



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Dinn

**Respondent:** Keys Child Care (Holdings) Limited

**Heard at:** Liverpool (by CVP)      **On:** 5 April 2024

**Before:** Employment Judge Barker

**Representatives**

**For the claimant:** in person

**For the respondent:** Mr Heard, counsel

## RESERVED JUDGMENT

The decision of the Tribunal is:

1. The claimant's claim of constructive unfair dismissal was presented to the Tribunal outside the primary time limit for doing so. It was reasonably practicable for the claimant to have presented his claim in time and so the claim cannot proceed. It is hereby dismissed;
2. The claimant's claims of direct sex discrimination were presented to the Tribunal outside the primary time limit for doing so. It was not just and equitable to extend the time limit to allow the claims to be presented late and they are hereby dismissed;
3. The claimant presented seven claims of detriment by reason of having made protected disclosures. Detriments 3, 5 and 6 have no reasonable prospect of success and are hereby struck out (rule 37 Employment Tribunals Rules of Procedure 2013);
4. The complaints identified as detriments 1, 2, 3A and 4 were presented to the Tribunal outside the primary time limit for doing so. It was reasonably practicable for the claimant to have presented his complaints in time and so they cannot proceed and are hereby dismissed;

5. The claimant applied at a previous hearing on 16 November 2023 to add two new detriments (numbered 7 and 8) to his claims. Both of these complaints were in time. Permission is given to the claimant to add these complaints to his claims. They are the subject of a deposit order, which is recorded by means of a separate Order.

## REASONS

### **Preliminary Matters and Issues for the Tribunal to decide**

1. The purpose of the hearing was to consider a number of case management preliminary issues as set down by EJ Horne at the preliminary hearing on 16 November 2023. The list of the claimant's complaints and issues was drawn up by EJ Horne at that hearing and is attached as an appendix to this judgment. The issues to be decided today were said by EJ Horne to be:
  - 1.1. whether it was reasonably practicable for the claimant to present his complaint of unfair constructive dismissal by 29 April 2023; and
  - 1.2. if it was not reasonably practicable, whether the period between 29 April 2023 and 4 July 2023 was reasonable.
  - 1.3. to clarify the issues in respect of the unfair constructive dismissal complaint if the tribunal has the legal power to consider it.
  - 1.4. to determine whether it is just and equitable to extend the time limit for presentation of the complaint of sex discrimination complaints by approximately one year.
  - 1.5. to decide whether or not the claimant should have permission to amend his claim to complain of Reference Detriment 1 and Reference Detriment 2 (see below).
  - 1.6. to decide whether the protected disclosure detriment complaints labelled (2023 Detriments 3, 5 and 6) below should be struck out on the ground that they have no reasonable prospects of success.  
(Here, the tribunal will consider in particular whether there is any reasonable prospect that the tribunal will find that:
    - (a) the respondent did the alleged detrimental act
    - (b) if there was a failure, whether the alleged failure was deliberate
    - (c) in either case, that the act or failure was on the ground that the claimant made the alleged protected disclosures.)
  - 1.7. To decide whether the earlier detriment complaints should be struck out on the ground that they have no reasonable prospects of success. (Here, the tribunal will consider, in particular:

(a) the claimant accepts that the acts and deliberate failures, which still need to be clarified, were all done before 23 February 2023;

(b) whether there is any reasonable prospect of the tribunal finding that they were part of a series of acts or failures that were similar to 2023 Detriments 3, 5 and 6; (there can be no such prospect if 2023 Detriments 3, 5 and 6 are struck out);

(c) if there is no such prospect, whether it was reasonably practicable for the claimant to present his claim in respect of the earlier detriment complaints within the statutory time limit, and whether he presented his claim within such further period as the tribunal considers reasonable.)

1.8. To decide whether or not to make a deposit order (not exceeding £1,000 per allegation) in respect of any of the detriment complaints on the ground that, having regard to the issues listed above, those complaints have little reasonable prospect of success.

1.9. To consider the claimant's application to add two further claims of protected disclosure detriment relating to the terms of his references provided in August 2023 and October 2023.

