



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Breary

**Respondent:** Reverend Elizabeth Welch  
Anne Aaron  
Yetunde (Bim) Oniwinde  
Mercy Mashem  
Abigail Kingston

being the Elders' Meeting of Clapton Park United Reformed Church

**Heard at:** East London Hearing Centre

**On:** 15th and 16th June 2017

**Before:** Employment Judge Reid

**Members:** Ms J Henry  
Dr J Ukemenam

## Representation

**Claimant:** In person

**Respondent:** Reverend Welch (Chair of the Elders' Meeting)

## RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:-

1. The Respondent did not unlawfully discriminate against the Claimant contrary to s5 and s13 Equality Act 2010. Her claim of direct age discrimination is therefore dismissed.
2. The Respondent did not subject the Claimant to a detriment or detriments on the ground of having made a protected disclosure, contrary to s47B Employment Rights Act 1996. Her claim is therefore dismissed.
3. The Respondent did not constructively dismiss the Claimant. Her claim of unfair dismissal under s103A Employment Rights Act 1996 is therefore dismissed.

## **REASONS**

### **Background**

1. The Claimant brought claims of direct age discrimination and detriment due to making a protected disclosure, by a claim form presented on 14<sup>th</sup> December 2016. At a preliminary hearing on 27<sup>th</sup> February 2017 she was given leave to amend her claim to also include a claim for constructive (unfair) dismissal (for making a protected disclosure).

2. The Claimant was employed as a Nursery Practitioner at the Round Chapel Nursery by the Respondent from 7<sup>th</sup> June 2016 to 4<sup>th</sup> January 2017 when she resigned. She worked 3 days per week, term times only. Prior to her employment she had been a volunteer at the nursery for around 3 years.

### **Issues**

3. A preliminary hearing was held on 27<sup>th</sup> February 2017 which both parties attended. The correct legal entity of the Respondent was discussed and subsequently changed to the entity set out above.

4. The context of the discussions at the preliminary hearing was the Claimant's letter dated 22<sup>nd</sup> November 2016 (page 21) raising issues with the Respondent regarding events on that day and whether this amounted to a protected disclosure within s43A and 43B Employment rights Act 1996. The Claimant's attachment to her ET1 referred to that letter as the complaint which triggered adverse consequences for her. It was identified at the preliminary hearing that the Claimant's case was that her letter dated 22<sup>nd</sup> November 2016 contained the matters she relied on as a protected disclosure, firstly about what she told the Respondent about an incident on 22<sup>nd</sup> November 2016 regarding the children being kept waiting in a hallway which the Claimant regarded as not taking into account their needs and secondly about the matters the Claimant told the Respondent about as regards how her colleague Ms Sevim Metin reacted to the Claimant on that day which the Claimant felt breached standards as regards behaviour. The detriments claimed to have followed were firstly adverse comments made in public by the Claimant's manager Ms Emma Spinelli about the Claimant and secondly being given the 'cold shoulder' by senior management.

5. The Tribunal identified with the Claimant at the beginning of the hearing that her witness statement sent on 29<sup>th</sup> May 2017 identified six further matters as disclosures raised with the Respondent between June and October 2016 and three additional detriments in June-July 2016. These had not been discussed at the Preliminary Hearing. The Claimant then made an application to amend her claim to also include both these previous matters as qualifying disclosures and to include the three new detriments. The Tribunal refused that application for the following reasons, applying the factors identified in *Selkent Bus Co Ltd v Moore [1996] IRLR 661*. The Claimant had not raised these matters at the Preliminary Hearing; whilst she is not represented, neither is the Respondent, and it is entitled to know the case against it in advance of the hearing. Although the Respondent said it had had time to put together a response to the new factual allegations contained in the witness statement (served on 29<sup>th</sup> May 2017) and was ready to address the issues, in relation to the new matters said to be protected disclosures the Respondent had not had the opportunity to consider them as

protected disclosures (as opposed to things which may have happened which were not protected disclosures but part of the factual background to the dispute). If the new matters said to be previous protected disclosures were to be included, further disclosure would be necessary because the Claimant said that the previous matters she raised with the Respondent should be contained in the nursery committee's monthly management meeting minutes. If the Claimant was allowed to amend her claim as regards what she said were additional protected disclosures then the Respondent would need time to amend its ET3 to deal with the new matters said to amount to protected disclosures. In relation to the three new claimed detriments in June and July 2016 these were made outside the usual 3 month time limit for such claims. Conducting the *Selkent* balancing exercise, the Tribunal took into account the nature of the amendment, applicable time limits and the manner and timing of the Claimant's application and decided that it would not allow these amendments. However the factual matters raised in terms of the history of her employment would still be relevant but just not additional protected disclosures and not as new detriment claims.

6. The issues were therefore:

- 6.1 Did the Respondent directly discriminate on the grounds of age contrary to s5 and s13 Equality Act 2010 in that it allowed Ms Metin to be critical and disrespectful of the Claimant because the Claimant was younger, which mistreatment was then taken on by other colleagues; in this respect the Claimant compared herself to her other older colleagues who were not treated in this way.
- 6.2 Did the Claimant's letter dated 22<sup>nd</sup> November 2016 contain a protected (and thus qualifying) disclosure within s43B Employment rights Act 1996.
- 6.3 If so, did the Claimant suffer a detriment or detriments contrary to s47B Employment Rights Act 1996 on the ground of that disclosure, the detriments claimed (see Preliminary Hearing summary) being the adverse comments about the Claimant as regards her appearance and timekeeping made by Ms Spinelli; the Claimant confirmed at the hearing that the 'cold shouldering' by other senior managers referred to treatment by a fundraiser called Michelle Young who worked in the office and an employee called Becky from an organisation called Artbash who rented premises within the building; the Claimant accepted at the hearing that these individuals were not senior managers of the Respondent.
- 6.4 Did the Respondent breach the implied term of trust and confidence as regards (1) Ms Metin's allegedly disrespectful behaviour to the Claimant which the Respondent failed to deal with, (2) the treatment in response to her protected disclosure (including extending her probation period), (3) Ms Spinelli's adverse comments about the Claimant after that disclosure and the cold shouldering by senior managers and (4) on 15<sup>th</sup> December 2016 Ms Spinelli not letting the Claimant into the building and being disrespectful to the Claimant. The issue was whether these matters amounted either separately or taken all together to amount to a breach of the implied term of trust and confidence; if they did, the next issue was whether that breach played a part in the reason why the Claimant resigned and whether the Claimant delayed in resigning and thereby

affirmed the contract. The burden of proof was on the Claimant to show that there was a constructive dismissal by the Respondent.

