EMPLOYMENT TRIBUNALS

Claimant: Mrs K Maron

Respondent: Rainbow Day Nursery Golborne Limited

Heard at: Manchester **On:** 21-25 October 2024
26 November 2024
(in Chambers)

Before: Employment Judge K M Ross
Ms A Berkeley-Hill
Mr B Rowen

REPRESENTATION:

Claimant: In person
Respondent: Mr Rutledge, Counsel
Interpreter: Mr Giers

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim that she was unfairly dismissed for asserting a statutory right pursuant to section 104 Employment Rights Act 1996 is not well-founded and fails.

2. The claimant's claim that she was unfairly dismissed for making a protected disclosure pursuant to section 103A Employment Rights Act 1996 is not well-founded and fails.

3. The claimant's claim that she was dismissed because of her Ukrainian nationality pursuant to section 13 Equality Act 2010 is not well-founded and fails.

4. The claimant's allegations of direct race discrimination pursuant to section 13 Equality Act 2010 and the claimant's claims for harassment related to race (Ukrainian nationality) pursuant to section 26 Equality Act 2010 as identified at 2.2.1, 2.2.2, 2.2.3, 2.2.4, 2.2.7, 2.2.8, 2.2.9 and 2.2.10 in the list of issues are not well-founded and fail.

REASONS

Introduction

1. The claimant was employed by the respondent as a Level 2 Nursery Practitioner at their Woodlands Day Nursery in Chorley. The claimant worked for the respondent from 3 March 2022 until her employment was terminated on 26 April 2023. The reason given was the breakdown of employee relationships (pages 665-668).

2. The claimant brought claims of direct race discrimination pursuant to section 13 Equality Act 2010, claims for harassment pursuant to section 26 Equality Act 2010 and a claim that she was automatically unfairly dismissed for asserting a statutory right and/or making a public interest disclosure.

3. So far as race is concerned, the claimant relies on a nationality. The claimant is of Ukrainian nationality.

4. The claims and issues were finalised by Employment Judge Slater on 8 February 2024. Those are the claims and issues we decided. For the avoidance of doubt, Employment Judge Slater did not permit the claimant to amend her claim and accordingly there is no allegation 2.2.5 or 2.2.6.

Conduct of the hearing

5. She speaks Ukrainian, Russian and Polish. She asked for an interpreter for this hearing in Polish as this is the language she feels is most comfortable using. The interpreter interpreted line by line with regard to the evidence when it was given and simultaneously at other stages of the hearing.

Witnesses

6. We heard from the claimant, and from Maisie Allen, nursery practioner. For the respondent we heard from Marie Carvall the owner of the nursery, Coral Evans the manager, room leaders Sarah Ashurst, Kelly Haddon and Emily Hugill and nursery practitioners Emma Fairclough and Katrina Dean.

Other Procedural Matters at Hearing

7. Given the tension in the relationship between witness Ms Ashurst and the claimant's husband (it was not disputed that the claimant's husband had followed Ms Ashurst home to ascertain her address in order to serve court proceedings on her in a county court claim), we re-arranged where witnesses were sitting so that Mr Maron was not in the witness' eyeline while she was giving evidence.

8. During the proceedings both the Employment Judge and one of the lay members reminded all parties that it was important not to react to or comment on evidence which was given.

9. At one point in the proceedings , when conducting cross examination, the claimant started to question a witness in relation to alleged use of a mobile phone

during the Tribunal hearing. Employment Judge Ross intervened to explain to the claimant, a litigant in person, that if she wished to make a complaint about the conduct of these proceedings, any complaint should be made direct to the Tribunal at the time that it happened, with full details of what exactly had occurred. At that point the Tribunal took a break, asking the claimant to consider what she would like to do. After the break the claimant indicated that she did not wish to make a formal complaint and the hearing moved on.

The Facts

10. We find that the Woodlands Nursery consisted of four rooms. The first room was named "Owls" and was for the youngest children (babies). At the time the claimant worked for the respondent the room leader was Kathryn Birchall. The next room was called "Bunnies". The team leader for that room was Emily Hugill. The third room was "Hedgehogs" and the team leader was Sarah Ashurst. That room was for children of approximately 2-3 years of age.

11. Finally, the last room was in a different building and was for pre-school children. The team leader for that room was Kelly Haddon and the children there were aged 3-4 years.

12. We heard evidence that the nursery was open from 7.00am to 6.00pm and there were up to 30 children in each room. We find that there are legal staffing ratios for the number of children to each member of staff. We find that if children were collected early so that the number of children in the room dropped the need for the number of adults working in the nursery was therefore reduced. We find that the claimant had a clause in her contract of employment (page 197) that:

> "If ratios are met at the end of the night you may be asked to finish earlier than expected. Similarly, if ratios are not met you may be asked to stay until needed. This must be documented on your timesheets and countersigned by management."

13. It was not disputed that if an employee left early due to the staff ratio they were not entitled to be paid for those hours.

14. We find the claimant had some volunteering experience and had 2 children of her own but no previous professional experience of working at a nursery.

15. The claimant initially worked in Hedgehogs room. The claimant made a complaint to the owner Marie Carvall about an incident about a child and pudding. The owner referred her to Coral Evans, the nursery manager (page 309).

16. The claimant then contacted Ms Evans on 11 April 2022 about that issue (page 685). Coral Evans investigated the matter, spoke to the staff member and the room leader (Emily Hugill) (page 578) and gave the claimant an outcome, having spoken to both parties. (Claimant's complaint pages 581-582. Emily Hugill account at pages 584-586).

17. Ms Evans also explained to the claimant at that time that there were some instances where the claimant had hurt people's feelings by saying things that she did not intend to hurt them with but were inappropriate. (page 580).

18. We rely on the evidence of Ms Hugill that the claimant was a hard worker and willing to work but she regularly questioned Ms Hugill because she did not like following her instructions (paragraph 9 of Ms Hugill's statement).

19. We find that not long after that incident the claimant moved to the babies' room, Owls. We find that the respondent received a complaint about the claimant from the leader of Owls room on 7 July 2022 (page 315a). The claimant moved to Hedgehogs room.

20. The claimant had an appraisal on 26 July 2022 (pages 317-320) which notes that the claimant was punctual and hardworking and that there were no safeguarding issues. There was a peer review on 13 October 2022 where the claimant was observed by her manager (room leader of Hedgehogs) Sarah Ashurst. It was positive (pages 320-321).

21. We rely on the evidence of the respondent's witnesses that the claimant had some unusual views which she shared with others which were not always welcome. We find that she made remarks to a new Nursery Practitioner, Kerys, about fertility treatment and suggested she took some medication and went to Poland to see a priest.. The claimant sent unsolicited health advice to an employee about using too much salt in food, about blood pressure and weight loss (pages 411-414).

22. We find that on 9 October the claimant was working in Hedgehogs where Sarah Ashurst was the room leader. It is not disputed that Ms Ashurst said, "What are you doing with my laptop?". We find Ms Ashurst had a personal laptop which she brought into work. The laptop was used for work purposes. Ms Ashurst said it had a whiteboard on it. There was also evidence that it was used to play YouTube videos of music to the children. We rely on Ms Ashurst's evidence that she allowed other members of staff in nursery to use the laptop for work purposes and shared her login details so they could do so. We rely on her evidence that she used to say to other members of staff (including Sammie who was the owner's daughter), "what are you doing with my laptop?" and wagging her finger in a jokey way. We find that on 9 October the claimant was using the laptop and Ms Ashurst made her usual joking remark, "what are you doing with my laptop?".

