Case No: 3304636/2018

EMPLOYMENT TRIBUNALS

Claimant: Miss M Bonney
Respondent: Diligent Care Services Ltd

Heard at: Watford **On:** 11 to 14 June 2024

Before: Employment Judge Dick

Representation
Claimant: In person
Respondent: Ms Y Barley - consultant

RESERVED JUDGMENT

1. The claimant was not an employee within the meaning of the Employment Rights Act 1996 before 18 April 2016 and was therefore not continuously employed for a period of not less than two years. The complaint of "ordinary" unfair dismissal is therefore dismissed because the Tribunal does not have jurisdiction to determine it.

2. The complaint of "automatically" unfair dismissal is not well-founded. The claimant was not unfairly dismissed for making a protected disclosure or protected disclosures.

3. The complaint of breach of contract in relation to wrongful dismissal is well-founded.

4. Remedy for the breach of contract will be determined at a hearing on 22 October 2024 at 10.00am by Hybrid.

REASONS

Key to references:

[x] = page of agreed bundle.

INTRODUCTION

1. The claimant was for many years an "enhanced foster carer" working under an agreement with the London Borough of Haringey ("LBH"). She, her partner Mr Rominus Sidonie Edgar and the children they cared for lived together in a house ("the home") provided by LBH. For much of that time the claimant and Mr Sidonie Edgar cared for three particular children, whom I shall call X, Y and Z. The children were all of a similar age and all had disabilities which required significant care. In October 2015 one reached the age of 18; since he was now an adult, the claimant was no longer his foster carer but she continued to care for him under a scheme called "Staying Put". The same happened when the next child reached 18. The last of the three children to reach adulthood did so on 17 April 2016. The following day, the claimant started employment with the respondent ("DCS") as a "Project Manager". DCS had been contracted by LBH to "provide services" at the home. The claimant continued to live in the home and to care for X, Y, and Z.

2. On 30 July 2017, what I will refer to as "the incident" took place at the home, involving X and Mr Sidonie Edgar, who by now was employed by the respondent as a support worker at the home. Precisely what happened was an area of contention in this case, though all agreed that Mr Sidonie Edgar had used some force on X during the course of the incident. The claimant's case was that the only force used by Mr Sidonie Edgar was in lawfully restraining X. The respondent, on the other hand, took the view that what had happened warranted Mr Sidonie Edgar's dismissal. Although the claimant had not been present when the incident took place, the respondent ultimately formed the view, it said, (and this was another point of contention in the case) that in failing to report the incident the claimant had also committed misconduct which warranted dismissal. The claimant was dismissed by letter dated 3 November 2017 after a disciplinary process. An unsuccessful appeal followed. The claimant says that the dismissal was unfair. Her claim is that the real reason for the dismissal was a number of protected disclosures she had made (i.e. "automatically unfair dismissal") and she argues in the alternative that the dismissal was otherwise unfair ("ordinary unfair dismissal"). The claimant also says that the dismissal was wrongful as she had not in fact committed gross misconduct.

BACKGROUND; CLAIMS AND ISSUES

3. As will be obvious this is a very old claim. The claim had originally been made against two respondents, the second being LBH, by way of claim form presented on 9 March 2018, the case having been in early conciliation from 10

January to 10 February 2018. On 17 May 2019 a preliminary hearing took place before Employment Judge ("EJ") Henry. The case was listed for a further hearing at which a number of preliminary points were to be considered. Before that further hearing had taken place, on 5 September 2019 EJ Bedeau issued a judgment dismissing the claim against LBH upon withdrawal. The further hearing took place before EJ Hyams on 21 January 2020. EJ Hyams decided that a number of the preliminary points were better dealt with at a final hearing. EJ Hyams prepared a list of issues which was substantially the same as what was to become the final list of issues. Further hearings took place before EJs Forde (13 January 2022) and Caiden (9 October 2023). The first of those hearings dealt with the claimant's application for disclosure of a number of documents. The second set the date for this hearing and settled a final list of issues. Part of the reason for the long delay in this case reaching a final hearing (though not the only reason) was illness on the part of the claimant.

4. The full list of factual and legal issues for me to decide are appended to this document. In summary these were:
    a. (Issues 1 to 3) Did the claimant have the two years' service required to claim ordinary unfair dismissal? She was only employed by the respondent DCS for a little under seven months. The respondent accepted that she would have more than two years service by way of a transfer within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 2006/246 (a "TUPE transfer"), but only if both of the following two conditions were met:
        i. She had been actually been an employee (within the meaning of the Employment Rights Act 1996, "ERA") of the transferor LBH;
        ii. There was no break in the continuity of that employment (i.e. she had not resigned before DCS took over).
    b. (Issues 4 to 5) Was the complaint for automatically unfair dismissal out of time and if so should the Tribunal allow the claimant's application to amend her claim?
    c. (Issue 6) Did the claimant make one or more protected disclosures and if so were they the reason for her dismissal? If so her dismissal would be automatically unfair. (The disclosures said to have been made, which I refer to as Pleaded Disclosures PD1, PD2 etc. are as set out in the amended particulars of claim. I deal with them individually below.)
    d. (Issue 7) If not, was the claimant's dismissal "ordinarily" unfair, i.e was dismissal within the range of reasonable responses open to a reasonable employer? (This would apply only if Issues 1 to 3 had been decided in the claimant's favour.)
    e. (Issue 8) Was the claimant's dismissal wrongful. i.e. did she in fact commit gross misconduct?

PROCEDURE, EVIDENCE etc.

5. Before the evidence was called I explained to the parties that I would read the witness statements but they should be sure to refer me to any documents of relevance in the agreed bundle during the course of the evidence or

submissions. Since EJ Caiden's case management order had not been included in the bundle I ensured that the parties each had a copy. Having had time to consider that, the parties agreed that the issues for me to decide were as set out by EJ Caiden, subject to the preliminary issues I deal with below.

6. Before hearing the evidence I dealt with a number of preliminary issues. I gave oral reasons for my decisions. This written record of those decisions is not intended to be written reasons, which were not requested at the hearing and so will only be provided if a written request is presented by either party within 14 days of the sending of this document. In short:

    a. I refused the claimant's application to re-add LBH as a respondent. The claims against LBH were dismissed upon withdrawal some time ago. Even had there been proper grounds to re-add LBH, it would inevitably lead to further significant delay in the case which would not be in the interests of justice.
    b. I refused the respondent's application to admit into evidence what I was told was an audio recording of X being asked about the incident which was said to contradict his account in the witness statement relied upon by the claimant. It was unclear whether the claimant had ever been provided with a copy of this recording (or access to it), it was not referred to in any of the witness statements or the agreed bundle and the respondent was not able to propose any way in which they would be able to play it to the Tribunal.
    c. I refused the claimant's application to admit into evidence a further bundle of evidence which she emailed to the Tribunal at midday on the first day of the hearing. No good reason was provided to explain why the issue had not been raised before and the bundle had not been sent to the respondent (even at the point the application was made to me).
    d. So far as both (b) and (c) were concerned, the parties had had six years to prepare for the case and I did not consider it proportionate to allow the case to be delayed any further.

7. Both parties wished me to hear evidence from X, who had attended. X is now 26 years old and has cerebral palsy. He had attended with a friend/supporter Mr Beckles. I took account of the fact that the claimant and the respondent (and the respondent's Ms Siggers, who was present) had been responsible for his care and both considered it appropriate for him to give evidence. The claimant told me, and there was no dispute from the respondent, that although X had physical disabilities and difficulty communicating in the sense that people might find it hard to understand him, he did not have learning difficulties and would have no difficulty in understanding us. I spoke to X and Mr Beckles about all of that. I formed the view that X was capable of understanding and participating in the hearing as a witness, though some help might be needed from Mr Beckles if I or the parties had any difficulty in understanding X. During the course of X's evidence, I repeated back to him my notes of his answers so that he was able to confirm that I had correctly understood. Ms Barley for the respondent confined her questioning in cross-examination to the points which were necessary for her to cover. The parties agreed that X's evidence could be heard first so that he did not need to stay for any longer than was necessary.

Aside from these measures, X and Mr Beckles confirmed that no other particular adjustments were necessary to the Tribunal's usual procedure, save for taking a little more time for the questions to be asked and answered.

8. Having heard submissions from the parties on the point, and having also asked X and Mr Beckles for their views, I also made privacy orders under rule 50 to protect the identity of X. These are contained in a separate document. In consequence of those orders, I do not use X's name or give the address of the home.

9. In response to my enquiry, the parties were able to confirm that the High Court proceedings which were mentioned in the written evidence had long ago concluded and were about the claimant's efforts to gain access to the possessions she had left at the home following her dismissal.

10. After taking time to read the statements, I heard oral evidence from the witnesses. In each case the usual procedure was adopted, i.e. their written statements stood as their evidence-in-chief and they were then cross-examined. I heard from the following witnesses called by the claimant: X, the claimant and Mr Sidonie Edgar. (The claimant had produced a number of statements and written submissions which by consent I also treated as statements.) I heard evidence on behalf of the respondent from Belinda Siggers, care manager for the respondent. The parties agreed that I could also take account of written evidence from the following witnesses who the claimant had been unable to call to give oral evidence, giving it such weight as I thought appropriate given that it had not been subject to cross-examination on oath: Judith Mekle and Stacey Shilleh (who both worked for DCS) and another witness who I shall not name (the mother of Z). I also took account of the statement of Naomi Bonney-Turner, the claimant's daughter, which the respondent did not dispute was accurate so far as it was relevant.

11. At the conclusion of the evidence I heard oral submissions from both parties. In order to assist the claimant, I had previously ensured the parties had printouts of (i) ss 43A, 43B, 43C, 43E to G of the Employment Rights Act 1996 and (ii) paragraphs 2.130 to 2.131a of Volume 3 of the *IDS Employment Law Handbook.* The latter summarises a number of authorities relating to the employment status of foster carers.

FACT FINDINGS

12. I find the following facts on the balance of probabilities. Where I have needed to resolve disputed facts I make that clear. I have not made findings on every disputed issue of fact, but merely on those which assist me to come to a decision bearing in mind the list of issues.

General Matters

13. The facts set out in paragraph 1 above were not in dispute and I take them into account. I also note the following. The claimant was a trained social worker. Clearly, by the time I am concerned with she had a considerable amount of experience caring for children with disabilities in general and X, Y, and Z in particular. In her witness statement the claimant said that during her time at the home the children thrived in a secure and stable environment. Putting aside the events of 30th of July 2017 and what followed, there was no dispute that that was an accurate statement. I was not told about any concerns whatsoever about the claimant's care of the children before that date and it was evident to me that X loved the claimant and Mr Sidonie Edgar, whom he referred to as Mum and Dad, and that they felt the same about X.

Fostering etc. for LBH

14. In her witness statement the claimant described her work for LBH in the following terms: " I was employed … on a permanent self-employed basis from 24th November 1997 as an enhanced foster carer providing personal care to [X, Y and Z]." Whether the claimant was in fact employed within the meaning of ERA is something I consider in the conclusions below. For now, I set out my factual findings on the nature of her engagement (to use a neutral term) by LBH.

15. The home was owned by LBH and was kept for the purposes of looking after children with disabilities. The claimant's evidence, which was not disputed and which I accept, was that X, Y and Z would otherwise had to have been in residential care. The home had a number of special adaptations for use in caring for the children, such as lifts, ramps and a hoist. The claimant had lived there, by way of licence rather than lease, since 1997. So too (for most of the material time) had Mr Sidonie Edgar. Aside from this the claimant's statement said little about the relationship between her and LBH before the children reached adulthood, save that she was entitled to 3 weeks' holiday per year and went on training courses provided by the respondent. There is also a reference to a letter which was in the bundle. The letter is dated 24 November 1997 and is written on behalf of LBH to the claimant's bank. So far as is relevant it says: "Since August this year [the claimant] has worked for Haringey as an Enhanced Foster Carer. She has a personal weekly income of £250 pw. and is on a permanent contract with this department. She is self-employed."