1.10. To clarify the earlier detriment complaints if the tribunal has the legal power to consider them.

2. The respondent provided a witness statement from Emma Ray, the respondent's in-house counsel who prepared the response to the claimant's subject access request. This was the subject of the claimant's detriments two and three, that there was a deliberate delay by his managers in providing documents for the SAR to Ms Ray (detriment 2) and that his managers redacted the SAR documents before sending them to Ms Ray (detriment 3).
3. Ms Ray's evidence was not challenged by Mr Dinn and so she was not called as a witness. Her evidence, which the Tribunal accepts, was that any delay in the SAR process was caused by her workload, and that the redaction of the documents was done by her (having received the documents unredacted from the respondent's employees from whom they were requested) and it was partly the task of redacting that caused her to be delayed in providing the results of the SAR to Mr Dinn.
4. The Tribunal on the previous occasion had asked Mr Dinn to prepare a witness statement about the issue of delay in submitting his claims. The statement was before this Tribunal and has been taken into consideration. Mr Dinn was sworn in to answer questions from the respondent's counsel on the statement. Mr Dinn frequently did not answer the questions he was asked. It proved difficult to follow some of the lines of his argument. At the end of the hearing, some of his evidence and arguments were still unclear, despite this being the second hearing at which his claims were discussed with a judge. This is partly because Mr Dinn frequently raises matters which were complaints made as part of his grievance and

grievance appeal to the respondent, which was very large, but which do not form part of his complaint to the Tribunal. Also his evidence on the issues that were before the Tribunal was unclear, such as his evidence on the issue of sex discrimination.

5. It was not possible to provide the parties with a decision at the end of the hearing and so this reserved decision and full reasons is provided. The Tribunal has also ordered Mr Dinn to pay a deposit, which is covered in the separate documents for the Deposit Order and the Case Management Summary. Given that Mr Dinn's claims are much reduced in scope following this hearing, there will be a further case management hearing to discuss the length of the final hearing and to make case management orders. The Tribunal will write to the parties about this in due course.

### **Time Limits and Prospects of Success**

6. In essence, Mr Dinn's oral evidence on the issue of whether the claims were out of time or not and why, was that he thought that he was obliged to follow the respondent's internal procedures through to conclusion before submitting his claim and that he thought he would be prevented from submitting his claim unless he had done so. As the respondent's counsel pointed out, the fact that he thought he would be prevented from submitting his claim unless he had followed the internal procedures at the respondent was not something that he wrote in this witness statement. Mr Dinn told the Tribunal that he wanted to go through the respondent's procedures first before going to the Tribunal. I find that he preferred to do so but I do not accept that he thought that he would be barred from putting a claim in to the Tribunal until he had done so.
7. A number of Mr Dinn's complaints centre around his female colleague "AN". He alleges that she behaved sexually inappropriately towards him at work and in front of children and that the respondent's response to him raising concerns about her behaviour was inadequate and discriminatory against him on the grounds of his sex. He also says that his disclosure to the respondent about AN's behaviour was a protected disclosure and that he was subjected to a number of detriments because of having made this disclosure.
8. In relation to AN's behaviour, it is the respondent's case that Mr Dinn was asked at the time he raised his concerns about her, if he wanted to make a formal complaint and if so, the respondent would begin an internal investigation. However, the respondent says, and Mr Dinn accepts, that he did not want to make a complaint about AN. His evidence to me at this hearing was "*I was trying to be courteous to AN... AN had a lot going on at the time...I wanted it dealt with informally.*"
9. The respondent's case is that AN also raised issues to them about Mr Dinn's behaviour towards her at work and otherwise. Managers at their place of work received reports of colleagues overhearing Mr Dinn speaking in an aggressive and hostile tone towards AN and others. Another colleague, LC, made a complaint about the way in which Mr Dinn spoke to her at work, but this could not

be investigated because Mr Dinn walked out of work on 30 January 2023 and did not return. In the bundle of evidence there are meeting minutes where the respondent discusses with Mr Dinn his attitude and conduct towards colleagues, and where he acknowledges that he may need to reflect on his behaviour. Mr Dinn seeks to minimise or dismiss any such evidence and alleges a conspiracy to discredit him on the part of the respondent. There is no evidence before this Tribunal to suggest a conspiracy against him. At times during his evidence to this Tribunal and in documentary evidence in the Tribunal bundle, Mr Dinn acknowledges that, although not a manager himself at the time, he took his managers to task in relation to issues in the workplace and would take jobs upon himself to do, that others had done but not to his satisfaction.

