email complaint. The account in the email by Mr Hutton is not verbatim. He went on to explain to the tribunal that Ms Aiello's apparent admission of being the aggressor and striking the claimant was that she had explained to him that the claimant was the aggressor and that she, Ms Aiello, acted in self-defence but regretted doing so because as the person in charge on the day, she should not have engaged in any act of violence although the violence was perpetrated on her first by the claimant.
52. That explanation is not in the email and we have some difficulty in relying on the accuracy of the conversation he had with Ms Aiello.
53. The claimant had sent the photographs of her injuries to Mr Hutton taken at the police station. These appear to show bruising to her shoulder, around the left elbow, chin, right and left areas around the knee. (106 to 109)
54. Mr Hutton had viewed the CCTV footage of the incident. In an earlier email sent on 4 June 2018, at 3.46pm, to Ms Jaiswal, he noted the claimant had dived into the pool twice which was against company policy; Ms Aiello faced the claimant twice and there was a point at which the claimant was waving off Ms Aiello's comments with her hands; both were facing each other for some time; and both were then seen leaving the poolside, the claimant first followed by Ms Aiello. (125)
55. Ms Katie O'Sullivan, Swimming Assistant, sent Ms Jaiswal an email setting out her account of relationship between Ms Aiello and the claimant. She wrote the following:

"My name is Katie O'Sullivan, I work as a Swimming Assistant at the Marriott Hotel.

I know Sarah and Margarita quite well, as we work together on Wednesdays and Saturdays, I am aware of what happened on 26 May 2018. I was very shocked because its so out of character for Sarah to be in any sort of fight, because she is a very professional, kind and gentle person who as a deep passion for teaching.

Everyone likes Sarah not only by her colleagues but also by members of the hotel.

There was a disagreement between them both a few weeks ago, I was there. When Sarah didn't feel that Margarita's child was ready to get a badge yet. Margarita didn't like it and was shouting at Sarah in front of the parents and Sarah was trying to calm her down but Margarita kept going over to her when she was trying to teach. This was the first time I have seem them disagree over something. I was surprised by Margarita's reaction as she was quite verbally aggressive to Sarah, it was unnecessary.

Obviously I can only speak on what I have witnessed from both of them, but from what I saw Sarah was the calm and professional one in this situation.

If you have any further questions I'm happy to help." (134)

56. Following Ms Jaiswal's return to work on 4 June, her intention was to invite both the claimant and Ms Aiello to grievance hearings. She sent a letter on that day to the claimant inviting her to a grievance hearing the following day at a neutral venue to start at 1pm. She informed the claimant that if she had evidence which she considered to be relevant, it should be brought to the hearing. Ms Jaiswal further stated that once the grievance was heard, the respondent would be investigating the incident from a disciplinary perspective. She would be conducting the grievance hearing with Mr Hutton in attendance to take notes. The claimant was informed that she could bring along a work colleague or trade union representative. (127)
57. A similar letter was sent to Ms Aiello the same day, but her meeting was scheduled to start at 10am. In all other respects the invitation letter had the same content as the letter sent to the claimant. (130)
58. Again, on that day, Ms Aiello had emailed her directly, again setting out her version of events. The first eight lines simply repeats what Ms Aiello had stated in her earlier email to Mr Hutton. She then wrote the following:

"After working time, we were together in the changing room, under shower. She started arguing with me, telling me that I'm shit, that she can do what she wants and I don't have to tell her anything because she is better teacher than me and she has more experience than me. When we went out of showers she slapped my face, keeping shouting on my face, I slapped her back to defend myself and she took my hands, pushing me really strong. I felt down, crashing with my back and bottom against the toilet, she continued catching my hair, pulling them strong, I tried to move my hands to defend me but I could not. After few times telling her to stop she stopped. It's impossible she has any marks because I just slapped her. If shew has something, probably she did it by herself. Here are the pictures of my marks, on the left leg, bottom and shoulder. The previous days I had pain everywhere and I got an appointment with the doctor. I went to the doctor on Friday, at Abbey Medical Centre,... I spoke with Doctor Barzin. She told me

that she can report everything to you or to the police... so please contact the Medical Centre.

You can speak as well with Kate O'Sullivan, the pool assistant that many times saw Margarita's attitude in the pool, screaming against me, saying that things and not follow the rules. You can also speak with Deniss, he can tell you about the previous meetings we had.

Let me know if you need something else please.

Thanks and we'll meet tomorrow." (115)

59. From the photographs sent by Ms Aiello to Ms Jaiswal, there appear to be bruising on the left leg, left bottom and on her left shoulder. There is also bruising to the upper part of her right leg (116 to 123).
60. Also, on the same day, Mr Ferre sent to Ms Jaiswal an email from Mr Smirnovs, Supervisor and Instructor, and the claimant's supervisor. He gave an account of an incident involving another instructor in relation to an incident that had occurred on 31 May 2018. This was not connected to the incident involving the claimant and Ms Aiello. Ms Jaiswal also received the email from Ms O'Sullivan which was unsolicited. (134)

The grievance meetings on 5 June 2018

61. The grievance hearing went ahead with the claimant on 5 June 2018 with Mr Hutton as note taker. The claimant was accompanied by Mr Akrabov. The notes summarised what was said and are not verbatim.
62. In relation to Mr Akrabov, the tribunal was taken to an email from Mr Smirnovs referred to above in relation to an incident on 31 May 2018 involving him and Mr Akrabov. It seemed that there was a breakdown in their working relationship. Mr Smirnovs was, however, a supervisor and was in charge. An incident occurred in relation to two classes taken, one by Mr Smirnovs and one by Mr Akrabov, which led to a confrontation between them. According to Mr Smirnovs, Mr Akrabov then talked to parents, "discrediting us with Sarah" Ms Aiello, accusing the respondent of being cruel and making everything look bad. Mr Smirnovs tried to put forward the other side of the argument to the parents but, according to him, it did not help as Mr Akrabov had spoken to them first. When Mr Akrabov was instructed by Mr Smirnovs to Alex, he got his bag and left. (139)
63. Mr Akrabov had been previously spoken to about his behaviour and was later dismissed either on 5 or 6 June 2018.
64. We refer to the above incident because we find from the evidence given by Ms Jaiswal and Mr Hutton, that Mr Akrabov was particularly difficult to control during the meeting He was raising his voice and had taken up aggressive gestures. He would also throw his hands in the air and talk about his own problems. Ms Jaiswal tried to calm him down and emphasised to him and the claimant on more than one occasion, that she and they had to focus on the incident on 26 May 2018. The claimant said

that Mr Akrabov was prevented from speaking but we do not accept that was the case having heard Mr Hutton and Ms Jaiswal. He was stopped only when he was talking about his own issues.

65. During the grievance hearing the claimant admitted that she had carried out a standing dive into the pool. As already stated, the pool is relatively shallow, and diving was not permitted and there were warning signs around the pool. Ms Aiello had told her not to dive but she replied by saying, "Didn't listen to her because of her abusive nature". The claimant further asserted that Mr Smirnovs and Ms Aiello did not like her. It was put to the claimant by Ms Jaiswal whether Ms Aiello had said to her that she had to do what she was told, to which the claimant agreed but said that it was said in an abusive fashion. She said that she did not report Mr Smirnovs' behaviour to anyone. She said that while having a shower Ms Aiello came to her shower door and began banging on it and went on to slap her as soon as she opened the door. She tried to stop Ms Aiello and pushed her down onto the floor just outside the shower room. Ms Aiello started screaming and was asked to stop. There then followed verbal abuse.
66. She then dealt with meeting Ms Aiello later in the afternoon. She denied that they had resolved their differences following their conversation at Swiss Cottage. Mr Hutton intervened and put to the claimant that she had given details on the phone about a reconciliation. The claimant responded by saying that she was in shock and said the following morning, Sunday, she went to the police. She stated that it was unacceptable for a swimming teacher to assault another. She handed over the crime letter from the police and said that Ms Aiello was a risk to children. Ms Jaiswal then asked, "When you met with Sarah was there talk of making money out of the company?" The claimant replied, "To make money, how?" Ms Jaiswal, "not sure". The claimant replied, "No I didn't mention that." The claimant suggested that Ms Jaiswal should speak to another employee called Mr Duta Alexandru Valentin, Swimming Instructor. Ms Jaiswal then asked, "Apart from pushing Sarah to the floor did you hit her?". The claimant replied, "I hit her twice and then pushed her to the ground as an act of self-defence." At that point the meeting came to an end. (140 to 142)
67. In Ms Aiello's grievance meeting she said that the claimant merged the Seal Swimmers with the Turtle Swimmer at the same time in order to get a break. Ms Jaiswal confirmed that the CCTV showed the claimant diving into the pool. Ms Aiello said that as the senior person on duty at the time, she told the claimant that she should not dive in, but she refused to accept the instruction. They had issues over the previous 10 months over the claimant not respecting authority.
68. She accused the claimant of lying. On one occasion she called in sick when in reality she was going out on a date. She had raised the issue of standing dives being prohibited but the claimant's response had been negative.
69. Ms Aiello said that she was proud of her job but felt that the claimant was stopping her from doing her work.

