



EMPLOYMENT TRIBUNALS

Claimant: Mrs R Kealy

Respondent: Westfield Community Development Association

Heard at: Midlands (East) Region by Cloud Video Platform
On: 27, 28 and 29 September 2021
Reserved to: 3 November 2021 and 20 December 2021
Judge and Members only

Before: Employment Judge Blackwell
Members: Mrs J Bonser
Mr C Goldson

Representation
Claimant: Mr N Bidnell-Edwards of Counsel
Respondent: Mr R Johns of Counsel

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

1. The claims of detriment pursuant to Section 47B of the Employment Rights Act 1996 (the 1996 Act) fail and are dismissed.
2. The claim of constructive unfair dismissal pursuant to Section 95(1)(c) of the 1996 Act fails and is dismissed.
3. The claim of automatic unfair dismissal pursuant to Section 103A of the 1996 Act also fails and is dismissed.
4. The claim of automatic unfair dismissal pursuant to Section 100 of the 1996 Act also fails and is dismissed.
5. The claim of automatic unfair dismissal pursuant to Section 104 of the 1996 Act also fails and is dismissal.
6. The claims of suffering detriment pursuant to Section 44 of the 1996 Act also fail and are dismissed.

RESERVED REASONS

1. Mr Bidnell-Edwards represented the Claimant whom he called to give evidence, along with her husband. Mr Johns represented the Respondent (Westfield) and he called Mr D Roberts, their Head of Centre; Mr A Smith and Mr P Adams, both Trustees and Ms Ann Hutchings, the Office and Finance Manager. There was an agreed bundle of documents and references are to page numbers in that bundle. There was insufficient time after the hearing of evidence for submissions and therefore the parties were Ordered to submit written submissions, which both parties complied with. Both parties were given liberty to comment on the other's submissions. The Respondent did so, the Claimant elected not to.

Issues

2. There was an agreed list of issues:

"Whistleblowing Detriment – s.47B ERA 1996

1. Did the Claimant make a protected disclosure of information? Specifically, do the following amount to protected disclosures:
 - a. "Disclosure 1" - the Claimant's action in sending the report (the "Claimant's Nursery Report") at BP180-2, on 2 October 2019 to David Peake, Chairperson of the Respondent, in which the Claimant reported that funds, namely Early Years Pupil Premium funds ("EYPP"), and Disability Access Funds ("DAF") were not being spent on children who were entitled to it: "EYPP monies – there is £1200 that has not been spent as the [Respondent believed it] could not afford [these funds] to be used on the children this money still has not been spent": BP180. Also, "*Disability access fund – we were able to claim a one off payment of £615.00 – we haven't been able to input it into our outdoor provision*": BP181, and CWS§5.
 - b. Disclosure 2 – on 8 October 2019 the Claimant sent a copy of the Claimant's Nursery Report (the same report at BP180-2) to Mr Paul Adams, Trustee of the Respondent: CWS §5.
 - c. Disclosure 3 – [subject to an amendment being granted] after a meeting on 14 October 2019 at which David Roberts told the Claimant to produce a document to show how she had spent the money, which had not been spent, the Claimant told David Roberts on 15 October 2019 [the date the Claimant sought advice from an external source] "to say that I could not provide such a report as the Respondent had not spent that money and what did he want me to do instead": BP203, and CWS §7.
 - d. Disclosure 4 – on 30 October 2019 the Claimant told Jo Fisher that David Roberts told her to prepare a misleading report.
 - e. The Claimant also relies on the following disclosures on the basis that they show the health and safety of the children and staff was being, or could be endangered:
 - f. Disclosure 5 – on 12 November 2019 the Claimant informed County Hall that there was a problem with the heating, and the nursery was