16. In her oral evidence, the claimant told me the following. Again, it was not disputed and I accept it. (The real dispute between the parties was whether on the basis of these facts there was an employment relationship.) The claimant and Mr Sidonie Edgar were paid weekly, separately, and did their own taxes (i.e. income tax was not deducted at source by LBH). They did not pay rent to LBH. Food and clothes for the children were paid for from a fostering allowance which was separate to what the claimant was paid by LBH. The arrangements for respite care (see below) operated in such a way that if the claimant found it difficult the children could spend time away or if "push came to shove" other carers could come in, but this rarely happened. The three weeks' paid holiday

was separate to the respite care; when the claimant wanted to go away LBH would arrange cover. It would have to be someone who knew the children well and the claimant would have a say in who it was – it was a partnership. On other occasions the claimant and Mr Sidonie Edgar went away with the children. There was no formal process for monitoring the quality of the claimant's work but she had a nominated social worker. So too did the children and there was a degree of monitoring in the sense that social workers would come round to the house and there were reviews every 6 months. When I asked about a hypothetical situation where LBH had concerns about her work, the claimant said she thought she would have been spoken to by the social worker – she had no line manager. In the event of a hypothetical disagreement about how the children would be cared for there would likely have been a meeting between the claimant and the social workers. When asked whether she was told what to do by LBH, the claimant said that she worked in partnership with LBH and with others – physiotherapists, a multi-disciplinary team. The claimant did not do any work but care for the children. I do not quite accept one assertion made by the claimant, which was that she was not *allowed* to do any work other than care for the children – this does not appear in the written agreement (see below) but I do accept that given her responsibilities under the agreement it would for all practical purposes have been difficult if not impossible for her to in fact have done any other work.

17. There was of course no evidence presented by LBH, who were no longer a party to the case, but as well as the letter I have already referred to, there was some other documentary evidence. At [66] was a document headed "Enhanced Carers – Agreement set out by Schedule 2 Fostering Regulation 3(6)B" signed in January 1999 by the claimant (and Mr Sidonie Edgar) and on behalf of LBH. It says it "forms the basis of the relationship" between those parties. It goes on to say that carers are required to sign a foster carer agreement which forms the basis of the relationship between the carers and LBH. It continues: "the purpose of this agreement [which I take to mean the document at [66] rather than the foster carer agreement] is to provide written information about the terms and conditions of the partnership between [LBH] and the foster carers." It describes LBH as the "approving authority" and says that carers are required by law to have only one approving authority. Any other authority wishing to use the carers would require written permission from LBH. The "expectation" would be that carers would only accommodate children from LBH. The document provides for an annual review of each foster carer's approval and says that "a review can take place following the refusal of the placement if [LBH] did not consider it an inappropriate placement." I take this to mean that the carer was entitled to refuse a particular placement (i.e. child) proposed by LBH. The document states that the home had as its objective providing family placements for three young people with severe disabilities who would otherwise need institutional care. The carers were to provide an experience as close to family life as possible and would be supported in the task by "appropriate respite arrangements". The respite care that could be offered is set out in a number of bullet points which include the children spending time away from the home and approved respite carers working at the home at various specified times (e.g. for six hours per day during seven weeks of the school holidays). The carers were "permitted three weeks paid holiday a year". Arrangements for these holidays

are set out in further detail. The carers could nominate three weeks per year when they would be unavailable. The "flat fee" would continue to be paid during that period to allow carers to have a break from their duties. To maintain continuity for the child it was expected that wherever possible the children would be placed with someone they know, i.e. an identified "respite carer who will have been checked and approved by "Panel". Provision is made for periods of notice to be provided for the change of carer. Flat fees would be paid to respite carers and the fostering allowance was to be passed from the carer to the respite carer. The carers would continue to receive a fee but no fostering allowance. Under the heading "termination of the agreement" it provides that the parties would give each other three months' notice in writing if they wished to terminate the agreement. Under the heading "enhanced carers expectation of the Department" [*sic*] the document provides that each enhanced carer would be provided with a named social worker to offer support and monitoring of placements. In the absence of the social worker the carer could contact others within LBH and LBH would provide a support group where the carers could meet other carers. Further training would be provided for enhanced carers as required and enhanced carers were to have access to the Department's formal complaints procedure.

18. I was not presented with any evidence to suggest that the actual agreement in practice differed materially from the written terms as set out in the previous paragraph. I find that the terms of the agreement were as set out in the previous three paragraphs.

Staying Put

19. X, Y and Z each reached the age of 18 between October 2015 and April 2016. At that time, as the claimant says and was not disputed, she was the manager of care services at the home for various statutory purposes. After each child reached the age of 18, the claimant was no longer their foster carer. Instead, she became responsible for their care under the terms of LBH's "Staying Put" arrangements. This decision was made taking into account the wishes of X, Y and Z and it meant that they could stay at the home and in the care of the claimant. Although I was not directly addressed on it by either party, it would appear that this arrangement was pursuant to s 23CZA of the Children Act 1989 as amended by the Children and Families Act 2014. So far as is relevant this provides that the local authority (i.e. LBH in this case) has a duty to monitor the arrangement and to provide advice and assistance and support to the former child and former foster parent, that support including financial support.

20. At [71] was a document marked "DRAFT" headed "Staying Put Guidance, Children and Young People's Services, September 2012." It explains the arrangements to be made should a carer and young person wish to extend a foster placement beyond the young person's 18th birthday for the "purpose of promoting the gradual transition from care to independent living." It provides for a panel to approve such an arrangement in advance. The carer would receive the carers' allowance at the full fostering rate (£205 in 2013). The young person

was to claim welfare benefits and housing benefit where appropriate, the latter being deducted from the carers' allowance which would then be topped up by the Young Adult Service (which I take to be an agency of LBH) to make it up to £205. The allowance was to cover the young person's living expenses – rent, groceries etc. The carer would be expected to provide oversight of the young person and support them to gain the skills for independent living. (I note that the document appears to apply generally rather than to disabled young persons in particular.) One section of the document deals with income tax and national insurance issues for staying put arrangements. It says the arrangement was classed as an "independent ex-foster care placement (in terms of income tax and national insurance regulations) which may require the completion of a relevant tax declaration" and which might affect the carers' entitlement to benefits. Under the heading "support for the carer" amongst other things it says the carer would be required to attend regular training (with optional support groups) and that there would be regular oversight and support from the supervising social worker twice a year unless otherwise agreed.

21. Before the arrangement began, continued the Guidance, there was to be a written agreement between the carer and the young person, facilitated by the allocated social worker, covering such things as the financial arrangements and education, training or employment activities. A draft/template agreement is included as an appendix. It is expressed to be an agreement between LBH, the carer and the young person. The template mostly provides for domestic arrangements, such as how the young person will contribute to the household budget, seeking permission from the carer to invite visitors in etc. It does not purport to impose any obligation on LBH (though it makes provision for rent costs to be covered by housing benefit or a contribution from the Young Adults Service). It does not purport to set out any powers that LBH would have, nor to impose any obligation on the carer or the young person towards LBH. I was not provided with a version (signed or otherwise) that purported to apply particularly to this case. At [88] is an email dated 28 July 2015 from the claimant to LBH (i.e. around the time that the Staying Put arrangements were being considered) which may refer to the document at [71], although that is not entirely clear. In the email the claimant makes various observations about the terms of any agreement. She says that she had only recently seen the agreement and expresses concern principally about whether respite care would in fact be provided but also about other aspects of how the arrangement would work in practice. The claimant does not take issue with any of the points I have summarised above, and I conclude from this (and from the evidence I heard about what happened in practice) that in all material ways what I have set out above, including in the draft/template, reflected the agreement between the parties. I should add that through a combination of her written and oral evidence the claimant explained that she had difficulties in fact obtaining the funding that should have been provided by LBH under the staying put policy once it came into operation; I accept that.

Start of claimant's employment with DCS

22. On 18 April 2016 the respondent company took on responsibility for the home, i.e. LBH "outsourced" its responsibilities for caring for X, Y, Z, all of whom were

now adults. A substantial part of the claimant's written evidence dealt with her dissatisfaction with the way LBH had handled the outsourcing to the respondent – the claimant makes a number of criticisms about the decision itself and about how the process was conducted. The claimant was told that in order to continue caring for the children when they reached adulthood she would need to register as a provider with the CQC or as an employee of, or as a sub-contractor to, a care agency. This is clear from an email in the bundle [126] dated January 2016. The claimant says she felt under pressure and felt that for the sake of the children she had little choice but to accept employment with the respondent; having heard her evidence on the point, I accept that, but given that LBH is not a respondent in this litigation I considered that I did not need to make detailed findings about the point beyond that. It was of course not disputed that the claimant did in fact begin employment with the respondent.

23. At [134] of the bundle was a document headed "statement of main terms of employment" signed, the respondent said, by Ms Siggers and the claimant on 18 April 2016. The claimant disputed ever signing it. I did not consider that I needed to resolve this dispute, since it seemed to me that there was no real dispute about the terms of the claimant's employment with the respondent – the claimant accepted that she had been given the document in June 2016 and clearly she then continued to work for the respondent, with the job title manager (i.e., of the home). The document says that the claimant's employment began the day was signed and states "no previous employment counts as part of your period of continuous employment". Given the respondent's concessions during the preparation for this case, as reflected in the list of issues, I did not need to decide whether this term could have the intended effect – the respondent now accepts that *if* the claimant was employed by LBH, and *if* there was no gap between that employment and her employment with the respondent, then the claimant would, by virtue of a TUPE transfer, have continuity of employment.

24. At [139] and [140] are two other employment related contracts purporting to be signed by the claimant on 19 April 2016. For the same reasons I considered that I did not need to resolve any dispute about whether the claimant had in fact signed them, although the claimant did accept that the signatures looked like hers even if she was not one hundred percent sure.

25. A letter from LBH dated 26 May 2016 confirms that following the claimant's request to "resign from fostering" for LBH her name had been removed from LBH's foster carers register. It notes that the claimant was to continue in her role caring for the young people now over the age of 18. Consistent with that, the claimant recalled that she had tendered the resignation in May.

26. It had been agreed that during the course of her employment with the respondent the claimant would remain living at the home. Her life and work at the home continued without incident until 30 July 2017.

Direct evidence about the incident of 30 July 2017

27. At this point in my reasons I simply record some of the direct evidence I heard relating to the incident. Before I set out my findings about what actually did happen, I deal with the evidence relating to the disciplinary process, since

documents for that process contain other accounts of what happened in the incident.

28. At the time of the incident the parties agreed that the claimant was not present in the home; there was no suggestion that she was in any way at fault for not being at the home. By the time of the incident Mr Sidonie Edgar no longer lived at the home, though as I have said he still worked there.

29. X's written evidence did not directly address the events of 30 July, although it did say that in October 2017 the police came to the address asking what had happened and that he told the police he had thrown a phone and Wi-Fi box at Mr Sidonie Edgar, he felt bad, he (i.e. X) was at fault, he should have listened to Mr Sidonie Edgar. In his oral evidence X said that he had been angry with Mr Sidonie Edgar and Mr Sidonie Edgar had tried to calm him down. X got annoyed and "kicked off" and threw the wi-fi box at Mr Sidonie Edgar. Mr Sidonie Edgar had restrained him – X had been on the floor as he had tripped (not *been* tripped) and Mr Sidonie Edgar was holding his hand. It stopped when X calmed down. Mr Sidonie Edgar never got aggressive. AA (see below) had been there but did not do anything. X recalled speaking to the claimant the same day but "way after" the incident and telling her that he and Mr Sidonie Edgar were "fighting" but it was his (X's) fault. He recalled seeing the claimant writing in the incident book (he was not asked what he meant by incident book).

30. Mr Sidonie Edgar's written evidence was that during the course of an argument about a wet toilet seat X had thrown a phone at him causing a cut to the corner of his eye and that he restrained X on his bed. When he let go of X, X bit him on the forearm. During the incident he had seen a member of staff, whom I will refer to as AA, watching. When X saw the blood coming from Mr Sidonie Edgar's eye, he apologised. AA had not intervened in the incident. He recalled AA relating the story of the incident to the claimant and saying that he did good. The claimant had advised him to go to hospital. In his oral evidence he said that he had not spoken to the claimant about the incident on the night as his shift had finished as she arrived. He at first said that he did not write an incident report. He later clarified that he was asked to write one, he thought the day after. He had written something down but did not have a copy with him at the Tribunal.

31. I was not provided with a witness statement from AA. At [167] was a document headed "Incident Report Form". Ms Siggers' statement refers to the form but does not explain exactly how and when Ms Siggers came by it. The form appears to have been filled in by AA. It says the "personnel involved" were Mr Sidonie Edgar and X. It says it happened in X's room and that AA was working with X at the time. It describes an exchange of words between Mr Sidonie Edgar and X and records "AA tried to separate". It says there were injuries to Mr Sidonie Edgar and says "I could not check [X] because he was aggressive." It describes a "fight" between Mr Sidonie Edgar and X and says that Mr Sidonie Edgar was on top of X, grabbed X's hands together and put his leg on X's legs. It says Mr Sidonie Edgar was pushing X on his bed and said "next time I'm going [or coming?] broke you hands [*sic*]". As best as I can represent it in typed script, the report records that it was reported by AA at "23'.30pm/7/17" (the "pm"

appears underneath the "30" in smaller script). It says the incident was reported to the claimant.

