EMPLOYMENT TRIBUNALS

Claimant: Ms K Davis

Respondent: 1. The Governing Body of St Michael's Church of England School Middleton
2. Ms Caroline McKeating

Heard at: Manchester **On:** 7–8, 11–12 December 2023

Before: Employment Judge Slater
Mr B Rowan
Ms V Worthington

REPRESENTATION:

Claimant: In person
Respondent: Ms L Quigley, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint against Ms McKeating is dismissed on withdrawal by the claimant.

2. The Tribunal has no jurisdiction to consider the complaints of detrimental treatment contrary to Section 44 of the Employment Rights Act 1996 which were presented out of time, except for the complaint at 5.15 in the list of complaints and issues.

3. The complaint of detrimental treatment at 5.15 in the list of complaints and issues, (an allegation that Caroline McKeating told the grievance panel incorrectly that they had not received any evidence from the claimant in support of her grievance), is not well founded.

4. The complaint of unfair dismissal contrary to Section 100 of the Employment Rights Act 1996 is not well founded.

5. The remedy hearing provisionally arranged for 1 March 2024 is cancelled.

REASONS

Complaints and Issues

1. No list of complaints and issues had been agreed prior to the start of the hearing. The respondent had produced a draft list of issues which had not been agreed with the claimant. The Judge produced an amended list of complaints and issues setting out the complaints under Section 44 and 100 of the Employment Rights Act 1996. This list of complaints and issues was agreed by the parties and is included in the Annex to this judgment and reasons.

2. There had been no discussion at the case management Preliminary Hearing about whether the claimant was bringing complaints relying on the protected disclosure provisions. The Judge raised with the claimant whether she wished to bring such complaints and the claimant considered this overnight after the first day of the hearing. On the second day of hearing, the claimant produced a list of points related to protected disclosure complaints. After some discussion at the start of the second day of hearing, the claimant decided not to ask to pursue the complaints under the protected disclosure provisions. The Tribunal, therefore, went on to consider only complaints under Section 44 and Section 100 of the Employment Rights Act 1996.

Evidence

3. The Tribunal heard evidence from the claimant herself and for the respondent from Ms Caroline McKeating, Ms Christine Taylor and Ms Carmelina Skarrat. Ms McKeating is the headteacher of St Michael's Church of England School. Ms Skarrat and Ms Taylor are both employed by the respondent as Before and After School Club workers. There was a bundle of documents of 717 pages.

Reasonable Adjustments

4. The hearing began as an in person hearing and the first two days of the hearing were held in person. The claimant has a hearing impairment and had considerable difficultly hearing in the physical hearing room. No reasonable adjustments had been discussed or requested prior to the final hearing. When in the physical hearing room, the claimant could not suggest anything we could do to assist other than to face her when speaking and to speak up, which we did. Ms Quigley, the respondent's counsel, suggested it might assist the claimant if the hearing was by video conference. The claimant agreed that this was likely to help her since she could then use headphones. We, therefore, converted the third and fourth days of the hearing to a hybrid hearing with the parties attending remotely and the Tribunal in the Tribunal hearing room.

Facts

5. We will first give an overview of the chronology to set matters in context and then return to the specific allegations and facts relevant to those allegations.

6. The respondent is a one form entry school from reception to year 6. Key Stage 1 is years 1 to 2, Key Stage 2 is years 3 to 6. The school also operates a breakfast club and after school club. The breakfast and after school clubs are held in the respondent's school premises, including a pre-school building owned by the respondent but used during the school day by a third- party pre-school provider.

7. The claimant was employed by the respondent from 1 September 2019 as a before and after school club leader.

8. As a result of the Covid 19 pandemic, schools were closed in the latter part of March 2020, other than for children of key workers and vulnerable children. The school continued to provide a breakfast club and after school club for children of key workers and vulnerable children during this period. From March to July 2020, the claimant worked in the kids' club on a rota basis. She did not raise any concerns about her safety or that of others during this period.

9. Ms McKeating is the Headteacher of the school. During the summer holidays, she produced a risk assessment in relation to the proposed re-opening of the school to all children from September 2020. This was approved by the local authority. On 2 September 2020, Ms McKeating held an all staff training day when she went through the risk assessment with staff.

10. The risk assessment dated August 2020 (page 534) included a section headed "breakfast club". There was no specific section headed "after school club" but we accept Ms McKeating's evidence that the detail in the breakfast club was also intended to apply to the after-school club. The claimant attended the training day and did not raise any concerns with Ms McKeating about health and safety.

11. Following the training day, Ms McKeating sent out suggestions for the new arrangements for the kids' club at the start of term: the breakfast club was relocated to the main school hall rather than being in the pre-school building; they maintained bubbles with staff being allocated to a bubble; tables were socially distanced; the children had their own activities to play with at the tables so they did not mix with other bubbles; the children helped themselves as much as possible to food rather than being served; and staff wore masks. At after-school club, staff were assigned to different groups; reception and key stage 1 were in the pre-school building; and children from key stage 2 were in the hall. The claimant was allocated key stage 2, being based in the school hall. Social distancing was encouraged and children were expected to stay at their tables. They went outside as much as possible.

12. Between September and December 2020, the school, including the kids' club, remained open for all children. During this time, the claimant did not raise any health and safety concerns with Ms McKeating. The claimant and Ms McKeating had a good working relationship.

13. In December 2020 many people were concerned about a rise in Covid transmission with a new variant of the virus. There was uncertainty as to whether

schools would be re-opening or not in January 2021. Schools were due to re-open on 4 January.

14. On 3 January 2021, Ms McKeating emailed all staff to update them on the latest correspondence she had received from the local authority, writing that, at that time, she was intending to open school on Monday if staffing allowed. She invited people to contact her if they would like to talk things through.

15. The claimant replied to Ms McKeating on 3 January, writing that she was in UNISON and would be following their advice and not opening breakfast club on Monday. She said she was not sure about the others but would let them know about herself. She said she would, however, be available to work from home. In her email (page 138), she did not raise any specific concerns about risks to health and safety but wrote that she would like to draw up a new risk assessment for kids' club before they returned because they worked with children from all bubbles and they were in an informal play situation. She asked Ms McKeating to email her the risk assessment for the school so that the claimant could draft one for the kids' club. She wrote that, when everything was in place, she would, of course, be in to work with key worker children.