- very cold: CWS, §9.
- g. Disclosure 6 – on 12 November 2019 the Claimant informed Ofsted that there was a problem with the heating, and the nursery was very cold: BP235-9, CWS, §9.
 - h. Disclosure 7 – on 14 November 2019 the Claimant informed Ofsted, and Faye Campbell that the working conditions were unacceptable for staff members in that the temperature was too low: CWS §10.
 - i. Disclosure 8 – [subject to an amendment] on 18 November 2019 the Claimant told Ofsted that the heating situation continued, and that she no longer had authority to make such decisions: CWS12
 - j. Disclosure 9 – on 19 November 2019 the Claimant told Ofsted that Mr Roberts wanted her to change the wording of her report of the incident in which the temperature had been too low for the children and the staff, which had led to the Respondent's registration being suspended.
2. To the extent that the disclosures were not to the Claimant's employer, do the disclosures qualify under Section 43G ERA 1996?
 3. If so, did that disclosure relate to one of the issues specified in s43B ERA 1996? The Claimant relies of s.43 (1) (a)(b) (d) and (e)
 4. If so, did the Claimant have a reasonable belief in the truth of her disclosure?
 5. If so, did the Claimant have a reasonable belief that the disclosure was made in the public interest?
 6. If the Claimant did make a qualifying protected disclosure, did the Respondent subject the Claimant to the following detriments:
 - a. Detriment 1 - On 19 November 2019, and afterwards Mr David Roberts called, and challenged the Claimant's conduct relating to contacting Ofsted, as well as her decisions in respect of finance: CWS §13 and thereafter.
 - b. Detriment 2 - On 19 November 2019 forcing the Claimant to contact Ofsted and to retract what she had said: CWS §13.
 - c. Detriment 3 – after 19 November 2019 the Respondent failed to follow up on the concerns reported to Nigel Thornborough: CWS §14;
 - d. Detriment 4 – David Roberts communicated what had happened when the Claimant contacted Ofsted about the heating, and on 2 December 2019 “Detriment 5” the Claimant suffered harassment and bullying from staff. Mr David Roberts relayed what had happened in relation to Ofsted and the heating to Bill Bell, and on 2 December 2019 Bill Bell then approach the Claimant with wooden spoons, said “these are for you and Katie to do some more stirring with”, and then pressed her hand on to a radiator: CWS §15.
 - e. Detriment 6 – the Respondent failed to take the Claimant's grievance seriously. The Claimant sent a grievance on 2 December 2019 to report what happened: CWS §16. Although the Claimant was asked to remain home whilst the matter was investigated, and that Bill Bell had been told to do the same, the Claimant learned that this was not the case: CWS §17.

- f. Detriment 7 – Although Mr Roberts told the Claimant that the committee would write to her following their meeting, they failed to do so on 9 December 2019: CWS §20.

Constructive Unfair Dismissal

7. Was the Claimant entitled to treat herself as constructively dismissed i.e. has the Respondent breached the implied term of trust and confidence?
8. Do the matters at Paragraph 43 of the Further and Better Particulars (BP64-5) amount to a breach of the implied term of trust and confidence?
9. Did the Claimant resign, at least in part, in response to those acts amounting to breaches?
10. Did the Respondent have a potentially fair reason for dismissal?
11. Was dismissal for that potentially fair reason within the range of reasonable responses open to a reasonable employer and fair in all the circumstances in accordance with Section 98(4) of the Employment Rights Act 1996?

Automatic Unfair Constructive Dismissal – s.103A ERA 1996

12. If the Claimant did make any qualifying protected disclosures, was the reason or principal reason for the Claimant's dismissal the making of the protected disclosures (detailed at paragraph 44 – 51 of the further and better particulars)?

Health and Safety Unfair Dismissal – s. 100 (1)(a) ERA 1996

13. Did the Claimant, being an employee at a place where there was no health and safety representative or safety committee bring to the Association's attention by reasonable means, the circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety (as detailed at paragraph 64 of the Further and Better Particulars)?
14. Was the reason or principal reason for the Claimant's dismissal, raising the issues detailed at paragraph 64 of the Further and Better Particulars?