32. The claimant's witness statements did not directly say what she had been told about the incident when she returned home – however her position was clear from what she said during the investigations (see below). When cross-examined the claimant agreed she had not raised the issue as a "safeguarding incident". As I understand it she was saying that she did not consider it to be such an incident as X had not been hurt or in danger. She maintained that what AA told her on the day was different to what AA said later (see below). She had recorded the incident in her "blue book" and also in what was a small space on the daily log. The claimant accepted that she had known that X had been restrained. When asked about whether the respondent had a policy on restraint, the claimant said that she did not know but she had never seen one – note that I was not shown any such policy. She denied that AA told her there had *been* a fight, rather, she said, AA had told her that X *gave* Mr Sidonie Edgar a fight.

33. Ms Siggers' evidence was that copies of the respondent's safeguarding policies were kept at all material times in the home. So too, she said, was the respondent's restraint policy. I was not shown either of these policies. Ms Siggers said that the respondent had a "no restraint policy", so that if restraint had occurred it should have been reported. Incidents were to be reported on an incident form. It was not made clear to me in evidence how the respondent defined incident for that purpose, though Ms Siggers told me there was a policy which set out what sort of incidents should be reported. I was not provided with this policy. Ms Siggers said that, since two members of staff were injured (i.e. she included AA) the possibility was that X too had been injured so the incident should have been reported. Also, she said, the fact that X had behaved violently, that being unusual on the claimant's account, meant that a report should have been made.

34. The statement of Stacey Shilleh says it relates to 13 October 2017, but in the context of all the other evidence it appears to me it is in fact meant to relate to 30 July 2017. Ms Shilleh recalls entering the home with the claimant at around 10:20 p.m. and being told by AA that X had given Mr Sidonie Edgar a fight, that X was very strong and that Mr Sidonie Edgar did well in handling the situation. Later she noticed a cut to Mr Sidonie Edgar's eye; he also said he was bitten. She recalled the claimant telling Mr Sidonie Edgar to go to hospital and to report the incident to "the office". Later still she recalled X being apologetic and saying that the claimant should call the police for what he had done. The claimant consoled him and gave him a hug.

12 October – Start of disciplinary process

35. Note that some of the pleaded disclosures are said to have been made during what I refer to as the disciplinary process, i.e. the period from 12 October 2017 to the claimant's dismissal. Rather than dealing with events in strict chronological order, for reasons of structure and clarity I deal first with the

disciplinary process, then with my findings on the incident and then with each of the pleaded disclosures in turn.

36. Ms Siggers's written evidence was that on 12 October 2017 she was contacted by a member of staff, with the initials AA, and told about the incident. AA told her, Ms Siggers said, that Mr Sidonie Edgar had "beat up" X and that AA had reported this to the claimant, who had later assured her that the matter had been dealt with. AA told Ms Siggers she had contacted her as she was concerned that Mr Sidonie Edgar was still working with X. I accept that Ms Siggers' recollection of this conversation was accurate. It is however unclear why AA waited so long to make the call to Ms Siggers.

37. Ms Siggers's evidence was that following the 12 October call the claimant was suspended from work but was allowed to stay at the home for one week in order to allow her to find alternative accommodation. Though there was some dispute about how and when all of that was communicated to the claimant, that is what then happened. (The claimant's evidence, which I accept, was that Ms Siggers told her on 15 October 2017 that she would be the subject of disciplinary proceedings and that she was told she would be suspended on 16 October 2017.)

13 October 2017

38. Ms Siggers's statement makes no mention of what happened on 13 October save to refer to an "investigatory meeting" taking place that day. The minutes of that meeting are at [198]. They record the following. The meeting took place at the home and was chaired by Ms Siggers. Minutes were taken by a Mr Asuman-Adu ("HR as note taker") and also present were AA and three other care/support workers. (Although her presence was not formally recorded at the start of the minutes, the claimant was also present, as will become clear.) The meeting had been called as a result of a "whistle blow" related to a "fight" between Mr Sidonie Edgar and X on 30 July. A long passage records AA's account. She said there was a verbal exchange with heated argument between X and Mr Sidonie Edgar. Mr Sidonie Edgar followed X into his room where it ended up in a fight. Whilst on top of "his victim" Mr Sidonie Edgar told X that if he did that again he would break his hand. AA tried to separate the fight, was unable to and "got herself hurt with bruises". Mr Sidonie Edgar released X "for the grip on his bed" when X promised to behave himself in future. Mr Sidonie Edgar sustained some bruises; because X was angry AA could not go near him to find out whether he was injured. When asked by Ms Siggers why she had not reported the incident, AA said she reported the matter to the claimant and wrote an incident report; a few minutes after the fight the claimant had entered and AA told her all that had happened.

39. The minutes then record the following: AA "went for the incident report which content was not comprehensive as compared to the narration given so [Ms Siggers] asked her to report to the office to add a supporting statement. [Ms Siggers] passed the report to [Mr Asuman-Adu] who in turn passed it on" to one of the other members of staff. Though the passage is rather difficult to follow, I

conclude the following. An incident report of some sort was made by AA and clearly it was readily available at the home on 13 October when Mr Asuman-Adu asked for it. I am not in a position to conclude when that report was made, or whether or not the report that was in the bundle (as I summarise above at para 31) was that report, or whether the report in the bundle was instead the "supporting statement" AA was asked to add (and which Ms Siggers accepted in her oral evidence she had asked her to provide). In other words, I cannot conclude, on the balance of probabilities, that the report I did see was a contemporaneous document. In a statement prepared for the High Court proceedings which I have already mentioned, Ms Siggers asserts that in the investigatory meeting the claimant was asked to provide incident reports and she said that she had a report from AA's file but not that of Mr Sidonie Edgar; she said she would provide them together in due course and took AA's incident reports with her but she did not subsequently provide either. The minutes of the meeting make no mention of the claimant being asked for Mr Sidonie Edgar's incident report and I find that Ms Siggers's recollection must be faulty in that regard. Given how important the issue was to the respondent, if such a request had been made it would have been minuted in the passage I summarise above. Given what the minutes do record, Ms Siggers must also be wrong about the claimant taking AA's report with her – the minutes clearly record it being given to someone else. AA's incident report, Ms Siggers' High Court statement continues, was subsequently discovered by other staff members under a sofa in the property along with handwritten notes that were "seemingly written by the claimant and sought to justify the aforementioned events". Also with those documents was the logbook for the property from which the page for the date of the incident had been torn out. No details were provided about who is said to have found the documents or when, nor was I provided with the notes (which I assume were from either the log book or the claimant's blue book or both). To put it mildly it is surprising that the respondent was apparently not in a position to provide those notes as part of the evidence. In the circumstances I can conclude little more than that someone told Ms Siggers at some point that some documents were found at the home.

40. The minutes then record that AA was asked why, having made the report and seeing Mr Sidonie Edgar still working, she had not escalated the matter to the main office. AA's response was that she thought the claimant would deal with the "impasse" and that her duty ended in reporting it to the manager. (Note that she is not saying here – as Ms Siggers recalled her saying the day before – that she later asked the claimant and the claimant reassured her that the matter was still being dealt with.)

41. The next passage records what the claimant said. It was a "new thing" hearing there was swearing like Mr Sidonie Edgar saying he would break X's hand. He (presumably Mr Sidonie Edgar) saw the incident as a mere altercation, a mere disagreement. She did see Mr Sidonie Edgar with "marks of injury on his head" and "he was probably restraining" X; X was later spoken to and apologised to Mr Sidonie Edgar. AA is then recorded as saying that it was the opposite, that X said he needed Mr Sidonie Edgar to say sorry to him. Mr Asuman-Adu is then recorded as saying, presumably to AA: "seeing no action taken you needed to take it further as was recently explained" during training at which AA and the

claimant had been present. He "queried" how, if it was a mere altercation or disagreement, Mr Sidonie Edgar and AA had been injured. The final part of the minutes records:

> [Ms Siggers] gave her verdict that, a fight is hereby established and also asked [the claimant] to explain why the safeguarding team was not informed, nor the main office received no report of this kind of serious incident proper action to be taken.
>
> [The claimant] indicated that, there has been a sort of differences throughout the history of [X] and [Mr Sidonie Edgar] for their more than 10 years (as foster parents) with [X] […]
>
> NB: this is the part of the minutes relevant to [Mr Sidonie Edgar 's] case at hand.

42. Regarding that last sentence, it is not clear to me what was omitted from the minutes. A space at the bottom of the minutes form for staff comments and signature was not filled in. I also note the following from the minutes. There is no record of the claimant having been warned that she was under suspicion and, at least by this time, there is no record of anyone having asked Mr Sidonie Edgar for his version of events before Ms Siggers rendered her "verdict".

43. The claimant and her witnesses characterised the events of 13 October as an unannounced visit rather than a meeting. (There was no dispute that the claimant was not given advance notice of the visit.) The claimant also says that during the course of the meeting, Ms Siggers said that Mr Sidonie Edgar would never work at the home again. Ms Siggers denied saying this in her oral evidence, but agreed she had said that he should not be let in to the home, as he was suspended. Given what did in fact happen, I prefer the claimant's evidence on this point.

44. It was the claimant's case that before the meeting began, Ms Siggers went into X's room and spoke to him (see below regarding her email of 20 October). Her account was consistent with X's written evidence, which he maintained in his oral evidence, that on 13 October Ms Siggers came into his room and asked what had happened between him and Mr Sidonie Edgar. He told her that it was not Mr Sidonie Edgar's fault but his. In her oral evidence Ms Siggers agreed that she had spoken to X alone, with the claimant's consent (or, I consider more likely, acquiescence). Ms Siggers said she asked X if he was OK and he said that he was. There did not appear to be any material dispute of fact about this conversation.

45. Mr Sidonie Edgar in his evidence says he was not present for the meeting on 13 October; nobody suggested otherwise. He had received a text that day saying that his shift was cancelled. The following day he received an email to say that he had been suspended. He was later dismissed.

46. I was shown a Metropolitan Police crime report which appears to relate to the incident. It has an incident date of 30 July 2017 and a "reported date" of 14

October 2017. It includes Mr Sidonie Edgar as the "VIW" (i.e. Victim/Informant/Witness). It records SUSP (suspect, i.e. X) got into argument with VIW which resulted in SUSP throwing a phone charger at VIW and biting him." It records the outcome as "V not support; evidential difficulties." Most of the rest of the report is redacted but it does record that Mr Sidonie Edgar had confirmed he did not want to proceed with prosecuting X – he had looked after him since he was four years old and had no issues with him. Having heard the evidence it is still unclear to me how the report came to be made – although Ms Siggers recalled the respondent first reporting the matter to the police, given the respondent's view of the incident it is hard to see how Mr Sidonie Edgar was recorded as the VIW.

Disciplinary meeting etc.

47. A letter dated 16 October 2017 to the claimant from Mr Asuman-Adu required her to attend a "meeting for disciplinary hearing" on 18 October 2017. The meeting, the letter said, was:

> …to discuss the following matters of concern:
>
> - Your Refusal to escalate the incident in connection with an alleged physical/verbal abuse by [Mr Sidonie Edgar] against [X] which occurred on the 30th July, 2017.
> - Your Failure to provide incident report of the alleged perpetrator during the investigatory meeting held Friday 13th, even though you had requested incident report from a witness (one of the staff) which was seen at the said meeting.
>
> If these allegations are substantiated, we will regard your inactions as negligence of duty of care.
>
> … If you are unable to provide a satisfactory explanation for the matters of concern set out above, you may be suspended immediately.

48. The letter drew the claimant's attention to the respondent's disciplinary rules and procedures and set out her entitlement to be accompanied by a fellow employee or a trade union official.

49. At page 14 of an agreed supplementary bundle was some text messages exchanged between the claimant and her daughter. Of note, on 15 October the claimant, having earlier stated that Mr Sidonie Edgar had been sacked, said, "I am concerned that I cannot find the incident report. Something strange is occurring…" On 16 October the claimant says "I have noticed that the file date of July 2017 on the young person concerned has disappeared."

50. The parties agreed that the disciplinary meeting did not in fact take place on 18 October. A letter dated 18 October was sent to the claimant informing her that she had been "suspended retrospectively" from the 16th to allow an

investigation to take place following the allegations (which were set out as in the bullet points above). The respondent, the letter says, had offered to provide hotel accommodation for the claimant as it would be inappropriate for her to remain at the home. The letter required the claimant, amongst other things, not to discuss the matter with any other employee of the respondent; this of course would have made it impossible for her to take up the respondent's earlier offer for her to be accompanied by a fellow employee at the disciplinary meeting. The claimant was invited to provide the name of anyone who might be able to provide a relevant witness statement. Somewhat confusingly in light of the letter of 16 October, the 18 October letter says that should the investigation indicate that there is substance to the allegations the claimant would be required to attend a disciplinary hearing.

51. In her oral evidence, Ms Siggers agreed that the 18 October letter was cc'd to the Quality Assurance Officer Mr Mensah, i.e. the person who later dealt with the claimant's appeal.

