EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102692/2020

Held in Edinburgh on 25-27, 30-31 August and 8, 10 & 14-16 December 2021

Employment Judge M Sangster
Tribunal Member G McKay
Tribunal Member J Ward

Ms C McCulloch	**Claimant** **Represented by** **Mr K Gibson** **Advocate**
The City of Edinburgh Council	**Respondent** **Represented by** **Ms F Ross** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant's complaints of detriment on the ground that she made protected disclosures, automatically unfair dismissal and unfair dismissal do not succeed and are dismissed.

REASONS

Introduction

1. The claimant presented complaints of detriment on the ground that she made protected disclosures, automatically unfair dismissal and unfair dismissal.

2. The respondent admitted the claimant was dismissed, but stated that the reason for dismissal was conduct, which is a potentially fair reason. The respondent maintained that they acted fairly and reasonably in treating misconduct as sufficient reason for dismissal. They denied subjecting the claimant to any detriments on the grounds that she had made protected disclosures.

3. The respondent led evidence from 7 witnesses, as follows:

    a. John Stevenson (**JS**), formerly Area Team Manager for the respondent, now retired;

    b. Laura Callender (**LC**), Governance Manager for the respondent;

    c. Dennis Shotten (**DS**), self-employed Investigation Officer;

    d. Anne McTiernan (**AM**), Children's Practice Team Manager for the respondent;

    e. Scott Dunbar (**SD**) Senior Manager, Looked After Children, for the respondent;

    f. Keith Dyer (**KD**), Quality Assurance and Compliance Manager for the respondent; and

    g. Councillor Kevin Lang (**KL**), local councillor for the respondent.

4. The claimant gave evidence on her own behalf and led evidence from:

    a. Councillor Cameron Rose (**CR**), local councillor for the respondent; and

    b. Deirdre Lonergan (**DL**), formerly a Reporter to the Children's Panel, now retired.

5. JS, DS and DL gave evidence remotely, via Cloud Video Platform. The respondent's representative participated remotely, via Cloud Video Platform on 14 & 15 December 2021 and the entire proceedings were conducted remotely on 16 December 2021.

6. A joint set of productions was lodged, extending to 648 pages.

Issues to be determined

7. The parties lodged an agreed list of issues. The issues to be determined by the Tribunal were accordingly as follows.

Whistleblowing Claim

8. Did the claimant make protected disclosures under s43A of the Employment Rights Act 1996 (**ERA**)? The claimant alleges that she made protected disclosures on four separate occasions:

    a. An internal verbal disclosure to JS on/around 21st August 2018;
    b. An internal written disclosure to AM within the return to work paperwork on/around 10 January 2019, and repeated in the meeting on 17 January 2019;
    c. An external disclosure to Safecall on or around 5 February 2019; and
    d. An external disclosure to Safecall at interview on/around 21 February 2019.

9. If so, was the claimant subjected to any detriment on the grounds that she made the alleged disclosures above (s47B ERA)?

10. The claimant alleges to have suffered the following detrimental treatment:

    a. Shouted at and verbally abused by Andy Jeffries;
    b. Suspended on 12 February 2019 and subjected to the commencement of formal disciplinary proceedings;
    c. Subjected to an investigation into her practice;
    d. Required to attend a disciplinary hearing on 30 August 2019;
    e. 14 week wait for the disciplinary outcome; and
    f. Receiving a dismissal letter outcome by e-mail on public transport on 12 December 2019.

11. Was the reason (or, if there was more than one reason, the principal reason) for the claimant's dismissal that she made any of the alleged disclosures (s103A ERA)?

Unfair Dismissal

12. What was the reason the respondent dismissed the claimant?

13. Was this the potentially fair reason of conduct (in terms of s98(2)(b) ERA)?

14. Was the dismissal fair within the meaning of s98(4) ERA?

Remedy

15. It was agreed at the case management preliminary hearing held on 18 September 2020 that the hearing would determine liability only, with remedy reserved for a separate hearing, if required.

Findings in Fact

16. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

17. The respondent operates a number of Codes/Procedures relevant to the conduct of employees as follows:

a. A Code of Conduct, which sets out the standards of conduct expected of employees;
b. A Disciplinary Code, detailing the types of behaviours and conduct that are considered unacceptable and the different levels of disciplinary action that may be taken where behaviour falls short of the required standards;
c. A Disciplinary Procedure detailing the procedure to be adopted if employees fail to meet the standards of conduct expected; and
d. A Personnel Appeals Committee Procedure detailing the procedure to be adopted for appeals against disciplinary action taken under the Disciplinary Procedure.

18. The respondent also operates a Whistleblowing Policy, which sets out that disclosures can be made to any of the respondent's managers, or by contacting an external, confidential, 'whistleblowing hotline' maintained by Safecall, a separate organisation, which is independent of the respondent. The

Whistleblowing Policy details the procedure which will be followed when disclosures are made.

19. The claimant qualified as a social worker in 1989. She was employed by the respondent from August 1990 to 2002 as a social worker. In 2002 she moved to work as a Senior Social Worker/Team Leader with Midlothian Council. She returned to work for the respondent, as a Senior Social Worker/Team Leader, on 8 August 2005.

20. In 2013, the claimant was involved in contempt of court proceedings, following a Sheriff Court child protection case. It was determined in December 2013 that the claimant and another social worker were guilty of contempt of court when they breached a legal order in relation to arrangements for certain children. The claimant and her colleague made a decision that the children should not have contact with their mother, contrary to a legal order permitting this.

21. The Sheriff's finding, that the claimant and her colleague were guilty of contempt of court, was unanimously overturned by the Court of Session on 27 March 2015. The claimant was supported throughout the legal processes by the respondent.

22. As a result of the contempt of court proceedings brought against the claimant and her colleague, Social Work Scotland and the Scottish Children's Reporter's Administration (**SCRA**) agreed a Joint Protocol on the Management of Contact Arrangements, which came into effect on 1 July 2014 (the **Protocol**). The Protocol states as follows:

    2.1 'Decisions of Children's Hearings and related Court proceedings provide a clear legal duty on the Local Authority which they must comply with.

    2.2 If, for whatever reason, the Local Authority is unable to comply with their legal obligations there has to be recourse to a Children's Hearing as soon as practicably possible. This is to ensure any restriction of rights are

minimised and to protect and safeguard the obligations on those individuals who have been granted contact.

2.3 Any departure from such legal obligations should only be made as a last resort resulting from urgent, immediate and significant concerns regarding the welfare of the child.

2.4 Such a decision should be proportionate with due regard to the rights of parents, the child and those who have been granted contact, and their right to family life.

2.5 This is a significant decision and should therefore be authorised at an appropriate level within the Local Authority, specifically Chief Social Work Officer or designate.

2.6 Once this decision has been authorised the Local Authority shall notify SCRA as soon as reasonably practicable, no later than one working day after authorisation.

2.7 The Local Authority shall provide SCRA with information supporting the decision to vary the contact arrangements. This information should be sufficient to allow a Children's Hearing to have full consideration of the child's case.

2.8 For example, an updated social work report that reflects the reasons why changes to contact were deemed necessary. The intention is to provide sufficient information to the Hearing to allow them to make a substantive decision where possible.

2.9 Accompanying this information there should be a request from the Local Authority requesting a review of the child's Compulsory Supervision Order.

2.10 SCRA would then arrange a Hearing for the purposes of reviewing the existing Compulsory Supervision Order. This Hearing shall take place no

later than two weeks on receipt of the authorisation, but no less than 10 days. This reflects the minimum period allowed within statute to arrange a Hearing.

2.11 The Local Authority would give effect to this decision of the Hearing as in all Hearing decisions.'

23. In 2018, the claimant was the Team Leader for the Northwest Team. The client group were children and families presenting with various problems around care of children, physical and emotional abuse, neglect and poor parenting. In that role she had managerial responsibility for more junior members of staff. Her duties included supervising those members of staff on a day-to-day basis and providing supervision to them at regular supervision sessions. There were 6 social workers in the Northwest team at that time, including:

a. Rachael James (**RJ**), Senior Practitioner; and
b. Rhea McGlashen (**RM**) a newly qualified social worker.

24. At the start of 2018, the claimant's line manager was JS. In summer 2018 she began reporting to AM, who held the role of Acting Practice Team Manager for Northwest at that time, due to the fact that JS was on secondment. The claimant was, at that stage, working 4 days per week, Monday to Thursday.

25. The respondent's social work department operate a computerised record keeping system called SWIFT. SWIFT is used to record the case notes for each individual the Practice Team are involved with. The records made on SWIFT are retained for 100 years and can be accessed at any time by the individual themselves or, in the case of a minor, their parents.

26. Shortly following the introduction of the Protocol, contact between the Local Authority and SCRA became more formalised, with almost all contact being in writing. To evidence that the requirements of the Protocol were being met, certain forms required to be completed and submitted through Business Services to SCRA, so that there was a clear audit trail. Doing so created a

record on SWIFT. Children's Hearings were requested via the respondent's Business Support team, which created a record of the request on SWIFT. It was not possible to call a Children's Hearing in any other way. It was not possible to request a Children's Hearing without the correlating record on SWIFT being created. Once a date for a Children's Hearing was confirmed by SCRA, the respondent (again via the Business Support team) would issue the relevant notice of hearing and formally request a report from the Practice Team. Both actions were recorded on SWIFT as they were done. The Practice Team would then prepare a report for presentation to the panel at the Children's Hearing.