Automatically Unfair Dismissal – s.104 ERA 1996

15. Did the Claimant assert a statutory right in the form at paragraphs 66-67 of the Further Particulars? BP70
16. Was the reason or principal reason for the Claimant's dismissal the making of the protected disclosures (s.104 (1) (b))?

Section 44 of the Employment Rights Act 1996 – Health and Safety Cases

17. Did the Respondent assert the Claimant's statutory right not to be subjected to a detriment under s.44 of the Employment Rights Act 1996 (detailed at

paragraph 65 of the Further and Better Particulars)?

18. Was the Claimant subjected to a detriment because of this as detailed at paragraph 52-61 of the Further and Better Particulars?

Compensation

19. If the Claimant succeeds in any of the above claims, what level of compensation is she entitled to?

20. Has the Claimant taken steps to mitigate her losses?

21. What is the percentage chance the Claimant would have been dismissed in any event, and/or when would any fair procedure have concluded?

22. Did the Respondent fail to follow the ACAS code of conduct relating to disciplinary hearings? If so what is the appropriate uplift on any award made to the Claimant?

23. Has the Claimant complied with the ACAS code? If not, should any compensation award made to the Claimant be reduced to take into account the Claimant's failure to comply with the ACAS code?"

3. Findings of fact

3.1 Mrs Kealy began employment with the Respondent (Westfield) as an Early Years Co-ordinator on 1 October 2016. She had previously run her own nursery and that was a significant factor in her appointment. She was the Line Manager of Ms Farmer, the Nursery Manager.

3.2 Mrs Kealy resigned from her employment on 4 December 2019, see email at page 272.

3.3 Westfield is a charity operating a large community centre providing educational services to all ages. It is controlled by a board of trustees. Mr Roberts is the employed Head of Centre and was Mrs Kealy's Line Manager at all relevant times.

3.4 Westfield had an annual turnover of some £700,000 which the nursery contributed some £200,000.

3.5 The nursery is regulated by Ofsted, who inspected the nursery on 19 June 2019 and downgraded its rating from "good" to "requires improvement". That was a serious blow to Westfield because it was likely to harm the nursery's reputation and its potential to attract children. There were criticisms of management, see page 153.

3.6 On 25 June 2019 Leicestershire City Council, who provided most of the funding for the early years, carried out an audit which is at page 159-161. There were general reservations about the funding of the nursery, and it was clear from the comments that the nursery was living a hand to mouth existence.

- 3.7 There were specific comments about EYPP funding, which found that of £3,536.72 allocated by the County Council, £1,256.72 had not been accounted for. In respect of DAF, £615.00 was not accounted for.
- 3.8 Mrs Kealy alleges that from 12 July 2019 she asked Mr Roberts for authorisation to spend the monies not accounted for above, but he refused. Mr Roberts denies that allegation and says that it was always within Mrs Kealy's authority to spend the allocated money. Mr Roberts' evidence is supported by Ms Hutchings.
- 3.9 Mrs Kealy prepared a report at page 180-182 and it was sent to Mr Peake the Chair of Trustees and also to Mr Adams, another Trustee.
- 3.10 Mr Peake was very ill at the time and has since died. Mr Adams accepts that he did receive the report and expected it to be discussed at the next meeting of Trustees to be held in mid-October. That meeting was not held because of the illness of Mr Peake and Mr Roberts.
- 3.11 The report was not sent to Mr Roberts, but he accepts that he did see it as part of the papers to be discussed at the next Trustees meeting.
- 3.12 We should note that there are paragraphs about both the EYPP monies and DAF monies, at page 181 appears the following comment:-
- “Katie and I are disappointed that we are not able to use these monies for what they are allocated and feel we are not fully providing for the children who need and deserve it. We also have another little girl we could claim this payment for but at the minute we haven't claimed it as there is no point if the money is not going to be spent on the child's needs.”***
- 3.13 The report also includes a section on the reaction to the Ofsted downgrading and a plan was attached, although we have not seen that.
- 3.14 There is also a lengthy section concerning staffing which was a response to Mr Roberts raising the issue that the nursery and pre-school seemed to be over staffed having regard to the statutory ratios.
- 3.15 It is common ground that Westfield faced cash flow problems and Mr Roberts intended to meet with Leicestershire County Council to ask that payment of grants be brought forward by two months.
- 3.16 Mr Roberts and Mrs Kealy met on or about 15 October to discuss and prepare for the meeting with Leicestershire County Council. Mrs Kealy alleges that Mr Roberts instructed her to prepare a report showing that the EYPP and DAF monies had actually been spent and how such monies had been applied. Mr Roberts denies that there was any such instruction. He says that he merely asked her for a report explaining why the monies had not been allocated, ie because of pressure at work and how they would be allocated. Both parties refer to the exchange of texts at pages 198/199 and 200.
- 3.17 At page 203 and 204 Mrs Kealy, without the knowledge of Mr Roberts, sent