52. Ms Siggers's statement said that on 19 October, i.e. during the claimant's suspension but before she moved out of the home, the claimant was believed to have entered the room of one of the residents of the home. I did not need to make any findings about this incident because the respondent did not rely upon it (either in these proceedings or during the disciplinary proceedings) as a reason for dismissing the claimant. In fairness to the claimant I should however record that she strenuously disputed any improper conduct.

53. On 20 October 2017 the claimant sent an email to Ms Siggers and others setting out various concerns she had. These included the following. The claimant said that recordings were made during the 13 October meeting which the claimant requested copies of. (I was not provided with any other evidence about those recordings.) Mr Sidonie Edgar had not been invited to the meeting. The claimant and Mr Sidonie Edgar had been suspended but AA had not. During the meeting a document was produced which was given to Ms Siggers which the claimant was not aware of; the claimant asked when it was written and why, if it was the incident report, it had not been given to her when the incident occurred. She said she was never given an incident report nor was it in the file the previous night. She said that what AA had told the meeting was inconsistent with what AA had told her on the night of 30 July. The claimant concludes by asking: "Who were the officials who came to the house to search for the files. I was not here and can I have their names please."

54. I was provided with the minutes of the disciplinary hearing dated 24 October 2017. It was the claimant's case this meeting in fact took place on 20 October. Given the generally poor quality of the minutes (see below) I accept that the claimant is likely to be right about that. The minutes say the meeting was chaired by Mr Asuman-Adu using audio recording for taking notes. The minutes do not record the presence of anyone else other than the claimant. Mr Asuman-Adu explains that the meeting was about the safeguarding issue that had come to light, which was described as alleged physical abuse perpetrated by Mr Sidonie Edgar against X. The meeting was to listen to the claimant's part of the story since she was accused of "neglecting her duty of care to report or make

a disclosure." "Having established" at the 13 October "investigatory meeting" that there was "a fight between staff and service user" the respondent wished to find out what action the claimant had taken. There is a long note of the claimant's account, which I now summarise so far as is relevant to my decision. The claimant said she had been out at the time of the incident and when she returned she was told there had been some kind of "altercation" between Mr Sidonie Edgar and X. AA had told her that Mr Sidonie Edgar did good and handled everything. She had seen that Mr Sidonie Edgar had an injury to the top of his eye and his arm so she advised him to seek medical attention; he said he would not bother. AA said that X wanted an apology. Mr Sidonie Edgar said that he had to restrain X as X was biting and kicking. She later saw that X had no injuries. It was not the first time Mr Sidonie Edgar had had to restrain X. A day or two later Mr Sidonie Edgar said he was going to the office and asked what he should say if they asked him; the claimant told him to tell the truth. The following is then recorded as the claimant's answers to Mr Asuman-Adu's questions. AA had told her there was a tassel [I assume this should read tussle] with X kicking and Mr Sidonie Edgar holding him. The claimant's main concern was how it was managed; AA had said Mr Sidonie Edgar did well. When asked whether she ought to have requested incident reports for Mr Sidonie Edgar and AA, she said that she had requested a report from Mr Sidonie Edgar. She was not aware there was not a report. When the team came to the house last week she was shocked. The next part of the minutes are difficult to paraphrase so I reproduce them directly. The square brackets are mine; the round brackets are in the original report:

> Basically I did not request [Mr Sidonie Edgar] to write something about the incidence and so forth, (to quote her verbatim) but when we were at the meeting (last week) [Ms Siggers] asked me whether I asked [Mr Sidonie Edgar] to write a report. I somewhat thought he had and said yes but in a way I was not 100% sure, there was none at all (Rominus incidence report) and had not followed up either. I had kept my own notes of what I had at that time a few bits and pieces I was getting and so forth. [AA] obviously somewhat likes writing and so forth I would have expected her to follow the same procedure to write an incident report. However I am extremely baffled and concerned when [Ms Siggers] asked if I asked for report I said yes and when she asked for it when [AA] was up to bring a report of her own I said great at least there was something recorded. It was my first time of seeing that report and raised issue with the incident, when the report was written, why it was missing and later found, why was the report not detail. Even [Ms Siggers] said it was scanty. I think it was produced for the meeting. I even sent a text to [Mr Asuman-Adu] promising to get for him but mysteriously disappeared and later found it with some notes. I will escalate the issue surrounding [AA's] incident report, I call document. There was also issue of a missing page i.e. 30/07/2017 in the July [X's] file.

55. Given the poor quality of the minutes I do not accept that the claimant said that she had *not* asked Mr Sidonie Edgar to do a report – the "not" in the first sentence above appears to me to be a "typo".

56. Mr Asuman-Adu then "reiterated" the need for an official report. The claimant said she had made some notes in her personal notebook and Mr Asuman-Adu told her that "the practice of using personal notes all as official documents are not acceptable" and said that the claimant could not "keep official matters of this nature to herself particularly when it bothers about service user's interest". Shortly afterwards the minutes indicate that the meeting was brought to a close. There then follows another page of typed text which appears to relate to another meeting having no relation to this claimant – as best I can tell it appears to be cut-and-paste error.

57. In her written evidence the claimant described being put under pressure to confirm that Mr Sidonie Edgar did something wrong. She described Mr Asuman-Adu as operating on the assumption that Mr Sidonie Edgar was guilty. She said that she offered to show Mr Asuman-Adu her blue book (i.e. her contemporaneous record) but that he was not interested. In light of what I have recorded above, I accept all of this.

58. The respondent's disciplinary and grievance procedures were in the bundle from [148]. There is a list, expressed to be non-exhaustive, of matters amounting to disciplinary offences, including such things as failure to observe procedures, unsatisfactory work and a breach of confidence or trust. It says that an employee may be summarily dismissed if established to have committed an act of gross misconduct. Gross misconduct is described as misconduct of such a serious and fundamental nature that it breaches the contractual relationship with the respondent. Another list, again expressed to be non-exhaustive, of matters amounting to gross misconduct includes: "falsification of records… Whether or not for personal gain"; "serious breach of [the respondent's] rules, including but not restricted to, health and safety rules"; and, "serious disregard of duties".

Dismissal

59. Following the hearing, in a letter dated 3 November 2017 [227] Mr Asuman-Ade set out the reasons for his decision to dismiss the claimant. (The claimant agreed that the date of her dismissal was 3 November.) In the absence of the apparent decision-maker, the evidence presented by the respondent about the decision consisted of Mr Asuman-Ade's letter and evidence from Ms Siggers. In her statement, Ms Siggers says that the reason was gross misconduct in that the "safeguarding breach" of 30 July 2017 was brought to the claimant's attention but she failed to follow due procedure in reporting it. Ms Siggers also notes that that claimant had had recent relevant training in "just such a scenario" [251]. At para 12 she says that it was Mr Asuman-Ade's decision to dismiss the claimant. She later says (at para 18): "We took the decision". Who "we" includes is not clear from para 18 and the preceding and following paragraphs, though I note that in another part of the statement Ms Siggers appears to use "we" and "our" to mean the respondent. Beyond what I have already recorded Ms Siggers's statement does not purport to set out the reasons for the dismissal. In her oral evidence, Ms Siggers said that it was a joint decision made between her, Mr Asuman-Ade and other members of the management team.

60. Mr Asuman-Ade's letter begins by stating the matters of concern that were the subject of the meeting of 20/24 October 2017, in somewhat different terms to those he had set out before:

> Neglecting your duty of care (when [Mr Sidonie Edgar], a staff, physically and verbally abused [X], a service user – with mental and physical disabilities – and failed to report or keep any official record thereon) at a project you work as a manager.

61. There followed a bullet-point summary of what was said to be the claimant's explanations. It is noted that Mr Sidonie Edgar was injured and X was not. It is said that the claimant said that Mr Sidonie Edgar having to restrain X was common (she had in fact said, at least according to the minutes I deal with above, that Ms S had to restrain X before, not that it was common). It is also said that when the claimant was asked what she had found out from the witness AA she had said that what mattered to her was how the situation was managed. That in my judgment significantly mis-characterises Mr Asuman-Ade's own note of what the claimant said. The note has her saying, when asked whether she asked AA the cause of the incident, that AA did not elaborate a lot but said there was a tassel with X kicking and Mr Sidonie Edgar holding him. She said that her *main* concern was how it was managed and AA had said Mr Sidonie Edgar did well. Another of the bullet points says that when asked about records of the incident, the claimant had taken notes in her personal notebook. The bullet point does not include the claimant's assertion made in the interview that she had asked for incident reports to be written.

62. Mr Asuman-Ade then says that he considered the claimant's explanation to be unsatisfactory. The reasons given for him coming to that conclusion are, I am afraid, expressed in such a way that I found them very difficult to understand. It appears that Mr Asuman-Ade concluded that the claimant had not taken the incident seriously, had not made an official record. It is a little clearer that he accepted the account that AA gave in the meeting about what happened during the incident. Mr Asuman-Ade accepted that the claimant had not been present at the incident but did not make any findings about what the claimant was told, either by AA or by Mr Sidonie Edgar. He then goes on to conclude:

> You neglected your duty which borders on:
> (1) having to raise or escalate safeguarding alert against [Mr Sidonie Edgar] which you failed, and
> (2) also your duty to have the incident reported and recorded for official use which you failed; amounted to condoning and conniving with [Mr Sidonie Edgar] in the perpetration of the abuse which you tried to keep secret.
>
> You are therefore charged with negligence of care of duty since keeping abusive action seen or suspected secret makes you as guilty as the perpetrator especially in your capacity as Manager of the project.

> Having carefully considered your responses including the fact that you have a short amount of service I have decided that your employment should be terminated.

63. I note at this point while it might technically be true the claimant had had a relatively short service with the respondent, it might have been better for Mr Asuman-Ade to have at least mentioned the claimant's very many years of caring for X.

64. The letter ends with a self contradictory statement. It says that the claimant is entitled to 4 weeks' notice of termination and her employment will therefore end on 3 November 2017 (i.e. the day the letter was written). The claimant is informed of her right to appeal. The letter makes no specific mention of a finding of gross misconduct.

65. Ms Siggers's statement says that the dismissal process was conducted in conjunction with the social worker team from LBH. This, she says, was a statutory requirement because of the nature of the allegation of breach of the safeguarding regulations. There is no mention in any of the minutes of the investigatory or disciplinary meetings (nor indeed those relating to the appeal, on which see below) of the social workers' involvement in the decision to dismiss.

Appeal

66. In one undated document addressed to Mr Asuman-Ade, the claimant says that her dismissal was unfair and disproportionate. She says the police visited the home on 17 October 2017 and the report vindicated Mr Sidonie Edgar, casting him as the victim and not the perpetrator, which she says invalidates the entire foundation of her dismissal. She also suggests that the lack of an incident report does not amount to gross misconduct. In a more detailed letter of 8 November 2017 the claimant complains of the lack of a thorough investigation and says that the failure to complete an incident report was a simple error, not one that would warrant such harsh treatment.

67. On 6 December an appeal hearing took place. It was chaired by Mr Kennedy Mensah, the respondent's "quality assurance manager". Mr Asuman-Adu, i.e. the person whose decision was the subject of the appeal, took the minutes. The minutes show that the claimant was not allowed to bring an acquaintance into the meeting as that person was "not qualified to be present". In her evidence, which I accept, the claimant said that she was told that her friend could not accompany her as she was not a union representative or work colleague.

68. At the hearing, the minutes show, the claimant objected to Mr Asuman-Adu's presence and was told by Mr Mensah that she had had the opportunity to object to Mr Asuman-Adu's presence in advance. (The letter inviting her to the hearing had said that Mr Asuman-Adu would be present.) The note is a little unclear but appears to record that the claimant was given the opportunity to apply for an adjournment of the hearing but agreed that it could go ahead. The claimant said

that she had not tried to keep anything secret and said that Mr Sidonie Edgar had restrained X; the issue was what information she had received about it. She did not wish to add to what she had said at the last meeting but she stood by it. She said that the respondent should speak to Mr Sidonie Edgar and Mr Mensah asserted that he had not made himself available. When asked whether she had raised any safeguarding concerns she said that she wrote down a report which she showed to Mr Asuman-Adu (i.e. at the previous meeting) which he said was in her notebook. She said that she had written comprehensive documentation but conceded that she had not done so on the company's incident report template provided for that purpose. She had told Mr Sidonie Edgar to go to A&E for a tetanus jab. Mr Mensah suggested that an incident that warranted somebody going to hospital should be reported. The claimant was asked for her notes of the incident and, it is clear from the minutes, that she provided them and a copy was taken. (I note again at this stage that that document, clearly significant in the context of this case, was not provided to me in evidence by either party.) The claimant was asked about AA's incident report. She said she did not see it until the 13 October meeting and that it was only a few lines. The claimant concluded by saying that she wished to call a witness who had heard AAs first account of the incident, which the claimant said contradicted her later account. No significant response to this request is recorded in the minutes. A later email records the claimant's acknowledgement of the transcript of the minutes; the claimant does not say in the email whether or not she accepts that they are an accurate record.