7. Both parties attended the hearing. The Respondent called four witnesses. There was a one file bundle also containing the witness statements of the Respondent's witnesses though of these (list page WS1) only Rev Welch, Ms Spinelli, Ms Metin and Mr McInnes attended the hearing. The Claimant provided a witness statement which she signed at the hearing. In view of the time available the Tribunal heard evidence in relation to liability issues, issues as to remedy being left over for a future date, should that be required if the Claimant won any of her claims.

8. As both parties were unrepresented the Tribunal allowed each party additional time to prepare questions for witnesses as they had not come prepared with questions. The Tribunal gave some assistance to the parties about how to frame questions and what was relevant and identified with the parties that where there is a factual dispute as to whether something happened or not, the Tribunal has to decide what in fact happened on the evidence before it. The Tribunal also allowed time for the preparation of oral submissions after the evidence was completed on the second day.

#### Findings of fact

9. The Claimant was employed as a nursery practitioner under a contract of employment dated 14<sup>th</sup> October 2016 (page 41). Her employment commenced on 7<sup>th</sup> June 2016. The contract contained a probationary period of six months (clause 11) with review meetings to take place at 3 months and then at 6 months to review performance. The clause contained the right to extend the probation period if a further period was required before a decision could be made. Clause 12 of the contract required the Respondent to give to the Claimant at least 3 months' notice in writing of termination. There was no shorter notice period applying during the probationary period.

10. The Tribunal finds that this dispute arose because of a serious difficulty in their working relationship between the Claimant and Ms Metin which became evident to the Respondent in November 2016.

11. The Claimant and her colleague Ms Metin are both committed and professional nursery workers and were valued by the Respondent. However they had different approaches to their work and different personalities and came from different backgrounds in terms of their training although both were qualified to Level 3. The Claimant had been asked to obtain an Early Years Foundation Stage (EYFS) formal qualification before she applied for the role. Ms Metin is Steiner qualified though also has EYFS knowledge completed via a training course. Both had their own views as to how things should be done and had different approaches. There appeared to be a degree of professional one-upmanship going both ways with each considering their own approach was better and each keen to establish their qualification, experience and credentials though they were employed at the same level. From her questioning of Ms Spinelli the Tribunal finds that that the Claimant resented that she, the Claimant, had had to obtain a formal EYFS qualification whereas Ms Metin had not been required to do so. Ms Metin meanwhile put some store by her Steiner qualification and the aspects of that she had brought to the nursery (witness statement paras 8,9,12,19). They started their employment at the nursery the same week. The both worked part time, only usually overlapping one day per week. They had to work together closely

within a single nursery room with few other colleagues on the day they overlapped. They both worked well with other colleagues except in the end with each other. The Claimant was the youngest at aged 34 with her colleagues being in the age range from late 30s to 52 (Ms Spinelli being the oldest). The Tribunal finds based on Ms Spinelli's oral evidence that Ms Metin was open from the outset that she planned to work at the nursery for about a year. If Ms Spinelli subsequently referred to that, it was not in the context of reassuring the Claimant that Ms Metin was not going to be there forever.

7<sup>th</sup> June 2016 – first day

12. From day one Ms Metin rubbed the Claimant up the wrong way (Claimant witness statement page 1). The Tribunal finds that Ms Metin did not make the comments about the Claimant being a young girl and that she, Ms Metin, was more experienced, though she is likely to have told the Claimant that her particular expertise was space planning because that is also what she said in her oral evidence though that comment was unlikely to have been made as suggested in the context of a discussion over the washing up. Ms Metin may have been a little brusque with the Claimant wanting her to concentrate on the matter in hand but was not rude and did not raise her voice. The Claimant characterised Ms Spinelli as 'intervening' but the Tribunal finds there was no need to intervene and at most Ms Spinelli asked the Claimant to go and have the conversation with Ms Metin that Ms Metin was asking for. The Tribunal therefore found that the Claimant did not complain later that day to Ms Spinelli about rudeness by Ms Metin or tell Ms Spinelli that Ms Metin had breached the code of conduct.

14<sup>th</sup> June 2016 – incident involving the lift

13. On this day some children managed to get out of the nursery room as Ms Metin had left the door unlatched (but not open) as she went out to the kitchen, and they attempted to go off in the lift. They were stopped by Ms Metin who brought them back in. According to her oral evidence and that of Ms Spinelli, Ms Metin herself reported this incident to Ms Spinelli. The Claimant raised it too with Ms Spinelli because she was concerned. Based on her oral evidence the Tribunal finds that Ms Spinelli then spoke to all the staff about the door not being left unlatched. The Tribunal therefore finds that given Ms Metin had raised the matter herself and the matter was out in the open with Ms Spinelli dealing with it, it is not likely that Ms Metin would then take against the Claimant for being concerned about an issue which Ms Metin had herself accepted had been a problem she was responsible for.

15<sup>th</sup> June 2016 – breakfast incident

14. On this day the Claimant set out the breakfast materials slightly earlier than usual for the 9am breakfast, because she wanted to be organised and get ahead, it being the date of an Ofsted visit. She had a disagreement with Ms Metin as to whether this was being done a bit too early. Neither of them was wrong in their approach. The Claimant was not being undermined by Ms Metin when she commented it was a bit earlier than usual. If Ms Spinelli was there (witness statement page 3) she did nothing because there was not anything wrong for her to react to apart from a niggly between colleagues. The Tribunal finds that the Claimant did not later complain to Ms Spinelli about this incident and tell her that Ms Metin needed training though she may have said she had been irritated by Ms Metin.