10. The respondent did deal with the conflict between Mr Dinn and AN informally, as he requested, but Mr Dinn was not satisfied with the outcome, particularly because in investigating matters, the respondent uncovered the evidence about issues with Mr Dinn's behaviour at work. He now suggests that the respondent ought to have investigated AN formally nonetheless. There is evidence to indicate that they did investigate his allegations but informally, as he had agreed, and that evidence such as what Mr Dinn alleged were explicit text messages and photographs were not considered by the respondent to be problematic as Mr Dinn considered them to be.
11. Mr Dinn also told the Tribunal that he found offensive a comment by his manager Ms O'Reilly (and similar comments by Mr Peel and Stuart) that he should be "flattered" by AN's attention towards him. However, Mr Dinn's evidence to this Tribunal was not consistently that this was offensive because it was sex discrimination, but that he also considered it offensive because it suggested that he was not as attractive as he considered himself to be. He told the Tribunal that he considered himself to be a good looking man, and that it was offensive to him for that reason to be told that he should be "flattered". However, he also said earlier during the hearing that Ms O'Reilly's comments made him feel "unsafe" and I find this evidence is contradictory.
12. Mr Dinn raised a grievance and an appeal against the outcome of that grievance. He alleges that Ms Bridger's appeal outcome was delayed because unidentified managers interfered with it. However, it is clear from the documents for the grievance appeal that the appeal covered a large amount of information, and that Mr Dinn raised a large number of issues for Ms Bridger to investigate. Indeed, the appeal covered so many issues that three meetings with the claimant were required for her to cover all the complaints. He also alleges that she was provided with false information by unidentified managers, as she says in her outcome that there were findings of bullying by Mr Dinn. However, I find that the outcome letter contains no such finding of bullying.
13. Mr Dinn resigned on 30 January 2023, without giving notice to the respondent. In order for his claim for constructive unfair dismissal to be in time, he needed to start ACAS Early Conciliation by 29 April 2023. He approached ACAS on 22 May 2023, by which time he was 23 days late to do so. ACAS Early Conciliation ended on 7 June 2023. Because he had failed to contact ACAS within three months of

his termination date, he did not receive the benefit of any extension of time after the end of ACAS Early Conciliation to submit his ET1 claim form. Nevertheless, Mr Dinn waited almost four more weeks, to 4 July, until he did so.

14. The question for the Tribunal is whether it was not reasonably practicable (that is, was it not reasonably feasible) for him to have approached ACAS in time. If it was not, the Tribunal needs then to consider if he did so within a reasonable time thereafter.
15. For his complaint of whistleblowing detriment, the test is also whether it was “reasonably practicable” to submit his claim in time but the time limits were slightly different. If Mr Dinn can persuade the Tribunal that detriments number 3, 3A, 5 and 6 are not to be struck out for having no reasonable prospect of success, those numbered 3, 5 and 6 are in time. If he can persuade the Tribunal that detriments 1-6 are part of a series of detriments, then the earlier detriments that are out of time may be brought as part of that series, the later of which are in time.
16. In relation to the sex discrimination complaints, the test is different, and the Tribunal has more discretion to extend time if discrimination complaints are late. This can be done if it is “just and equitable” to do so. Mr Dinn accepted that the sex discrimination complaints all arose during the period May to August 2022. It therefore follows that they were approximately 9 months late.
17. Mr Dinn provided the Tribunal with evidence on the issue of time limits. He was a member of Unison during his employment. During the period when he was off work sick and only being paid Statutory Sick Pay, he cancelled his union membership because of the cost of the fees. His period of sick pay started in November 2022 and so I accept he did not have access to a union for advice from that point. However, when he was in work and being subjected to what he alleged was sex discrimination, he was in Unison and able to access legal advice as a member.
18. I also accept that Mr Dinn had access to the Internet, was able to and in fact had done research on the issue of his employment rights. He was familiar with employment law and discrimination as he told the Tribunal he had done several courses on the topic at work.
19. Mr Dinn was off work sick, with “stress at work” being the stated reason on his Fit Note from his GP, but not incapacitated, I find. He was able to look for and find other jobs during this time and raised a grievance and participated in the grievance process in work. He was therefore also well enough to be able to research how to complain to an Employment Tribunal and well enough to approach ACAS and submit an ET1 form.
20. Mr Dinn’s consistent evidence to the Tribunal was that he did not know that he could go to ACAS for Early Conciliation, or submit a claim to the Employment Tribunal, while internal processes were ongoing. He maintained this position despite acknowledging that he was a member of a union for a considerable

period of time during his employment, and that he had access to the internet and had done some research during his employment and afterwards.