16. There was further correspondence between the claimant and Ms McKeating on 3 January about whether there would be enough staff to run breakfast club and after school club. The claimant wrote that Carmel and Pam were both prepared to come in and she hadn't been able to get hold of Chris for her decision. Ms McKeating wrote that they would have sufficient staff to run breakfast club but, if the claimant was not going to be in, they would need to close the after-school club for key stage 2. She asked the claimant to let parents know.

17. The school reopened on 4 January 2021. The claimant did not return to work in the school, although she worked from home.

18. In the morning of 4 January, Ms McKeating wrote to the claimant (page 160), writing that she had obtained advice from the local authority to say that the claimant needed to put in writing exactly why she had not returned to work, not just that she was following union advice. Ms McKeating attached the risk assessment they had in school and wrote that she was due to review it again that day with Meryl Bruen, who was the Deputy Head and the designated health and safety lead for the school. Ms McKeating wrote to the claimant:

> "I would like to work with you to ensure that the Ks2 after school club can open so please think about what you think will help and/or what your main concerns are so that we can find a solution.
>
> "At the moment all staff are in school here and in all of the schools that are in our alliance, which is reassuring to me. Hopefully, with some adjustments, you will feel it is also safe to return asap. Can I also check whether you fall into any of the categories i.e. vulnerable due to underlying health issues?"

19. The claimant replied that morning saying that she was following the advice from the union which she copied and pasted. This advice was headed "If your school is open to all pupils next week". It included the following:

> "After careful consideration and scientific advice given to government and current infection rates, UNISON does not believe it is safe for you to attend the workplace at present if your school is fully open to all pupils."

UNISON advised that their members should advise their Headteacher or employer that they would not be attending the workplace on Monday but would be available to work remotely from home or would only be in school to support provision and the learning of key worker and vulnerable children if necessary. The claimant wrote that they had also included a model letter which contained information about health and safety law. The claimant wrote that she would forward it to Ms McKeating as soon as she had had a chance to read it in detail.

20. Ms McKeating replied the same morning, asking the claimant to send her the model letter. She wrote that, as an employee, the claimant was advised to put her reasons in writing. She also wrote that she felt it essential that the claimant rang her so they could talk through the claimant's specific concerns in relation to safety and what they could do to make the workplace as safe as possible for the claimant.

21. The claimant responded that afternoon, sending a copy of the model letter from the union which she said she had changed by putting her name and the name of the school in. She wrote in her covering email (page 158):

> "Please understand that this is not a reflection on your efforts to keep St Michael's covid safe of which you are doing everything possible. I am responding to the national rise in the new variant of covid – not in any way because I feel that you are not trying to make the school covid-secure".

22. The model letter sent by the claimant (page 143) referred to various legal duties to protect the health, safety and welfare of staff and pupils and referred to recent advice from SAGE that schools should not open in January other than for children of key workers and vulnerable children. It referred to new variants of Covid 19 that were highly infectious and that infection rates had increased significantly since schools closed. The letter included the following: "If I do attend I believe that this will present a serious and imminent danger to my health and safety". The letter concluded: "In the meantime, I am of course willing to carry out any of my duties or alternative agreed duties at my grade that can be undertaken from my home, and to be in school supporting provision and the learning of key worker and vulnerable children where necessary".

23. Although Ms McKeating had asked the claimant to notify parents that after-school club would be closed to key stage 2 pupils, it appears from the register for that day that there were some key stage 2 pupils who attended after school club. The claimant suggests that the registers show that staff were working across more than one bubble but we do not feel able to draw that conclusion on the basis of the registers alone.

24. On the evening of 4 January 2021, the government announced that schools would be closed from the next day, apart from for children of key workers and vulnerable children. In accordance with this announcement, the respondent school was closed to all but the children of key workers and vulnerable children from 5 January 2021. This continued to be the case until 8 March 2021 when schools were re-opened to all pupils.

25. On 5 January 2021, the claimant sent back the risk assessment, raising various concerns about kids' club, Ms McKeating responded to these concerns with her comments. Ms McKeating also wrote that the claimant's letter outlining her reasons for not attending work was no longer valid as the last sentence had stated that she would be in school supporting provision and the learning of key worker and vulnerable children where necessary and they now only had children who were vulnerable or who had parents were critical workers (page 164).

26. A third national lockdown began on 6 January 2021.

27. On 6 January 2021, the claimant and Ms McKeating had a telephone meeting. Ms McKeating asked the claimant to try and explain what specifically was making her feel unsafe. The claimant said that she didn't feel that a bit of cloth and plastic would stop her getting the virus and that there was no point in going through the points she had raised in the risk assessment as nothing Ms McKeating could say would make her feel safe. Ms McKeating said that it sounded like that the claimant was feeling anxious and suggested she take advice from her GP or PAM Assist and the union. The claimant said she was not feeling anxious; the claimant said that she was reacting to a global pandemic and following the advice of SAGE, which the government was not doing. Ms McKeating said that the claimant was contractually obliged to come into work unless she was critically extremely vulnerable or had a fit note. The claimant said she would contact her union and Ms McKeating said that she would contact HR. Ms McKeating agreed that the claimant could work from home until she had contacted her union. Ms McKeating asked the claimant to contact her by the end of the school day on 7 January with the outcome of her union's advice (page 172).

28. Ms McKeating and the claimant had a further call on 7 January 2021. The claimant said that her union's advice was that "Article 44" said that, if she did not feel safe, she did not have to return to work. Ms McKeating said that HR said that, unless the claimant was critically vulnerable or had a fit note or self-certification, she should attend work. The claimant said that there was no point in going through concerns because none of what was in place would keep her safe. The meeting was brought to an abrupt end because Ms McKeating had to deal with a safeguarding concern (page 174) .

29. Also on 7 January, the claimant's trade union representative wrote to Ms McKeating (page 182). The representative wrote that hopefully the school would revise the risk assessment to take into account the claimant's concerns so she felt comfortable to withdraw her Section 44 letter and go back to work. He wrote that it seemed the respondent had not provided the union with a copy of the Covid risk assessment and asked Ms McKeating to forward a copy of this.

30. On 8 January there was a further telephone conversation between the claimant and Ms McKeating. The claimant asked whether Ms McKeating would like to go through the risk assessment that she had sent and Ms McKeating said she was awaiting HR to contact her about next steps and at the moment she was agreeing to the claimant working from home.