5<sup>th</sup> July 2016 - computer incident

15. The Claimant was using the computer at Ms Spinelli's request and was asked to stop by Ms Metin. Based on Ms Spinelli's oral evidence the Tribunal finds that Ms Spinelli was annoyed with Ms Metin about this but she did not walk out crying though she commented to the Claimant that this incident had annoyed her too. However the Tribunal finds that this did not go beyond colleagues getting irritated with each other.

14<sup>th</sup> July 2016 – parents' tours

16. The Tribunal finds that Ms Metin was not rude to parents or disciplinary action would have been taken, the relationship with parents being important. Therefore the Tribunal finds that the staff were not told in Ms Metin's absence that she was no longer to do parent tours because she had been rude to a parent and tours would not even be conducted on a day Ms Metin worked. According to Ms Spinelli's oral evidence Ms Metin had never done parent tours and accordingly if there was a comment about Ms Metin not in fact doing tours (because she did not in practice do them) the Claimant has jumped to the conclusion that this was because of Ms Metin's behaviour. It is very unlikely that the Respondent would have continued to employ an employee in such a small environment where it was considered that parents could not even be shown round (by someone else) on one of Ms Metin's working days. Given the Tribunal has found Ms Spinelli did not say this, the Tribunal finds that the Claimant did not tell Ms Spinelli that Ms Metin lacked EYFS training.

July 2016 - asking the Claimant to keep her voice down incident

17. The Tribunal finds that one day the Claimant was talking to a parent in the nursery room at the time Ms Metin was about to start an activity with the children. (A further incident of this nature occurred in November 2016 – see below). This was one of the Steiner activities which Ms Metin did with the children lasting for around 20-30 minutes each day. For this Ms Metin needed the room to be quieter and asked the Claimant to step outside the room to continue her conversation with the parent. The Tribunal finds this to be a minor incident; if Ms Metin was a bit brusque, the Claimant overreacted to it and the parent did not complain about rudeness from Ms Metin. The Tribunal finds that the Claimant's reaction to this incident was influenced by the way she felt about Ms Metin's Steiner experience which the Claimant felt was given undue significance.

15<sup>th</sup> September 2016

18. The Claimant said this incident showed that Ms Spinelli had taken on Ms Metin's discriminatory attitude to the Claimant because she did not accept the Claimant's advice about the right approach regarding the start of a disabled boy at the nursery but did accept Ms Nunekpeku's because she is older than the Claimant (witness statement page 5). Ms Nunekpeku was acting Deputy Manager. Based on Ms Spinelli's oral evidence the Tribunal finds that prior to the boy's arrival with his father, the Claimant thought that it was to be his first day left alone without his parent and not a settling in day with the parent present. Her reaction was based on the premise therefore that there was an immediate serious problem with getting the right care in place for a child with complex needs who was about to be left in their care. On her understanding of the situation the Claimant rightly spoke to Ms Spinelli about the Claimant's concerns

that they were not yet ready to have the boy in the nursery ( her understanding being, without a parent) because there was no health care plan and the Learning Trust had not been contacted about the boy's admission to the nursery. Ms Spinelli then spoke to Ms Nunekpeku when she arrived at work who confirmed the Claimant was right about the prior arrangements which needed to be put in place. When the boy then arrived with his father, it emerged that the father had got the wrong end of the stick and thought that he could just drop his son off and was not aware that the day was a settling in day during which he had to stay; the Tribunal does not find that he thought this because that is what Ms Spinelli had told him, it was just a misunderstanding. Based on her oral evidence the Tribunal found that it was Ms Spinelli who explained the situation to the father about the settling in day and did not ask the Claimant to do so.

19. The Tribunal finds that whilst it may have understandably irritated the Claimant to have the advice about the appropriate steps taken from Ms Nunekpeku when it had not been from herself, Ms Nunekpeku was Deputy Manager and it was not therefore wrong for Ms Spinelli to also discuss the issue with her. Ms Spinelli was in practice reacting to the Claimant's concerns and took her advice though she checked the situation with her Deputy Manager. The Claimant had raised a genuine concern (on her understanding of the situation) but had not been undermined by Ms Spinelli checking what the position was with Ms Nunekpeku and it was not because the Claimant was younger than Ms Nunekpeku but because she was Deputy Manager. The Claimant was in practice criticising Ms Spinelli for not knowing immediately herself what the correct procedures were.

20. The Tribunal finds based on Ms Spinelli's oral evidence that she did tell the Claimant that the nursery must be inclusive. The Tribunal finds that this was in response to the Claimant treating the matter as urgent (when it was not as urgent as the Claimant thought) because the Claimant was giving the impression that the child simply could not stay for the session that day because she thought it was without a parent. Reminding an employee that they must be inclusive is not the same as accusing them of discrimination and was based on the misunderstanding between them as to the settling in day – the Claimant was acting on her understanding that the matter was urgent and the boy could not be left with them alone that day because the proper arrangements were not in place and Ms Spinelli (on her understanding) was seeing a colleague apparently saying a disabled child could not attend with his father on a settling in day. The Tribunal finds that Ms Spinelli did not view the Claimant as discriminating against the boy because that would have been a serious matter which would have been raised in the review meeting on 29<sup>th</sup> September 2016 (page 27); instead (page 29) the Claimant was recorded as respectful of the children and their needs.

21. The Tribunal finds based on the Claimant's oral evidence that Ms Spinelli apologised to the Claimant in any event after this incident and said that she knew the Claimant had had the boy's best interests at heart. From this the Tribunal found that whilst Ms Spinelli had not been be rude or dismissive of the Claimant's concerns or sought to undermine the Claimant she recognised that it must have irritated the Claimant. As she took no further steps about this incident, the Tribunal finds that the Claimant accepted that apology and moved on, the incident not in the end damaging her working relationship with Ms Spinelli.