23. We find that the claimant sent a message by text to Ms Ashurst the same day which showed she had taken the remark "what are you doing with my laptop?" literally. The claimant said, "I felt very bad and felt discriminated because Liz, Maisie, Katrina and Emma and another staff can use your laptop but I cannot". The claimant raised a lot of other issues and stated, "I have decided that I will only talk to you about work, short questions and short answers and everything is clear". The claimant then sent a copy of the message to manager Coral Evans (page 692).

24. We rely on the evidence of Coral Evans at her paragraphs 10-13 that the claimant on a number of occasions made remarks to colleagues which they found offensive. We rely on her evidence that she had asked why Stefanie Williams (who had chronic fatigue and therefore only worked three days a week), questions about why she only worked three days in a way that was not sensitive or appropriate. We

rely on her evidence that the claimant said to her that she should not let her daughter drink tap water because she would get cancer and that Ms Evans should not eat microwave meals because she would get cancer. We also rely on her evidence that once when she came to work wearing a skirt the claimant said she looked better in a skirt than in her usual pants and that she looked like a boy.

25. A further issue arose in relation to Ms Ashurst's laptop. The claimant's version is that Ms Ashurst allowed the claimant's husband to fix Ms Ashurst's laptop and refused to pay £80 for the repair. Ms Ashurst's version is that she did not agree to her laptop being repaired and that it did not work properly after it was taken for repair.

26. The claimant's husband sued Ms Ashurst in the County Court for the sum of the repair. It is not disputed that he followed her home to obtain her address in order to serve the court proceedings. The county court case is not directly relevant to this case.

27. The issue in relation to the laptop being taken for repair to be carried out by the claimant's husband appears to have occurred in or around late October (page 426).

28. We find that Laura Parker, the daughter of Sarah Ashurst, also worked in Hedgehogs room.

29. On 20 October 2022 the claimant posted a lengthy entry on the work WhatsApp group at approximately 10.30pm, stating:

> "We have to ventilate the rooms revealing the windows in which there are children and us because we and children exhale carbon dioxide which is harmful to us. Or we should go outside as often as possible, when is not rain or really cold, because it healthy for adults and children. The fact that we often have headaches is because there are many people in one room and we all exhale carbon dioxide and then we all breathe it in and there is more carbon dioxide in the room than oxygen if we do not ventilation room."

30. We rely on the evidence of Laura Parker that her mother had had a headache that day – she suffers from migraines (see 19 October 2022 entry at 22:34). We find Ms Parker (Laura Jane in the WhatsApp chat) reacted strongly – we find she was feeling protective of her mother. She stated:

> "It hasn't got anything to do with you not going outside. She gets them all the time with or without going outside. So maybe you should research that on Google and come back to us with what you find hun. I won't sit and read all your petty little stuff that you want to send to people so please kindly and politely stop, and that's me being nice."

31. We find that Coral Evans intervened, asking to keep the chat for work only, but the claimant repeated that:

> "I know about it from childhood because we were taught in schools that carbon dioxide we exhale does not have a positive effect on us."

She went on to say in an entry that does not make complete sense:

> "This does not only apply to Sarah because I also sometimes have headaches at work, although I never had them because I am a healthy person."

32. The claimant was asked by Coral Evans not to speak like that. Ms Evans went on to say:

> "If anyone is concerned about headaches please go to the doctors and get them checked out. If not let's hope then it's a case of live and let live."

33. The claimant posted a further entry to which others responded the following morning. Ms Evans tried again to stop the conversation, saying:

> "Right girls, this needs dropping now. Please keep it work-related in future unless you have something to say that's going to make someone smile."

34. Regrettably, the conversation continued until the owner (Marie) intervened. After Coral said, "you've all been asked to stop so please drop it now", the owner stated:

> "Kamila, you need to stop. You're welcome to have your views but you've offended a lot of people on this chat."

35. The Tribunal finds that the WhatsApp conversation showed the claimant struggled to let an issue go once she had raised it. The Tribunal finds that the reactions of those taking part in the conversation (Kelly Haddon, Laura Parker, Emily and Stephanie) were related to the fact that the claimant had previously made personal remarks verbally to them which were insensitive. We find that Kelly Haddon left the WhatsApp group on 20 October (see entry on 20 October 2022 at 7.37am).

36. We find that the claimant sent an extremely lengthy complaint about the WhatsApp chat on 20 October to the management team, Marie Carvall, Coral Evans (the Manager), Alison Dickinson (the Deputy Manager) on Sunday 23 October at 9:18am. The complaint was 11 pages long (pages 329-340) and stated in very bold large font that the comments violated the claimant's human rights of free speech. It stated that the claimant was an altruist and thought of others first and then about herself – that she believed in the transmigration of souls and stated, "do I deserve a verbal lynching?". She then sent three further emails on Monday 24 October at 7:17am, 7:18am and 3:01pm.

37. We rely on the evidence of Marie Carvall and Coral Evans that they were shocked by the tone of the emails, very concerned and took legal advice.

38. We find that there was a meeting on 20 October 2022 (pages 322-323) attended by Maria Carvall, Coral Evans and the claimant. The claimant refused to sign the minutes of the meeting. We find it was agreed at the meeting that "Kamila will no longer send messages to people about health-related issues unless they ask her for advice of certain subjects", and that if she continues to send unwanted messages people may choose to "unfriend" her.

39. The meeting also discussed that that was not the first time the claimant had upset people with the nature of her messages. It was noted people can become upset because the messages can sometimes appear to be directed at individuals and personal experiences they have had and would prefer not to discuss. They also discussed that sometimes in the staffroom the claimant had made comments about the foods people were eating and why they should not eat them.

40. The claimant stated that she acknowledged that this could be seen as inappropriate but said her messages come from a good place because she just wants to share her knowledge about health and did not want to attack or criticise others. The claimant stated that in Ukraine people are much more straight to the point than in England and that English care more about offending people so speak more carefully.

41. We find that Kelly Haddon was spoken to about using inappropriate language on WhatsApp on 21 October 2022 at 10:30am (page 324).

42. On 26 October 2022 Coral Evans reprimanded Laura Ashurst (known in this Tribunal as Laura Parker) about her use of language regarding her WhatsApp posts.p345

43. We find that around this time the relationship between the claimant and Sarah Ashurst continued to deteriorate. We find that Sarah Ashurst (relying on her evidence in her statement, which the claimant did not challenge) was feeling increasingly challenged by the claimant in terms of her day-to-day management of Hedgehogs room.

44. On 27 October 2022 Sarah Ashurst provided a written statement outlining her concerns about working in a room alone with the claimant (pages 346-347). On the same day Sammie Holland also provided a written statement outlining concerns working alone with the claimant (348 and 349). The claimant in cross examination said that these statements were fabricated.

45. On 27 October 2022 Kerys Firkins provided a handwritten statement outlining her concern about comments made by the claimant about her fertility and a priest (page 350).

46. On 1 November 2022 Alison Dickinson submitted a grievance against the claimant regarding an unsolicited weight loss video sent to her by the claimant.

47. On 3 November 2022 the claimant submitted a grievance about WhatsApp posts from 20 October (pages 352-392).

48. We find on 3 November 2022 the claimant provided further information about the WhatsApp conversation (pages 352-359). The claimant reiterated her reference to verbal lynching and her right to free speech.

49. We find the respondent invited the claimant to a formal grievance meeting on 10 November 2022 (page 402). The grievance meeting took place on 10 November 2022 (pages 404-407). Present were the claimant, Sarah Ashurst, Elizabeth Hart and a friend of the claimant, Luiza Bodolic. The claimant was asked what outcome she would like from the meeting. The claimant stated (as was written on her

grievance form) she wanted the people who "bullied her to walk in her shoes, feel her pain". She also stated she would like the staff to be "punished based upon the English law", the issues to be monitored and for further action to be taken if anything similar happened again. We find that Coral Evans explained that staff members had been spoken to regarding their conduct.

