EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104941/2020

Final Hearing in Glasgow by Cloud Video Platform (CVP) from 24 May to 28 May, 1 June 2021 and 7 July 2021

Employment Judge: R McPherson
D Frew
R McPherson

Ms. Anita McGeachie	**Claimant** **Represented by** **A Stobart** **Counsel** **M Gribbon** **Solicitor**
St Mary's Kenmure	**First Respondent** **Represented by:** **K McGuire** **Counsel** **F McCormick** **Solicitor**
Mr Kevin Miller	**Second Respondent** **-as above**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant's claims

1. of detriment(s) for making a protected disclosure, contrary to Section 47(B) of the Employment Rights Act 1996, do not succeed; and

2. for constructive unfair dismissal do not succeed.

REASONS

Preliminary Procedure

1. The claimant presented her claim to the Employment Tribunal on **Sunday 20 September 2020**, following ACAS Early Conciliation which commenced, in relation to the first respondent on **Monday 13 July 2020** followed by issue of certificate on **Thursday 27 August 2020,** and in relation to the second respondent on Friday **7 August 2020** and which was followed by issued of certificate on **Thursday 27 August 2020.**

2. The ET3 for both respondents was presented on **Thursday 22 October 2020** timeously.

3. A case management preliminary hearing took place **Wednesday 18 November 2020** following upon which the claimant provided table showing alleged protected disclosure and legal obligations under cover of email of **Wednesday 16 December 2020** and the respondent issued response on **Friday 29 January 2021.**

4. On **Monday 2 March 2021** the claimant intimated that they were withdrawing detriments previously listed as 4, 5 and 11; April/May failure to appoint an independent grievance hearer, the respondent's handling of the claimant's grievance, and August 2020 respondent's failure to respond to claimant communication of 18 August 2020.

5. A further case management preliminary hearing took place on **Tuesday 23 March 2021** at which parties were advised that the Final Hearing would take place remotely via Cloud Video Platform (CVP) over a period of up to 7 days.

6. The claimant asserts claim constructive dismissal and for detriment on ground of making protected disclosure (commonly described as whistleblowing) in terms of s47 of the Employment Rights Act 1996.

7. In relation to the claimant's claim of public interest disclosure (PID) / "Whistleblowing", the claimant relies upon 7 asserted protected disclosures which are said to have occurred:

1. On **Wednesday 8 April 2020,** in relation to what is said to be a matter of child protection made to the first respondent's Chair Mr Gillon: and

2. On **Wednesday 8 April 2020,** in relation to what is said to be a matter of child protection to the first respondent's HR Manager and Claire Lundie the first respondent's Head Teacher; and

3. On **Monday 27 April 2020,** in relation to what is said to be a matter of child protection made to the second respondent: and

4. On **Thursday 30 April 2020**, in relation to what is said to be a matter of child protection set out in the claimant's Written Grievance to the first respondent; and

5. On **Thursday 11 June 2020,** in relation to what is said to be a matter of child protection to the first respondent's Board member Mr McGinty: and

6. On **Thursday 25 June 2020,** in relation to what is said to be a matter of child protection in the claimants Written Grievance to the first respondent; and

7. On **Sunday 26 July 2020,** in relation to what is said to be a matter of child protection to the first respondent's Board members Mr Tierney and Mr Farrell

8. The issue for the Tribunal included:

    a. Did the claimant have a genuine belief that the information tended to show (Sections 43B [& 43C] ERA), relying on subsection(s) of section 43B(1)(a- f) that the first respondent had failed to comply with a legal obligation; (the obligations being said to arise within

Children & Young People (Sc) 2014, UN Convention on the Rights of the Child 72,The Children (Scotland) Act 1995, The Public Services Reforms (General Teaching Council for Sc) Order 2011,The Protection of Vulnerable Groups (Sc) Act 2007, Children and Young People (Sc) Act 2010, Public Services Reform (Sc) Act 2010Regulation of Care Act 2010 SSSC Code of Practice Employment the Children (Sc) Act 1995 to which they was subject and

b. Was that belief a *reasonable belief*; and

c. Did the claimant have a *genuine belief* that the disclosure was in *the public interest* AND

d. Was that a reasonable belief (s43B(1))

e. Do any of the exceptions apply (disclosure of criminal offence s43B93) or subject to legal privilege (s43B (4))
The disclosures relied upon on each occasion were made to the employer (s43(1)(c)).

9. The respondent defends the claim arguing that the asserted disclosures did not amount to protected disclosures, the alleged detriments relied upon were not in consequence of the alleged disclosures and that the claimant's resignation was not a constructive dismissal.

10. Issues arising for the Tribunal include did the respondent subject the claimant to any detriments relied upon, as set out below (included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law)?

1. On **Wednesday 15 April 2020**, the alleged removal of the claimant's duties by the first respondent; and

2. On **Thursday 16 April 2020,** the alleged removal of the claimant's responsibilities/duties by the first respondent; and

3. On **Monday 27 April 2020**, the alleged removal of operational decision-making responsibilities and changes of role/threatened with demotion by the first respondent; and

4. On **Friday 26 June 2020**, the first respondent deciding, it is alleged, to terminate the claimant's position as Assistant Director Head of Care; and

5. On **Wednesday 29 July 2020**, the second respondent acting, in what the claimant alleges, was a hostile and threatening manner towards the claimant; and

6. On **Thursday 6 August 2020**, the second respondent making what is alleged to be a false allegation of Data Protection breaches against the claimant; and

7. On **Thursday 13 August 2020**, the second respondent engaging in threatening and bullying conduct toward the claimant and records meeting on mobile phone without consent

8. On **Thursday 13 August 2020**, the second respondent it is alleged, accusing the claimant of misconduct; and

9. On **Thursday 27 August 2020,** provision being made by the first respondent and/or the second respondent, it is alleged, to remove the claimant from her current office.

11. If so, were any or all those alleged detriments done on the ground that the claimant made one or more protected disclosures?

12. In relation to the claimant's claim of **Constructive Unfair Dismissal***,* the issues for the Tribunal to consider whether the claimant was constructive dismissed, included:

1. Did the alleged breach or breaches of contract relied upon ,viewed separately or isolation, or cumulatively, amount to breaches of the claimant's employment contact *a fundamental breach of the contract of employment, and/or did the respondent breach the implied term of mutual trust and confidence, i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant?*

2. If so, did the claimant "*affirm*" the contract of employment before resigning? To *"affirm"* means to act in a manner that indicates the claimant remains bound by the terms of the contract.

3. If not, did the claimant resign in response to the breach of contract (was the breach a reason for the claimant's resignation – it need not be the only reason for the resignation?

4. What was the final straw relied upon?

5. If so – was the dismissal unfair as a result of s95 of the ERA 1996, Section 94(1) provides that an employee has the right not to be unfairly dismissed by his employer, section 95(1)(c) provides that an employee is to be regarded as dismissed if *"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*

Compensation

13. If the claimant was subjected to detriments, as alleged and or was constructively dismissed, what if any compensation should the Tribunal order the respondent to pay to the claimant.

Preliminary Issues

14. At the outset of the hearing 2 preliminary matters were raised.

a. The first related to, what can be broadly described as an issue of fair notice, the respondent arguing that certain aspects of the written witness statements for the claimant, Ms. Carol Dearie and Mr Willie McKeown should not be admitted having regard to the matters set out in the ET1 and further particulars with those areas being identified by redlining. In advance of the commencement of the hearing, the claimant agreed that some, though not all elements of proposed redlining deletions in respect of Ms. Carol Dearie and Mr Willie McKeown's witness statements were not relevant for the issues in this case. After discussion it was agreed that to the extent that issue remained live, the issue would be dealt with by the respondent's position being reserved and dealt with in submissions at the conclusion of the evidential hearing.

b. The second preliminary issue related to whether an email dated **Friday 4 September 2020,** contained within the joint bundle, from the respondents' solicitor was covered by what may be referred to as litigation privilege. After discussion it was agreed that the document would be admitted subject to the respondent's position being reserved and would be addressed in submission after the evidential hearing.

Hearing

15. The Tribunal was provided with written witness statements from the claimant, Ms. Carol Dearie former Director of the first respondent, Mr Willie McKeown former Depute Director of the first respondent and Ms. Helen Strang, Learning and Development Coordinator for the first respondent.

16. For the respondent, the Tribunal was provided with written witness statements for Mr Kevin Miller who was appointed as Interim Director with the first respondent as set out in the Findings in Fact below and who is the second respondent, Ms. Bernie Sanderson HR Manager with the first respondent, Mr Angus Gillon volunteer Chair/Chairman of the Board of the first respondent, Mr Gerry McGinty, former volunteer first respondent Board member.

17. In addition, and under reservation of preliminary matters, an affidavit was provided Mr FP McCormick Solicitor for the respondents in respect of which it was intimated that it was offered in lieu of Mr FP McCormick attending to give evidence. In the course of the hearing, it was intimated for the claimant that the affidavit for Mr McCormick was not objected to, that is there was no insistence that he attend to speak to same and the affidavit was accepted without its author being cross examined.

18. Each of the witnesses confirmed their written witness statement at the Final Hearing, the respondent's preliminary issue being noted by the Tribunal in respect aspects of the claimant's witness statement and those for Ms. Dearie and Mr McKeown (those areas being identified in strike through by the respondent) reserved for submissions. All witnesses were permitted limited supplementary oral evidence in chief and were thereafter subject to cross examination and re-examination.

19. The Tribunal was provided with an agreed joint Bundle with a supplementary bundle provided by the claimant and headed s47B (1) (b) ERA 1996 and which containing extracts, specifically s35 of the Children (Scotland) Act 1995, Reg 16 &17 The Health and Social Care Act (Regulated Activities) Regulations 2004, Reg 4 of the Secure Accommodation (Scotland) Regulations 2013, and Article 3 of the UN Convention of the Rights of the Child (20 Nov 1989).

20. The Tribunal was provided with 2 loss calculations for the claimant, the first based on the loss of the Acting Depute Post seeking 29 weeks loss the second (p272) based on loss of the Service Manager post, together with a pension loss calculation (page 280), which calculation was prepared in accordance with the Guidance from the Presidents of The Employment Tribunals (England & Wales and Scotland) 2017 and as revised 2019.

21. Following conclusion of the evidential element of the hearing parties were provided with an opportunity to share with each other their draft written submissions in advance of providing same to the Tribunal by **Friday 2 July**

2021 with parties thereafter attending **Wednesday 7 July 2021** by CVP, for commentary by the parties' representatives on their submissions.

22. The Tribunal's private deliberation took place at **Members' Meeting on Wednesday 28 July 2021** being the earliest mutually available date for the full panel of the Tribunal.

Findings of Fact

1. The first respondent is a company limited by guarantee and a registered charity employing around 150 staff who work within a secure accommodation unit in Bishopbriggs, Glasgow which provides 24 single person bedrooms for young people (both male and female) aged between 11 and 18 (the Unit).

2. The unit (the first respondent) operates across a campus style facility formed by 4 house units, an education centre, administration, and catering centre. An inspection in January 2021 presented a positive view of the service. The first respondent has child protection and safeguarding guidance and policy linked to national guidance and up to date research.

3. Immediately prior to **March 2020,** the first respondent was managed on a day-to-day basis by a professional team of employees known as the Senior Management Team, which included Ms Carole Dearie as Director, Willie McKeown as Depute Director and the claimant.

4. The Senior Management Team was overseen by a Board of Directors who are the proprietors of the first respondent secure school in terms of the Education (Scotland) Act 1980. The board was made up of volunteer members who, with the exception of Mr McGinty as a retired social worker, were not from a social care background, the board's primary role was to consider matters of strategy.