12<sup>th</sup> October 2016 – boy in park with support worker incident

22. The Tribunal finds that the Claimant was concerned because of what happened on a trip to the park which included a boy with special needs who had his own dedicated support worker with him. The Tribunal finds based on Ms Spinelli's oral evidence that the boy's 1:1 support worker from the Rainbow Trust was with him (having worked with the family since 2015) and was solely responsible for him as was appropriate, knowing his needs. The boy became upset and was sick and the other staff were understandably concerned about this, though the support worker was looking after him. The Tribunal therefore finds that the Claimant (as probably did the other staff as also concerned) told Ms Spinelli about the incident as it was upsetting even though the Claimant did not think it was a serious incident (witness statement page 5-6). The Claimant's concern was what might have happened if there had not been a suitably qualified person to deal with it (page 5) because the Respondent had not yet allocated him 1:1 support. The Tribunal therefore finds that her concern was about what might happen if there was no 1:1 support in place in the future, although there had been on that day ie the Rainbow Trust support worker. It was understandable and appropriate that the Claimant would tell Ms Spinelli about the incident but the Tribunal finds that she did not as claimed raise it as a concern about the safety of the other children because on her own account they were not at risk that day because of what happened given the 1:1 support was in place that day. Ms Spinelli's oral evidence was that the Claimant did not mention this to her at all but the Tribunal finds that the Claimant did tell her about what happened because that would be the responsible thing to do, even though there had been no risk to the children and the Claimant was worrying about something which had not yet happened and was not likely to happen because 1:1 support would be in place for that particular child.

22<sup>nd</sup> November 2016

The hallway incident

23. The Tribunal finds that the Claimant, Ms Nunekpeku and Ms Metin took 9 children to the park. The Claimant said it was around 15 children but the Respondent has its rosters for each day and so the Tribunal finds the Respondent's figure of 9 is the correct one.

24. Ms Nunekpeku's witness statement says nothing about this incident but she did not attend so could not be asked questions about it.

25. The Tribunal finds that prior to this date there had been a practice of Ms Metin going ahead into the nursery room when they arrived back from the park, with her two colleagues dealing with the children in the small hallway for a minute or two to take off their outer clothes and see that they washed their hands. The purpose of this was to make sure the room was completely ready for the children when they then came in. On this day Ms Metin went ahead as usual into the room, shutting the door behind her, but it took her longer than usual to get things ready, around 5 minutes. This left the Claimant and Ms Nunekpeku in the hallway with the children longer than usual, although initially they had been occupied in getting the children ready to go back into the nursery room. Some parents were also present according to the Claimant. Whilst the children were safe they were getting restless and were hungry. The Claimant accordingly opened the door to let them in but Ms Metin asked them not to come in just



yet. As they had all been running late the Tribunal finds she may have been brusque when she asked the Claimant not to come in just yet as she was not ready and was feeling a bit under pressure as running late. However Ms Metin was not purposefully taking longer than usual to make a point (Claimant's witness statement page 6). The Respondent changed this arrangement subsequently as it had not worked well that day – see below.

Asking the Claimant to go outside later when talking to a parent

26. Later on a parent arrived to pick up a child and Ms Metin, as she had done previously (see above), asked the Claimant and the parent to step away to continue their conversation as she needed quiet for her activity with the children. According to Ms Metin's oral evidence she subsequently apologised to the parent; she said this was because she had not wanted the parent to feel awkward (because caught up in a moment of slight irritation between colleagues) and because she wanted to explain to the parent that she had asked them to move away because she needed quiet for the activity. The Tribunal therefore finds that she apologised to the parent because she knew she had probably been a bit brusque with the Claimant and thus indirectly with the parent, taking into account her witness statement (para 15) that she apologised for disturbing their conversation. This was a minor incident. Ideally she should also have apologised to the Claimant as she did to the parent but the fact that she did not does not mean that she was rude or critical to the Claimant in front of the parent.

Meeting later that day

27. The Tribunal finds that later on that day around 2/2.30pm Ms Metin asked to speak to the Claimant and to Ms Nunekpeku saying she wanted a friendly chat. Ms Metin did not arrange for that to take place away from the children at a time that was possible. The Tribunal finds that Ms Metin was aware by this stage that her relationship with the Claimant was not very good because the Claimant had some two weeks previously said to Ms Metin that she would not be bringing a complaint against her and because when she raised her own grievance later on (page 23) Ms Metin says that she and the Claimant had had some issues for a while, from which the Tribunal found that Ms Metin had been aware for a few weeks that they were not getting on very well, in particular noting the two occasions she had asked the Claimant to, as she put it, respect the need for quietness when doing certain activities with the children. To ask for a meeting to try to address these issues was not inappropriate (although it was unlikely to be the entirely friendly chat described by Ms Metin) but it was a misjudgement to have that discussion in front of the children. Ms Nunekpeku clearly thought so and tried to head it off at an early stage (witness statement para 2) but did not say that Ms Metin went off into a tirade as suggested by the Claimant. Ms Metin said that the Claimant was not co-operating with her and supporting her and the Claimant said she was being dictated to and not treated with respect. The Claimant also said she was unhappy about what had happened earlier that day. Ms Nunekpeku stopped the meeting going any further because parents were shortly to arrive to pick up children.

The Claimant's letter dated 22<sup>nd</sup> November 2016

28. After this incident the Claimant wrote a letter to Ms Spinelli dated 22<sup>nd</sup> November 2016 (page 21) said to be the protected disclosure. It raised four concerns, namely the hallway incident, the second incident of being asked with a

parent to step away so that the nursery could be quieter for the activity, another incident that day when Ms Metin had taken over the breakfast task and the meeting that afternoon. She said she hoped Ms Spinelli could find a solution to this.

29. The Tribunal finds that the Claimant made a disclosure of information to the Respondent in this letter in relating the factual circumstances of these four incidents.