27. RJ was the social worker responsible for the cases of Child A and Child B, siblings who were Looked After and Accommodated through statutory orders. In 2018 they were aged 7 and 4 respectively. They were taken into the care of separate foster families because of concerns regarding their home life, including concern of prescribed medication being withheld from Child A, and Child B being significantly overweight/obese. Child B also had been diagnosed with anal warts in 2017 and a multi-agency Initial Referral Discussion (IRD) had been convened at that time as a result, involving social work, police and medical experts. When asked about the cause of those warts, the mother stated that she had had warts on her finger when Child B was young. The other possibility was that the warts were sexually transmitted, which was why the IRD had been convened. The IRD was closed as it was determined that there was no evidence to support sexual transmission and transmission from the mother was the likely reason.

28. Around the same time, it was also discussed at an IRD that the children's uncle had been investigated by the police in relation to an allegation of sexual abuse against a minor. The conclusion of the IRD in relation to that was that the allegations against the uncle were maliciously made by a former partner, so no further action was taken.

29. On 29 June 2018, a Children's Hearing was conducted to review Child A and Child B's Child Plans and renew their Compulsory Supervision Orders. The

claimant and RJ were present from the social work department. The children were, at that time, residing in two separate foster placements and had only supervised contact with their parents. The Children's Panel, following the recommendation of the social work department, altered the terms of the Compulsory Supervision Order to allow for Child A & B to have unsupervised contact with their parents twice a week, for a minimum of 2 hours. This was done with some hesitation, and RJ and the claimant were informed by the Children's Panel that, if there was any hint of future risk to the children, a further hearing should be convened immediately.

30. The team of professionals involved in the children's case agreed, following the Children's Hearing on 29 June 2018, that unsupervised contact should increase very gradually, over a number of months. By mid-July 2018 however, the children were having unsupervised overnight stays with their parents. This was done with a view to Child B potentially returning home permanently on 17 July 2018, when his foster carers went on holiday, rather than him moving to respite care.

31. On Thursday 12 July 2018, RM informed the claimant that she had been informed by Child A, when she collected the children following contact with their parents, that Child A and her brother (Child B) had been taken to a beach by their parents to meet with their maternal grandmother and uncle. RM advised the claimant that she had learned, from the children's records, that the uncle had previously been investigated in relation to an allegation of sexual abuse against a minor.

32. The children had overnight contact with their parents on 12 & 13 July 2018.

33. RJ was absent due to non-working days and holidays from 13-27 July 2018 inclusive.

34. On Monday 16 July 2018, the claimant altered the Child Plan for Child A and B, so that Child B would not permanently return home the next day as planned, unsupervised contact would be stopped, and supervised contact would be

resumed. She then held three separate meetings in relation to Child A and B. The others present at each meeting were:

a. Child B's foster carer and liaison social worker;
b. Child A's foster carer and liaison social worker; and
c. The parents of Child A and B, an advocate from a not-for-profit support organisation and RM. No interpreter was present.

35. On 13 August 2018, the claimant and RJ had a meeting with the parents of Child A and B. An interpreter was present at this meeting.

36. On 14 August 2018, RJ approached AM raising concerns in relation to the case of Child A & B and the claimant's actions related to that case.

37. As AM was due to commence annual leave the following day, she asked JS to conduct an investigation into the concerns raised by RJ, during her absence. He agreed to do so.

38. JS sent an email to the claimant and RJ on 15 August 2018. In the email he confirmed that AM had asked him to review the case. He stated that it would take him some time to review matters, but that there were some immediate points he needed clarification on. He noted the order of the Children's Panel and stated that it appeared that unsupervised contact had been stopped and substituted with supervised contact. He asked why this had been done, whether there were 'urgent, immediate and significant concerns' justifying a breach of the order and whether the Protocol had been followed.

39. On 16 August 2018, JS sent a further email to the claimant asking to meet on 17 August 2018 and raising 8 points they needed to discuss about decision making in the case of Child A and Child B. The claimant responded to say that she did not work on Fridays but could meet on Monday 20 August 2018 at around 1pm.

40. On Friday 17 August 2018, JS reversed the decision to supervise contact in respect of Child A and Child B.

41. JS and the claimant did not meet on 20 August 2018, as planned, as he was unable to find her at the time they had agreed to meet. Instead, they met the following day, on 21 August 2018. During the meeting, the claimant confirmed that she had unilaterally altered the Child Plans for Child A and Child B. She stated that she had concerns for the welfare of Child A and Child B, particularly given that she had learned that they had been taken by their parents to the beach to meet with the maternal grandmother and uncle and the uncle had previously been investigated for potential sexual abuse of a minor. She stated that she felt that unsupervised contact exposed the children to the risk of abuse, including sexual abuse.

42. On 27 August 2018 the claimant was certified as unfit to work by her GP, as a result of work-related stress. She remained absent until 29 January 2019.

43. On 28 August 2018 the claimant made case note on SWIFT regarding her meeting with JS on 21 August 2018, which included a summary of what had been discussed/ordered at the Children's Hearing on 29 June 2018 and what had happened following the hearing in relation to contact, all of which was recorded in the context of the claimant having discussed each point with JS on 21 August 2018. Towards the end of the entry, the claimant recorded *'There were other examples of concern that I cannot recall at time of writing that added to my decision to place contact back to supervised and return to Hearing. I met with parents and explained my decision and reasoning. Both, albeit reluctantly, agreed to same. A few days later I spoke to Reporter and Hearing was arranged for 21st August but same cancelled due to sudden decision to appoint John to investigate my decision making. This has not been discussed with me on any level. I did emphasis to John that a return to previous plan would, in my opinion, place the children at considerable risk of harm and the volume of emerging evidence of a very short space of time confirms for me that both these parents require a more detailed assessment that considers some underlying psychological assessment.'*

44. On 28 August 2018, JS concluded his report following his review of case of Child A and Child B. He concluded that the claimant had taken decisions in July 2018 that led to the respondent breaching a legal order by reverting to supervised contact and ceasing unsupervised contact. Whilst doing so, she had met with the family, whose first language was not English, to advise them of significant change in their children's planning without the use of an interpreter. He concluded that this decision had a significant and detrimental impact on Child B's welfare and wellbeing, as it had been planned that he would return home the day after the claimant took her decision, which necessitated a change in foster placement. He concluded that the claimant had not followed the Protocol and departmental procedure, which required her to seek senior manager approval for changing contact arrangements in a Compulsory Supervision Order and immediately to call a Children's Hearing.

45. The claimant was referred to Occupational Health during her absence from work and a report was issued dated 3 December 2018. It recommended that a stress risk assessment be undertaken.

46. On 16 January 2019, following the recommendation from OH, the claimant completed a stress risk assessment form and sent this to AM. On the form, in response to a question '*Current situation – what is it about your job or situation that's making you feel stressed?'*, the claimant stated *'Continued and very serious reported practice issues that I have raised which have been ignored or minimised exposing children to ongoing risk of harm.'* When asked to provide specific examples, the claimant stated *'Subjected to so called investigation by [JS] who concluded his assessment and committed same to case records prior to my interview. Children returned to parental care despite new evidence that parents had exposed children to serious risk of physical and sexual harm. One child of 11yrs not seen for four years and left in highly inappropriate care of Kinship carer where previous allegations of sexual abuse against children had been made. Child removed within a few weeks of my involvement and placed with biological father who made similar claims of historic nature.'*

47. On 17 January 2019, the claimant attended a return to work meeting with AM. The claimant was accompanied by her trade union representative. At the meeting the stress risk assessment form which the claimant had previously completed was discussed. The claimant repeated what she had stated in the stress risk assessment form. She stated that she had raised concerns about serious neglectful practice that had been ignored, referring expressly to the case of Child A and B and the other case of the 11 year old child which she had referred to in her stress risk assessment form. She stated that she was concerned that some children were left at risk and that she was unhappy that some of her concerns had not been followed up. The claimant raised at this meeting that she would like to be considered for redeployed or seconded to another post. She also requested information in relation to her pension. As part of the actions to take forward following the meeting, it was agreed that AM would obtain further information in relation to redeployment, secondment and the claimant's entitlement/options regarding her pension.

48. On Tuesday 29 January 2019, the claimant returned to work. She was tasked solely with reviewing and managing her email inbox on her return, which had 5 months of email correspondence requiring attention. At this point RJ was being managed by another Team Leader, Billy Brown (**BB**). RJ and BB were accordingly responsible for the cases of Child A and Child B. This remained the case following the claimant's return to work.