emails respectively to Jane Moore and Fay Campbell which essentially say that Mr Roberts is instructing her to prepare a fraudulent report showing how the EYPP and DAF money has actually been spent. There are further relevant documents at pages 351 and 352.

- 3.18 On 7 November 2019 Mr Roberts and Mrs Kealy met with Ms Campbell, Ms Fisher and Ms Farmer of Leicestershire County Council. At this meeting for the first time, Mr Roberts became aware that Mrs Kealy had accused him both of preventing her of spending the EYPP and DAF money and further, instructing her to prepare a fraudulent report indicating how the money had been spent.
- 3.19 At about this time, Mr Roberts and Ms Hutchings the Finance Manager began to suspect that there was a shortfall in the collection of fees payable to the nursery.
- 3.20 On 12 November 2019 there were problems in respect of the heating of the nursery. The gas boiler appeared to have failed. There are conflicting accounts, Westfield's account beginning at page 217 and Mrs Kealy's account beginning at page 235. That latter document was submitted to Ofsted by Mrs Kealy on 18 November 2019 which lead to Ofsted immediately suspending Westfield's registration.
- 3.21 There were a number of difficulties with the heating.
- 3.22 Reviewing the available material, in particular the contemporaneous accounts, it is clear that on the morning of 12 November, the heating supplied by the gas boiler had failed by reason of a stuck pump and that prevailed for the whole of 12 November.
- 3.23 On 13 November the pump was operating again, though the nursery remained colder than it should have been.
- 3.24 On 14 November the heating worked sporadically because the timer had not been reset correctly. After contacting Leicestershire County Council, Mrs Kealy closed the department and informed parents that the nursery would remain closed both on Friday 15 November and Monday 18 November.
- 3.25 On 15 November, Mrs Kealy was not at work. Mr Roberts took temperatures throughout the day and concluded the heating was working appropriately and that the nursery should reopen on 18 November. He asked Ms Farmer to communicate that decision to Mrs Kealy. Mr Adams had assisted on the Friday and his evidence confirmed that the heating was working appropriately. Mr Adams' evidence, which we accept, was that the temperature readings taken by Mrs Kealy were from areas which you would have expected to be cold, eg a small corridor, and he found that another thermometer was next to a turned off radiator.
- 3.26 On Monday 18 November, there is a conflict of evidence about whether the heating was working. Mr Roberts recordings are at page 233 whereas at page 238, Mrs Kealy records Ms Farmer's finding that at 7:10 am the temperature was 10 degrees. It is clear to us that temperatures had risen to an appropriate level by 10:30 am on the morning of 18 November. Put another way, we prefer