30. As regards the hallway incident the Tribunal finds that the Claimant raised this in her letter as she was concerned about the children's needs not being taken into account ie it was potentially a matter of the children's welfare not having been taken into account. No child was in danger and the Claimant was not saying they had been or that there had been any adverse consequences but she believed their needs had not been considered on that occasion because they had had to be contained in a relatively small area albeit not for very long. The Tribunal finds that the Claimant reasonably believed that this breached the Respondent's duty of care to the children or was a safety issue, even though in fact there had been no adverse consequences. The Claimant does not have to show she was right in having those beliefs or that something bad had in fact happened or was about to happen but only that she had a reasonable belief that it tended to show either (a) that the Respondent had failed to comply a legal obligation or was failing to comply with one or was likely to fail to comply with one or (b) that the children's health or safety had been endangered, was being endangered or was likely to be endangered. The Claimant was flagging up an issue which she felt compromised the children's welfare even though in fact nothing dangerous had in fact happened. The breach being claimed by the employee does not have to be a serious or systemic breach.

31. The Tribunal also finds that the Claimant made the hallway disclosure in the public interest because of the interest of parents and the local church community in the nursery, in terms of the children being well looked after. The Claimant has a sense of the importance of childcare being done properly. The 'public' does not have to be a wide or numerous group. The Claimant made the disclosure because she was concerned about the hallway incident and did not make it because of personal spite towards Ms Metin or for reasons of self-interest, even though they had not been getting along.

32. The Tribunal however finds that the three other matters did not amount to matters the Claimant reasonably believed tended to show a failure to comply with a legal obligation or which tended to show that there would be any danger to health or safety. This is because whilst they might show that there had been some disharmony it was not a reasonable belief that this tended to show breach of a legal obligation or endangered health or safety, however much the Claimant felt it was not appropriate professional communication behaviour and in breach of EYFS standards (page 167). In addition in disclosing these three other matters the Claimant did not do so reasonably believing that these matters (colleagues having disagreements) were in the public interest.

#### The Respondent's reaction to the Claimant's letter

33. Ms Spinelli informed Rev Welch (her line manager) about the letter the next day and also told Mr McInnes (head of the nursery committee at that time). The nursery committee's usual monthly meeting with Ms Spinelli had been due in any event the next day. From then on Ms Spinelli kept a record of the steps she took (page 11-19) based on her handwritten notes which she later typed up into the record.

34. Ms Spinelli met Ms Metin on 23rd November 2016 and obtained her account of what happened (page 11). Ms Spinelli immediately noted (under Actions Taken) that she asked Ms Metin not to raise issues or have conversations in front of the children again and that they needed to change the procedure so that the door was not closed as the children were getting ready to come back in and that the staff would take it in turns to get the room ready before they went out so that this problem would be less likely to arise. Ms Spinelli had therefore taken on board what the Claimant had raised and made changes accordingly. However it was clear that there was nonetheless a serious working relationship issue remaining.

35. Ms Spinelli then met with the Claimant on 24<sup>th</sup> February 2016 (page 12). She told the Claimant that she had already spoken to Ms Metin about not having discussions in front of the children.

36. The Claimant said that she had not asked Ms Spinelli at this meeting not to tell Ms Metin about her letter of complaint. Ms Spinelli said that the Claimant had asked her not to tell Ms Metin that she had written a letter of complaint (as Ms Spinelli's notes record page 12, the only area which the Claimant took issue with the record as regards its accuracy, though she said that contemporaneous meeting notes were not taken at the time). Both the Claimant and Ms Metin knew by now that Ms Spinelli was investigating the incidents on 22nd November 2016 ie the subject matter of the Claimant's letter was being investigated. In that context it was likely that Ms Spinelli and the Claimant agreed that given steps were taken to address what had happened, it was not necessary to tell Ms Metin specifically that the Claimant had written a letter of complaint about these issues as that would be unlikely to help in resolving the matters already being investigated. The Tribunal finds that it was not in that context inappropriate for the Respondent not to tell Ms Metin at this stage the fact that the Claimant had raised these issues in a letter, given the objective to resolve matters between them.

37. Ms Spinelli's next step was to meet again with Ms Metin (page 13). Whilst Ms Metin said she would be more careful about how she spoke to the Claimant she still felt unsupported by the Claimant.

38. On 29<sup>th</sup> November (page 14) Ms Spinelli held a long meeting with both the Claimant and Ms Metin with a view to getting them to discuss what had happened between them. They were able to have some discussion (bullet points) but things took a turn for the worse when the Claimant said that Ms Metin had lied when Ms Metin explained that she had had to try to get the Claimant's attention twice for the Claimant to take notice. The Claimant insisted that this was a lie by Ms Metin. At this point the meeting became heated and Ms Spinelli was unable to move matters along further, so ended the meeting. Ms Spinelli told them both at the beginning and end of the meeting that she valued them.

39. After this meeting Ms Metin raised a written complaint about the Claimant (page 23). Her principal complaint was that the Claimant had accused her of being a liar. Ms Metin said that she did not want to work alone with the Claimant because of the Claimant's false (in her view) accusation against her. At this stage Ms Metin did not know that the Claimant had written a letter but she did know that Ms Spinelli was looking into the events of 22<sup>nd</sup> November 2016. The situation had now escalated even though Ms Metin did not yet know about the Claimant's letter. The situation was also

becoming very bogged down, with the Claimant saying she told the truth and Ms Metin saying she also told the truth, about only part of the whole problem (whether or not Ms Metin had in fact had to ask the Claimant twice to keep the noise down). Ms Spinelli informed Rev Welch about Ms Metin's complaint the next day (page 15) and it was agreed that Ms Metin should now be told about the Claimant's letter. There was a discussion about extending the probation period for both employees (page 16).

40. Ms Spinelli followed up on the lying accusation by speaking to Ms Nunekpeku on 30<sup>th</sup> November 2016 (page 16) who confirmed she had heard Ms Metin trying to get the Claimant's attention. Ms Spinelli accordingly suggested to the Claimant on 1<sup>st</sup> December (page 16) that she apologise to Ms Metin for calling her a liar for saying that she had had to get the Claimant's attention. The Claimant refused to do so. Ms Spinelli raised the possibility of extending the Claimant's probationary period but told the Claimant she needed to take advice. Ms Spinelli then took advice from ACAS and spoke to the committee chair. She also contacted Ms Corr at the Hackney Learning Trust (page WS21) to discuss the way forward.