69. A letter dated 15 December 2017 records Mr Mensah's findings for the purposes of the appeal. The reasons are easier to follow than Mr Asuman-Adu's and contain what appears to be a broadly accurate summary of the claimant's account. Mr Mensah says that he finds the claimant's explanations unsatisfactory. He says that it was the claimant's duty as required by company policies to have the incident reported as somebody had been injured and required medical attention and that it was also a requirement of legislation. (Again, I was not taken to any such policies or legislation.) The claimant had recently been given health and safety training. (While I was provided with records showing the claimant's attendance at training sessions, I was not provided with any information about their contents beyond their titles – see below.) The claimant had said that she asked AA for a report but did not follow it up. This, Mr Mensah said, was "a sheer irresponsibility and negligence of duty." Mr Mensah then appears to conflate the claimant's acceptance of the accuracy of the minutes of the meeting where AA gave her account, with her acceptance of the truth of AA's account – the claimant clearly never accepted the latter. Mr Mensah says that the claimant had failed to indicate in advance, having been given the opportunity, whether she had any witnesses and says that Mr Sidonie Edgar had been given three opportunities to attend a hearing. (Mr Sidonie Edgar 's evidence on this point, which I accept, was that written requests were sent to the home, and another address, where he no longer or never lived. He accepted he had received a request by text but that was the day before the meeting and he did not attend the meeting given the short notice and the inadequate time to prepare for it. He said that he had eventually provided a statement to the respondent on 8 December 2017. Neither party provided me with a copy of this statement.)

70. Mr Mensah notes what he says are a number of inconsistencies in the claimant's "submissions". I will not set these out in detail here, but I record that many of them even on their face are not inconsistencies (for example that the claimant said she had requested AA's incident report but did not see it for over two months) and others are inaccurate (for example the assertion that the claimant did not mention requesting Mr Sidonie Edgar to write an incident report, which led Mr Mensah to the conclusion that the claimant was keeping something secret). Mr Mensah then says: "In dealing with official matters as per company policies, it is not acceptable to maintain your personal note book as official records and for reporting. It is totally unprofessional." He concludes: "Having carefully considered the responses and including the fact that, no difficult circumstances was stopping you from escalating an abusive actions or inactions, I conclude that, you have neglected your duty of care to both service user and staff. It is also very serious, for you still maintaining that, you see no wrong in your actions." I note that this is a misstatement – the claimant's position was merely that her actions did not warrant summary dismissal. Another letter, this time dated 19 December 2017 is in similar, though not identical, terms; I was not provided with a particularly clear explanation why there were two letters.

Findings on the incident

71. In considering the evidence I set out above, I attach little if any weight to the written evidence of Stacey Shilleh and to the account of AA recorded in the meeting of 13 October. Neither had been the subject of evidence on oath subject to cross-examination. The latter was not recorded well and was in some ways inconsistent with the incident report form apparently filled in by AA. Further, while in many different circumstances there may be good reasons for reports of incidents such as this to be delayed, in this particular case I consider it significant that AA did not mention the incident to Ms Siggers for over two months. I give even less weight to the form purportedly filled in by AA, given the uncertainties about when it was filled in, what version I was provided with and the circumstances as to how it came to be filled in. I was also not greatly assisted by the crime report. I therefore find the following further facts, based principally on the evidence of X, the claimant and Mr Sidonie Edgar, but taking into account also what the claimant told the respondent during the disciplinary process.

72. On the night of 30 July 2017 the claimant returned to the home. She spoke that evening to AA, to X and, briefly, to Mr Sidonie Edgar. As a result of those conversations the claimant understood that an incident had taken place. Although the word fight may have been used, putting it in context the claimant understood that Mr Sidonie Edgar had restrained X. The claimant understood that Mr Sidonie Edgar had been bitten on the arm by X and she advised Mr Sidonie Edgar to get a tetanus jab. The claimant knew that Mr Sidonie Edgar had sustained a minor injury to his head as well. The claimant had no reason to believe, and did not believe, that X had been injured. Nor did she believe, nor have any reason to believe, that Mr Sidonie Edgar had done anything wrong

or that AA had been injured. I do not accept that the claimant asked Mr Sidonie Edgar and AA to complete incident reports; the evidence that suggested she did was vague and I consider it likely that had the claimant considered such reports were necessary she would have "chased them up". The claimant made a record of what had happened in her "blue book" and in the log book, which were left at the home and were readily accessible. Since neither party produced copies of either document I am unable to make findings about what the claimant recorded. The claimant did not file her own incident report, i.e. a report on the respondent's standard template. Although it was never made clear to me precisely how one might make a safeguarding report, it was clear – as the claimant accepted – that she did not do so. I was not provided with any written policy of the respondent which might have explained the circumstances in which a safeguarding report and/or an incident report should be prepared. Nor was I provided with evidence about what training (i.e. the contents of the training) the claimant might have received in this regard. In the circumstances, I accept the claimant's evidence that she did not make a safeguarding report because she did not believe that X – i.e. the person to be "safeguarded" – had been in any danger. If the respondent did have a "no restraint policy", I find that the claimant was unaware of it.

73. Given the generally confused state of the evidence I do not find that any written records of the incident were deliberately removed from the premises or hidden by the claimant. While the respondent (or an employee of the respondent) may have believed that to have happened and that the claimant was responsible, I do not accept that that was a fair conclusion in the circumstances. Put simply, in those circumstances, the claimant was not the only likely culprit and consideration does not appear to have been given to that. In light of the contemporaneous messages the claimant sent her daughter I find that the claimant did not do any such thing.

Pleaded disclosures

74. The disclosures relied upon by the claimant were set out in paragraph 13 of the amended particulars of claim. Very little is said about them in the claimant's written evidence, so I asked her about them during the course of her oral evidence. Except as I record below, the claimant told me that she had done what was pleaded.

PD1

75. The pleading for this PD simply sets out the claimant's allegation that Ms Siggers went into X's room on the morning of 13 October to ask about the incident – see above. In other words, on the face if it there was not a disclosure of information, though it may have been referred to in later disclosures.

PD2: 18 October 2017

76. PD2 as pleaded is that the claimant saw another employee sleeping on Y's floor; when challenged by the claimant the employee said that Ms Siggers had agreed she could do this. In other words, on the face of it there was not a

disclosure of information, though it may have been referred to in later disclosures.

PD3: 19 October 2017 (CQC)

77. PD3 related to a call the claimant said she made to the Care Quality Commission ("CQC") on 19 October 2017. The pleadings say the claimant raised concerns: "that the home was not being run properly and "explained the malpractice that claimant was aware of. Claimant did state the feeding tube, syringes and the giving sets all belong to [Y] been left outside the premises (got Photography's) this was health and safety issues and could led to serious infection for [Y]." In her oral evidence the claimant said that on about the 30th or 31st (not the 19th) of October a neighbour told her that tubes and syringes for feeding Y were being left outside the home in boxes – they had been there about a week. The claimant was no longer on the premises – she had left around the 20th and this happened after that. She was provided with photos. These photos were not in evidence and the claimant agreed she had not sent them to the respondent at any point. The claimant said she was concerned as this was unhygienic and may have demonstrated that syringes were running out inside the home. I accept that a call as described by the claimant took place – in other words where she reported concerns that tubes and syringes were being left outside – but in light of the claimant's oral evidence I find that the call must have happened on or after 30 October 2017. Having heard her oral evidence, the claimant's concern for X, Y and Z was apparent to me and I accept that her call was made out of a genuine concern for Y's welfare.

78. Ms Siggers's evidence was that she only became aware of the claimant's call to the CQC after these proceedings began. Nor had anyone else at the respondent been aware at the time to her knowledge. See my conclusions below for my findings on this.

PD4: 21 October (safeguarding team)

79. PD4 was that on 21 October 2017 the claimant rung LBH's safeguarding team out of hours and told them that Y was not being fed properly/was not receiving all her feeds from the respondent's carers. In her oral evidence the claimant said this was her first such disclosure to the safeguarding team. The respondent did not suggest that the claimant was not telling the truth about this. Again in light of my findings about the claimant's genuine concerns about X, Y and Z, I accept her evidence on this point, noting that of course on 21 October the claimant had only just left the home and so would have been in a position to be observing the care being given to Y, so the claimant is probably right or about right regarding the date of the call.

80. Ms Siggers's evidence was that she was not made aware of this; she would not have expected LBH to tell her about it. All correspondence *from* the safeguarding team came to her but if they had thought it was something that they thought should be investigated they would need to investigate it, but that would only happen if it was deemed a safeguarding issue.

PD5: 31 October 2017 (letter to MP)

81. PD5 relates to a letter the claimant wrote to her MP on 31 October 2017. The letter was in the bundle. The matters contained within PD1 and PD2 are set out in it. The letter runs over 12 typed pages. Much of it consists of the claimant's criticisms of LBH and the respondent. It contains details about the needs of X, Y and Z and contains the claimant's account of the incident of 30 July 2017, as well as referring to a number of events on a number of other days. Though I need not set them out individually, it also contains a number of specific criticisms of the care being provided by the respondent to X, Y and Z. It is evident that in some instances the claimant's concerns include the effect of this upon the health and safety of the particular young person. She expresses a concern that the respondent's staff were not sufficiently experienced to care for the young people, given their particular needs.

82. Ms Siggers's oral evidence was that she was now aware that, following the claimant's letter, the MP had written to the social services and the respondent had been inspected. At the time, she had not known the reason for the inspections – she had only become aware of that after these proceedings began. Before then she did not know about the letter to the MP and as far as she knew nor did anyone else at the respondent. (Ms Siggers later said the respondent was inspected in January 2018.)

PD6: (MP's surgery)

83. PD6 was that the claimant raised concerns to her MP in November in the MP's surgery about what the claimant considered to be an inappropriate personal relationship between an employee of the respondent and an employee of LBC. The claimant considered it to be inappropriate as the LBC employee was "on safeguarding" for the second respondent. I accept that the claimant raised this with her MP. Ms Siggers's evidence was that she was not aware of this until these proceedings began and so far as she was aware nor was anyone else at the respondent.

Other matters

84. At [190] is a record of training attendance for the claimant for "safeguarding vulnerable adults" on 28 June 2017. At [194] a similar record records attendance for "health and safety (children/adults)" on 26 July 2017. As I have said, I was not presented with any evidence about what happened in those sessions.

85. Judith Mekle's statement covered events from 24 October 2017 and in particular Ms Mekle's concerns, which she raised on 30 October, about the standard of care provided to 2 of X, Y, and Z around that time. Since the evidence related to events after the claimant had left the home I was not assisted by it in deciding any of the matters in issue.

86. Substantial parts of the claimant's evidence (i.e. her own statements and those of her witnesses) dealt with her concerns about how X, Y, or Z were cared for

by the respondent from January 2018 onwards. While I have no doubt that the claimant's motivation in raising these points was a genuine concern for the young persons' welfare, they were quite simply not relevant to this case given the claimant's employment had ended in 2017. I therefore did not need to make factual findings about these points. The claimant's evidence also refers to a number of concerns that she says she had about the way the respondent ran the home during the time that she was employed. I have confined myself to making factual findings about those concerns which the claimant says she raised with the respondent (and others) by way of public interest disclosure and which she says resulted in her dismissal – in other words I have concentrated on the agreed issues between the parties.

Time limits

87. The claim form was presented on 9 March 2018. There was no dispute that, taking into account the dates of the early conciliation process, the form was presented on time (with a dismissal date of 3 November 2017, the latest date on which the claimant could have been presented on time would have been 10 March 2018). By way of the relevant box being ticked the form asserted that the claimant had been unfairly dismissed (among other things). The facts on which the claim was based were set out in a separate document, or rather part of such a document; it appears the end of the document had been omitted, so that the particulars first presented to the Tribunal dealt only with the background to the case. They made no mention of an automatically unfair dismissal on the basis of protected disclosures. On 12 March 2018 a further document was sent to the Tribunal. This was the letter dated 31 October 2017 from the claimant to her MP. On 9 May 2018 a full version of the particulars of claim was presented (bearing the date 9 March 2018) and on 17 May 2018 the claimant's then-representatives submitted a formal application to amend the claim.

LAW

Unfair dismissal generally

88. S 94 of ERA confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under s 111. By operation of s 108, a claim for unfair dismissal may only be heard by a Tribunal if the employee has been continuously employed for a period of not less than two years ending with the effective date of termination. That two-year rule is subject to exceptions, one of which is relied upon in this case (see "Automatically unfair dismissal" below). The effective date or termination in this case was 3 November 2017, i.e. the date of the claimant's dismissal, as she was dismissed without notice.

