



**IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH**

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**Judgment of the Employment Tribunal in Case No: 4101893/2020 Held at  
Edinburgh on 4, 5, 15, 16, 17, 18, 19, 22, 23, 24, (25), and 26<sup>th</sup> February 2021  
with Deliberation on 9 and 10 March 2021**

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**Employment Judge J G d’Inverno**

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**Ms E A Gibson**

**Claimant  
In Person  
assisted by  
Ms C Downie, friend**

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**Moore House School Limited (Moore House  
Care & Education)**

**Respondent  
Represented by:  
Mr D Maguire, Solicitor  
per Allcourt Solicitors  
Limited**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The Judgment of the Employment Tribunal is:-

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**(First)** That the claimant’s complaint of having suffered detriment in terms of section 47B of the Employment Rights Act 1996 (“the ERA”) and or of having been constructively dismissed, as a result of making a protected disclosure in terms of section 43B(1)(d) and or (f) of the Act, is dismissed.

**(Second)** That the claimant was constructively dismissed, by the respondents, in terms of section 95(1)(c) of the ERA.

**(Third)** That the claimant is entitled, in consequence of her constructive dismissal at the hands of the respondent, to receive a basic award in terms of section 119 of the ERA.

5 **(Fourth)** That the claimant's conduct at and in relation to the "May 2019 Butterstone meeting" was blameworthy conduct for the purposes of section 122 of the ERA – Basic Award: Reductions.

10 **(Fifth)** That it is just and equitable in the circumstances that the basic award to which the claimant would otherwise be entitled be reduced, in light of her blameworthy conduct, by the sum of £630.

**(Sixth)** That the respondent shall pay to the claimant a reduced basic award in the sum of £2,520.

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**(Seventh)** That the respondent shall pay to the claimant a compensatory award, for loss of statutory rights only, in the agreed sum of £300.

## REASONS

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1. This case called for Final Hearing at Edinburgh in conventional In Person form on 4, 5, 15, 16, 17, 18, 19, 22, 23, 24, (25), and 26<sup>th</sup> February 2021. The evidential element of the Hearing having concluded on 24<sup>th</sup> February the Tribunal did not sit on 25<sup>th</sup> allowing parties/their representatives the use of, that day, for the purposes of reviewing their notes of evidence and preparing submissions on which they were heard on 26<sup>th</sup> February.

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2. The claimant, who had had the benefit of professional representation prior to the commencement of the Final Hearing, appeared in person, ably assisted by her friend Ms Downie. The Respondent Company was represented by Mr Maguire, Solicitor.

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**The Issues**

3. In the course of Case Management Discussion conducted at the outset of the Hearing, parties confirmed that the Issues requiring investigation and determination by the Tribunal at Final Hearing remained those set down and recorded at paragraph 2 of the Note of Output, issued following the Closed Preliminary Hearing, (Case Management Conference), which was held in the case by Telephone Conference on the 24<sup>th</sup> of September 2020 at 10 am; these being:-

“(First) Did the claimant make a protected disclosure/disclosures in terms of section 43B(1)(d) and or (f) of the ERA, in terms of the specification provided by the claimant’s then legal representative at paragraph 2.2 of the claimant’s CMD Agenda return and orally confirmed by him in the course of Case Management Discussion held on 24<sup>th</sup> September 2020.

**(Second)** If so, when?

**(Third)** Was the claimant treated to her detriment (per section 47B of the Employment Rights Act 1996), as a result of making a protected disclosure?

**(Fourth)** Was the claimant (constructively) dismissed (per section 47B of the Employment Rights Act), as a result of making a protected disclosure?

**(Fifth)** Are any of the claimant’s claims of detriment at paragraph 3 above, and of constructive dismissal at paragraph 4 above, presented outwith the time limit and time barred or, are they part of a series of acts/failures which would bring them all within time?

**(Sixth)** Separately, was the claimant constructively unfairly dismissed per section 95(1)(c) and section 98(4) of the Employment Rights Act 1996?

5 **(Seventh)** In the event that one or all of the claimant's complaints succeed, to what remedy is she entitled in consequence thereof?"

### **Documentary and Oral Evidence**

10 4. There was before the Tribunal a Joint Bundle of Documents prepared by parties in compliance with the Tribunal's Case Management Orders of 24<sup>th</sup> September 2020. The Bundle extended to some 499 pages to some of which reference was made in the course of evidence and submission. The Bundle included, at page 496, an updated Schedule of Loss which was orally  
15 further updated by parties' representatives in the course of the hearing and in terms of which the following matters were the subject of agreement and confirmed by parties as intended to be binding upon the Tribunal for the purposes of the Hearing:-

20 (a) The Effective Date of Termination (EDT) of the claimant's employment, was 30<sup>th</sup> March 2020,

(b) The claimant's date of birth, completed years of service and contractual notice entitlement as at the EDT;

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(c) The claimant's net and gross weekly pay;

(d) The claimant's earnings received post termination from fixed term employment in the period June to December 2021  
30 (£19,080.01);

(e) on a contingent basis and without admission of liability on the part of the respondents and subject to any submissions to be made on contribution and or Polkey deductions, the arithmetic

value of the basic award to which the claimant would be entitled, in the event of her complaint of Unfair Dismissal succeeding being (£3,150);

5 (f) the arithmetic value of compensation for loss of statutory rights in the amount of (£300); and

10 (g) the arithmetic value of the net monthly rate at which loss of employer pension contributions, accrued between the Effective Date of Termination and the commencement of post termination fixed term employment in June 2020, and said to continue to accrue in respect of any continuing loss contended for, being (£400 per month);

15 **Oral Evidence**

5. The claimant gave evidence on her own behalf.

20 (a) In addition the Tribunal heard evidence for the claimant from:-

• Mr Tam Baillie, a professional consultant providing services to the respondent and who functioned for a period as the claimant's mentor

25 • Janet Campbell, the claimant's Line Manager in a previous employment

• Olyn Clark, a previous Senior Manager of the respondents

30 • David Cameron, a former Line Manager of the claimant in a previous employment

(b) For the respondent, the Tribunal heard evidence from:-

- Patricia Sheridan, Managing Director of the Respondent Company.
- Julie Hughes, Director of the Respondent Company
- Dr Steven Drysdale, the respondent's Director of Children's Services and former colleague of the claimant
- Dr James Urquhart, independent organisational consultant and latterly the claimant's Line Manager

All witnesses gave their evidence on oath or on affirmation.

6. An additional four witnesses for the respondent were ultimately not called with the claimant's express consent.
7. Parties were in agreement that the names of the two individuals who were the subject of the alleged protected disclosures founded upon by the claimant be redacted. In circumstances where neither had had notice of nor participated in the Hearing, the Tribunal acceded to that request considering it in keeping with the Overriding Objective to do so.

### **Findings in Fact**

8. On the documentary and oral evidence presented, the Tribunal made the following essential Findings in Fact, restricted to those relevant and necessary to the determination of the Issues:-
9. The respondent provides residential care and education for young persons, including those who encounter difficulties in attending mainstream schools.
10. The claimant was employed by the respondent from 3<sup>rd</sup> August 2015 until 30<sup>th</sup> March 2020, latterly in the appointment of Director of Development and

previously, prior to a restructuring of the business by the respondent, as Chief Executive Officer.

- 5 11. In a letter attached to an email of 30<sup>th</sup> December 2019, the claimant gave three months contractual notice of resignation, effective as at 30<sup>th</sup> March 2020. In her letter of resignation the claimant asserted that she had been constructively dismissed in terms of section 95(1)(c) of the Employment Rights Act 1996.
- 10 12. The claimant was paid until her leaving date of 30<sup>th</sup> March but, with the consent of the respondent subsequently sought and given, did not attend for work beyond 27<sup>th</sup> of January 2020.
- 15 13. The Effective Date of Termination of the claimant's Employment was 30<sup>th</sup> March 2020.
- 20 14. In the claimant's perception she worked successfully in the appointment of Chief Executive Officer and experienced no significant negative issues in her relationship with her Line Manager, the respondent's Managing Director, prior to April/May of 2019.
- 25 15. Prior to her being employed by the respondent, the claimant had worked as a HMI Inspector of Schools for some 14 years. By the time of her early retirement from HMI, ("the Inspectorate"), the claimant had established a good professional reputation and although she had not worked directly within the care sector or within residential child care environments, was particularly regarded by her last Line Manager within the Inspectorate, and amongst other agencies with which the Inspectorate engaged in the course of its business, for her networking and inter agency skills.
- 30 16. The respondent had operated its business since 1988, for a period of some 27 years prior to employing the claimant.

17. Following her early retirement from the Inspectorate, the claimant carried on business on her own behalf as a Consultant providing support services from time to time to the Inspectorate's ongoing work and, from time to time directly to customers within the care sector which was, and continues to be, a not uncommon practice.
18. Following an initial period of consultancy with the respondent, the respondent offered the claimant a three year fixed term contract as Chief Executive Officer. In the first year of that contract the claimant asked the respondent to make the appointment permanent in order that she could apply for a mortgage to purchase a property for her daughter. The respondent agreed to do so, not only because the claimant had requested it, but also because they considered that the claimant, whilst in post, had had an initial positive impact on solidifying the Senior Management Team.
19. The claimant's permanent employment with the respondent commenced on 3<sup>rd</sup> August 2015. In her permanent appointment, the claimant continued to be employed as Chief Executive Officer, contracted to work 32 hours per week.
20. At the time of the claimant's engagement, the respondent's Managing Director, in the absence of an appointed Chief Executive Officer, had been personally overseeing the respondent's Board in the strategic management of the business while also line managing the individual Senior Managers.
21. In the opinion of the respondent's Managing Director, "the claimant initially had an overall strategic view of the organisation and worked well to delegate tasks to Senior Managers to ensure that the overall strategic goals of the organisation were met". She commented positively to the claimant on her performance on a number of occasions.

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## **Alleged Protected Disclosures**

### **First Alleged Disclosure**



22. In or about the end of March 2018, one of the respondent's Directors, Julie Hughes, who had functioned as the Disciplining Officer in the matter, determined upon and issued to one of the respondent's employees, hereinafter referred to as "person B", a disciplinary outcome of a three month final warning.
23. Julie Hughes was, at the time, someone who was very experienced across a period of 30 years, in the conduct and determining of disciplinary proceedings.
24. The conduct in respect of which the disciplinary outcome was awarded involved conduct on the part of the employee, "the person B incident", in one of the residential houses, which had occurred at a time when the claimant had been on holiday.
25. The claimant had no personal involvement with the incident nor any direct knowledge of the circumstances in which it occurred.
26. The claimant formed a view, on principal, and prior to the outcome of the disciplinary hearing that the appropriate disciplinary sanction for the employee would be dismissal, regardless of any particular circumstances in which the conduct occurred and which the disciplinary hearing might find established.
27. The claimant expressed that view to the respondent's Director, Julie Hughes, who was the Disciplinary Officer charged with considering and determining the matter.
28. Julie Hughes, for her part, explained to the claimant that it was not appropriate that her consideration and determination of the matter be influenced by the wishes of the claimant, as Chief Executive Officer, but rather, that it was her responsibility to determine the matter upon the facts which she found established in the course of the disciplinary hearing, including taking account of any relevant mitigating facts.

29. A fellow member of staff of person B had brought the conduct in question to the attention of the respondents at the time. The respondents:-

- 5 (a) Immediately suspended person B pending investigation.
- (b) Informed the SSSC (the Scottish Social Services Council) of the occurrence of the alleged incident.
- 10 (c) They caused there to be conducted a fact finding investigation which produced a recommendation that there was a case for person B to answer through a disciplinary process.
- (d) They assessed, incorporating the advice of a Child Protection  
15 Officer for the respondent's associated Trust, that the matter fell to be dealt with as a practice conduct issue and not a child protection issue.
- (e) They convened Person B to a disciplinary hearing which  
20 proceeded before Julie Hughes, one of the Company's Directors and an experienced Disciplinary Chair.

30. In the course of the disciplinary hearing;

- 25 (a) the allegation, which the investigation had recommended person B required to answer, was upheld but there was no evidence that went to suggest that the resident young person had been harmed or was in danger of being harmed, at any point.
- 30 (b) It was also established that there had been in the particular residential house a history of staff behaving in that particular way.

(c) Against that established factual background, including the eight years of prior unblemished service by person B, the Disciplinary Officer concluded, in all the circumstances, that the sanction of dismissal was not merited but rather, that the appropriate sanction to be awarded was the imposition of a final written warning combined with a direction that there be a change in procedures to ensure that staff were clear, going forward, that such conduct was neither appropriate nor acceptable.

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10 31. The outcome of the disciplinary process was communicated to the SSSC who declared themselves content with it.

32. Following the issue of the disciplinary outcome to person B, the claimant continued to take issue with the Disciplining Officer's determination and complained also about it to the Managing Director.

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20 33. The claimant reiterated her dissatisfaction with the disciplinary outcome in her email of 1<sup>st</sup> April 2018, addressed to the respondent's Director Julie Hughes, who was the Disciplinary Officer, and whom she described in it as making "a *very poor judgment call*" in imposing a disciplinary sanction other than dismissal.

25 34. By email dated 2<sup>nd</sup> of April, Julie Hughes responded to the claimant reiterating in detail the basis of her decision in the context of the matters of fact which had been established, and separately advising the claimant that, in her opinion, a sanction of dismissal was not merited in the circumstances and would not have been sustainable at an Employment Tribunal if it had been imposed and challenged.

30 35. The claimant thereafter made an anonymous complaint to the Care Commission about the person B incident, which she expressed, in the anonymous complaint as:- "*A young person was placed at risk when child protection procedures were not followed*".

36. In response to the anonymous complaint, made by the claimant, a Care Commission Investigator attended at the respondents and, with the respondent's cooperation, accessed the entirety of the case file relating to the incident, the disciplinary process, and the findings and outcome. The Care Commission did not consider that the facts and circumstances of the conduct which was held established, focused a child protection issue.
37. In a letter dated 21<sup>st</sup> August 2018, the Care Inspectorate Complaint Inspector sent a letter to the respondents, addressed to the claimant in her capacity as Chief Executive of the respondents, and which is copied at page 274 of the bundle, referring to the anonymous complaint that "*A young person was placed at risk when child protection procedures were not followed*" and confirming that as a result of the investigation carried out by them they did not identify any evidence to uphold the complaint.
38. The claimant did not disclose to the respondents that it was she who had made the anonymous complaint.
39. At the time of the occurrence of the subsequent instances of alleged conduct and or failure to act on the part of the respondents upon which the claimant founds for the purposes of her complaints, the respondents were wholly unaware of the fact that it was the claimant who had made the anonymous complaint to the SSSC.
40. The claimant's criticisms of Julie Hughes' decision making in imposing the disciplinary sanction of a three month final warning upon person B and her complaining about it to the Managing Director, conveyed no factual information to Julie Hughes or to the Managing Director. They were expressions of opinion on the part of the claimant. They did not constitute a qualifying and protected disclosure in terms of section 43(B)(1)(d) and or (f) of the Employment Rights Act 1996.
41. The claimant's subsequent anonymous complaint to the SSSC that "*a young person was placed at risk when child protection procedures were not*

*followed*” was so lacking in specification as to fail to meet the requirements of section 43(B)(1)(d) and or (f). Separately the claimant not having disclosed to the respondents and the respondents being wholly unaware that it was the claimant who had made the anonymous complaint, as at the date of the occurrence of all of the matters on which the claimant founds by way of alleged detriment, no causal connection is established between the alleged disclosure on the one hand and any alleged detriments suffered on the other.

42. In her letter of resignation, dated 30<sup>th</sup> December 2020, the claimant makes no reference to or reliance upon the person B incident after the occurrence of which she continued in her employment with the respondents, including in the performance of her role as CEO, for a period of a year before the occurrence of the first incidence of conduct upon which she gives notice of founding for the purposes of her complaint of constructive unfair dismissal.

43. In her letter of resignation of 30<sup>th</sup> December 2019, upon which she founds as setting out the main reasons for her resignation and why she considered the actions of the respondent to amount to an unfair constructive dismissal, the claimant makes no reference to the person B incident.

### **Second Alleged Disclosure – the person A Incident**

44. In 2009, some years prior to the claimant’s first involvement with the respondents, the respondents recruited and employed person A. That employment had ceased in 2012, some 3 years before the claimant’s employment commenced.

45. Before formally responding to the respondent’s advertisement inviting applications for the post, person A wrote to the respondent’s Managing Director disclosing; the existence of an historical allegation:-

(a) which had been made concerning person A’s conduct when 18/19 years of age,

(b) which related to a period of early employment,

(c) that the allegation was denied, and,

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(d) that the allegation had been subject to investigation by all of the normal authorities who had not found it established.

10 46. The employment to which the allegation related was one in which person A had been line managed by Mr Tam Baillie. The allegation emerged only some months after person A had moved to a new employment the successful transition to which had been supported by a very positive reference provided by Mr Baillie based upon person A's performance in post.