41. The Respondent decided that both employees' probation period would be extended by a further 3 months to enable them to try and work together. This was a decision taken not just by Ms Spinelli but taken with the approval of Rev Welch and Mr McInnes after discussing the matter with them and taking advice. Ms Spinelli delayed telling the Claimant this until after her birthday (page 18).

42. Ms Spinelli told the Claimant at a meeting on 8<sup>th</sup> December 2016 (page 35) that she was extending her probation period (as she was also doing for Ms Metin in identical terms) because she had to be sure that the team worked effectively (para 9). Ms Spinelli made it clear that the Claimant's work was otherwise good but she had been faced with a situation of two employees complaining about each other. Ms Spinelli specifically took the Claimant through the steps taken by the Respondent in response to the Claimant's concerns about what had happened on 22<sup>nd</sup> November 2016 (para 8 a-d); the Respondent had addressed her concerns and taken action and had not sought to minimise them or brush them under the carpet but had taken them seriously. The extension was confirmed in writing (page 31) stressing that the Respondent needed to be sure that they could work together before their probation period ended. Whilst also referring to the need to investigate the Tribunal finds that the extension to the probation period was because it was already clear that they appeared unable so far to resolve their differences and needed to work on their working relationship. The Tribunal finds that 3 months was reasonable period for improvement given they only overlapped one day per week.

43. Taking into account the above findings, the Tribunal finds that Ms Spinelli (checking with Rev Welch and Mr McInnes where appropriate) was reacting in this period to a difficult situation and trying to resolve the relationship issue between the Claimant and Ms Metin. She had responded appropriately to the Claimant's concerns about what had happened on 22<sup>nd</sup> November and had made necessary changes. However she was left with two entrenched employees who had fallen out with each other (and not just to a minor degree) which was very difficult in such a small working environment and where they had to work closely and with young children and their parents. The big issue was the poor relationship, which issue had emerged towards the end of November 2016. Whilst the Claimant had had a good review of her conduct (including team work) in September 2016 this issue had not come up by that point; further whilst she may have been a good team player as regards other colleagues,

being a good team player sometimes means having to work with people who work differently and having to work out how to work with someone they do not like or who irritates them. The Respondent's Code of Conduct (page 109) made it clear that employees should support colleagues and communicate in a positive manner and it was clear by this stage that the relationship between them was not such that this was being met by either of them, whatever the irritation on each side.

44. The Claimant (and Ms Metin) did not have a formal review meeting at the 6 month point which the Tribunal finds to have been because this relationship issue blew up shortly before that review. The Respondent had no concerns about the quality of the Claimant's work with the children or her relationships at work save for the relationship with Ms Metin and made it clear that this was the sole reason for the extension of the probation period. Therefore a formal review would have made no difference as this relationship issue would still have been there.

45. The Claimant viewed the extension as a punishment but her contractual position as regards the Respondent was unchanged by the extension. Unusually, the Claimant's contract of employment (page 42) did not contain a shorter notice period applicable during the probationary period (para 11). The notice period from the Respondent from the outset was 3 months notice (para 12). This meant that extending the Claimant's probation period did not affect her job security as regards being given notice, relevant as to whether the Respondent was acting in a way calculated or likely to destroy trust and confidence. Had the Respondent instead confirmed the employment and then instead put in place a specified 3 month period for improvement for the working relationship after which the matter would be reviewed (as it would have been entitled to do) the effect would have been the same. The Respondent treated both the Claimant and Ms Metin the same way by extending both their probation periods. By extending both their probation periods the Respondent was reacting to the poor relationship between them and the need to resolve it and not to any other issues. The Respondent was not acting in a high handed way in deciding to extend the probationary period under the contract or in an irrational or capricious way. The Respondent was acting with reasonable and proper cause, that cause being the breakdown in the working relationship (a performance issue albeit limited to between the two of them but affecting other staff, children and the smooth running of the nursery) and the need for that to improve.

46. The Tribunal finds that the extension of the probation period was a detriment because it was something adversely affecting the Claimant in terms of it being something affecting her work record. However the Tribunal finds that the extension of the probation period was not on the ground of her making a protected disclosure but because of the relationship issue.

47. The Claimant did not take the matter further despite it being identified that she could do so (page 36 para 12).

#### Ignoring the Claimant – the door incident

48. The Claimant said that Ms Spinelli did not let the Claimant into the building one day via the side entrance after she made her complaint, which she said Ms Spinelli usually did, even though the Claimant also had her own key to another door. The Claimant said that this was because the Claimant had made a disclosure (witness statement page 7). The Tribunal finds based on Ms Spinelli's oral evidence that she

had not seen the Claimant arrive then did not hear the buzzer and hence did not let her in, meaning that the Claimant had to go round to the other entrance and use her own key. When the Claimant complained Ms Spinelli pointed out she had her own key. This was the only time this is said to have happened and the Tribunal finds that it was the Claimant jumping to an unjustified conclusion based on what happened on one occasion.

#### Making personal remarks – the photo incident

49. The Tribunal finds that Ms Spinelli did not make a rude comment to the Claimant about her hair (witness statement page 8). In the context of a group photo it was likely that Ms Spinelli made a general remark to all about being ready for the photo (and may therefore have made a light-hearted comment about hairbrushing in general) but these were not comments directed at the Claimant, though the Claimant interpreted them as directed at her.

50. The issue of criticisms of the Claimant's 'timekeeping' raised at the preliminary hearing was not addressed in the Claimant's witness statement.

#### Cold shouldering by senior management

51. The Claimant confirmed at the hearing that that she felt cold shouldered by two individuals but accepted that these were not senior managers of the Respondent. She gave no details of what the cold shouldering amounted to. One of them (Becky) was a fundraiser so not connected to the nursery and so was unlikely to know that the Claimant had made a protected disclosure or much if anything as to what had happened and the other (Michelle) worked for a different organisation entirely. They accordingly had no say in what happened to the Claimant and were unlikely, taking into account the above findings, to have been influenced by the Respondent into treating the Claimant coldly. They were not individuals who had any say in the Claimant's employment or how she was treated.