50. Coral Evans' evidence is that page 436 is an outcome to the claimant's grievance meeting on 10 November (see her paragraph 26).

51. On 10 November 2022 the claimant left the Woodlands WhatsApp group (page 293).

52. On 17 November 2022 Rachel Turner submitted a grievance against the claimant regarding an unsolicited weight loss video (412).

53. On 18 November 2022 Coral Evans investigated a concern raised by a parent regarding the claimant's handling of a child (pages 418-420).

54. On 21 November 2022 (page 421) the claimant sent a lengthy email (pages 421-427) about various complaints she had relating to Sarah Ashurst and in relation to health videos she (the claimant) had shared.

55. On 22 November 2022 a meeting was held (page 431) between Alison Dickinson, Kathryn Birchall and the claimant to discuss the email. Alison Dickinson reiterated to the claimant that she needed to stop giving medical advice to her colleagues as "we are not doctors or scientists and the information is unrelated to her job role".

56. Ms Dickinson also explained to the claimant that issues in relation to Sarah Ashurst's laptop and the repair were not work-related and it was between Ms Ashurst and the claimant's husband. The meeting was an attempt to address the issues raised by the claimant and draw a line under it. However, on 23 November 2022 the claimant sent a further email to Ms Dickinson and Ms Evans stating, "treat my email as an extension of our conversation yesterday and my answers I wanted to give yesterday but couldn't due to stress" (pages 432-435). We find this is evidence which shows the claimant was reluctant to leave an issue once the respondent considered it had been resolved.

57. On 8 December 2022 the claimant submitted a grievance against Sarah Ashurst (pages 444-446).

58. On 21 December 2022 there was an incident where Laura Parker shouted at the claimant.

59. The incident concerned a towel. There was a large degree of factual agreement between the evidence of Ms Parker and the evidence of the claimant. Both agreed that a towel had been used to dry dishes. The claimant considered the towel was unsanitary and should be changed. Ms Parker understood her mother, the manager of the room, Sarah Ashurst to have said it did not need to be changed. Ms Parker became angry because the claimant challenged her mother. Ms Parker said, "your supervisor has asked you to do something, so you do it". The claimant then left and changed the towel anyway.

60. The claimant submitted a grievance against Sarah Ashurst in relation to this matter (page 452) i.e. the towel incident. Laura Ashurst (Parker) was given a verbal warning arising out of the incident (page 448).

61. Meanwhile, the laptop repair issue continued to cause problems. The management had received a complaint from Sarah Ashurst that she believed the claimant had taken her address from work records intentionally to share with a third party. The respondent has a confidentiality agreement which does not allow sharing of information. The claimant was suspended (pages 493, 499).

62. A meeting was held on 30 January 2023. The claimant's husband joined by telephone to explain that he had followed Sarah Ashurst home from work to obtain her address (pages 503-505). The claimant was emailed the same day to confirm that no further action would be been taken against her regarding how Sarah Ashurst's home address was obtained as it had not been obtained by the claimant.(pages 506-507).

63. On 31 January 2023 the claimant was moved from the Hedgehogs room to the pre-school room. P507. The room leader was Kelly Haddon.

64. By this stage the claimant had worked in all three other rooms of the respondent and had been moved following complaints about her behaviour towards the room leader.

65. In February 2023 the claimant says there was an incident when Sarah Ashurst shouted to her to instruct her that the claimant was going home whereas Katrina Dean was given a choice about going home and the claimant was not. Sarah Ashurst denies shouting to the claimant that the claimant was going home. Katrina Dean has no recollection of the incident. The Tribunal relies on the evidence that in relation to staff going home early when the numbers required fell due to children going home , the respondent's policy was to seek volunteers as to who was going home. The claimant's evidence was unclear in cross examination, and she said that it was Kelly Haddon rather than Sarah Ashurst who shouted, "you're going home". The claimant agreed in cross examination that both she and Katrina were offered the choice to go home initially. Katrina Dean gave evidence that she was usually happy to go home early.

66. The Tribunal prefers the recollection of Sarah Ashurst to the claimant's recollection as it is consistent. The Tribunal finds Ms Ashurst did not shout at the claimant to go home. The Tribunal has also taken into account that in February 2023 the claimant was no longer working in Hedgehogs room where Ms Ashurst was the manager.

67. On 22 February 2023 Laura Parker was leaving the respondent's business. She hugged the other members of the staff in the room and then said either, "Kamila, I'm not saying goodbye to you because I'm a racist" or "Kamila, I'm not saying goodbye to you because apparently I'm a racist". The claimant complained about this in her email of 5 March 2023 (page 513). The claimant took the words spoken by Ms Parker literally and considered she had admitted she was a racist.

68. According to the claimant, present were Kelly Haddon, Emma Fairclough, Katrina, Amy (a volunteer) and the claimant. We heard from Emma Fairclough who

was a good, clear witness, making concessions where necessary. She was very clear that the comment was sarcastic. She recalled Laura Parker had used the word "apparently". The letter of reprimand to Laura Parker at page 669 did not include the word "apparently" but Coral Evans' explanation for that is that she only spoke to the claimant about the incident and so recorded the words the claimant told her were used.

69. Laura Parker agreed in cross examination that she made the remark without the word "apparently" but that she said she made the remark in a sarcastic way. Katrina Dean (who gave evidence, giving concessions in favour of the claimant) was also very clear that whether or not "apparently" was used in the statement, it was said sarcastically, not literally.

70. Coral Evans wrote to Laura Parker to reprimand about her conduct immediately after she had left (page 669) and said the matter would be referred to in any reference.

71. We find the comment was made sarcastically, not literally. The claimant understood the comment literally. All the respondent witnesses said the comment was said sarcastically. Only the claimant, who is speaking English as an additional language considered the words were spoken literally.

72. On 3 March 2023 Sarah Ashurst sent a letter to Marie Carvall and Coral Evans asking not to work with the claimant (pages 511-512). She explained that given all the grievances raised by the claimant against her and the laptop repair issue she was now under the care of her doctor for mental health concerns and had been placed on antidepressants and asked to attend counselling. She threatened to resign.

73. On 28 March Ms Evans received a complaint from a parent about the claimant's conduct (page 526).

74. By 30 March 2023 the respondent wrote to the claimant indicating they were having difficulty "struggling to place her in any room" (page 523)

75. Meanwhile on 29 March 2023 the claimant emailed the owner to arrange a meeting to discuss timesheets. A meeting was arranged for 13 April 2023 (page 527).

76. The respondent received a further email from the claimant on 23 April 2023 about her timesheet and salary.

77. On 25 April Ms Carvall and Ms Evans sent an email to the claimant agreeing to pay all the sums she said she was owed and the claimant replied saying the pay issue had been resolved (pages 629-630, 651-657). The amount involved was just over £300 and related to the calculation of holiday pay where overtime had been worked.

78. Meanwhile Alison Dickinson sent Coral Evans a handwritten statement regarding an incident on 28 March.

79. On 4 April 2023 Emily Hugill raised a grievance against the claimant (pages 537-540).

80. On 4 April 2023 Marie Carvall held a meeting with Sarah Ashurst, Rachel Turner and Alison Dickinson about the claimant's conduct.