31. On 8 January 2021 the government published updated guidance regarding holiday and after school clubs (page 475). Contrary to the understanding the claimant expressed in this Tribunal hearing, we find that this guidance and subsequent updated guidance was intended to apply to breakfast club and after school club provision held

in school buildings by schools. At page 476, it identifies "schools or colleges which offer extracurricular activities or provision for children before and after school" as one of the organisations the guidance was for. The claimant expressed, at this Tribunal hearing, the understanding that the guidance only applied to out of school settings which were defined as not including schools. However, the section on who the guidance was for listed out of school settings as one type of organisation to which the guidance applied as well as the guidance applying to schools or colleges offering provision for children before and after school.

32. On 12 January 2021 the claimant's trade union representative wrote again to Ms McKeating since the risk assessment had not been provided. Ms McKeating apologised for having overlooked the email from the 7 January and attached the risk assessment. She wrote that she had spent an hour that morning going through that risk assessment with the claimant. The claimant's trade union representative replied that the risk assessment was missing the sharing of the pre-school building which he understood was used by a third-party pre-school (page 177). Ms McKeating responded saying that the claimant did not work in the pre-school building, only the school hall. The trade union representative replied saying that the main school risk assessment did not make any reference to the pre-school building so, whether it was the claimant or another member of staff, it should include it. Ms McKeating later wrote to say that there was mention of the pre-school building in the main risk assessment but she had made further additions to this (page 190).

33. Ms McKeating wrote to the claimant on 15 January 2021, responding formally to the claimant's letter of 4 January. She sent her an updated risk assessment questionnaire and risk assessment questionnaire for her to complete (page 221). The claimant duly completed this.

34. On 20 January 2021, Ms McKeating received a letter from the Health and Safety Executive who wrote that a concern had been raised that kids' club had not been considered in the Covid risk assessment and asking for a copy of that assessment. Ms McKeating sent them a copy of the risk assessment and the Health and Safety Executive replied that they considered the risk assessment to be in line with Department for Education guidance.

35. On 21 January 2021, Ms McKeating wrote to the claimant (page 262) following a conversation that morning. She wrote that she had contacted the claimant as she had still not received a clear response from the claimant as to why she did not feel safe to return to her post as manager of the kids' club. She attached a link to the latest government guidance. She wrote that, as discussed, there would be a maximum of eight children attending the key stage 2 group and the group would not be added to until guidance changed or the schools were allowed to fully open. She also advised the claimant that the Health and Safety Executive had confirmed that they were satisfied with the risk assessment she had sent them. Ms McKeating wrote that she would telephone the claimant on Tuesday to discuss her return to work.

36. On 22 February 2021, the government announced that schools were to fully reopen on 8 March. The claimant requested that, rather than phoning her on Tuesday, from now on they conducted calls via Skype or Teams so that her trade union representative could also attend.

37. On 3 February 2021, the claimant and her trade union representative had a video meeting with Ms McKeating. No notes were taken of the meeting. Ms McKeating found the meeting difficult, finding the claimant's trade union's representative aggressive. The claimant's trade union representative pointed out that children were grouped in three ways rather than two. Ms McKeating apologised for the error and changed the groupings ready for the next day. The claimant raised the fact that she would be working in two different locations because of grouping changes. Ms McKeating explained that there would be more than 72 hours between her working in one location and the other and they had enhanced cleaning in place. The claimant expressed concern that she was at a higher risk of contracting Covid 19 than school staff due to school staff mixing with only one year group whereas she was mixing with four year groups. Ms McKeating said that the risk to her was lower due to the level of time she was with the groups compared to the school staff and the fact that she was with fewer children.

38. On 4 February 2021, Ms McKeating had a Zoom meeting with the claimant and the deputy manager of the kids' club to discuss the new groups. Because of the claimant's concerns and due to the fact that numbers were low, after the meeting, Ms McKeating emailed the claimant and proposed a third option, suggesting that the claimant could be responsible for year 4 only. The claimant would then work in a separate area from the rest of the group. Ms McKeating would take the claimant's place and work with the remaining children. The claimant agreed to return to work on this basis.

39. The claimant returned to work in school, working with year 4 only, until she started sick leave after a meeting on 26 February.

40. The school was closed for half term between 15 to 19 February 2021.

41. On 22 February 2021, the Government announced that schools were to fully re-open on 8 March 2021.

42. On 23 February 2021, Ms McKeating emailed the claimant the government guidance. She asked to meet with the claimant and Carmel to discuss how they saw the return of all children i.e. how they thought they should group them.

43. On 26 February, Ms McKeating met with the claimant and the Deputy Manager. Ms McKeating explained that the new guidance issued by the government stated that all children could return fully to school and enquired whether the claimant was prepared to return to kids' club. The claimant got upset and said she was worried about everyone. The claimant went home.

44. The claimant began a period of sick leave which continued until her resignation. She initially self-certified and, from 10 March 2021, she had fit notes for her absence stating "stress at work" as the reason for absence.

45. The respondent has a policy on sickness absence which appears beginning at page 636 of the bundle.

46. Ms McKeating reviewed the risk assessment a number of times. She discussed this with the claimant a number of times and put the claimant's initials against reviews when she had discussed it with the claimant.

47. On 1 March 2021, the claimant called the school to ask what the arrangements would be for kids' club from 8 March. Ms McKeating explained that the arrangements would be the same as previously: breakfast and after school attendees to be in the hall and after school only to be in the pre-school building.

48. Ms McKeating tried to contact the claimant by phone without success between 1 and 17 March.

49. On 17 March, Ms McKeating emailed the claimant in respect of her absence to arrange a health-related absence meeting.

50. On 19 March, Ms McKeating wrote to the claimant seeking to arrange a meeting on the 29 March. Ms McKeating used a pro forma letter which she thought seemed appropriate, although later she was told that it was not the correct letter. The letter was headed "employee welfare support meeting: sickness absence". It included that Ms McKeating would like to arrange to meet with the claimant to see how she was, to talk about her current health situation and how they may be able to support her once she was fit to return to work. Ms McKeating advised the claimant in this letter of her right to be accompanied by a trade union representative or a work colleague. Ms McKeating wrote: "Please do not be anxious about this meeting. If you have any concerns, please do not hesitate to contact me [giving the telephone number] or alternatively you may wish to contact your trade union representative prior to the meeting for advice and support".