## The Law

21. In Tribunal claims for discrimination, whistleblowing and unfair dismissal, a claimant must engage with ACAS Early Conciliation before an ET1 can be submitted. The ACAS Early Conciliation must begin within three months of the date of the act complained of.
22. Discrimination complaints are subject to the time limits set out in the Equality Act 2010 at s123(1), as follows:

*“Proceedings on a complaint within section 120 may not be brought after the end of –*

  - (a) *the period of 3 months starting with the date to which the complaint relates, or*
  - (b) *such other period as the employment tribunal thinks just and equitable.”*
23. The Tribunal must consider several factors in deciding whether a claim presented late can still be considered on a “just and equitable” basis.
24. These include, but are not limited to, the prejudice each party would suffer as a result of the decision reached, and the circumstances of the case, such as the length of the delay and the reasons for the delay, the extent to which the evidence might be affected by the delay and the steps taken by the claimant to obtain advice once he knew of the possibility of taking action.
25. Tribunals have a wide discretion to extend time in discrimination cases, but it is the exception rather than the rule to do so. (***Robertson v Bexley Community Centre [2003] IRLR 434***).
26. Where a claim for unfair dismissal or whistleblowing under the Employment Rights Act 1996 is presented late, the Tribunal may only extend time for its presentation when it was not “reasonably practicable” to submit the claim in time and if it was submitted within such further period as the Tribunal considers reasonable. (Employment Rights Act 1996 sections 48 and 111). This was clarified in ***Palmer v Southend-on-Sea Borough Council [1984] ICR 372*** as meaning “reasonably feasible”.
27. A Tribunal is to consider the factors in ***British Coal Corporation v Keeble [1997] IRLR 336*** when considering exercising its discretion to extend time. These factors include:
  - 27.1. The length of and reasons for the delay
  - 27.2. The extent to which the quality of the evidence is likely to be affected by the delay
  - 27.3. The extent to which the party sued had cooperated with requests for

information

- 27.4. The promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action
- 27.5. The steps taken to obtain professional advice once he or she knew of the facts giving rise to the cause of action.
28. The fact that internal proceedings were ongoing is only one factor to be taken into account (***Apelogun-Gabriels v London Borough of Lambeth [2002] IRLR 116***).
29. The merits of a claim may be relevant to the decision as to whether or not to extend time (***Lupetti v Wrens Old House [1984] ICR 348***)
30. Ignorance of rights or ignorance of time limits is not a valid reason, unless it is the case that the claimant or his advisors could not reasonably have been expected to be aware of them. (***Wall's Meat Co v Khan [1978] IRLR 499***).
31. The mere fact of an internal appeal being ongoing is not by itself enough to justify a finding that it was not "reasonably practicable" to present a complaint to the Tribunal in time (***Bodha (Vishnudut) v Hampshire Area Health Authority [1982] ICR 201***)
32. The Employment Tribunal Rules of Procedure 2013 deal with strike out orders at rule 37 and deposit orders at rule 39. In the claimant's case, the respondent alleges that strike out is appropriate because the claims have no reasonable prospect of success (rule 37). In the alternative, the respondent alleges that a deposit order should be made because the claims have little reasonable prospect of success (rule 39).
33. Tribunals are cautioned against striking out claims at an early stage in the proceedings where there are disputed factual issues and/or where an issue is fact-sensitive, and the bar for doing so is high. In such situations, it is highly unlikely that a strike-out will be appropriate (as per ***Cox v Adecco & Ors UKEAT/0339/18/AT***).
34. Where new claims arise after the claim form has been submitted, a claimant does not need to submit a new claim but can add these new claims to the existing proceedings (***Prakash v Wolverhampton***) if the Tribunal allows those new claims to be added on consideration of the factors in ***Selkent v Moore***.
35. ***Selkent Bus Company Limited v Moore [1996] ICR 836*** - the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Relevant factors are:



- 35.1. The nature of the amendment i.e. whether the amendment sought is one of the minor matters or is a substantive alteration pleading a new cause of action;
- 35.2. The applicability of time limits. If a new complaint of cause of action is proposed to be added by way of amendment it is essential for the Tribunal to consider whether that complaint is out of time and if so whether the time limit should be extended; and
- 35.3. The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the rules for making amendments, but delay is a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made (for example the discovery of new facts or new information).