5. At the relevant time, the first respondent had a policy document extending to around 84 section headings called **Standard Operating Procedures** version 10.0 2018 (the 2018 Standard Operating Procedures). It set out that "*The purpose of the policy and procedures is to ensure that all concerns about the care and protection of young people are effectively managed. It is the responsibility of all workers to understand the policy and procedures and to act accordingly"* and described that the "*policy is informed by legislation regarding care and protection, in particular the Children (Scotland) Act 1995, The Regulation of Care (Scotland) Act 2001, the Protection of Children (Scotland) Act 2003… our policy takes into account the Protecting Children and Young People Charter and Frameworks for Standards, Scottish Social Service Council (SSSC) code of Practice for Employers of Social Services Workers and Social Services Workers."*

6. The 2018 Standard Operating Procedures set out "*In cases where the member of staff against whom the allegation is made is the Head of Service, Depute Head of Service (Care) or Depute Head of Service (Education), a report will be provided to the Chairman of the Board of the Directors of St Mary's Kenmure who will convene an extraordinary meeting within seventy - two hours in order to investigate the allegation. In the intervening period, the Chairman may wish to make an interim decision to protect the interests of the young people and staff member involved…. Anyone who wishes to report a matter of concern to the Chairman of the Board or another member of the Board of Directors should follow the protocol outlined in "Information on how to contact Board of Directors" under the Purpose Statement heading of the SOPs"*.

7. The respondent's Grievance Policy and Procedure 2017 were in place at the material time (the **2017 Grievance Policy**).

8. On **Monday 28 August 2017,** the claimant who is a qualified social worker commenced employment with the first respondents as a Unit Manager.

9. On or around **Friday 1 December 2017,** the claimant was promoted from Unit Manager to **Service Manager** and was at all relevant times when employed

by the respondent a member of the Local Government Pension Scheme, a final salary scheme.

10. With effect from **Friday 1 November 2019,** the claimant was notified by Ms Sanderson that she had been promoted to the position of **Acting Deputy Head of Care** (which role was commonly referred within the first respondents as Acting Depute Director and which was the title which the claimant arranged to place on her office door), with an increased annual salary on a temporary basis for a period of **12 months**. This was primarily because the claimant been asked to step up to overseeing a proposed new 6 bed residential facility for vulnerable young females to be known as Dochas House and which was anticipated to be opened in April 2020.

11. In early **March 2020,** Mr Gillon received two anonymous letters **post marked Saturday 8 March 2020** and **Saturday 4 March 2020** which appeared to be from first respondent staff members concerning the actions of members of the Senior Management Team, specifically the **Director** and **Depute Director,** and the **claimant** (**collectively the March 2020 Anonymous Complaint letters**).

12. The post marked **Saturday 4 March 2020 Anonymous Complaint** letter, set out criticisms broadly around alleged instances of workplace bullying over 13 short paragraphs over 1.5 pages. In paragraph 9 it alleges that the claimant and the Assistant Director were not blameless, they saw what was going on but just did the Director's bidding and concluded with the phrase "*hiding things under the carpet it being a child protection issue or staff not doing their job which could have caused a child to die and not taking any action"* (**the specific statement within the first postmarked letter of the March 2020 Anonymous Complaint letters**). While providing no relevant specification of what is said to have occurred and indicating that matters were not recorded (or hidden under the carpet), that statement implicated all members of the Senior Management Team.

13. The post marked **Saturday 8 March 2020 Anonymous Complaint letter**, set out criticism broadly directed against the Senior Management Team around alleged instances of workplace bullying over 8 paragraphs over 1.5 pages.

14. On previous occasions, generalised allegations made with some specificity such as relevant temporal details of wrongdoing and alleged wrongdoers, were capable of being investigated including by review of records known as Incident Forms to establish (where an incident had been recorded) whether the form set out that that any relevant procedure had been followed. The decision on how, and if, to investigate was an operational matter for the Senior Management Team, subject to them referring the Board to the 2018 Standard Operating Procedures.

15. In the evening of **Monday 16 March 2020,** following a meeting of the Board at which the Board was notified of the **March 2020 Anonymous Complaint letters**, Mr Gillon provided copies to the Director and the Depute Director following brief discussion (around 20-30 minutes) about them.

16. The Tribunal does not consider it necessary, in all the circumstances of the present claim to make substantive findings of fact as to what occurred during that discussion.

17. On **Tuesday 17 March 2020**, the claimant was informed of the fact of the complaints by the Director.

18. Further on **Tuesday 17 March 2020,** the Director intimated her intention to resign in writing to Mr Gillon.

19. Also on **Tuesday 17 March 2020**, Mr Gillon emailed Ms Sanderson (copied to Ms Dearie and Mr McKeown) setting out the Board wished to act on the anonymous complaints and asked her to approach an outside agency to carry out a "*staff satisfaction survey".* Neither the Director nor the Depute Director raised any objection, in response, as to this proposed course of

action as a means of acting on the **March 2020 Anonymous Complaint letters**.

20. On **Thursday 19 March 2020,** the Director intimated by email to Mr Gillon (copied to a general work email for the first respondent company secretary) that she was suspending her letter of resignation, at the request of Mr Gillon, on a temporary basis, setting out that the Depute Director and the claimant were also looking to resign from their posts in response to the **two anonymous complaint letters.**

21. The Director did not refer to the specific statement within the first postmarked letter of the March 2020 Anonymous Complaint letters.

22. On **Thursday 19 March 2020,** the Director also set out in a letter addressed to Mr Gillon that as requested by Mr Gillon, she was suspending her letter of resignation "*on the basis that the allegations against me be investigated speedily and the matter be brought to a satisfactory conclusion"* describing that she was resolute "*to refute all the allegations laid against"* her. That was a statement referring to all matters without specification raised in **the March 2020 Anonymous Complaint letters** and concluded that the **"***allegation that a child could die because of us is horrifying to say the least."*

23. By letter dated **Monday 23 March 2020,** the Depute Director tendered his resignation letter, identifying that he was giving required 1 months' notice commencing that day and would resign by means of early retirement. Mr McKeown's letter described that the **March 2020 Anonymous Complaint letters** were "*harmful, spurious and anonymous complaints* ". He did not describe that any investigation was merited into any aspect of the **March 2020 Anonymous Complaint letters.**

24. On **Monday 23 March 2020**, the UK PM announced what has become known as "*lockdown"* as response to the Covid 19 pandemic identifying that most people should stay at home.

25. On **Wednesday 25 March 2020,** the Director resubmitted her resignation. The Director was not in attendance at the first respondent from around Tuesday 28 April 2020. The Director did not describe that any investigation was merited into any aspect of the **March 2020 Anonymous Complaint letters.**

26. Neither the Director nor the Depute Director issued any notification to Mr Gillon or the Board identifying the provisions with the **2018 Standard Operating Procedures** regarding the process set out where an allegation is made against either of Head of Service, Depute Head of Care (Care) or Depute Head of Service (Education). Neither took steps to initiate any arrangements alternative to that notified to them in response to the **March 2020 Anonymous Complaint letters**, being a staff satisfaction survey and which became subsequently classed as an Employee Voice Survey.

27. On **Friday 27 March 2020,** Mr Gillon wrote to the claimant referencing communication regarding allegations put to the Board, apologising for delay, commenting that the impact of the Covid 19 pandemic had been quite substantial and he had taken time to understand how the Board wished to proceed. He set out "*as this was an anonymous complaint the Board of Directors have taken the decision to survey all staff. With this in mind all staff … excluding you, will be issued with an Employee Survey over the coming days".* He confirmed that, it would be issued from him as Chair and staff advised to return the completed survey to the law firm in which the company secretary is based by **Sunday 7 April 2020**. He set out, that the responses would be evaluated, and a report would be compiled "*which will be considered by the Board"*. He set out, that he was aware how stressful the situation *"must be for you, and I want to assure you of my continued support. I am truly sorry that we have found ourselves in this position: however, I hope you understand that we must take matters seriously."* He provided details of the respondent Employee Assistance Programme.

28. It did not prove practicable, for reasons connected with the pandemic, for an outside agency to be instructed to create and carry out the staff satisfaction

survey. The first respondent had not previously carried out such a survey and did not have an existing previous survey to adapt. However, and by the end of March 2020, an internally created and circulated voluntary and confidential staff survey, the **March 2020 Employee Voice Survey** was circulated among respondent staff (excluding the Senior Management Team who had been the subject of the criticism in the **March 2020 Anonymous Complaint letters),** with those staff who elected to respond, being requested to reply by Tuesday 7 April 2020. The **March 2020 Employee Voice Survey** was divided into 4 Sections:

1. Environment (around 23 questions which were positively framed, responders invited rate from 1 Strongly Disagree to 5 Strongly Agree),

2. Culture (around 6 questions which were negatively framed and included directly asking whether there was culture of bullying and whether responders felt their job was more stressful because they were afraid, they would get into trouble, with responders invited to rate responses from 1 Strongly Disagree to 5 Strongly Agree),

3. Leadership (around 22 questions of which 12 were positively framed with the remaining 10 framed as negative statements, with responders invited rate from 1 Strongly Disagree to 5 Strongly Agree), and

4. Communication (around 8 questions of which 4 were positively framed with 2 neutrally framed and the remaining 2 framed as negative statements, with responders invited rate from 1 Strongly Disagree to 5 Strongly Agree).

5. It did not describe that that was any compulsion on staff to respond. The **March 2020 Employee Voice Survey** concluded "*Please use the last page to share any information that you think would be helpful to the Board moving forward. The Board would like to take this opportunity to thank you for your participation".*

29. The Board are, and were at the material time, not responsible for the day-to-day operational running of the first respondent. The **March 2020 Employee**

Voice Survey was the way in which the Board itself decided to respond to the **March 2020 Anonymous Complaint letters**.

30. On **Monday 30 March 2020**, the Director issued an email containing 6 paragraphs to Mr Gillon copied to the Board suggesting that although she had not seen the questions in the March 2020 Employee Voice Survey, unidentified staff were distressed by it, it made them vulnerable and she criticised it being, she understood, anonymous. The Director further made criticism of Ms Sanderson describing that "*she was mentioned in one complaint as being able to support the allegations. Can you confirm that you did as you stated and brought an external agency into investigate this".*

31. On **Friday 3 April 2020**, against the background of the resignations of the then Director, Deputy Director and Covid 19 pandemic, Ms Lundy met with the claimant and Ms Sanderson to discuss immediate continuity plans for the first respondent. It was agreed that responsibility of Education, Health and Wellbeing, Facilities and HR Administration would be allocated to Ms Lundy while Social Care, Learning and Development and Quality Improvement would be allocated to the claimant. Further, it was agreed, that as the claimant was the only one of the three who could take on the role of Child Protection Officer the claimant would adopt the role of Child Protection Officer representing the first respondent at weekly Scottish Government conference calls and Ms Lundy would oversee Health and Safety. An email reporting this operation decision was issued by Ms Lundy to Mr Gillon as Chair, copied to the claimant. This was, in effect a '*flat management'* structure, requiring a sharing of responsibilities rather than a hierarchical approach. The claimant was involved in the discussions leading to this new proposed flat management structure.

32. In the late afternoon of **Monday 6 April 2020**, the claimant proposed separately, in email addressed to Mr Gillon and copied to Mr Frank McCormick, an **alternative contingency proposal** in a 4-page document. The claimant set out that it was "*As requested…"* for consideration by Mr Gillon and Mr F McCormick, further that she had time to digest her

conversion with Mr Gillon, describing that she appreciated his anxiety *"however a decision of this magnitude should sit with yourself and the Board of Directors and as such I've not discussed this with anyone else".* Under the claimant's proposal, the claimant would take on role of Acting Director of Service in a non-flat management structure and her responsibilities would include overseeing the running of the first respondent, with Ms Lundy Head Teacher, Mr Millar Acting Service Manager and Ms Sanderson, HR Manager each reporting to the claimant.

33. By afternoon of **Tuesday 7 April 2020,** claimant's proposal was not accepted by the Board. The first respondent reported by email that day to the Scottish Government and the Care Inspectorate that an interim flat management structure involving a '*joint committee approach'* had been put in place with the claimant holding responsibilities for Social Care, Learning and Development and Quality Improvement with it being confirmed that the claimant would adopt the role of Child Protection Officer and represent the first respondent at weekly Scottish Government conference calls, with Ms Lundy and Ms Sanderson having remaining areas of responsibility. The first respondent further confirmed at this time that Dochas House would not open in the immediate future partly due to registration matters and partly due to the Covid Pandemic.