Mr Roberts' evidence on the point. On that morning, Mr Roberts alleges, and we accept, that Mrs Kealy burst into a meeting he was holding with Ms Hutchings alleging that he had overruled her decision regarding the closure of the nursery. Mr Roberts also alleges, and we accept, that at around 2:00 pm he was in a meeting with Mr Adams and, again, Mrs Kealy interrupted the meeting to inform them "*you have been closed down*". Mr Adams' and Mr Roberts' accounts are at one and we accept them. Mrs Kealy then handed to Mr Roberts and Mr Adams the Ofsted letter which begins at page 222 which had the effect of suspending Westfield's licence for six weeks to the 29 December 2019 bringing about an immediate closure. The letter said as follows:-

"We believe children are, or may be, exposed to a risk of harm as the heating is not working and the temperature is too cold for the children and staff. We have spoken with your manager today and she confirmed the heating is not working and the temperature can fall as low as 10 Degrees Celsius. This is an ongoing problem. The manager has raised this as a concern with you, but nothing is being done about it. Children are shivering and having to wear their coats and parents are complaining".

"We have asked your manager if there is any way in which the risk can be minimised, but a resolution has not been offered. We have been unable to make contact with your nominated individual (Mr Peake). This leaves us with no alternative but to suspend your registration for the safety and welfare of the children.

It is of extreme concern that you have done nothing to ensure that children's health and wellbeing is not affected by the broken heating system. It is of further concern that you have continued to provide care knowing this, and have done nothing to resolve the issue".

- 3.27 Mr Roberts and Mr Adams were very concerned. As a consequence, Mr Roberts together with Mr Smith invited Mrs Kealy and Ms Farmer to a meeting on 19 November to find out how the suspension came about.
- 3.28 We accept that at that meeting, on the basis of the evidence of Mr Roberts and Mr Smith, that Mrs Kealy denied informing Ofsted that Westfield's had done nothing to remedy the heating problems. Again, on the evidence of Mr Roberts and Mr Smith, we accept that Mrs Kealy agreed to speak to Ofsted in the absence of Mr Peake who was still ill. That conversation did take place.
- 3.29 Also on 19 November, Mr Roberts called the Borough Council's Environment Health Officer and asked them to conduct an emergency inspection of the heating system. His report is at page 262 and indicates that both the heating and water systems were working and there were no issues. That report was forwarded to Ofsted later that day, see page 231.
- 3.30 As a consequence on the same day, Ofsted lifted the suspension and the registration was restored in the light of the information supplied by Mr Roberts and the Environmental Health Officer's report.

- 3.31 Having reviewed the conflicting evidence about the heating situation we find that Mr Roberts adopted a constructive approach whereas Mrs Kealy seems to have been obstructive and intent on closing the nursery to the detriment of Westfield and the parents of those children who would normally attend.
- 3.32 Mrs Kealy alleges that in the meeting of 19 November, Mr Roberts harassed her and forced her to make the call to Ofsted. Mr Roberts and Mr Smith who was present, both deny that accusation.
- 3.33 Mrs Kealy then alleges she was intimidated by Mr Roberts and refers us to an email at page 267.
- 3.34 On 2 December, Mrs Kealy alleges that the Caretaker, Mr Bell, produced two wooden spoons, handed them to Mrs Kealy and said "*these are for you and Katie (Katherine Farmer) to do some more stirring*". Mrs Kealy reported this to Mr Roberts who invited her to put the complaint into writing, see page 273. Mr Roberts responded at page 273. Shortly after, Mrs Kealy alleges that Mr Bell pressed her hand to a radiator pipe and would not permit her to remove her hand. Mrs Kealy alleges that whilst she was effectively suspended from work, Mr Bell was not because he was seen at work on 4 December. Mr Roberts' explanation is that Mr Bell starts work early and he was not able to contact him in time to prevent him working on.
- 3.35 On 4 December 2019 Mrs Kealy resigned, see page 272.