51. Ms McKeating met with the claimant and her trade union representative on the 29 March 2021. Ms McKeating began by explaining that, although the letter stated it was a welfare support meeting, the letter was sent in error and that she had written to the claimant due to being unable to contact her (page 288). The claimant apologised and said she had seen Ms McKeating's number and chosen to ignore her calls. The claimant said she was still concerned about arrangements for kids' club; she was specifically concerned about children and staff and the wider community. Ms McKeating said she was following guidance and felt that school and wraparound care were as safe as they could make it. The claimant said she could not cope with current arrangements, especially grandparents being in danger. She said it was not just about her own personal safety but she was worried about others. The claimant's trade union representative suggested that, as manager of the kids' club, it might be better for the claimant to be in work, to monitor the risk assessment and ensure it was being followed. The claimant said she would not be able to do that; if she came back, it would be just the same. She was stressed and tearful. The trade union representative said that the claimant, therefore, needed to return to her GP and Ms McKeating urged her to get support from counselling.

52. The government issued updated guidance on 7 April concerning holiday and after school clubs.

53. Ms McKeating arranged to ring the claimant on 21 April. Ms McKeating tried to phone the claimant on 21 April but received no answer so she sent an email inviting the claimant to a meeting on 29 April. This was changed to 30 April so the claimant's trade union representative could attend.

54. On 30 April 2021, the claimant met with Ms McKeating and the claimant's trade union representative (page 293). This was a health-related absence interview stage

one meeting. The claimant accepted in evidence that she had hit the trigger for this meeting because of absence of 20 calendar days and absence due to stress. During the meeting, the claimant said that she did not feel they did enough to stop the spread of Covid; she said that children were not kept separate enough; kids' club was not operated the same as school; they crossed bubbles. Ms McKeating said she was not sure how they could move this on as the situation was going to be with them for a long time and she could not operate with seven bubbles. Ms McKeating suggested that a reasonable adjustment which might help the claimant to return would be to use her skills and work as a Teaching Assistant in class to get back into the school situation. The claimant said she would think about this. A review meeting was set for 11 June 2021.

55. On 4 May 2021, the claimant wrote to Caroline McKeating asking for various information about kids' club so that she could prepare for a return to work. In response, Ms McKeating sent the risk assessment which had been updated in February and answered other questions

56. By email dated 6 May 2021, the claimant resigned. Her letter included the following:

> "…despite a global pandemic you treated the covid health and safety of the staff in the main school more favourably than me and the other Kids Club staff. This left us and also the children who attended Kids Club at a higher risk of contracting, getting ill and spreading the virus than the staff who worked in the main school.
>
> "Therefore, if I was to return to work, I would not feel safe if there was another wave of covid infection and do not believe you would support me in creating a safe environment for Kidz Club. In addition, because I feel that you didn't take my covid safety concerns seriously, I don't believe that you would take any other of my health and safety concerns seriously so would not feel safe regardless of covid.
>
> "The RA that you sent me on 5/05/21 does not seem to have been updated as you claimed because it still has my name on it as a member of staff providing cover for the children – even though I have not attended work since 26th February 2021 due to stress and anxiety caused by the situation that I have outlined above. Also, you have put my initials at the bottom of the RA and dated them 26/02/21. That was the date I had to go home ill and I certainly did not agree that the RA was covid safe and would like my name removed from it.
>
> "Neither am I confident that the current organisation of Kids Club that you outlined in your email on 5/05/21 is in line with current covid guidance.
>
> "Under the circumstances, I do not feel that it would be productive for me to return to work and am left with no option other than to hand in my notice. Could I request that we come to an agreement so that I do not need to work my notice period".

57. The claimant subsequently requested to work from home during her notice period. This request was refused and the claimant then provided a sick note dated 13 May 2021 covering her absence until her resignation took effect on 6 June 2021.

58. The claimant presented a grievance on 21 May 2021. The grievance was heard in September 2021 but the claimant did not attend. The claimant included various evidence with her grievance. We find this was all included in the pack which was sent to the grievance panel members.

59. At the grievance hearing on 24 September 2021, Ms McKeating is recorded as saying that Ms Davies had not submitted any evidence. We accept the evidence of Ms McKeating that the note should correctly have said "any further evidence" since all the claimant's evidence submitted with her grievance had been included in the packs for the grievance panel.

60. The claimant began early conciliation on 20 July 2021. The ACAS Early Conciliation Certificate was issued on 31 August 2021. The claimant presented her claim to the Tribunal on 22 September 2021.

61. The claimant's grievance was dismissed by a letter dated 8 October 2021 (page 455).

62. In relation to the particular allegations brought by the claimant we make the following further findings of fact.

63. Meryl Bruen was the designated health and safety lead. Lucy Blunn was the designated Governor responsible for health and safety. The claimant was aware at all relevant times that Meryl Bruen was the designated health and safety lead. The claimant accepted in cross examination that she could have contacted Meryl Bruen about her concerns but said that she was trying to sort things out rather than opening the net to other people.

64. We find that Ms McKeating put in place measures in accordance with the government guidance and Local Authority guidance in place at the time. The government guidance allowed for bubbles in wraparound care consisting of more than one year group, where it was not possible, or it was impractical, to group children in the same bubbles as they had been in during the school day. The guidance gave an example: if they only had one or two children attending their provision from the same school day bubble, they may need to group children with other children outside their school day bubble. The guidance (page 481) was that, if they needed to do this, they should seek to keep children in small consistent groups of no more than fifteen children with the same children each time, as far as this was possible. The guidance provided that it would be appropriate for one staff member to supervise up to two small groups.

65. The claimant took a different view as to what measures were required to keep everyone safe from that included in the government guidance. Her main concern was about children from different school day bubbles mixing at breakfast club or after school club. She thought that the respondent should have seven separate bubbles so that they had one bubble for each year group and that they should employ additional staff to make this possible.

66. Ms McKeating did tell the claimant in January 2021 that she was the only person to have submitted a Section 44 letter. This was factually accurate. No other staff submitted such a letter. All other staff returned to work in the school, the breakfast club and after school club.

67. At the meeting by telephone on 6 January 2021, Ms McKeating said to the claimant that, as Ms McKeating was responsible for the safety and welfare of pupils and staff, she would sort out staffing and there was no need for the claimant to contact staff. We find that this was done in a supportive way. Ms McKeating did not prohibit the claimant from contacting other staff and the claimant did continue contact with other staff.