34. On **Tuesday 7 April 2020 at 4.06pm** Mr Gillon emailed the claimant, Ms Lundy and Ms Sanderson describing that the committee joint collective approach was preferred for the short period ahead, until they successfully recruit new colleagues describing that the last few weeks had been problematical *"hopefully we will now proceed confident that we are all working to a positive future"*

35. On **Tuesday 7 April 2020 at 16.08** Mr Gillon forwarded an email the respondent company secretary had sent to the first respondent Board with proposed first respondent Contingency Plans, to the claimant, Ms Lundy and Ms Sanderson**.**

36. On **Wednesday 8 April 2020 at 9.35am** the claimant responded to Mr Gillon email of 4.06pm, the preceding day to the claimant, Ms Lundy, Ms Sanderson and copied to the board which was headed "*temporary operational decision by the Board"* (**the claimant's email of Wednesday 8 April 2020**). The claimant set out to Mr Gillon addressed to his non-first respondent email (copied only to Mr F McCormick at his first respondent email address) with the heading *Re: temporary operational decision by SMK Board*;

"*Good morning Angus.*

To answer your question, myself and Claire made the decision to continue to take referrals and admissions in light of healthy staffing numbers. I informed the government of this position on Thursday afternoon.

In relation to the decision to have a joint committee approach, can I ask for clarity on this please. Can you confirm for me that we each have autonomy to make day to day operational decisions under our own respective designated roles and responsibility?

Can I ask why payroll would sit with me as this would naturally sit with" … Ms Sanderson.

"The role of Child Protection has been delegated to me and I understand the rationale for this as I am the only one who can do it. However, I am not prepared to take this on at present as you will know there is currently an outstanding allegation against the senior management team concerning child protection, to quote the complaint "hiding things under the carpet whether it be a child protection issue or staff not doing their job which could have caused a child to die". You will appreciate that whilst this allegation currently is outstanding it not only places me but also the organisation at risk. If you can confirm that this has been investigated and there is no case to answer, i.e. exoneration then of course I am more than happy to assume this role I look forward to hearing from you Anita."

37. The claimant informed Mr Sanderson that she was not prepared to take on the Child Protection role later the same day. The claimant made no disclosure to Ms Sanderson or Ms Lundy during that discussion.

38. Further on **Wednesday 8 April 2020**, Mr Gillon as Chair in response to the claimant declining to take the role of Child Protection Officer, a role which the respondent required someone to hold to have weekly meetings with the Scottish Government, made an approach to Mr Miller, who was at the time Director of a separate sister organisation Stepdown Services asking to him take on the role of Child Protection Officer on an interim basis. The approach was made as Mr Miller was, known to be able to provide the Child Protection Officer status required by the first respondent.

39. In the early morning of **Thursday 9 April 2020,** the claimant sent a text message to Ms Lundy, in absence of a Line Manager reflecting the Senior Management Team departures, that she was "*reporting sick"* and was thereafter absent due to ill heath until **Wednesday 15 April 2020,** providing **GP Fit Notes.**

40. On **Thursday 9 April 2020,** Mr Miller took on interim role of Director assuming the required role of **Child Protection Officer,** the first respondent subsequently advising the Scottish Government and relevant agencies.

41. For reasons surrounding the Covid pandemic, it had become apparent to first respondent Board, that the unit known as Dochas House would not be opening at that time and in consequence 12 members of existing staff employed for the Dochas House unit including Ms Faith Watson, who had been employed as Service Manager for the unopened Dochas House, were offered seconded posts to the operational unit at Bishopbriggs.

42. Ms Watson, who had in previous employment been a Team Leader, Supervisor and Service Manager in two secure units, had asked to provide a continuing supportive role for Dochas House until **Monday 27 April 2020,** and thereafter stepped into role of Service Manager at Bishopbriggs on a

temporary basis after the claimant had submitted a second Fit Note, this time covering the period up to **Sunday 10 May 2020.** At this time, the role of Service Manager with the first respondent at Bishopbriggs was vacant while the claimant had the acting role of Depute Director of Services. Ms Watson continued in a purely supporting role until on or around **Wednesday 27 April 2021**.

43. The claimants' duties were not removed on **Wednesday 15 April 2020**. The decision to recruit Mr Miller reflected a practical response, the first respondent to the claimant having notified the first respondent of her decision to withdraw her previous agreement to take on required role of Child Protection Officer.

44. The respondent continued to work to the flat management structure and by **Thursday 16 April 2020**, Mr Miller had joined the respondent as Director on interim basis. No decision had been made by the Board to remove the flat management responsibilities from the claimant at this time.

45. On **Thursday 16 April 2020,** the claimant returned to work and in an informal meeting with Ms Lundy, in advance of the claimant meeting with the second respondent, the claimant asked Ms Lundy if Ms Watson had responsibility for Social Care. Ms Lundy erroneously indicated that Ms Watson had assumed the claimant's role during her period of absence. Ms Lundy, in response to a further question from the claimant on whether they both maintained operational responsibility, erroneously (reflecting a degree of confusion arising from the ongoing Covid 19 pandemic, the resignation of two members of the Senior Management Team and her reading of notice of revised management structure shared with Scottish Government and the Care Inspectorate) replied to the effect that Ms Lundy had assumed sole executive decision-making function.

46. The claimant thereafter that day met with the second respondent, the first such meeting with the interim director, explaining that he had taken over the

role of Interim Director, that the respondent was operating to a Flat Management Structure with the claimant intimating that she was happy to work under his direction.

47. It was confirmed that Ms Watson had at that stage, lead responsibility for the managers under the second respondent's direction, and upon raising matters which she had earlier raised with Ms Lundy and the responses, the second respondent intimated that he would confirm matters with Mr Gillon and phone her, with the claimant leaving work mid-morning pending clarification.

48. On **Friday 17 April 2020,** Mr Miller made a telephone call to the claimant advising that Mr Gillon had confirmed that her position (role), within the respondent had not altered, that she had line management responsibility for Ms Watson, and she remained Head of Social Care.

49. On **Friday 17 April 2020,** the claimant had a telephone consultation with her GP due to the pandemic, the GP recorded that that the claimant was Assistant Manager at secure unit in Glasgow, the director had resigned, her responsibilities given to other, the claimant felt isolated and humiliated, she had self-signed off and wanted a GP Fit Note, stress at work situational anxiety was described. The requested GP Fit Note was provided, and the claimant was advised if condition persisted to call the GP back.

50. The claimant submitted a Fit Note up to **Sunday 10 May 2020.**

51. On **Monday 27 April 2020**, the claimant attended a return-to-work meeting with the second respondent and Ms Sanderson. The claimant was informed that she would have no line management responsibilities at this stage as the first respondent was working to the flat management structure, that decision being explained as she had been implicated in aspects of the confidential staff responses to the **March 2020 Employee Voice Survey**, although it was intimated that no specific action would be taken as against the claimant in response, and what was described as "*her subsequent unknown period of absence"* it having been agreed that the flat management structure *"following*

the departure of both the Director and substantive Director would remain with an overview undertaken by " the second respondent. The claimant intimated that she considered that she was being punished *"for something she had not done",* that is the broad allegations contained in the **March 2020 Anonymous Complaint letters.** The claimant intimated in this meeting that she would require further time to consider her options and the second respondent confirmed that he would have a further meeting with her before the end of the day. The second respondent requested that the claimant undertake task of reviewing and updating the 2018 Standard Operating Procedure, create a database of Service Level Agreements with both the first respondent and Dochas house and prepare generic update on situation regarding current on registration, in light of the pandemic. The claimant intimated that such tasks were degrading, they amounted to mere administrative tasks, to which the second respondent intimated that he disagreed, they required to be undertaken by someone with the claimant's operational knowledge and understanding. The second respondent further intimated that because of her response to this request, she was making things very difficult, and should she continue to go down that route, he would give her 4 weeks' notice reverting her to the substantive role of Service Manager as per the 2019 appointment notice. The claimant, in response to that statement, intimated that she could see no future with the first respondent and she had previously anticipated working with the respondent until her retirement.

52. The claimant separately on that date, considered submitting a grievance in relation to what she regarded as a threat of demotion and sought and obtained legal advice on the possibility of a constructive dismissal claim following upon a resignation in consequence of the meetings on that date.

53. As the second respondent was, at that that stage, relatively new to the first respondent he did not utilise or complete the first respondent's standard Return to Work for, preparing his own typed and signed note. He was not advised to use the first respondent's standard Return to Work Form by Ms Sanderson who concluded that the second respondent's typed and signed note was sufficient.

54. No further substantive discussion took place that day.

55. Following the return to work meeting the claimant was again absent from work from **Tuesday 28 April** to **Sunday 19 July 2020.**

56. On **Thursday 30 April 2020,** the claimant submitted a written grievance to the first respondent's Company Secretary Mr F McCormick to his non-respondent email (the **April 2020 Grievance**). The claimant set out that she felt that she had been left with no alternative other than to instigate Stage 1 of the respondent's Grievance Procedure. The April 2020 Grievance was set out over 4 pages in some 20 paragraphs. The claimant set out criticism of Mr Gillon including describing, in the context of her decision not to take on Child Protection Officer role that Mr Gillon did not understand the claimant's refusal to hold the Child Protection function whilst there was an outstanding and yet to be investigated complaint, which she indicated was taken to protect the claimant's professional registration with SSSC and the first respondent's registration with the Care Inspectorate. The claimant commented that as Mr Gillon did not come from a social care background and did not have any social care qualifications "*this may explain why he failed in this instance to understand the implications of his decision making for the organisation – and for my professional registration".*

57. On **Thursday 7 May 2020,** the first respondent's Company Secretary Mr F McCormick responded to the claimant outlining arrangements for dealing with the grievance.

58. The claimant responded to Mr F McCormick's email of **Thursday 7 May 2020** setting that she had "*originally requested that this grievance been heard by an individual who was external to the organisation and who was experienced in secure social care. I accept that Mr McGinty as an experienced social worker, is well equipped professionally to deal with the issues at hand".* The claimant set out that she "*too have taken advice"* and had been assured that where is there is a complaint against the Chair it was customary for an independent person to be appointed. The claimant expressed the hope that the first respondent would follow what the claimant expressed was, in her

view, good practice and agree to the appointment of an external appropriately qualified and experienced individual. The claimant set out that she appreciated, in light of the current pandemic circumstances, amendments to the procedure "*will be required".*

59. The claimant prepared a document "**Timeline"** document for the Grievance Hearing (the **claimant's Grievance Timeline**). The claimant's Grievance TimeLine set out in table format dates alongside her description of Details (being the events described) and in separate columns, what the claimant described as the (relevant) Issue was and evidence.

60. **The claimant's Grievance Timeline** referred to events including on:

1. on **Thursday 30 April 2020 –** while setting out as a detail at conclusion of 4 paragraphs of the matters she raised, that child protection she understood, had not been investigated this was the *"most serious element of what was said*", the Issues arising were identified in the subsequent column set out over 5 paragraphs focusing of the claimant's criticisms of the March 2020 Employee Voice Survey as being *"fully loaded*" against herself and others in the senior management team at the time. The final line of the final paragraph set out that "*Survey never touched"* on child protection*;* and

2. two events on **Wednesday 8 April 2020** setting out that:

1. that the claimant emailed Mr Gillon "*seeking clarity if under each of their departmental roles if normal line management still in place?(this was not referring to the shared responsibility at corporate level) and that she was not prepared to undertake Child Protection Office as that there were allegations that the senior Management Team or which she was one – additional to Ms and Mr McKeown) had swept child protection issues under the rug" from the anonymous complaint. As this implicated "*the claimant "*she felt that due process required that this responsibility was placing both* "the claimant and the second respondent "*at risk until*

an investigation had taken place and "the claimant "*had been exonerated. (Dangers of being out of process with Child Protection Issues in terms of my professional registration with SSSC and"* the first respondent" *with Care Inspectorate.)"*; and

2. Ms Lundy *"invited the claimant to attend Comms meeting with her and"* Ms Sanderson, they "*wanted to communicate new senior management arrangements to all staff*". The claimant "*disagree on the basis that it had not yet been signed off by the S government and such a communication would be premature and could in fact be reserved at a later stage."*

The claimant *"communicated the contents of her email to the chair, i.e., that she would not be assuming the role of child protection, given the outstanding CP allegation and was waiting his response. This met with general agreement."*

61. The claimant did not identify any Issue in the **claimant's Grievance Timeline** arising from either event identified to have occurred on Wednesday 8 April 2020. No information was disclosed in relation to same, no clear reference was made in the Issues raised, to what steps the respondent ought to take.