Burden of proof

89. Any party who bears the burden of proof must do so on the balance of probabilities. In general it will be for the claimant to prove that there was a dismissal but in this case there is no issue about that.

90. In a claim of ordinary unfair dismissal, as s 98 makes clear, the employer bears the burden of showing the reason for the dismissal. The same applies where an employee who has two years' service asserts an automatically unfair reason, provided that (1) the employee has satisfied the "evidential burden" of showing – without having to prove – that there is a real issue as to whether the reason put forward by the employers was not the true reason. If the employee has satisfied that evidential burden, the Tribunal must decide (2) whether the employer has proved their reason for dismissal and, if not, (3) whether the employer has disproved the automatically unfair reason advanced by the claimant; if not, (4) the dismissal will be for the reason asserted by the claimant. In assessing the reason for dismissal, the Tribunal may draw reasonable inferences from the primary facts. (See *Kuzel* v *Roche Products Limited* [2008] ICR 799.) The evidential burden on the employee was described as "light" by the EAT in *Serco Ltd* v *Mr Z Dahou* UKEAT/0027/14/JOJ.

91. In contrast, where an employee who lacks the two years' service asserts an automatically unfair reason for dismissal, the burden will be on the employee to show that the reason for dismissal was an automatically unfair one (see *Ross* v *Eddie Stobart Ltd* in the particular context of automatically unfair dismissal for "whistleblowing"). In order to decide who bears the burden of proving the reason for the dismissal, in this case it will therefore first be necessary to decide whether the claimant had two years' service; the burden of establishing that will be on the claimant.

Continuous employment etc.

92. Continuity of employment is dealt with in Chapter 1 of Part XIV of ERA. For the purposes of this case, it is important to note that continuity here refers to any employment with the employer, not to a particular job. Continuity is to be determined week by week and so is not broken unless there is a whole week in which the employee is not employed. Continuity of employment cannot be circumvented by contracting out. (S 210(3) and *Carrington* v *Harwich Dock Co Ltd* [1998] I.C.R. 1112.)

93. A TUPE transfer preserves the continuity of employment. On the facts of this case, given the agreed position on a TUPE transfer, the claimant could have two years' service, but only if she had been an employee (within the meaning of ERA) of LBH in November 2015 (i.e. 2 years before the EDT) and had remained an employee of LBH until the respondent took over in April 2016. A significant issue in this case is therefore be whether the claimant was an employee of LBH in November 2015 for the purposes of ERA.

Employment status generally

94. The starting point is s 230 ERA, which so far as is relevant provides:

> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

95. "Employee" is to be distinguished from "worker"; the latter is defined by s 230(3) ERA and is not relevant to this case in that workers do not have the right not to be unfairly dismissed (though it is relevant in the sense that some of the authorities I refer to below deal with the distinction between employees and workers).

96. In *Ready Mixed Concrete Ltd* v *Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515 Mackenna J set out the three conditions necessary for a contract of service to exist.
    i. The employee agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for the employer ("mutuality of obligation" and a requirement of "personal service").
    ii. The employee agrees, expressly or impliedly, that in the performance of that service he will be subject to the employer's control in a sufficient degree consistent with an employment relationship ("control").
    iii. The other provisions of the contract are consistent with its being a contract of service.

97. Regarding mutuality of obligation, there must be an obligation on the employee to do some work and for the employer to pay for that; as long as there is an obligation to do some work, the fact that an employee is entitled to refuse work is not necessarily inconsistent with mutuality of obligation and the obligation of personal service. *Ryanair DAC* v *Lutz* [2023] EAT 146 para 180.

98. Regarding personal service, in *Stuart Delivery Ltd* v *Augustine* [2022] ICR 511 the EAT held that while an unfettered right to substitute another person to do the work or perform the services was inconsistent with an undertaking to do so personally, a conditional right might or might not be inconsistent with personal performance, depending on the precise contractual arrangements and, in particular, the nature and degree of any fetter on that right. In *RyanAir* (at para 186) the EAT concluded that that the fact that the fetter on the right to substitute arose from regulatory requirements did not make it any less of a fetter. The fact the claimant could withdraw agreement to work once he had accepted an offer did not mean that there was no agreement to do the work personally in *Nursing and Midwifery Council* v *Somerville* [2022] ICR 755).

99. Regarding control, in *Ready Mixed Concrete*, at 515, the court said:

> Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make [an employment contract]. The right need not be unrestricted.

100. The question is whether there is to a sufficient degree a contractual right of control over the employee, rather than whether in practice the employee had day to day control over their own work. The *extent* of control will remain relevant to the overall assessment where the employee/worker establishes *sufficient* control to satisfy the *Ready Mixed Concrete* control requirement (*Revenue and Customs Commissioners* v *Atholl House Productions Ltd* [2022] I.C.R. 1059 at para 75).

101. Once mutuality of obligation and control are established, a multi-factorial approach must be applied to determine whether, judged objectively by reference to the contract and the circumstances in which it was made, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made and on the basis of facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to the parties (*Atholl House* (above)).

102. In *Uber BV and others* v *Aslam and others* [2021] UKSC 5 the Supreme Court held that when deciding whether someone was a worker it was wrong in principle to treat the written agreements as a starting point. Rather, it was necessary to determine, as a matter of statutory interpretation, whether the claimants fell within the definition of a "worker". The Tribunal's findings should be based on the language of the agreement but also the way in which the relationship in fact operated and the parties' evidence about their understanding of it. As the same court put it in *Autoclenz Ltd* v *Belcher* [2011] UKSC 41, the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. The *Autoclenz*/*Uber* principle applies to determination of employee status just as it does to the determination of worker status – *Ter-Berg* v *Simply Smile Manor House Ltd* [2023] EAT 2 para 47. In the latter case, the EAT clarified that in a case where what was the true intention of the parties in reality is a live issue, it is necessary to consider all the circumstances of the case which may cast light on whether the written terms do truly reflect the agreement, applying the broad *Autoclenz* approach rather then stricter contractual principles. At paras 65 onwards, the EAT said that a written term stating that a person is not an employee or worker could not stand if as a matter of fact the person was, nor if the object of the term was to defeat statutory rights. Absent those circumstances, it is however legitimate to have regard to the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain, it can be decisive.

Employment status and foster carers

103. In *W and others* v *Essex County Council* (1998) 3 WLR 534 the Court of Appeal decided that a fostering agreement was not contractual but was regulated by the provisions of a statutory scheme. The parents in *W* were "fulltime specialist adolescent foster carers". That case was not in an employment law context, but it was applied by the same Court in an

employment law context in *Rowlands* v *City of Bradford Metropolitan District Council* [1999]. In the former case, the Court said:

> There are, in my judgment, a number of reasons why the plaintiffs' claim in contract must fail. First, although the Specialist Foster Carer Agreement had a number of features which one would expect to find in a contract, such as the payment of an allowance and expenses, provisions as to National Insurance, termination and restriction on receiving a legacy or engaging in other gainful employment and other matters to which the judge referred... I do not accept that this makes the agreement a contract in the circumstances of this case. A contract is essentially an agreement that is freely entered into on terms that are freely negotiated. If there is a statutory obligation to enter into a form of agreement the terms of which are laid down, at any rate in their most important respects, there is no contract: see *Norweb Plc* v *Dixon* (1995) 1 WLR 636, 643F."

104. In *Bullock* v *Norfolk County Council* UKEAT/0230/10/RN, that EAT held that a foster carer was not a worker within the meaning ERA, on the basis that there was no contractual relationship; *W* and *Rowlands* were still good law and binding on Employment Tribunals. The fact that in *Bullock* there was (in contrast to the earlier cases) a discretionary element to the foster carers' pay did not change the situation (para 13). Nor did the fact that the *Bullock* case (in 2010) was subject to the Fostering Services Regulations 2002 rather than under the Foster Placement (Children) Regulations 1991 in force when *Rowlands* was decided. The authorities illustrating the breadth of the concept of 'performing personally any work or services' within section 230(3) ERA 1996 do not assist in determining whether the relationship between parties is contractual (para 40).

105. The EAT reached a similar conclusion in *National Union of Professional Foster Carers* v *Certification Officer* UKEAT/0285/17 in the context of the Fostering Regulations that would have applied in this claimant's case (the decision which was the subject of the appeal was made in January 2017 and related to 2011 regulations – "to a very large extent, the terms of the relationship between the foster carer and the local authority, is the same now as it was [when *W* was decided]" (para 28)). Although the EAT's decision was overturned by the Court of Appeal ([2021] EWCA Civ 548) that was on the basis of the definition of employment in the context of trade union rights, taking into account human rights considerations, in which context there was nothing to suggest that the relationship had to be contractual. It did not follow, the Court of Appeal said, that since employment law distinguished between different kinds of contract in determining the extent of the individual employment rights enjoyed by workers, it was legitimate to exclude trade union rights for workers who did not work under a contract. The effect of the Court of Appeal's reading down of the relevant legislation did not require foster carers to be treated as workers for the purpose of that legislation generally, still less for the purpose of any other legislation in the employment field. It applies only to the extent necessary to give effect to their Convention rights. Although Bean LJ observed that though doctrine of precedent means that the Court of Appeal is bound by *W*, that may require reconsideration either by the Supreme Court or by

Parliament (para 155), it is clear than in the absence of any such reconsideration, the above authorities are still binding.

106. So, to summarise the authorities so far, not only is a foster care agreement not an employment contract, it is not a contract of any sort.

107. In *Glasgow City Council* v *Johnstone* UKEATS/0011/18/J the Scottish EAT upheld an Employment Tribunal's finding that foster carers who had signed a 'multi-treatment foster care' agreement under Scottish regulations were employees. Parts of the agreement were not prescribed by statute and were contractual in nature under Scots law. The agreement was said to be different to an ordinary foster care agreement in a number of ways. First, the carer was not allowed to be in other paid employment. Second there was a professional fee not paid to ordinary foster carers, payable whether or not a child was placed with them. The carers were obliged to attend meetings and training whether or not a child was placed with them. Third, they were permitted to take their holidays without the child placed with them (ordinary foster carers being expected to take the child with them). The court found that the council had the right under the agreement to a high level of control (these "numerous obligations" are not set out in the judgment) but the agreement contained a variety of terms exerting a significant degree of control beyond that in an ordinary foster agreement. (The judge at first instance found a "very high degree of control".) The fee paid to the carers was in addition to payments made with the purpose of "defraying" the cost of having the child. The foster carers were obliged to supply a daily report on any child in their care. In the court's estimation the council's description of the foster carers as self-employed indicated that it considered itself in a contractual relationship. In coming to its decision the court expressly stated that it was not bound by the English authorities (above); the EAT explicitly applied Scots contract law in deciding whether there was a contract, and did not assume that to be the same as English law. In any event the court considered that the English cases were "to a degree fact-specific" and could be distinguished. The EAT expressly declined to consider whether the level of control exercisable under an 'ordinary' foster care arrangement, as distinct from the MTFC arrangement, brings the contract within the scope of a contract of employment (i.e. in Scots law).

"Ordinary" unfair dismissal

108. Where the dismissal was not automatically unfair, and where the claimant has two years' continuous employment, the Tribunal applies S 98 ERA in two stages. First, the employer must show that it had a potentially fair reason for the dismissal within section 98 (1) and (2). Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

109. So far as the first stage of fairness is concerned, S 98 ERA provides, so far as is relevant:

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

110. The second stage of fairness is governed by s 98 (4) ERA:

> (4) … the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

111. In deciding fairness, the Tribunal must therefore have regard to the reason shown by the Respondent and to the resources etc. of the Respondent. In general, the assessment of fairness must be governed by the band of reasonable responses test set out by the EAT in *Iceland Frozen Foods Ltd* v *Jones* 1983 ICR 17. In applying s 98(4), it is not for me to substitute my judgment for that of the employer and to say what I would have done. Rather, I would determine whether in the particular circumstances of this case the decision to dismiss the claimant fell within the band of reasonable responses open to a reasonable employer.

Automatically unfair dismissal and protected disclosures

112. S 103A ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure. Where there are multiple protected disclosures, the Tribunal is required to ask itself whether, taken as a whole, the disclosures were the principal reason for the dismissal: *El-Megrisi* v *Azad University* EAT 0448/08.

113. By s 43A, a protected disclosure means a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H. By s 43B, a qualifying disclosure means any disclosure of information which, in the reasonable belief of the person making the disclosure, is made in the public interest and tends to show one or more of a number of things. One of those things (s43B(d)) is that

that the health or safety of any individual has been, is being or is likely to be endangered.