70. When questioned about the incident in the changing rooms, she said that the claimant had shouted at her, calling her a weak person because she did whatever Mr Smirnovs wanted her to do. In the changing rooms they then had an argument and were shouting although they were in separate showers. They were then face to face when she was slapped first by the claimant and retaliated. The claimant got hold of her hair and pushed her into the toilet, bruising her hip and buttocks. She reached for the claimant's face and hair and requested the claimant to stop. She then changed and left the changing room. After about an hour they saw each other at the Swiss Cottage Leisure Centre after having initiated the call to the claimant. They spoke and later reconciled. They then phoned Mr Hutton to explain that the situation had been resolved. They apologised and hugged each other. She did not see any visible bruises on the claimant's body at that time and the claimant did not mention to her any bruising to her.
71. At that stage the claimant suggested to Ms Aiello that they could get money, compensation for the situation. She went to the police on Sunday afternoon after hearing the claimant had gone to the police.
72. She was asked whether the claimant had ever complained about Mr Smirnovs, to which she replied that she had not but had asked her to stop feeding information to him on a regular basis.
73. She stated that the claimant went to the police on the Sunday morning, and she went that Sunday afternoon.
74. Ms Aiello was shown the communication from the claimant about how she felt threatened.
75. Mr Hutton then questioned Ms Aiello about her account to him when she said that she was the first person to use physical violence. Ms Aiello's response was to say, "Perhaps because of my English and the situation it didn't come across the right way. Margarita hit first." It was put to her that there should not have been any physical violence. There were DBS implications for her career. Ms Aiello replied by saying that she had worked for three years and nothing had happened and that other teachers had been made aware of the incident falsely. She was told by Ms Jaiswal that the investigation would continue and that she would be kept away from the claimant and would be informed of the outcome. At that point Ms Aiello told Ms Jaiswal and Mr Hutton that she would be leaving the respondent at the end of the term. (143 to 144)
76. On 7 June 2018, Ms Aiello emailed Mr Hutton her resignation giving notice until the end of term. Her last day of work would be on 3 August 2018. (145)
77. From the accounts given it was difficult to determine who struck the first blow and what had preceded it. Ms Jaiswal, therefore, had to conduct her own investigation and contacted several employees who may have witnessed the incident. At her request, Mr Smirnovs provided his account on 7 June 2018 in which he wrote:

“Hi Eliza,

No, at first when she called she was very stressed and she was saying that she was sorry that she slapped Margarita, I thought that she was the only one who fought, but later on when she calmed down, she explained the situation, that she only slapped her back once after receiving a slap from Margarita and that she had to defend herself after Margarita pushed her down to the floor. I’ve already sent my vision on this situation to Tim, also as I wrote in my previous email, the person who is responsible for the consequences is Nicola as he told her to go to the police and he tried to play the same trick with me, and both of them are spreading false information to our customers and other teachers and venue staff.

Please let me know if you have any other questions.

I want to make sure you aware that I’ve been contacted by the police in regards of that and that I’ve told the same thing as to you.”

78. Ms Jaiswal had asked Mr Smirnovs whether Ms Aiello had verbally admitted that she was the first one to strike the claimant and whether she had confessed the incident, which he answered in his response. (146)
79. As Ms Aiello and the claimant were teachers of young children the respondent had a duty of care to the children and to its employees. Ms Jaiswal considered the serious nature of the allegation and having been informed that physical violence had taken place, decided to suspend both. Suspension letters were sent on 7 June 2018. They were to be paid their normal salary during suspension. They were both informed that should the outcome be disciplinary proceedings, they would be told. (147 to 151)
80. We find that the claimant was not suspended from work any earlier than 7 June 2018. She did not want to work at the Marriott and did not attend work from 20 June 2018. The decision to suspend was taken within two weeks after the incident on 26 May 2018.
81. On 8 June 2018, Ms Jaiswal emailed Ms Kasia Traczuk, Receptionist, as it was believed she may have witnessed the aftermath of the incident. Ms Traczuk’s reply was on 8 June in which she stated that over the previous few weeks she had heard arguments in the changing room between Ms Aiello and the claimant about teaching guidance, methodology, rules, and behaviour. The claimant was not happy about Ms Aiello’s involvement. Referring to the incident, she stated that Ms Aiello came out of the changing rooms quicker than was usually the case and was very emotional. She was shaking. She was asked by Ms Traczuk whether she was ok, to which she replied, “No” and began to cry. She was taken to a room near reception and was asked what had happened. She could hardly speak and said that she had a fight with the claimant in the changing rooms. They were arguing on the poolside during lessons because the claimant was diving with students into the pool. They continued shouting, blaming each other in the changing rooms. The claimant then grabbed Ms Aiello and hit her a few times, but she was unable to respond. Ms Traczuk said that Ms Aiello had a few red marks on her arms and leg. The claimant then came upstairs like nothing had happened. She bought Lucozade and left. On Monday Ms Aiello

showed Ms Traczuk, “massive bruises at the same places she showed me before.” (152)

82. It was clear that Ms Traczuk did not witness the incident in question. Her evidence was important as to Ms Aiello’s state of mind and physical appearance after the incident.
83. On the same day Ms Jaiswal emailed Mr Valentin for information regarding the incident on 26 May. He replied that same day in the afternoon stating that during the lessons on Saturday 26 May, the last lessons were around 12 noon, when he noticed that something was not quite right between Ms Aiello and the claimant. They had, “some small arguments”. The parents could hear the first argument which was unprofessional, and it was by the pool. The claimant was diving with her head forward with one child and Ms Aiello was complaining that she was not allowed to do that dive. The claimant’s response was to say that she was aware and was being careful. Ms Aiello was pointing to the signs displayed around the pool to the claimant and was arguing about her dives. At that point the claimant responded by saying that Ms Aiello should mind her own lesson.
84. In relation to the second argument, this was after Mr Valentin’s last lesson and when he was ready to leave, he stated that the claimant had one child with her who could swim on his own and one who needed a bit of assistance. The one who could swim on his own was around 8 or 9 years old. Ms Aiello argued with the claimant because she was not allowed to have two children and one was swimming unassisted. Ms Aiello then spoke to the parents of one of the children which Mr Valentin did not approve. He stated Ms Aiello said to the parents, “Are you ok with this way for your kid to have the lesson because I don’t like it.”. The parents replied that they were fine with it. The claimant had heard Ms Aiello and said to her, “Sarah what’s your problem, speak with me if you have an issue not with parents. That is unprofessional.”. Mr Valentin said that although he wanted to help, he did not intervene. He wanted to say to them do not have arguments in front of the children and parents. In answer to a follow-up question by Ms Jaiswal whether there were any arguments prior to 12 noon, he responded by saying he was not sure as he was focussed on his own lesson. (154 to 157)

The police investigation

85. On 6 June 2018, Ms Jaiswal received an email from PC James Clarehugh, who was dealing with the allegations made by Ms Aiello and the claimant. Ms Jaiswal had an email conversation with P Clarehugh over several days. The outcome was that the police decided not to pursue the allegations due to insufficient evidence. Ms Jaiswal did not believe that she was under any obligation to share the email trail with the claimant during the grievance and disciplinary processes. It was, therefore, not part of the evidence collected into the incident. She also did not consider that she was under an obligation to inform the claimant that the police had been in contact with her. She had provided the police with what they had requested. Contrary to what the claimant asserted, she had no influence over the decision taken by them.

She had one telephone call with PC Clarehugh but at the time she did not make any notes, nor could she remember the date of the call.

The grievance outcome

86. Having considered all the evidence, Ms Jaiswal found that there had been a verbal and physical altercation between Ms Aiello and the claimant. Both parties admitted slapping and hitting each other and had provided evidence of bruising to their bodies with photographs taken within a few days of the incident. It appeared to Ms Jaiswal that Ms Aiello's bruising was more significant than the claimant's. It also matched her account that she had been pushed to the floor by the claimant. Due to the lack of witness evidence of the incident in the shower, the lack of CCTV footage, and the differing version of events, she was unable to determine who started the physical violence. Further, considering the events leading up to the physical altercation, it was clear that both employees had been fully involved in unreasonable behaviour towards each other. The claimant had disregarded Ms Aiello's instructions and clear signage around the pool and dived into the pool. Ms Aiello had argued with the claimant in front of parents and then tried to involve the parents in their argument. Ms Jaiswal believed that both parties were equally to blame and equally culpable. She, therefore, decided not to uphold the grievances and recommended that disciplinary action should be taken against them. Her account and reasoning were contained in the grievance outcome letters. She did not believe it was necessary to complete a separate investigation report.
87. The claimant and Ms Aiello were sent their grievance outcome letters on 11 June 2018. (164 to 165, 174-175)
88. On the same date, 11 June 2018, the claimant emailed Ms Jaiswal at 10:07pm, in relation to the grievance outcome, stating that she was shocked to receive it and would appeal. She was in the process of taking legal advice and further steps. She wrote that although Ms Jaiswal had stated that she had conducted a full investigation, she, the claimant, had not been provided with a single piece of evidence to support her decision and had provided details of the incident she reported to the police. Ms Jaiswal's response was that she did not require the crime incident number. The photographic evidence the claimant provided clearly revealed the injuries she had sustained at the hands of Ms Aiello. As regards independent witnesses, Ms Aiello had fully admitted to Mr Hutton in her account dated 4 June 2018, that she attacked her. With regard to that account being provided by Mr Hutton, a copy was not forwarded to the claimant. The claimant alleged that no evidence had been given in support of the finding that she and Ms Aiello were equally to blame, and she was still waiting to receive a copy of the notes of the grievance meeting as she had earlier requested. She stated that there is a further case of unfair dismissal and requested all documents and evidence be sent to her as soon as possible and that she would be taking, "both matters to the relevant regulating bodies." (176)

Disciplinary proceedings

89. On 12 June 2018, Ms Jaiswal invited the claimant, in writing, to a disciplinary hearing scheduled to take place on 14 June 2018 at 9am at the respondent's head office. The allegations against her were:

- "Aggressive and violent behaviour
- Bringing the business into disrepute due to unprofessional behaviour and not upholding company standards
- Breach of Health & Safety instructions relating to diving where unsafe to do so, and not following a reasonable management instruction, which is also insubordination."