#### Other issues before the Claimant resigned

52. The Claimant also raised feeling made to feel like an outsider by Ms Spinelli (witness statement page 8). This was in the context of a comment about possible changes to the Claimant's role in January 2017 and that she had contributed well and produced good displays and that the responsibility for planning might be reviewed. The Claimant interpreted this as that there would be an adverse change to her role and interpreted it as Ms Spinelli finding fault with her and that this was because of her disclosure but what Ms Spinelli had said was that things might change and noted her good work. A discussion about changes happening in January 2017 (possible reshuffling of roles) had already taken place (see page 3 of attachment to ET1) in September. The Tribunal therefore finds that Ms Spinelli was not hinting at future adverse change. If she used the phrase 'regardless of what happens' (see page 3 of attachment to ET1) it was rather clumsy but the Tribunal finds that the message she was getting across in the context in which she said it was that although things were difficult she wanted the Claimant to know that she valued her work.

53. The Claimant also said that she felt awkward and under pressure when asked in December 2016 to check on colleagues' observation records (page 9 of witness statement). It was a slightly sensitive issue as it was difficult for the staff to fit in

completing the observations as they were often very busy on other matters. The Claimant said at the hearing that Ms Spinelli had asked the Claimant to do this. Ms Spinelli said that she had not asked the Claimant to check the records (profile books) but she had asked her to tell the staff that she, Ms Spinelli would be doing the checks. The Tribunal finds that it was unlikely that Ms Spinelli used the Claimant as a messenger in this way as it was her practice to tell things direct to staff. The Tribunal therefore finds that Ms Spinelli did ask the Claimant to start doing the checks but this was consistent with thinking that the Claimant could be trusted to do this properly (and entirely inconsistent with worrying that the Claimant was a whistleblower because giving the Claimant a task involving checking compliance with observation record keeping). This was not a one off task, consistent with thinking the Claimant had a long-term future and not consistent with hoping the Claimant was going to leave. Whilst the Tribunal finds that the Claimant found the situation awkward she could have simply explained that Ms Spinelli had asked her to do the checks, if she had felt under pressure. The Tribunal therefore finds that she felt awkward but not under pressure and it was not Ms Spinelli's intention to put her under pressure.

54. The Claimant raised a further issue about the handling of a possible intruder issue (witness statement page 7). The building is also occupied by other organisations who rent space from the Respondent. The Claimant characterised it as there being an attempted attack on Ms Nunekpeku from behind but although startled by the man (page 105) he did not attempt to attack her. Whilst the Claimant criticised how the matter was handled and that Ms Spinelli should have alerted the Respondent to the man being in the building if she had seen him there before, the Tribunal finds that the Claimant's knowledge of the incident was based on what she had been told, not what she had seen, and she accepted in her oral evidence that this was the second occasion the man had been seen and not on the 'numerous' occasions referred to in her witness statement. This allegation appeared to be a criticism of Ms Spinelli as a manager and the Respondent's handling of it (though it was reported to the police, page 105) but was not relevant to the issues in the Claimant's claim but was a general criticism of Ms Spinelli and the Respondent on an unrelated matter.

#### Respondent's knowledge of a significant problem between the Claimant and Ms Metin

55. The Tribunal finds that the Respondent was not aware that there was a problem beyond colleagues from time to time having differences of opinion or irritating each other until the events of 22<sup>nd</sup> November 2016. Taking into account the above findings the Claimant had not complained to Ms Spinelli or to anyone else about Ms Metin though she may have grumbled from time to time, in the way colleagues sometimes do grumble about each other. The Tribunal finds that she did not complain to Ms Spinelli (or anyone else, page 49) about being bullied by Ms Metin (witness statement page 9); the Claimant is intelligent and able to speak up for herself and if she had felt bullied she would have said so either to Ms Spinelli or to Ms Nunekpeku who she regarded as a friend so would have been easier to approach. The Claimant did not do so.

56. The Claimant said that she had never seen the Rev Welch or Mr McInnes visit the nursery. The Tribunal finds that Ms Spinelli reported to them appropriately about the issues involving the Claimant and that is not affected by the number of their visits and whether the Claimant ever saw them visit. Given she worked part time term time only and they have other commitments it is likely that she just never saw them when they visited as they didn't overlap in the months she was employed.

Did the Respondent breach the implied term of trust and confidence

57. Taking into account the above findings the Tribunal finds that the Respondent did not breach the implied term of trust and confidence either by extending the Claimant's probation period or cumulatively in the way it treated the Claimant.

58. The Claimant viewed the extension of her probation period as a punishment but it was a pragmatic solution to a tense and difficult situation in a small environment, and making it clear to the Claimant that it was not about her overall ability but about a poor working relationship which it would be detrimental to ignore. Ms Metin also had her probation period extended for the same reason. There was fault on both sides and the Respondent had reasonable and proper cause to act in the way it did (identifying the relationship issue as a performance issue and because of that performance issue extending the probationary period), given the deep schism between them, the nature of their work, the small environment and the fact that they had one employee saying the other was a liar and the other reacting to that by a written complaint, from which position neither appeared able or particularly willing to move on. The Respondent thought that giving a timescale for improvement was the way forward.

The Claimant's resignation

59. The Claimant resigned on 4<sup>th</sup> January 2017 with immediate effect (page 39). She said she would not be working out the 4 weeks' notice she was required to give.

60. The Tribunal finds that the Claimant resigned because she was annoyed at having had her probationary period extended which she felt was unfair. She was unable to take steps to repair the working relationship with Ms Metin because she felt the problems were all Ms Metin's fault and could not see that to work effectively together (and they only had to do so one day a week) both she and Ms Metin would have to let bygones be bygones and move on, putting their differences aside. That would take effort on both sides but the Claimant was not prepared to make that effort which would not have involved accepting that the Respondent or Ms Metin were 'right' but would have involved moving on from their differences.

61. The Claimant did not resign because the Respondent breached the implied term of trust and confidence because it hadn't – see above. The Claimant was therefore not constructively dismissed by the Respondent but left voluntarily because she no longer wanted to work there.

Relevant law

Age discrimination

62. S13 Equality Act 2010 defines direct discrimination. It says that a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others. Age is a protected characteristic under s5 Equality Act 2010.