81. On 4 April 2023 Rachel Turner also raised a grievance against the claimant (page 542).

82. On 11 April 2023 Kelly Haddon sent an email to Marie Cavel, Coral Evans and Alison Dickinson stating she would resign unless the claimant was removed from her room.

83. We find Ms Carvall and Ms Evans sought advice. Ms Evans prepared a statement outlining her concerns regarding the claimant (pages 547-552, 812).

84. On 24 April 2023 Alison Dickson provided a statement outlining the difficulties she was now having carrying out her role as deputy manager. (pages 658-659).

85. On 25 April 2023 a parent emailed Coral Evans to request her child have no contact with the claimant (page 662).

86. On 6 April 2023 the claimant was invited to a meeting which was held on 30 April 2023 (pages 589-593).

87. Minutes of the meeting are recorded at pages 665-668. The letter of termination is at page 665. The reason given was the substantial breakdown of employee relationships which was affecting the business.

88. The Tribunal find that all witnesses confirmed that the claimant was very hardworking and essentially well meaning. However, it was clear through cross examination and when considering the claimant's emails that she believes her opinions are right. The Tribunal finds it likely where the claimant is speaking English as an additional language that she does not always understand the nuances of a joke or sarcasm which is reflected in two of the comments where the claimant took serious offence.

89. The claimant frequently reiterated her right to free speech and to express her opinions. However she seemed to find it difficult to understand that her opinions could cause offence to others. This is despite the fact the respondent repeatedly asked her to reflect on this and not to raise sensitive or non-work matters .The Tribunal notes the claimant herself was sensitive to the remarks of others as her complaints about the what's app conversation show.

90. The claimant demonstrated both in the WhatsApp messages and in the very lengthy emails she sent to Marie Carvall and Coral Evans that she was reluctant to let an issue go once she had raised it, even where the respondent thought they had resolved it.

91. By the time the claimant's employment relationship ended none of the managers of the four rooms were willing to work with her because they felt challenged repeatedly by her and were upset by comments the claimant had made.

92. Although the claimant repeatedly stated that she had the interests of the children at heart, she did not appear to be aware that the others working at Woodlands also had the interests of the children at heart. The claimant did not have any substantive experience with children in a paid capacity before she started at Woodlands.

The Law

93. The relevant law for direct discrimination is section 13 Equality Act 2010.

94. The burden of proof provisions are at section 136 Equality Act 2010. The Tribunal reminded itself the established authorities demonstrate there is a two stage process in a direct discrimination case. These authorities include **Wong v Igen Ltd 2005 3 All ER 812** and **Madarassy v Nomura International PLC 2007 IRLR 246** and **Efobi v Royal Mail Group Ltd 2019 2 All ER 917**.

95. The Tribunal reminded itself that a difference in treatment and a difference in protected characteristic are not sufficient to shift the burden of proof. There must be "something more". See Mummery LJ in **Madarassy v Nomura International PLC**.

96. We also reminded ourselves that it is necessary to explore the alleged discriminator's mental processes. We took into account Lord Nicholl's guidance in that bias may be unconscious. See **Nagarajan v London Regional Transport 1999 ICR 877**.

97. The relevant law for harassment is section 26 Equality Act 2010. We reminded ourselves of the guidance in **Pemberton v Inwood 2018 ICR 1291 CA** which gives guidance as to how the effect test in section 26(4) Equality Act should be applied.

98. For the unfair dismissal claim the relevant law is section 104 Employment Rights Act 1996.The EAT decision in **Derbyshire v Davis and another trading as Samuel Davies EAT 0703/03** is relevant.

99. The relevant law for the public interest disclosure claim is s103A Employment Rights Act 1996.

List of Issues as identified by Judge Slater

100. The issues for the Tribunal to determine were as follows:

1. Unfair dismissal

Unfair dismissal – assertion of a statutory right (s.104 Employment Rights Act 1996)

1.1 Did the claimant allege that the respondent had infringed a statutory right in her emails of 13th and 23rd of April 2023?

1.2 Was the principal reason for the claimant's dismissal that she had done so?

If the answer to both questions is yes, the claimant will be regarded as having been automatically unfairly dismissed as a result of having asserted a statutory right (section 104 of the Employment Rights Act 1996).

Unfair dismissal – protected disclosure (whistleblowing) (s.103A Employment Rights Act 1996)

1.3 Did the claimant make one or more protected disclosure(s) (see below)?

1.4 If the claimant made one or more protected disclosures, was the reason or principal reason for the claimant's dismissal that she had done so? If so, the dismissal was automatically unfair.

Protected Disclosures

1.5 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

1.6 What did the claimant say or write? When? To whom? The claimant says she made disclosures in an email to the manager, Coral, and owner, Maria, around 24 April 2023, raising the issue that improper payments had been made for holiday pay and for hours worked and that this affected other employees as well as the claimant.

1.6.1 Did she disclose information?

1.6.2 Did she believe the disclosure of information was made in the public interest?

1.6.3 Was that belief reasonable?

1.6.4 Did she believe it tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation?

1.6.5 Was that belief reasonable?

1.7 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

2. Race discrimination/harassment related to race

2.1 The claimant identifies her race as being of Ukrainian nationality and she alleges that she was treated less favourably when compared to others who were not Ukrainian.

2.2 The claimant relies upon the following as being direct discrimination on the grounds of race and/or harassment related to race. The Tribunal will need to decide what happened in relation to each of the following allegations (original numbering from List of Issues attached to Record of Preliminary Hearing on 29 August 2023 used):

2.2.1 From September 2022 onwards, the claimant was ignored whenever decisions and plans for the future were being made by the room leaders, when they discussed their plans and changes with others. The claimant was ignored and left out of the discussions (by Sarah Ashurst and Kelly Haddon);

2.2.2 On 9 October 2022, Sarah Ashurst said to the claimant "*what are you doing with my laptop*", when the claimant used it to play music to the children;

2.2.3 On 20 October 2022, when the claimant tried to say something on WhatsApp about airing the rooms where children and staff are, she was verbally attacked and ridiculed for her statements by Kelly Haddon, Laura Parker, Emily Rose and/or Stephanie. The next day, when the claimant attended work, she was invited to the dining room and blamed for the bad behaviour by Marie Carvall and/or Coral Evans;

2.2.4 On 21 December 2022, Laura Parker shouted at the claimant, when the claimant chose to dispose of a dirty towel;

[Application to amend claim to include 2.2.5 and 2.2.6 refused]

2.2.7 In February 2023, Sarah Ashton shouted to the claimant that the claimant was going home, when Katrina Dean was given a choice about going home (which the claimant wasn't);

2.2.8 On 22 February 2023, Laura Parker said to the claimant "*Kamila, I'm not saying goodbye to you because I'm a racist*";

2.2.9 On approximately 23 February 2023, Sarah Ashurst and/or Alison Dickinson verbally criticised the claimant and accused the claimant of racism (in relation to Laura Parker and the allegation of 22 February 2023);

2.2.10 After the claimant had tried to make contact with other employees on Facebook, particularly after exchanging

messages with one person around difficulties which the claimant had previously had in getting pregnant and some tablets that a priest had given the claimant, the claimant was criticised by managers for having done so (Coral Evans, Alison Dickinson and/or Marie Carvall); and

2.2.11 The dismissal of the claimant.

3 Harassment related to race (Equality Act 2010 section 26)

3.1 The claimant relies upon the matters listed as 2.2.1, 2.2.2, 2.2.3, 2.2.4, 2.2.7, 2.2.8, 2.2.9 and 2.2.10 as being harassment related to race (but not 2.2.11). For each allegation, the following will need to be decided:

3.1.1 Was that unwanted conduct?

3.1.2 Was it related to race?

3.1.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.1.4 Did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? The Tribunal will take into account the claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect.