90. The claimant was warned that the allegations constituted gross misconduct and, if proven, the possible outcome could be the termination of her employment without notice. She was informed that should she have any evidence that she would like to be considered at the hearing, to provide copies as soon as possible. She could also submit a written statement in advance of the hearing. She would be given full opportunity to explain her case and answer to the allegations. She could ask questions, dispute the evidence, put forward her own evidence and argue her case. She would be given the opportunity of putting forward any mitigating information. Possible outcomes could be no further action; termination on grounds of gross misconduct; or taking formal action by issuing a written warning or final written warning. In addition to Mr Gary Young, Operations Director, who would be conducting the hearing, Mr Mark Trude, Project Co-ordinator, would also be present to take notes. She was reminded of her right to have a colleague accompany her or a trade union representative. Her suspension would continue pending the outcome of the disciplinary hearing. (166 to 167)

91. As the claimant had requested documents obtained during the investigation and grievance meeting notes, she was unable to prepare for the hearing and asked that it be rescheduled. (176, 182-183)

92. It was eventually rescheduled for the 18 June 2018 at 3.00pm. (185-186)

93. The claimant asserted that Ms Jaiswal decided that her grievance appeal should be heard on the same day by Mr Young as the disciplinary allegations. This was, she said, contrary to her expressed view.

94. We were taken to the emails sent by Ms Jaiswal to the claimant dated 18 June 2018 at 11:53, in the morning, in which she wrote to the claimant:

"We refer to your email dated 17 June 2018 by which you appealed against the formal grievance outcome.

Normally we give you 24 hours' notice for such appeal but as per our phone conversation now you have given consent to attend the appeal today before the disciplinary hearing starts."

95. We were not taken to an email response from the claimant challenging that procedure to hear the grievance appeal prior to the disciplinary matters. We, therefore, find that the claimant did agree that her grievance appeal should be heard by Mr Young before the disciplinary hearing. (198)
96. The claimant attended in the company of Ms Roberta Contegreco, a work colleague. In relation to the grievance appeal meeting, she was shown clearer photographs of Ms Aiello's injuries and disputed the bruising being caused by the altercation in the changing rooms and asserted that they were self-inflicted or caused by someone else. She also said there was no bruising on Ms Aiello's body after the incident, and that she went to the police to report the alleged assault. She disputed the authenticity of the pictures.
97. In relation to the disciplinary allegations, she asserted that no one had instructed her not to dive in a 1.2 metre pool. She admitted seeing the "No diving" signs around the sides of the pool but as she was not told she could not dive, she did not have to follow the signs. She denied the allegations and stated that a dismissal would not be a fair outcome. In closing, she stated that she would pursue a case through to the "highest institution" and felt that the issue was a criminal matter as a dangerous person, namely Ms Aiello, was still working with children. Mr Young, at the end of the meeting, allowed the claimant to take photographs of his computer screen showing the notes taken. (199-207)
98. In his evidence to us Mr Young said that after the hearing he reconsidered all of the evidence. It was clear to him that the claimant had taken advice from many people. He first considered the grievance appeal and drafted his outcome letter taking each point in turn. He wrote on 20 June 2018, the following:

"... following full consideration of your grounds of appeal and all the evidence I have reached the following findings:

1. I have been unfairly treated by SN Team from the very start of this grievance notice.

With regards to the above you mentioned that your email about the physical incident with Sarah was not acknowledged and you were shown no concern. However, your manager Tim has been in touch with you since this incident happened and he has followed the official procedures required to report it to the head office. Tim Hutton was a senior member in Swimming Nature and represents the company. Hence this point of appeal has not been upheld.

2. There has been a clear case of prejudice against me.

With regard to this grievance, when we tried to investigate the reason why you feel that there was prejudice involved and any evidence relating to this, you did not discuss this and said you would not like to provide any further clarification till points were covered. There were no proper reasons provided for this grievance throughout the whole hearing and no evidence to support

the same. Hence this grievance has not been upheld. You gave no details of why you felt you [were] prejudiced against, or for what reason.

3. SN has not provided me with the reasons for rejecting my grievance.

I have looked at the grievance hearing outcome and there was a clear reason given within this letter for rejecting the grievance and hence this grievance is not upheld.

4. SN has not provided me with valid evidence supporting this decision.

The investigation process and evidence collected are for decision making purposes. These can only be sent to you if you request the same. I have checked this further with Eliza Jaiswal and have seen an email to you with the evidence sent which supported the grievance outcome decisions and can confirm that these were sent when you requested for them. Hence this grievance has not been upheld.

5. SN deliberately withheld and not provided me with key evidence (despite me requesting it on many occasions) – Tim Hutton’s statement who personally confirmed during our official meeting on 1 June 2018 that Sarah Aiello had fully admitted the attack and taken full responsibility for it on the day that it happened (26th May 2018).

All the evidence collected was presented to you on your request. Tim has confirmed that his first account was his understanding of what Sarah said. However, the grievance appeal about requesting it many occasions is not upheld since no such request was received at all. Also the other statements collected from Kasia and Alex were only collected because you had yourself asked Eliza to investigate this incident with these two teachers since you believed that they would support you and your claims of Sarah initiating the arguments from the start of the lessons and Kasia confirming that Sarah did the first attack. However, this has not been the case as per the statements received and they do not support your claims about Sarah at all. No evidence was withheld from you, and this appeal is not upheld.

6. Eliza Jaiswal has no medical competence to evaluate and compare severity of my bruises.

With regard to the above, I have investigated this further with Eliza and it does not suggest anywhere that she confirmed she has any medical competence to evaluate or compare the bruises. The comparison was purely on the basis of the visual images of the bruises which was taken into consideration. This was reasonable in the circumstances, and your appeal point is not upheld.

7. I have been brutally attacked and assaulted while at work and SM Team has failed to protect me as their employee.

With regard to this point of appeal, you did confirm in the appeal hearing that when requested relocation to another venue, we did accommodate it straight away which shows that we did protect and help you when you made us aware of the situation. However, this request was only made after the incident took place and no issues of any conflicts with Sarah was ever reported earlier.

As per the grievance hearing notes, you said that you were a person who does not like to report and also pre-judge that the company would not have done anything to mitigate such situations. An employer can only protect and help an employee if the employee makes them aware about any problems being faced by them. Hence this appeal point has not been upheld.

You have now exercised your right of appeal and my decision set out within this letter is final.” (222-223)

99. In relation to the disciplinary allegations, Mr Young first considered the allegation of aggressive and violent behaviour. One of the issues was that Ms Aiello had admitted, immediately after the incident, to Mr Hutton that she did hit the claimant. This was later changed by her in subsequent emails. She blamed her poor English for the confusion. Mr Young was able to determine that the start of the incident was poolside with the verbal interactions between the claimant and Ms Aiello. In his view, they had not behaved appropriately during the poolside discussions. Further, the claimant did admit that she struck Ms Aiello at least twice and pushed her down. The photographs of Ms Aiello’s injuries were, in his view, more significant than the claimant’s injuries. However, he did not have sufficient evidence to determine who was the aggressor. The verbal confrontation at the poolside occurred because of an accumulation of incidents to which the claimant was not without fault. She had contributed to the altercation. The physical fight was the end of the confrontation. He was able to find that violent conduct did occur and both parties were injured, but in his view Ms Aiello’s injuries were more severe. On that basis he found that the claimant was guilty of aggressive and violent behaviour.
100. In relation to the second allegation of bringing the company into disrepute, both were arguing in front of children and parents at poolside. They both admitted to such conduct and one witness who was at the pool confirmed that there had been an argument. Such behaviour brought the respondent into disrepute. In addition, Mr Young was also of the view that fighting at the hotel was also capable of bringing the company into disrepute because the Marriott Hotel’s staff were aware of what had occurred.
101. In relation to the final allegation, breach of health and safety instruction relating to diving where unsafe to do so and not following reasonable management instructions, Mr Young decided that the claimant ignored the clear signs with the notice that diving was not permitted. He was surprised that she had admitted to him that she knew the signs were there but claimed that because it was not in her local documentation or that since no one specifically told her that she could not dive, she dived into a pool that was 1.2 metres deep and in front of children. She breached health and safety instructions relating to diving where unsafe to do so. She also admitted that she had been told by Ms Aiello, who was in charge on the day in question that she had not followed her instructions not to dive into the pool. After receiving those instructions, the claimant again dived into the pool. In Mr Young’s view this was a clear failure to follow a reasonable management instruction, which was also insubordination. The allegation was upheld.