15 47. Although the allegation had been investigated and found not to be established, person A, in the interests of openness, had made a point of proactively disclosing it in relation to all of the employments in which person A had been successfully engaged in the intervening years.

20 48. In proactively writing to the respondent's Managing Director, person A sought to afford the respondents the opportunity of indicating, in light of the historical allegation and notwithstanding the fact that it was denied and on investigation not established, that they would prefer person A not to apply for the advertised post.

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30 49. The respondent's Managing Director met with person A and, following that meeting indicated, standing what appeared to be person A's evident potential suitability for the post, that the respondent was content to consider an application for employment while also advising that in considering such an application they would require to make contact with all of the relevant regulatory agencies including the Social Work Departments of the local authorities in which person A had worked, in order to satisfy themselves, in light of person A's disclosure of the historical allegation, that there was no ground upon which person A's suitability for employment in the field of

residential care and education might be subject to question. Person A was content that they do so.

5 50. The respondent's Managing Director Patricia Sheridan engaged in that "rigorous and detailed recruitment process" and was advised by all parties and authorities contacted that they were all aware of; the historical allegation, of the fact that it had been investigated and found not to be established and further that all were content that there was nothing that adversely impacted upon person A's suitability to be employed in the relevant fields.

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51. Person A's application was subsequently successful resulting in the offer and acceptance of a post with the respondent.

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52. At the point of commencing employment with the respondent, person A had fully disclosed and the respondent's Managing Director was fully aware of, the historical allegation.

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53. Person A left the respondent's employment to pursue a career change in December 2012. Person A was regarded by the respondent, and by those for who had been line managed by person A, including Dr Drysdale, the respondent's Director of Children's Services as having had a highly successful period of employment with the respondent. Although pursuing another career, person A remained on friendly terms with the respondents and from time to time in contact with its Managing Director.

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54. At the point in time when the respondent's Managing Director was discussing with the claimant the claimant's potential engagement with the respondents as an employee, she considered it appropriate, in the interests of openness and conscious that the claimant was protective of her own reputation, to tell the claimant, in confidence and told the claimant;

- (a) that person A had been employed with the respondents from 2009 to 2012, and about the historical allegation dating from some 15 years previously which person A had proactively disclosed,

- (b) that that allegation, it having been investigated by the relevant authorities, was found not to be established,
- 5 (c) about the enhanced recruitment process and additional checks which the respondent had carried out before offering person A employment,
- 10 (d) that all sources and agencies contacted had confirmed that there was nothing which impacted adversely on person A's suitability for employment in the residential care and education field.
55. The respondent's Managing Director further arranged for the claimant to meet person A over a lunch, in order to afford the claimant the opportunity of  
15 indicating that she would not wish to take up employment with the respondent by reason of person A having previously been employed by the respondent, and in the event that she had any concerns as to how, in those circumstances, her employment with the respondent might impact upon her own reputation.
- 20 56. At the end of that process, the claimant was aware of all that the respondent's Managing Director was aware of in relation to person A and the historical allegation.
- 25 57. At the end of that process the claimant had formed a positive view of person A, was content to take up employment with the respondent and did so.

### **The Butterstone Conduct**

- 30 58. During the period of the claimant's employment with the respondent, the respondent secured the opportunity of taking over and reopening a former residential educational facility at Butterstone.



59. The claimant played a material and highly positive part in securing the necessary consents and cooperation of the relevant authorities, agencies and Social Work Departments including, their approval of and commitment to consider placing young people in the facility once reopened.
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60. In May 2019, the respondents hosted an Open Day for the soon to be reopened Butterstone School and at which, amongst others, the claimant and two members of managerial staff who reported to her; Dr Drysdale and Mharie McRailed were in attendance.
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61. At the open day, Mharie McRailed spoke to Dr Drysdale and advised him that the claimant had sent her to get him, as she wished to speak to them both, but advised that she (Ms McRailed) did not know what it was about.
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62. When she met with Dr Drysdale and Ms McRailed the claimant began to ask Dr Drysdale about his relationship with person A who had line managed him some years earlier when both had been employed by the respondents.
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63. The claimant asked Dr Drysdale what the respondent's Managing Director's relationship with person A was.
64. The claimant asked Dr Drysdale whether he had knowledge of any other business relationships of person A over the years.
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65. Dr Drysdale did not know where the conversation was leading and asked the claimant to explain what the purpose of the conversation was before asking any further questions of him.
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66. The claimant responded by stating that she had been made aware of historical conduct on the part of person A namely, that person A had *"hypnotised young people as far back as the 1980s to have sex with them"*.
67. Dr Drysdale stated that that sounded ridiculous to him, he having trained in hypnotherapy himself.

68. Dr Drysdale asked the claimant how she had become aware of what she had just recounted.
- 5 69. The claimant responded by stating that Tam Baillie had told her.
70. Dr Drysdale asked had any such an allegation been proven, was there any evidence to support it?
- 10 71. The claimant responded by stating only that she was confident that Mr Baillie "*knew it to be true*".
72. Dr Drysdale was shocked by what the claimant said. He stated that having worked with person A he found it difficult to believe such a thing. He stated that he was aware only of person A being an outstanding member of Moore House staff when working there.
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73. The claimant asked Dr Drysdale if he knew of any child protection issues involving person A when person A had been employed by the respondent. Dr Drysdale stated that he was not aware of the occurrence of any such issues.
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74. The claimant then returned to questioning Dr Drysdale about what, if anything, he knew about the respondent's Managing Director's relationship with person A. Dr Drysdale stated that she should direct any further questions of that sort to the Managing Director herself.
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75. Dr Drysdale was not satisfied that anything said or referred to by the claimant went to show that person A had done anything wrong. He considered that it was no more than speculation on the part of the claimant.
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76. The claimant next asked Dr Drysdale if he was aware of any intention that person A to return to work for the respondents. He replied that he was not.

77. Dr Drysdale said to the claimant that it sounded to him from what she was saying that there was an agenda of some sort behind her questions, or that she was trying to “dig up some dirt” about person A and that he did not have any dirt to give her. He went on to state that he was not happy to continue with the meeting and withdrew from it returning to his duties at the Open Day.
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78. After the claimant left, he asked Ms McRailed if she knew “what on earth was going on”. Ms McRailed replied “I have no idea but if something is going on I am going to stay well out of it”. She went on to state that she did not know why the claimant had involved her in the meeting.
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79. Dr Drysdale, who was concerned by the claimant’s conduct, reported the fact of the meeting and the content of the exchange between the claimant and himself which had occurred in the presence of Ms McRailed to the respondent’s Managing Director.
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80. The respondent’s Managing Director assured Dr Drysdale:-
- (a) that person A had been recruited following an enhanced recruitment process in the course of which,
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- (b) all the relevant agencies and authorities had confirmed themselves satisfied with person A’s suitability to work with young people and in residential care,
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- (c) that person A had disclosed, prior to applying to the respondents, the existence of a single, historical, investigated and found to be not established allegation of conduct which bore no relation to what Dr Drysdale reported the claimant had said to him,
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- (d) that there had never been any issues or concerns raised during the period of person A’s employment with the respondent and,

- (e) that she did not know why the claimant would have asked Dr Drysdale if he knew whether there was any intention that person A return to employment with the respondent which, person A having left to make a career change, there was not.

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81. The respondent's Managing Director took immediate advice from the respondent's solicitors regarding what Dr Drysdale had reported to her. The advice provided was it was important that the respondent satisfy itself that the relayed allegation; was historical, did not relate to the time of person A's employment with the respondent and, as to whether there was any factual basis for it, and that she should do so by meeting with the claimant and with Mr Baillie whom the claimant had identified as the source of it.

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82. Mr Tam Baillie first engaged with the respondents in the capacity of an external Consultant, as one of a group of such Consultants brought together by the respondents to offer views on a number of areas including governance and development. Mr Baillie thereafter continued for a period to provide consultancy services to the respondent.

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83. At or about the time of his beginning to do so, on 27<sup>th</sup> March 2018, the respondent's Managing Director asked to meet with Mr Baillie. At the meeting the respondent's Managing Director indicated that she was aware that he and person A had worked together many years ago in 1986/87 at which time person A had been line managed by Mr Baillie, and she made him aware of the fact that person A had been employed by the respondent between 2009 and 2012.

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84. At the meeting, the respondent's Managing Director and Mr Baillie each advised the other of their pre-existing knowledge of person A and of what they knew in relation to any alleged conduct of person A;

- (a) Mr Baillie did not tell the respondent's Managing Director anything that she was not already fully aware of by reason of

person A's proactive disclosure and the subsequent enhanced recruitment process carried out by her.

5 (b) The respondent's Managing Director advised Mr Baillie that there had been no incidents or matters giving rise to concern in relation to person A during person A's employment with the respondent.

10 85. There was no suggestion made in the course of the meeting of 27 March 2018 of any intention that person A return to the respondent's employment.

15 86. Mr Baillie and the organisation for which he worked and in which he had line managed person A had decided some 15 years earlier at the time of it's emerging not to report the historical allegation to the police, when they became aware of it, because there was no evidence that went to support the allegation and person A had already left that organisation's employment by the time that the allegation emerged.

20 87. Approximately one year after his meeting with the respondent's Managing Director, Mr Baillie, who was functioning, at the request of the claimant, as her mentor, decided to share with her his knowledge of the by then some 20 year old historical allegation about person A, that being the same allegation that person A had proactively disclosed to the respondents and other employers. He did so telling her also that he had met, a year earlier, 25 with the respondent's Managing Director at her request and that she had confirmed that she was already aware of the allegation which had been proactively disclosed to the respondent by person A at the point of recruitment, and that there had been no incidents or issues arising to give any cause for concern in relation to person A during the period of person A's 30 employment with the respondents.

88. In his discussion with the claimant, Mr Baillie also said that some years later he had been at a party where person A, who had been training in

hypnotherapy, had, by way of a party trick, agreed to demonstrate the hypnotising of a volunteer.

5 89. Mr Baillie did not tell the claimant that person A hypnotised people to take advantage of them. He unequivocally denied in his evidence before the Tribunal that he had said so. The Tribunal considered Mr Baillie's evidence in that regard to be both credible and reliable and accepted it.

10 90. In his evidence Mr Baillie accepted that the predisclosed historical allegation about person A had been investigated and not found to be established. He confirmed in evidence that he was not in a position to contradict the suggestion that it was mere hearsay.

15 91. In sharing with the claimant what he knew about the historical allegation in relation to person A, Mr Baillie assumed that the claimant would use the information in some way;

20 (a) He gained the impression, from his discussion with the claimant, that she did not intend to speak to the respondent's Managing Director or to any of the Board of Directors to whom she reported about it but rather to some other employee or employees.

25 (b) He knew that her intention was to speak in particular to someone who knew person A, to see whether she could obtain any information about person A's time at Moore House.

30 92. The claimant was already aware, before her meeting with Mr Baillie at which he recounted his witnessing of person A's party trick, of the 20 year old historical allegation which had been made in relation to person A and which person A had proactively disclosed to the respondents. The respondent's Managing Director had told the claimant about that historical and unestablished allegation at the time of her taking up employment with the respondent.

93. The discussion which the claimant had with the two employees for whom she had line management responsibility at Butterstone, did not include the disclosure by the claimant of any factual information.

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(a) At its highest what the claimant communicated was an inaccurate representation of an anecdote recounted to her by Mr Baillie and speculation on her part about a matter which Mr Baillie subsequently denied being the source of.

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(b) The alleged disclosure was not made to the claimant's employer in terms of section 43C of the Employment Rights Act 1996 but rather to employees of the respondent for whom she, the claimant, had managerial responsibility;

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(c) nor was the alleged disclosure made in compliance with any of the other provisions of sections 43(E) to 43(H) of the 1996 Act.

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(d) No reasonable grounds existed, at the time of the alleged disclosure, upon which the claimant could reasonably believe that the speculation communicated by her was substantially true.

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(e) At the time of making the alleged disclosure, there was no imminent risk to the health and safety of any individual of which the claimant was aware, nor did the claimant believe that the health and safety of any individual was likely to be endangered a matter which the claimant confirmed was the case, in the course of her evidence before the Tribunal.

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(f) In making the alleged disclosure the claimant provided no information that tended to show that any matter falling within the terms of section 43B(1)(a) to (e) inclusive had been or was likely to be, deliberately concealed.

- 5 94. The discussion held by the claimant, with Ms McRailed and Dr Drysdale at Butterstone in April/May 2019, was not a qualifying and or protected disclosure in terms of sections 43A and 43B of the Employment Rights Act 1996.
- 10 95. The instances of treatment, at the hands of the respondent upon which the claimant relies as detriments for the purposes of section 47B(1) of the ERA, and which are founded upon by her in her email to the respondent of 30<sup>th</sup> April 2019 (copied and produced at pages 295 to 298 of the bundle) predate the alleged disclosure made at Butterstone in May of 2019.
- 15 96. There is no causal connection between the instances of treatment at the hands of the respondent, founded upon by the claimant in her email of 30<sup>th</sup> April 2019 on the one hand, and the alleged disclosure made at Butterstone in May of 2019 on the other.
- 20 97. The respondent's Managing Director considered that the claimant's conduct, in making a speculative and pejorative statement about person A to two of her fellow employees at Butterstone in May 2019, and in questioning one of the employees about the Managing Director's relationship with person A, to amount to gross misconduct which would have justified the claimant's summary dismissal. She subsequently described it in a meeting with the claimant of 19<sup>th</sup> November 2019 as a "sackable" conduct.
- 25 98. The respondent's Managing Director knew that the claimant was already aware of the actual historical allegation in respect of person A, because she had told the claimant about it. She considered that had the claimant had any concerns about any other matter, such as the one which she had speculated about to fellow employees, she ought to have raised that concern with the respondent's Managing Director or, if she had any grounds for believing that the respondent's Managing Director might conceal any such information disclosed to her, she, the claimant, ought to have disclosed any such
- 30



information which she had to another member of the Board of Directors to whom she had ready access.

5 99. In the event, the respondent's Managing Director decided not to dismiss the claimant over the issue and advising her in the same meeting of 19<sup>th</sup> November 2019 that she had no intention of the claimant not being in the organisation. She had reached that view,

10 (a) because the claimant's conduct had in fact been contained and had not gone beyond the two employees to whom the claimant had spoken and the Board; and,

15 (b) because, notwithstanding the claimant's conduct and based upon the claimant's positive contribution during her employment, and her potential to substantially support the development of the to be reopened school at Butterstone, she wished, and separately considered that it would be in the interests of the respondent's business, to retain the claimant in employment.

20 **Constructive Dismissal**

100. In March of 2019 the claimant was on holiday. During her absence Dr Steven Drysdale spoke with the respondent's Managing Director to advise her that he had been offered a new post with another employer which he had  
25 accepted with a view to providing her with maximum notice of his departure.

101. The respondent's Managing Director was concerned to learn that Steven Drysdale intended to leave considering him, as she did, to be a major asset.

30 (a) She wished to try to retain his services. She was particularly concerned at his announced departure against the background of another Senior Manager (Gary Greenshields) having already confirmed that he was leaving.

(b) She considered the matter serious enough to wish to address it by meeting with the claimant, in her capacity as CEO, and with her fellow Board member and Financial Director Julie Hughes, as soon as the claimant returned from holiday.

5

(c) For that reason, and although not wanting to unnecessarily interrupt the claimant's holiday, she felt it necessary to flag up the matter for her so that their meeting could proceed as soon as she returned.

10

(d) She accordingly sent the claimant an email dated 30<sup>th</sup> March 2019, the terms of which are copied and produced at page 294 of the Joint Bundle.

15 102. The respondent's Board of Directors considered the situation focused by Dr Drysdale's intimated resignation with a view to achieving an outcome by which Dr Drysdale might be retained together with the claimant.

20 (a) They considered that the imminent opening of the second school at Butterstone provided an opportunity for internal reorganisation of the management structure; and,

25 (b) they devised a plan whereby the appointment of Chief Executive Officer would go and be replaced by two senior non-Board Director posts;

(c) one to be held by Dr Drysdale, with the focus on the existing Moore House School and the delivery of services there,

30 (d) the other by the claimant with the focus on the ongoing business development of the new school at Butterstone.

103. On the claimant's return, the respondents discussed the plans for reorganisation with her and with Dr Drysdale inviting each respectively to consider the new posts.

5 104. The claimant had reservations about the post being offered to her considering, amongst other things, that there should be an uplift in her remuneration in the light of what she understood was the remuneration which was being offered to Dr Drysdale. She proposed that there be a £5,000 uplift to her salary in the context of the reorganisation.

10

105. The claimant considered that she had agreed that salary uplift of £5,000 with the respondents, regardless of whether or not she accepted the new post.

15

106. The claimant considered that it should be given effect to immediately and pending her consideration of whether or not she would accept the new Director's post.