62. On **Thursday 11 June 2020,** the claimant's April 2020 grievance was heard by **Gerard McGinty** (the June 2020 Grievance Hearing). The claimant was provided with the opportunity to read from her Timeline document. The claimant's representative identified that the claimant's letter of **Thursday 30 April 2020,** outlined that the claimant felt subject to bullying and harassment and undermining of her position.

63. The June 2020 Grievance Hearing lasted around 4 hours. While broadly the minutes of the hearing are a reasonably accurate account of the discussion that took place, they do not however record all comments, and in particular do not record Mr McGinty making a comment, which he accepted in evidence and recognised to be misjudged, that if he said it was raining ice cream would

this be believed and just "*because some one says there is a child protection issued doesn't actually mean there is"* .

64. In the June 2020 Grievance Hearing:

a. the claimant expressed disappointment that the child protection allegations had not been investigated. She stated that because of this "*lack of investigation she had refused to take on the Child Protection Officer"* role *"because due process had not been followed and she was protecting her professional registration with the SSSC*" and the respondent's *"registration with the Care Inspectorate and she was trying to protect"* the first respondent. That was a statement confirming the claimant was seeking to protect her own registration.

b. Mr McGinty in response to the claimant's criticism of the flat management structure set out that "*these were not normal times"* a reference to the pandemic "*and the absence of two thirds of senior management was massive…"*

c. Mr McGinty intimated, in response to the claimant indicating that she did not have a job to come back, that this was not correct to which the claimant intimated that while she was content that Ms Lundy took on Health and Wellbeing she objected to Care and Quality Improvement being allocated to Ms Lundy as the claimant considered that Ms Lundy did not have relevant experience.

d. In discussion around the claimant's refusal to take on Child Protection Officer role and share responsibilities, the claimant asked what else she could do and as had to protect herself and the Board as she was being investigated. That was a reference the **March 2020 Employee Voice Survey.**

e. the claimant set out that she wanted to be reinstated as Acting Depute Director and requested that she be paid full pay while on sick leave.

f. the claimant's representative intimated the anonymous complaint should still be investigated.

65. Mr McGinty fairly and objectively considered the points raised by the claimant and written responses from other relevant people before reaching his decision.

66. The Note of the Hearing accurately recorded that the proposed remedy was that the claimant had asked to return to her acting up post (Acting Depute Director) and for the Board to use "*their discretion and pay her full pay instead of half pay while she remains of sick*".

67. On **Tuesday 23 June 2020**, the claimant was advised by a trichologist that that she was suffering from onset of medical induced heavy hair loss that resulted approximately 100 days *after* metabolic disruption (that is approximately from around the date of the Director and Depute Director resigning) and although there were many causes, a common aetiology was stress. The claimant did not share that advice with either respondent.

68. By email on **Thursday 25 June 2020,** the claimant submitted appeal against the decision not to uphold her grievance to Mr F McCormick at his non-first respondent email, who confirmed that it had been passed on (the June 2020 Grievance Appeal). The claimant set out in her two-page appeal, that her appeal was on three grounds:

1. No explanation or reasoning as to why her grievance had not been upheld.
2. She did not believe that the grievance had been investigated in a transparent or proper manner.
3. Mr McGinty had failed to address all the issues raised.

69. In the June 2020 Grievance Appeal, in relation to failure to address all issues raised the claimant set out that she raised several concerns in her grievance

letter of 30 April 2020 many of which related to Mr Gillon's behaviour toward the claimant. She set out that she did raise a number of additional concerns relating to the second respondent's actions and what she described as the unilateral decision to remove her duties and effectively demote her and "*It also became apparent to me that he did not appreciate or understand the seriousness of the concerns I raised in relation child protection".* In relation to what she said was a failure to address all issues raised described that *"I also raised concerns relating to the care provided at*" the first respondent "*regarding the decisions being made in relation to child protection. The grievance outcome letter refers only the allegations of bullying, harassments and undermining of"* the claimant's position "*and fails entirely to address any of the other points raised. I do not therefore believe my grievance has been properly or fully investigated. I note in particular that no response has been provided in relation to my role or what it will look like on my return to the workplace. I was specifically informed during the course of the meeting that Mr McGinty would come back to me on this point. I would again ask that given the gravity of the issues at hand and the concerns I have raised that my grievance be heard by someone who has considerable senior management experience in the secure social care sector and that the person appointed be independent of the organisation".*

70. It is not, in all the circumstances of the present case, not considered necessary for the Tribunal to make findings in fact regarding the appeal process itself.

71. By letter dated **Friday June 26 June 2020**, against the background that the first respondent had confirmed that they would not be able to the open the Dochas House unit "*in the near future"*. the claimant was given 4 weeks' notice that her appointment to the post of temporary Acting Depute Head of Care would come to an end of Friday 24 July 2020 and that with effect from Monday 27 July 2020 the claimant would return to her substantive post of Service Manager. The notice was issued in accordance with the notice provision set out in the letter appointing her to the post. Dochas House has, as at the date of this Tribunal hearing, still not opened.

72. On **Wednesday 15 July 2020,** the claimant's solicitor set out to the first respondent company secretary that they had been instructed to raise proceedings for alleged breach of s47B of the ERA 1996, that they were satisfied that the claimant raised protected disclosure in email to the Chair on 8 April and at the grievance hearing on 11 June 2020 "*the information which our client disclosed related to child protection concerns … there is a direct causal link between the alleged protected disclosure"* and the first respondent's decision to alter her duties, remove her from post of Acting Deputy Director and in it's handling of her ongoing grievance. It set out that the minute of 11 June 2020 was incomplete and omitted "*crucial exchanges she had with Mr McGinty about her child protection concerns and allegation that her refusal to take on child protection duties was the reason why she had been subject to the detriments."*

73. On **Friday 17 July 2020**, first respondent's company secretary set out in an email to the claimant that "*it had been brought to our attention that you may not have been provided with all or some of the statements taken as part of the investigation and these are now attached for your information and attention".* The claimant received remaining documentation at that time.

74. On **Monday 20 July 2020**, the claimant attended a return-to-work meeting with the second respondent and Ms Sanderson at which the claimant advised she was happy to be back at work and that it had been a long absence (14 weeks) and while she had found the time stressful, she was getting stronger and confirmed that she was not undergoing any therapy or taking any medication. The claimant's return was agreed to be facilitated on a 2-week phased return basis, with the respondent facilitating full pay during the phased period. If the claimant felt this required to be extended, it could be accommodated, although it was indicated that the claimant would require to utilise annual leave. The claimant was advised that the first respondent was undergoing a restructure and both the second respondent and Ms Watson would be in post for 12 months. The claimant was provided with copy Stress Assessment for completion which she did not complete. The claimant was advised that she should familiarise herself with GDPR and was advised that

the respondent had required to report some matters to the Information Commissioner. The claimant co-signed the Minutes.

75. Further on **Monday 20 July 2020,** the claimant's then representative intimated that claimant's strong preference would be that an external third party be appointed to hear the appeal, but in the absence of same as the claimant had just returned to work after a period of work-related stress claimant requested that the appeal takes place by written submissions, without attending as the claimant had concerns as to the accuracy of the grievance hearing minutes.

76. On **Sunday 26 July 2020,** the claimant issued an email containing her June 2020 appeal letter, her solicitors' letters including 15 July 2020 and an 8-page document with three schedules (schedule 1 being 4 pages, schedule 2 being 3 pages and schedule 3 being 1 page) which was headed Appeal Submission of the claimant (the claimant's July 2020 Appeal Submission)

77. The claimant's **July 2020 Appeal Submission** set out that the central issue was the anonymous allegation that the senior management team (the director, Deputy Director and the claimant) swept child protection issues under the rug which could have "*caused the death of a child. Despite repeated requested from"* the claimant, the (now former) Director and (now former) Deputy Director Mr Gillon as Chair "*refused to have this investigated. In doing so he was departing from the safeguarding and whistleblowing policies*" of the first respondent "*the child protection guidance and policies of the Catholic Church and the requirements of the SSSC and the care Inspectorate"*. At Part A Substantive concerns, the claimant set out that what she described as the failure of the chair to follow the child protection procedures set out by the Care Inspectorate and SSSC resulted in the former Director "*having to self-report. As this child protection investigation has not been undertaken, my registration has been compromised in the absence of an investigation, I have not been exonerated. My registration is therefore deemed to be an open case and there is a fitness to practice issue outstanding".*

78. On **Wednesday 29 July 2020**, the claimant attended a further **Return to Work** meeting with the second respondent and Ms Sanderson**.** The claimant confirmed that she was feeling a bit odd just being back and it was quiet and described that "*staff had been popping in*" to see her. In response to whether the claimant had managed to do the GDPR training, the claimant advised that her had not yet done so but would get to it. The claimant was advised that her duties would be to manage Learning & Development, Wellbeing and Night Shift Co-ordinators and working with Learning & Development to review induction and probationary process to ensure it was fit for purpose.

79. Further in the Return to Work meeting on Wednesday 29 July 2020, the claimant intimated that some colleagues had raised with her a matter relating to child protection. In absence of detail being provided and noting that the claimant had a duty to disclosure in terms of SSSC regulation, the second respondent, as the Child Protection Officer insisted that claimant identify those colleagues. There was a heated exchange and upon being provided with details of the colleagues by the claimant, the second respondent was able to reassure the claimant, that due process had been followed and relevant agencies informed, and he would therefore be able to reassure the colleagues who had spoken to the claimant.

80. While both Ms Sanderson and the second respondent signed the minutes prepared of that Return to Working meeting on Wednesday 29 July 2020, the claimant declined to sign the minutes of that Return-to-Work Meeting as the claimant considered that that it did not fully reflect the meeting. The Tribunal is however satisfied that the minutes are a reasonably accurate account of what took place at the meeting.

81. On **Tuesday 4 August 2020,** Mr Brian Tierney issue a letter to the claimant confirming that the appeal, which had been considered on the documents by Mr Tierney and Mr Farrell, was not upheld.

82. On **Thursday 6 April 2020,** the second respondent invited the claimant to attend an "*information meeting"* with the second respondent and Ms I McKenna of the first respondent's HR Department.

83. On **Thursday 6 August 2020** a further Return to Work meeting took place (the 3rd week of return). The claimant described that she would complete the Stress Assessment the following week. The claimant set out that she felt isolated and ignored by colleagues, she gave some examples and described 3 colleagues. The second respondent commented that he was not happy with what the claimant described, although he recognised that these were the claimant's feelings and intimated, he would raise matters with the 3 colleagues. A discussion took place around management of the first respondents Unit and why it had not been returned to the claimant, it being explained to the claimant with the claimant just having returned and as Faith Watson had been managing the Units for the preceding 14 weeks (that is from around 30 April 2020), the second respondent's view was the status quo should prevail pending advertising for a new of Head of Care. At that stage Mr Miller described that with the possibility of Dochas House there would be 2 Service Managers in the structure and requested that the claimant bear with him while he eased her back into her post. The claimant requested that more responsibility be delegated describing that she was used to going at 90 miles an hour. The claimant confirmed she had completed the case note review and GDPR training and the induction and probationary process was ongoing. The claimant confirmed she would not undertake on call duties at that time.