102. All three allegations were potentially gross misconduct offences. It was impossible to know for sure who started the physical fight or who was the main aggressor. He had taken into account the claimant's previous clean disciplinary record and discussed his findings with Ms Jaiswal. He was informed that Ms Aiello had been issued with a final written warning and taking all matters into account, he decided that a lesser sanction of a final written warning, was appropriate. As the claimant had less than two years' service, he could have dismissed her on notice for misconduct but decided against it and issued her with a final written warning. His outcome letter also dated 20 June 2018, was sent to her. (220-221)
103. In Mr Young's outcome letter, he advised her of her right to appeal his decision within seven days form the date of his letter.
104. Although the claimant claims that she suffered detriments because of making protected disclosures, this was not raised during the disciplinary hearing nor during the grievance appeal hearing before Mr Young. We also find that Mr Hutton, unlike Ms Jaiswal, did not know what was meant by qualifying and protected disclosures.

The claimant's resignation on 22 June 2018

105. On 22 June 2018, she emailed Ms Jaiswal, Mr Young, and the Human Resources Team, expressing her disappointment at the grievance appeal and disciplinary hearing outcomes. She maintained that she was the victim of a "brutal physical attack". She alleged that there was a complete lack of support from the respondent. It had attempted to cover up and hide events and that the decisions were prejudicial, unfair, and discriminatory. She suffered stress, anxiety and panic attacks and was in poor health. It was totally impossible for her to return to work and wrote that she would like to give her official leaving notice of one month ending on 22 July 2018. She then made a number of allegations regarding her treatment which repeated what she had said during the grievance appeal and disciplinary hearings. She stated she felt totally humiliated and could not be part of a company that tolerated bullying, harassment, and dangerous behaviour. She felt that the meetings with Ms Jaiswal and Mr Young, led her to take the view that the outcomes were predetermined. She was taking legal advice and would inform the respondent of any further action she would be taking. (225-226)
106. The claimant said that she was paid statutory sick pay instead of full pay. She submitted a fit note dated 22 June 2018, in which it stated that she was not fit for work due to stress. The fit note covered the period 22 June to 23 July 2018. (227)
107. On 25 June 2018, after the claimant's resignation, Ms Jaiswal emailed her to confirm that she had received fit note and stated that she would pass the information on to the Payroll Team for statutory sick pay purposes. There was no documentary evidence or other evidence showing that the claimant had challenged this process, that it would be the Payroll Team to determine her entitlement to full pay while on sick leave.

108. On 25 June 2018, Ms Jaiswal emailed the claimant accepting her letter of resignation and confirming that her last day of employment would be 22 July 2018. She invited her to clarify whether it was her intention to appeal the disciplinary outcome, and, if so, to set out her grounds. (228)
109. The claimant emailed Ms Jaiswal and the Human Resources Team on 29 June 2018, stating that she would not be appealing the “unfair disciplinary outcome” as she had no trust and confidence in the process after the way she had been treated. To appeal would be a waste of time and that it was not good for her health as she had been signed off by her doctor with stress. She would be contacting ACAS as she believed that she had been constructively dismissed and that the respondent had victimised her for making protected disclosures. (232)
110. Ms Jaiswal responded on 23 October 2018, giving an account of the claimant’s entitlements on termination referring again to sick pay, amongst other things. (250-257)
111. We were not taken to any documents purporting to show that the claimant was entitled to full pay while on sick leave.

The public interest disclosures

112. In relation to the alleged protected disclosures, these are set out in paragraph 9 of the claim form. They are as follows:
 - 112.1 On Saturday 26 May 2018, she telephoned her line manager, Mr Hutton, to report the assault in the changing room. She reported to Mr Hutton that Ms Aiello was unstable, had previously spoken aggressively in front of the children in their care and that the claimant thought she presented a risk to the children, paragraph 9(a).
 - 112.2 Early on Sunday 27 May 2018, the claimant reported the assault to the police, paragraph 9(b).
 - 112.3 On Monday 28 May 2018, the claimant emailed Mr Hutton giving a written account of the incident stating that she had reported it to the police and invited the respondent to carry out an investigation. She informed him that she was scared for her health and safety, paragraph 9(c).
 - 112.4 On 1 June 2018, the claimant emailed the Human Resources Team, Mr Hutton, and Mr Eduardo Ferre, the owner of the company, attaching her email dated 28 May and enquiring why the respondent had not started an investigation into the incident. She referred to its duty of care to its employees. She reminded them of the seriousness of the incident and attached photographs of her injuries taken by the police, paragraph 9(d).

- 112.5 On 5 June 2018, at the grievance meeting accompanied by Mr Akrabov, the claimant provided further information in relation to the assault and events leading up to it and afterwards, paragraph 9(e).
- 112.6 On 17 June 2018, she sent a further email to the human resources team repeating that she had been “brutally attacked” and that the respondent failed to protect her. She further asserted that the respondent had deliberately withheld evidence from her and that her concerns had been handled in a prejudicial manner, paragraph 9(f).
- 112.7 On 18 June 2018, at a further meeting called by the respondent, with Mr Young, Mr James Bagan, and with Ms Roberta Contegreco, as her companion, the claimant again repeated that she had been assaulted. She expressed concerns about the investigation and the way it had been handled. She stated that she would continue to escalate the matter:
- “Not only for my rights and also my safety. For me it is a criminal matter for a dangerous person to work with children. It is my responsibility as a teacher and a citizen to escalate this case, and I cannot stay silent.”, paragraph 9(g).
- 112.8 On 22 June 2018, she sent a further email to Ms Jaiswal, Mr Young, and the human resources team, giving her notice of resignation and an explanation why she was resigning. She referred, again, to having been assaulted at work; having received no protection or support from the respondent; having been unfairly treated; and having expressed concern that the respondent was tolerating bullying, harassment, and dangerous behaviour, and allowing such people to work with children, paragraph 9(g). (24-25)

Public interest disclosure detriments

- 112.9 In relation to the alleged detriments suffered after making her protected disclosures, she was ordered by Employment Judge Hyams, at the preliminary hearing held on 13 January 2020, to serve further information in respect of her public interest disclosure detriments by not later than 4pm, 24 February 2020. (51)
- 112.10 On that date the claimant served a document entitled “Clarification of claim”, in which she sets out the alleged detriments suffered as a consequence of making the alleged protected disclosures in paragraph 4. They are as follows:

Delaying the commencement of an investigation into the protected disclosures first made to Mr Hutton 26 May causing unnecessary stress and upset and failing to offer her any support or protection. She further repeated her disclosures on 28 May and 1 June 2018. She relies on Mr Hutton as the person to whom the disclosures were made, paragraph 4(a).

Failing to promptly suspend Ms Aiello pending an investigation into the incident or to take appropriate action to ensure that the claimant and others were protected from any (further) potential risk to their health and safety

after having made protected disclosure on 26, 28 May and 1 June 2018. She relies on disclosures made either to Mr Hutton or to Ms Jaiswal, paragraph 4(b).

Failing to properly investigate the claimant's grievance and other concerns, such as failing to obtain a written statement from Ms Aiello about the events on 26 May; failing to obtain a written statement from Mr Hutton about the events of 26-27 May; failing to provide a copy of their evidence to her in advance or at the grievance hearing on 5 June; seeking evidence from third parties who were not direct witnesses to the complaints and concerns expressed by the claimant, and subsequently using their evidence as a basis to pursue disciplinary proceedings against the claimant for reasons unrelated to her concerns about Ms Aiello and the risks she presented to staff and customers. The persons responsible were either Ms Jaiswal or Mr Hutton, paragraph 4(c).

Failing to carry out a fair and proper grievance hearing on 5 June, in breach of the ACAS Code, in particular, inappropriately appointing Mr Hutton as notetaker to the grievance hearing who lacked independence; conducting a poor grievance hearing in which the subject matter of the grievance and the legitimate concerns raised by the claimant, were not appropriately considered despite the claimant and her companion's objection; failing to allow the claimant's companion to speak; making the focus of the grievance hearing unrelated allegations of misconduct against her, such as, allegedly diving into the pool. The person responsible, she asserts was Ms Jaiswal, paragraph 4(d).