49. On Thursday 31 January 2019, there was a North-West management team meeting (attended by the claimant and BB).

50. The claimant was not at work on Friday 1 February 2019.

51. On 5 February 2019, the claimant created a record on the SWIFT system stating that, on Friday 1 February 2019, the Head Teacher of Child A's school had left a message for the claimant asking her to call back urgently, as RJ was out of the office that day. She stated in the record that she had opened the email with this message on 5 February 2019 and called the head teacher that day. She stated in the record that the head teacher had informed her that she

had spoken to BB on Friday 1 February 2019 and that Child A had made allegations of sexual and physical abuse to some older pupils at school. The head teacher informed the claimant of the plan which had been discussed with BB in relation to this. In the case record, the claimant recorded that *'I shared with [the head teacher] my own view both these children were at clear and current risk'* and expressed clear views in relation to the circumstances. She went on to state *'I have already shared with Team manager, [JS], that I believe these children are exposed to harm within parental care and should have been returned to Children's panel, following information becoming known that parents had taken them to meet with maternal Grandmother and Uncle, whilst accommodated. No professional was aware of this event MGM had, allegedly, been the one who deprived [Child A] of her medication that led to life threatening operation, according to children's mother. Her brother, Paternal Uncle, had been previously investigated for, allegedly, sexually inappropriate behaviour towards minors. This information should have been presented, in my opinion, to Children/s Hearing prior to return home decision being made as agreed at previous Hearing in July 2018. Both Rachel James, Social worker, and I had confirmed with this panel that if, 'one incident of concern came to light' we would return to a new Hearing to share and discuss more fully before future plans and decision making was made in relation to children/s future.'*

52. On 4 February 2019, the claimant contacted LC by telephone. She stated that she wanted to make her aware of very serious concerns regarding social work practice and risks regarding child protection. It was agreed that the claimant would come to the respondent's offices to discuss matters with LC. She did so later that morning. In the meeting she raised numerous and wide-ranging concerns, which had arisen over the last 20 years, including in relation to Child A & B. In relation to Child A & B, the claimant stated both children were and at clear and current risk of harm and provided detailed information regarding the circumstances of Child A & B to explain why she believed this to be the case, including the fact that Child A had recently made an allegation of sexual and physical abuse to older pupils at her school. The meeting lasted around 2 hours. It was agreed that the claimant would take some time to consider her concerns, put these in some form of logical order and make a formal disclosure to Safecall.

The claimant contacted Safecall by telephone immediately following her meeting with LC, disclosing the same information. The claimant's disclosures were kept confidential and only disclosed, in confidence, to the respondent's internal legal team and, in very general terms, to the respondent's Chief Executive. It was agreed that the investigation into the concerns raised by the claimant should be overseen independently, and an external investigator would be identified and appointed. It was agreed that the independent investigator, once appointed, would, in the first instance, contact the claimant to discuss matters in detail with her.

53. On 7 February 2019, RJ contacted AM regarding alleged actions on the part of the claimant. In particular she alleged that the claimant was interfering in her cases. She stated that the claimant was undermining her, BB and other team members, as well as RJ's relationships with the children, their family and the team around them. She alleged that the claimant's behaviour towards her amounted to bullying and stated that she could not work with her.

54. On 8 February 2019, BB contacted AM to make a formal complaint regarding the claimant's actions. He indicated that prior to the claimant returning to work he had been concerned that she may seek to interfere with the cases of the social workers he was now managing. He indicated that this proved to be the case and, on the day the claimant returned to work, she had tried to elicit information in relation to a case she was previously involved in. Then, two days later on 31 January 2019, the claimant had approached BB and informed him that she had accessed SWIFT records in relation to Child A and Child B and had concerns in relation to their welfare. He did not engage in that discussion and simply informed the claimant that he would discuss matters with RJ, who was the allocated social worker, which he duly did. He stated that, on 6 February 2019, RJ highlighted to BB the case note written by the claimant on 5 February 2019. BB raised concerns in relation to the claimant's actions as the claimant was no longer involved in the case of Child A and Child B, so had no reason to speak to the head teacher, other than to undermine decisions and planning undertaken by the current key team. The claimant would have been aware that BB had already contacted the head teacher, as he made a note on

SWIFT to that effect four days before the claimant made the call. Even if she had not seen that record, he stated that the appropriate course of action was to speak to BB, rather than calling the head teacher herself. He also raised concerns that the claimant's actions undermined confidence in the Practice Team's assessment and planned approach, which was unacceptable. Finally, he raised that three of his supervisees had spoken to him expressing anxiety at the claimant being back in the office, and the difficulties that this may cause for them should they have any dealings with the claimant with casework, as they did not trust the claimant's judgement and felt bullied and pressured by her to conform to her view on planning/assessments.

55. On 8 February 2019, JS emailed Andy Jeffries (**AJ**), Acting Head of Service at the time (now Senior Manager of Children's Practice Teams and Reviewing Team) regarding his concerns about the claimant's actions, particularly related to the SWIFT records that she created on 28 August 2018 and 5 February 2019, both of which he stated he had first seen on 7 February 2019. In relation to the case note of 5 February 2019, he stated that this raised a number of significant concerns in relation to professional practice: The claimant was no longer involved in the case, having been absent from work for 5 months; she was aware who the allocated social worker and team leader were and that the allocated team leader had already had a discussion with the head teacher; notwithstanding this, she responded to the head teacher and communicated strong opinions, stating to the head teacher that the children were at clear and current risk, despite having no up to date information in relation to the case or evidence to support that view. He stated that this was unprofessional, could create confusion and undermined the current team. He stated that the case notes she recorded on SWIFT dated 28 August 2018 and 5 February 2019 were misleading and inaccurate and that it was inappropriate and unprofessional for entries covering disagreements between professionals, justified or not, to be placed on a child's record. He stated that the claimant had acted in breach of the order of the Children's Hearing made on 29 June 2018, and that this had a significant detrimental impact on the children. He acknowledged that the claimant felt that the parents presented a serious risk to the children, but stated that she could not evidence why this was the case.

56. On 11 February 2019, AM forwarded the emails from RJ & BB to her line manager, AJ, who was on annual leave at the time.

57. On 11 February 2019, the claimant attended a further meeting with AM. The claimant was again accompanied by her trade union representative. The meeting was to review how the claimant was settling back to work. During the course of the meeting the claimant raised the case of Child A and B stating that, in her view, the children were not safe at home. AM advised the claimant that the case had been independently reviewed by JS while the claimant was on sick leave and that she agreed with the conclusions reached. AM stated that, if the claimant still had concerns, then the next step would be for AJ, as AM's line manager, to review matters. If the claimant wished this to happen, AM would prepare reports on each case where the claimant had concerns and pass this to AJ to conduct a review. This was agreed as an action for AM to take forward following the meeting. Following on from the discussion at the previous meeting, AM asked the claimant if she had given further consideration to her pension, as she was aware that the claimant had attended an appointment with her pension adviser the previous week. The claimant responded that she was considering matters but taking her time and may wish to consider flexible retirement.

58. On 12 February 2019, AM informed the claimant that AJ wanted to speak to her on her mobile telephone. During the call he informed her that she was suspended pending an investigation into her conduct. During the telephone call, AJ was angry and shouted at the claimant. He referred to the case of Child A and B and stated that the claimant had breached a legal order in relation to them. He implied that her decisions had no basis and that "Sheriff Mackie was right".

59. The claimant contacted LC following the discussion with AJ. She asked her if AJ or anyone else had been informed of her disclosures. LC assured her that no one had been informed.

60. The claimant's suspension was confirmed by letter dated 13 February 2019. A separate letter was also sent informing the claimant that an investigation would be undertaken in relation to allegations of potential gross misconduct. The letter set out the allegations that were to be investigated. The eight allegations were as follows:

a. On 16 July 2018 the claimant took a unilateral decision to change child plans (for Child A and Child B), which had previously been agreed at a Children's Hearing on 29 June 2018, resulting in the claimant not adhering to the conditions of a Compulsory Supervision Order set on 29 June 2018;
b. On 16 July 2018 the claimant failed to follow protocol on non-compliance with legal orders which are agreed between ADSW (now Social Work Scotland) and SCRA;
c. On 16 July 2018 the claimant failed to offer an interpreter when she met with Child A and Child B's parents to inform them of her decision, although being aware that English was not their first language and that this service should be offered for complex discussions;
d. On 13 August 2018 the claimant failed to treat a colleague fairly and respect her professional judgement during a meeting by allowing them to have no input, and instructing her to write a report without adhering to departmental procedure;
e. On 5 February 2019 the claimant had a telephone conversation with a child's head teacher without any discussion with the child's allocated social worker or team leader, thereby undermining both the claimant's colleagues and ignoring up to date relevant information on the child;
f. On 5 February 2019 the claimant recorded her professional disagreement on SWIFT with colleagues which is a misuse of the system;
g. On various occasions during August 2018 the claimant had spoken to colleagues, a foster parent and another Team Leader about the social worker involved with Child A and Child B's case in a derogatory manner; and

h. During 2018 the claimant failed to provide support to a worker(s), thus failing in her duty of care and neglecting her responsibility to support a worker(s) and to assist them with professional development.

61. On 18 February 2019, Keith Dyer, Quality Assurance and Compliance Manager, was appointed as the Investigating Officer. At the commencement of his investigation, he received the following documentation:

a. Email correspondence from JS to AJ dated 8 February 2019;
b. SWIFT extract of Child A's case records for 5 February 2019 and 28 August 2018;
c. Timeline created for Child A and B authored by Theresa Dickson, Team Leader for the Foster Care Team;
d. Case review report of Child A and B authored by JS dated 28 August 2018; and
e. Email correspondence between AJ and AM, including the complaints made by RJ and BB on 7 and 8 February 2019.

62. On 25 February 2019, AM provided summaries of the cases the claimant had raised concerns about to AJ, requesting that he review these. He did so and found that, in three out of the four cases the assessment and actions taken had been appropriate. In the final case, he concluded that learnings could be taken and communication could have been better when a social worker changed supervisor.

63. KD took the following steps in investigating the allegations:

a. He reviewed the information which had been passed to him;
b. On 8 March 2019, he interviewed JS;
c. On 15 March 2019, he interviewed the claimant;
d. On 22 March 2019, he interviewed BB;
e. On 22 March 2019, he interviewed Theresa Dickson, Team Leader for the Foster Care Team;
f. On 27 March 2019, he interviewed RJ;

g. On 27 March 2019, he interviewed AM;
h. On 3 April 2019, he interviewed a Foster Carer;
i. On 16 April 2019, he interviewed RM;
j. On 25 April 2019, he interviewed Andrew Gillies, the claimant's former line manager;
k. He reviewed SWIFT case notes for Child A and B, as well as LAAC documentation and reports prepared for SCRA;
l. He reviewed notes of the claimant's supervision and return to work meetings with AM; and
m. He reviewed the Occupational Health report prepared in respect of the claimant, dated 3 December 2018.