84. A discussion took place regarding the previous child protection matter mentioned by the claimant at the previous Return to Work meeting on **Wednesday 29 July 2020** the second respondent advising that having spoken to the two colleagues (one also a manager) their recollection differed and the claimant advised that she had inadvertently confused what had been raised. The claimant confirmed she would apologise to the manager colleague. The second respondent advised that he had spoken with the Information Commissioner's office and that reading a non-active file would amount to a breach with the claimant confirming that she had not read such a file. The second respondent indicated that he did not like such situations to exist between managers.

85. The second respondent commented that he understood that it had been intimated that the claimant intended to raise a grievance against him, to which the claimant advised that as she had no confidence in the process she would not be doing so. The claimant further confirmed that her earlier grievance was complete.

86. The meeting was conducted in a reasonably professional and supportive manner by the second respondent.

87. The second respondent's reasons for raising a matter regarding GDPR were in no way related to any alleged protected disclosure by the claimant.

88. The claimant had requested that a colleague Ms Strang attend, which request had been agreed to. After the Minutes had been prepared Ms Strange co-signed the Minutes, the claimant however declined sign the minute owing what the claimant regarding a one line omission and Ms Strang prepared a separate note which neither the claimant nor the Ms Strang signed.

89. A further meeting arranged for **Thursday 13 August 2020**, commenced but did not substantively take place. Mr Miller had sought advice from ACAS and understood that subject to consent it would be permissible to make an overt (as opposed to covert) recording of the meeting on his mobile phone and what he regarded would be a neutral recording of the meeting to avoid confusion as to what was said. The meeting was scheduled for the afternoon and when claimant's view was expressed at the outset of the meeting was, as there were, in effect two notetakers, that is Ms Sanderson and Mr Nisbet (the first respondent Unit Manager accompanying the claimant), it was unnecessary and objected, at this point after a few seconds the second respondent stopped the recording and a discussion ensued with the respondent considering that the claimant left the meeting abruptly and caused the meeting room door to slam. The second respondent did not record any substantive part of the meeting, a recording of a few seconds took place while the claimant was present, the second respondent's inaccurate but honest view was and remains that he did not record the

meeting, that is, he stopped the recording before any substantive part of the meeting took place.

90. The second respondent, reflective of his view of the claimant's actions at the proposed meeting on **Thursday 13 August 2020**, sent the claimant an email late that evening 10.42pm (the late-night email of Thursday 13 August 2020). The terms of the email represented his genuine and honest view that the claimant acted in an aggressive manner, had been disrespectful to the second respondent and that the claimant had slammed the door behind her. The second respondent in the late-night email of Thursday 13 August 2020 set out that that he had "*taken time to reflect on*" the claimant's "*behaviour and actions today and I still come up with the term misconduct and this gives me cause for concern",* he described that the behaviour was conducted in the presence of all those at the meeting and intimated that he considered it was not appropriate for a senior manager, professional social worker "*let alone the Director of Service* "referring to the relevant Code of Practice. He asked the claimant to reflect on what he described as her behaviour and meet with himself on Monday 24 August, when "*we will consider how we resolve the impasse that is perpetuating in the workplace"* and indicated that during his weeks leave, Ms Lundy would have leadership responsibility and the claimant should contact Ms Lundy to arrange working arrangement while he was annual leave.

91. On **Tuesday 6 August 2020** and **Tuesday 25 August 2020**, the claimant's solicitor sent emails to the first respondent's solicitor raising concerns on behalf of the claimant. The **Tuesday 25 August 2020** email refers to *"the imminent litigation*" (the August 2020 claimant solicitor emails). The August 2020 claimant solicitor emails were not sent to the first respondent's company secretary. The possibility and likelihood of litigation against the respondent was apparent in both emails.

92. Separately the claimant issued an email **Tuesday 18 August 2020** to Mr Gillon. The claimant advised that she would not be participating in return-to-work meetings with the second respondent and set out what she regarded

as criticism of the second respondent including indicating that the second respondent had breached the claimant's human rights by recording her without permission (which was intended as a reference to the meeting on 13 August 2020).

93. Mr Gillon responded by email on **Wednesday 19 August 2020** setting out that he was surprised to receive the email and that he would discuss the contents with the second respondent on his return to work the following week.

94. On **Tuesday 25 August 2020,** the claimant sent an email to the second respondent (replying to the late-night email of Thursday 13 August 2020 set out above), setting out her views of the meeting on Thursday 13 August 2020 criticising the second respondent and requesting that *"going forward, and in attempt to diffuse the ongoing situation… where possible, all our communications at work are in writing."*

95. On **Monday 27 August 2020**, the claimant attended the meeting intimated by the second respondent for his return to work. By that time the second respondent had reorganised office allocation, reflecting his view of maximising the available office resources and had introduced a Specialist Intervention Team and created a therapy room for young adults in consequence of which he had given up his own office space into which he had arranged for 6 desks to be placed to accommodate the claimant and two colleagues. The claimant was advised that she was to move office. The second respondent believed that this would assist the claimant working directly with two colleagues with whom the claimant would be expected to work collaboratively and against the claimant have previously expressed the view at **Return-to-Work** meeting on **Tuesday 6 August 2020,** that she was feeling isolated and ignored by colleagues.

96. On **Friday 4 September 2020,** the first respondent's solicitor sent a reply to the claimant's solicitor. The reply was expressly stated as being "*Without Prejudice".* The contents of the reply are accepted as factually accurate.

97. On **Sunday 6 September 2020,** the claimant completed an application for a post in with an alternate employer in Glasgow. The claimant had at that point had decided to leave her employment with St Mary's. The claimant had decided that she would leave employment in response to the two anonymous complaint letters and her conclusion over the subsequent period that the respondent would not act in effect to exonerate her from the broad bullying allegations and the subsequent re-organisation which she did not support.

98. On **Monday 7 September 2020**, the claimant's solicitor forwarded the respondent's solicitor's email of Friday 4 September 2020 to the claimant.

99. On **Wednesday 9 September 2020,** the claimant issued letter of resignation with notice. The claimant was paid at the level of her Service Manager post the time of her resignation. The claimant's decision to resign reflected her conclusion by that time that the first respondent would not act in effect to exonerate her from the broad bullying allegations set out in the two anonymous complaint letters and the subsequent re-organisation which she did not support.

100. On **Thursday 10 September** 2020, Mr Gillon acknowledged receipt of the claimant's letter of resignation.

101. On **Wednesday 7 October 2020,** the claimant's employment with the first respondent ended, the claimant who was 46 years of age had had 3 full years' service. At that time the claimant was being paid as Service Manager and was at all times a member of the Local Government Pension Scheme (a final salary scheme).

102. The claimant was without employment from **Thursday 8 October 2020** to **Sunday 11 April 2021** and was in receipt of Job Seekers Allowance. During this period, she carried out daily searches of job sites and had registered with recruitment agencies and applied for 3 posts and was successful in securing employment as Head of Care with an alternate employer in March 2021, the claimant's salary in her new post is slightly higher than that of Service Manager although lower than that of Acting Depute Head of Care. It is does

not provided membership of the Local Government Pension Scheme. The claimant's new alternate employment requires additional travel.

Submissions

103. Both parties provided detailed written submissions.

104. It is not considered necessary to repeat the submission for the claimant. They were detailed and extended to some 27 pages, addressing issues of credibility of witnesses, detailed proposed Findings in Fact including in relation to Protection Disclosures, Disclosure of Information and Breach of Legal Obligation, Detriments, Constructive Dismissal, Without Prejudice, Issue of relevancy on the respondent redactions (on witness statements) and observations on the respondents' submissions. In addition, the claimant submissions included extract from the 5th edition of Walker and Walker: The Law of Evidence in Scotland (May 2020). The claimant provided extract of legislation including Reg 16 and 17 of the Health and Social Care Act (Regulated Activities) Regulations 2004 the terms of which regulations are noted. The claimant referred to **Williams v Governing Body of Alderman** 2020 IRLR 2020 (**Willams**) in relation to law straw doctrine. The claimant's written submissions were expanded upon for the claimant at the final day of the hearing (for submissions) on **Wednesday 7 July 2021.**

105. It is not considered necessary to repeat the submission for the respondent which set out the respondent position in relation to the preliminary issues, proposed relevant facts, credibility of witnesses, claims under s47B ERA 1996 and constructive dismissal. The respondent's written submissions were expanded upon for the respondent at the final day of the hearing (for submissions) on **Wednesday 7 July 2021.** The respondent referred to **Chandhok v Tirkey [2015] ICR 527, Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38 (**Cavendish**), **Blackbay Ventures Ltd t/a Chemistree v Gahir** [2014] IRLR 416 (**Gahir**), **Chesterton Global Ltd (t/a Chesterton) v Nurmohamed** [2017] EWCA Civ 979 (**Nurmohamed**), **NHS Manchester v Fecitt** [2012] IRLR 64 (**Fecitt**), Daks

Simpson Group plc v Kuiper 1994 SLT 689 (**Daks**), **Brodie v Nicola Ward (t/a First Steps Nursery**) 2007 2WLUK 186 (**Brodie**) and **Kaur v Leeds Teaching Hospital NHS Trust** 2019 ICR 1 (**Kaur**).

Relevant Law Protected Disclosure Generally.

106. Section 47B ERA 1996, so far as relevant, provides:

"47B Protected disclosures.

(1)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 has made a protected disclosure."

107. Section 43A ERA1996 defines a protected disclosure as a "*qualifying disclosure"* (as defined in s.43B ERA 1996) which is made by a worker in accordance with any of ss.43C to 43H ERA 1996.

108. Section 43B ERA, provides:

"43B Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made ***in the public interest*** *and tends to show one or more of the following—*

(a) … ,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject …"

109. The word "*information"* (or for that matter *"disclosure*") is not defined in the ERA 1996. In **Geduld v Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38 (**Cavendish**), the EAT held, considering whether a solicitors letter which set out that health and safety requirements were not being complied with was an unprotected allegation

(The EAT indicating in contrast that to say "*wards of the hospitals have not been cleaned for two weeks and sharps were left lying around"* would be conveying information) that for the legislation to have effect a disclosure must involve information, and not simply voice a concern or raise an allegation.

110. Subsequently the Court of Appeal in **Kilraine v London Borough of Wandsworth [2018]** IRLR 1850 (**Kilraine**), approved the EAT decision in **Kilraine v London Borough of Wandsworth** [2016] IRLR 422 in which it was noted the statute did not draw a distinction between information and allegation.

111. The Court of Appeal went on to say in **Kilraine** at para 35 to 36: *"In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity which is capable of intending to show one of the matters listed in subsection (1) …. Whether an identified statement or disclosure in any particular case does or does not meet that standard, will be a matter for an evaluative judgment by the tribunal in the light of all of the facts of the case. It is a question that is likely to be closely aligned with the other requirements set out in section 43B (1) namely that the work in making the disclosure should have the reasonable belief that the information that he or she disclosures does tend to show one of the listed matters."*

112. In **Blackbay Ventures Ltd t/a Chemistree v Gahir** [2014] IRLR 416 (**Gahir**) the EAT set out guidance, indicating that the Tribunal should:

4. Separately identify each alleged disclosure by reference to date and content

5. Identify each alleged failure to comply with a legal obligation (or as the case may be health and safety matter)

6. Identify the basis on which it is alleged each disclosure is qualifying and protected and

7. Identify the source of the legal obligation relied upon by reference to statute or regulations (save in obvious cases); and

113. Thereafter the Tribunal should consider whether the claimant had the reasonable belief required under **s43B(1),** and subsequently consider whether the disclosure was made in the public interest.

114. The public interest test was considered by the Court of Appeal in **Chesterton Global Ltd (t/a Chesterton) v Nurmohamed** [2017] EWCA Civ 979 (**Nurmohamed**), which set out (para 27) that a Tribunal must determine:

a. whether the worker believed at the time of making it, that the disclosure was in the public interest, and,

b. whether, if so that belief was reasonable.