Failing to make an accurate and complete note of the grievance hearing on 5 June, thereby failing to record the claimant's protected disclosures and her complaint about how poorly the investigation and grievance hearing was conducted. The person responsible was Mr Hutton, paragraph 4(e).

Notifying the claimant by letter on 7 June that she was subject to disciplinary proceedings without providing any details of the alleged misconduct and asserting that grievances had been raised against her without specifying what they were or by whom. The person responsible for such treatment was Ms Jaiswal, Paragraph 4(f).

Suspending the claimant on 7 June without any reasonable cause and subsequently failing to arrange "keeping in touch" and/or support for her during her suspension. The person responsible was Ms Jaiswal. The claimant asserts that she was suspended soon after the alleged unspecified misconduct and/or grievance against her by Ms Aiello but in Ms Aiello's case she had not been suspended when the claimant reported the assault on 26 May, paragraph 4(g).

On 11 June 2018, failing to uphold the claimant's serious complaint or to address her concerns; and failing to provide supporting documents to explain how the decision had been reached. There was no investigation report; no meeting notes; no deliberations and no copies of relevant evidence. Such conduct was by Ms Jaiswal, paragraph 4(h).

Prior to the grievance outcome, accepting at face value, and without further investigation, challenge, written evidence an assertion by Ms Aiello that she had been "misunderstood" by Mr Hutton when she had previously

admitted to him that she had attacked the claimant. The conduct here was by Ms Jaiswal, paragraph 4(i).

Prior to the grievance decision, communicating directly with the police about the claimant's case without notifying the claimant or sharing relevant information with her. This includes claiming to have obtained evidence from the police which was apparently relied on in reaching the grievance decision but not shared with the claimant before or at the time of the hearing. This was conduct on the part of Ms Jaiswal, paragraph 4(j).

The communication between Ms Jaiswal and the police caused or contributed to the police's decision not to pursue charges against Ms Aiello to the distress of the claimant but for the benefit of Ms Aiello and the respondent. The person responsible was Ms Jaiswal, paragraph 4(k) is.

Failing to carry out fair disciplinary proceedings in breach of Acas Code and rule of natural justice, in particular, writing to the claimant on 11 June to invite her to a disciplinary hearing scheduled to take place three days later on 14 June to answer charges of gross misconduct without having first carried out a disciplinary investigation and without providing any details or dates of the specific allegations which would have allowed the claimant to understand and respond to them. Those responsible were Ms Jaiswal and/or Mr Young, paragraph 4(l).

On 18 June 2018, a few hours before the disciplinary hearing and within sufficient time for the claimant to prepare and/or seek advice, she was asked to agree her grievance appeal should take place at the same time as the disciplinary hearing and before the same decision maker. Those responsible were Ms Jaiswal and/or Mr Young, paragraph 4(m).

Failing to carry out a fair grievance appeal hearing on 18 June, such as. Failing to address the claimant's legitimate concerns regarding the poor grievance investigation; lack of evidence from Ms Aiello and Mr Hutton; failure to address her concerns about Ms Aiello; the lack of challenge to bald assertions made by others, including the claim that Mr Hutton had "misunderstood" Ms Aiello's admission of guilt; why Ms Aiello was still attending work after the assault on the claimant when the claimant had been suspended; the weaknesses in the evidence supposedly relied upon in reaching the decision; Ms Aiello was dangerous and should not be working with children. The person responsible for such conduct or treatment was Mr Young, paragraph 4(n).

Failing to conduct a fair disciplinary hearing on 18 June contrary to the ACAS Code, in that, no detailed allegations were communicated to the claimant in advance of the hearing; no disciplinary investigation report; no effort was made to interview the claimant prior to the hearing to establish the facts; no new witness evidence was provided; no closed circuit TV footage was provided to corroborate or disprove the allegations made at the hearing, despite the claimant's requests, paragraph 4(o).

Unreasonably failing to uphold the claimant's grievance appeal as reported on 20 June. The responsibility here was Mr Young, paragraph 4(p).

Unreasonably finding the claimant guilty of gross misconduct and unreasonably issuing her with a final written warning on 20 June, putting

her under the threat of dismissal in the event of any further adverse disciplinary findings in the coming year. The claimant relies on Mr Young's conduct, paragraph 4(q).

Having suffered stress, anxiety, eating problems and sleeping problems as a result of the detriments listed above. She was paid statutory sick pay during her period of sickness absence rather than full pay. The conduct here was that of Ms Jaiswal and Mr Young, paragraph 4(r).

As a result of her treatment she had no option but to resign on 22 June 2018. Those responsible were Ms Jaiswal and Mr Young, paragraph 4(s). (54-57)

Submissions

113. The tribunal has considered the written and oral submissions by the claimant which were very detailed covering the relevant law and the facts as she saw them in support of her claims.
114. Mr Smith, counsel on behalf of the respondent, gave oral submissions covering, very briefly, the law.
115. We do not propose to repeat their submissions herein having regard to Rule 62(5) Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013, as amended.

The law

116. In relation to public interest disclosure, we have taken into account sections 103A and 47B Employment Rights Act 1996 on dismissal and detriment.
117. Section 47B(1), Employment Rights Act 1996 provides,

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

118. A protected disclosure means a qualifying disclosure as defined under section 43B made by a worker in accordance with sections 43C to 43H, ERA 1996, section 43A.
119. Section 43B defines what is a qualifying disclosure. It provides,

“(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.”
120. What is a detriment under section 47B is not defined in the legislation? In this regard the judgments of their Lordships in the case of Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285, will apply. It is whether or not the worker was put at a particular disadvantage having made a protected disclosure? The disadvantage could be either physical, such as being instructed to engage in degrading work; or denying them benefits such as a company car, medical cover or membership of a sports or social club; being denied the opportunity of promotion, or a delay in addressing an issue. It may also be psychological, financial or not being offered employment, amongst other things.
121. The qualifying disclosure must be a disclosure of information, that is conveying facts, Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38, a judgment of the Employment Appeal tribunal.
122. A reasonable belief is assessed objectively taking into account the particular characteristics of the worker in determining whether it was reasonable for him/her to hold that belief, Korashi v Abertwe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT.
123. In the case of Fecitt and Others and Public Concern at Work-v-NHS Manchester [2011] EWCA Civ 1190, the Court of Appeal held that the causal link between the protected disclosure and suffering a detriment under section 47B, is whether the protected disclosure “materially influenced”, in the sense of being more than a trivial influence, the employer’s treatment of the whistleblower.
124. In a breach of a legal obligation case, the tribunal should identify the source of the legal obligation and how the employer failed to comply with it. Actions could be considered wrong because they were immoral, undesirable or in breach of guidance without being a breach of a legal obligation, Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT.
125. Section 103A ERA provides that, “An employee who is dismissed shall be regarded for the purposes of the 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.”
126. It is for the employer to prove the reason for the dismissal. Where the employee lacks the relevant qualifying period of service the burden will be

on the employee to prove the reason for the dismissal was by reason of making a protected disclosure, Kuzel v Roche Products Ltd [2008] ICR 799.

127. A claim under section 47B must be presented within three months beginning with the date of the act or the failure to act, section 48(3).
128. This time is extended under section 207B where there has been conciliation before the presentation of the claim, section 48(4A).
129. If a detriment claim is well-founded the tribunal can make a declaration to that effect and award compensation, section 49(1) Employment Rights Act 1996. The claimant is under a duty to mitigate, section 49(4), and the tribunal can consider whether the claimant either caused or contributed to the act complained of, section 49(5). Compensation is assessed on the same basis as a discrimination claim and can include an injury to feelings award, Virgo Fidelis Senior School v Boyle [200] IRLR 268.
130. In relation to constructive unfair dismissal, section 95(1)(c) ERA 1996, provides for the employee to terminate the contract in circumstances in which he or she is entitled to do so, without notice.
131. There has to be a fundamental breach going to the root of the contract, repudiating it, Western Excavating (ECC) v Sharp [1978] ICR 221, Court of Appeal. The breach must have caused the resignation, but it need not be the only cause, Meikle v Nottinghamshire County Council [2005] ICR 27. Where there is a continuing cumulative breach of the implied term of mutual trust and confidence, the employee is entitled to rely on the totality of the employers acts even if she has previously affirmed the contract. The effect of the last straw is to revive the employee's right to resign, Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.
132. It is for the worker to prove, on the balance of probabilities, that there was a protected disclosure, that there was a detriment, and the employer subjected the worker to the detriment. If proved, the burden shifts to the employer to show the ground on which the detrimental act was done, section 48(2) ERA. If a tribunal rejects the reason advanced by the employer, then it is not bound to accept the reason advanced by the worker, namely that it was on the ground of a protected disclosure, as it is open to a tribunal to find another reason for the detriment.
133. Where the constructive dismissal is the dismissal under section 103A ERA, the employee has to establish that the principal reason for the dismissal was that they made a protected disclosure or several protected disclosures. The reason for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused them to dismiss, or which motivates them to do so, the Co-operative Group v Baddeley [2017] EWCA Civ 658.