3.1.5 Did the respondent take all reasonable steps to prevent the alleged discriminator from doing the thing alleged or from doing anything of that description?

4 Direct race discrimination (Equality Act 2010 section 13)

This only applies if the complaints are not found to be harassment related to race.

4.1 The claimant relies upon the following as being acts of direct race discrimination: 2.2.2; 2.2.3; 2.2.4; 2.2.8; 2.2.9 and 2.2.11.

For all of those allegations the claimant compares herself either to all other employees and/or to a hypothetical comparator. For each of those allegations, the following will need to be decided.

4.1.1 Did the claimant reasonably see the treatment as a detriment?

4.1.2 If so, was the claimant treated less favourably than someone in the same material circumstances of a different race was or would have been treated?

4.1.3 If so, was the less favourable treatment because of race?

4.1.4 Did the respondent take all reasonable steps to prevent the alleged discriminator from doing the thing alleged or from doing anything of that description?

5 Time limits

5.1 Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 6 February 2023 may not have been brought in time.

5.2 Were the discrimination and harassment complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

5.2.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

5.2.2 If not, was there conduct extending over a period?

5.2.3 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

5.2.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

5.2.4.1 Why were the complaints not made to the Tribunal in time?

5.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

6 Remedy

6.1 If the claimant succeeds in any of her claims, how much should the claimant be awarded?

6.2 Has there been any injury to the claimant's feelings and, if so, what award should be made as a result (applying the bands from the case of *Vento*)? (For the discrimination and harassment claims only).

Conclusions

Unfair Dismissal (assertion of a statutory right)

101. The claimant alleged that she was unfairly dismissed either for asserting a statutory right or for making a protected disclosure or as an act of direct race discrimination because of Ukrainian nationality.

102. The Tribunal turned to consider first of all whether the claimant was dismissed for asserting a statutory right.

103. There was no dispute that the claimant alleged the respondent had infringed her statutory right to wages in her email of 23 April 2023 (page 496) (there is no email of 13 April 2023).

104. We turn to the next question: was the principal reason for the claimant's dismissal that she had done so?

105. The Tribunal finds the reason for the claimant's dismissal was that the relationship between her and members of staff (in particular managers) had irretrievably broken down.

106. The only evidence to suggest that there could be a connection between the claimant asserting a statutory right in relation to her pay in the email of 23 April 2023 and the termination of her employment is that it was close in time to the date when the decision to dismiss was made.

107. However, when referring back to the findings of fact it is clear that the respondent acted promptly and conscientiously in relation to the claimant's pay issue when the claimant first raised it on 29 March 2023, arranging a discussion on 13 April and then following that agreeing to pay the claimant the hours and pay she requested in full. The amount was relatively modest. The respondent paid it a few days later in the regular payroll on 28 April.

108. The Tribunal has also taken into account that Katrina Dean and Maisie Allen both raised queries about their pay so also asserted a statutory right and they were not dismissed by the respondent. The Tribunal finds that the respondent was willing to listen to the claimant's concerns about her pay being calculated inaccurately and acted promptly to resolve the issue.

109. The Tribunal relies on the extensive evidence which shows that the relationship between the claimant and her managers in particular had broken down at the point her employment was ended. The claimant had upset many of her colleagues. The Tribunal finds that the claimant had very strong views on some matters which are controversial and shared those views even when she was asked not to do so because it was upsetting others. The Tribunal relies on its finding of fact that although the claimant had never previously worked in a paid employed role within the childcare sector, she swiftly and regularly challenged team leaders about the way they managed the children.

110. The claimant had sent unsolicited health messages, for example writing to a member of staff telling her not to use too much salt in her food and sending her a

video of the claimant taking her blood pressure. We rely on the remarks set out in our statement to Kerys (Nursery Practitioner) about fertility treatment; her remarks to Coral Evans at paragraphs 10-13 of her statement and the remarks to colleague Stefanie Williams who had chronic fatigue and only worked three days a week about why she only worked three days a week in an insensitive way.

111. The Tribunal is satisfied that by the time the claimant was dismissed she had worked in all four of the respondent's rooms and none of the team leaders were willing to work with her. At the point that her employment was terminated one of the team leaders was on antidepressants and under the care of her GP as a result of how the claimant had treated her (according to the information she had provided to the respondent) and another was threatening to resign.

112. The Tribunal finds that the claimant was not dismissed for asserting a statutory right.

Unfair dismissal protected disclosure (whistleblowing) – section 103A Employment Rights Act 1996

113. The first question is: did the claimant make a protected disclosure in an email to manager Coral and owner Maria on or around 24 April 2023 raising the issue that improper payments had been made for holiday pay and for hours worked and that this had affected other employees as well as the claimant?

114. The respondent did not accept that this was a protected disclosure, but the Tribunal has assumed that it was protected and qualifying and moved to the causation question. Was the claimant dismissed because she raised concerns on 24 April about the calculation of her pay?

115. The Tribunal finds there is no evidence to suggest that the reason the claimant was dismissed was because of raising issues about her pay.

116. There is no dispute that the respondent was contractually entitled to send employees home at the end of the day early without pay if the ratio of staff to children fell below what was required by law.

117. Inevitably this led to some complexity in calculating payroll as the hours varied day to day. It also led to some complexity in calculating holiday pay. The respondent dealt quickly with the claimant's concerns about this issue.

118. We rely on our reasoning above to find that the reason the claimant was dismissed was because of the irretrievable breakdown in the relationship between herself and her colleagues, and particularly team leaders for each of the four rooms in the nursery.

Allegations of race discrimination pursuant to section 13 Equality Act 2010 and/or harassment related to race pursuant to section 26 Equality Act 2010

119. The claimant relied on 11 allegations. All allegations were relied on as either direct race discrimination or harassment (it is not possible for an allegation in law to be both direct discrimination and harassment).

120. There were no allegations 5 and 6 because these had been disallowed by Employment Judge Slater. Allegation 11 related to dismissal.

121. We reminded ourselves of the guidance in relation to the burden of proof and in dealing with harassment and discrimination cases.

Allegation 2.2.1: From September 2022 onwards, the claimant was ignored whenever decisions and plans for the future were being made by the room leaders, when they discussed their plans and changes with others. The claimant was ignored and left out of the discussions (by Sarah Ashurst and Kelly Haddon).

122. We find that the claimant had a misconception about her role with the respondent. She was employed as a Nursery Practitioner. There was a Senior Management Team in the nursery. Mrs Carvall was the owner of the business but we accept her evidence that she was "hands on" and attended the nursery regularly.

123. Coral Evans was the Nursery Manager. She reported to Marie Carvall and was responsible for the day-to-day running of the nursery.

124. Below Ms Evans were each of the room leaders who were responsible for managing each of the four rooms within the nursery. The room leaders were Kathryn Birchall, Emily Hugill, Sarah Ashurst and Kelly Haddon.

125. We turn to the specific allegation. We find that Sarah Ashurst and Kelly Haddon were both room leaders. The claimant worked in the room managed by Sarah Ashurst from September 2022 and in the room managed by Kelly Haddon from the end of January 2023. The claimant was not part of the management team. It was not her role to make decisions and plans for the future. That was the role of the room leaders and the senior management team. The claimant did not adduce any evidence to suggest that others were included where she was not.