68. We heard no evidence to support the allegation that Ms McKeating repeatedly told the claimant that she should only concern herself with her own health and safety. The claimant has not satisfied us that this occurred.

69. The claimant did request the pre-school provider's risk assessment on a couple of occasions. Ms McKeating did not give this to the claimant; she was advised by their health and safety advisor that it was not relevant; the staff from both settings did not mix.

70. The claimant did not know about Ms McKeating's alleged comment that they had not received any evidence from the claimant in support of her grievance until disclosure in these proceedings.

Submissions

71. Ms Quigley and the claimant made written submissions with some additional oral submissions. We do not seek to summarise these since the written submissions can be read if required.

The Law

72. The relevant statutory provisions are those contained in Section 44 and Section 100 of the Employment Rights Act 1996 (ERA). Section 44 applies as it was prior to amendments made which took effect from 31 May 2021. The relevant parts of s.44 are as follows:

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

(d) In circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work.

73. Section 48(2) ERA provides that it is for the employer to show the ground on which any act or deliberate failure to act was done.

74. The relevant parts of section 100 ERA are as follows:

"100 Health and safety cases

(1) 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 –

…….

(c) being an employee at a place where –

(i) there was no such representative or safety committee, or

(ii) There was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matters by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety,

(d) In circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any danger as part of his place of work, or

……."

75. Section 100 ERA has been considered in the context of the Covid pandemic in the case of **Rodgers -v- Leeds Laser Cutting Limited [2022] EWCA Civ 1659** Court of Appeal. In paragraph 17 of the judgment, Lord Justice Underhill commented that, in his view, Section 100(1)(d) should be construed purposively rather than literally and that it was sufficient that the employee had a reasonable belief in the existence of the danger as well as its seriousness and imminence. At paragraph 19 he expressed the view that it was quite clear that the perceived danger must arise at the workplace; the employee must believe that they are subject to the danger as a result of being at the workplace. If that were not the case, the question of them leaving the workplace would not arise. He wrote that it did not follow that the danger need be present only at the workplace. Lord Justice Underhill wrote at paragraph 21:

"On that basis the questions which the ET has to decide in a case under Section 100(1)(d) can be analysed as follows:

(1) Did the employee believe that there were circumstances of serious and imminent danger at the workplace? If so:

(2) Was that belief reasonable? If so:

(3) Could they reasonably have averted that danger? If not:

(4) Did they leave or propose to leave or refused to return to, the workplace, or the relevant part, because of the (perceived) serious and imminent danger? If so:

(5) Was that the reason (or principal reason) for the dismissal?"

76. In paragraph 59, Lord Justice Underhill returned to the question of whether the danger had to be exclusive to the workplace. He wrote "I can see nothing in the language of Section 100(1)(d) that requires that the danger should be exclusive to the workplace. All that matters is that the employee reasonably believes that there is a serious and imminent danger in the workplace. If that is the case, it is the policy of the statute that they should be protected from dismissal if they absent themselves in order to avoid that danger. It is immaterial that the same danger may be present outside the workplace – for example, on the bus or in the supermarket".

77. Section 44 and Section 100 were considered in the EAT decision of **Miles -v- Driver and Vehicle Standards Agency [2023] EAT 62.** The EAT rejected an appeal against the decision of the Employment Tribunal that the claimant did not hold a reasonable belief in a serious and imminent danger to himself for the purposes of Section 44(1)(d) and 100(1)(d). The claimant was employed as a Driving Examiner. He had a condition which made him clinically vulnerable but not classified as clinically extremely vulnerable. He refused to return to work when tests began again in July 2020 and his pay was stopped and he resigned on 10 August 2020. The Employment Tribunal made a finding that the claimant had formed a fixed view that nothing less than social distancing of 2 metres would be safe for him. The Tribunal found that he regarded any other measure as insufficient and that his assessment of the risk levels lost objectivity. The Employment Tribunal found that the claimant had a reasonable belief of circumstances connected with his work which were harmful to health against the background of the information published. For the purposes of Section 44(1)(c), the Tribunal commented that what is believed to be harmful to health is not the same as a belief in serious and imminent danger. The Tribunal concluded that the opinion which the claimant held of a serious and imminent danger to himself if he returned to work was not a reasonable one. There were mitigating measures which had been put in place which would have provided reasonable protection and, had he informed himself properly rather than reaching a premature conclusion, he would have reasonably formed that view. In those circumstances the claims under Section 44(1)(d) and (e) could not succeed.

78. In a s.100 unfair dismissal case, as for other categories or "automatic unfair dismissal," where the employee lacks the requisite continuous service to claim "ordinary unfair dismissal", the claimant has the burden of proving, on the balance of probabilities, that the reason for dismissal was the s.100 reason: **Smith v Hayle Town Council 1978 ICR 996 CA**.

Conclusions

Section 44 ERA detriment claim

Did the circumstances in Section 44(1)(c) apply?

79. Section 44(1)(c) requires either that the claimant was an employee at a place where there was no health and safety representative or a safety committee or that if there was such a representative or committee it was not reasonably practicable for the claimant to raise the matter by those means. The claimant accepted that there was a health and safety representative at the place where the claimant worked. The claimant was aware of the identity of the health and safety representative, Meryl Bruen, and accepted that she could have contacted her. The claimant chose not to do so because she was raising her concerns directly with Ms McKeating. We conclude that it was reasonably practicable for the claimant to raise her concerns by means of contacting the health and safety representative. The circumstances in section 44(1)(c) do not apply and, for this reason, the complaint of being subjected to a detriment on the grounds in s.44(1)(c) is not well founded.

80. Nevertheless, we go on to comment on what we would have found, had we concluded that it was not reasonably practicable for the claimant to raise her health and safety concerns by means of the health and safety representative or committee. We accept that the matter raised by the claimant about working with children from different bubbles was raising matters which she reasonably believed to be harmful or potentially harmful to health and safety, even though the respondent was complying with government guidance.

Did the circumstances in section 44(1)(d) ERA apply?