64. During the investigation, the claimant alleged that she had been suspended because AJ wanted his wife to be given the claimant's job. In order to avoid any suggestion of bias, AJ stepped down as Nominated Officer and SD was appointed in his place. The claimant was informed of the change of Nominated Officer by letter dated 16 April 2019.

65. Safecall appointed an Independent Investigating Officer, DS, to investigate the claimant's disclosures. He met with the claimant on 21 February 2019 to obtain full details from her. The meeting lasted approximately 4 hours. LC and the claimant's trade union representative were also present. During the meeting, the claimant restated the information previously provided in relation to her concern that Child A & B were at risk of harm and the information which led her to reach that conclusion. Based on his discussion with the claimant, and the papers provided to him by the claimant, DS prepared a statement that was reviewed and signed by the claimant on 27 March 2019. That statement formed the basis for the subsequent investigation. No one within the Communities and Families Division had been informed of the disclosures or the matters raised by the claimant prior to the claimant's statement being agreed. Given that specialist knowledge and access to confidential records was required to investigate some of the matters raised by the claimant in her disclosures to Safecall, Bernadette Oxley, the newly appointed Head of Children's Services (who had recently commenced employment with the respondent) was asked,

on 8 April 2019, to investigate certain matters in relation to the disclosures made and provide a report to the independent investigator, DS. She did so and provided reports dated 23 August and 12 December 2019.

66. In June 2019, at the conclusion of his investigation into the claimant's alleged conduct, KD prepared an Investigation Report extending to 22 pages, plus appendices. The appendices comprised of the statements of each of the witnesses and all the supporting evidence. The appendices extended to a further 172 pages. The Investigation Report was split into 5 sections, as follows: Background information; Details of the Allegations; Chronology of Events; Supporting Evidence (which provided the detail of the evidence gathered); and Summary. At page 9 of his report, within the section entitled 'Chronology of Events', KD stated *'[The claimant] advised me in interview that whilst she had been off work with stress, the case of Child A and B was in her thoughts. [The claimant] advised me that on her return she used SWIFT to check Child A's record. With no clear role or permission to undertake this record check, there are grounds to query how accessing Child A's file sits with both the Acceptable ICT Use Policy (s4) as well as the Employee Code of Conduct (s11).'*

67. The summary in KD's Investigation Report stated as follows:

'Summary of the evidence found in relation to the allegations.

• On 16 July 2018 you took a unilateral decision to change child plans (for child A and B) which had previously been agreed at a children's hearing on 29 June 2018, resulting in you not adhering to the conditions of a compulsory supervision order set on 29 June 2018.

The evidence obtained in this investigation strongly indicates that this statement is accurate. Carol McCulloch has admitted, to myself and John Stevenson that this took place. Rhea McGlashan witnessed this and provided evidence that this change of plan was initiated and decided upon by Carol McCulloch.

• *On 16 July 2018 you failed to follow protocol on non-compliance with legal orders which are agreed between ADSW (now Social Work Scotland) and SCRA.*

Evidence obtained for this investigation strongly indicates that this statement is accurate. This protocol was universally known of and the actions required to be taken was known by all practice team social work professionals interviewed (Billy Brown, Rachael James, Rhea McGlashan, Anne McTiernan and John Stevenson), with the notable exception of Carol McCulloch. Carol provided evidence that she was out of practice at the time this protocol became active, which is accurate. However, evidence from Andrew Gillies highlights that Carol was aware of the protocol as well as the fact that it was an immediate response to her own contempt of court case.

• *On 16 July 2018 you failed to offer an interpreter when you met with the children's parents (child A and B) to inform them of your decision, although being aware that English was not their first language and that this service should be offered for complex discussions.*

Evidence obtained for this investigation strongly indicates that this statement is accurate. Carol McCulloch's statement indicates that Carol made the decision to progress without an interpreter. Rhea McGlashan's statement questions whether this was fair by failing to provide the parents with the required understanding of what was being discussed. Rhea's evidence also highlights that interpretation was always offered and present at other significant meetings. John Stevenson's statement indicates that the importance of this issue was known to Carol McCulloch due to previous actions taken where interpretation was required yet not provided. Carol McCulloch in her statement states that the responsibility for this arrangement lay with Rachael James, yet Rachael James was on annual leave at this time and was not present at the meeting.

• *On 13 August 2018 you failed to treat a colleague fairly and respect her professional judgement during a meeting by allowing her to have no input and*

by later instructing her to write a report without adhering to departmental procedure.

Evidence obtained for this investigation indicates that this statement is accurate. The statement provided by Rachael James, as well as her corresponding case note dated 13 August 2018 (entered onto SWIFT 31 August 2018) indicates that this was not a collaborative meeting shared by Carol and Rachel. Rachel's description in her evidence of Carol standing over her, and the impact that this had on her, also indicates that this was not a balanced meeting. There is no indication in the case of Child A and B that Rachael James's view or concerns were being noted or considered by Carol McCulloch. Carol McCulloch advised in her statement her surprise that Rachael James did not advise Carol of her concerns directly. Rachael McCulloch and Rhea McGlashan's statements both allude to a culture being created where challenge and disagreement with Carol was something to be avoided, as they had both witnessed how doing so could be problematic.

The Looked After Children Achieving Permanence procedure outlines that a LAAC review decides upon the need for a Permanence Panel. This was not the case with Child A and B, as decisions connected to permanence were being made unilaterally, and outwith the typical LAAC review process. As a result, Carol McCulloch's insistence that permanence needed to be referred to is not in adherence with departmental procedure.

• On 5 February 2019 you had a telephone conversation with a child's head teacher without any discussion with the child's allocated social worker or team leader, thereby undermining both your colleagues and ignoring up to date relevant information on the child.

Evidence obtained for this investigation strongly indicates that this statement is accurate. Carol McCulloch's own evidence reinforces that her actions on the day in question were borne out of professional frustration. However, the frustration Carol McCulloch had at Billy Brown refusing to discuss the case with her, was equally felt by Billy Brown in his own statement to the investigation

that this involvement in a case no longer held by Carol was entirely predicted. Carol McCulloch knew that Billy Brown had the matter in hand, and advised this through her statement. Anne McTiernan's statement indicates that she understood Billy Brown's concerns that upon Carol's return to work, Carol may interfere with cases previously held by her or her team. Anne advised that an initial return to work meeting agreed one task for Carol – email clearance – and two further meetings saw Carol fail to attend or refuse to attend (Appendix 14).

• On 5 February 2019 you recorded your professional disagreement on SWIFT with colleagues, which is a misuse of the system.

Evidence obtained for this investigation strongly indicates that this statement is accurate. Carol McCulloch in her statement made it clear that the message left for her by Child A's headteacher provided her with an opportunity to provide her own personal assessment of this child and their family's circumstances. There is also evidence that Carol McCulloch does not deem her lack of involvement in the intervening 6-month period to have been sufficient to caution her or provide information in the context of being both supposition and being in the context of when she was involved, that being 6 months previous.

• On various occasions during August 2018 you have spoken to colleagues, a foster parent and another team leader about the social worker involved with the above case (child A and B) in a derogatory manner.

Evidence obtained for this investigation partially indicates that this statement is accurate.

There is some evidence to suggest that Carol McCulloch engaged in discussion with Chris Jack, Acting Team Leader, regarding concerns relating to Rachael James's social work practice. This evidence came through Rachael James, and not directly from Chris Jack – who Rachael advises told her of the incident immediately afterward. However, in John Stevenson's statement, Carol McCulloch had made statements regarding Rachael James being gullible, easily deceived and manipulated by the parents of Child A and B.

There is no evidence to support the statement that Carol McCulloch spoke in a derogatory manner to the foster carer regarding Rachael James. There is however strong evidence that Carol McCulloch had engaged in derogatory remarks regarding the social work practice of a colleague unconnected to Child A and B – as was cited in evidence from Rachael James, Rhea McGlashan and John Stevenson.

• During 2018 you have failed to provide support to a worker(s), thus failing in your duty of care and neglecting your responsibility to support a worker(s) and to assist them with professional development.

Evidence obtained for this investigation strongly indicates that this statement is accurate. Rachael James in her statement provided in the strongest terms her negative view of the management support provided by Carol McCulloch. This echoes what Rhea McGlashan also shared regarding her experiences of becoming increasing anxious and concerned that she was being manipulated whilst being managed by Carol McCulloch. The evidence provided by Anne McTiernan regarding the majority of Carol McCulloch's supervisory group citing significant management issues connected with Carol, further supports this statement.'

68. KD accordingly concluded that there was evidence to either support or strongly support each of the allegations, with the exception of the part of allegation 7, which alleged that the claimant had made derogatory comments about RJ to Child A's foster carer.

69. The Investigation Report was sent to the Nominated Officer, SD, on 7 June 2019. In accordance with the respondent's procedure, it was for SD, as Nominated Officer, to review the Investigation Report and decide if there was a case to answer at a disciplinary hearing. SD decided that there was a case to answer at a disciplinary hearing in respect of the eight allegations outlined above.