126. We turned first to consider this as an allegation of direct race discrimination. Can the claimant show that she reasonably sees the treatment as detriment? This allegation fails at the first hurdle. It was not reasonable for the claimant to consider the treatment as detriment because she was a nursery practitioner – she was not a room leader and it was not part of her role to be involved in making decisions and plans for the future of the nursery. Even if the Tribunal is wrong about that, the next question is: was the claimant treated less favourably than someone in the same material circumstances of a different race (not Ukrainian) was or would have been treated? The claimant did not adduce any evidence to suggest that someone else was treated differently or involved in the discussions. The burden of proof has not shifted and even if it had, there is a non discriminatory explanation. The claimant was not part of the management team and so not entitled to be involved in these discussions. Accordingly, the claimant's claim for direct race discrimination fails.

127. We turn to consider this allegation in the alternative as an act of harassment related to race. The first question is: was it unwanted conduct? The claimant may have found it unwanted conduct not to be included in these discussions, but when we turn to the second question -was it related to the claimant's race i.e. her Ukrainian nationality? - we find that it was not. The claimant was not included for a non discriminatory reason – because she was not part of the management team. Accordingly, this allegation fails.

Allegation 2.2.2: On 9 October 2022, Sarah Ashurst said to the claimant *"what are you doing with my laptop"*, when the claimant used it to play music to the children.

128. We rely on our finding of fact that Sarah Ashurst brought her own laptop and allowed it to be used in the nursery to benefit the children. We rely on our evidence that she shared her login details so that other members of staff could use it. We find the claimant misunderstood the words Sarah Ashurst used. We found Sarah Ashurst to be a clear witness and a quietly spoken person. We entirely accept her account that she used to say in a jokey way "what are you doing with my laptop?" to a number of members of staff when they were using it. We find the claimant was speaking English as a second language. We find that although she did not report any serious problems with using English at work, the nuances of the language were sometimes missed, particularly when irony or sarcasm was used or jokes was made.

129. We turn to consider this first as an allegation of direct race discrimination. The first question is: did the claimant reasonable see the treatment as detriment? We find the answer to this question is "no". We find that Sarah Ashurst was joking when she made the remark and it was not a serious enquiry.

130. However, in case we are wrong about that we turn to the next issue: was the claimant treated less favourably than someone in the same material circumstances who was not Ukrainian was or would have been treated?

131. We rely on our finding of fact that Sarah Ashurst used this remark to other members of staff including Sammie, the owner's daughter – wagging her finger in a jokey way. The claimant has not adduced any evidence to suggest that she was treated less favourably than somebody else of a different nationality. In fact the evidence is the opposite – that other members of staff (including Sammie, the owner's daughter who is British) were treated in the same way as the claimant. Accordingly, that allegation does not succeed.

132. We turn to consider the allegation as an allegation of race related harassment. The first question is: was the conduct unwanted conduct? The claimant says that it was, so we move to the next question: was it related to the claimant's Ukrainian nationality? We find that it was not. There was no evidence to suggest that Ms Ashurst made the remark in relation to the fact that the claimant was Ukrainian. In fact the remark was made to other staff including Sammie (the owner's daughter) which suggests it was not related to Ukrainian nationality and accordingly the allegation fails at that stage.

Allegation 2.2.3: On 20 October 2022, when the claimant tried to say something on WhatsApp about airing the rooms where children and staff are, she was verbally attacked and ridiculed for her statements by Kelly Haddon, Laura Parker, Emily Rose and/or Stephanie. The next day, when the claimant attended work, she was invited to the dining room and blamed for the bad behaviour by Marie Carvall and/or Coral Evans.

133. We turned to consider this as an allegation of direct race discrimination.

134. We find this allegation is in two parts. The first part is in relation to the WhatsApp conversation itself. We are not satisfied that it is factually accurate to say

the claimant was verbally attacked and ridiculed for her statements by Kelly Haddon, Laura Parker, Emily Rose and/or Stephanie.

135. We find the context of the WhatsApp conversation is important. We find that all four women about whom the claimant complains had previously been upset by her.

136. We find that Laura Parker was protective of her mother. We rely on her evidence that her mother had a headache that day of the what's app conversation (she suffers from migraines.) Ms Parker responded strongly to the claimant's suggestion that headaches were to do with the room not being sufficiently ventilated. In addition, we find that the relationship between the claimant, Sarah Ashurst and Laura Parker was deteriorating around October 2022. The claimant had been moved to Sarah Ashurst's room in September but in or around late October the issue of the laptop "repair" had occurred.

137. We find that Stefanie Williams was the member of staff who the claimant had asked why she did not work full-time in way that was not sensitive or appropriate (see the evidence of Coral Evans at paragraphs 10-13 and page 342). She was also the subject of a complaint previously made by the claimant. We find that Emily Rose is Emily Hugill. By this time the claimant's relationship with her was poor because the claimant had repeatedly challenged Ms Hugill as team leader when she had worked in the room where Ms Hugill was team leader.

138. We find the claimant had also raised unsolicited medical advice to Kelly Haddon (see her statement at paragraphs 7 and 8). We find the claimant, when Ms Haddon's mother was suffering from cancer, had suggested that fresh air and eating turmeric would help cure her cancer. This had upset Ms Haddon.

139. The Tribunal finds that the comments made by Ms Haddon, Ms Parker, Emily Rose Hugill and Stephanie Williams do not amount to verbally attacking and ridiculing the claimant. The Tribunal finds that the claimant had very firm views on particular subjects (which included fresh air), and although she was very sensitive to criticism of her views, she could be very assertive in her contention that she had the right to continue to express her views to her work colleagues even when they were unsolicited.

140. We therefore turn to the first issue in the direct discrimination claim: could the claimant reasonably see the treatment as detriment? The Tribunal finds that the claimant could regard the challenging of her views and the way that they were made in the WhatsApp conversation as a detriment.

141. The next issue is: was the claimant less favourably treated than someone in the same material circumstances of a different nationality (not Ukrainian) was or would have been treated?

142. The claimant was not able to adduce any evidence which suggested that the reason for the remarks make in the conversation were her Ukrainian nationality. However, if we are wrong about this and the burden of proof had shifted to the respondent, we are satisfied that there is a non discriminatory explanation for the treatment. The reason the women responded to the claimant in the way that they did was because she had upset them prior to the WhatsApp conversation with her

unsolicited views and opinions and that despite being asked not to pursue the conversation in the what's app exchange, on a number of occasions by Coral Evans, she continued to do so. Accordingly, the claimant's claim of direct race discrimination fails.

143. We turn to consider the matter as an allegation of harassment. The first issue is whether there was unwanted conduct. The claimant says the conduct was unwanted. We find, turning to the second issue, there is no evidence to suggest that the remarks made in the WhatsApp conversation are related to the claimant's nationality for the reasons given above. The claim therefore fails at that point.

144. However, for the sake of completeness we have gone on to consider whether the remark had the disadvantageous prohibited intention. We are satisfied there was no such intention relying on the evidence of Ms Hugill, Ms Parker and Ms Haddon.

145. We have gone on to consider whether the remark had the disadvantageous prohibited effect. The claimant said that it did. However, we must consider all the circumstances of the case as well as the perception of the claimant and whether it was reasonable for the conduct to have that effect. We find having regard to the claimant's perception and all the circumstances of the case, it was not reasonable for the conduct to have that effect. The claimant was repeatedly told by Coral Evans and eventually by Marie Carvall to "keep the chat for work only" and "if anyone is concerned about headaches please go to the doctors and get them checked out. If not, let's hope it's a case of live and let live". Ms Evans again stated, "Right girls, this needs dropping now. Please keep it work-related in future unless you have something to say that's going to make someone smile". We note that Ms Evans' attempts to end the conversation were directed at all the participants not just the claimant. For those reasons it was not reasonable for the conduct to have the disadvantageous effect.