81. For s.44(1)(d) to apply, since this is the same as s.100(1)(d), the first four questions set out in **Rodgers** are applicable, namely:

81.1. Did the employee believe that there were circumstances of serious and imminent danger at the workplace? If so:

81.2. Was that belief reasonable? If so:

81.3. Could they reasonably have averted that danger? If not:

81.4. Did they leave or propose to leave or refused to return to, the workplace, or the relevant part, because of the (perceived) serious and imminent danger?

82. In accordance with the purposive interpretation in **Rodgers**, it is not necessary that, objectively, there are circumstances of danger. The focus is on the claimant's belief, which must be reasonable.

83. We accepted, when considering s.44(1)(c) that the matter raised by the claimant about working with children from different bubbles was raising matters which she reasonably believed to be harmful or potentially harmful to health and safety. As the Tribunal in the **Miles** case noted, what is believed to be harmful to health is not the same as the belief in serious and imminent danger. We agree with the view expressed by the Tribunal in **Miles** that serious and imminent danger is at the unacceptable end of the spectrum of risk to harm. We have doubts that the claimant's belief was that there were circumstances of serious and imminent danger at the workplace. We note,

particularly, that, when writing to Ms McKeating on 4 January 2021, the claimant stressed that her refusal to return to work was not a reflection on Ms McKeating's efforts to keep the school covid safe, writing that Ms McKeating was doing everything possible. She wrote that she was responding to the national rise in the new variant of covid, not because she felt Ms McKeating was not trying to make the school covid-secure (see paragraph 21). Even if the claimant's belief was of danger of this degree, we conclude that this belief was not reasonable. We conclude that, since the respondent was complying with government guidance, the claimant could not reasonably have believed there to be circumstances of danger which were serious and imminent. For this reason, we conclude that the complaint under s.44(1)(d) is not well founded.

<u>What we would have found in relation to the individual allegations, had we concluded that the circumstances in s.44(1)(c) or (d) applied</u>

84. Although, for the reasons we have given, the s.44 detriment complaints fail, we go on to consider what we would have concluded in relation to the individual allegations had we concluded that the circumstances in Section 44(1)(c) or (d) would have applied.

85. There is also the jurisdictional question of whether the complaints were presented in time or, if it was not reasonably practicable to do so, whether the complaints were presented within a reasonable time after expiry of the time limit. We consider the merits of the individual complaints before addressing the jurisdictional question since our conclusions on the merits may impact on the time limits point. If there was a series of detrimental treatment ending with the final act relied on, which is Ms McKeating telling the grievance panel incorrectly that they had not received any evidence from the claimant in support of her grievance, this could mean that failures were part of a similar acts or failures making earlier complaints forming part of that series brought in time.

86. In considering the merits of the individual allegations, we adopt the numbering of the allegations in the list of complaints and issues.

5.1 January to May 2021 failing to consistently put in place the appropriate guidelines and safeguards so that the claimant felt safe enough to come in to work.

87. We have found that Ms McKeating was putting in place measures in accordance with government guidance and local authority guidance. She had provided risk assessments to the local authorities which were approved. The Health and Safety Executive also approved the risk assessment. Although we accept that the claimant was genuine in her belief that it was not safe to come into work, the claimant has not satisfied us that the respondent failed to consistently put in place the appropriate guidelines and safeguards. This complaint would have failed on its facts. Even if we had concluded that there was detrimental treatment as alleged, we would have concluded that the treatment was because the respondent was trying to comply with government guidance. The respondent would have satisfied us that this was not done on the grounds that the claimant had taken the action falling within Section 44(1)(c) or (d).

5.2 January 2021 opening the kids club without adequate risk assessment.

88. The kids club reopened on 4 January 2021. The August 2020 risk assessment was in place. There was no separate risk assessment at this time for breakfast club and after school club but there was a section (page 540) on breakfast club which we have found applied also to after school club. This made limited reference to shared use of the pre-school building but the claimant has not satisfied us that this or anything else meant that this was not an adequate risk assessment. The claimant had seen the risk assessment on 3 September 2020 and had not suggested any changes at that point and had worked under the risk assessment for some months. Ms McKeating updated the risk assessment at various times in January and also subsequently prepared a separate risk assessment for breakfast club and after school club. This complaint would have failed on its facts. The claimant in evidence said that she was not saying that this was done on the ground that she had raised health and safety issues. The complaint would also, therefore, have failed on the grounds that the treatment was not done on the grounds that the claimant had taken the action falling within Section 44(1)(c) or (d).

5.3 January – May 2021 failing to consistently provide as safe a working environment as the staff who worked in school during the day to enable the claimant to return to work.

89. This is effectively the same as 5.1. For the same reasons as we gave in relation to 5.1, we would have concluded that this complaint failed on its facts. It was a different working environment compared to staff working in the school during the day but each was in accordance with Government guidance. There were different risks and the claimant has not satisfied us that working environment for working in kids club was less safe than that for staff working in the school. Although there was some mixing of children in after school club and breakfast club between their school day bubbles, there were fewer children at after school club and breakfast club and they were there for less time than children attending school during the day. Even if we had concluded that there was detrimental treatment as alleged, we would have concluded that the treatment was because the respondent was trying to comply with government guidance. The respondent would have satisfied us that this was not done on the grounds that the claimant had taken the action falling within Section 44(1)(c) or (d).

5.4 Requiring the claimant, if she had returned to work on 5 January 2021, to work with between 4-7 bubbles in a shared space whereas school day staff worked with one bubble.

90. The claimant would not have worked with seven bubbles since the year groups at kids' club were split between different staff. The respondent was complying with government guidance. The claimant has not satisfied us that there was detrimental treatment as alleged. In any event, the respondent has satisfied us that the treatment was not on the ground of having raised health and safety issues. The respondent acted as it did because Ms McKeating was seeking to comply with government guidance and to provide a necessary service.

5.5 January 2021 CM telling the claimant she was the only person to have submitted a s.44 letter.

91. This was factually accurate. However, we would have concluded that this was not detrimental treatment. The complaint would have failed for this reason.

5.6 January 2021, telling the claimant that the claimant was suffering from Covid anxiety and that she should notify her GP

92. This was done in the meeting on 6 January 2021 (page 172). We would have concluded that this was not detrimental treatment. We would have concluded that the respondent had satisfied us that it was not done on the ground of the claimant raising the health and safety concerns. This was done out of concern for the claimant. The complaint would have failed on its merits for these reasons.