20

107. The £5,000 uplift was not reflected in the claimant's April 2019 salary and, on 25<sup>th</sup> of April 2019, she sent an email to the respondent's Finance Director stating that her understanding was that she had agreed with the respondent's Managing Director that although she wasn't taking on the Director's role, at this point, the uplift would be applied and would be backdated to the 1<sup>st</sup> of April in recognition of the additional responsibility which she had been undertaking in relation to Butterstone.

25

108. The claimant also asked the respondent's Finance Director to tell her what salary had been agreed by the Board for Dr Drysdale who, for his part, had accepted the new non-Board Director level post which had been offered to him in the reorganisation.

30

109. By email dated 26<sup>th</sup> April 2019, copied and produced at page 297 of the Joint Bundle, the respondent's Finance Director Julie Hughes advised the claimant:-

- (a) that the potential increase in pay was for a new role which she had not yet been agreed
- (b) It would come into force if and when there was a new job description.
- (c) At the moment nothing had changed and therefore, the claimant's pay remained the same.

10 110. The claimant was angered by that response and by email of the same date, 26<sup>th</sup> April 2019, copied and produced at page 296 of the bundle, she wrote to the respondent's Managing Director stating that she was "furious", that the non-payment to her of a retrospective increase was totally unacceptable and concluding with the statement "*unless this is resolved Pat, I will have to seek*

15 *advice. Can I claim overtime for all the extra hours I'm having to work.*"

111. The respondent's Managing Director's response to that email, in terms of which she did not agree to apply a retrospective increase to the claimant's salary in circumstances in which the claimant not confirmed that she would

20 accept the new post offered, did not satisfy the claimant. She took legal advice about constructive dismissal and, on the basis of that advice decided that she would leave the respondent's employment and give them notice of termination of her contract of employment.

25 112. By email dated 30<sup>th</sup> April 2019, the terms of which are copied and produced at page 295 of the bundle, the claimant wrote to the respondent's Managing Director by email while the latter was on holiday. The claimant's email included statements:-

- 30 (a) that she believed that whereas she thought a £5,000 retrospective increase in her salary had been agreed with the respondent's Managing Director independently of whether or not she accepted the new post on reorganisation, she felt that it

had been effectively withdrawn because she hadn't taken on that new role.

5 (b) that she had requested a review of her terms and conditions of employment and an increase in her salary in the past given the evolving nature of her remit and responsibilities.

10 (c) she made reference to the respondent's Managing Director's email of 30<sup>th</sup> March 2019, in which she had advised her of Steven Drysdale's resignation and had gone on to express concern that something was wrong within the Management Team;

15 (d) the claimant then stated "*Things have changed for me following the receipt of the email you sent to me whilst I was enjoying my holiday in Spain. I too wished you had waited until I had returned home as it ruined my holiday and I would have appreciated being involved in the dialogue. I understand your concerns re Steven leaving but I am very concerned about creating posts and restructuring just because someone chooses to leave. The fact that Steven was offered my job whilst at Gary's leaving meal completely threw me.*

25 *The advice that I have sought is in relation to constructive dismissal as I feel that the changes in my role, increased expectations and responsibilities without a review of my terms and conditions are grossly unfair. My intention is to resign from my post around October as I feel my current position is becoming untenable. I feel that I have insufficient support and direction and have no mentor to discuss issues with. ....*

30 *I spent a lot of time thinking about the situation and suggested a £12,000 rise in my salary to compensate for full working, travelling and additional responsibilities. I thought that this was*

*very fair given the circumstances. Your response was very hurtful ..... I am committed to seeing the Butterstone development though ..... my plan would be to leave just into the new year when the school is hopefully up and running. .... I am happy to plan my exit with you Pat, to ensure that the impact is minimal and we agree clear targets from June to January. Please relax and enjoy the rest of your holiday. Best wishes Anne”.*

5  
10 113. As stated in her email of 30<sup>th</sup> April 2019, in which she gave notice of her intention to resign from her employment with the respondents “*just into the new year*” the claimant continued in her employment with the respondent in the months of May, June, July, August, September, October and December 2019.

15  
20 114. Although in the course of the period May to December 2019, the claimant continued to engage with the respondents in relation to proposed changes to her terms and conditions of employment and although she ultimately did accept the new non-Board Director level appointment offered to her on restructuring, she never withdrew the notice contained in her email of 30<sup>th</sup> April 2019.

25 115. By letter dated 30<sup>th</sup> December 2019 the claimant ultimately attached a letter confirming her resignation in which she stated that she intended to bring a claim to the Employment Tribunal for Constructive Unfair Dismissal.

30 116. The timing of the claimant’s resignation letter, the terms of which are copied and produced at page 336 of the bundle, were consistent with the original notice of termination of employment she gave to the respondents in her email of 30<sup>th</sup> April 2019.

117. In her email covering the 30<sup>th</sup> December resignation letter, which is copied and produced at 335 of the bundle, the claimant, referring to previous correspondence to the respondents from her lawyer, stated that she

remained willing to discuss an agreed settlement, and suggested that the respondents contact her lawyer directly should they wish to discuss such a settlement.

- 5 118. By letter dated 30<sup>th</sup> December 2019, copied and produced at page 338 of the bundle, the respondent's Managing Director wrote to the claimant stating that she accepted the claimant's resignation and confirming, that with three months contractual notice her finishing date would be the 30<sup>th</sup> March 2020.

10 **Constructive Dismissal – Affirmation of the Contract as at 24 June 2019**

119. Having taken legal advice on the various matters about which she complained and in respect of which she expressed concern in her email to the respondent's Managing Director of 30<sup>th</sup> April 2019, the claimant thereafter  
15 advised the respondents that she had taken that advice on those matters including;

(a) her position on reorganisation,

- 20 (b) the discontinuance of the post of Managing Director and the offering to her of another post (on reorganisation and the implications that had for her employment rights, including the right to resign and complain of constructive dismissal, in the same email.

25

120. Thereafter and with the benefit of having taken that advice, the claimant accepted her new appointment on the 24<sup>th</sup> of June 2019. She worked in it until her departure from the respondent's employment in March 2020, seeking to perform and, on her assertion performing, the duties required of  
30 her by the respondents and, in her turn calling upon the respondent to perform its obligations including payment to her of the remuneration package agreed in respect of the new post, and accepting that performance.

121. In so doing she affirmed her Contract of Employment with the respondent and, let it be assumed that the acts and or omissions of the respondent complained of by her in her email of 30<sup>th</sup> April 2019 and otherwise prior to 24 June 2019 constituted material breach of contract entitling the claimant to resign in terms of section 95(1)(c) of the Employment Rights Act 1996, the claimant acquiesced in any such asserted breach/breaches for the purposes of resiling and lost the right to subsequently rely on those instances of conduct, for the purposes of resigning and asserting that she was constructively dismissed in terms of section 95(1)(c) of the ERA.

10

122. On the 28<sup>th</sup> of May 2019 the respondent's Managing Director and Finance Director met with the claimant who was accompanied by Mr Tam Baillie. At the meeting the claimant was challenged over her behaviours in respect of; meeting with Dr Drysdale and Mharie McRailed, Senior Managers at Butterstone earlier in the month, in respect of her questioning of Dr Drysdale about his relationship with a former staff member, about the Managing Director's relationship with that former staff member, and, the fact that she had identified Mr Baillie as the source of the speculative remarks which she had made about the former staff member at the Butterstone meeting.

20

123. At the meeting of 28<sup>th</sup> May 2019 the respondent's Managing Director asked Mr Baillie if he had any concerns or information that would go to suggest that the former staff member had behaved unprofessionally when employed by the respondent. Mr Baillie responded by stating that he did not have any such concerns or information. When asked at the meeting why, in those circumstances, he had had a conversation with the claimant about the former staff member he replied by stating that he had passed information to the claimant regarding an historical allegation about the former member of staff and the claimant had discussed that with two members of her team. Mr Baillie did not specify in the course of the meeting of 28<sup>th</sup> May 19 the detail of the allegation which he had passed to the claimant. He said that he wanted the terms of the conversation to be set up and requested another time to discuss the Butterstone incident with the respondent's Managing Director.

30



124. In his evidence before the Tribunal Mr Baillie stated that the only information which he had passed to the claimant about the former staff member (person A) was the information about the one historical allegation which the respondent's Managing Director was already aware of and being the same allegation which the respondent's Managing Director had previously discussed with him and had previously made the claimant aware of at the point of her accepting an offer of employment with the respondent.
125. In his evidence before the Tribunal Mr Baillie stated that he had also told the claimant on that occasion that he and person A had, some years after the emergence of the historical allegation, both been present at a party at which person A, who had recently been studying hypnotherapy, had agreed to a request that, by way of party trick, he demonstrate the same by attempting to hypnotise a volunteer. In his evidence before the Tribunal Mr Baillie categorically denied that he had told the claimant that person A "*had hypnotised young people as far back as the 1980s to have sex with them*", the same being the remark which the claimant had made to Dr Drysdale and Ms McRailed at the Butterstone meeting and in respect of which the claimant had identified Mr Baillie as the source.
126. At the meeting of 28<sup>th</sup> May the respondents separately focused with the claimant their concerns over what they perceived to be adverse views of the claimant's managerial interactions expressed by a number of fellow employees including two, in the course of exit interviews. The claimant stated for her part that she considered that she had good working relations with those whom she managed, with one or two exceptions which were attributable to particular reasons.
127. The exchanges, between the claimant and Mr Baillie and the respondent's Managing and Finance Directors, became heated during the discussion about the claimant's Butterstone meeting with Dr Drysdale and Ms McRailed. The respondent's Managing Director raised her voice at one point during that discussion. She told the claimant that she considered that in questioning

Dr Drysdale in the way that she had, and in making, without any factual basis, a speculative and pejorative statement to him about a former employee of the respondents, the claimant had sought to bypass her as Managing Director and had undermined the Board. The respondent's Managing Director stated that she "*felt betrayed*" by the claimant and that it "*had very serious repercussions*". At a subsequent meeting with the claimant on 19<sup>th</sup> November 2019, she described the claimant's conduct in that regard as "sackable".

10 128. Notwithstanding the meeting of 28<sup>th</sup> May 2019 the exchanges between the claimant and the respondent's Managing Director at it, and the claimant's complaints, made at that meeting about various aspects of what she perceived to be the respondent's conduct, in June of 2019, she subsequently decided to and unequivocally accepted her new Director of Development post and worked in it for some 6 months before resigning. In the respondent's perception the claimant engaged enthusiastically in her new role volunteering expertise in areas that had not been considered by the respondent's Board of Directors.

20 129. In doing so the claimant confirmed in evidence that she focused upon the positive aspects of the new role and considered that it provided substantial opportunity for her.

25 130. In the circumstances pertaining, the restructuring exercise carried out by the respondent and their offering to the claimant and the claimant's unqualified acceptance of her new role of Director of Development, did not constitute a breach of contract which destroyed the implied term of confidence and trust between the parties.

30 131. Separately, and in any event, had the respondent's conduct in that regard constituted a material breach of contract, the claimant, by her unqualified acceptance of the appointment and her working in it for a period of 6 months, including initially with great positivity and enthusiasm, in performing her obligations and seeking and accepting from the respondents performance of

their obligations under the contract, the claimant acquiesced in any such breach such that she is not entitled to rely upon it as a repudiation for the purposes of a section 95(1)(c) ERA resignation.

5 132. Following the taking up of their new appointments by both Dr Drysdale and the claimant, the respondent's Managing Director required to step back temporarily from her line management duties due to the serious illness of her daughter and her own ill health. In those circumstances she proposed that Dr Urquhart, an external consultant with his own practice who had provided support services to the respondents in respect of the internal restructure, 10 function, on a temporary basis, as Line Manager of both the claimant and Dr Drysdale. That appointment was made with the knowledge and consent of both Dr Drysdale and the claimant. The claimant declared herself delighted with that appointment.

15

133. Dr Urquhart, in functioning as the claimant's Line Manager, became concerned about her ability to carry out tasks assigned to her and about the fact that she had delegated tasks allocated to her down through the management team resulting in team members raising concerns that they 20 lacked the necessary skills, ability and time to do what was being asked of them by the claimant.

134. At no time in the course of the claimant's employment did the respondents, the claimant or Dr Urquhart propose that Dr Urquhart act as a mediator 25 between the claimant and the respondent's Managing Director.

135. Dr Urquhart was retained by the respondent to provide consultancy advice and input in relation to the governance of Moor House School Limited in the context of the internal restructuring.

30

136. Dr Urquhart had a different management approach to that of the respondent's Managing Director. He considered that the Managing Director and the claimant appeared to "*go round in circles*" in their relationship. He adopted a

stronger line, than that hitherto taken by the respondent's Managing Director, in the line management of both Dr Drysdale and of the claimant.

5 137. The claimant accepted the Director development post by correspondence dated 19<sup>th</sup> June 2019 sent by email to the respondent's Managing Director and Finance Director. The written acceptance, which is copied and produced at page 314 of the bundle, was in the following terms:-

10 *"Re Director Development Post*

*Dear Pat and Julie*

15 *Following further discussion with you today Pat, I am writing to accept the post of Director Development. I look forward to our discussions next week where we can explore aspects of the post in more depth and identify synergies across both Steven's areas of responsibility and mine. I am delighted that you have confirmed my leadership role in supporting and developing Butterstone House School.*

20 *I would be grateful if you could confirm that you have received my email.*

*Kind regards*

25 *Anne."*

30 138. On 28<sup>th</sup> October 2019 Dr Urquhart, in his capacity as Line Manager of the claimant, met with the claimant and issued to her "smart goals" for achievement in her new role.

139. Dr Urquhart had extracted the smart goals from the job specification of the claimant's new post.

140. The smart goals extracted were approved by the respondent's Board in advance of them being issued to the claimant.
141. The smart goals were not subject to adjustment or agreement with the claimant prior to their being issued to her.
142. There was no contractual requirement that they be agreed by the claimant in advance of their being issued.
143. The setting and issuing of smart goals, based upon the job specification of the post accepted by the claimant, was a matter properly within the managerial conduct of the respondents.
144. Their setting for and issuing to the claimant, at the hands of her Line Manager Dr Urquhart on 28<sup>th</sup> October 2019, of smart goals, and, the putting in place of a meeting scheduled for one month later (25<sup>th</sup> November 2019) at which the claimant's performance against the goals would be reviewed, did not constitute a breach of contract. It was not conduct which, objectively construed, was destructive of the implied term of confidence and trust between the parties.
145. The smart goals issued to the claimant by Dr Urquhart on the 28<sup>th</sup> of October are copied and produced at page 322 of the bundle and are in the following terms:-
- "Prioritised Smart Goals (extracted from job description: LEADING and MANAGING NEW SERVICES)
- 1 To effectively produce a detailed 3 year strategic Business Development Plan. To include:
- (a) PESTEL (analysis; a SWOT analysis; a vision statement; market positioning; competitor analysis; financial analysis; human resource analysis;

communication strategy; legislative analysis; local authority/customer requirements; and projected future development within **one month of today's date.**

5

2 To identify in detail and present 4 realistic opportunities for business growth each month.

10

3 To convert at least 2 of the opportunities for business growth into confirmed delivered revenue each month.

4 To meet 8 potential partnership prospects face to face each month and to produce reports on those meetings.

15

5 To attend a performance review meeting each month with the Board authorised interim Human Resources Consultant [a reference to Dr Urquhart]

20

6 To identify funding streams/opportunities for small, low level projects which enhance services that the organisations can provide. Provide report to Board- authorised Human Resources Consultant each month.

25

7 To complete and submit a self report on performance each month to the interim Human Resources Consultant by email, one day prior to the review meeting.

30

8 To meet with the Senior Manager Education (Butterstone) once per month, with the Senior Manager Education setting the agenda.

Signed

Managing Director (Patricia Sheridan)

Signed

Interim HR Consultant (Dr James Urquhart)

5

Signed

Director of Development (Anne Gibson)

Date October 28, 2019”

10

146. The first of the smart goals, the production of a detailed 3 year strategic Business Development Plan, was a task which the respondent’s Board and the claimant’s Line Manager intended and expected the claimant to carry out personally, and without delegation.

15

147. The claimant, for her part, considered that it would be helpful to her if she were to obtain views and potential input from members of the wider management team before preparing a plan for submission to the Board for approval. She accordingly asked for such input from various members of her management team.

20

148. That in turn prompted complaints from the team to the respondent’s Managing Director that they did not consider that they possessed the experience, skills or time to do what the claimant was asking them to do.

25

149. As a consequence of the concerns raised by the management team Dr Urquhart arranged a meeting with the claimant to discuss them.

30

150. In advance of that meeting Dr Urquhart met with Julie Hughes, who was also to attend the meeting in the capacity of a note taker, to discuss his concerns about the claimant’s ability to carry out the tasks assigned to her and the inappropriateness of her seeking to delegate those tasks down through the management team rather than performing them herself.