70. By letter dated 19 June 2019, the claimant was invited to a disciplinary hearing. Two dates were offered: 27 June or 31 July 2019. The letter advised that the allegations could constitute a breach of the Employee Code of Conduct and fall within a number of the examples of gross misconduct under the Disciplinary Code. A copy of the Investigation Report and all appendices (including statements from each of the individuals interviewed) was included with the letter. The letter confirmed that AT, BB and RM would be called as witnesses. The claimant was informed that, if she wished to call further witnesses or submit statements or other documents she could do so, but least 24 hours' notice was required.

71. At the claimant's request, the disciplinary hearing was postponed to 30 August 2019. She was informed of this by letter dated 2 August 2019.

72. The disciplinary hearing took place on 30 August 2019. In attendance were the claimant, her trade union representative, SD, Claire Cochrane (Human Resources), Lynne Crawford (Business Support / Minute Taker AM) and Chloe Sinclair (Business Support / Minute Taker PM).

73. SD was not aware that the claimant had made a disclosure to Safecall until immediately prior to her disciplinary hearing, when she provided SD with a copy of the statement she had agreed with Safecall on 27 March 2019.

74. At the outset of the disciplinary hearing, SD explained that he would not be considering her disclosures as these were being separately investigated by Safecall. The claimant was, however, permitted to present any information which was relevant to the allegations against her, including any information presented to Safecall.

75. During the disciplinary hearing, the claimant admitted that she had taken steps to change Child Plans for Child A and Child B and put in place arrangements contrary to a Compulsory Supervision Order. The claimant was asked twice whether she would do anything differently in the future. She indicated that she would not.

76. On 5 September 2019, the claimant sent an additional submission to SD to be considered as part of the disciplinary process.

77. The claimant was referred to Occupational Health in September and October 2019, to ascertain whether she was fit to participate in the disciplinary process. The reports obtained confirmed that she was fit to participate.

78. SD gave careful consideration to all of the evidence, the discussions at the disciplinary hearing and the claimant's additional submission. His outcome was delayed due to the following:

a. The fact that he had two weeks' annual leave in September 2019;
b. Awaiting the outcome of the OH referral in relation to the claimant; and
c. The extent of the materials to be considered and the fact that SD was aware of the potential implications of his decision, so wanted to ensure that he considered all of the evidence thoroughly before reaching a decision.

79. SD reached the following conclusions in relation to key factual matters:

a. The claimant was aware of the Protocol and its requirements. It was compiled to address the issues which arose in the contempt of court case the claimant was involved in and the claimant's Team Leader at the time the Protocol was introduced, AG, was clear that the claimant was present during a briefing in relation to the Protocol. SD also took into account the fact that the social work professionals interviewed (BB, RJ, RM, AM and JS) had all confirmed that they were aware of the Protocol and its requirements on non-compliance with legal orders.
b. The claimant made a unilateral decision to change the conditions of a Compulsory Supervision Order that was in place for both Child A and Child B, in breach of the Protocol. This was based on the claimant accepting that she had done so at the disciplinary hearing and during the investigation. Both RM and AM also confirmed that she had done so.

c. The claimant had not arranged an emergency Children's Hearing in accordance with the Protocol when she made the decision to breach the Order. He based this conclusion on the fact that there was no evidence on SWIFT to confirm that the claimant had spoken to the Reporter's office regarding this action and no evidence to support the claimant's position that she had secured a Hearing date. It was not recorded on SWIFT by the claimant or Business Support, who manage Hearing dates. There was also no evidence that a Hearing, once arranged, was then cancelled.

d. The claimant failed to ensure the services of an interpreter were available when she met with the parents of Child A and B on 16 July 2018, despite being aware that English was not their first language and that this service should be offered for complex discussions, such as those taking place on that date. He based this conclusion on the fact that the claimant had accepted that she had done so, during the investigation and at the disciplinary hearing. He also took into account JS and RM's evidence that an interpreter was always offered for these parents and had been present at all other significant meetings which the parents attended.

e. That on 13 August 2018 the claimant failed to treat RJ fairly and respect her professional judgement during a meeting by not allowing her to have input and by later instructing her to write a report without adhering to departmental procedure. He based that conclusion on the evidence from RJ stating that she felt disempowered when she was prevented from contributing her opinion during the meeting, despite the fact that she was the allocated social worker. He determined that RJ's account was corroborated by RM, who described similar behaviour where she did not believe it was possible to disagree with the claimant.

f. The claimant should not have contacted the head teacher on 5 February 2019. She had no locus to do so. She was not familiar with the most up to date and relevant developments in relation to Child A and expressed opinions that undermined the professional assessment of colleagues, which had been accurate and correct. The claimant was aware that the case was allocated to another team. If she had concerns about the

approach they were taking, she ought to have written to the allocated social worker and team leader noting her concerns, copying in senior managers. Instead, she used the telephone message as an opportunity to state her personal assessment of the child and their family's circumstances, even though she had not had any involvement in the case for a significant length of time.

g. The claimant recorded her professional disagreement with colleagues on SWIFT, which was inappropriate and a misuse of the system. The claimant accepted that she had done so. SD concluded that this was inappropriate as it was a client record, which could be viewed by the client at any time. Professional disagreements should not therefore be recorded on SWIFT: other appropriate channels of communication should have been used.

h. That the claimant spoke to a colleague about the practice of RJ, in a manner which undermined her. The claimant accepted that she had done so.

i. That the claimant failed to provide appropriate support to members of her team in 2018 and to assist them with professional development. He based that conclusion on evidence from RJ and RM in which they provided examples of conduct on the claimant's part which they stated they viewed as unsupportive or anxiety provoking, as well as evidence from AM that the majority of the claimant's supervisory group had raised significant concerns about her management.

80. Based on these factual findings, SD found that all the allegations were substantiated. He found that the first 6 constituted gross misconduct individually and cumulatively. Allegations 7 & 8 were found to constitute misconduct only.

81. SD considered the claimant's assertion that the disciplinary investigation was instigated because of issues she had raised with Safecall. He determined that this was not the case given that:

a. He had not been made aware of the disclosures to Safecall when he was appointed as the Nominated Officer;

b. He had contacted the previous Nominated Officer, AJ, and he had also confirmed that he was not aware of the disclosures to Safecall at the time of the claimant's suspension; and
c. The allegations were substantiated, and in some cases admitted by the claimant, which indicated that conduct was the reason the disciplinary process was initiated, rather than any other reason.

82. SD considered a range of sanctions, but concluded that the appropriate sanction was summary dismissal. In reaching this decision he took into account the fact that the claimant was in a position where she required to demonstrate high standards of trust and integrity and required to work, individually and as part of a team, to ensure the rights of vulnerable children and their families were protected, adhering to legal and professional agreements while doing so. He also took into account the serious nature of the conduct established, as well the fact that the claimant did not accept that her actions were wrong and said she would not change anything about her practice in the future. He concluded that the respondent could not continue to employ the claimant in these circumstances. SD considered alternatives to dismissal but felt that her conduct was so serious that dismissal was the only appropriate option.

83. By letter dated 12 December 2019 the claimant was informed of the outcome of the disciplinary proceedings, namely that she was summarily dismissed. The letter detailed SD's findings in relation to each allegation, the basis upon which he had concluded that the claimant's actions amounted to gross misconduct/misconduct, why he felt it was not related to her disclosures to Safecall and why he reached the conclusion that summary dismissal was the appropriate sanction. The letter confirmed the claimant's right to appeal and the process for doing so.

84. The claimant received the letter at home, it having been sent to her by recorded delivery.

85. On 24 December 2019 the claimant submitted an appeal in relation to the decision to summarily dismiss her. In summary, her grounds of appeal were that:

a. There was procedural unfairness and irregularity;
b. RJ did not attend the disciplinary hearing as a witness, which undermined the findings reached;
c. The real reason she was dismissed was that she made protected disclosures to Safecall on 5 February 2019;
d. The respondent failed to take into account her disability; and
e. The sanction was excessive.

86. On 13 March 2020 the Personnel Appeals Committee heard the claimant's appeal. SD attended as presenting officer. The claimant was accompanied by her trade union representative.

87. The Committee did not uphold any aspect of the claimant's appeal. They did not find there to be any procedural failings or unfairness, irregularity, unreliable evidence, alternative reason for dismissal or excessive sanction. They found that there was no evidence of a link between the disciplinary action and the claimant’s disclosures. Accordingly, the Committee upheld the claimant's summary dismissal.

88. The claimant was informed of the outcome of her appeal by letter dated 15 April 2020.

89. Safecall had recommended to the respondent's Monitoring Officer that closure of the claimant's whistleblowing concerns be held in abeyance pending the disciplinary and appeal process. The respondent agreed with this recommendation. The outcome of the investigations conducted by Safecall were accordingly issued after the appeal process had concluded. DS concluded in his report of 18 May 2020 that there was no evidence to support the allegations made by the claimant in her whistleblowing disclosure.

Submissions

Respondent's submissions

90. The respondent submitted a written skeleton submission, extending to 14 pages, which focused solely on factual issues. This was supplemented by an oral submission, the basic summary of which was as follows:

a. The respondent's evidence, and that of DL, should be preferred to that of the claimant and CR. The claimant's credibility was significantly undermined.

b. The respondent had a genuine belief, based on reasonable grounds and following a thorough and balanced investigation, that the claimant was guilty of misconduct. A fair procedure was adopted. Dismissal fell within the band of reasonable responses open to the respondent in the circumstances.

c. The claimant's disclosures were not qualifying protected disclosures.

d. If the asserted detriments were established, then it is accepted that these would indeed constitute detriments.

e. Any detriments established were not however on the ground that the claimant made protected disclosures. There is no evidence upon which the Tribunal could infer that any protected disclosures made materially influenced the respondent's actions. The relevant individuals did not know about the asserted protected disclosures. It was not put to AM or JS that they informed AJ about the disclosures prior to the claimant's suspension. The respondent's actions were solely as a result of the claimant's misconduct

f. The claim of automatically unfair dismissal must also fail. The sole or principal reason for the claimant's dismissal was her misconduct, not any protected disclosures made.