36. ***Vaughan v Modality Partnership UKEAT/0147/20/BA*** the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The assessment of the balance of injustice and hardship may include an examination of the merits of the case (***Gillett v Bridge 86 Limited [2017] 6 WL UK 46***).

#### **Application of the law to the facts found**

#### **Reasonable prospects of success of detriment claims 3, 5 and 6?**

37. Mr Dinn accepted that Ms Ray was in fact responsible for the delay to his subject access request being fulfilled. He also accepted that she had redacted the documents herself. He therefore cannot succeed in his claim of whistleblowing detriment number 3 (or indeed number 2, but this was not a matter for the Tribunal to decide at this hearing) which alleges that his managers did so because he made protected disclosures.
38. Furthermore, detriments 5 and 6 have no reasonable prospect of success. Detriment 5 alleges that Ms Bridger's appeal outcome was delayed because unidentified managers interfered with it. However, it is clear from the documents for the grievance appeal that the appeal covered a large amount of information and that Mr Dinn raised a large number of issues for Ms Bridger to investigate. Indeed, the appeal covered so many issues that three meetings with the claimant were required for her to cover all of the complaints. The allegation is that the process was delayed by approximately three months. Given the scope of the appeal, and that Ms Bridger had other work commitments to see to during that time, and given that Mr Dinn has provided no information about who may have interfered with the process or how, I find that this allegation has no reasonable prospects of success at a final hearing of establishing that the delay was because of having made protected disclosures.
39. Allegation 6 was that false information was provided to Ms Bridger and consequently she referred to bullying by Mr Dinn in her outcome. However, there is no reference to bullying in her grievance appeal outcome and Mr Dinn

accepted this before the Tribunal. There is no longer a dispute of fact and so this allegation has no reasonable prospect of success.

**Time Limits – Unfair dismissal and whistleblowing detriment claims 1, 2, 3A and 4**

40. It was reasonably feasible for the claimant to present his claims of unfair dismissal and whistleblowing detriments 1, 2, 3A and 4 to the Tribunal in time and he did not do so. He was not incapacitated by illness, or some other reason and he participated in the internal processes of the respondent and looked for alternative employment during this time. I find that on the balance of probabilities he preferred to resolve the matter with the respondent rather than go to the Tribunal, which is understandable, but does not mean that it was not reasonably feasible for him to present his claims in time.

41. I do not accept that he did not know, or (if he in fact did not know) that he could not have easily found out that, he had to start ACAS Early Conciliation within three months of his resignation or of the detriments he alleges he suffered from. Mr Dinn is clearly an articulate and resourceful person and is currently in a position of responsibility. He had access (for part of his employment) to a trade union and access to the internet throughout. I do not accept that his references to having consulted “lawyers” found in the Tribunal documentation was accurate. I find that he referred to having spoken to “lawyers” to make his submissions to the respondent sound as though they should be taken more seriously. However, I accepted his evidence that he struggled financially while receiving SSP and was not able to afford to instruct solicitors. Nevertheless, there is a significant amount of advice, including on the Tribunal website, about how and when to start a claim, and I find that Mr Dinn could have found out what he needed to do, had he made this a priority to do so. It was therefore reasonably feasible for him to have approached ACAS in time. His unfair dismissal claim and whistleblowing detriments 1, 2, 3A and 4 are out of time and cannot proceed.

**Time Limits – Sex discrimination claims**

42. In relation to the claims of sex discrimination, is it just and equitable for the Tribunal to extend time to allow the claims to be brought late? The delay here is considerable, on average approximately nine months. It is the respondent’s case that anything that happened before 23 February 2023 is out of time. I accept that the initial time limit, given when the claimant first approached ACAS, is 23 February 2023.