146. We turn to the second part of the allegation contained in 2.2.3, which was "The next day when the claimant attended work she was invited to the dining room and blamed for the bad behaviour by Marie Carvall and/or Coral Evans".

147. The Tribunal finds that this is factually inaccurate. We find the meeting which took place the following day was a necessary meeting because of the tone of the comments in the WhatsApp group. The claimant did not receive any note of concern following that meeting. She was not blamed for what happened. In contrast, Laura Parker (page 345) and Kelly Haddon (page 324) received a note of concern about the way they had spoken on the WhatsApp group.

148. We turn to consider this as an allegation of direct race discrimination. The first question: did the claimant reasonably see the treatment as detriment? We find the answer to this question is "no". We prefer the recollection of Ms Carvall and Ms Evans whom we found to be clear, careful and conscientious witnesses in their recollection.

149. Even if we are wrong about that and the claimant could reasonably see the treatment as detriment, the claimant cannot show that she was treated less favourably than someone in the same material circumstances who was not Ukrainian would have been treated. The claimant did not receive any note of concern arising out of the WhatsApp conversation even though she continued to promote her views

when asked to stop. By contrast, Laura Parker and Kelly Haddon (who were both British nationality) had received a reprimand. Therefore, the claim cannot succeed.

150. We turn to consider the allegation as harassment related to race. The claimant says that what happened at the meeting was unwanted conduct. We find the claimant's recollection is inaccurate. However, we turn to the next question: was it related to race? We find the answer to that question is "no" and rely on our previous findings, in particular that the claimant was not blamed and that two other employees who participated in the WhatsApp group of British nationality were reprimanded when the claimant was not. Accordingly, the allegation fails.

Allegation 2.2.4: On 21 December 2022, Laura Parker shouted at the claimant, when the claimant chose to dispose of a dirty towel.

151. The Tribunal relies on its finding of fact. We turn to consider this as an allegation of direct race discrimination. The first question is: could the claimant reasonably consider the treatment as detriment? There is no dispute that Laura Parker shouted at the claimant, and the claimant was entitled to see this treatment as detriment. We turn to the next question: was the claimant treated less favourably than someone in the same material circumstances of a different nationality was or would have been treated?

152. We rely on our finding of fact. Laura Parker is the daughter of Sarah Ashurst. We find (and this is supported by other witnesses and Laura Parker herself) that she is an assertive individual who speaks her mind. In contrast we found her mother (Ms Ashurst) to be a gentle, quieter personality. There is no dispute that the claimant declined to do what Ms Ashurst had asked (i.e. not to change the towel) and in fact even after she was shouted at by Laura Parker, she changed the towel anyway.

153. We find by the date the incident occurred (which was December 2022) the claimant had sent a lengthy email about various complaints she had in relation to Sarah Ashurst and in relation to health videos the claimant had shared. There had been a meeting on 22 November 2022 as set out in our fact find above where the respondent had sought to deal with issues and conclude them. The claimant had presented a further grievance on 8 December against Sarah Ashurst.

154. The Tribunal finds that Laura Parker was protective of her mother and resentful of the claimant, who was a nursery practitioner and not the team leader and was not following her mother's instructions, and that was the reason why she had shouted at her. We rely on our evidence too that Laura Parker was a forceful individual and the fact she admitted in her own evidence had fallen out with others at work.

155. Therefore the Tribunal is not satisfied that the burden of proof has shifted but even if it has there is a non discriminatory explanation for the treatment.

156. We turn to consider the allegation as an act of race related harassment. We find that shouting at the claimant was unwanted conduct. However, we find the claimant has not adduced any evidence which could suggest that Laura Parker shouting at her was related to her Ukrainian nationality and accordingly the claim fails at this stage.

157. Allegations 2.2.5 and 2.2.6 were not permitted to proceed.

Allegation 2.2.7: In February 2023, Sarah Ashton shouted to the claimant that the claimant was going home, when Katrina Dean was given a choice about going home (which the claimant wasn't).

158. We find the claimant's evidence about this allegation was contradictory. There is no clear account of it in the claimant's witness statement. In cross examination the claimant agreed that both she and Katrina Dean were offered the opportunity to go home. Although the allegation states it was Sarah Ashurst (there is a typographical error saying "Ashton") shouted at the claimant, in cross examination the claimant said it was Kelly Haddon.

159. The Tribunal relies on its finding of fact that the respondent had a contractual entitlement to send home staff when the ratios of staff to children fell below the legal requirement. It was not disputed that the respondent had the entitlement to do this without pay. We rely on the evidence of Katrina Dean that the usual procedure was that staff were asked if they wanted to volunteer to go home early. Katrina Dean (who was a conscientious witness, making concessions in favour of the claimant on occasion) stated that she normally wanted to go home and would volunteer to do so.

160. We rely on the evidence of Sarah Ashurst who was clear that she did not shout at the claimant and tell her she was going home.

161. We rely on the fact that by February 2023 the claimant was no longer working in the room where Ms Ashurst was team leader.

162. The claimant agreed in cross examination that both she and Katrina Dean were offered the opportunity of going home.

163. Therefore, given the unreliability of the claimant's evidence on this point, and preferring the evidence of Ms Ashurst, the Tribunal finds that Sarah Ashurst did not shout at the claimant to say she was going home.

164. We turn to consider this as an act of direct race discrimination. The first question is whether the claimant reasonably saw the treatment as detriment. We are not satisfied the treatment occurred so it cannot have amounted to detriment.

165. We turn to consider the allegation as an allegation of race related harassment. We are not satisfied the unwanted conduct occurred as set out in the allegation and accordingly it fails at that point.

Allegation 2.2.8: On 22 February 2023, Laura Parker said to the claimant "*Kamila, I'm not saying goodbye to you because I'm a racist*".

166. The Tribunal finds that (as set out in our finding of fact) on 22 February 2023, when Laura Parker was leaving the respondent's business, she had said goodbye to the other members of staff in the room and then said either "Kamila, I'm not saying goodbye to you because I'm a racist" or "Kamila, I'm not saying goodbye to you because apparently I'm a racist".

167. We find that it is immaterial whether the word “apparently” was included or not. We find that Laura Parker said the words in a sarcastic or ironic tone of voice. All the witnesses who were present (Kelly Haddon, Emma Fairclough, Katrina Dean) said that Laura Parker used the words in a sarcastic or ironic tone of voice. Only the claimant thought the words were said literally. We find the words were not said literally. We find they were said in a sarcastic or ironic manner.

168. At this point the Tribunal reminds itself that Laura Parker was leaving the respondent’s business. The relationship between the claimant and Laura Parker was very poor. The claimant had a poor relationship with Laura Parker’s mother and made a number of complaints against her and they had fallen out over the laptop repair incident. Furthermore, by this stage the claimant's husband had said that he had followed Sarah Ashurst home in order to obtain her address to sue her in the small claims court. We rely on Ms Ashurst’s evidence that she found this very upsetting and disturbing.

169. The Tribunal finds that when a person speaks in a sarcastic or ironic way then the words used have the opposite meaning to the literal meaning. We find that Laura Parker was not saying to the claimant that she was admitting she was a racist. Rather, she was saying the claimant had previously suggested that Ms Parker herself and her mother were racist (see pages 452 and 485). There is no dispute that in her lengthy complaints about the Ms Parker (452) and her mother (485) the claimant had used strong language generally, in one sentence referring to unspecified “racial persecution” and in another to “discrimination”.