Conclusion

134. In relation to qualifying disclosures, the claimant relies on a criminal offence having been committed; the health and safety of individuals was

endangered; and there were breaches of the respondent's legal obligations including its duty of care to staff and to the public.

135. Her first protected disclosure, 9(a), is based on what she said to Mr Hutton in her telephone call on Saturday 26 May 2018. We find that she did say to him that she had been assaulted by Ms Aiello and that she was on her way to the police station to report the assault. This is supported by him in his email dated 4 June 2018. He described her as being very distressed. His account is very brief but what the claimant said was that she was on a bus on her way to initially St John's Wood Police Station and said that she had been attacked by Ms Aiello.
136. We do not accept that the claimant referred to health and safety being endangered, in that, Ms Aiello was a risk to children and parents as well as to members of the public. Further, the claimant did not disclose facts in support of a breach of a legal obligation in relation to the duty of care. The qualifying disclosure was that a criminal offence had been committed, namely that she had been assaulted by Ms Aiello and that she was on her way to report the matter to the police.
137. She reported the assault to the police on 27 May 2018. Reporting the matter to the police does not feature in the Public Interest Disclosure (Prescribed Persons) Order 2014 but may fall under section 43G, "Disclosure in other cases". In any event, we have found that she made a qualifying disclosure of facts which was in the public interest as it concerned the respondent who provided swimming services to members of the public or a section of the public, 9(b).
138. In relation to 9(c), the claimant emailed Mr Hutton on 28 May 2018, setting out her account, in more detail, of the incident and the alleged assault in the shower cubicle. She then went on to state that she was scared for her health and safety and was not comfortable working at the Marriott Regents Park on Wednesdays and Saturdays. We have concluded that this was a qualifying disclosure referring to the fact of the assault being a criminal act, as well as her health and safety being endangered. She held a reasonable belief in those disclosures being in the public interest. In so doing we are not saying that she was assaulted by Ms Aiello.
139. The disclosures so far were protected as they were made to Mr Hutton, who was Regional Manager at the time.
140. In relation to 9(d), the claimant made a qualifying and protected disclosure to the human resources team, Mr Hutton, and the owner of the company Mr Ferre, when she attached her email of 28 May giving her account of the incident. In support of the assault, she also attached photographic evidence of her bruises and scratches. This disclosure was made in the public interest because of the important role of the respondent in providing swimming services to the public.
141. In relation to paragraph 9(e), the claimant said that on 5 June 2018, she made protected disclosures to Ms Jaiswal and to Mr Hutton. We accept that

she again referred to the alleged assault on her and that it was a criminal act. We do not accept that she made reference to Ms Aiello being either a danger to her health and safety, or to the public, or to children and parents. She had a reasonable belief that the disclosure in respect of the alleged assault on her was made in the public interest.

142. The claimant, on 17 June 2018, in her further email to the human resources team, again disclosed that she had been attacked while at work and that the respondent failed to protect her. In line with the earlier disclosures, she repeated the alleged assault on her, and that the respondent had failed to protect her as an employee. We accept that this is a protected disclosure referring to a criminal act and a breach of a legal obligation, namely the respondent's duty of care, to protect her. We conclude that these were disclosure facts which the claimant reasonably believed were made in the public interest.
143. In relation to paragraph 9(e), we further find that the claimant did disclose risks to the children, in that, their health and safety were likely to be endangered. She had a reasonable belief that that disclosure was made in the public interest.
144. In relation to 9(g), on 18 June 2018, during the disciplinary hearing, she again repeated the assault on her which is a disclosure of a crime having been committed and at the time of making that disclosure, she held a reasonable belief that it was in the public interest.
145. As regards paragraph 9(h), she sent an email dated 22 June 2018, setting out an account of her treatment and stating that she had decided to resign. This was sent to Ms Jaiswal, Mr Young, and the human resources team. Quite apart from repeating that she had been in her words "brutally attacked and assaulted whilst at work", the rest of the email focusses on her treatment as being unfair and that she felt humiliated, bullied, harassed, and emotionally destroyed. There is a reference to the respondent continuing to allow people to work with children, but no expansion is given on that statement. We find that this email is nothing more than an account of the claimant's treatment, as she saw it, by the respondent. In our view this does not amount either to a qualifying disclosure of information and does not amount to a protected disclosure.
146. In relation to the detriments, paragraph 4(a), delaying the commencement of an investigation on 26 May resulting in further disclosures on 28 May and 1 June, the claimant asserts that the detriment was causing unnecessary stress and upset and failing to offer her any support or protection. We find that she was not required to continue to work at Marriott Regents Park hotel. She told the tribunal that she was able to work at the other venue on Wednesdays. We find, having regard to Mr Hutton's evidence, that she was offered the respondent's venue at Kensington as it was felt that the supervisor at Kensington was well placed to assist her, but she did not want to work there because she was too distressed. Ms Jaiswal also understood that the claimant was offered the option of being separated from Ms Aiello on 1 June 2018. Mr Hutton did email Mr Ferre, to inform him that the

claimant and Ms Aiello would be kept apart and that he had been in regular contact with the claimant since the incident.

147. We further find that Mr Jaiswal was the person who was going to take charge of the investigation being the only human resources person in the company. She was on leave at the time of the incident and did not return to work until 4 June 2018 although Mr Hutton did make contact with her while she was on leave. It unrealistic to have expected an investigation to have taken place prior to her return to work.
148. We have come to the conclusion that the respondent did not delay in commencing an investigation into the incident because of the claimant's protected disclosures on 26 May nor indeed in respect of her disclosures on 28 May and 1 June. The respondent did protect her by offering her another venue which she did not take up. Mr Hutton was in regular contact with her. She had not demonstrated a causal connection between her protected disclosures and the detriment as set out in paragraph 4(a).
149. In relation to paragraph 4(b), the claimant asserted that the detriment was the respondent's failure to promptly suspend Ms Aiello pending an investigation into the incident or to take appropriate action to ensure that the claimant and others were protected from any further potential risks to their health and safety. She cites either Mr Hutton or Ms Jaiswal. We found that Ms Jaiswal was aware that the claimant had been offered Kensington but did not take up that offer. In his email to Mr Ferre on 1 June 2018, Mr Hutton confirmed that the claimant and Ms Aiello would not be working together until the issues had been investigated. By 27 May 2018, Ms Hutton was aware that both Ms Aiello and the claimant were blaming each other for the assault and Ms Aiello was going to report it to the police. The person responsible for investigating the matter was on leave and did not return to work until 4 June. We are satisfied that reasonable steps were taken to ensure that both Ms Aiello and the claimant did not work together following the incident. There was no perceived threat to the health and safety of others from Ms Aiello. On the contrary, the claimant had dived into the pool on at least two occasions on 26 May in the presence of children when she knew that she was not supposed to do so, and it was contrary to the instructions given to her by Ms Aiello. If anything, she posed a risk to the children's health and safety, in that, they may follow her by diving into the pool. The investigation and subsequent suspension took place following Ms Jaiswal's return to work. According to Ms Jaiswal, after interviewing both parties, it was clear that a serious incident had occurred, but she was unsure as to who the aggressor was. In those circumstances her decision was to suspend both on 7 June 2018.
150. Mr Hutton told the tribunal, and we find as fact, that he was unaware of the concept of qualifying and protected disclosures. His decision to wait until Ms Jaiswal return to work to investigate the assault, we find, was unrelated to the claimant's protected disclosures but to the fact that she was responsible for human resources issues.

151. In relation to Ms Jaiswal's evidence, she told the tribunal that she was aware of qualifying and protected disclosures and the whistleblowing provisions. The reason why both parties were suspended on 7 June had nothing to do with any qualifying or protected disclosures but Ms Jaiswal wanting to investigate the incident and having done so, concluded that she was unsure who the aggressor was and decided to suspend both. She was sure from both parties that physical violence had taken place. Her decision was unrelated to any qualifying of protected disclosures.
152. In relation to paragraph 4(c), the claimant alleged that the respondent Ms Jaiswal, and possibly Mr Hutton, failed to properly investigate her grievance and associated concern. Ms Jaiswal did have in her possession the claimant's grievance as well as the grievance lodged by Ms Aiello. In addition, she had Mr Hutton's email of 4 June 2018. She was engaged in a fact-finding investigation and not a disciplinary hearing. The claimant and Mr Akrabov were given the opportunity to put her case. Mr Hutton's role was that of note taker and was not the investigator. After listening to the claimant and indeed Ms Aiello, Ms Jaiswal conducted her own investigation by speaking to potential witnesses to the incident. She was satisfied that an assault occurred. It was a serious incident having considered all of the evidence. The manner in which she conducted her investigation and the outcome leading to suspension and a recommendation that disciplinary proceedings be invoked against Ms Aiello and the claimant, had nothing to do with any of the claimant's protected disclosures. Ms Jaiswal treated both the same, in that, they did not get in advance of the grievance hearing, documents to assist them in preparing a response. In our view this was both pragmatic and fair.
153. In paragraph 4(d), the claimant alleged that there had been a failure on the part of the respondent to carry out a fair and proper grievance hearing on 5 June in breach of the ACAS Code. She referred to several instances in support of her contention. We repeat what we have stated in paragraph 4(c) above. In addition, we do find that Mr Akrabov's behaviour was aggressive as he wanted Ms Jaiswal and Mr Hutton to hear his own concerns about the respondent and less about the claimant's case. He was reminded one more than once occasion, that they had to focus on the claimant's grievance. We do not accept the assertion made by the claimant and Mr Akrabov, that he was not allowed to speak. In our view, the grievance hearing was conducted fairly as the claimant was eventually able to articulate her case. It was relevant to consider the claimant's conduct in diving into the pool. We do not accept that such behaviour was unrelated to matters Ms Jaiswal was investigating. Ms Jaiswal's conduct of the grievance hearing on 5 June was unrelated to any protected disclosures.
154. As regards paragraph 4(e), failing to make an accurate and complete note of the grievance hearing on 5 June and thereby failing to record the claimant's protected disclosures and her complaints about how poorly the investigation hearing was being conducted, Mr Hutton and Ms Jaiswal did say in evidence that the notes of the hearing were not meant to be verbatim, but a summary of the questions asked, and answers given. Mr Hutton did

not know about qualifying disclosures and protected disclosures. The notes he took were taken in ignorance of any protected disclosures.