115. Further In relation to 1.b. the Tribunal is required to recognise that there might be more than one reasonable view as to whether a particular disclosure was in the public interest, and the Tribunal should not substitute its own view for another reasonable view.

116. The necessary belief is simply that the disclosure is in public interest.

117. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not require to be the predominant motive in making it.

118. The Court of Appeal in **Nurmohamed**, also identified that the test is not one of mere numerical analysis (as to how many its serves) but depends on the character of the interest served. All the circumstances of the case should be considered including:

1. the numbers whose interests are served by the disclosure, and

2. the nature of the interest affected and its importance, and

3. whether the matter complained of was deliberate; and

4. the identity of the alleged wrongdoer.

119. In **NHS Manchester v Fecitt** [2012] IRLR 64 **(Fecitt)** the Court of Appeal**,** set out that the burden of proof of showing that the making of the protected disclosure played no part in the alleged acts (or omissions) relied upon as detrimental treatment, and (at para 45) the correct test in relation to the connection to any detriment was whether '*the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*" **.**

Relevant Law: Potential source of legal obligation relied upon by reference to statute or regulations

120. The Tribunal was directed provisions including the Health and Social Care Act 2008 (Regulated Activities) Regulation 2014 which sets out that

16 Receiving and acting on complaints

(1) Any complaint received must be investigated as necessary and proportionate action must be taken in response to any failure identified by the complaint or investigation.

(2) The registered person must establish and operate effectively an accessible system for identifying, receiving, recording, handling and responding to complaints by service users and other persons in relation to the carrying on of the regulated activity.

(3) The registered person must provide to the Commission, when requested to do so and by no later than 28 days beginning on the day after receipt of the request, a summary of—

(a) complaints made under such complaints system,

(b) responses made by the registered person to such complaints and any further correspondence with the complainants in relation to such complaints, and

(c) any other relevant information in relation to such complaints as the Commission may request.

17 Good governance

(1) Systems or processes must be established and operated effectively to ensure compliance with the requirements in this Part.

(2) Without limiting paragraph (1), such systems or processes must enable the registered person, in particular, to—

(a) assess, monitor and improve the quality and safety of the services provided in the carrying on of the regulated activity (including the quality of the experience of service users in receiving those services);

(b) assess, monitor and mitigate the risks relating to the health, safety and welfare of service users and others who may be at risk which arise from the carrying on of the regulated activity;

(c) maintain securely an accurate, complete and contemporaneous record in respect of each service user, including a record of the care and treatment provided to the service user and of decisions taken in relation to the care and treatment provided;

(d) maintain securely such other records as are necessary to be kept in relation to—

(i) persons employed in the carrying on of the regulated activity; and

(ii) the management of the regulated activity;

(e) seek and act on feedback from relevant persons and other persons on the services provided in the carrying on of the regulated activity, for the purposes of continually evaluating and improving such services;

(f) evaluate and improve their practice in respect of the processing of the information referred to in sub-paragraphs (a) to (e).

(3) The registered person must send to the Commission, when requested to do so and by no later than 28 days beginning on the day after receipt of the request—

(a) a written report setting out how, and the extent to which, in the opinion of the registered person, the requirements of paragraph (2)(a) and (b) are being complied with, and

(b) any plans that the registered person has for improving the standard of the services provided to service users with a view to ensuring their health and welfare.

Relevant Law: Constructive Dismissal

121. The leading case relating to constructive unfair dismissal is **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221 in which it was held that in order to claim constructive dismissal, an employee must establish that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach; the final act must add something to the breach even if relatively insignificant; if she does so, and terminates the contract by reason of the employer's conduct she is constructively dismissed.

122. The Tribunal was directed to **Williams v The Governing Body of Alderman Davies Church in Wales Primary School** [2020] UKEAT/0108/19 (**Willaims**), a decision of Mr HHJ Auerbach, in which the EAT held (in a disability discrimination claim) that a Tribunal had erred in concluding that, because it had found that the conduct of the respondent which tipped the claimant into resigning could not contribute to a breach of the implied duty of trust and confidence, the claim that he was constructively dismissed must fail. That would be correct only had it, properly, found that *(a) there was no prior conduct by the Respondent amounting to a fundamental breach; or (b) there was, but it was affirmed*.

123. **Williams** set out that if there was prior conduct amounting to a breach which was not affirmed, and which also materially contributed to the decision to resign, the claim of constructive dismissal will succeed from para 30

"… If there has been conduct …" which individually or cumulatively establishes a breach of the implied duty of trust and confidence *"threshold, followed by affirmation, but there is then further conduct which does not, by itself, cross that threshold, but would be capable of contributing to a breach of the Malik term, can the employee then treat that conduct, taken with the earlier conduct, as terminating the contract of employment?*

31. That question appeared to have received different answers from the EAT, but was tackled head on by the Court of Appeal in ***Kaur v Leeds Teaching Hospital NHS Trust****. Their decision confirms that the answer is "yes". In* ***Kaur,*** *Underhill LJ, which whose speech Singh LJ concurred, gave the following guidance:*

> *"I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach? None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy".

32. This helpful guidance assists Tribunals to navigate through one particular possible permutation of the branchings of the decision tree"

Fair Notice

124. For the respondent reliance was placed on **Chandhok and Another v Tirkey** [2015] IRLR 195 (**Chandhok**). The Tribunal notes that in **Chandhok** Langstaff J, commented at para 18 that parties are expected to set out the essence of their respective cases in the ET1 and ET3 and "*… a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it".*

Recording of meetings

125. The Tribunal has reminded itself of the EAT guidance in **Phoenix House v Stockman** (2019) EAT/0284/17 and 0058/18 on the impact of the recording of meetings, setting out at para 77, that "*times have changed in our experience such a record is not necessarily undertaken to entrap or gain a dishonest advantage. It may have been done to keep a record, or to protect an employee from being misrepresented when faced with an accusation – we do not think an ET is bound to conclude that the covert recording of a meeting necessarily undermines the trust and confidence between employer and employee".*

Privilege

126. In relation to the respondent's position on the **Friday 4 September 2020** email (the **Friday 4 September 2020 email**) being privileged and the contents not being capable of being relied upon in the current proceedings the respondent raises several issues.

127. The **Friday 4 September 2020 email** was issued by the first respondent's solicitor and not the company secretary, it is however not clear that anything turns on such a distinction between a company secretary who has certain corporate responsibilities and a solicitor acting for a company client. In the present case both were solicitors.

128. The respondent argues that it was sent in response to solicitor correspondence, although as the claimant points out only one of which was issued by the claimant's solicitor.

129. The **Friday 4 September 2020 email** was stated to be **"***on behalf of the chair".*

130. The respondent points out that it is expressly stated to be without prejudice.

131. The respondent argues that the context, including previous correspondence for the claimant identified that there was an ongoing dispute at the time and the circumstances fall within the ambit set out in **Daks Simpson Group v Kuiper** 1994 SLT 689 (**Daks**).

132. The respondent further refers to a decision of the EAT in England **Brodie v Nicola Ward (t/a First Steps Nursery)** 2007 2WLUK 186 (**Brodie**) which in the circumstances of that case it was held that a "*without prejudice"* letter was privileged, and Ms Brodie could not disclose its contents despite seeking to rely upon a proposal within that letter for the purpose of the last straw in her constructive dismissal claim.

133. For the claimant it was argued that **Brodie** describes the position in England, the correct approach is as set in the extract of Walker and Walker 10.7.1. with specific emphasis on *"Communications made during negotiations which are not strictly related to settlement negotiations also fall out with the privilege"*, citing various authorities, the most recent being **Richardson v Quercus** 1999 SLT 596 (**Richardson**).

134. Walker sets out (referring to **Daks** and **Richardson**) that, in considering the concessionary purpose, a communication can be broken down into its parts and unequivocal admissions which are made during negotiations are not protected.

135. Further in **Richardson,** it was set out that the effect of the words "*without prejudice"* had to be judged on the facts of each situation.

136. The Tribunal considers that as set out in Walker and Walker concessions made in the course of and for the furtherance of negotiation are privileged and includes negotiations before any proceedings commenced "… *it is the concessionary purpose of the communications rather than its expression "without prejudice" that attracts the privilege. The aim of this privilege is to encourage consensual settlement of disputes."*

137. In **Daks**, an admission had been made at a meeting, which was then followed up by a letter and that the argument about admissibility related only to the letter, reference was made to a Canadian case of **Kirschbaum v "Our Voices" Publishing Co** [1971] 1 OR 737, where it was said that the question to be considered in this context was - *"...what was the view and intention of the party in making the admission; whether it was to concede a fact*

hypothetically, in order to effect a settlement, or to declare a fact really to exist."

138. The Tribunal, has however, reminded itself that **Rule 41** of the 2013 Rules of Procedure set out that "*The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witness as far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.*"

139. The Tribunal considers that, in all the circumstances, the starting point is the application of Rule 41, and it is considered consistent with the case law in Scotland, as identified in Walker & Walker, that those elements of the email which state facts and which are not related to negotiation are divisible and admissible. The Tribunal concludes that the statement that there was an element of recording is admissible.

Evidence

140. The Tribunal accepts the evidence of all the respondent's witnesses as straightforward and credible, in particular Mr Gillon and Mr McGinty who were wholly straightforward and credible in their evidence.

141. The claimant's evidence reflected her view of first and second respondent. However, and where the claimant's evidence was contradicted by the respondent witnesses, the respondent witnesses are preferred. The Tribunal would not wish these reasons to be misunderstood as implying a finding that the claimant lied. The position is simply that, having heard the evidence of those witness, the Tribunal was unable to accept the accuracy of the claimant's honest, but the Tribunal considers inaccurate, recall of matters at the relevant time when compared to other accounts.

142. **Discussion and decision asserted Protected Disclosure; the claimant's email of Wednesday 8 April 2020.**

143. The Tribunal reminded itself that the correct approach is to ask whether statement by the claimant as asserted discloser, contained information of sufficient factual content and specification which is capable of showing one of the factors listed in s43B (1). This is matter of evaluation in light of the context and facts in which it was made (**Kilraine)**. The Tribunal approached the matter of the relevant provisions reading them broadly, having regard to the substance of what has been set out in the statement rather than taking an overly technical approach for a worker, at any level. The statement relied upon is set out above and repeated for ease " *The role of Child Protection has been delegated to me and I understand the rationale for this as I am the only one who can do it. However, I am not prepared to take this on at present as you will know there is currently an outstanding allegation against the senior management team concerning child protection, to quote the complaint "hiding things under the carpet whether it be a child protection issue or staff not doing their job which could have caused a child to die". You will appreciate that whilst this allegation currently is outstanding it not only places me but also the organisation at risk. If you can confirm that this has been investigated and there is no case to answer, i.e. exoneration then of course I am more than happy to assume this role I look forward to hearing from you Anita."*

144. The Tribunal has reminded itself that there is nothing within the statute which requires that a worker set out any specific statutory or regulatory provision.

145. The Tribunal expressly records that it is not critical that the claimant in setting set out her position did not, in her capacity as member of the Senior Management Team make any reference to **2018 Standard Operating Procedures** regarding the process set out where an allegation is made against either of Head of Service, Depute Head of Care (Care) or Depute Head of Service (Education).

146. Similarly, the Tribunal is expressly not critical that the claimant did not, in her professional capacity as qualified Social Worker, make any reference to any statutory obligations including those the Tribunal has been directed to, in the course of this hearing, such as the Health and Social Care Act 2008 (Regulated Activities) Regulation 2014 either directly or indirectly, upon the first respondent.

147. For this asserted protected disclosure taking all the circumstances of the case, recognising that there might be more than one reasonable view as to whether the specific statement was in the public interest and not substituting its own view for another reasonable view, concludes that the claimant did not have a belief at the time of making the statement, that it was the public interest. The Tribunal notes that the information the claimant was providing, while repeating, aspects of the March 2020 Anonymous Complaint letters was that she was happy to take on that Child Protection Officer role but would not be doing so until the chair confirmed an investigation had exonerated her. The Tribunal in coming to this view has considered that such a belief would not require to be the predominant motive in making the statement.