43. It was Mr Dinn’s evidence that in June 2022 he raised the issue of AN’s behaviour in a supervision with Ms O’Reilly. However, his evidence and his allegations of what he said is not reflected in the supervision minutes from that date. The minutes record him raising “*an uncomfortable situation with a female senior potentially on an attraction level*”, in other words, that AN was seemingly attracted to Mr Dinn and this was making him uncomfortable. Ms O’Reilly offered to speak to the member of staff in question. However, Mr Dinn is recorded in the meeting minutes as having said “*at this time he did not think or feel this was the best*

*course of action and we discussed moving shift lines, which would mean that he had no contact with the member of staff in question. Gordon will swap shift patterns so they do not directly work with each other."*

44. He told the Tribunal that he declined the offer for the respondent to investigate AN formally and that he wanted matters dealt with informally. This matches the evidence of the notes of his June 2022 supervision report.
45. However he also told the Tribunal that, despite this, it was sex discrimination for AN not to have been suspended anyway. His evidence to the Tribunal now is that AN's behaviour was a serious concern but that the respondent did not take it seriously, because she is a woman and he (the person complaining) was male. He says that a man in her position would have been suspended simply on the grounds that a colleague had complained about sexual behaviour in the workplace. He also says that he raised this issue as a serious safeguarding concern with the respondent at the time, and this is PID3. However, this is not what the notes of the discussions at the time report him as having said, taken as a whole.
46. As stated above, his evidence was also somewhat contradictory in that he both said that he was offended that Ms O'Reilly said he should be flattered, on account of his own attractiveness, but also that her comments made him feel unsafe at work.
47. He also waited until 20 May 2023 to approach ACAS about this and other issues in the workplace. He did not present his claim to the Tribunal until 4 July 2023, over a year after the supervision in question.
48. On the balance of probabilities I find that Mr Dinn will struggle to establish facts from which the Tribunal could conclude that this is unfavourable treatment of him on the grounds of his sex. Mr Dinn was the main complainant about AN's behaviour and was offered the opportunity to complain about her formally but declined that opportunity. Had he considered the matter to be serious enough to warrant the respondent suspending AN, he would not, on the balance of probabilities, have declined an investigation on the basis that he was "*trying to be courteous*" to AN, particularly given that he has since expressed safeguarding concerns for the children in the vicinity of AN at the time of her allegedly inappropriate behaviour.
49. Furthermore, there is evidence that, contrary to the allegations that no-one spoke to AN about her behaviour, that the respondent's management did investigate Mr Dinn's allegations about AN's behaviour with AN herself. AN was provided with a letter dated 29 November 2022 with the outcome of that investigation, which was that no further action would be taken.
50. Finally, there is evidence that the alleged delay in changing shift patterns was queried by the respondent for the reason that AN had already moved away from Mr Dinn's place of work when he requested the move. The respondent therefore

questioned why he still wanted to move, as the primary reason for the request was to avoid AN's presence and she was no longer there.

51. Having considered the potential merits of the discrimination claims, and taking into account the length of the delay and reasons for the delay as described above, I do not consider it just and equitable to extend time to allow these claims to be brought late. Given the discrepancy between what Mr Dinn now says was said in the relevant discussions with the respondent and what is contained in the respondent's contemporaneous evidence, oral evidence from witnesses will be very important and the reliability of this is likely to be affected by the delay in bringing a claim.
52. I accept that Mr Dinn chose to wait for the outcome of the respondent's internal proceedings before approaching ACAS, but this is just one factor to take into account. I also note that the scope of the internal proceedings was very wide and covered a very large number of issues, and not just those now before the Tribunal. I also find, as set out above, that Mr Dinn either already knew or was able to find out about the time limits in the Tribunal. It is therefore not just and equitable to allow him to bring these discrimination claims late.

#### **The claimant's application to add new detriment claims**

53. The claimant's new detriment claims mirror that listed as "Detriment 1" in the list of issues, only the dates for these new detriments are significantly later than Detriment 1. It is the claimant's case that because he made protected disclosures, the respondent has referred to an investigation about the claimant's conduct towards a colleague called LC in his references. These new allegations relating to references in August 2023 and October 2023, were not out of time when Mr Dinn raised these with EJ Horne. The Tribunal's reasoning to accept these two new claims is set out in the separate record of the Case Management Discussion that took place during this hearing. The Tribunal's decision to impose a deposit order is also set out separately.

Employment Judge Barker

Date\_\_ 25 April 2024

JUDGMENT SENT TO THE PARTIES ON  
2 May 2024

FOR THE TRIBUNAL OFFICE

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judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions>

## COMPLAINTS AND ISSUES AS SET OUT ON 16 NOVEMBER 2023

### Unfair dismissal

1. In his claim form the claimant has set out a number of reasons why he resigned. He will say that, cumulatively, they amounted to a fundamental breach of his contract.
2. We did not clarify the issues any further. This will need to be done if the tribunal decides that it has the legal power to consider his unfair dismissal complaint. There is no doubt that it was presented after the statutory time limit expired. The decision about whether or not to extend the time limit is suitable for determination as a preliminary issue.