Conclusions

4. In our view, the outcome of all the issues in this case turn on the credibility of Mrs Kealy against that of Mr Roberts, the two Trustees, Mr Smith and Mr Adams and, finally, Ms Hutchings, the Office and Finance Manager.
5. As to Mrs Kealy, it is clear that as early as 10 June 2019 (see page 149) she was making allegations against Mr Roberts to Leicestershire County Council and that she did not inform Mr Roberts of those allegations. That conduct was repeated on 15 and 21 October 2019 (see pages 197 and 204). Mrs Kealy was cross-examined about the email purportedly sent by Mary Moffatt to the Charity Bank, which was designed to undermine Westfield's application for a loan from that Bank. We accept Mr Roberts' evidence that at that time, Miss Moffatt was no longer an employee of Westfield and, further, that her name is misspelt. We also accept that that email was found on Mrs Kealy's computer when it was recovered by Westfield. Mrs Kealy denied that she had sent that email.
6. We also note the excerpts from Mrs Kealy's notebook at pages 320 and 321. Mrs Kealy accepts that what is written is in her handwriting but that she was simply copying down what she had been told by Ms Farmer in respect of the Moffett email. Whilst it may be true that Mrs Kealy did not "send" the email, we are firmly of the view that she had had a hand in it and was complicit in its sending. Taken with the emails at pages 197, 204 and 149 in our view Mrs Kealy's credibility is fatally undermined because she had begun a campaign to undermine Mr Roberts and as a consequence Westfield.

7. On the other hand, we found Mr Roberts to be a straightforward witness. The two Trustees were both open and credible. We also accepted Ms Hutchings' evidence insofar as she confirmed Mr Roberts' evidence that Mrs Kealy had the authority to spend the EYPP and DAF funding without any further approval.
8. As to the first specific conflict of evidence, namely did Mrs Roberts prevent Mrs Kealy from spending funds already allocated to both EYPP and DAF, we prefer the evidence of Mr Roberts and Ms Hutchings. We note that there is no independent documentary evidence to support Mrs Kealy's allegation.
9. As to the allegation that Mr Roberts instructed Mrs Kealy to prepare a report falsely stating that the EYPP and DAF monies had been applied and spent at a time when they had not, again we prefer the evidence of Mr Roberts. As he said in cross-examination, he knew that there was an existing report highlighting that some of the EYPP and DAF money had not been spent and that there was a strong likelihood that the County Council would want to be satisfied that the money had been correctly spent and would audit the position again, which would inevitably highlight a false account of its spending.
10. The next major factual issue is the circumstances surrounding the failure of the heating in November 2019. As we have found in our findings of fact, Mrs Kealy went out of her way to be obstructive. We particularly note the evidence of Mr Adams in relation to the placing of the thermometers by Mrs Kealy/Ms Farmer. There is also a further major conflict of evidence concerning what Mrs Kealy told Ofsted about the heating and in particular the paragraph recorded at paragraph 3.26 of our findings of fact, namely that Ofsted had said:

"It is of extreme concern that you have done nothing to ensure that children's health and wellbeing is not affected by the broken heating system. It is of further concern that you have continued to provide care knowing this, and have done nothing to resolve the issue."
11. Mrs Kealy denied making that statement to Ofsted. We do not believe her. It seems inconceivable to us that a Regulator would have recorded such a damning statement and followed it with a six-week suspension had Mrs Kealy not informed them what is recorded in that paragraph.
12. Thus, we have an employee who is both deliberately undermining her Line Manager and acting against the interests of her employer.

The issues

Whistleblowing detriment – Section 47B of the 1996 Act

"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.
- (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

- (a) by another worker of W's employer in the course of that other worker's employment, or
- (b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

- (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
- (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.
- (1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—
 - (a) from doing that thing, or
 - (b) from doing anything of that description.
- (1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—
 - (a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and
 - (b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).

- (2) This section does not apply where—
 - (a) the worker is an employee, and
 - (b) the detriment in question amounts to dismissal (within the meaning of Part X).
- (3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, “worker”, “worker’s contract”, “employment” and “employer” have the extended meaning given by section 43K.”