151. In his pre meeting with Julie Hughes, Dr Urquhart did not disclose an intention on his part to issue the claimant with a verbal warning. Nor did Julie Hughes, for her part, suggest that a verbal warning be issued to the claimant, nor did Dr Urquhart disclose to the respondent's Managing Director, and the respondent's Managing Director was not aware of, any intention on the part of Dr Urquhart to issue the claimant with a verbal warning.
152. The issuing of verbal warnings to employees is subject to the following procedures prescribed in the respondent's Disciplinary Code which, Dr Urquhart, amongst other Managers, would be and was obliged to follow in respect of the issue of any such warning.
153. At the time of his meeting with the claimant, 4<sup>th</sup> November 2019, Dr Urquhart had not read and was not otherwise aware of the prescribed procedures relating to the issuing of verbal warnings. Had he disclosed any such intention to either Julie Hughes or the respondent's Managing Director in advance of the meeting, they would have drawn his attention to the requirements of the Disciplinary Code, would have made clear to him that the issuing of such a warning in those circumstances was not compatible with the respondent's own procedures and that in doing so the respondent would be failing to follow its own procedures.
154. At the meeting with the claimant on 4<sup>th</sup> November 2019 Dr Urquhart issued the claimant with a verbal warning. He did so in circumstances which constituted a breach of the respondent's own disciplinary procedure which is copied and produced at pages 213 to 217 of the bundle and which prescribes, amongst other matters, that; "Where the issue is in regards to perceived capability, the Capability Procedure will be evoked."
155. The procedure separately specifies in circumstances where the issue is with regards to conduct, an express series of procedural stages including, at pages 214 and 215:-

- An investigation



- The consideration of the appropriateness of “extraordinary supervision” as an alternative to disciplinary action
  - 5 • Where a disciplinary action is considered merited a Disciplinary Hearing will be called with the person who is to be subject to it being notified in writing of the Hearing with at least 7 days’ notice and provision of any relevant papers including the detailing of possible outcomes of any disciplinary action being considered
  - 10 • The opportunity to be accompanied by a chosen employee representative at all stages of the formal disciplinary procedure
  - The preference that all relevant parties be present at the Hearing and that reasonable adjustments be made to ensure that this can happen
  - 15 • The Hearing to be chaired by the Director of Finance
- 20 156. “Verbal warning” is identified, within the procedure, at page 215 of the bundle, as a possible outcome only following a Disciplinary Hearing.
157. The procedure also provides for an appeal against any outcome, to be exercised in writing to the Board within 7 days of receipt of confirmation of the outcome.
- 25 158. Beyond what was said to her verbally at the meeting of 4<sup>th</sup> November 2019 the claimant did not receive subsequent confirmation of the verbal warning or its terms.
- 30 159. At the meeting of 4<sup>th</sup> November 2019 Dr Urquhart misrepresented to the claimant, in the presence of Julie Hughes Finance Director, that the Board had decided to issue a verbal warning to the claimant which would remain on her file for 3 months.

- 5 160. The respondent's Julie Hughes was surprised to hear Dr Urquhart issue the claimant with a verbal warning in circumstances where she knew that the Board had not decided or approved any such plan for the meeting and further that to do so at the meeting would result in a failure on the part of the respondents to adhere to their own disciplinary procedure.
- 10 161. Although Julie Hughes's principal function at the meeting was that of note taker, she, being present and knowing the actual position, had opportunity to intervene, in her capacity as Director and countermand the issuing of the verbal warning, or to stop the meeting. She did neither.
- 15 162. The respondents issued a verbal warning to the claimant in breach of their own disciplinary policy and procedure.
- 20 163. At the meeting of 4<sup>th</sup> November and as part of the grounds upon which the issuing of the verbal warning was said to proceed, Dr Urquhart advised the claimant that her failure to deliver, as at the 4<sup>th</sup> of November the first smart goal which had been given to her only seven days previously and which she had been advised her performance against was not due to be assessed until the 25<sup>th</sup> of November, constituted "clear performance failure".
- 25 164. At the meeting Dr Urquhart advised the claimant that he would next meet with her on the Board's behalf on the 25<sup>th</sup> of November 2019.
- 30 165. He advised her at the meeting that the Board required that she deliver significant improvement on the three areas identified by him including her relationships with the large number of Managers and staff who had advised that they could not work with the claimant but did not tell her who any of those individuals were such that she considered that she would be unable to attempt to address that issue.
- 35 166. At the meeting Dr Urquhart told the claimant that if, impliedly by the 25<sup>th</sup> of November, the Board were not satisfied as to the progress made by the claimant they would "consider other options available to them".

167. Neither Dr Urquhart nor any of the respondent's Directors gave the claimant any further information as to what those other options might be, engendering in the claimant, a reasonable apprehension and belief, in the circumstances, that what was being referred to was an anticipated dismissal of her by the respondents on or shortly after the 25<sup>th</sup> of November 2019.
168. The claimant considered the verbal warning to be unreasonably and improperly issued. She wished it to be withdrawn.
169. The claimant wrote to the respondents and, among other matters focused by her, protesting the warning, within the time period provided in the respondent's disciplinary procedure and seeking a response. She considered that letter to be an exercise of her right to appeal against the decision.
170. She received no response to that letter and no appeal or notice of the arrangement of any appeal, or of intention on the part of the respondents to rescind the warning was received by her.
171. Following the issuing of the verbal warning to the claimant neither the respondent's Managing nor Financial Director took any steps to rescind the warning, in circumstances where they were both aware that Dr Urquhart had misrepresented the claimant at the meeting of 4<sup>th</sup> November, that they had given prior approval to the issuing of the warning and further that the warning, so issued had been issued contrary to their own discipline procedures.
172. That failure to act on their part or otherwise to respond to the claimant's letter protesting the warning, reinforced in the claimant her increasing apprehension that she was being set up to be dismissed by the respondents on or shortly after the 25<sup>th</sup> of November when her performance against the issued smart goals was next to be reviewed by Dr Urquhart on the Board's behalf.
173. In so acting through their agent Dr Urquhart and in so allowing Dr Urquhart to act at the meeting of 4<sup>th</sup> November 2019, in their conduct in issuing to the

claimant a verbal warning at that meeting and in so subsequently acting and failing to act in relation to that verbal warning once issued, the respondents materially breached the claimant's Contract of Employment.

5 174. The said conduct was conduct going to the root of the contract. It was conduct which objectively viewed, had the effect of destroying the condition of confidence and trust implied within the Contract.

10 175. It was conduct entitling the claimant, to resign, with or without notice and to hold herself as constructively dismissed in terms of section 95(1)(c) of the ERA.

15 176. In subsequently confirming her resignation with three months' notice, in her letter of 30<sup>th</sup> December 2019, the claimant so resigned partly in response to the respondent's said material breach of contract.

177. The claimant was constructively dismissed by the respondent in terms of section 95(1)(c) of the Employment Rights Act 1996.

20 178. Had the respondents not issued the claimant with a verbal warning on 4<sup>th</sup> November 2019, on the balance of probabilities, the claimant would separately have brought her employment with the respondent to an end on a date not later than 30<sup>th</sup> March 2020, in accordance with the written and  
25 unwritten notice of intention to resign issued by her to the respondent on 30<sup>th</sup> April 2019. In those circumstances, loss of earnings and related benefits sustained by the claimant in consequence of her constructive dismissal, after the 30<sup>th</sup> of March 2020, does not fall to be regarded as loss attributable to  
30 action taken by the respondents in breaching the claimant's Contract of Employment.

179. Notwithstanding the conduct of the claimant which had been the subject of criticism by the respondents, including the claimant's conduct at the May 2019 meeting which she held with Dr Drysdale and Ms McRailed at Butterstone and which the respondent's Managing Director advised the  
35 claimant at their meeting of 19<sup>th</sup> November 2019 she regarded as "sackable"

conduct, the respondent's Managing Director remained committed to retaining the claimant in the respondent's employment.

180. The respondent's Managing Director stated in her evidence before the Tribunal that she did not want the claimant to resign and had continued to desire to retain her in the respondent's employment because of the very positive outputs that she had delivered to and for the respondent in the earlier periods of her employment, and because of her potential to continue to do so in the areas of business development where she was at her strongest.

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### **The Claimant's Butterstone May 2019 Conduct**

181. The claimant's conduct in making unsubstantiated, pejorative and speculative statements to two Senior Managers at Butterstone in May of 2019 ("the May 2019 Butterstone conduct"); including in interrogating Dr Steven Drysdale about the former employee and about the respondent's Managing Director's relationship with the employee, in circumstances in which no grounds existed upon which she might form and hold the reasonable belief that doing so was in the public interest, and or, that doing so showed or tended to show that the health or safety of any individual was being or was likely to be endangered, and or that information tending to show any matter falling within any of the circumstances described in section 43B(1)(a) to (e) of the ERA had been or was likely to be deliberately concealed, had the effect of undermining the position and authority of the respondent's Managing Director to whom she reported and of the respondent's Board in the eyes of the Senior Managers to whom she made the statements and directed her questions. Absent its being contained internally, it had the potential to seriously damage the respondent's reputation in the field in which they operated.

182. In her then appointment of Chief Executive Officer, the claimant knew or ought reasonably to have known that that conduct would have that effect and further that she had no ground upon which to hold the reasonable belief that the statement which she made was true or that its making was in the public interest.

183. The claimant's May 2019 Butterstone conduct, objectively viewed in the circumstances pertaining, was blameworthy conduct for the purposes of section 122(2) and section 123(6) of the ERA 1996.
- 5
184. The claimant's May 2019 Butterstone conduct, while having the potential to cause or contribute to the claimant's dismissal, in the event it did not so cause or contribute to the dismissal, by reason of the respondent's continuing to desire to seek to retain the claimant in their employment notwithstanding the conduct, a position confirmed in evidence by the respondent's Managing Director.
- 10
185. In consequence of her constructive unfair dismissal the claimant is entitled to a basic award in terms of section 119 of the Employment Rights Act 1996.
- 15
186. The arithmetic value of that basic award, before deductions, is agreed between the parties in an amount binding upon the Tribunal, of £3,150.
187. It is just and equitable, in the circumstances presented, that the claimant's blameworthy conduct at Butterstone in May 2020 be reflected by the Tribunal reducing the basic award to which she would otherwise be entitled, by an amount of £630, being an amount equivalent to  $\frac{1}{5}$  and resulting in a balance of basic award after reduction of £2,835.
- 20
188. Any loss sustained by the claimant in consequence of the dismissal, beyond the Effective Date of Termination 30<sup>th</sup> March 2020, to which date she was fully paid by the respondent and by which date on the balance of probabilities and at the latest, her employment would have terminated in terms of the unwithdrawn notice given by her on 30<sup>th</sup> April 2019, not being loss attributable to action taken by the respondent upon which she is entitled to found for the purposes of resiling from the contract, the claimant is not entitled to be compensated by the respondent for loss of earnings and associated benefits beyond that date.
- 25
- 30

189. The claimant is entitled to a compensatory award in the sum of £300 being the amount agreed between the parties as binding upon the Tribunal in respect of compensation for loss of statutory rights.

5 **The Applicable Law**

190. The following list of authorities was handed up by the respondent's representative to some of which reference was made in the course of submission.

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1. **Peter Wood v Bromley College and others** – Judgment dated 25<sup>th</sup> January 2021 on the Employment Tribunal website – Judgment of the London South Employment Tribunal, paragraph 136

15

2. **Mrs D Greaves v The Unity Centre and Mr Bevis** – Judgment dated 30<sup>th</sup> November 2020 on the Employment Tribunal website

3. **Western Excavating (ECC) Limited v Sharp** [1978] ICR 121

20

4. **Formalic v Bank of Credit and Commerce International SA** (in liquidation) [1997] IRLR 462

5. **Omilaju v Waltham Forest London Borough Council** [2005] IRLR 35

25

6. **W E Cox Turner (International) Limited v Crook** [1981] ICR 823

7. **Day v Pickles Farms** [1999] IRLR 217

30

8. **Mr C Adams v Carpet Right Plc** – Judgment dated 25<sup>th</sup> June 2018 on Tribunal website

191. The Tribunal found the case law to which it was referred in the course of submissions to be both relevant and helpful.

192. The legislative provisions relating to; the making of a qualifying and protected disclosures, protection from suffering detriment in consequence of the same, of constructive unfair dismissal, entitlement to basic and compensatory awards in the event of a complaint of unfair dismissal succeeding and the making of deductions from both basic and compensatory awards are set out respectively in the following provisions of the Employment Rights Act 1996:-

- (a) **Protected Disclosures** – Part IVA, section 43A of the ERA
- (b) **Disclosures qualifying for protection** – section 43B
- (c) **Persons to whom disclosures are made** – sections 43C to sections 43H
- (d) **Protection from suffering detriment in consequence of making a protected disclosure** – Part V, section 47(B) ERA
- (e) **Circumstances in which a person is to be regarded as constructively dismissed** – section 95(1)(c) of the ERA
- (f) **Fairness of a dismissal** – section 98 ERA
- (g) **Calculation of the “basic award”** – section 119 ERA
- (h) **Reductions in basic award** – section 122 ERA
- (i) **Compensatory award** – section 123
- (j) **Reduction in compensatory award** – section 123(6)

193. The terms of the above statutory provisions which are here referred to for their terms and incorporated for reasons of brevity, are readily accessible on the internet and they are accordingly not set out in detail in this Note of Reasons, save as where referred to in the Discussion section.

### **Submissions for the Claimant**

194. The evidence led in the case covered substantial areas of background and in the submissions made for the claimant there occurred reference to a number of these. In those circumstances, and for completeness sake, I set out below



the claimant's submissions, as noted in full, and where used by her, in the first person.

5 195. For the avoidance of doubt, and lest it appear from the same that the claimant was in places seeking to give additional evidence in the course of making submissions, Ms Gibson acknowledged, at the outset, her understanding that submissions were not a vehicle for the giving of further evidence and explained that if it appeared that she was doing so, that would not be deliberate and only due to her unfamiliarity with the process.

10 196. At the outset of her submissions the claimant sought to apologise for what she anticipated would be an inability on her part to direct the Tribunal to the applicable law, as she appeared on her own behalf. The Employment Judge sought to reassure the claimant, by reiterating the position outlined by him at  
15 the commencement of the Hearing when the claimant had expressed a similar concern, that the Employment Tribunal is a forum designed by Parliament for the purposes, amongst others, of facilitating parties access to justice without the requirement for representation of any type, legally qualified or otherwise. Further, that the claimant could rely upon the Tribunal to seek  
20 to apply the applicable law to the Findings in Fact which on its consideration of the evidence presented, it made in the case.

25 197. The claimant stated that she had found revisiting, in the course of the Hearing, the months leading up to her resignation to be an emotional experience. She stated that the witnesses whom she had led had described her as a person having a warm and kind personality who cared about people and who took relationships seriously. Against that background she encouraged the Tribunal to pay little regard to the negative statements, apparently made by some Managers and staff, in their exit interviews but  
30 rather to regard these as "unprofessional name calling".

198. The claimant went on to submit that she had been stunned by the evidence of Dr Urquhart and now had a better understanding of matters. At the time she had been confused and the respondents had not shared with her the reported

reasons for their concerns. Had they done so she would have made every effort to address and rectify her relationships with the individuals concerned.

5 199. In the claimant's submission, there had occurred a series of events and acts on the part of her employer which extended to her being constructively unfairly dismissed. Those events had been associated with her concerns with the respondent's poor decision making in not imposing the sanction of dismissal upon an employee hereafter referred to as "person B" as the outcome of the disciplinary process to which person B was subjected and  
10 separately associated with her decision to "share certain child care allegations" about a former employee of the respondents hereafter referred to as "A", with two employees of the respondent who were Line Managers by and reported to her.

15 200. In relation to that first matter the claimant stated in submission that there was no malicious element in what she had decided to do. Rather she had considered that she had no option but to put in an anonymous complaint as she wanted reassurance from the Care Inspectorate about the steps that she had taken within the organisation. In respect of her communicating certain  
20 historical allegations to two members of the management team for whom she had line management responsibility, the claimant stated in submissions that she thought it was important that she do so because if she had been "run over by a bus, that information would have been lost" (that was a submission for which there was no evidential basis, the claimant not having given any  
25 evidence to that effect nor having put that proposition to any of the respondent's witnesses in cross examination).

30 201. In relation to her April 2019 conversation with two of her management team, the claimant invited the Tribunal to disbelieve Dr Drysdale when he said in his evidence, and as he had reported back to the respondent's Managing Director, that the claimant had sought to interrogate him about the Managing Director's relationship with a previous employee of the respondent's hereafter referred to as "person A" about whom she, the claimant, had made the statements which he, Dr Drysdale, had reported back to the Board. In the  
35 same way that she regarded and invited the Tribunal to hold Dr Drysdale as

being untruthful, on that matter, the claimant also submitted that in listening to what Dr Drysdale reported back to it in April 2019, the Board and the Managing Director should have likewise considered that to be unreliable and untruthful and should have dismissed what he said. She invited the Tribunal to do so submitted that the Board should have done so on the basis that it was unlikely that she, the claimant, would have asked Dr Drysdale questions about the Managing Director and person A when the Managing Director herself had already told the claimant about those things prior to her taking up her appointment as CEO, and prior to she and the Managing Director having lunch with person A.