114. A qualifying disclosure is made in accordance with sections 43C to 43H if made in any of the following circumstances (I list only those relevant to this case):
    a. To an employer (s 43C(1)(a)).
    b. To a person other than the employer when done in accordance with a procedure whose use by the employee is authorised by the employer (s 43C(2)).
    c. To a person other than the employer, where the employee reasonably believes that the relevant failure relates solely or mainly to any other matter for which that other person has legal responsibility.
    d. To a minister of the Crown in certain circumstances (s 43E).
    e. To a prescribed person (s 44F). In this case there was no dispute that the CQC is a prescribed person.
    f. In other cases, as set out in s 43G.
    g. In the case of an exceptionally serious failure, as set out in s 43H.

115. Section 43G says:

> (1) A qualifying disclosure is made in accordance with this section if—
>
> (b) the worker[1] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
>
> (c) he does not make the disclosure for purposes of personal gain,
>
> (d) any of the conditions in subsection (2) is met, and
>
> (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.
>
> (2) The conditions referred to in subsection (1)(d) are—
>
> (a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,
>
> (b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
>
> (c) that the worker has previously made a disclosure of substantially the same information—
>
> (i) to his employer, or
>
> (ii) in accordance with section 43F.

[1] Although the word worker is used here, for the purposes of an unfair dismissal case, it means employee.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

116. Section 43 H says:

(1)A qualifying disclosure is made in accordance with this section if—

(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) the relevant failure is of an exceptionally serious nature, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.

Wrongful dismissal

117. A dismissal in breach of contract will give rise to an action for wrongful dismissal. Such an action may, by operation of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623, be brought in

the Employment Tribunal in certain circumstances (which do, there was no dispute, arise here).

118. In the context of this case, the claimant would have been wrongfully dismissed – i.e. dismissed in breach of contract – if she was dismissed without notice (as the respondent accepts she was) where summary dismissal was not justifiable (which the respondent does not accept). Summary dismissal is justifiable where the employee has repudiated the contract in the circumstances set out by the Court of Appeal in *Briscoe* v *Lubrizol Ltd* 2002 IRLR 607: the employee's conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment". The Court stressed that the employee's conduct should be viewed objectively, and so an employee can repudiate the contract even without an intention to do so. In this case the fact that the contract provided for the possibility of summary dismissal for a case of gross misconduct will need to be considered.

119. In a claim for wrongful dismissal, the Tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct.

120. I note that, after taking the time to consider the point, Ms Barley for the respondent confirmed that the claimant had not been paid in lieu of notice. It was the respondent's case that this was not done as the dismissal was summary.

Time limits

121. The time limits applicable for presenting a claim for unfair dismissal (including automatically unfair dismissal) are set out in section 111 of ERA. Subject to the rules about early conciliation, an Employment Tribunal shall not consider a complaint:

> unless it is presented to the tribunal—
>
> (a) before the end of the period of three months beginning with the effective date of termination, or
>
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

122. The question of reasonable practicability is one of fact, but where the failure to meet the time limit is the fault of the claimant's solicitor it will generally have been reasonably practicable to have presented the claim in time, though there could be exceptions (*Northamptonshire County Council* v *Entwhistle* 2010 IRLR 740).

Amendment

123. When considering whether to grant an amendment, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it (*Selkent Bus Co Ltd* v *Moore* [1996] I.C.R. 836). The following factors will be relevant:
    a. The nature of the amendment. Amendments range, on the one hand, from the correction of clerical errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded ("relabelling") to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal has to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.
    b. The applicability of time limits. (See below.)
    c. The timing and manner of the application. An application should not be refused solely because there has been a delay in making it, but delay is a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made.

124. In *Vaughan* v *Modality Partnership* UKEAT/147/20 the Employment Appeal Tribunal ("EAT") stressed that the balance of injustice/hardship was the paramount test. The real practical consequences of allowing or refusing an amendment should underlie the entire balancing exercise. The "*Selkent* Factors" should not be taken as a checklist to be ticked off to determine the application, but are factors to take into account in conducting the fundamental balancing exercise. They are not the only factors which may be relevant.

125. In considering applications which arguably raise new causes of action, the focus should be not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted *Abercrombie* v *Aga Rangemaster Ltd* [2014] I.C.R. 209.

126. The fact that an amendment would introduce a claim that was out of time is not decisive against allowing the amendment, but is a factor to be taken into account in the balancing exercise: *Transport and General Workers' Union* v *Safeway Stores Ltd* UKEAT/0092/07/LA.

127. Guidance Note 1 within the Presidential Guidance – General Case Management (which pre-dates *Vaughan*) also deals with amendment. The note sets out many of the points above and also says that the Tribunal draws a distinction between amendments which seek to add a new claim based on the same facts as the original claim ("relabelling") and amendments which seek to add a new claim entirely unconnected with the original claim. In the case of relabelling, the Tribunal will adopt a flexible approach. If, on the other hand, there is no link between the facts described in the claim form and the proposed

amendment, the claimant will be bringing an entirely new cause of action and the Tribunal will have to take into account the statutory time limits.

128. The overriding objective (rule 2), which applies to this decision as it would to any other, states (to paraphrase) that dealing with cases fairly and justly includes, so far as is practicable: ensuring that the parties are on an equal footing; proportionality; avoiding unnecessary formality and seeking flexibility; avoiding delay; and saving expense.

CONCLUSIONS

Employment status (1) – Enhanced Fostering

129. In my judgment I am bound by the line of English authorities I deal with at paras 103 to 105 above, notwithstanding the observations of Bean LJ which I refer to at para 105. A standard foster care agreement is not a contract. I am not bound by the *Glasgow City* decision which I refer to at para 106, though I can of course take it into account insofar as it does not directly conflict with the English authorities.

130. As the claimant pointed out in submissions, as the name implies, there are some important differences between what I will call a standard foster care agreement (dealt with in the English authorities) and the enhanced fostering agreement between the claimant and LBH. The most obvious is the fact that given the children's disabilities the claimant was required to do a considerable amount of work, and apply a considerable amount of skill and expertise, beyond that which a foster carer for children without disabilities might have to do. (Although not necessarily more than a parent of children with such disabilities might have to do.) I also note that LBH described the claimant as self-employed, which the Scottish EAT in the *Glasgow City* case considered to be some indication that the local authority itself considered there to be some form of contractual relationship. It seems to me that the following features of the agreement (as I set out at paragraphs 14 to 17 above) were not imposed upon the parties by statute. First, that the claimant lived on specially adapted premises provided by the respondent. Second, that the claimant would be paid during her three weeks' holiday. Third, that she would be provided with respite care, which LBH would pay for, at other times. In my judgment those three extra features are not sufficient to take this case outside the English authorities. The fundamental features of the relationship were in my judgment still prescribed by statute. Just like "standard" foster caring, what the claimant was doing, given the familial nature of the relationship, does not fit comfortably into the concept of contractual relations – although the claimant was being paid, she was not in my judgment running a business, but rather was caring for her foster children. While it may be that the amount paid to the claimant was more than required under standard fostering agreements, I do not consider that to be significant, given that it appears that some of the standard fostering agreements considered in the authorities also provided for some payment beyond that which was required by statute. I also note that the requirement not to work for other authorities without LBH's permission appears to have been imposed by

statute. The same would apply to the involvement of the social workers. It is not clear to me on the evidence whether the claimant's work assisted LBH in discharging any statutory duties they may have had, in addition to those under the fostering by virtue of the children's disabilities, but even if that were the case I cannot see that it would have affected my decision. The relationship was not in my judgment contractual.

131. Even if I had considered there to have been a contractual relationship, I would not have considered it to have amounted to an employment contract. I consider the matter in light of how the arrangements worked in practice, in other words the reality of the agreement between the claimant and LBH. Clearly there was some mutuality of obligation – the claimant would care for the children and LBH would offer payment and less tangible forms of support. Regarding personal service, the claimant had a right to substitution during her holiday periods and seems to have been responsible for arranging the substitution; the respondent's fetter on that right did not go much beyond checking that the person was suitable. More significant in my judgment is the issue of control. As the foster parent the claimant clearly had the legal right to make decisions about the children's care. Whilst the respondent, through its social services department, clearly engaged in some monitoring of the claimant's work, and indeed was involved significantly in the children's care, the respondent lacked the fundamental right to control how the claimant cared for the children. On a more logistical level, while LBH might be said to have been in control of where the claimant cared for the children, it lacked, it appears, any right to control the hours the claimant worked, when she took breaks etc. While that may appear something of an incongruous consideration in the circumstances, that only serves to illustrate another way in which what the claimant was doing does not fit easily into the scope of an employment relationship. Just as in the case of other parents, there were no limits to the hours which she was expected to spend caring for the children, beyond the respite arrangements I have already mentioned. I would give some weight to the fact that the claimant was responsible for paying her own tax, and some small amount of weight to the parties' own description of the arrangement as self-employment (whilst noting that although the claimant use the words self-employed in her statement, in the same sentence she also asserted that she was employed). Having considered those features of obligation and control I would stand back and consider whether the arrangements could aptly be described, and were consistent, with there being a contract of service, in other words in employment contract. For the reasons I have set out already, and in particular what I have referred to as the familial nature of the work, although the enhanced agreement had features beyond those of a standard foster care agreement, the arrangement was fundamentally different in my judgment to a contract of employment.

Employment status (2) – Staying Put

132. Did the situation change when the Staying Put arrangements came into effect? Even though the claimant was not employed as a foster carer, did she become an employee whose job it was to look after the now adult X (while still being the foster carer of Y and Z)? (If so, the employment would have started

in October 2015, i.e. more than two years before the effective date of termination.) It does not seem to me that the parties contemplated any such change in their relationship. As I have already said, s 23CZA of the Children Act 1989 imposed a duty on LBH to monitor the arrangement and to provide advice and assistance and provide support, including financial support. The broad nature of LBH's obligations under the agreement, if not the precise terms of how those obligations were to be met, were therefore imposed by statute. I would therefore hold, by analogy with the English authorities on foster agreements, that the relationship between the parties remained non-contractual.

133. If I am wrong about that, I would nevertheless have considered that the contract was not an employment contract for broadly the same reasons as applied to the enhanced foster care agreement. The relationship was essentially familial in nature and LBH had if anything even less control over how the claimant would care for the young persons.

Continuity of employment, "ordinary" unfair dismissal

134. Having reached the above conclusions, there is no question for me to consider about whether there was a break in the claimant's employment by virtue of her resignation as a registered foster carer. The claimant was not an employee within the meaning of ERA until 18 April 2016. The Tribunal therefore lacks jurisdiction to consider a claim of ordinary unfair dismissal, and that claim is dismissed. That means, and I recognise that this will cause the claimant some consternation, that it is not necessary for me to consider in detail the claimant's numerous complaints about the fairness of the disciplinary process, dismissal and appeal, many of which may be apparent without the need for me to set them out given the findings I make above. I considered it necessary to make those the findings which I did make about those processes, as the findings informed my conclusions to some extent on whether the dismissal was for an automatically unfair reason or was wrongful.

Automatically unfair dismissal

135. As I explain above, PDs 1 and 2 were not in fact disclosures of information. In my judgment on the basis of the facts set out above, PDs 3 to 6 were disclosures of information. Putting to one side for now whether the disclosures otherwise fulfilled the other requirements of s 43A and 43B ERA, I consider first whether the claimant has discharged the burden of proving that the disclosures were the principal reason for the dismissal.

136. In the circumstances of this case it is clear that the person or persons who made the decision to dismiss cannot have been influenced in making that decision by the disclosures, subconsciously or otherwise, if they did not know about the disclosures. It is necessary then, first of all, to identify the decision-maker or makers and then to decide whether that person or persons had any knowledge of the disclosures.

137. Taking Ms Siggers' evidence in the round, I find that the decision was in reality made jointly between her and Mr Asuman-Ade. While others may have

had some input into the decision, the decision was made by those two people over the period 20 October 2017 (the date of the disciplinary hearing) and 3 November 2017. The first disclosure in time, PD4, was the call to LBH's safeguarding team around 21 October 2017. The call to the CQC, PD3 was, I have found, on or after 30 October 2017. The letter to the claimant's MP, PD5, was sent on 31 October 2017. The disclosure to the MP in her surgery was in November 2017. I consider it significant that the disciplinary process which resulted in the claimant's dismissal began on 12 October 2017, i.e. well before any disclosure was made. In particular, the disciplinary hearing took place before any disclosure was made. The question for me then is whether Mr Asuman-Ade or Ms Siggers can have been made aware of any of the disclosures between the time of the meeting and the time they made the decision.