13. Issue 1

- 13.1 1.a. We accept that the Claimant sent the report at pages 180 to 182 to Mr Peake and to Adams.
- 13.2. 1.c. We do not accept as a matter of fact that Mr Roberts told Mrs Kealy to produce a document to show how the money had been spent which had not been spent.
- 13.3. 1.d. We accept that that disclosure was made.
- 13.4. 1.e. We do not accept that the health and safety of the children and staff was being, or could be, endangered by the non-application of the funds. No evidence was advanced to support that contention.
- 13.5. 1.f. We accept that the disclosure was made.
- 13.6. 1.g. We accept that the disclosure was made in the form set out at pages 235 – 239.
- 13.7. 1.h. and 1.i. Given that there is no documentary evidence to support the allegations and our views on Mrs Kealy's credibility, we do not accept that these disclosures were made.
- 13.8. 1.j. Again, we prefer the evidence of Mr Roberts supported by Mr Smith that no such instruction was given. We accept that Mr Roberts asked Mrs Kealy to inform Ofsted that the paragraph quoted above at paragraph 3.26 of our findings of fact was wrong.

14. Issue 2

We accept that in relation to those disclosures that were not made to Westfield, the disclosures do qualify under Section 43G of the 1996 Act in that Mrs Kealy had made disclosures of substantially the same information to Westfield.

15. Issue 3

We accept that each of the disclosures relate to either failures under subsection (1)(b) or (d).

16. Issue 4

As to the allegations that Mrs Kealy was prevented from spending the allocated EYPP and DAF monies, we have found as a fact that that allegation is not true. As to the allegation that Mr Roberts instructed Mrs Kealy to prepare a report wrongly stating that those funds had been applied to a particular purpose, again we have found as a fact that that allegation is not true. Thus, she could not have had a reasonable belief in the truth of her disclosures.

17. Turning now to the allegations concerning the problems with the heating, we accept that there are elements of the disclosure beginning at page 235 that are true. But they are undermined by Mrs Kealy's statement to Ofsted that nothing

was being done with the heating failure. We therefore do not accept that Mrs Kealy had a reasonable belief in the truth of the totality of any of her disclosures. Since no qualifying protected disclosures were made, we do not need to consider whether Mrs Kealy suffered the alleged detriments set out at issue 6.

Constructive unfair dismissal

18. Mrs Kealy relies upon the implied term of trust and confidence. Namely, that the employer will not without reasonable or proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. The intentions of the employer are not relevant, and the matter is to be judged objectively. Mrs Kealy relies upon the matters set out in paragraph 43 of the further and better particulars beginning at page 64.
19. As to (a), we have found that as a matter of fact that did not occur.
20. As to (b), we accept that the report at page 180 – 182 was sent to both Mr Peake and Mr Adams in October 2019. As Mrs Kealy must have known, the October Trustees' meeting at which the report was to be considered was postponed because of the illness of both Mr Peake and Mr Roberts. The matter was to be discussed at the November meeting, but it was not reached, primarily because Mr Roberts and the Trustees were engaged in dealing with the heating problems at Westfield and the public relations consequences thereof.
21. As to (c), we have found as a fact that Mrs Kealy was not requested to produce a misleading document.
22. As to (d), we understand that the allegation is that Mr Roberts made false claims in front of County Council employees on 7 November 2019 that Mrs Kealy had not requested the funding. We accept that he did but that that statement was true.
23. As to (e), having regard to the evidence of Mr Adams and Mr Roberts, we do not accept there was any accusatory treatment.
24. As to (f), there was no such undermining. Mr Roberts was, with reasonable and proper cause trying to deal with an urgent problem in the best way that he could. If there was any undermining, it was the other way around, namely it was Mrs Kealy who was undermining Mr Roberts.
25. As to (g), we find that that did not occur.
26. As to (h), again we prefer the evidence of Mr Roberts, supported by Mr Smith.
27. As to (i), we accept that Mr Roberts did ask Mrs Kealy on 19 November 2019 to name the parents who had complained about the heating to County Hall and Ofsted. It seems to us that that was a perfectly reasonable request to make. If Mrs Kealy knew which parents had complained, then effectively the identity of those parents was already within Westfield's knowledge.
28. As to (j), we do not accept that there was any such intimidatory and harassing

behaviour. We prefer the evidence of Mr Roberts.