202. The claimant submitted that she had found the treatment which she had experienced at the respondent's hands to be extremely disruptive and something which had destroyed her self-belief. She stated that she believed that she demonstrated a willingness to listen and an openness to change together with a desire to resolve matters, as she was an individual who was "solution focused".

203. She had been told, in April 2019, that she was not prepared to accept reality.

204. She believed that there had been a lack of good faith on the part of the respondents in dealing with her, right from the time of the meeting in the Houston House Hotel in April of 2019. That was the first occasion upon which she had been directly told that she lacked interpersonal skills or that people could not work with her or that they did not like her. Prior to April 2019 she had only ever received positive feedback from the respondents or any members of staff. She would have had numerous questions to gain information about how things could have changed in that way but the respondents did not provide her with the details of any specific instance at that meeting. In relation to Dr Drysdale, he had previously described himself, in his evidence, as having a positive relationship with the claimant. In early 2017 he had decided to spread his wings and had applied for a promoted post. He had shared the feedback which he had received from that interview

process with the claimant. She offered him her support in applications for other posts.

5 205. The claimant went on to state; “At the 3<sup>rd</sup> April 2019 meeting I was told that Mr Greenshields had said that he had left because I micromanaged him but my evidence was that I had a positive relationship with him. I had understood that he had left due to personal circumstances. I was very confused after the meeting of 3<sup>rd</sup> April 2019. I did not know how to address the issues. I felt devastated. I was working extremely hard to achieve the registration of the new school. I felt that the mat had been pulled out from under my feet.

10 206. I considered it unfair to have such a discussion in what was a public place, the foyer of the hotel. I felt that the remarks relayed to me at the meeting were contrary to my previous experience. No evidence was produced to me at the meeting, by the respondents, to substantiate that any of the Managers had left because of my management style. I do accept that one member of staff (Cargill) did have issues with me but I did provide her with support for which she was grateful.

15 207. Dr Drysdale acknowledged that I had provided support to him also but also said here in the Tribunal that he began to feel that I had been actually encouraging him to leave.

20 208. In relation to the meeting of 28<sup>th</sup> May 2019, Mr Baillie’s evidence should be accepted. They [the respondents] were raising issues at the meeting in terms of Managers not being able to work with me, Miss Cargill’s issues regarding bullying and issues regarding the allegations made about A.

25 209. They, Miss Hughes and Mrs Sheridan were angry. “The claimant” was upset. I was shouted at and not listened to at the meeting. Miss Hughes raised concerns in relation to an email that I had sent her a year previously in which I challenged her disciplinary decision about person B which she described as “a rant”. I then realised that Miss Hughes was still angry about my challenging her disciplinary decision.

210. I do not understand why my view as CEO was not allowed to influence Miss Hughes' disciplinary decision.

211. Shortly after that, Winn Wood and I had a discussion about Dr Urquhart. Miss Wood suggested Dr Urquhart would be appropriate as a mediator so when I subsequently had a meeting with Dr Urquhart I thought I was coming to that meeting as part of a mediation process.

212. At the meeting which I had with Dr Urquhart on the 11<sup>th</sup> of June, I was given the option of accepting a new job on restructuring or redundancy.

213. There was no proper consultation about those options or about the potential redundancy of the CEO post. There was no proper job marketing or job description created for the new post. I believe they were setting me up to fail. I believe that the job of CEO was effectively being given to Dr Drysdale with the title changed to Director of Children's Services. Following my resignation my "new" post has not been re-advertised so I don't think it was ever a genuine redundancy. At the June 11 meeting I was distressed and crying. I could not understand why I was being taken from my role.

214. However, I am a solution focused person and so decided to soldier on despite it because I was committed to the children and families at Butterstone and did not want to let them down. I wanted to make sure that the school was up and running and the relationships established. I felt financially that I had no option but to take up the post. I didn't regard it as a promotion. I was then given tasks which did not suit my skillset or strengths or background. These included dealing with resources and health and safety matters but I decided to carry on because at the June 11<sup>th</sup> meeting I was told I would have the lead role in developing Butterstone and I regarded it as an opportunity. I had also invested so much in Butterstone so I began to see the opportunities and was enthusiastic to my colleagues but still recognised concern about what had happened.

215. Within the first few weeks, my line management responsibilities at Butterstone however were removed and I was told that Dr Drysdale would be line managing those members.

5 216. I was still being line managed by Mrs Sheridan at that time. We used to have regular weekly catch ups. Mrs Sheridan was still positive and she raised no issues re my performance. The tasks that I were given, however, were slightly different from the job description and I was asked to deliver; capacity building training for Senior Managers, to take the lead role for quality assurance. Mrs Sheridan told me that, in mid-October I believe, that I was to meet with Dr Urquhart who had become my Line Manager. I was anxious about that based on my two previous meetings with him.

### **The meeting of 28<sup>th</sup> October 2019**

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217. On the 28<sup>th</sup> of October Dr Urquhart, as my Line Manager, presented me with smart goals. These were *fait accomplis* without any prior discussion. There was no option to review them. At the meeting he made no effort to find out about my work previously done for the organisation. He did not know about the business plan which I had prepared for the registration of Butterstone. He was unaware of my then current tasks. He did seem aware that there were tensions between myself and the Managing Director. I felt he did not have a grasp of my contribution to the organisation. He did not seem to know that I was leading the Butterstone development.

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### **“Procedural unfairness”**

30 218. Nevertheless I began to address the first goal which was to produce a detailed three year strategic business and development plan. I set up two meetings, one with the Board and one with the Senior Management Team to gather their views on what they thought the goals should be. I think there was a lack of clarity on the 28<sup>th</sup> of October. Dr Urquhart did not make clear

his expectation of the process that I should follow. I still cannot understand why they believe that there was an issue with what I did.

5 219. I was called to a meeting on the 4<sup>th</sup> of November with no notice. We were supposed to next meet a month later on the 25<sup>th</sup> of November to review progress with the smart goals. At the 4<sup>th</sup> November 2019 meeting I was given a verbal warning.

10 220. There is a conflict between the evidence of Dr Urquhart who says that the giving of that warning was all discussed with and agreed by Mrs Sheridan and Julie Hughes in advance of his meeting with me, on the one hand, and the evidence of Miss Hughes and Mrs Sheridan, on the other who both say that they did not know in advance of the meeting that Dr Urquhart was going to issue a verbal warning. Miss Hughes, who was at the meeting, she says  
15 just as a note taker, did not intervene to stop it and even afterwards she did not intervene to change it. It was devastating for me to face disciplinary action for the first time. The impact has been dreadful. I believe that it has also had a professional impact and cost me the permanent CEO post which I applied for after the fixed term post which I got following my resignation  
20 because I had to disclose it in the application for the permanent post.

221. At the 4<sup>th</sup> November meeting in the verbal warning, recorded at page 323 of the Bundle, I was warned about three areas: Performance, Behaviour and Relationships, and not only about my approach to preparing a strategic plan.  
25 I was told that the first two items on the list of smart goals had not been achieved that is; preparation of the detailed three years strategic business and development plan and identifying and presenting four realistic opportunities for business growth each month, and that this was a clear failure of performance, but I had only been given those goals four days earlier  
30 on the 28<sup>th</sup> of October and had been told that my performance against achieving them would be reviewed at a meeting in a month's time on the 25<sup>th</sup> of November.

35 222. The aspects of my behaviour that were criticised were that I had sought to get input to the strategic business plan from Senior Managers at the start of the

process. That's always been my approach but I was told by Dr Urquhart that the Board had made it clear that I was the only person who had the expertise and knowledge to complete the task and that it shouldn't be delegated to anyone else and that gaining thoughts and ideas from others was something that should be done after the plan had been delivered to the Board and agreed.

223. Finally, I was told that I needed to improve my relationship with staff since there had been a large number of senior and junior staff who had informed the Board that they couldn't work with me but, I was given no details of who those people were and by that time had no line management responsibilities so had no vehicle through which to address an improvement. I was told that the Board had decided to issue a verbal warning to me which would remain on my file for three months, that substantial improvement was required in all three areas and if the Board considered that that improvement has been insufficient they would "*review other options available to them*". I was told that the next meeting would be the meeting scheduled for 25<sup>th</sup> November 2019. I was given no explanation of what "*other options available to them*" might mean in those circumstances. I thought that it might mean I would be dismissed. I found it difficult to reflect on and took some days annual leave. I then sent an email to the respondents, within the seven day period provided for in the disciplinary policy, and said that the respondent should not have allowed the verbal warning and that it felt like I had been slapped in the face. That was my appeal. I asked the respondent for a response by return. I received no response. When it became apparent that I would not be receiving a response I felt it was a clear message that the respondents did not value me.

224. Mrs Sheridan and Miss McSeminay then came into my office on the 19<sup>th</sup> of November 2019. They had a meeting with me which is noted at pages 325 to 329 (of the Bundle). At the meeting I think Mrs Sheridan made her position clear to me by various things that she said:- she said that my "*reality was not her reality or the world's reality.*", that "*because she cared for (me) she hadn't wanted (me) to hear what people were saying, but it was too late now and*



*nothing more could be done*". She said that what I had done with Tam Baillie regarding the ("Person A") situation amounted to unprofessional behaviour and gross misconduct. She said it had been a sackable offence, she divulged some of the content of my solicitor's letter to the Board Secretary.

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225. I had been warned to review and improve my performance by the 25<sup>th</sup> of November but had still been given no detailed information about the relationship issues. I sent an email saying that I was feeling anxious but got no response so that weekend I was in a state of anxiety and my daughter spoke to me and realised I was upset. She said that I had to go to see the doctor. I did so and was signed off with work related stress.

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226. I was committed to the organisation and was loyal to Mrs Sheridan. I could not come to terms with how I was being treated. It took me time to realise that I had no option but to resign. I felt as if my services were no longer required. I resigned on the 30<sup>th</sup> of December. My letter of resignation dated 30<sup>th</sup> of December is at page 336 and 337 of the Bundle. When I was signed off the respondents made no attempt to contact me other than providing me with details of the counselling contract for employees. I found that hurtful. They had no conversation with me about my health and wellbeing. I do not think they followed their own absence management procedures.

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227. When I was off sick, I applied for (and subsequently obtained) a non-executive post with NHS 24 Board. It is a four year appointment which started on 1<sup>st</sup> of May 2020 with a part-time salary of £8,584 for seven hours per week. Getting that post has helped build my confidence again. I have also obtained an appointment with the Joint Harmony Education Board beginning from January 2021 and was interim CEO at Ochil Towers School from June to December 2020 where I earned the amounts in the adjusted Schedule of Loss at page 496 [when revising insert at the appropriate paragraph – documentary evidence – the specific agreement of the adjusted earnings figure here of £19,080.01]. The new job with "Harmony Education Board" – delete "joint" insert "joined" will be £8,000 per annum? in my appointment as interim CEO of Ochil Towers School June to December 2020. I received positive feedback from the staff.

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228. In conclusion in relation to the negative evidence provided by the respondent, I say there is nothing in the file of documents (the Bundle) to prove it. The exit interviews are appalling, no up to date HR input. Only three are produced in the Bundle, two of which mention me and both of which I have challenged. I believe that the comments made about me are mere name calling, describing me as "*mad and dangerous*". These are matters which were never raised with me. There is no evidence of any fact finding regarding my performance, my grievances or my complaints. The suggestion that 15 Managers have left because of me is unfounded; Lillian D left to go back to the Prison Service, Alistair Clark retired, Douglas Holiday left because of a disciplinary process, Gary Greentree left because of family circumstances. I have no authority to make decisions about dismissing people.

229. The claimant's witnesses were credible. The respondent's witnesses were confused and contradictory. They disclosed a situation of poor communication between the Directors and Dr Urquhart in relation to the verbal warning. The exit interviews can be seen to be little more than tittle tattle. I believe I was set up to fail by deliberate actions of my employer which led to my constructive unfair dismissal because I shared historical allegations. I was only doing my job as I saw it to protect children and young people. That's what's most important to me.

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### **Submissions for the Respondent**

230. The respondent's representative commenced his submissions by referring the Tribunal to the recorded issues for determination in the case, which had been confirmed with parties by the Tribunal at the outset of the Hearing.

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Those are set out at paragraph 3 above and accordingly not reiterated at length here

He reminded the Tribunal:-

5 (a) that the alleged “qualifying disclosure” which the claimant gave notice of offering to prove was one intending to show, in terms of section 43B(1):-

(d) “that the health or safety of any individual has been, is being or is likely to be endangered and or,

10 (f) that information tending to show any matter falling within any one of the preceding paragraphs”, [that is sub-paragraphs (a) to (f) inclusive of section 43B(1) of the ERA], “has been, or is likely to be deliberately concealed.

15 (b) That to qualify, an alleged disclosure required to be a disclosure of information which in the reasonable belief of the worker making the disclosure [is made in the public interest and] tends to show the matters described at sub-paragraphs (d) and (f) of section 43B(f).

20 (c) He submitted that while the question of whether or not a worker held such a belief was a matter which fell to be viewed from the subjective standpoint of the worker, the fact that the statutory provision required that the belief be held reasonably, introduced an element of objectivity; even a genuine belief, if  
25 not held reasonably in the circumstances, would not be sufficient for qualifying purposes.

30 (d) Under reference to the case of **Peter Wood** ----- number 1 on the respondent’s list he invited the Tribunal to consider firstly whether on the evidence led, the claimant could be said to have disclosed sufficient information to amount to a protected disclosure.

5 (e) Separately, and let it be assumed that a qualifying disclosure had been made, under reference to the case of **Grieves** (number 2 on the respondent's List of Authorities), he submitted that the Tribunal required to consider, in terms of the section, whether any separate and distinct detriment had occurred to which the claimant had been subjected by the respondent, done on the ground that the claimant had made that protected disclosure.

10 (f) Only, in the respondent's representative's submission, if the claimant succeeded in proving on the balance of probabilities that both those elements were present, could her complaint, in this regard, succeed.

15 231. The claimant, identified two potential communications/incidents one or other or both of which she appeared to assert amounted to a protected disclosure:-

(a) The first of these related to an employee hereinafter referred to as "person B/the person B issue"; and

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(i) to the disciplinary sanction applied by the respondents to person B by way of outcome to a disciplinary process to which that person was subjected, and

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(ii) the claimant's communication to the Disciplinary Officer (Board member) Julie Hughes and to the respondent's Managing Director, of the claimant's disagreement with that outcome, as summarised and reiterated in her email to Julie Hughes of 1<sup>st</sup> April 2018 (produced at 250 to 253 of the Bundle);

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(iii) That disciplinary decision was to impose a sanction of final written warning, whereas the claimant's assertion was, and remained, that a sanction of dismissal which reflected her own view of what would be appropriate, should be substituted for it,

(b) The second was her communication, to two of the respondent's Managers who at that time reported to her and whom she line managed, at Butterstone in May 2019 of a hearsay historical allegation ("the person A incident") relating to a person, hereafter referred to as "person A", who, some years prior to the claimant's first engagement with the respondents had been employed by the respondents. That allegation, investigated both at the historical time and subsequently and not found to be established, referred to a time some 20 years or so earlier and long before person A had had any engagement/been employed by the respondents

232. The respondent's representative submitted that the person B incident could not on any view constitute a protected disclosure made by the respondent. The conduct/occurrence which resulted in person B being convened to disciplinary procedure was not conduct disclosed by the claimant. The claimant was not the "whistleblower" indeed she had been on holiday at the time of that disclosure. Rather, it was a fellow member of staff of person B who made the disclosure.

233. Separately and in any event, he submitted, the following were undisputed matters of fact:-

(a) person B, in accordance with the respondent's then applicable policies was immediately suspended pending an investigation.