5.7 CM instructing the claimant not to contact her colleagues.

93. We have found that no such instruction was given. Ms McKeating told the claimant that she did not need to contact her colleagues because Ms McKeating would sort out the staffing when the claimant was not in school. There was no ban on the claimant contacting her colleagues. The claimant has not proved the facts on which she relies and the complaint would fail on this basis. We would have concluded that what was said was not detrimental treatment. We would have concluded that the respondent had shown that this was not on the ground of raising health and safety concerns, but because Ms McKeating was willing to sort out the staffing of kids club at a time when the claimant was not coming into school.

5.8 CM repeatedly telling the claimant that she should only concern herself with her own health and safety.

94. There was no evidence to support this allegation. It would have failed on the facts.

5.9 Denying the claimant access to risk assessment for pre-school.

95. It is correct that Ms McKeating did not provide the claimant with a copy of the pre-school risk assessment. This was a third party's document and the claimant has not satisfied us that not being given this was to the claimant's detriment. In addition, we would have concluded that the respondent had satisfied us that this was not on the ground of the claimant raising health and safety concerns. Ms McKeating did not provide it to the claimant because she was advised that this was not relevant.

5.10 Failing to follow sickness policy

96. The only point raised in relation to this allegation was Ms McKeating saying in the meeting on 30 March 2021 that she had sent the wrong letter. The claimant has not pointed to any part of the sickness policy which she alleges was breached by this mistake, if it was a mistake. The claimant has not satisfied us that the respondent failed to follow its sickness policy in any respect. This allegation would have failed on its facts.

5.11 Unreasonable delay in agreeing to a system of working with one bubble only

97. Ms McKeating suggested to the claimant in early February 2021 that she returned to work working with year 4 only. This was because of the claimant's concerns about working with more than one year group. By making this suggestion, Ms McKeating was doing more than government guidance required. The claimant has not satisfied us that there was an unreasonable delay in agreeing to the claimant working with one bubble only. Ms McKeating was not required to agree to this and suggested it as a

means of helping the claimant to return to work. There was no detrimental treatment. This complaint would have failed for this reason.

5.12 March 2021 unfairly requiring kids club and the claimant to work with more than one bubble in a shared space

98. This relates to the whole school re-opening on 8 March 2021. The respondent was following government guidance. The claimant has not satisfied us that this would have been detrimental treatment had the claimant returned to work under these circumstances. In any event, the claimant never went back to work under these arrangements so suffered no detriment. The complaint would have failed on this basis.

5.13 Adding the claimant's initials to risk assessments without her knowledge or agreement.

99. Ms McKeating added the claimant's initials on some assessments to indicate that the matter had been discussed with the claimant. The claimant has not satisfied us that this was detrimental treatment. Even if there had been detrimental treatment, the respondent has satisfied us that the reason Ms McKeating did this was because this was to indicate that the claimant had discussed the risk assessments with her, not because of the claimant raising health and safety concerns.

5.14 CM not keeping to agreements.

100. In the claimant's closing submissions, she identifies this as relating to Ms McKeating agreeing that there would be no key stage two children in after school club until further notice but then key stage two children attending. We understand that this allegation relates to January 2021. It appears that the respondent did not understand this to be the allegation made by the claimant. The respondent's submissions on this point relate to Ms McKeating allegedly breaking an agreement to keep the key stage two numbers at a maximum of eight. Ms McKeating was not asked in cross-examination about key stage 2 children attending when Ms McKeating had agreed there would be none. It does appear that there were some key stage two children who attended on 4 January and some subsequent dates. Since Ms McKeating was not asked about this, we do not know the reason for this. However, even if Ms McKeating had failed to keep to an agreement in this respect, this complaint would have failed since the claimant has not satisfied us that this resulted in any detriment to her. The claimant was not working in the building at the time and instead working from home.

5.15 CM telling the grievance panel incorrectly that they had not received any evidence from the claimant in support of her grievance

101. The claimant did not know about this until disclosure of documents in these proceedings. We have found that the claimant's evidence was, in fact, provided to the grievance panel. We found that Ms McKeating told the grievance panel that no further evidence had been provided by the claimant, rather than no evidence having been provided, so this complaint would have failed on its facts. In addition, the complaint would have failed because the claimant has not satisfied us she suffered any detriment because of the alleged remark.

Jurisdiction – time limits

102. In relation to the jurisdictional point about time limits, we have found that the allegations of detrimental treatment were not made out. There was, therefore, no series of similar acts or failures allowing earlier acts to be in time. The claimant has put forward no reason as to why it was not reasonably practicable for her to make complaints in relation to earlier allegations in time. The claimant was being advised by her trade union at relevant times. We conclude that the complaints other than the complaint in relation to allegation 5.15 were presented out of time and the Tribunal has no jurisdiction to consider them.

103. For the reasons we have given, even if the Tribunal had had jurisdiction in relation to the other detriment complaints, they would have failed on their merits.

104. The complaint set out at allegation 5.15 fails on its merits for the reasons given in paragraph 101 as well as because we concluded that the circumstances in s.44(1)(c) and (d) ERA did not apply.

Section 100 Unfair Dismissal complaint

105. The claimant relies on the same matters as for her detriment complaints, other than the grievance matter which post-dated the resignation, as together constituting a breach of contract entitling her to resign.

106. We conclude that the matters the claimant relies on do not together constitute a fundamental breach of the implied duty of mutual trust and confidence. We rely on the same reasons given, when dealing with the s.44 detriment complaints, for conclusions that the alleged treatment was, in some cases, not made out on the facts and, in others, did not constitute detrimental treatment. We conclude that the claimant was not constructively dismissed, so the s.100 unfair dismissal complaint would fail for this reason.

107. Even if the claimant had been constructively dismissed, it would only be unfair under s.100 if the circumstances in s.100(1)(c) or (d) ERA applied and this was the reason or principal reason for the constructive dismissal.

108. The provisions in s.100(1)(c) and (d) ERA are the same as those in s.44(1)(c) and (d). For the same reasons as we gave when considering the s.44 provisions, we conclude that the circumstances in s.100(1)(c) and (d) did not apply. The s.100 unfair dismissal complaint, therefore, also fails on this basis.

109. Even if we had found that the circumstances in s.100(1)(c) or (d) applied and that the claimant had been constructively dismissed, we would have concluded that the claimant had not satisfied us that the reason or principal reason was not as required by s.100.