155. In paragraph 4(f), the claimant alleged that she was notified by letter on 7 June 2018, that she was subjected to disciplinary proceedings without providing any details of the alleged misconduct and stating that grievances were raised against her without specifying what they were or by whom. We find that the letter of 7 June simply informed her that she was on suspension and that it was not a disciplinary act on the part of the respondent. She was on suspension pending the outcome of Ms Jaiswal's investigation. It was, therefore, neither necessary nor inappropriate to set out allegations in the suspension letter prior to the conclusion of Ms Jaiswal's investigation. We do take the view that it would have been helpful to have summarised the grievance against the claimant though not identifying the person who had lodged it. The documents from Ms Aiello were not disclosed to the claimant, according to Ms Jaiswal due to data protection laws. The photographic evidence of Ms Aiello was quite graphic and highly personal. Ms Jaiswal's failure to summarise the grievance against the claimant had nothing to do with the protected disclosures. Indeed, her conduct of the grievance hearing had nothing to do with protected disclosures. She had to find out precisely what happened on 26 May and who was responsible. In the end she was neither clear nor certain who the aggressor was. However, she was satisfied that both had been involved in a serious incident.
156. In relation to paragraph 4(g), the detriment being suspending the claimant without any reasonable cause for doing so. We are satisfied that Ms Jaiswal reasonably believed, on the evidence before her, that both the claimant and Ms Aiello had behaved in an unacceptable way on 26 May 2018. Both had engaged in violent conduct which could not be tolerated. The claimant further alleged that the respondent failed to arrange any "keeping in touch" meetings or communications, or to provide support for her during her suspension. The terms of the suspension equally applied to Ms Aiello who did not make any qualifying disclosures. In relation to keeping in touch and not providing any support, the claimant was told that she was suspended on 7 June. On 11 June she was invited to a disciplinary hearing, initially scheduled to take place on 14 June, eventually it took place on 18 June following the claimant's request for her to be sent some of the evidence in the possession of the respondent. In the circumstances, having regard to the very short timeframe, it would have been difficult to have arranged a keeping in touch session. In relation to support, as stated earlier, the respondent did not want Ms Aiello and the claimant to be working together and had offered the claimant Kensington, which she turned down. It is difficult to see what further support the respondent could have provided. She was treated in exactly the same way as Ms Aiello. The normal procedure is for the person who is under suspension not to contact their employer's customers or work colleagues until the outcome of the investigation. We are satisfied that the claimant's treatment was unrelated to any protected disclosures. It was only after it became clear that a serious incident had occurred, was the decision taken to suspend both Ms Aiello and the claimant. It would have been premature to have suspended Ms

Aiello in circumstances in which the claimant had informed Mr Hutton later on 26 May, that she had resolved matters with Ms Aiello. She then raised her concerns, and the following day Ms Aiello lodged her complaint. Both matters had to be investigated.

157. In paragraph 4(h), the claimant alleged that on 11 June the respondent failed to uphold her grievance or to address her concerns. Also, it failed to provide supporting documents to explain how the decision had been reached to invoke disciplinary proceedings. There was no investigation report, no meetings note, no deliberations and no copies of relevant evidence. The person responsible was Ms Jaiswal. From our industrial experience, an employer would normally attach relevant documents to the invitation to a disciplinary hearing to enable the employee to prepare for the hearing. In this case the claimant had not been working for the respondent for at least two years, therefore, the respondent was not obliged to follow the ACAS procedure. We have come to the conclusion that Ms Jaiswal, in not providing the information to the claimant at the time when the 11 June letter was sent or shortly thereafter, was reflective of the fact that she took the view that the claimant, based on her short period of service with the respondent, did not come within the purview of the ACAS Code of Practice. This was unrelated to her protected disclosures. In any event, following the claimant's request, Ms Jaiswal rescheduled the disciplinary hearing in her letter of 12 June 2018, to 18 June 2018. She also added her comments in red to the claimant's email in which she stated that she would be appealing the grievance outcome and requested the disclosure of several documents in preparation for the disciplinary hearing. Ms Jaiswal also enclosed with the letter, all the statements she had received from the instructors, pool assistant and three photographs of Ms Aiello's bruises. She candidly stated in evidence that by sending the documents she rectified her earlier mistake of not sending to the claimant the evidence collected. Her conduct was unrelated to any protected disclosures.
158. As regards paragraph 4(i), the claimant asserted that as a further detriment, prior to the grievance outcome, the respondent accepted the evidence given by Ms Aiello that she had been, "misunderstood" by Mr Hutton when she had previously admitted to him that she had attacked the claimant. The claimant cites Ms Jaiswal as the person responsible. According to Ms Jaiswal, during the grievance meetings both women had stated that the other was the aggressor. There was information in Mr Hutton's 4 June email where it appeared that Ms Aiello was admitting to having thrown the first punch. Later, Ms Aiello clarified that she had been misunderstood because of her poor English. Ms Jaiswal then conducted an investigation after the grievance meeting and concluded that she could not be sure who was the aggressor. Ms Jaiswal believed that both parties were equally to blame and equally culpable. Ms Jaiswal's outcome was based on all the evidence before her including her investigation after the grievance meeting. It was not based solely on Ms Aiello's statement that she had been misunderstood. Ms Jaiswal said in evidence that due to a lack of witness evidence of the main incident in the showers, the lack of CCTV evidence and very different versions of events, she was unable to determine who initiated the physical

violence. Further, due to the incidents witnessed by a few individuals leading up to the physical altercation, it was clear to Ms Jaiswal that both employees had been fully involved in unreasonable behaviour towards the other. They were equally to blame and equally culpable. She, therefore, decided not to uphold the grievances.

159. We have come to the conclusion that Ms Jaiswal's consideration of the evidence was unrelated to the claimant's protected disclosures.
160. As regards paragraph 4(j), the claimant alleged that prior to the grievance decision Ms Jaiswal communicated directly with the police about her case without notifying her or showing relevant information. She further asserted that Ms Jaiswal had obtained evidence from the police which she relied on in reaching her outcome, but she did not share the information with her prior to the grievance hearing.
161. Ms Jaiswal accepted that she had been in contact with PC James Clarehugh with regards to the alleged assault. Ultimately, the police decided not to pursue the allegation due to insufficient evidence. Ms Jaiswal did not believe that she was under any obligation to share the email trail between herself and the police with the claimant during the grievance process or during the disciplinary process as they did not form part of the evidence she collected in relation to the incident. She had provided the police with everything they had requested, and she had no influence over the decision taken not to prosecute. She was told by a police officer that he expected the outcome would be no further action due to the lack of evidence as it was a straightforward conflict between two employees.
162. According to Ms Jaiswal she was of the view that she was under no obligation to disclose her contacts with, or the information disclosed to the police, to the claimant as the two sets of investigation were separate. There is no reference to Ms Jaiswal's grievance outcome being influenced by any information obtained from the police. There was nothing she could share with the claimant arising out of her communication with the police. We are satisfied that her view was unrelated to any protected disclosures made by the claimant.
163. In paragraph 4(k), the claimant asserted that communication between Ms Jaiswal and the police either caused or contributed to the police's decision not to press charges against Ms Aiello. This was for the benefit of both Ms Aiello and the respondent and to the claimant's distress. The person responsible for such treatment was Ms Jaiswal. There is simply no evidence to support this contention. It is pure speculation. The police are completely independent of the respondent and proceed on the basis of whether the evidence is sufficient to support a conviction. To convict, the standard of proof is beyond a reasonable doubt. There is no evidence from the police setting out the reasons why they decided not to prosecute the claimant and Ms Aiello, save for the fact that the evidence was insufficient as both asserted that the other was the aggressor.