- 5
- (b) The SSSC were advised.
- (c) A fact finding investigation was conducted which produced a recommendation that there was a case for person B to answer through a disciplinary process,
- 10
- (d) the respondent's assessment, which incorporated the advice of the Child Protection Officer for the respondent's associated Trust was that the matter fell to be dealt with as a practice conduct issue and not as a child protection issue
- (e) That person B was convened to a Disciplinary Hearing which proceeded before Julie Hughes, a very experienced Disciplinary Officer.
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- (f) That in the course of the Disciplinary Hearing, the allegation which the investigation had recommended person B required to answer was upheld but,
- 20
- (g) that there was no evidence to suggest that the resident had been harmed or was in danger of being harmed, and
- (h) that there had been in the particular residential house a history of staff behaving in the particular way.
- 25
- (i) Against the background of those established facts, the Disciplinary Officer concluded, in all the circumstances, that the sanction of dismissal was not merited but rather that of the imposition of a final written warning combined with a change in procedures, to ensure that staff were clear that such conduct was neither appropriate nor acceptable going forward was the appropriate sanction.
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- (j) That the outcome was communicated to the SSSC who declared themselves content with it.
- 5 (k) The claimant however disagreed and expressed to the Disciplining Officer her disagreement with the decision not to dismiss person B.
- 10 (l) The claimant did the same notwithstanding the fact that she had not been involved in the process and that it was not her position or place to seek to influence the outcome of the disciplinary process, that being a matter properly within the decision making remit of the Disciplining Officer who presided at the Disciplinary Hearing.
- 15 (m) The claimant then sent the email on 1<sup>st</sup> April 2018, produced at page 250 of the Bundle, to the Disciplinary Officer Miss Hughes disagreeing with her decision which she described as “poor decision making”.
- 20 (n) In the email of 1<sup>st</sup> April 2018 the claimant disclosed no new information regarding the incident for which person B had been disciplined.

25 234. The respondent’s representative invited the Tribunal to hold that neither that email, nor any of the claimant’s other expressed criticism of the Disciplinary Hearing outcome, constituted a protected disclosure.

30 235. The claimant had thereafter made an anonymous complaint about the incident in which she stated that “*a young person was placed at risk when child protection procedures were not followed*”, to the Care Commission.

236. In consequence of which a Care Commission’s representative attended at the respondent’s premises and carried out an investigation. During that investigation which they declared themselves satisfied that the matter had

been properly dealt with by the respondents as a “practice issue” and that they had no reservations about the decision to retain person B in employment with young persons. The respondent’s were unaware that the claimant was the anonymous complainer. The claimant did not tell them that she was.

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237. The Care Commission had not and did not consider that the matter should have been dealt with as a child protection issue as the claimant asserted it should have been, rather they confirmed that they were content with and approved of the changes to internal procedures which the respondent had put in place, both in relation to making the position clear to staff going forward and in relation to informing all of the same parties, even where treating a matter as a practice issue, as those whom they would inform were they treating it as a child protection issue.

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15 238. When the Care Commission investigator attended, the claimant instructed Dr Drysdale, to facilitate the Care Commission’s investigation. She did not tell him or the respondent’s Directors that she was the source of the anonymous complaint.

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239. In a letter dated 21<sup>st</sup> August 2018, the Care Inspectorate’s Complaint Inspector wrote to the respondents, addressed to the claimant in her capacity as Chief Executive of the respondent (copied at page 274 of the Bundle), referring to the anonymous complaint that “*a young person was placed at risk when child protection procedures were not followed*” and confirming that as a result of the investigation carried out by them, they did not identify any evidence to uphold the complaint.

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240. Notwithstanding that determination by the Care Inspectorate the claimant had continued to disagree with and be dissatisfied with the fact that person B had not been dismissed as a result of the Disciplinary Hearing.

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241. Separately and in any event, as the claimant had made her complaint anonymously and as the respondents were wholly unaware that it was she who had made the complaint, no question of her having suffered detriment at



the hands of the respondent on the grounds that she had made such a complaint could arise.

5 242. In relation to the person A incident, at Butterstone at the Open Day upon the claimant's communications in relation to which, she also relied as constituting the making of a protected disclosure, the respondent's representative submitted as follows:-

10 (a) That it was clear, on the evidence, including the claimant's evidence that as far as she was concerned she was already aware of all that was said at that meeting prior to having lunch with person A and the respondent's Managing Director before taking up her appointment with the respondent. The respondent's Managing Director had been adamant in her evidence that that was the case. It was entirely credible and consistent with the approach taken by the MD to the claimant, in relation to person A, that she would have done so. The claimant in her own evidence confirming that the MD talked to her about person A on a regular basis.

20 (b) The claimant's position, that those matters had not been raised with her at all prior to her discussion with Mr Baillie was incredible and inconsistent with her own evidence. It was further inconsistent with the evidence of the MD that she, the MD, had arranged to meet with Mr Tam Baillie (in discussion with whom the claimant now asserts she first became aware of the historical allegations), a whole year earlier in Edinburgh, to share with Mr Baillie what she already knew about those matters, including confirming to Mr Baillie that there had been no issues arising concerning person A during the period of his employment with the respondents and, in order to confirm from Mr Baillie, in the context of his having been person A's Line Manager at the time of the alleged incident, whether he was aware of anything relating to person A and in answer to which,

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on the MD's evidence, he, Mr Baillie, had confirmed to her was not the case.

5 (c) Against the above background and the claimant's evidence which was to the effect that he, Mr Baillie, had told her what the MD had told him, he invited the Tribunal to find that the claimant was already aware of the historical allegations and to regard as neither credible nor consistent with any of the other sources of evidence the claimant's assertion that he, Mr Baillie, had told her that it had come as a revelation and a shock to him a year earlier.

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243. The respondent's representative directed the Tribunal's attention to:-

15 (a) the evidence of the Managing Director who had said that at her Edinburgh meeting with Mr Baillie, it was confirmed that neither was aware of anything that the other was not already aware of. That at that meeting Mr Baillie had also appeared vociferous in his anger against person A and had stated "*he would follow person A until he died and he would make sure he got his comeuppance*" and that the Managing Director, for her part, had been taken aback by his being so and did not understand his taking such a position against the background where the allegations had all been investigated and not found to be

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25 substantiated.

(b) That Mr Baillie had volunteered on his own evidence:-

30 (i) that he had notified the Care Inspectorate of the person A issue many years after the event in order to "*cover his own back going into a public appointment*";

- (ii) he had also raised the matter in 1990 with Strathclyde Region Social Work when he became aware that person A was employed by them at that time; and,
- 5 (iii) had again spoken to the staff of the current public inquiry who in turn had referred the matter, as they were obliged to do, to the police who had subsequently interviewed Mr Baillie.
- 10 (c) It had been clear to the Managing Director, in her meeting with Mr Baillie,
- (i) that Mr Baillie was angry and wanted to get at person A.
- 15 (ii) The Managing Director had asked him directly if Mr Baillie was aware of anything additional and in particular whether he was aware of any subsequent allegations which related to person A's period of employment with the respondent,
- 20 (iii) that in response, Mr Baillie had made clear that he was aware only of the same historical allegation dating from 1980 which person A had disclosed to the MD prior to his applying for an appointment with the respondents, and which the MD had in turn disclosed to the claimant at the time of her taking up appointment, but notwithstanding had displayed clear anger towards her.
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- (d) The respondent's representative submitted that at this point a divergence emerged between the evidence of Mr Baillie on the one hand, that of the claimant on the other and that of Dr Drysdale (about what the claimant had said to Dr Drysdale at the Butterstone meeting);-
- 30 (i) Dr Drysdale's direct evidence to the Tribunal was consistent with that of the Managing Director's evidence of

what Dr Drysdale had reported as the remarks made by the claimant.

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- (ii) The evidence of the MD and of Dr Drysdale had confirmed that in the course of the Butterstone meeting the claimant had stated that person A “used hypnosis to take advantage of young persons” and when challenged by Dr Drysdale as to what evidence, if any, existed to substantiate such an allegation the claimant had responded by saying that Tam Baillie believed it to be true.
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- (iii) The claimant in her evidence before the Tribunal has stated that Tam Baillie told her that and she was just passing on what he had said.
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- (iv) Mr Baillie, in his evidence, on the other hand had vehemently denied that he had ever said such a thing to the claimant but rather had only recounted to her that he had on a separate occasion witnessed person A demonstrating the use of hypnosis at a party.
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- (v) Mr Baillie had accepted, in cross examination, that no evidence or detail existed to substantiate the proposition that person A used hypnosis to take advantage of young persons and that that could be nothing more than speculation.
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244. The respondent’s representative submitted that that divergence and conflict in the evidence resulted in the claimant’s evidence as to what Mr Baillie had allegedly said to her and as to what she genuinely believed when making the statements which she made to Dr Drysdale and Ms McRailed, as being both unreliable and incredible. Separately and in any event, on the basis of Mr Baillie’s evidence, that, in the alternative it was not reasonable for the claimant to have held any such genuine belief.

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245. What the evidence did establish, in his submission, was that at a meeting between the Managing Director and Mr Baillie in 2018, Mr Baillie had confirmed that he was already aware of all that the Managing Director recounted to him and for his part he brought to her attention nothing new about person A which she did not already know.

246. On Mr Baillie's own evidence what he had recounted to the claimant at her meeting with him was a mere anecdote about a party trick and at no stage had he made an allegation or told the claimant that person A "*hypnotised people to take advantage of them.*"

247. The respondent's representative further submitted that this conflict of evidence, particularly that between the evidence of Mr Baillie and of the claimant on such an important matter, called into question the credibility and reliability of both Mr Baillie's and of the claimant's evidence in relation to their respective accounts of the claimant's subsequent meeting with the MD and Julie Hughes on 28 of May 2019 to which he accompanied the claimant.

248. The respondent's representative separately submitted that, even taken at its highest, the evidence, including the claimant's own evidence of what she said to Dr Drysdale and Ms McRailed in May of 2019 at Butterstone, fell far short of what would be required to amount to one of the qualifying and thus protected disclosures pled by her in terms of section 43B(1)(d) – Health and Safety and or (f) Concealment.

(a) In relation to health and safety the claimant had in her evidence confirmed that, at the time of saying what she said, there was no threat either proximate or identifiable which she was seeking to address and thus, he submitted, even taken at its highest what was said by the claimant did not tend to show "*that the health or safety of any individual has been, is being or is likely to be endangered*".

- 5 (b) Regarding the requirements of sub-section (1)(f) again, taken at its highest, there was nothing in what was said that went to show or even suggest that “*information tending to show any matter falling within any one of the preceding paragraphs [of section 43B(1)(a) to (f)], has been or is likely to be deliberately concealed.*”
- 10 (c) Quite separately there was no evidence from any source before the Tribunal that went to show any concealment of any matter relating to person A, far less deliberate concealment.
- 15 (d) On the other hand the evidence all indicated that the respondent’s MD had shared independently with both Mr Baillie and the claimant all that she had become aware of in relation to person A and had further fully discussed the same to relevant Local Authority Departments and other Agencies in the course of making her own pre-employment enquiries about person A, under the “safer recruitment process”, and had been reassured by the relevant Heads of Department that no concerns existed in relation to the employment of person A in appointments similar to that for which he was applying with the respondent at that time.
- 20 (e) Separately Dr Drysdale had confirmed in evidence that following an anonymous complaint made to the Care Inspectorate, about person A, the Inspectorate had confirmed to him that they had found no merit in any such complaint.
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30 249. The respondent’s representative concluded that portion of his submissions by inviting the Tribunal to hold, on the evidence,

- (a) that the claimant had not established that a protected disclosure had been made by her on either occasion.

(b) On neither of the two occasions founded upon was anything new raised by the claimant.

5 (c) In relation to the person B incident, the claimant had made no disclosure of information to the respondents whatsoever but rather in an email to Julie Hughes had merely expressed her thoughts and criticisms of Julie Hughes's disciplinary outcome sanction.

10 (d) She had never put anything in writing about person A and,

(e) neither had there been any evidence that went to establish that concealment had occurred. Finally there was no danger to health and safety to any individual demonstrated.

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250. On the above grounds, of failure to establish the making of a protected disclosure, he invited the Tribunal to dismiss the claimant's complaints of having suffered detriment, and or of having been dismissed, in consequence of making any such disclosure.

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251. In the alternative and let it be assumed that the Tribunal was to hold that a protected disclosure had been made either in relation to the person B incident on 1<sup>st</sup> of April 2018 twenty months prior to the claimant's resignation or, in relation to the person A incident in mid May 2019 that is to say before the 28<sup>th</sup>  
25 of May 2019, the secondary question as to whether any separate, distinct and consequential detriment had been established on the evidence for the purposes of section 47B(1) of the ERA 1996 which provides that "a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker  
30 has made a protected disclosure, fell to be answered in the negative.

252. In the respondent's representative's submission for a claim to succeed under that section there must be proved to be a causal link between an established protected disclosure relied upon and a specific detriment suffered. In his

submission the claimant had failed to identify in her pleadings, or to establish in evidence before the Tribunal, any specific detriment causally linked to one or other of the alleged protected disclosures. It could not reasonably be taken to be her case that all of the treatment of which she complains was causally linked and specifically to one or other of the alleged disclosures. Following the person B incident in April 2018, which is relied upon by the claimant, there is no averment or evidence of anything said to be considered by the claimant as detrimental for at least a period of a year. On her evidence it was only after April 2019 that matters changed. If they did then, submitted the respondent's representative, they could not reasonably be regarded as having done so as a result of something which occurred a year earlier without some additional specification and proof of facts that went to establish a causal link between the two. *Per contra* the evidence of Julie Hughes was that while she was annoyed with the claimant's position that she, the claimant, should have been able to influence the disciplinary sanction to be applied as a result of the disciplinary process to which person B had been convened, she held no grudge against the claimant for expressing that view. Indeed her evidence was that she considered it healthy for her judgment to be questioned. She simply disagreed with what the claimant said.

253. He invited the Tribunal to hold on the evidence that no detriment linked to the person B issue alleged disclosure had been established.

254. In relation to the person A issue, the alleged disclosure said to have been made in May of 2019 post-dated the actings of the respondent which the claimant sought to rely upon as detriments and in respect of which, on the 30<sup>th</sup> of April 2019, the claimant had already sent an email (copied and produced at pages 295 to 298 of the Bundle) to the respondent's MD in which she advised that she had taken advice in relation to;

- "constructive dismissal arising from the changes to her role,
- increased expectations and responsibilities without a review of her terms and conditions which she stated was grossly unfair and,



- gave formal written notice of intention to resign from her post in or around October as she felt her current position was becoming untenable,

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- while, going on to state that she was happy to plan her exit with the Managing Director to ensure that the impact was minimal and that they agree clear targets for the period June to January the latter being, as she explained in evidence, the date by which she envisaged she would have worked the period of notice associated with her intended resignation in October.

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255. On the above basis alone the respondent's representative submitted that there could be no causal link between any of the matters complained of by the claimant in her email of 30<sup>th</sup> April 2019 and the alleged disclosure relied upon in relation to the person A incident which occurred in May 2019.

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256. Separately and in any event, far from suffering detriment in consequence of the person A alleged disclosure, the claimant had within a very few weeks of that formally accepted the new post offered to her by the respondents on reorganisation. In the respondent's representative's submission it was telling that the claimant in her submission had made no reference to her email of 30<sup>th</sup> April 2019 at page 295 of the Bundle. He submitted that it was also significant that in that email, which communicated the claimant's intention to resign in the context of what she considered to be her constructive dismissal and an offer to "plan her exit", the claimant made no mention whatsoever of the person B issue, or of any matter relating to health and safety or concealment relating to person A. Neither was mentioned. Rather, she communicated in the email that she would remain employed with the respondents for a further eight months and then give three months' notice. It was, he also submitted, telling that the claimant had not only not mentioned her email of 30<sup>th</sup> April 2019 in her submissions, but had not made any reference to it in her evidence in chief. The email and its content was evidence which went to demonstrate there was no such causal link between

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the matters complained of in it and any alleged protected disclosure or of the matters of fact said to give rise to the alleged disclosures.

5 257. Regarding what had occurred post the person A alleged alleged disclosure and the discussion of it at the meeting of 28<sup>th</sup> May 2019, amongst other matters, the claimant had shortly thereafter, in June formally and unequivocally accepted her new role under the respondent's restructuring. In the respondent's representative's submission neither the offering to her of that role by the respondents on preserved benefits, nor the claimant's 10 unequivocal acceptance of it fell within the definition of or fell to be regarded as, a detriment.

15 258. On the issue of time bar in relation to the complaints of having suffered detriment that matter was regulated by the terms of section 48(3) of the ERA which established the same three month primary time limit with provision for extension by the operation of the Early Conciliation Rules and the test of "not reasonably practicable" for the operation of the saving provisions as applied to complaints of unfair dismissal.

20 259. The respondent's representative submitted that the relevant time period fell to be measured from the date of the specific detriment about which complaint was made, that is to say not simply from the date of her resignation, in relation to all the detriments complained of. It was for the claimant to establish, on the balance of probabilities, that any detriment which could be 25 seen to have occurred more than three months from the date of the raising of proceedings formed part of a series of similar and sufficiently connected acts, or failures to act, such as to bring it within the terms of section 48(4)(a) of the ERA which provides that where an act extends over a period the "date of the act" means the last day of that period".

30 260. In the respondent's representative's submission the claimant had failed to do that, either in terms of the evidence presented or in terms of her submissions.