### Sex discrimination

3. The claimant says that, because he is a man, the respondent treated him less favourably than it would treat a woman in the following ways:

**SXD1** – Not suspending A (the claimant's case is that, had a woman complained that a younger colleague was behaving sexually towards her, the colleague would have been suspended)

**SXD2** – Mr Peel not speaking to A informally to remind her of appropriate standards of behaviour

**SXD3** – Stuart's failure to do the same

**SXD4** - When the claimant spoke to Ms O'Reilly about A's behaviour, she made light of it, with comments such as "you should be flattered"

**SXD5** – Similar comments from Mr Peel and Stuart

**SXD6** - Delay in changing the claimant's and A's shift patterns

4. The claimant accepted that all of these alleged discriminatory acts were done in the summer of 2022.

### Protected Disclosures

#### PID1

5. The claimant says that in a 1:1 meeting in August 2021 he orally disclosed the following information to Ms O'Reilly:

- Deputy Managers had asked him to sign backdated supervision records with "cut and paste" information, when no supervision had

actually happened.

- He had refused and offered to carry out the actual supervision instead.

6. The claimant's contention is that he believed this information tended to show:
  1. "malpractice"
  2. Breaches of policies and procedures
  3. That if he had agreed to do what was asked of him, there would have been a breach of "good practice in legislation through the Data Protection Act 2018" (but he was unable to tell me anything more about what he thought that Data Protection Act obligation was) and
  4. That the practice would "go against employees' rights and everything that's ethical".
7. It is the claimant's case that he raised this concern in the public interest.

#### PID2

8. It is the claimant's case that in February 2022 he disclosed the following information to Ms O'Reilly:
  1. He had added information to children's individual risk assessments based on incidents involving those children and
  2. Mr Peel had retrospectively altered those risk assessments by removing the claimant's name and the dates on which the claimant had reviewed the documents and added the information.
9. According to the claimant, he believed that this information tended to show that a criminal offence had been committed and/or the respondent had breached its legal obligations. Here is how he reasoned. He thought there was a "legal stipulation of factual information about timescales", and "you're not able to tamper with information that has been recorded about a young person in your care". His understanding was that the law required that a child risk assessment should be a "live document", so if there was "no timescale to show when the editing had been" that obligation had been breached.
10. The claimant says that he made this disclosure for the benefit of the home and for the young people living there.

#### PID3

11. The claimant says that in a 1:1 meeting in the office with Ms O'Reilly in June 2022, he disclosed the following information:

1. A had been flirtatious on shift
2. She was doing it in front of the kids and in the work environment
3. A was sending him messages (he showed her messages on his phone including one that stated something like, "sniff the tissues")
4. In communal areas A was bending over, exposing her stomach and invading his personal space
5. This was "not acceptable"

12. The claimant's case is that he believed that this information tended to show that "A's sexualised behaviour could pose a safeguarding risk", and that safety of the children was therefore likely to be put in danger.

13. He says that he raised this concern for his own benefit, but also in the public interest, because of the risk to children.

14. The claimant also raised a grievance, but it is not his case that there was any separate protected disclosure in that grievance.

### Detriments

15. We clarified all the detriments to which the claimant says he was subjected in 2023.

16. If his detriment complaint goes forward, he will also allege that he was subjected to a number of detriments in 2021 and 2022. Not all of these currently appear in his claim form.

17. The 2023 detriments are:

#### *2023 Detriment 1 – We Are Nugent reference*

18. In October 2022, the claimant applied for a job with We Are Nugent and was given an offer subject to references.

19. On 25 January 2023, the respondent provided a reference to We Are Nugent. It stated that the claimant was "currently under investigation for a



non-safeguarding matter”.