Claimant's submissions

91. The claimant submitted a written submission, extending to 27 pages, summarising the facts which the claimant submitted were proved. This was supplemented by an oral submission, the basic summary of which was as follows:

a. The disclosures made by the claimant were qualifying protected disclosures.

b. The Tribunal should draw inferences as to the detriments being on the grounds that the claimant made protected disclosures from:

i. the timing of the detriments, (all were after the protected disclosures and there was no suggestion of disciplinary action being taken prior to February 2019);

ii. the claimant being asked about her retirement intentions the day before her suspension;

iii. the claimant's colleagues all submitting complaints around the same time;

iv. DL not being contacted or interviewed; and

v. SD having a closed mindset, whereby dismissal was always the only outcome.

c. All of the above also points to the claimant's dismissal being automatically unfair. The principal reason for the claimant's dismissal was her protected disclosures.

d. In relation to the ordinary unfair dismissal claim, the investigation was not reasonable as the respondent failed to contact DL in relation to allegations 1 and 2. The remaining allegations did not amount to gross misconduct. At best they were misconduct.

e. The respondent did not follow a fair procedure. In particular,

i. They did not contact DL;

ii. They failed to allow the claimant to argue that her protected disclosures were the reason for the allegations being made against her;

iii. RJ was not present at the disciplinary hearing; and

iv. SD relied upon the IT Fair Use Policy when reaching his decision, which was not put to the claimant.

f. The sanction of dismissal was excessive and there was insufficient consideration of alternatives.

Relevant Law

Protected Disclosure

92. Section 43A of the Employment Rights Act 1996 (**ERA**) provides:

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

93. A qualifying disclosure is defined in section 43B ERA as *"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."

94. Section 43C ERA states that:

'A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –
(a) to his employer, or
(b) where the worker reasonably believes that the relevant failure relates solely or mainly to –
(i) the conduct of a person other than his employer, or
(ii) any other matter for which a person other than his employer has legal responsibility,
to that other person...."

95. In, ***Kilraine v London Borough of Wandsworth*** [2018] EWCA Civ 1436, at paragraphs 35 and 36, the Court of Appeal set out guidance on whether a particular statement should be regarded as a qualifying disclosure:

"35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a 'disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the matters set out in sub-paragraphs (a) to (f).' Grammatically, the word 'information' has to be read with the qualifying phrase 'which tends to show [etc]' (as, for example, in the present case, information which tends to show 'that a person has failed or is likely to fail to comply with any legal obligation to which he is subject'). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

"36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses

does tend to show one of the listed matters. As explained by Underhill J in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

Detriment Claim

96. Section 47B ERA states that

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

97. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] IRLR 285 confirms that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. An 'unjustified sense of grievance' is not enough.

98. Whether a detriment is 'on the ground' that a worker has made a protected disclosure involves consideration of the mental processes (conscious or unconscious) of the employer acting as it did. It is not sufficient for the Tribunal to simply find that 'but for' the disclosure, the employer's act or omission would not have taken place, or that the detriment is related to the disclosure. Rather, the protected disclosure must materially influence (in the sense of it being more than a trivial influence) the employer's treatment of the whistleblower (***NHS Manchester v Fecitt and others*** [2012] IRLR 64).

99. Helpful guidance on the approach to be taken by a Tribunal when considering claims of this nature is provided in the decision of ***Blackbay Ventures Ltd (t/a Chemistree) v Gahir*** [2014] IRLR 416 at paragraph 98.

Automatically Unfair Dismissal

100. S103A ERA states that:

'An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure.'

Unfair Dismissal

101. S94 ERA provides that an employee has the right not to be unfairly dismissed.

102. In cases where the fact of dismissal is admitted, as it is in the present case, the first task of the Tribunal is to consider whether it has been satisfied by the respondent (the burden of proof being upon them in this regard) as to the reason for the dismissal and that it is a potentially fair reason falling within s98(1) or (2) ERA.

103. If the Tribunal is so satisfied, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s98(4) ERA. The determination of that question (having regard to the reason shown by the employer):

"(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

104. Where an employee has been dismissed for misconduct, ***British Home Stores v Burchell*** [1978] IRLR 379, sets out the questions to be addressed by the Tribunal when considering reasonableness as follows:

a. whether the respondent genuinely believed the individual to be guilty of misconduct;

b. whether the respondent had reasonable grounds for believing the individual was guilty of that misconduct; and
c. whether, when it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

105. The Tribunal will then require to consider whether the decision to dismiss fell within the range of reasonable responses available to a reasonable employer in the circumstances. In determining this, it is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law, as the Tribunal would have 'substituted its own view' for that of the employer. Rather, the Tribunal must consider the objective standards of a reasonable employer and bear in mind that there is a range of responses to any given situation available to a reasonable employer. It is only if, applying that objective standard, the decision to dismiss (and the procedure adopted) is found to be outside that range of reasonable responses, that the dismissal should be found to be unfair (***Iceland Frozen Foods Limited v Jones*** [1982] IRLR 439).

Observations on Evidence

106. The Tribunal found the respondent's witnesses to be generally credible.

107. The Tribunal found DL to be entirely credible, giving her evidence in a clear and straightforward manner. The Tribunal accepted her evidence.

108. CR had very limited recall of the detail of the particular issues in the claimant's appeal and appeared to be influenced in his evidence by wider, underlying issues highlighted in a report recently issued, which was not available to him at the time of the claimant's appeal. Where his evidence differed to that of KL, who also gave evidence in relation to the appeal process, the Tribunal preferred the evidence of KL.

109. The Tribunal found that the claimant's credibility was undermined on a number of occasions, for example:

a. Her evidence, that she telephoned DL on/around 16 July 2018 and a date for a further Children's Hearing had been fixed for around the 21 August 2019 during that call was contradicted by DL, who she called as a witness. DL stated that this would not have occurred as the claimant suggested, as it would have been very unusual for her to take the call and, even if she had, she would have required the request to be put in writing and sent together with the requisite authority, in accordance with the strict requirements in place as a result of the Protocol. Further, given the circumstances, the Children's Hearing would require to take place within 14 days, not the timescales suggested by the claimant.

b. It was clear from the documentary evidence the Tribunal were referred to that the claimant stated throughout the investigation and disciplinary proceedings that she was unaware of the Protocol. She stated in evidence however that she was, in fact, aware of this at the time she took the relevant decisions.

c. She was very clear in evidence that she had not received an email from JS dated 15 August 2018, and maintained that position even when referred to emails demonstrating that she had replied to this, which she accepted she had sent.

d. She provided a very detailed account in her evidence of a discussion she had with a social work assistant who had escorted Child A & B to have unsupervised contact with their parents on 21 August 2019. She described in great detail that the social work assistant had witnessed something which had significantly distressed her in Child B's interaction with his mother. The claimant stated in evidence that she too was incredibly concerned by this, so much so that she immediately went to see JS, recounted what she had been told to him and explained that she felt that what had been described demonstrated that the children were at clear and current risk of abuse. Notwithstanding this, in the report which she prepared and entered on the SWIFT system on 28 August 2019 there was no express mention of this. Rather, her evidence to the Tribunal was what she was referring to that incident when she stated in the record *'there were other examples of concern that I cannot recall at the time of writing that added to my decision to place contact back to*

supervised…'. The Tribunal found that this was not credible. If the events had happened as the claimant described, she would have been able to clearly recall them a week later and they would have been expressly mentioned and given prominence in the report she prepared, which covered other concerns she had in relation to the children. Further, she stated that the events she described took place on 21 August 2018, which was over a month after she took the decision to place contact back to supervised. They could not therefore have been a factor in that decision.

e. One of the detriments she relied upon was that she had received the disciplinary outcome letter by email, while on public transport, but she stated in evidence in chief that she received this at home, and it only came by post.

Discussion & Decision

Protected Disclosures

110. The Tribunal considered each of the matters relied upon by the claimant as protected disclosures. The Tribunal's conclusions in relation to each are as follows:

a. The internal verbal disclosure to JS on 21 August 2018. The Tribunal's findings in relation to what the claimant stated to JS during that meeting are set out in paragraph 41 above. The Tribunal concluded that this was a disclosure of information which the claimant reasonably believed to be in the public interest and which she reasonably believed tended showed that the respondent had breached, or was breaching, its legal obligations towards the children and that their health and safety had been, was being or was likely to be endangered. Sections 43B(1)(b)&(d) ERA were accordingly engaged. The disclosure was therefore a qualifying disclosure. The information was disclosed to the claimant's line manager, so fell within the scope of s43C(1)(a) ERA. The claimant's

disclosure was accordingly also a protected disclosure (the **First Protected Disclosure**).

b. The internal disclosure within the stress risk assessment form, which was passed to AM on 16 January 2019 and discussed at the meeting on 17 January 2019. The Tribunal's findings in relation to what was stated in the stress risk assessment form, and in relation to what the claimant stated to AM during the meeting on 17 January 2019, are set out in paragraphs 46 and 47 above. The Tribunal concluded that in both the form and during the meeting the claimant disclosed information which she reasonably believed to be in the public interest and which she reasonably believed tended showed that the respondent had breached, or was breaching, its legal obligations towards the children and that their health and safety had been, was being or was likely to be endangered Sections 43B(1)(b)&(d) ERA were accordingly engaged. The disclosures were therefore qualifying disclosures. The information was disclosed to the claimant's line manager, so fell within the scope of s43C(1)(a) ERA. The claimant's disclosures were accordingly also protected disclosures (the **Second Protected Disclosure**).

c. The external disclosure to Safecall during a telephone call on or around 5 February 2019. The Tribunal's findings in relation to what was stated by the claimant in the initial telephone discussion with Safecall is set out in paragraph 52 above. The Tribunal concluded that this was a disclosure of information which the claimant reasonably believed to be in the public interest and which she reasonably believed tended showed that the respondent had breached, or was breaching, its legal obligations towards the children and that their health and safety had been, was being or was likely to be endangered. Sections 43B(1)(b)&(d) ERA were accordingly engaged. The disclosure was therefore a qualifying disclosure. The information was disclosed to Safecall, in accordance with the respondent's policy, so fell within the scope of s43C(2) ERA.