148. The second question (whether, if so that belief was reasonable) does not arise, however it the Tribunal's conclusion is that on an objective basis it could not be said that such a belief would be reasonable given the context and language used.

149. The Tribunal recognises that the test is not one mere numerical analysis (as to how many its serves) but depends on the character of the interest served. The claimant, and her two colleagues, are those served by the statement which said to be a disclosure. While the nature of the interest affected could have been a wider, on the facts of this case the interest served was that of the claimant confirming that she would be happy to take on the role if exonerated, to the extent that the matter was complained of was an omission to carry out an investigation to exonerate the claimant that may be said to be deliberate. The Tribunal concludes on the facts in case, the alleged wrongdoers were the senior management team against whom allegations

had been made and in respect which allegations, as those who were operationally in charge of the first respondent, had not initiated an investigation.

150. The information the claimant was providing, while repeating, aspects of the March 2020 Anonymous Complaint letters was that she was happy to take on that Child Protection Officer role but would not be doing so until the chair confirmed an investigation had exonerated her.

151. That is the information which is said to be disclosed by the worker which is said to amount to a qualifying disclosure.

152. The next question under s43(B) (1) requires the Tribunal to consider whether the claimant's belief about that specific information falls within the section.

153. The Tribunals conclusion is that the claimant did not think, at the time, that she was providing information of any need (whether by reason of regulation or otherwise) for investigation, beyond the exoneration she sought as a precursor to her taking on the Child Protection Officer role.

154. It is the Tribunals' conclusion that in the whole circumstances and while it is now argued that the claimant believed that a legal obligation (to investigate) was being breached, taking the information in the context that it was made the claimant did not have a belief at the time, that that statement was made in the public interest. The concern was that in absence of an investigation the claimant would not be exonerated.

155. In conclusion there was no protected disclosure, by the claimant, within the meaning of s47B(1) (b) ERA 1996 on **Wednesday 8 April 2020**. As such it is not considered necessary to further consider the source of the legal obligation which may be relied upon, however the Tribunal recognises that Regulations 16 and 17 of the Health and Social Care Act 2008 (Regulated Activities) Regulation 2014 provides a statutory regime for responding to complaints as may be necessary.

156. **Discussion and Decision alleged protected disclosure -Wednesday 8 April 2020,** in relation to what is said to be a matter of child protection to the first respondent's HR Manager and Claire Lundie the first respondent's Head Teacher

157. The claimant did not make any statement which may be considered to be a potential protected disclosure within the meaning of s47B(1) (b) ERA 1996 on Wednesday 8 April 2020 to the first respondent's HR Manager and Claire Lundie the first respondent's Head Teacher.

158. **Discussion and Decision alleged protected disclosure - Monday 27 April 2020 Child Protection made to Kevin Miller**

159. Applying the principles set out above to the statement made, the claimant intimated that she considered that she was being punished *"for something she had not done",* that is the broad allegations contained in the **March 2020 Anonymous Complaint letters.**

160. It is the Tribunals' conclusion that in the whole circumstances and while it is understood to now be argued that the claimant believed that a legal obligation (to investigate) was being breached, taking the statement in the context that it was made, the claimant did not have a belief at the time that that statement was made in the public interest. The concern was that she felt she was being punished for something that she had not done.

161. There was no protected disclosure, by the claimant, within the meaning of s47B(1) (b) ERA 1996 on Monday 27 April 2020.

162. **Discussion and Decision alleged protected disclosure- Thursday 30 April 2020 -written grievance to St Mary's**

163. Applying the principles set out above to the statement made, it is the Tribunal's conclusion that the only information the claimant substantively provided in her written grievance was her rationale for deciding not to hold the Child Protection Officer role.

164. It is the Tribunals' conclusion that in the whole circumstances and while it is understood that it is now argued that the claimant believed that a legal obligation (to investigate) was being breached, taking the statement in the context that it was made, the claimant did not have a belief at the time, that that statement was made in the public interest. The information provided was her rationale for deciding not to hold the Child Protection Officer role.

165. In conclusion there was no protected disclosure, by the claimant, within the meaning of s47B(1) (b) ERA 1996 in the claimant grievance on Thursday 30 April 2020 by the claimant.

166. **Discussion and Decision alleged protected disclosure Thursday 11 June 2020 Child Protection to Gerry McGinty (during hearing)**

167. Applying the principles set out above to the statement made, the Tribunal notes that the claimant's representative toward the latter part of the grievance hearing on Thursday 11 June 2020, briefly set out that he believed the child protection matter (without giving any specification) should still be investigated (on the basis that the claimant had become aware that this had not been the case to date).

168. It is the Tribunals' conclusion that in the whole circumstances and while it is understood to now be argued that the claimant believed that a legal obligation (to investigate) was being breached, taking the statement in the context that it was made the claimant did not have a belief at the time, that her statements in the course of the grievance hearing were made in the public interest.

169. In conclusion there was no protected disclosure, by the claimant, within the meaning of s47B(1) (b) ERA 1996 on Thursday 11 June 2020 Child Protection Board Member to respondent Board member Gerry McGinty (during the appeal).

170. **Discussion and Decision: Alleged protected disclosure Thursday 25 June 2020 Child Protection written grievance (appeal to the first respondent).**

171. Applying the principles set out above to the statement made, no information was provided of any need on the part of the first respondent to carry out an investigation.

172. In the whole circumstances, including the context of the appeal letter, and while it is understood to be argued that the claimant believed that a legal obligation (to investigate) was being breached, taking the statement in the context that it was made, the Tribunal concludes that the claimant did not have a belief at the time, that the statement on Thursday 25 June 2020, was made in the public interest.

173. There was no protected disclosure by the claimant, within the meaning of s47B(1) (b) ERA 1996, on **Thursday 25 June 2020.**

174. **Discussion and Decision: Alleged protected disclosure Sunday 26 July 2020 to first respondent board members Brian Tierney and Joe Farrell**

175. Applying the principles set out above to the statement made, and while there is no requirement to make specific reference to statutory obligations, the Tribunal notes, the claimant did make such reference. The claimant provided specification information of a need, by reason of regulation on the part of the first respondent to carry out an investigation.

176. While aspects of the claimant's statements issued on Sunday 26 July 2020 focused on the respondent's alleged failure to investigate as an issue for the claimant's registration, rather than a matter of general public interest, the Tribunal has reminded itself that the public interest does not require to be the predominate matter in such a statement. Taking the information in the context it was made, the Tribunal is satisfied that the claimant believed that the statement was made in the public interest. Further again in the context, as set out, the Tribunal is satisfied that the claimant had a reasonable belief that the statement was made in the public interest.

177. The Tribunal concludes that the statement set out on Sunday 26 July 2020 to respondent Brian Tierney and Joe Farrell**, being the claimant's July 2020 Appeal Submission** contained a protected disclosure within the meaning of

s47B(1) (b) ERA 1996. It set out the claimant's assertion that that there had been a failure to investigate in response to the anonymous allegation that the senior management team (the director, Deputy Director and the claimant) swept child protection issues under the rug which could have "*caused the death of a child. Despite repeated requested from"* the claimant, the (now former) Director and (now former) Deputy Director, Mr Gillon as Chair "*refused to have this investigated. In doing so he was departing from the safeguarding and whistleblowing policies*" of the first respondent "*the child protection guidance and policies of the Catholic Church and the requirements of the SSSC and the care Inspectorate"*. At Part A Substantive concerns, the claimant set out that what she described as the failure of the chair to follow the child protection procedures set out by the Care Inspectorate and SSSC resulted in the former Director "*having to self-report. As this child protection investigation has not been undertaken, my registration has been compromised in the absence of an investigation, I have not been exonerated. My registration is therefore deemed to be an open case and there is a fitness to practice issue outstanding".* While that final element describes matters specific to the claimant, as above the Tribunal has reminded itself that the public interest does not require to be the predominate matter in such a statement.

178. In conclusion there was a protected disclosure by the claimant, within the meaning of s47B(1) (b) ERA 1996, on **Sunday 26 July 2020**

Detriments:

179. **Discussion and Decision:** alleged protected disclosure detriment removal of duties, **Wednesday 15 April 2020**:

1. The decision to recruit Mr Miller reflected a practical response, the first respondent to the claimant having notified the first respondent of her decision to withdraw her previous agreement to take on required role of Child Protection Officer and was in no way connected to any alleged protected disclosure. The respondent had not removed the claimant's duties as of this date.

180. **Discussion and Decision:** alleged protected disclosure detriment removal of responsibilities/duties, **Thursday 16 April 2020**:

1. The respondents did not in fact remove the claimant responsibilities and duties and allocate such duties to the Ms Watson by **Thursday 16 April 2020**. The subsequent secondment of Ms Watson was in no way connected to any alleged protected disclosure, Ms Watson had been initially asked to provide a continuing supportive role for Dochas House until **Monday 27 April 2020,** and thereafter stepped into role of Service Manager at Bishopbriggs on a temporary basis after the claimant had submitted a second Fit Note, this time covering the period up to **Sunday 10 May 2020.** Ms Lundy had not assumed sole executive decision-making function.

181. **Discussion and decision:** alleged protected disclosure detriment, **Monday 27 April 2020**, being the alleged removal of operational decision-making responsibilities and changes of role/threatened with demotion by the first respondent.

1. It is the Tribunal's conclusion that the first respondent's intimation to the claimant that that she would have no line management responsibilities at this stage as the first respondent was working to the flat management structure was in no way related to any alleged Protected Disclosures by the claimant. The decision reflected the claimant having been implicated in aspects of confidential staff response to the **March 2020 Employee Voice Survey** and what was described as "*her subsequent unknown period of absence",* it having been agreed that the flat management structure *"following the departure of both the Director and substantive Director would remain with an overview undertaken by* "the second respondent. It represented a practical approach against the background of the reasons for the **March 2020 Employee Voice Survey,** responses to same and the claimant's absence.

182. **Discussion and Decision:** Alleged protected disclosure detriment, **Friday 26 June 2020,** the first respondent deciding, it is alleged, to terminate the claimant's position as Assistant Director Head of Care.

1. The respondent's decision to transfer the claimant back to the position of Service Manager was in no way related to any alleged Protected Disclosures by the claimant. The decision reflected the non-opening of the Dochas House unit.

183. **Discussion and Decision** Alleged protected disclosure detriment, **Wednesday 29 July 2020**, the second respondent acting, in what the claimant alleges, was a hostile and threatening manner towards the claimant.

1. The claimant's honest but erroneous recollection was that during the Return to Working meeting on Wednesday 29 July 2020, the second respondent was hostile and threatening. The Tribunal accepts that the second respondent was not. The second respondent's conduct during the meeting was in no way related to any alleged protected disclosure by the claimant. While the second respondent insisted on some detail, this was to clarify the context of child protection matter which the claimant intimated she had been advised of by two colleagues. The second respondent was the Child Protection Officer. Upon being provided with the information, the second respondent was able to confirm that he would reassure the colleagues that due process had been followed. The second respondent's actions in the meeting on Wednesday 29 July 2020, were in no way related to any alleged Protected Disclosure by the claimant.

184. **Discussion and Decision:** Alleged protected disclosure detriment **Thursday 6 August 2020**, the second respondent making what is alleged to be a false allegation of Data Protection Breaches against the claimant

1. The second respondent had a genuine belief that there was a potential issue around data protection (GDPR) which he considered he ought to raise with the claimant at the meeting on Thursday 6 August 2020. It is not considered necessary to conclude whether such breach actually or potentially had occurred. His decision for doing so was no way related to any alleged protected disclosure by the claimant.

185. **Discussion and Decision:** Alleged protected disclosure detriment**, Thursday 13 August 2020**, the second respondent engaging in threatening and bullying conduct toward the claimant and recording meeting on mobile phone without consent.

1. The second respondent's actions did not amount to threatening and bullying conduct. He did not act in a threatening manner towards the claimant. The second respondent's actions on Thursday 13 August 2020, were in no way related to any alleged protected disclosure by the claimant.