170. Sarcasm or irony is not easy to understand when speaking English as an additional language.

171. We turn to consider the allegation as an allegation of direct race discrimination. The first question is: did the claimant reasonably see the treatment as a detriment? This is not an easy question to answer because the claimant did not understand the comment was made in an ironic or sarcastic tone of voice and so did not understand its actual meaning.

172. However, if the claimant was entitled to see the treatment as detriment, the Tribunal has gone on to the next question: was the claimant treated less favourably than someone on the same material circumstances of a different nationality was or would have been treated? The question after that is: if so, was the less favourable treatment because of race?

173. The Tribunal has had regard to the burden of proof. The Tribunal is not satisfied that the claimant has been able to shift the burden of proof, but in case we are wrong about that we have gone straight to the question: did the respondent have a non discriminatory explanation for the treatment? We find that Laura Parker did.

174. We find Laura Parker made that comment not because of the claimant's Ukrainian nationality but because she was upset that the claimant had put in complaints of “racial persecution” by her and her mother to the respondent. We are therefore satisfied there is a non discriminatory explanation for the treatment.

175. Ms Parker accepted in her evidence that the remark was ill judged and it had caused difficulty for the respondent.

176. The Tribunal has considered carefully whether the remark was an act of direct race discrimination and finds for the reasons above that it was not. Therefore the allegation fails.

177. We turn to consider the comment as an allegation of race related harassment. The Tribunal reminded itself of the guidance in **Pemberton**. We remind ourselves we must be clear about what was the unwanted conduct. The claimant said the unwanted conducted was Laura Parker saying to her, "Kamila, I'm not saying goodbye to you because I'm a racist". The claimant said she understood those words were meant at face value. The Tribunal has found the claimant was wrong about that. The Tribunal relies on the evidence of the other witnesses who all say (including those who made concessions on the part of the claimant) that the tone used was sarcastic and ironic. In those circumstances, the claimant having misunderstood the comment, it is difficult to see that it amounted to unwanted conduct.

178. However, in case we are wrong about that we have gone on to the next question: was the comment related to race? The claimant's race for the purposes of this case was her Ukrainian nationality. We are not satisfied that the comment was directly related to the claimant's Ukrainian nationality. It was directed to the fact the claimant had alleged the claimant and her mother were racist. The claim therefore fails at this point.

179. However, in case we are wrong about that we have gone on to the next question: did the conduct have the purpose of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? We are not satisfied (relying on the evidence of Ms Parker) that she did have that intention. Ms Parker is a plain-speaking individual. She was upset with the claimant because the claimant had made complaints about her. She was not going to pretend their relationship was friendly when it was not. Therefore she did not want to say goodbye to the claimant and stated that.

180. However we are satisfied she did no intend to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

181. We therefore turn to the next question (3.2.4): did the conduct have the disadvantageous effect? We must take into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

182. At this point the Tribunal steps back and looks at the whole picture. The claimant and Laura Parker did not get on. Their relationship had broken down some time previously. We have set out the reasons why in our findings of fact. Laura Parker is an assertive and feisty individual. She says what she thinks. The claimant is also a very assertive individual. She is insistent on promoting her views even when she had been told they can be upsetting to others. The claimant (who was speaking English as a second language) did not understand the nuance of the comment being made by Laura Parker and misunderstood it. That is a circumstance we need to take into account. The claimant had made consistent and lengthy email complaints about extensive matters she was not happy about at the respondent's nursery, and that included complaints about Laura Parker and her mother. Laura

Parker had twice been reprimanded at work following a complaint from the claimant (the what's app conversation incident and the towel incident) Indeed, Laura Parker was further reprimanded for her comment to the claimant on the day that she left and was told that it would be in a reference in future..

183. Taking into account the breakdown of the relationship between the two women, and all of the matters raised above, the Tribunal is not satisfied that it was reasonable for the conduct to have the disadvantageous effect and it therefore fails.

Allegation 2.2.9: On approximately 23 February 2023, Sarah Ashurst and/or Alison Dickinson verbally criticised the claimant and accused the claimant of racism (in relation to Laura Parker and the allegation of 22 February 2023).

184. The claimant provided no detailed evidence about this matter in her witness statement. She conceded in cross examination that the date 22 February 2023 was incorrect. The only real reference to this incident is in an email at page 513.

185. The Tribunal finds there was a conversation between Sarah Ashurst and/or Alison Dickinson and the claimant, although the date is not entirely clear. The Tribunal prefers the recollection of Sarah Ashurst whom it found to be a conscientious witness, that she was trying to explain that her daughter had not been racist.

186. The Tribunal is not satisfied the claimant has adduce any evidence to suggest that Ms Ashurst and Ms Dickinson accused the claimant of racism.

187. We turn to consider this as an act of direct race discrimination. We are not satisfied that the claimant has established the facts as set out in allegation 2.2.9 and accordingly we cannot show that the treatment amounted to a detriment and the claim fails at that point. Likewise in relation to an allegation of race related harassment. The claimant is unable to establish that the allegation occurred, and the claim therefore fails at that point.

Allegation 2.2.10: After the claimant had tried to make contact with other employees on Facebook, particularly after exchanging messages with one person around difficulties which the claimant had previously had in getting pregnant and some tablets that a priest had given the claimant, the claimant was criticised by managers for having done so (Coral Evans, Alison Dickinson and/or Marie Carvall).

188. The Tribunal relies on the account of Nursery Practioner Kerys made on 27 October 2022 in relation to unsolicited comments made to her about fertility issues. The Tribunal finds that the respondent's managers spoke to the claimant about making unsolicited comments on sensitive matters.

189. The Tribunal turns to consider this as an allegation of direct race discrimination. The first question is: did the claimant reasonably see the treatment as detriment? The Tribunal finds that it is not a detriment to be spoken to by managers where an employee has made ill-judgment, inappropriate and unsolicited comments about a sensitive matter to another employee. In particular, the employee concerned was a very junior employee on her second day at work.

190. Even if the Tribunal is wrong about this and the claimant can see the treatment as detriment, the claimant was not treated less favourably than someone in the same material circumstances of a different nationality was or would have been treated. Even if the claimant can shift the burden of proof (which she cannot), the respondent has a non discriminatory explanation for the treatment. The claimant was not spoken to about this matter because she was Ukrainian. She was spoken to about this matter because she had made an making ill-judged, inappropriate and insensitive remark on an unsolicited non work related matter to a junior employee. Accordingly, the allegation fails.

191. We turn to consider the allegation as harassment related to race. The first question was: was the conduct unwanted? The tribunal finds the conduct was unwanted. The next question is: was it related to race? There was no evidence whatsoever to suggest that the comment made by the managers to the claimant in relation to this matter was related to race and accordingly the allegation fails at that point.

Allegation 2.2.11: The dismissal of the claimant.

192. The Tribunal relies on its findings of fact and the findings it made in relation to the claimant's claim that she was dismissed for whistleblowing or for asserting a statutory right. The Tribunal relies on its finding that the claimant was dismissed because of the fact her relationship with many of the respondent's employees and all of the respondent's room managers had irretrievably broken down.

193. The claimant has not adduced any evidence which could suggest that the real reason she was dismissed was because she was Ukrainian. Even if she is able to do this, the respondent has shown a non discriminatory explanation for the claimant's dismissal, namely the breakdown of her relationship with many of the respondent's employees and all of the respondent's room managers.

Time Limits

194. The last issue was time limits but given that the claimant's claim has failed completely there is no requirement for us to consider the issue of time limits.

Remedy

195. There is also no requirement for us to deal with remedy because the claimant has lost all her claims.

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Employment Judge K M Ross

Date: 28 November 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

29 November 2024

FOR THE TRIBUNAL OFFICE

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