63. If something is done by another employee that is treated as done by the employer under s109 Equality Act 2010. An employer must show that it took all reasonable steps to prevent that other employee from doing that thing, in order to avoid liability. The Claimant's case was that the acts of direct discrimination were carried out by Ms Metin and later also by Ms Spinelli.



64. *Igen v Wong [2005] ICR 931* held that it must be shown that the act complained of was in no sense whatsoever connected to the protected characteristic.

Protected disclosure /whistleblowing

65. It is unlawful to subject an employee or worker to a detriment on the ground that he/she has made a protected disclosure (s47B Employment Rights Act 1996). It is automatically unfair to dismiss an employee for this reason (section 103A Employment Rights Act 1996)

66. Disclosures qualifying as protected disclosures are defined in s43B(1) of the 1996 Act.

67. Qualifying disclosures can only be made to certain classes of person as defined in the 1996 Act, these include the Claimant's employer (s43C ERA 1996). There is no dispute that in this case the disclosure the Claimant relies on was made to her employer.

68. The word disclosure must be given its ordinary meaning which involves the disclosure of information, that is conveying facts; there is no dichotomy between 'information' and making an allegation (*Kilraine v London Borough of Wandsworth [2016] IRLR 422*) and something may be both an allegation and disclose information.

69. Where a disclosure is made to an employer it does not need to be true to qualify for protection but the employee must reasonably believe it to be true (*Babula v Waltham Forest College [2007] IRLR 346*). That said, the test of reasonable belief must take account of what a person with that employee's understanding and experience might reasonably believe (*Korashi v Abertaw Bro Morgannwg University Local Health Board [2012] IRLR 4*).

70. The term detriment is not defined in the Employment Rights Act 1996 but it is a concept that is familiar throughout discrimination law and is to be construed in a consistent fashion. A detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment. Furthermore, it is not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of in order to establish a detriment (see *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*).

71. An employee or worker need only establish that he/she has made a qualifying disclosure and that he/she has been subjected to a detriment to succeed in a claim of detriment on the ground of whistle-blowing. If he/she establishes these two elements it is then for the employer to prove on the balance of probabilities the reason for the detriment and to show that the treatment was in no sense whatever on the ground of the protected act (*Fecitt v NHS Manchester [2011] IRLR 111*). An employer will succeed in this if the evidence shows that the protected act played no more than a trivial part in the application of the detriment.

72. A claim of automatic unfair dismissal on grounds of whistle-blowing is contingent upon there being a dismissal within the definition in section 95 Employment Rights Act 1996 (which includes a constructive dismissal – see below). In this case the Respondent does not accept that it constructively dismissed the Claimant.

### Constructive dismissal

73. A constructive dismissal (and thus a dismissal for unfair dismissal purposes) is defined in s95(1)(c) Employment Rights Act 1996 as where the employee terminates the contract (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

74. In *Western Excavating v Sharp [1978] IRLR 27* it was identified that a constructive dismissal must involve a repudiatory breach of contract, going to the root of the contract or which shows the employer no longer intends to be bound by one or more of its essential terms. The burden of proof was on the Claimant to show that there was a fundamental breach of contract, it contributed to why she resigned and that she did not delay, thus affirming the contract.

75. The term identified by the Claimant was the implied term of trust and confidence under which an employer should not without reasonable cause act in such a way calculated or likely to destroy or seriously damage the mutual trust and confidence between employer and employee. In *Malik v BCCI [1988] AC 20* it was identified that the employer's conduct needs to be viewed objectively to establish whether it is likely to destroy or damage that trust and confidence the employee is reasonably entitled to have in the employer, looking at all the circumstances. As to the reasonable and proper cause part of the test, even if the employee's trust and confidence in the employer is in fact undermined, there may be no breach if, viewed objectively, the employer's conduct was not unreasonable (*Sharfudeen v T J Morris t/a Home Bargains EAT/0272/2016*).

76. The high-handed application of a power under the contract can amount to a breach of the implied term of trust and confidence (*United Bank v Akhtar [1989] IRLR 507*).

77. The Claimant identified incidents/matters which she said breached this term. The burden of proof was on her to either show that one of them amounted to a breach of the implied term or that taken together they cumulatively amounted to a breach of the implied term (*Lewis v Motorworld [1985] IRLR 465*).

### **Reasons**

78. Based on the findings of fact set out above the Respondent did not unlawfully discriminate against the Claimant because Ms Metin and Ms Spinelli did not treat her less favourably because of her age. The treatment of the Claimant was in no sense whatsoever connected to her age. The Respondent could not therefore be liable for any discriminatory act by them because none had occurred. She was the youngest employee in the small team but the Tribunal has found that she was not treated less favourably because she was the youngest or was younger or was in a different age range, when compared to her colleagues.

79. Based on the findings of fact set out above the Claimant made a qualifying (protected) disclosure to the Respondent regarding the hallway incident on 22<sup>nd</sup> November 2016. However the Tribunal has found that the events said to be detriments after that disclosure did not happen in the way and for the reasons claimed by the Claimant to mean they were detriments and were in any event in no sense whatsoever on the ground that she had made a protected disclosure.

80. The extension to her probationary period was a detriment but was put in place because of the breakdown in the relationship with Ms Metin which needed to improve. The Respondent has shown that this was the reason the probation period was extended and that it was in no sense whatsoever on the ground of having made a protected disclosure.

81. Based on the findings of fact set out above the Claimant has not discharged the burden of proof on her to show that she was constructively dismissed by the Respondent. The Respondent did not by extending her probationary period breach the implied term of trust and confidence and the other events said to amount to the breach of the implied term (whether taken individually or together) either did not happen or did not happen in the way described by the Claimant and were not breaches of the implied term. The Respondent acted with reasonable and proper cause in its treatment of the Claimant, solely because of the relationship issue. If the Claimant in fact had lost confidence in the Respondent, there had been no breach because the Respondent's conduct viewed objectively was not unreasonable and it did not act without reasonable and proper cause.

Employment Judge Reid

30 June 2017