The claimant's disclosure was accordingly also a protected disclosure (the **Third Protected Disclosure**).

d. The external disclosure to Safecall at an interview on or around 21 February 2019. The Tribunal's findings in relation to what was stated by the claimant during the meeting with Safecall is set out in paragraph 65 above. The Tribunal concluded that this was a disclosure of information which the claimant reasonably believed to be in the public interest and which she reasonably believed tended showed that the respondent had breached, or was breaching, its legal obligations towards the children and that their health and safety had been, was being or was likely to be endangered. Sections 43B(1)(b)&(d) ERA were accordingly engaged. The disclosure was therefore a qualifying disclosure. The information was disclosed to Safecall, in accordance with the respondent's policy, so fell within the scope of s43C(2) ERA. The claimant's disclosure was accordingly also a protected disclosure (the **Fourth Protected Disclosure**).

Detriment Claim – S47B ERA

111. The Tribunal then considered whether the claimant was subjected to any detriment by an act, or a deliberate failure to act, by her employer on the ground that she made a protected disclosure. As indicated above, the Tribunal found that each disclosure amounted to a protected disclosure.

112. The claimant submitted that the Tribunal should draw inferences as to the respondent's motivation from a number of specified points, each of which is addressed below.

a. The timing of the detriments, (all were after the protected disclosures and there was no suggestion of disciplinary action being taken prior to February 2019). Whilst no action was taken in relation to the events in July/August 2018 until February 2019, the Tribunal accepted that this was due to the fact that JS did not conclude his report until after the

claimant commenced a lengthy period of absence. It was then not felt to be appropriate to take action to formally investigate the claimant's actions while she was absent from work due to work related stress. Action was however taken to formally investigate all matters upon the claimant's return to work, including in relation to matters regarding the claimant's conduct on her return to work. The Tribunal concluded that no inference could be drawn from this.

b. The claimant being asked about her retirement intentions the day before her suspension. The Tribunal concluded that the claimant was asked about her retirement intentions on 11 February 2019 as a result of her raising this with AM at the return to work meeting on 17 January 2019 and AM agreeing to follow up in relation to the claimant's options. No inference could be drawn from this.

c. The claimant's colleagues all submitting complaints around the same time. The Tribunal concluded that this was due to the claimant's conduct in contacting Child A's head teacher on 5 February 2019 and the entry she subsequently recorded on SWIFT, which also led to previous SWIFT records being reviewed. It was not appropriate to draw any inference from this.

d. DL not being contacted or interviewed. The Tribunal accepted that DL was not interviewed or contacted in the course of the investigation as it was felt that she could not provide any relevant evidence: had a Children's Hearing been fixed, as the claimant asserted, there would have been a record of this on SWIFT. As there was no such record, it was clear that there was no value in contacting DL. The Tribunal concluded that it was not appropriate to draw any inference from this.

e. SD having a closed mindset, whereby dismissal was always the only outcome. The Tribunal did not accept that SD had a closed mindset, so did not agree that any inference could be drawn from this.

113. The Tribunal's conclusions in relation to each detriment asserted by the claimant, taking into account the above findings, are set out below.

a. AJ shouting at and verbally abusing the claimant during the call on 12 February 2019. The Tribunal's findings in relation to what occurred during that call are set out in paragraph 58 above. The Tribunal accepted that AJ was angry and shouted at the claimant during that call. In reaching this conclusion the Tribunal took into account the fact that AJ specifically requested to call the claimant on her mobile and she move into a private office, rather than asking the claimant to go to a private office and call her on the landline in that room, which may have meant that the call was recorded. The Tribunal were also cognisant of the fact that, despite the respondent having a large HR team, and that team clearly having been involved in the preparation of the paperwork in relation to the claimant's suspension, they were not present when the claimant was suspended. Indeed, there were no witnesses, as the Tribunal would have expected. The Tribunal found however that, whilst this was a detriment, it was in no way linked to or influenced by the fact that the claimant made the Protected Disclosures. Rather, it was as a result of the claimant's alleged misconduct as set out in the allegations. There was no evidence that AJ was aware of the First Protected Disclosure. It was not put to JS that he had informed AJ or anyone else of this. AJ was not informed of the Second Protected Disclosure until 25 February 2019, after the claimant was suspended. There was no evidence before the Tribunal to suggest that AJ was aware of these matters prior to that date, and it was not put to AM that she had informed AJ of the concerns raised by the claimant prior to then. AJ was not aware of the Third or Fourth Disclosures. The Tribunal accepted the evidence from LC that she did not disclose to anyone (other than the legal team and Chief Executive, in confidence) that the claimant had made disclosures. This was supported by the claimant's evidence of what LC informed her on 12 February 2019, after she had been suspended. Given that AJ was not aware of the claimant's protected disclosures, these could not, consciously or unconsciously, have materially influenced his actions.

b. Suspending the claimant on 12 February 2019 and subjecting her to the commencement of formal disciplinary proceedings. The Tribunal found that the claimant was suspended and subjected to the commencement of formal disciplinary proceedings due to the misconduct alleged, not for any other reason. The decision was taken by AJ. As set out above, the Tribunal concluded that AJ was not aware of the claimant's protected disclosures, so these could not, consciously or unconsciously, have materially influenced his actions.

c. Subjecting the claimant to an investigation into her practice. The investigation was instigated due to the misconduct alleged, at AJ's request, not for any other reason. As set out above, the Tribunal concluded that AJ was not aware of the claimant's protected disclosures, so these could not, consciously or unconsciously, have materially influenced his actions.

d. Requiring the claimant to attend a disciplinary hearing on 20 August 2019. The claimant was required to attend a disciplinary hearing on 20 August 2019 solely as a result of the conclusions reached by KD in his Investigation Report, namely that there was sufficient evidence to either support or strongly support each of the allegations, with the exception of part of allegation 7. The requirement for the claimant to attend a disciplinary hearing was related solely to her conduct. The Tribunal concluded that KD was not, consciously or unconsciously, materially influenced by any disclosures made by the claimant.

e. A 14 week wait for the disciplinary outcome. The reasons why there was a delay in issuing the disciplinary outcome are set out above at paragraph 78. While clearly a long delay, there was no evidence to suggest that this was related, in any way, to the fact that the claimant had made Protected Disclosures. In not issuing the disciplinary outcome for 14 weeks, SD was not, consciously or unconsciously, materially influenced by any disclosures made by the claimant.

f. Receiving a dismissal letter outcome by email, on public transport, on 12 December 2019. In evidence in chief, the claimant stated that she received the outcome letter by post, when she was at home. When asked if she had received it in any other way, she stated that she did not. The detriment alleged has accordingly not been established.

114. The Tribunal accordingly did not find that the claimant was subjected to any detriment by any act, or any failure to act, by the respondent on the ground that she made protected disclosures.

Automatically Unfair Dismissal Claim – s103A ERA

115. The Tribunal considered what the reason or principal reason for the claimant's dismissal was. The Tribunal concluded that the sole reason was her conduct and the respondent's actions were not influenced in any way by the protected disclosures made by the claimant. The Tribunal accordingly concluded that claimant was not unfairly dismissed by reference to section 103A ERA. The reason or principal reason for the termination of her employment was not that she had made protected disclosures.

Unfair Dismissal

116. The Tribunal referred to s98(1) ERA. It provides that the respondent must show the reason for the dismissal, or if more than one the principal reason, and that it was for one of the potentially fair reasons set out in s98(2) ERA. At this stage the Tribunal was not considering the question of reasonableness. The Tribunal had to consider whether the respondent had established a potentially fair reason for dismissal. The Tribunal accepted that the reason for dismissal was the claimant's conduct – a potentially fair reason under s98(2)(b) ERA.

117. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason as shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources of the

employer's undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited v Jones*** that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. There is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep the employee on. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, the dismissal is fair.

118. The Tribunal referred to the case of ***British Home Stores v Burchell***. The Tribunal was mindful that it should not consider whether the claimant had in fact committed the conduct in question, as alleged, but rather whether the respondent genuinely believed she had and whether the respondent had reasonable grounds for that belief, having carried out a reasonable investigation.

Did SD have a genuine belief that the claimant was guilty of misconduct?

119. The Tribunal concluded that SD did have a genuine belief that the claimant had committed the misconduct detailed in the dismissal letter.

Did SD have reasonable grounds for his belief?