110. For the s.100(1)(c) complaint, the claimant would have to have satisfied us that the reason or principal reason for her constructive dismissal (i.e. for the respondent doing the things which together constituted a fundamental breach of contract) was because she brought to her employer's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety. The claimant would not have satisfied us that the reason or principal reason for the respondent's actions was because she had done that. For the reasons we gave in relation to the s.44 complaints (where, unlike for

s.100, the burden passes to the respondent to show the reason that something has been done), we concluded that the respondent acted for other reasons. In many cases, this was because Ms McKeating was complying with government guidance.

111. For the s.100(1)(d) complaint, the claimant would have to have satisfied us that the reason or principal reason for her constructive dismissal was because she took (or proposed to take) appropriate steps to protect herself or other persons from the danger which she reasonably believed to be serious and imminent. The claimant would not have satisfied us that the reason or principal reason for the respondent's actions was because she had done that. For the reasons we gave in relation to the s.44 complaints, we concluded that the respondent acted for other reasons. In many cases, this was because Ms McKeating was complying with government guidance.

112. For all these reasons, the Section 100 unfair dismissal complaint fails.

Employment Judge Slater
20 December 2023

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON 2 JANUARY 2024

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

ANNEX

Ms K Davis v The Governing Body of St Michael's Church of England School Middleton
Case no. 2411197/2021
List of claims and issues (as amended by EJ Slater 7.12.23)

Section 44 Employment Rights Act 1996 (ERA) detriment claim (as s.44 was pre 31 May 2021 changes)

1. Was the complaint of s.44 detriment made within the time limit in s.48 ERA? The Tribunal will decide:

    1.1. Was the complaint made to the Tribunal within three months (allowing for any early conciliation extension) of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them?

    1.2. If not, was it reasonably practicable for the complaint to be made to the Tribunal within the time limit?

    1.3. If it was not reasonably practicable for the complaint to be made to the Tribunal within the time limit, was it made within such further period as the Tribunal considers reasonable?

2. Did the circumstances in s.44(1)(c) apply:

    2.1. Was the claimant an employee at a place where there was no health and safety representative or safety committee; or

    2.2. If there was a representative or committee, was it not reasonably practicable for the claimant to raise that matter by those means?

    2.3. Did the claimant bring to her employer's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety?

3. Did the circumstances in s.44(1)(d) apply:

    3.1. In circumstances of danger which the claimant reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert, she left (or proposed to leave) or (while the danger persisted) refused to return to her place of work or any dangerous part of her place of work.

4. If the circumstances in s.44(1)(c) or (d) applied, was the claimant subjected to a detriment by any act, or any deliberate failure to act, by her employer done on the ground that she had taken the action falling within s.44(1)(c) or (d)? In

accordance with s.48(2) ERA it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

5. The detrimental treatment to which the claimant says the respondent subjected her was:

5.1. January to May 2021 failing to consistently put in place the appropriate guidelines and safeguards so that the claimant felt safe enough to come into work.

5.2. January 2021 opening the Kids Club without an adequate risk assessment.

5.3. January to May 2021 failing to consistently provide as safe a working environment as the staff who worked in school during the day to enable the claimant to return to work.

5.4. Requiring the claimant, if she had returned to work on 5 January 2021, to work with between 4-7 bubbles in a shared space whereas school day staff worked with one bubble.

5.5. January 2021 CM telling the claimant she was the only person to have submitted a s.44 letter.

5.6. January 2021, telling the claimant that the claimant was suffering from covid anxiety and that she should notify her GP.

5.7. CM instructing the claimant not to contact her colleagues.

5.8. CM repeatedly telling the claimant that she should only concern herself with her own health and safety.

5.9. Denying the claimant access to risk assessment for pre-school.

5.10. Failing to follow sickness policy.

5.11. Unreasonable delay in agreeing to a system of working with one bubble only.

5.12. March 2021 unfairly requiring kids club and the claimant to work with more than one bubble in a shared space.

5.13. Adding the claimant's initials to risk assessments without her knowledge or agreement.

5.14. CM not keeping to agreements.

5.15. CM telling the grievance panel incorrectly that they had not received any evidence from the claimant in support of her grievance.

Section 100 ERA unfair dismissal complaint

6. Did the respondent subject the claimant to the following alleged treatment?

6.1. January to May 2021 failing to consistently put in place the appropriate guidelines and safeguards so that the claimant felt safe enough to come into work.

6.2. January 2021 opening the Kids Club without an adequate risk assessment.

6.3. January to May 2021 failing to consistently provide as safe a working environment as the staff who worked in school during the day to enable the claimant to return to work.

6.4. Requiring the claimant, if she had returned to work on 5 January 2021, to work with between 4-7 bubbles in a shared space whereas school day staff worked with one bubble.

6.5. January 2021 CM telling the claimant she was the only person to have submitted a s.44 letter.

6.6. January 2021, telling the claimant that the claimant was suffering from covid anxiety and that she should notify her GP.

6.7. CM instructing the claimant not to contact her colleagues.

6.8. CM repeatedly telling the claimant that she should only concern herself with her own health and safety.

6.9. Denying the claimant access to risk assessment for pre-school.

6.10. Failing to follow sickness policy.

6.11. Unreasonable delay in agreeing to a system of working with one bubble only.

6.12. March 2021 unfairly requiring kids club and the claimant to work with more than one bubble in a shared space.

6.13. Adding the claimant's initials to risk assessments without her knowledge or agreement.

6.14. CM not keeping to agreements.

7. Did that fundamentally breach the implied term of trust and confidence? Taking account of the actions or omissions alleged in the previous paragraph, individually and cumulatively, the Tribunal will need to decide:

   7.1. whether the respondent had reasonable and proper cause for those actions or omissions, and if not

   7.2. whether the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

8. If so, was the fundamental breach of contract a reason for the claimant's resignation?

9. Did the claimant affirm the contract before resigning, by delay or otherwise? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

10. Was the reason or principal reason for dismissal that the claimant:

    10.1. Was an employee at a place where there was no health and safety representative or safety committee; or

    10.2. If there was a representative or committee, it was not reasonably practicable for the claimant to raise that matter by those means.

    10.3. And, if so, that the claimant brought to her employer's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety?

    or

    10.4. In circumstances of danger which the claimant reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert, she left (or proposed to leave) or (while the danger persisted) refused to return to her place of work or any dangerous part of her place of work.