2. In relation to the issue of recording the second respondent had sought advice that recording, subject to consent, would be permissible. The Tribunal does not conclude what would have been overt (rather than covert) recording would undermine the trust and confidence between the employer and employee. The second respondent sought the claimant's view. The claimant was entitled in all the circumstances to decline to agree to a recording been made as unnecessary**.** The second respondent's view was that recording would provide both parties with a clear record of proceeding. While the Tribunal agrees with the claimant that recording, where there were two notetakers reflected an excess of caution on the part of the second respondent, the second respondent's actions were in no way related to any alleged protected disclosure.

186. **Discussion and Decision: Alleged detriment** on **Thursday 13 August 2020**, the second respondent, accusing the claimant of misconduct.

1. The second's respondent email issued Thursday 13 August 2020 accusing the claimant of misconduct, reflected his honest view of the claimant's actions at the meeting that day. It was in no way related to any alleged protected disclosure. While the Tribunal regards the second respondent's accusation as being misguided in that in the Tribunals view the claimant's actions did not come within the ambit of misconduct as set out the respondent's procedure, the second respondent's view was his genuinely held view.

187. **Discussion and Decision** Alleged protected disclosure detriment on **Thursday 27 August 2020,** provision being made by the first respondent and/or the second respondent to remove the claimant from her current office.

1. The first respondent had concluded that arranging for the claimant to return to work in a shared office alongside with two colleagues was an appropriate use of available accommodation affording the claimant the opportunity to work directly with two colleagues with whom the claimant would be expected to work collaboratively and the claimant have previously expressed the view at **Return-to-Work** meeting on **Tuesday 6 August 2020,** that she was feeling isolated and ignored by colleagues. The claimant disagreed, reflecting her view that Ms Sanderson and the second respondent had their own office and her view that she would not have positive communication with the two colleagues, she would be office sharing with, as she felt that they were isolating her, rather than assisting in addressing her complaint of feeling isolated.

2. The first respondent's implementation of change of office was in no way related to any alleged protected disclosure by the claimant. The shared office arrangement reflected a genuine attempt by the respondents to address the claimant's previously expressed view at **Return-to-Work** meeting on **Tuesday 6 August 2020,** that she was feeling isolated and ignored by colleagues.

Discussion and decision: Constructive Dismissal.

188. The first respondent did not allocate the claimant's duties under the flat management structure to Ms Watson on **Wednesday 15 April 2020**. The respondent's decision to recruit Mr Miller did not amount to a fundamental breach of the contract of employment. The first respondent did not breach the implied term of mutual trust and confidence. The first respondent decision to recruit Mr Miller was not made without reasonable and proper cause reflecting a requirement on the first respondent to have a Child Protection Officer in place. The first respondent had not allocated the claimant duties under the flat management structure to Ms Watson by Wednesday 15 April 2020, the first respondent did not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant. The claimant did not take action to terminate her employment in consequence of the alleged allocation of the duties to Ms Watson and/or the recruitment of Mr Miller, taken either individually or cumulatively.

189. The first respondent's decision on **Monday 27 April 2020**, that the claimant would have no line management responsibilities at this stage as the first respondent was working to the flat management structure did not amount to a fundamental breach of the contract of employment the claimant having been implicated in aspects of confidential staff response to the **March 2020 Employee Voice Survey** and what was described as "*her subsequent unknown period of absence"* it having been agreed that the flat management structure *"following the departure of both the Director and substantive Director would remain with an overview undertaken by* "Mr Miller. The first respondent, in their decision, did not breach the implied term of mutual trust and confidence. The first respondent's decision that the claimant would not have line management responsibilities at this stage, as the first respondent was working to the flat management structure was not made without reasonable and proper cause reflecting the first respondent concern regarding the anonymous allegations, the 2020 Employee Staff Survey confidential

responses, and the claimant's absence. In making this decision the first respondent did not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant. The claimant did not take action to terminate her employment in response, or partly in response to the respondent's decision on **Monday 27 April 2020** taken either individually or cumulatively.

190. The claimant had, by the commencement of the hearing withdrawn as an alleged protected detriment criticism around what was said to be a failure on the part of the first respondent to appoint an independent Grievance investigator/ hearer in **April/May 2020**. The Tribunal however considered that it was appropriate in all the circumstances to consider that criticism in the context of the constructive dismissal complaint.

191. The first respondent's decision to appoint Mr McGinty to hear the claimant's grievance did not amount to a fundamental breach of the contract of employment. Mr McGinty was accepted as someone who had relevant experience. The first respondent, in their decision, did not breach the implied term of mutual trust and confidence. The first respondent's decision to appoint Mr McGinty was not made without reasonable and proper cause reflecting what the claimant accepted was his relevant experience, the first respondent did not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant. The claimant did not take action to terminate her employment in response (or party in response) to this conduct taken either individually or cumulatively.

192. It was reasonable for Mr McGinty to deal with the issues raised in the claimant's grievance letter. He approached the matter with an open mind. A misjudged comment around ice cream was accepted to misjudged by Mr McGinty, and it is the Tribunal's conclusion that he seeking to articulate a challenge of unspecific or unfounded allegations against the background of his professional experience to someone who was also a professional.

193. Mr McGinty fairly conducted the grievance and fairly concluded that he did not uphold the grievance. His conduct of the grievance and decision not to uphold

the grievance, did not breach the implied term of mutual trust and confidence. His conduct of the grievance and decision not to uphold the grievance was not carried out a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the first respondent and the claimant. The claimant did not take action to terminate her employment in response (or partly in response) to this conduct taken either individually or cumulatively.

194. The first respondent's decision to transfer the claimant back to the position of Service Manager by notice issued **Friday 26 June 2020** did not amount to a fundamental breach of the contract of employment. The claimant had been appointed on a temporary basis with the principal focus of Dochas House which was not opening. The first respondent, in their decision, did not breach the implied term of mutual trust and confidence. The first respondent decision was not made without reasonable and proper cause, the first respondent did not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant. The claimant did not take action to terminate her employment in response (or partly in response) to this conduct taken either individually or cumulatively.

195. The second respondent's conduct during the Return-to-Work Meeting on **Wednesday 29 July 2020** was not hostile, although he insisted on detail to clarify context of what appeared to be a new child protection matter, he did so as the Child protection Officer with relevant responsibility for this area, this did not amount to a fundamental breach of the contract of employment. The second respondent, in his conduct, did not breach the implied term of mutual trust and confidence. The minutes fairly demonstrate a supportive and professional response by the respondent's to managing the claimant's return to work (after a lengthy absence) was being managed. The respondent's conduct in that meeting was not made without reasonable and proper cause, the second respondent did not conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between him and the claimant. The claimant did not take action to terminate

her employment in response (or partly in response) to this conduct taken either individually or cumulatively.

196. The second respondent's raising of a data protection issue with the claimant at the meeting on **Thursday 6 August 2020**, did not amount to a fundamental breach of the contract of employment. In doing so the respondents did not breach the implied term of mutual trust and confidence. The respondent's conduct was not made without reasonable and proper cause, the second respondent had a genuine concern around data protection issues which he considered he required to raise with the claimant. The respondents did not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant. The claimant did not take action to terminate her employment in response (or partly in response) to this conduct taken either individually or cumulatively.

197. With regard to the second respondent actions on **Thursday 13 August 2020,** the second respondent did not act in a threatening and bullying manner.

198. In relation to the issue of recording on **Thursday 13 August 2020**, the second respondent had sought advice that recording, subject to consent, would be permissible. The Tribunal does not conclude what would have been overt (rather than covert) recording would undermine the trust and confidence between the employer and employee. The second respondent sought the claimant's view. The claimant was entitled in all the circumstances to decline to agree to a recording been made as unnecessary**.** The second respondent's view was that recording would provide both parties with a clear record of proceeding. While the Tribunal agrees with the claimant that recording, where there were two notetakers reflected an excess of caution on the part of the second respondent it did not breach the implied term of mutual trust and confidence and was not made without reasonable and proper cause.

199. The Tribunal has reminded itself of the EAT's guidance in **Phoenix House,** the second respondent's actions would have amounted to a covert, rather than overt attempt to record the meeting.

200. The second respondent assertion of misconduct and recording did not amount to a fundamental breach of the contract of employment. In doing so the respondent did not breach the implied term of mutual trust and confidence. The respondent's conduct was not made without reasonable and proper cause, the respondent did not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant. The claimant did not take action to terminate her employment in response (or partly in response) to this conduct taken either individually or cumulatively.

201. The second respondent's email on **Thursday 13 August 2020**, accusing the claimant of misconduct, reflected his honest view of the claimant's actions at the meeting that day. While the Tribunal regards the second respondent's accusation as being misguided in that in the Tribunals view the claimant's actions did not come within the ambit of misconduct, as set out the respondent's procedure, the second respondent's view was his genuinely held view. The second respondent assertion of misconduct did not amount to a fundamental breach of the contract of employment. In doing so the respondent did not breach the implied term of mutual trust and confidence. The respondent's conduct in issuing that email was not made without reasonable and proper cause reflecting his genuine although the Tribunal concludes mistaken view that the claimant's actions which he felt disrespectful to him amounted to misconduct. In issuing that email the second respondent did not conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between himself and the claimant. The claimant did not take action to terminate her employment in response (or partly in response) to this conduct taken either individually or cumulatively.

202. In relation to, provision being made by the first respondent and/or the second respondent, on **Thursday 27 August 2020**, to remove the claimant from her current office, the first respondent's implementation of shared accommodation did not amount to a fundamental breach of the contract of employment. In doing so the respondents did not breach the implied term of

mutual trust and confidence. The respondent's implementation of the shared office was not made without reasonable and proper cause, it was considered by the respondent to be an appropriate use of available space and was designed to assist the claimant who had previously expressed the view that she was feeling isolated at Return-to-Work meeting on **Tuesday 6 August 2020.** The respondents did not in its decision conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant. The claimant did not resign in response (or partly in response) to this conduct taken either individually or cumulatively.

203. The first respondent's solicitor's email of **Friday 4 September 2021** did not amount to fundamental breach of the contract of employment. It was a genuine attempt to seek to resolve a matter without litigation. Its terms did not breach the implied term of mutual trust and confidence. The respondent's solicitor's communication was not made without reasonable and proper cause, it was considered by the respondent to be an attempt to resolve a dispute. The respondent in arranging for its solicitor to issue that email, did not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant.

204. The email of **Friday 4 September 2021** was not a final straw, it did not contribute to any asserted breach of the implied duty of trust and confidence. The claimant was not entitled to treat that email, when taken with the earlier conduct complained of either individually or cumulatively, as terminating the contract of employment.

205. In any event the Tribunal does not accept that the claimant resigned, in part or in whole, in response to same.

206. The claimant decision to resign is no way criticised, the claimant was entitled to resign with notice, however the claimant was not constructively dismissed.

Discussion and Decision: Fair Notice

207. It is considered that for the relevant areas relied upon in the present dispute, the respondent knew in essence what the claimant was saying and the relevant areas in dispute were set out.

Discussion and Decision: operation of the Regulations 16 and 17 of the Health and Social Care Act 2008 (Regulated Activities) Regulation 201

208. The Tribunal noted that the **specific statement within the first postmarked of the March 2020 Anonymous Complaint letters** was set out in distressing terms and concludes that it was not a statement of sufficient specificity which was apt for investigation.

209. It is not, however, within the role of this Tribunal to determine whether the first respondent's response to the anonymous complaints letters was in accordance with the statutory regime described.

Decision

210. The claimant's claims do not succeed.

211. The role of the Tribunal is to weigh the evidence before it. This involves an evaluation of the primary facts and an exercise of judgment. The Tribunal has done so applying the relevant law.

212. If there are further submissions which either party considers it is necessary, in the interests of justice, to address supplemental to their respective existing submissions, they should set out their position in a request for reconsideration in accordance with Rule 71 of the 2013 Rules.

Employment Judge: Rory McPherson
Date of Judgment: 12 August 2021
Entered in register: 24 August 2021
and copied to parties