164. In paragraph 4(l), the claimant challenged the conduct of the disciplinary proceedings, asserting breach of the ACAS Code and rules of natural justice, and inviting her to a disciplinary hearing to take place on 14 June. Insufficient information had been provided to afford her the opportunity to present an effective response. She cites Ms Jaiswal and Mr Young. We have come to the conclusion that Ms Jaiswal considered the claimant as not falling within the protection of the ACAS Code as she had not worked for the respondent continuously for two years. We have accepted her evidence and her opinion was unrelated to any protected disclosures. Following the claimant's 11 June email complaining about the short timeframe in which to prepare and requesting additional documents, Ms Jaiswal complied, and the disciplinary hearing was rescheduled to 18 June. During the disciplinary hearing Mr Young heard the claimant's account and considered the other evidence. His conclusion was to issue a final written warning. Ms Aiello also received a final written warning. There was no evidence that his conduct of the disciplinary hearing was in any way influenced by any protected disclosures.
165. In relation to 4(m), the claimant complained that on 18 June 2018, a few hours before the disciplinary hearing, she was asked to agree that her grievance appeal should take place at the same time rather than separately. We found that Ms Jaiswal invited the claimant to consider whether her grievance appeal should be heard prior to the disciplinary hearing and the claimant agreed. This avoided the respondent having to consider these two matters on two separate dates. The email from Ms Jaiswal dated 18 June 2018, confirmed the claimant's acceptance that her grievance appeal would be considered on 18 June. There is no evidence that the claimant subsequently objected to that account. Accordingly, both matters proceeded on the same day. This aspect of the claimant's detriment claims is without foundation.
166. In relation to paragraph 4(n), the alleged failure by Mr Gary Young to carry out a fair grievance appeal hearing on 18 June, the claimant's concerns were that she had been assaulted by Ms Aiello and that she viewed Ms Aiello as being a threat to the children and members of the public. That matter was indeed investigated by Ms Jaiswal. The claimant was interviewed by her as well as Ms Aiello, thereafter, Ms Jaiswal interviewed others who were present on 26 May. She also had the photographic evidence. These were all given to Mr Young prior to the grievance appeal and disciplinary hearing. During the grievance appeal, he questioned the claimant in relation to the incident. The claimant was accompanied by a work colleague. On 11 June 2018, she asked for evidence in the possession of Ms Jaiswal to be disclosed to her, to which Ms Jaiswal responded sending her the evidence but not the detailed, personal, and intimate nature of the photographic evidence produced by Ms Aiello. We do not accept, nor do we find that Mr Young did not conduct a fair grievance appeal. His conduct of the appeal was not in any way significantly or materially influenced by the claimant's protected disclosures but base on his assessment of the information before him.

167. In paragraph 4(o), the claimant asserted that Mr Young failed to conduct a fair disciplinary hearing on 18 June. We find that prior to the hearing the claimant was informed of the allegations against her and had in her possession the statements sent to her by Ms Jaiswal as well as the photographic evidence of Ms Aiello's injuries. No CCTV footage could be produced because none covered the incident in question, namely in the shower cubicles. The claimant was questioned in relation to the disciplinary allegations and gave her account in which she challenged the account given by Ms Aiello. The conduct of the disciplinary hearing and the outcome were unrelated to the claimant's protected disclosures.
168. As regards paragraph 4(p), the claimant alleged that Mr Young unreasonably failed to uphold the claimant's grievance appeal on 20 June in his outcome letter. We do conclude that Mr Young considered the evidence and the account given by the claimant and dealt with each of her allegations in turn and they were not upheld. He set out his reasons and stated that all the evidence collected was presented to the claimant upon her request. The evidence from the witnesses did not support the claimant's account that Ms Aiello was the initiator of the argument. He stated that the claimant had asked Ms Jaiswal to interview two of the teachers she believed would support her case that Ms Aiello initiated the confrontation, but the two witnesses did not support her contention. In relation to her not being supported, he stated that she confirmed during the appeal hearing that when she requested relocation to another venue the respondent accommodated her straightaway and helped her when she made the respondent aware of the situation.
169. We find that Mr Young conducted the grievance appeal fairly and was independent of anything that preceded it. His grievance appeal outcome was unrelated to any protected disclosures.
170. In relation to paragraph 4(q), the claimant further stated that Mr Young unreasonably found her guilty of gross misconduct and unreasonably issued her with a final written warning, putting her under threat of dismissal. We have already concluded above that Mr Young was completely independent and considered the evidence and sent to the claimant his outcome letter on the same day as the grievance appeal outcome. He stated that he considered the evidence and was satisfied that a physical fight took place in which Ms Aiello and the claimant sustained bruising. He was satisfied that, at the poolside, the claimant was equally involved in arguments in front of parents and the children. This was supported by witness evidence. CCTV evidence showed that the claimant had dived into the pool twice when told not to do so. When he considered the evidence, he was satisfied that the allegations of gross misconduct were proved and although he considered dismissal, he considered mitigating factors, such as the claimant did not have a disciplinary record. He, therefore, issued her with a final written warning. Ms Aiello was also issued a final written warning though not by Mr Young. We do not conclude that Mr Young's conduct and outcome during the disciplinary hearing could be described as unreasonable. He concluded based on the evidence before him that the claimant was guilty of gross misconduct and although he could have terminated her employment,

decided not to do so by issuing a final written warning. His conduct and his decision were not influenced by the claimant's protected disclosures but were based on his evaluation of the evidence before him.

171. As regards paragraph 4(r), the claimant referred to her treatment in the above paragraphs having resulted in her suffering from stress, including anxiety, eating, and sleeping problems. She then gave an account of her other medical conditions, but these have nothing to do with the respondent's decisions but are matters more relevant to injury to feelings or to a claim in respect of personal injury. As regards being paid statutory sick pay instead of full pay, in her fit note dated 22 June 2018, it stated that she was not fit for work due to stress. The fit note covered the period 22 June to 23 July 2018. (227)
172. Following the claimant's resignation, on 25 June 2018, Ms Jaiswal emailed her confirming receipt of the fit note and stated that she would pass the information on to the Payroll Team for statutory sick pay purposes.
173. On 29 June 2018, the claimant replied to Ms Jaiswal and answering the question whether she was going to appeal the disciplinary outcome in which the claimant stated that she would not be appealing as she had lost trust and confidence in the process. She did not challenge the statement that she would be paid statutory sick pay. During the hearing the claimant had not referred the tribunal to any policy or contractual provision entitling her to contractual sick pay as opposed to statutory sick pay or indeed full pay during her period of sickness. Ms Jaiswal responded on 23 October 2018, giving an account of the claimant's entitlements on termination referring again to sick pay, amongst other things. (250-257)
174. We were not satisfied that the claimant was entitled to full pay during her period of sickness absence nor were we satisfied that the various ailments described were as a direct result of either Ms Jaiswal and/or Mr Young's conduct nor were they materially influenced by any protected disclosures.
175. In paragraph 34(s), the claimant wrote that she had no option but to resign in response to the respondent's conduct towards her, on 22 June 2018. She held Ms Jaiswal and Mr Young responsible.
176. In respect of her constructive unfair dismissal claim, her case is that she made protected disclosures and that the reason for her resignation was because of those protected disclosures and the treatment she suffered led to her decision to resign. We have in our conclusions above found against the claimant in relation to the alleged detriments she stated she suffered because of making her protected disclosures, as found. Although she resigned on 22 June 2018, setting out an account of her treatment, we have not found that her treatment was materially influenced by any of the protected disclosures. She had not established that there was a fundamental breach of her contract of employment amounting to a repudiatory breach, entitling her to resign. She has not established that the reason for her dismissal, namely her resignation, was that she had made protected disclosures.

177. Accordingly, her s.103A Employment Rights Act unfair dismissal claim based on her resignation, is not well-founded and is dismissed.
178. She also claimed that the respondent was worried about the negative publicity and/or reputational damage from the parents and/or customers hearing about the incident and wanted to quash the reports and to limit the police's involvement.
179. There was no evidence produced in support of this contention. The respondent was faced with the claimant diving into the pool when she was not supposed to do so, and such behaviour was in front of the children and their parents. It was also clear that Ms Aiello did speak to her about diving into the pool, but she was ignored. The respondent's view was that Ms Aiello should not have dealt with the matter publicly in front of the parents and children and had behaved in an unprofessional way in doing so. There then followed the assault and the respondent had to investigate that incident and came to the conclusion that it could not decide who was the aggressor. Outcomes were given in respect of the grievances and the disciplinary allegations. There was no evidence that the respondent's conduct throughout was designed to avoid negative publicity or any reputational damage. Nor did it want to quash any adverse reports. There was further no evidence that the respondent had influenced the police's decision not to prosecute either the claimant or Ms Aiello. Moreover, there was nothing stopping the parents from reporting the incidents by the pool to any third party. The respondent would have no control over their conduct in doing so.
180. The provisional remedy hearing listed on 1 June 2021, is hereby vacated. The parties are no longer required to attend.

Employment Judge Bedeau

Date: ...25 May 2021.....

Sent to the parties on: ..25 May 2021.....

.....GDJ.....

For the Tribunal Office