20. The respondent says that the “non-safeguarding matter” was an incident involving another colleague to whom it has referred as “LC”. The claimant’s case is that the respondent could not genuinely have believed that the investigation was still current. Although the difficulties between the claimant and the colleague were still unresolved, a decision had already been taken that there should be no disciplinary action.
21. The claimant contends that the real reason for referring to the investigation in the reference was that he had made the three protected disclosures. Of course, this detrimental step would have the effect of making it more likely that the claimant would remain in the respondent’s employment. The claimant believes that the respondent would prefer that than have a whistleblower start work for another care provider and start telling them about what he had discovered whilst working for the respondent.
22. Unless this detrimental act was part of a series of similar acts done later in time, the last day for presenting a complaint about this detriment was 24 April 2023.

#### *2023 Detriment 2 – SAR delay*

23. The claimant made his SAR on 17 November 2023. His understanding was that the respondent was required to reply within 30 days, but could in certain circumstances provide a response within 3 months. He received the SAR response on 13 March 2023.
24. His SAR request was dealt with by Emma Ray. The claimant does not suggest that Ms Ray was motivated by any protected disclosures that he had made.
25. The claimant’s case is that, on the ground that he had made his three protected disclosures, his managers subjected him to detriments by deliberately delaying providing documents to Ms Ray.
26. If the claimant is correct in his understanding of the required timescales, any decision to delay the provision of documents beyond the 30-day deadline must have been made on or before 17 December 2023. Any decision to delay documents beyond the three-month deadline must have been made on or before 17 February 2023. (Absent a series of similar acts) the last day for presenting a claim about this latter decision was 16 May 2023.

#### *2023 Detriment 3 – SAR redaction*

27. There is no time limit problem so far as the redaction of his documents is concerned. All the documents apart from one appeared to have been redacted on 10 March 2023.
28. Just as with Detriment 2, Ms Ray’s motivation is not impugned here. It is the claimant’s case that managers redacted documents before supplying them to Ms Ray. The claimant could not tell me what makes him think that it was the managers, rather than Ms Ray, who had

redacted the documents. If he is right, the managers would have had to do all the redacting on the same day.

29. It is not clear what basis the claimant has for thinking that the Data Protection Act 2018 entitled him to the unredacted information. If he had no such right, it is hard to see how he could reasonably understand the redaction to be detrimental to him.

*2023 Detriment 3A – grievance delay*

30. The claimant did not receive an outcome to his grievance until 31 January 2023.
31. The claimant's grievance was investigated by Ms Jo Carter. It is no part of the claimant's case that Ms Carter was motivated by any protected disclosure he had made.
32. It is the claimant's case that someone other than Ms Carter deliberately delayed the progress of his grievance, and did so on the ground that he had made his three protected disclosures. He does not know who that person was.
33. The last day for presenting a complaint about this delay, on its own, was 30 April 2023.

*2023 Detriment 4 – false information provided to grievance investigator*

34. Ms Carter's outcome letter made reference to alleged bullying behaviour on the claimant's part.
35. The claimant contends that managers, such as Ms O'Reilly and Ms McCloskey, provided inaccurate information to Ms Carter about the claimant's alleged bullying behaviour. On the claimant's case, it was they, and not Ms Carter, who were motivated by the claimant's protected disclosures.
36. The last day for presenting a complaint about the managers' alleged false information (unless it was part of a series of similar acts) was 30 April 2023.

*2023 Detriment 5 – grievance appeal delay*

37. The grievance appeal was investigated by Ms Lucy Bridger. The claimant does not suggest that Ms Bridger was influenced by his protected disclosures.
38. It is common ground that Ms Bridger met with the claimant three times in February 2023.
39. There was then a delay. Ms Bridger did not provide the claimant with the outcome to the appeal until 10 May 2023.
40. The claimant does not know who was responsible for the delay, but believes that, whoever it was, they were motivated by his three protected disclosures.

*2023 Detriment 6 – false information provided to appeal investigator*

41. Like the grievance outcome, the appeal outcome also made reference to alleged bullying behaviour on the part of the claimant.
42. The claimant says that the managers who provided this information were motivated by his protected disclosures.
43. It is not clear whether any managers did provide such information directly to Ms Bridger. Ms Bridger may have relied on the original grievance investigation evidence. She may have been told about the alleged bullying by Ms Carter. The claimant does not know.

Proposed amendments

44. If given permission to do so, the claimant wishes to complain that he was subjected to two further detriments since he presented his claim:
45. *Reference Detriment 1* – the respondent provided a reference to QPS stating that the claimant’s employment ended whilst he was under an investigation of a non-safeguarding nature.
46. *Reference Detriment 2* – the respondent provided a reference in October 2023 with substantially the same information.