120. The Tribunal considered each allegation which SD relied upon when determining that the claimant should be dismissed and reached the following conclusions in relation to each:

    a. Allegation 1 – The claimant admitted that she had taken a unilateral decision to change Child Plans for Child A & B, which had previously been agreed at a Children's Hearing on 29 June 2018. She admitted that she did not, therefore, adhere to the conditions of a Compulsory Supervision Order made by the Children's Hearing on 29 June 2018. SD accordingly had reasonable grounds for his belief that the misconduct identified in allegation 1 was established.

b. Allegation 2 – The claimant admitted that she failed to follow the Protocol on non-compliance with legal orders which were agreed between a ADSW (now Social Work Scotland) and SCRA. The claimant accepted that she had not contacted her line manager in relation to her decision to change the legal order. No authority was accordingly sought from the Chief Social Work Officer or their designate, in accordance with paragraph 2.5 of the Protocol. SD accordingly had reasonable grounds to believe that the claimant had failed to follow the Protocol in relation to that. SD also had reasonable grounds to believe that the claimant had not formally informed SCRA of the breach of the legal order and had not requested further Children's Hearing, in accordance with paragraph 2.6-2.9 inclusive of the Protocol. It had been a requirement for a number of years that all contact between the Local Authority and SCRA be formalised. For the requirements of the Protocol to be met, certain forms required to be completed and submitted through Business Services to SCRA, so that there was a clear audit trail. Doing so creates a record on SWIFT. It was not possible to request a Children's Hearing in any other way. As there was no record of a Children's Hearing being requested on SWIFT, SD had reasonable grounds to believe that a Children's Hearing had not been requested in accordance with the terms of the Protocol. SD had reasonable grounds to believe that the claimant was aware of the Protocol, given that:

    i. It was introduced as a direct consequence of the contempt of court proceedings which the claimant had been involved in;

    ii. The claimant's line manager, at the time the Protocol was introduced, had confirmed in the course of the investigation that he had discussed the Protocol with the claimant at the time it was introduced, prior to discussing the terms of this at a team meeting during which the claimant was present; and

    iii. All the claimant's colleagues were aware of the Protocol and its requirements.

SD accordingly had reasonable grounds to believe that the misconduct identified in allegation 2 was established.

c. Allegation 3 - The claimant admitted that she had failed to offer an interpreter when she met with the parents of Child A & B to inform them of her decision to move from unsupervised to supervised contact, contrary to the terms of the legal order. This was despite the fact that she accepted that she was aware that English was not their first language and that this service should be offered for complex discussions. SD accordingly had reasonable grounds for his belief that the misconduct identified in allegation 3 was established.

d. Allegation 4 – The claimant denied that she had failed to treat RJ fairly and respect her professional judgement during a meeting on 13 August 2018 and allow her to have input during the meeting. She also denied that she had then instructed RJ to write a report without adhering to departmental procedure. Notwithstanding this, SD concluded that she had. There were reasonable grounds for him to reach that conclusion, namely evidence from RJ stating that she felt disempowered when she was prevented from contributing her opinion during the meeting, despite the fact that she was the allocated social worker, which was corroborated by RM, who described similar behaviour. SD accordingly had reasonable grounds for his belief that the misconduct identified in allegation 4 was established.

e. Allegation 5 – The claimant accepted that she had accessed Child A and Child B's records following her return to work, despite having no locus to do so at that time and that she had a telephone conversation with the head teacher at Child A's school on 5 February 2019, without any discussion with the child's allocated social worker or the team leader. She had been absent from work, and not involved in the case at all, for 5 months immediately prior to this. She was not the allocated social worker or team leader for Child A's case at that time. SD accordingly had reasonable grounds for his belief that the misconduct identified in allegation 5 was established.

f. Allegation 6 – The claimant accepted that she had made the SWIFT record dated 5 February 2018, recording her professional disagreement on that system with the actions taken by her colleagues on the client record, which could be accessed by both the children and their parents. Given that the claimant admitted this conduct, SD had reasonable grounds for his belief that the misconduct identified in allegation 6 was established.

Was there a reasonable investigation?

121. The respondent conducted a thorough and balanced investigation. KD interviewed the claimant and 8 further witnesses. He reviewed the SWIFT records and the other documentary evidence collated during the course of the hearing. He prepared a detailed investigation report, extending to 23 pages, which set out the findings of his investigation. He appended notes of the interviews conducted and the documentary evidence gathered to his report (other than the SWIFT notes, which were extensive). There were no further steps which should, reasonably, have been undertaken during the investigation. The Tribunal did not find that KD's decision not to interview or contact DL fell outside the band of reasonable responses open to the respondent in the circumstances, as asserted by the claimant. The explanation which he provided, namely that interviewing her would have made no difference as it was clear from the other evidence available that no Children's Hearing had been organised, was reasonable in the circumstances.

Procedure

122. The respondent investigated the allegations against the claimant. They informed her of the allegations and the potential consequences and provided copies of the evidence compiled. The claimant was given the opportunity to respond to the allegations at the disciplinary hearing and was provided with the opportunity to appeal. She was afforded the right to be accompanied at all stages.

123. The claimant sought to challenge the procedure adopted by the respondent in a number of respects. The Tribunal's conclusions in relation to each are set out below:

a. Not allowing the claimant to put forward whistleblowing as an explanation for the allegations being levelled against her. The Tribunal did not accept this was the case. The claimant was able to fully state her position in both the investigation and disciplinary process, both at the meetings held with her and in additional documents submitted by her, which the respondent accepted and considered. SD considered the position stated by the claimant at the disciplinary hearing, namely that the disciplinary investigation was instigated because of the issues which the claimant had raised with Safecall. He stated in the disciplinary outcome letter that he had done so and why he believed that this was not the case.

b. RJ not being present at the disciplinary hearing. In the letter dated 19 June 2019, inviting her to a disciplinary hearing, the claimant was informed of who would be called by the respondent as witnesses to give evidence. It was clear from the terms of that letter that RJ would not be present. The Tribunal concluded that it did not fall outside the band of reasonable responses open to the respondent in the circumstances to decide not to call RJ as a witness, and require her to participate in quasi-judicial proceedings, while she was absent from work with work related stress, which she attributed to the actions of the claimant. This is particularly the case where the respondent made it clear to the claimant that they would not be calling RJ as a witness well in advance of the disciplinary hearing and informed her in the letter that she could call further witnesses if she wished, but she took no steps to attempt to call RJ as a witness.

c. The IT Fair Use Policy being relied upon by SD. SD mentioned in evidence to the Tribunal that he thought that the IT Fair Use Policy was relevant to the allegations, albeit it was not mentioned in his outcome letter as it was not central to his decision. The Tribunal concluded that

there was no unfairness in this given that it was expressly mentioned in the investigation report, a copy of which was provided to the claimant in advance of the disciplinary hearing. She accordingly had the opportunity to comment on this, if she wished but, in any event, it was not central to the decision taken.

d. The delay in the disciplinary hearing taking place and the outcome being issued. The Tribunal found that the delay in the disciplinary hearing taking place was solely due to the claimant: she was given the option of earlier dates in June and July 2019. She however requested that the hearing take place on 30 August 2019. Other than a delay in the issuing of the outcome, the respondent followed their internal procedures. While the Tribunal found that this delay was significant and that the outcome ought to have been issued earlier, they accepted the reasons advanced by SD for this and did not feel that the delay undermined the fairness of the entire process.

The Tribunal accordingly concluded that the procedure adopted by the respondent was fair and reasonable in the circumstances.

Did the decision to dismiss fall within the band of reasonable responses?

124. The Tribunal then moved on to consider whether the decision to dismiss the claimant as a result of the identified misconduct, fell within the range of reasonable responses available to a reasonable employer in the circumstances.

125. SD reached the conclusion that allegations 1-6 inclusive (individually and cumulatively) amounted to gross misconduct and the appropriate sanction was summary dismissal. The Tribunal found that the decision to categorise allegation 4 as gross misconduct, rather than misconduct, fell outside the band of reasonable responses. No reasonable employer would or could have reached the conclusion that misconduct of this nature was so serious that it amounted to gross misconduct, potentially meriting summary dismissal. The Tribunal also saw some strength in the claimant's argument that there was a degree of crossover/duplication in allegations 1 & 2. Notwithstanding these

points, and having regard to the factual matters established in allegations 1 & 2 (whether considered as one allegation or two separate matters), as well as allegations 3, 5 & 6, which were also established, the Tribunal found that the conclusion that the claimant's conduct amounted to gross misconduct, and the decision to summarily dismiss her as a result of that established conduct, fell within the range of reasonable responses available to a reasonable employer in the circumstances. SD considered alternatives to dismissal but felt that her conduct was so serious that dismissal was the only appropriate option. In reaching his decision, SD took into account that the claimant was in a position where she required to demonstrate high standards of trust and integrity and work, individually and as part of a team, to ensure the rights of vulnerable children and their families were protected, adhering to legal and professional agreements while doing so. SD concluded that the claimant had not done so, showed no remorse and would act in the same manner in the future, if presented with a similar scenario. The claimant's conduct, in that context, entirely undermined her continued employment with the respondent.

126. The Tribunal accordingly found that SD's conclusion to dismiss the claimant fell within the band of reasonable responses open to the respondent in the circumstances.

Conclusions re s98(4)

127. For the reasons stated above the Tribunal concluded that the respondent acted reasonably in treating the claimant's conduct as a sufficient reason for dismissal. The claimant's dismissal was accordingly fair.

Employment Judge: **M Sangster**
Date of Judgment: **11 January 2022**
Entered in register: **12 January 2022**
and copied to parties