138. So far as the disclosure to LBH's safeguarding team is concerned, if some information about that had been passed to Ms Siggers, even without naming the source, clearly in the circumstances Ms Siggers would have been able to draw her own conclusions about the source. But there is also the question of whether that information could have got to Ms Siggers in time (i.e. before the decision was made). It seems particularly unlikely to me that any information about the disclosures to the CQC or to the claimant's MP could have reached Ms Siggers before 3 November. More significantly however is Ms Siggers' direct evidence on oath to me – she straightforwardly denied knowledge of any of the disclosures at the material time. Ultimately I accept that evidence, having considered it in the light of everything else I have heard about the case. In coming to this decision, I have carefully considered whether what are some obvious flaws in the disciplinary process should lead me to conclude that the real reason for the dismissal was not the respondent's genuine belief that the claimant was guilty of misconduct, but instead some other reason (which might include the disclosures). Without setting them all out, there do seem to me to have been failures in the investigation process and some degree of prejudging on the part of those involved. However, those points apply with just as much force before the disclosures were made as after the disclosures were made. While of course it is perfectly possible for a disciplinary process begun for one reason to ultimately be influenced by another reason, having considered the witness' evidence and the contemporaneous documentary evidence, I consider that the respondent's belief that the claimant had been guilty of misconduct ran as a very clear strand throughout the disciplinary, dismissal and appeal processes. It is particularly evident to me from the meeting minutes I summarise above. Whether that belief had been reached reasonably is another matter, but I do find that the belief was held genuinely both by Ms Siggers and Mr Asuman-Adu.

139. I also accept Ms Siggers' evidence that so far as she was aware nobody else at the respondent was aware of the disclosures at the material time. Clearly she included Mr Asuman-Adu in that statement. It is of course theoretically possible that Mr Asuman-Adu knew about the disclosures, and let them influence the decision, without Ms Siggers being aware of that. I am conscious of the difficulty in making findings about the reasons for a decision made by somebody without hearing from that person; this is a difficulty for

which the claimant clearly does not bear responsibility. Ultimately however I conclude that it is more likely than not that Mr Asuman-Adu too had no knowledge of the disclosures and so they did not influence the decision to dismiss the claimant. I say this in view of: (i) it not been particularly likely given the timescales that Mr Asuman-Adu could have been aware of the disclosures (ii) Ms Siggers' evidence that so far as she knew he was not aware and (iii) my observations above about the obvious strand running through the processes.

140. The claimant therefore has not shown that taken as a whole the disclosures were the principal reason for the dismissal. I therefore do not need to go on to consider whether any of the disclosures in fact amounted to protected disclosures within the meaning of s 43A ERA. I should however note that, although the disclosures came shortly after the claimant was made aware that she would be the subject of a disciplinary process, I would not have concluded that her disclosures were motivated substantially by that fact. It seemed evident to me that the claimant's concerns, whether or not reasonable, were genuine. Whether or not they were reasonable was not something I needed to decide.

Wrongful dismissal

141. If the claimant by her conduct repudiated the contract by breaching the implied term of trust and confidence, the respondent was entitled to dismiss her summarily. In the alternative, is she was guilty of gross misconduct, the express terms of the contract entitled the respondent to dismiss the claimant summarily. In my judgment, on the facts of this case, "breach of the implied term" and "gross misconduct" are in reality interchangeable, as implied in the agreed list of issues – if the claimant was guilty of gross misconduct, clearly there was a breach of the implied term. For the sake of brevity I now simply consider whether the claimant was guilty of gross misconduct. As I have said, the respondent's belief about that is not the issue.

142. On the facts as I have found them, the claimant knew that an incident had taken place in which X had been restrained and Mr Sidonie Edgar was injured such that he should have had a tetanus jab. On the facts known to the claimant, Mr Sidonie had not done anything wrong and X was not hurt nor put in any danger. In the circumstances, I consider that the claimant reached this conclusion reasonably and on the basis of what she was told. The claimant did not fill in a formal incident report, though she did make a record of the incident in the log book and in her own blue book, which were both left accessible at the home. The claimant did not make a safeguarding report.

143. What should the claimant have done under the respondent's procedures? I note at this point that it would have been a simple matter for the respondent to have specified which policy or policies was said to have been breached (both during the disciplinary process and these Tribunal proceedings) and to provide me with copies of the policy or policies. The respondent did not do so and I must do my best on the basis of other evidence to decide whether, on the balance of probabilities the claimant in fact breached any policy and if so

whether that amounted to gross misconduct. I proceed on the basis that the claimant cannot be guilty of gross misconduct for failing to abide by a policy of which she was unaware (unless perhaps she was unaware through her own negligence or inattention, and I have not seen any evidence about what specific training she had in that regard).

144. I conclude that the claimant was not aware of a "no restraint" policy, nor should she have been (if there was one). It is not clear to me whether an incident where a member of staff is injured was required by the respondent's policies to be reported. Nor was it clear whether any policy required reporting (either by the claimant or others) of the sort of incident I have found the claimant reasonably believed happened. (I accept that Ms Siggers' view was that it should have been reported, but that is not sufficient in my judgment.) Nor was it clear whether, if a report was required (either a report of a restraint or an incident report), the respondent's policy required that to be on a particular form, or to be sent to head office (for example), as opposed to a written record of the incident being kept at the home (which, I have found, it was). I was not taken to any statutory requirement which the claimant might have breached in failing to report/record Mr Sidonie Edgar's injury. It was not suggested that the claimant was under obligation to ensure Mr Sidonie Edgar sought hospital treatment.

145. Given the lack of clarity and the ease with which the respondent might have chosen to resolve that lack of clarity, I find on the balance of probabilities that there was in fact no breach of the respondent's policies by the claimant. Even if there was, I would not have considered any failure on the claimant's part in that regard to have been gross misconduct as opposed to misconduct. Looking at the (non-exhaustive) examples of gross misconduct given in the respondent's disciplinary procedure, the examples are concerned in the main, as one might expect, with dishonesty, integrity, *serious* breaches of the respondents rules and other things which might endanger service users. As I have already made clear, I find that the claimant did not destroy any records, not do I find that she participated in any sort of cover up.

146. For the avoidance of doubt, since Mr Asuman-Adu's dismissal letter of 3 November 2017 does not use the words gross misconduct, I also find that the claimant did not "neglect her duty" in the ways described by Mr Asuman-Adu. More generally, I find that the claimant's actions were not such as to breach the implied term of trust and confidence.

147. I therefore find that the claimant was not guilty of gross misconduct. She was therefore wrongfully dismissed.

Time limits and amendment

148. In light of my findings above it was not necessary for me to decide whether the claim for automatically unfair dismissal was out of time and if so whether I should allow the claim to be amended. In the event that an application for

amendment had been required, I would have allowed it on the basis that, given how long the respondent had known about the application, it would have been caused no material prejudice by the application being granted.

Final remarks

149. Remedy, i.e. the damages to be paid by the respondent, will now be decided at another hearing. I should make it clear to the claimant that since she has succeeded only in her claim for wrongful dismissal, the Tribunal only has the power to compensate her for the breach of contract in dismissing her without notice. In practice, this typically means that the amount ordered in damages will be limited to the wages that the claimant would have earned over her notice period. In the circumstances the Tribunal has no power to award damages for loss of wages over a longer period or for such things as injury to feelings.

150. Finally, I apologise to the parties for the length of time it has taken me to prepare this judgment and reasons.

APPENDIX:

Edited Version of the List of Issues set out by EJ Caiden following the hearing of 9 October 2023

1. Was the Claimant an employee of LBH before the October 2015? The Respondent alleges that the Claimant was in fact a self-employed contractor during this time and so has insufficient continuity of employment to bring an ordinary unfair dismissal claim. The Claimant alleges that she was an employee since starting working for LBH in 1997 until the service she worked in was taken over by the Respondent.

2. If the Claimant was an employee of LBH before October 2015, was there nevertheless a resignation from this contract of employment prior to her entering a contract of employment with the Respondent on or around 16 April 2017? The Respondent alleges that even if the Claimant was an employee, there is no continuity of employment as she had resigned from her contract of employment and there was a gap before she commenced employment before commencing with the Respondent meaning there is insufficient continuity of employment for her ordinary unfair dismissal claim. The Claimant alleges there was no such gap.

3. If the Claimant establishes that she was an employee and there was no gap by virtue of the resignation, the parties agree that there was a TUPE transfer. Accordingly, in these circumstances the Claimant would have sufficient continuity of employment for an ordinary unfair dismissal claim which is set out at paragraph 7 below.

4. Was the claim of the claimant that she had been dismissed contrary to section 103A of the Employment Rights Act 1996 ("ERA 1996") i.e. that the reason or, if not the reason, the principal reason, for her dismissal was that she had made a protected disclosure within the meaning of section 43A of the ERA 1996, made in time? The claimant was dismissed on 20 October 2017. Her ET1 claim form was received by the tribunal on 9 March 2018. The ACAS conciliation certificate showed that the ACAS conciliation period was commenced by the claimant on 10 January 2018 and that the certificate was issued on 10 February 2018. On that basis, the claim in relation to the dismissal was made in time. However, the ET1 form was accompanied by a document stating the details of the claim which (it is now apparent) was incomplete. The claim was filed by Mr Lewis. He has (it appears) said that it was for electronic reasons not possible to file the claim with the correct attachment. On 12 March 2018 he sent a further document, which he called "the appendix [to] the ET 1", which was a letter dated 31 October 2017 from the claimant to her MP. On 9 May 2018, Mr Lewis sent to Haringey and the tribunal an email among other things enclosing what he described as "my particulars of claim, full version that was posted/emailed to the tribunal separately". Haringey had not before seen that document. It was dated 9 March 2018. On 17 May 2018, Mr Lewis formally applied to amend the claim so that the "long version of the particulars of claim" was substituted for the original version.

5. If the claim under s.103A ERA 1996 is found to be out of time, does the Tribunal exercise its discretion to allow the claim by virtue of the above amendment?

6. If the claim of s.103A ERA 1996 is considered by the Tribunal (which does not require any length of continuity of employment):
   6.1. Did the claimant make one or more qualifying disclosures as defined in section 43B ERA 1996 1996? The Tribunal will decide:
      6.1.1. Do any of the alleged disclosures set out at paragraphs 32 of the Particulars of Claim (Amended) disclose information?
      6.1.2. Did the Claimant believe the disclosure of information was made in the public interest?
      6.1.3. Was that belief reasonable?
      6.1.4. Did they believe it tended to show that: (i) a person had failed, was failing or was likely to fail to comply with any legal obligation, (ii) the health or safety of any individual had been, was being or was likely to be endangered, or (iii) information tending to show any of these things had been, was being or was likely to be deliberately concealed?
      6.1.5. Was that belief reasonable?
      6.1.6. In relation to any disclosure that meets 6.1.1-6.1.5 above was it a protected disclosure by virtue of: (i) being made to the Claimant's employer (ii) where the Claimant reasonably believes that the relevant failure relates mainly to the conduct of a person other than her employer, being made to that other person (iii) being made to the CQC where the Claimant reasonably believes the relevant failures fall within a description of matters for which they are a prescribed person and the information disclosed, and any allegations contained in it are substantially true and/or (iv) to her MP in circumstances where she reasonably believed that the information disclosed, and any allegations contained in it, were substantially true, it was not made for personal gain, in all the circumstances it was reasonable for her to make the disclosure and she believed either that she would be subject to detriment if she made the disclosure to her employer or had already substantially disclosed the same information to it.

7. If the claim of s.103A ERA 1996 fails (or is not considered owing to being out of time and no discretion is exercised to allow the amendment), there is the ordinary unfair dismissal claim under s.98 ERA 1996 to consider assuming that the Claimant has established sufficient continuity of employment, this usually requires the following to be considered:

   7.1. Was the reason, or principal reason, for the claimant's dismissal conduct? The Respondent alleges the conduct was the Claimant's failure to report another carer (Rominus) who allegedly had physically and verbally abused a service user (X).

   7.2. Did the person or persons responsible for deciding that the claimant should be dismissed genuinely believe that the claimant had committed that misconduct?

   7.3. Did the respondent conduct a reasonable investigation into the alleged misconduct of the claimant before deciding that she should be dismissed for that conduct, ie was that investigation one which it was within the range of reasonable responses of a reasonable employer to conduct?

   7.4. Were there reasonable grounds for the belief of whoever decided that the claimant should be dismissed that the claimant had committed the misconduct for which she was in fact dismissed?

7.5. Was the claimant's dismissal within the range of reasonable responses of a reasonable employer?

8. Was the claimant's dismissal wrongful, i.e. was she guilty of gross misconduct (that being shorthand for the question whether she had committed a fundamental breach of her contract of employment, or repudiated it)? In the circumstances, that question will fall to be determined by asking whether the claimant had committed a breach of the implied term of trust and confidence. That imposes an obligation not, without reasonable and proper cause, to act in a way which is likely seriously to damage or to destroy the relationship of trust and confidence that exists, or should exist, between employer and employee as employer and employee. There is no need for specific continuity of employment for this claim.

Employment Judge Dick

12 September 2024

REASONS SENT TO THE PARTIES ON

……13 September 2024.....

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FOR THE TRIBUNAL OFFICE