35 261. The claimant founded upon the meeting of 19<sup>th</sup> November 2019 as constituting the "final straw" and thereafter presented her claim form (page 1

of the Bundle) on the 23<sup>rd</sup> of March 2020 having engaged with and received from ACAS an Early Conciliation Certificate on the 6<sup>th</sup> of January. The net effect of which was to extend the statutory time limit, otherwise existing in terms of section 48(3) of the 1996 Act, from the 18<sup>th</sup> of February to the 18<sup>th</sup> of March 2020. Accordingly, the claimant's complaints of detriment, first presented on the 23<sup>rd</sup> of March were in any event outwith the early ACAS conciliation extended time limit. The claimant had had access to legal advice since from at least June 2019 and, prior to the meeting of 19<sup>th</sup> November had caused her legal representatives to write to the respondents in relation to the various matters that she now sought to rely upon. There had been no alternative case presented in evidence or submission which went to suggest or prove that it had not been reasonably practicable for the complaints of having suffered detriment to have been presented timeously. That position in any event had been one which would be inconsistent with the claimant's access to legal advice. The last of the alleged detriments, identified by the claimant as the last straw and as having occurred on the 19<sup>th</sup> of November 2019, falling, as it did, outwith the statutory period the Tribunal had no jurisdiction to consider the complaints and they fell to be dismissed for want of jurisdiction.

### **Constructive Dismissal**

262. Regarding the claimant's complaint of constructive dismissal, the respondent's representative submitted that the Tribunal must be satisfied that the claimant had not waived her right to so resign by delaying too long before doing so. Under reference to **W E Cox Turner (International) Limited v Crook** [1981] ICR 823 (number 6 on the List of Authorities) he directed the Tribunal to Lord Brown Wilkinson at page 828 where he stated:-

- that mere delay in accepting a repudiation (and in resigning on the part of an innocent party (unaccompanied by any express or implied affirmation of contract) does not constitute affirmation of the contract;
- but, if it is prolonged it may be evidence of an implied affirmation.

- Affirmation of the contract can be implied if the innocent party calls on the guilty party for further performance of the contract, since his conduct is only consistent with the continued existence of the contractual obligation.
- Moreover if the innocent party himself does acts which are only consistent with the continued existence of the contract such acts will normally show affirmation of the contract.

263. In the case of the claimant she had accepted her new appointment on the 24<sup>th</sup> of June 2019 and had enthusiastically performed under it for a period of six months [when revising check and confirm the date of the intimated “last straw” and the period of six months which included a three month period between the last straw and the 30<sup>th</sup> of December upon which she sent the letter of resignation upon which she founds and, at that time in her communicated intention a further three month period between 30<sup>th</sup> December to 30<sup>th</sup> March 2020 during which she stated it was her intention to work her notice. [19<sup>th</sup> November meeting which was precipitated by receipt by the respondent’s Managing Director of a letter from the claimant’s solicitor which suggested to her that the claimant was unhappy and not clear where things stood. – the Minute of the Meeting is at page 325.

Concerning the sixth issue namely was the claimant constructively unfairly dismissed in terms of section 95(1)(c) and section 98(4) of the ERA, the respondent’s representative submitted as follows:-

- (a) It was not sufficient for the claimant to assert or establish that the respondents behaved unreasonably. The test was the contractual test of repudiation of contract as set out in **Western Excavating v Sharp** (number 3 on the List of Authorities).
- (b) The claimant required to firstly establish that there had been a breach of contract

- (ii) that the breach had been a fundamental breach that goes to the root of the contract, and,
- 5 (iii) that she had resigned in response to that breach and not for some other reason

(c) The fundamental breach of which the claimant gave notice of intention to prove was an alleged breach of the implied duty of trust and confidence.

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(d) The onus of proof was on the claimant. It was not a matter that the respondent required to disprove.

15 264. Turning to an analysis of what, in his submission, the evidence indicated had happened to the claimant, the respondent's representative continued and submitted as follows:-

(a) Going back to late 2018 the claimant had conceded that issues about Managers leaving were becoming a cause for concern and were focused by Edwina Grant as likely to have an impact on the respondent's attainment of DDP accreditation.

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(b) Although a number of Managers had left, the respondents had neither offered to prove nor said in evidence that they were leaving because of the claimant, only that they had left during the period when she was Chief Executive Officer.

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(c) It was Dr Drysdale who had described it as "a continuity factor" and certain individual Managers/staff members who had made reference to the claimant's management technique/skills in exit interviews.

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- 5 (d) What had really brought matters to a head was Dr Drysdale's resignation but that had not resulted in the respondents wanting the claimant to leave. Rather, they wanted to keep Dr Drysdale and other Managers who appeared about to leave while also retaining the claimant and so they gave thought to putting in place a reorganisation, in the context of the Butterstone development, in order to find a solution.
- 10 (e) While the claimant maintains that from the meeting at Houston House Hotel she was being pushed out, the evidence did not support any such Finding in Fact. Separately, in terms of her correspondence of 30<sup>th</sup> April in which she intimated her intention to resign at or about the year end, the claimant had offered to "plan her exit" with the respondents and, had they wished to see her leave they could simply have accepted her offer to do so. The respondents however did not do that.
- 15 (f) The respondent's actions say clearly that that was not what they were trying to achieve or to communicate to the claimant. For example the claimant had asked for a mentor; the respondent agreed to her suggestion that that be Tam Baillie. In the new role which they created for the claimant, they considered she would be able to play to her strengths which undoubtedly lay in the areas of partnership working with local authorities and Care Inspectorate etc, while at the same time insulating her from Line Management of the Senior Management Team and thus from the potential criticisms of the type raised in exit interviews.
- 20 (g) Despite the fact that the person A issue did lead to a deterioration in that the respondent's MD viewed it as a very serious issue of misconduct on the part of the claimant which would have merited disciplinary action, the respondent, however, did not take that course but rather, continued to commit to protecting the claimant and to retaining her.
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5 (h) The claimant's assertion that Dr Urquhart's role was to act as a mediator between themselves and the respondent's MD was without any foundation in evidence. Dr Urquhart was retained by the respondent to provide consultancy advice and input in relation to the governance of Moore House School Limited in the context of the restructure; And, subsequently, at a time when the Managing Director required to temporarily step away from certain hands on aspects of her role due to the serious ill health of her daughter and her own ill health, to function as Line Manager for both Dr Drysdale and the claimant in the context of governance and business development. His appointment in that latter role was put in place with the knowledge and consent of both Dr Drysdale and the claimant and the claimant had expressed herself as being "delighted", by it.

10 (i) Dr Drysdale did have a different management approach to that of the respondent's Managing Director. He considered that the MD and the claimant had "*gone round in circles*" and he adopted a stronger line, than that hitherto taken by the MD, in the line management of both Dr Drysdale and the claimant.

15 (j) The claimant's evidence was that she was positive about her new role considering that it provided substantial opportunity for both the respondents and herself. She had unequivocally accepted the new post and had worked in it for over six months before resigning.

20 265. Against the above evidential background, the respondent's representative submitted that the restructuring exercise carried out by the respondents, and their offering to and the claimant's unqualified acceptance of her new role, did not amount to a breach of contract or something which destroyed the implied term of trust and confidence between the parties. Separately, and in any event, even if it could be said to amount to a breach of contract, which was

denied, the claimant, by her unqualified acceptance of the appointment and her working in it for a period of six months, including initially with great positivity and enthusiasm, had acquiesced in any such breach such that she was not entitled to rely upon it as a repudiation for the purposes of a section 95(1)(c) resignation.

266. In relation to the smart goals issued by Dr Urquhart in his capacity as Line Manager to the claimant on 28<sup>th</sup> October 2019 the respondent's representative submitted as follows:-

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(a) Dr Urquhart had extracted the smart goals from the job specification of the claimant's new post.

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(b) The smart goals extracted were approved by the respondent's Board.

(c) There was no contractual requirement that they be agreed by the claimant in advance of their being issued.

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(d) The setting and issuing of smart goals, based upon the job specification of the post accepted by the claimant, was a matter properly within the managerial conduct of the respondents.

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(e) Their doing so at the hands of the claimant's Line Manager, Dr Urquhart, on the 28<sup>th</sup> of October 2019, and the putting in place of a meeting one month later (25<sup>th</sup> November 2019) at which the claimant's performance against the goals would be reviewed, did not amount to a breach of contract.

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(f) It was not conduct which, objectively construed, was destructive of the implied term of trust and confidence between the parties.



267. The meeting with Dr Urquhart and Julie Hughes, at which Dr Urquhart issued a verbal warning to the claimant (of 4<sup>th</sup> November 2019) was prompted by concerns raised with the respondent's Managing Director about the claimant's requests of the Management Team that they provide her with their views of what should be included in the Strategic Business and Development Plan, a task which, in terms of the first paragraph of her smart goals copied at page 322, she herself was charged with doing. The Managers whom she had asked to provide that input had expressed their concern that they had neither the time to nor did they feel themselves qualified to do what the claimant was asking of them.

268. The respondent's representative accepted that there was a divergence on the one hand between the evidence of Dr Urquhart who had maintained that the decision to issue the claimant with a verbal warning at the 4<sup>th</sup> November meeting was a matter which had been discussed by him with both the Managing Director and Julie Hughes and agreed by them before the meeting on the one hand and that of both Julie Hughes and the MD on the other, which was to the effect that neither had been aware of Dr Urquhart's intention to issue a verbal warning and that had they been done they would have told him not to do it referring him instead to the respondent's Disciplinary Code which imposed upon the adoption of such a course of action certain prerequisites. The evidence of Julie Hughes, who was at the meeting in the capacity of a note taker, was that she was surprised when Dr Urquhart issued a verbal warning albeit that she did not intervene to stop it, and that it was only after the meeting of 4<sup>th</sup> November that she spoke with Dr Urquhart about it and at that point gave him a copy of the respondent's Disciplinary Code. The respondent's representative's submission was that the evidence of the respondent's MD and of Julie Hughes was to be preferred over that of Dr Urquhart on this matter, the latter being mistaken in his recollection, and it making no sense, if he had, as he stated in evidence looked at the Disciplinary Code in advance of the meeting, that he would have issued a warning in circumstances in which the procedure set out in the Court was not being followed. In her consideration of matters after the event, Julie Hughes had decided to take no action to revoke the verbal warning because she

considered, on balance that it was justified and, for her part, was of the view that it would not be referred to in any other proceedings.

5 269. The respondent's representative recognised that there may be an element of procedural unfairness associated with the issuing of the verbal warning and that the claimant had asserted in evidence that the otherwise unqualified reference, in the fifth paragraph of the warning, to the "*Board reviewing other options available to them if they considered that improvement on the matters set out in the warning had been insufficient*", which the claimant had asserted  
10 in her evidence she was afraid meant that she was going to be sacked. However, under reference to the case of **Adams v Carpet Right Plc** (number 8 on the List of Authorities), he submitted that that did not necessarily amount to a material breach of contract.

### 15 **The 19<sup>th</sup> November Meeting**

270. The respondent's representative submitted that the actions of both parties at the meeting of 19<sup>th</sup> November were inconsistent with a section 95(1)(c) Constructive Dismissal and yet that was the meeting which the claimant  
20 asserted was the final straw. The Minutes of the Meeting were produced at pages 325 to 329 of the Bundle. It was he submitted clear from the Minutes:

(a) In the first paragraph, that the meeting had been prompted by a letter which the respondents had received from the claimant's  
25 solicitor suggesting that she was unhappy and was not clear where things stood.

(i) The claimant stated in evidence that she felt she was under pressure and that what Dr Urquhart had said to her at the verbal warning meeting had thrown her.  
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(ii) The respondent's Managing Director, while recognising that there appeared to be

5 differences between the claimant's perception of matters and other people's perceptions, including her own, stated that she had been supportive and protective of the claimant since she joined the organisation and the claimant had responded by stating that she felt that she and the MD worked well together.

10 (iii) The respondent's MD had stated that she did not know how she and the claimant had got to the place where they were now at but that for her part she had no intentions that the claimant not be in the organisation.

15 (b) While the meeting had seen further discussion of the claimant's actions in relation to the person A incident, including a reiteration of the MD's previously expressed view that that conduct was potentially sackable, the MD had explained that she had reacted as she did because the claimant had spoken to  
20 two Senior Managers about the matter instead of speaking with herself or with Julie Hughes, or another Board member. She considered that to be a bad judgment call on the part of the claimant. The claimant was noted, at page 328 of the Bundle on page 4 of the Minute, as stating:

25 (i) that she would really like to stay,

30 (ii) that she didn't want to look for another job and she needed to work but she had never had the opportunity to discuss the new post that she was in with Mrs Sheridan and had felt isolated, but that she got on well with her colleagues and had had a laugh earlier that day with Eileen Gallagher.

5 (iii) She went on to state that if the respondent's MD genuinely wanted her to stay then they i.e. she and the MD needed to sit together and discuss her job description.

10 (iv) The Minute showed that the meeting had concluded with the claimant asking if the MD would be happy to sit down and review her job description over the next couple of weeks and the MD advising that she would be happy to sit down with the claimant and Dr Urquhart.

15 271. The respondent's representative submitted that it was material that at the meeting of 19<sup>th</sup> November, which the claimant founded upon as the last straw, neither party made any mention of the person B incident which only served to emphasise that there was no causal connection between the claimant's resignation and that incident.

20 272. Addressing, on a contingent basis, an outcome in terms of which the claimant's complaint of constructive dismissal were to succeed the respondent's representative, while confirming that no issue was taken in relation to performance by the claimant of her duty to mitigate her loss, did submit;

25 (a) in those circumstances, that the Tribunal should find that there had occurred a substantial degree of culpable contributory conduct on the part of the claimant, when assessing the amount of any compensatory award in terms of section 123 and

30 (b) reflect such a contribution in any compensatory award made.

**Additional Submissions made by the Claimant in reply**

273. In exercising a limited right of reply the claimant submitted:-

- 5 (a) That it was wrong to seek to characterise the meeting of 19<sup>th</sup> of November as a pleasant or constructive meeting and that she had not left it with any indication of a real desire on the part of the respondents to resolve matters albeit that she, the claimant, was prepared to suggest she was prepared to have a mediation with a view to restoring relationships between herself and the Managing Director.
- 10 (b) Regarding the divergence in her own evidence and that of Dr Drysdale in recounting what she had said to Dr Drysdale about person A, the claimant invited the Tribunal to hold that Dr Drysdale was not telling the truth and in doing so was attempting to discredit her.
- 15 (c) In relation to the meeting of 28<sup>th</sup> of May that she considered the conduct of Ms Hughes and of the Managing Director to be unreasonable.
- 20 (d) In relation to the person B incident, she reiterated that she remained of the view that the manner in which the matter had been approached by the respondents and dealt with by them was wrong because, in her view, no worker should have put themselves in that position with a resident. She therefore continued to be of the view that person B should have been dismissed and that the lesser disciplinary sanction imposed was therefore wrong. That remained her view notwithstanding the fact that both the SSC and the Care Inspectorate had confirmed that they were content with the outcome.
- 25 (e) She restated that she considered that Ms Hughes had been unhappy with the fact that she, the claimant, had challenged her decision making in relation to the disciplinary sanction applied to person B.
- 30 (f) That while it was the case that she had decided to accept and had accepted her new position with the respondents on reorganisation, she

had done so on the basis that she would be leading all aspects of the Butterstone Project including line managing the Manager for Education but had been told within a week that she would not be.

- 5 (g) That after the meeting of 19<sup>th</sup> of November she had become so concerned about the possible outcome of the scheduled performance review meeting of 25<sup>th</sup> November that she had gone to her doctor who had signed her off and thus she did not have to attend the meeting. During her period between going on sick leave and her resignation she considered that the respondents had failed in their duty of care towards her. They had not communicated with her beyond making available to her the details of the in-house funded counselling service which she did access.
- 10
- 15 (h) That while it was the case that 15 Managers/staff had left the respondent's organisation during the period in which she was Chief Executive Officer, the departure of none of them had been her fault. She did not feel that the person A incident had ever gone away or would ever go away and the MD had told her that she had regarded it, at the time, as a sackable offence even though she had not sacked the claimant.
- 20
- (i) That she had been given a verbal warning which was wholly unjustified and in doing so the respondents had not followed their own rules and Disciplinary Code.
- 25
- (j) That the respondents who now appeared to accept that it shouldn't have been issued in the way that it was could have removed it but they did not do so.
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- (k) That even after that she was prepared at the meeting of 19<sup>th</sup> November to make a last ditch attempt to resolve matters but that was not achieved and she considered that meeting to be the final straw.

274. The claimant concluded her supplementary submissions by stating that at all times she had acted with the very best of intentions motivated by the interests of children and young people about which she was passionate.

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### **Discussion and Determination**

275. The Tribunal found the respondent's Managing Director and Finance Director to be both credible and reliable in the evidence which they gave and accepted it on a number of material matters which were in dispute including, in preference to that of Dr Urquhart, on the issue of whether or not there had been discussion and agreement in advance of the meeting of 4<sup>th</sup> November 2019 about the issuing to the claimant of a verbal warning at that meeting.

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276. In relation to his evidence on the material issues of fact relating to the issuing of the verbal warning, the Tribunal found the evidence of Dr Urquhart to be unreliable and self-contradictory and rejected it, preferring that of the respondent's Managing and Finance Directors and that of the claimant in relation to that meeting and the issuing of the warning.

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277. While finding the evidence of Mr Baillie to be unsatisfactory in some areas including in particular his failure to clearly explain his motivation in speaking to the claimant about person A in circumstances where the claimant was already aware of all matters of fact known to him about person A, the Tribunal did accept as credible and reliable his emphatic denial that he had told the claimant that person A had for many years been "*hypnotising young people in order to have sex with them*", and accepted that evidence in contra distinction to that of the claimant.

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278. While accepting the claimant's evidence as reliable and credible in relation to a number of the material matters in respect of which it has made Findings in Fact, the Tribunal found the claimant to be neither credible nor reliable in relation to her explanation of and motivation for her Butterstone 2019 conduct including her questioning of Dr Drysdale.

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279. The Tribunal found the evidence of Dr Drysdale to be both credible and reliable and accepted it in relation to material matters in dispute between the parties.

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### **Alleged Protected Disclosures**

280. On the Findings in Fact which it has made and as set out in those Findings, the Tribunal concluded that the claimant's actings in respect of the person B incident and in respect of the person A incident, did not constitute the making of a qualifying and protected disclosure. Separately and in any event, on the Findings in Fact which it has made and as set out in those Findings, no causal connection was established between the asserted detriments founded upon on the one hand and either of the alleged protected disclosures on the other. The claimant having failed to discharge her burden of proof in respect to the complaint of having suffered detriment in consequence of making a protected disclosure, that complaint falls to be dismissed.

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### **Constructive Unfair Dismissal**

281. The circumstances in which an employee is held to have been constructively dismissed are prescribed in the terms of section 95(1)(c) of the Employment Rights Act 1996 ("the ERA"), ("the 1996 Act") which provides:-

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***"95 Circumstances in which an employee is dismissed***

*(1) For the purposes of this part an employee is dismissed by his employer if (and, subject to sub-section (2) only if) –*

*(a) ....*

*(b) .....*



*(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*

5

(2) .....

282. Unlike in the case of asserted unfair dismissal in terms of section 95(1)(a) of the ERA, where the assessment of the test of fairness set out in section 98(4) turns upon a consideration of the reasonableness of the employer's actings in the particular circumstances of a case, the test incorporated in section 95(1)(c) for establishing a constructive dismissal is the contractual test of repudiation by way of material breach of contract on the part of the employer, followed by acceptance of that repudiation and recision (resignation in response to the breach) on the part of the employee, see **Western Excavating v Sharp** (No 3 on the List of Authorities).

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283. In satisfying the section 95(1)(c) test, the claimant requires to prove, on the preponderance of the evidence and on the balance of probabilities;

(a) that there has occurred, at the hands of the respondent a material (fundamental) breach that goes to the root of the contract, and,

(b) that she had resigned in response to that breach and not for some other reason

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284. The fundamental breach, of which the claimant gave notice of intention to prove, was an alleged breach of the implied duty of confidence and trust, said to have been constituted individually or variously and or collectively by the acts of the respondents, or of the respondents' Managers, for which the respondents were vicariously liable, as specified in her Particulars of Claim.

285. The onus of proof in respect of the above sits with the claimant. As the respondents' representative submitted, the respondent does not require to disprove the same.

5 286. The instances of conduct founded upon by the claimant for the purposes of establishing constructive dismissal are accurately summarised in the note of the respondents' representative's submissions set out above, and which are here referred to for their terms.

10 287. Let it be assumed that a party asserting constructive dismissal establishes, on the evidence, the occurrence of material breach of contract, whether constituted by a single act or collectively by a number of acts, thus entitling a party to resign in terms of section 95(1)(c), the Tribunal must also be satisfied that the party (the claimant in the instant case) has not waived that right to so  
15 resign by delaying too long before doing so.

288. **In W E Cox Turner (International) Limited v Crook** [1981] ICR 823, (No 6 on the List of Authorities,) Lord Brown Wilkinson, at page 828, explained the position thus:-

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“● That mere delay in accepting a repudiation (and in resigning) on the part of an innocent party, (unaccompanied by any express or implied affirmation of contract) does not constitute affirmation of the contract;

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● But, if it is prolonged it may be evidence of an implied affirmation.

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● Affirmation of the contract can be implied if the innocent party calls on the guilty party for further performance of the contract, since his conduct is only consistent with the continued existence of the contractual obligation.

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● Moreover if the innocent party himself does acts which are only consistent with the continued existence of the contract such acts will normally show affirmation of the contract.

289. On the evidence presented the Tribunal has found in fact that, notwithstanding having taken legal advice on the specific issue of constructive dismissal prior to writing to the respondents on 30<sup>th</sup> April 2019 and, notwithstanding the conduct which she asserts occurred on the part of the respondents at the meeting of 28<sup>th</sup> May 2019 upon which she also founds as giving rise to a material breach of contract, the claimant thereafter and with the benefit of having taken that legal advice, accepted the new appointment of Director of Development, on 24<sup>th</sup> June 2019. Further, that she then worked in the appointment seeking to perform and, on her assertion performing, the duties required of her by the respondents, and in her turn calling upon the respondents to perform its obligation including payment to her of the remuneration package agreed in respect of the new post, and accepting that performance.

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290. The Tribunal has further found that in so doing let it be assumed that all or some of the acts and or omissions of the respondent complained of by the claimant in her email of 30<sup>th</sup> April 2019, and otherwise prior to 24<sup>th</sup> June 2019, constituted a material breach of contract entitling the claimant to resign in terms of section 95(1)(c) of the ERA, (which the Tribunal has not so found,), the claimant affirmed the contract, acquiesced in any such asserted breach/breaches and lost the right to subsequently rely on those instances of conduct for the purposes of resigning and asserting that she was constructively dismissed in terms of section 95(1)(c).

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291. The instances of conduct at the hands of the respondent, or for which the respondent is vicariously liable said to have occurred after the 24<sup>th</sup> of June 2019 and founded upon by the claimant are given notice of and are to be found;

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(a) In her written and oral proceedings before the Tribunal, and,

(b) in her letter of 30<sup>th</sup> December 2019, in which she confirmed her resignation on 3 months' notice and gave notice of resigning in

5 response to, amongst other matters, the issuing to her of an unjustified verbal warning, by Dr Urquhart in the presence of one of the respondent's Directors and contrary to the provisions of the respondent's disciplinary procedure on 4<sup>th</sup> November 2019. She also finds upon the respondent's subsequent acts and omissions relative to that warning and relative to the conduct to which it related

10 292. As is set out in its Findings in Fact the Tribunal was satisfied, on the evidence presented, and has found in fact that that conduct constituted material breach of contract on the part of the respondent, entitling the claimant, upon its acceptance, to resign in terms of section 95(1)(c) of the ERA.

15 293. The Tribunal has further found that in subsequently confirming her resignation with notice, on 30<sup>th</sup> December 2019,

- (a) the claimant resigned in part in response to that material breach of contract in circumstances in which she was entitled so to do and,
- (b) that the claimant was constructively dismissed by the respondents in terms of section 95(1)(c) of the 1996 Act.

20 294. Although following the issuing of a verbal warning on the 4<sup>th</sup> of November 19, the claimant did not confirm her resignation until 30<sup>th</sup> December of that year, the Tribunal was satisfied that the claimant's delay in so doing did not, in the circumstances, constitute an acquiescence in the breach, or a subsequent affirmation, of the contract:-

- (a) The claimant was shocked by the issuing of the verbal warning. She was not expecting it knowing that to issue a verbal warning in that way was non-compliant with the terms of the respondent's disciplinary policy and procedure,
- (b) The claimant was further shocked by the fact that, as at the 4<sup>th</sup> of November, she was being viewed by the respondents as having

delivered “clear performance failure” in relation to the production of the first two smart goals which had been issued to her only 7 days previously, her performance against which was not due to be assessed until the 25<sup>th</sup> of November some 3 weeks hence.

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(c) She was further shocked by the requirement set out in the verbal warning that she significantly improve on 3 areas including her relationships with Managers and staff in circumstances where she was informed that a large number of them had said they could not work with her on the one hand but, on the other, she was not provided with any information as to who the Managers in question were to enable her to attempt to address that issue.

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(d) The warning put the claimant on notice that she would next meet with her Line Manager, who held himself out in the presence of a Board member as representing the Board on these issues, on the 25<sup>th</sup> of November and was also told that in the event that the Board considered that insufficient progress had been made by her, the Board would consider other options available to it.

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(e) The claimant was given no further information as to what those other options might be. She was reasonably fearful, in the circumstances that what was being referred to was an anticipated dismissal of her by the respondents on or shortly after the 25<sup>th</sup> of November.

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(f) She required some time to absorb and consider what had happened and its potential consequences.

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(g) She considered the verbal warning to have been unreasonably and improperly issued. She wished it to be withdrawn.

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(h) She wrote to the respondents protesting the warning, within the time period provided in the respondents’ disciplinary procedure, and

seeking a response, and which letter she considered was an exercise of her right to Appeal against the Decision.

5 (i) She received; no response and no appeal or notice of the arrangement of any appeal; or of intention on the part of the respondent to rescind the warning.

10 (j) She became ill and was signed off by her General Practitioner as unfit to work for a period of weeks.

15 (k) At the respondents' Managing Director's request she attended a meeting on the 19<sup>th</sup> of November said to discuss her diary entries and at which the discussion expanded to consider other matters over which she and the respondents continued to be at large and which, in her assessment, were not satisfactorily addressed or resolved.

(l) She became ill again and was unable to attend the performance review meeting of 25<sup>th</sup> November.

20 (m) Following a period of continued ill health and worry over the Christmas period she concluded that the respondents did not intend to take any action to remove or rescind the verbal warning which she regarded as a mechanism designed to lead to her subsequent dismissal, and concluded that she had no alternative but to resign.

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295. In the above circumstances and as found above, the Tribunal was satisfied that in delaying her resignation, between the issuing of the verbal warning on the 4<sup>th</sup> November and 30<sup>th</sup> December both 2019, the claimant had not acquiesced in the material breach of contract constituted by the respondents' conduct in issuing, and conduct associated with, the verbal warning and, that she had not affirmed the contract.

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296. In order to succeed in her complaint of constructive dismissal it is sufficient that the claimant prove the occurrence of one material repudiatory breach of

contract on the part of the respondents upon which she is entitled to rely for the purposes of section 95(1)(c) and that in subsequently resigning she did so at least partly in response to that breach.

- 5 297. On the evidence presented, the Tribunal was satisfied that the claimant had proved, upon the preponderance of the evidence and on the balance of probabilities, the occurrence of that breach and also that her resignation was partly in response to it. The Tribunal was satisfied that the claimant had discharged her burden of proof in respect of her complaint such that the  
10 Tribunal holds that the claimant was constructively dismissed in terms of section 95(1)(c) of the ERA.

### **Remedy**

- 15 298. In terms of section 119 of the 1996 Act and in consequence of her constructive dismissal, the claimant is entitled to receive a basic award the amount of which, prior to any deduction, had been quantified by the parties in the agreed sum of £3,150 binding upon the Tribunal for the purposes of the  
Hearing.

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299. The claimant also seeks a compensatory award both in respect of loss of statutory rights, in an agreed contingently qualified sum of £300, and in respect of consequential loss of earnings and associated employer's pension contribution beyond the Effective Date of Termination 30<sup>th</sup> March 2020 up to  
25 which date she was fully paid by the respondent.

300. Regarding compensatory awards the Tribunal has found in fact that regardless of the occurrence of the conduct upon which the Tribunal found the claimant was entitled to rely for the purposes of section 95(1)(c) of the  
30 1996 Act, the claimant had separately given notice, in terms of her correspondence of 30<sup>th</sup> April 2019, of her intention to leave the respondent's employment "just into the new year when the school is hopefully up and running". At no point prior to or following her taking up the duties of Development Director, did the claimant withdraw that notice.

301. On the evidence presented, the Tribunal was satisfied that the claimant would have determined her employment with the respondents, regardless of the issuing of the verbal warning of 4<sup>th</sup> November 2019, in accordance with that notice, on or before what became the Effective Date of Termination 30<sup>th</sup> March 2020. The Tribunal further found, standing the same, that loss of earnings and associated benefits occurring beyond the Effective Date of Termination were not attributable, beyond that date, to action taken by the respondent upon which the claimant was entitled to found for the purposes of resigning in terms of section 95(1)(c) of the Act. Accordingly the Tribunal makes a compensatory award which is restricted to the agreed sum of £300 for loss of statutory rights.

302. Section 122 and section 123(6) of the ERA make provision, on a mandatory basis, respectively for reduction in the amount of basic award and compensatory award on the grounds of culpable or blameworthy contributory conduct on the part of an otherwise successful claimant. To fall into this category the claimant's conduct must be held by the Tribunal, in the circumstances, to be "*culpable*" or "*blameworthy*".

303. In order to trigger a reduction in the compensatory award the conduct must further cause or contribute to the claimant's dismissal – see the terms of section 123(6) of the 1996 Act:-

*"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

304. Although it has found in fact that the claimant's conduct in relation to the May 2019 Butterstone incident was blameworthy, the Tribunal has also found that that conduct did not cause or contribute to the claimant's constructive dismissal, principally upon the evidence of the respondent's Managing Director, which the Tribunal accepted as both reliable and credible on the point, and which was to the effect that, notwithstanding her considering that



she would have been justified in dismissing the claimant over that conduct, she consciously decided not to do so, continuing, notwithstanding the conduct, to seek to retain the claimant in the respondent's employment for the reasons spoken to in her evidence. Thus, the question of reduction of the compensatory award falls away.

305. Reduction of the basic award is regulated by the terms of section 122 of the 1996 Act which provides, at section 122(2) as follows:-

10                   **“122 Basic Award: Reductions**

                  (2) *Where the Tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.”*

306. In order to engage the terms of section 122 there is no requirement that the claimant's conduct in question be conduct that caused or contributed to the claimant's dismissal. Rather, it is sufficient that the Tribunal find the conduct to be *“culpable or blameworthy”*.

307. As reflected in its Findings in Fact and in the terms set out therein, the Tribunal has found the claimant's conduct in relation to the May 2019 Butterstone meeting with Dr Drysdale and Ms McRailed to be blameworthy, including in particular its characteristic of undermining the position and authority of the respondent's Managing Director and Board with two of the respondent's Senior Managers and its potential, absent the respondents managing to internally contain knowledge of the conduct, to seriously damage the respondent's reputation at a critical time in the development and the then imminent opening of their new educational facility at Butterstone.

308. The claimant was, at the material time, in the appointment of Chief Executive Officer reporting directly to the respondent's Managing Director. She was

5 already fully in possession of the only fact based and substantiated  
information relating to the relevant former employee about whom she chose  
to make the wholly speculative and pejorative remarks. She misrepresented  
to Dr Drysdale and Ms McRailed, in answer to Dr Drysdale's direct question,  
10 that Mr Tam Baillie was the source of the pejorative statement which she  
made about the former employee and further that he, Mr Baillie, believed it to  
be true in circumstances in which, on an objective view, she could not have  
been satisfied that any factual or evidential basis existed for the statement  
which she made, or that the making of it was in the public interest. In so  
15 doing she put in question Mr Baillie's reputation in the minds of the  
respondents and his role in the matter, placing him in a position where he  
required to deny having been the source of the statement in his evidence,  
given on affirmation before the Tribunal. Her conduct impacted upon  
Mr Baillie's relationship with the respondents.

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309. In the circumstances the Tribunal considers that it would be just and  
equitable to reduce the basic award by a sum of £630 (an amount equivalent  
to one fifth) and so reduces the basic award from the otherwise agreed  
amount of £3,150 to £2,520.

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310. While there is no requirement that the blameworthy conduct in question have  
caused or contributed to the dismissal in order to trigger the requirement to  
reduce a basic award in terms of section 122, where the conduct in question  
does cause or contribute to the dismissal that is a factor which the Tribunal is  
25 entitled to take into account when assessing the amount by which it would be  
just and equitable to reduce a basic award. In the instant case the Tribunal  
has found that the blameworthy conduct did not contribute to the dismissal.  
But for the candid evidence of the respondent's Managing Director which the  
Tribunal accepted as credible and reliable and which was to the effect that  
30 she did not wish the claimant to resign at any point up until she did so, but  
rather, sought to retain her in employment, the Tribunal would have found on  
the balance of probabilities that the claimant's conduct so contributed to the  
claimant's dismissal. Had it done so, it would have considered it just and  
equitable to reduce the basic award by a larger amount.

Employment Judge: Joseph d'Inverno  
Date of Judgment: 27 July 2021  
Entered in register: 29 July 2021  
and copied to parties

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**I confirm that this is my Judgment in the case of Gibson v Moore House School Limited (Moore House Care & Education) and that I have signed the Judgment by electronic signature.**

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