29. As to (k), we do not accept that Mr Roberts made accusations, he was simply trying to ascertain why there appeared to be a shortfall in the fees received.
30. As to (l), we accept that Mr Roberts queried why Mrs Kealy's staff levels were above the statutory ratio. That was something he was perfectly entitled to do as her line manager.
31. As to (m), since this allegation is unsupported by anything other than Mrs Kealy's evidence, we do not accept that it took place. We make the same comment in relation to allegation (n).
32. As to (o), as we understand it the Claimant alleges that she raised Mr Roberts' behaviour with Mr Thornborough, a Trustee of Westfield, on or after 19 November. Mrs Kealy alleges that she told Mr Thornborough: "That David Roberts needed to be removed from the Respondent as he was impossible to work with". That is plainly a very serious allegation and one which would need sometime to investigate. Given that Mrs Kealy resigned some 14 days later, we cannot see that that allegation can support a breach of the implied term of trust and confidence.
33. As to (q), that allegation is a repeat of (b) above.
34. As to (r), (s) and (t), Mrs Kealy raised a written grievance to Mr Roberts about the conduct of Mr Bell and resigned within hours of making the grievance. We accept Mr Roberts' evidence that he suspended Mr Bell and did carry out an investigation.
35. There is a further matter not pleaded in the further and better particulars but alleged to be the last straw, namely that whilst Mrs Kealy was instructed by Mr Roberts to stay at home, Mr Bell was not. That allegation is based on the fact that Mr Bell was seen at work early on the morning of 4 December. Mr Roberts' explanation, which we accept, was that Mr Bell began work before Mr Roberts did and as soon as he learned that Mr Bell was at work, he sent him home.
36. Given the context which we have set out at paragraphs 4 to 12 of our conclusions and the factual findings set out above in respect of each allegation, in our view it cannot be said that the implied term of trust and confidence has been breached. It seems to us that in general Mr Roberts has acted throughout with reasonable and proper cause, again as set out above in our findings of fact.

Automatic unfair constructive dismissal – Section 103A of the 1996 Act

37. Given that we have found that no qualifying protected disclosures were made, this claim must fail.

Health and safety unfair dismissal – Section 100(1)(a) of the 1996 Act

38. We accept that Mrs Kealy did inform Mr Roberts about the problems with the heating. We also accept that the failure of heating was potentially harmful.

However, given our findings of fact, we cannot see any causative connection whatsoever between Mrs Kealy’s resignation and her reporting of the failure of the heating system.

Automatically unfair dismissal – Paragraphs 15 and 16

39. That matter has been dealt with in relation to our findings on protected disclosures and therefore must fail.

Section 44 of the 1996 Act

40. We accept that Mrs Kealy did inform Mr Roberts of the failure of the heating system and that that is capable of falling within the meaning of subsection (1)(c) of Section 44.

41. As to the alleged detriments relied upon in issue 18, namely paragraphs 52 – 60, we rely on the findings of fact that we have made above in relation to constructive unfair dismissal.

42. As to paragraph 61, given that Mrs Kealy had by then resigned, we do not consider Westfield’s failure to respond to her grievance amounted to a detriment.

43. Given our findings above, we do not need to deal with issues 9, 10, 11, 19, 20, 21, 22 and 23.

44. We therefore conclude that all of Mrs Kealy’s claims should fail. They are largely founded upon a foundation of falsehoods.

Employment Judge Blackwell

Date: 10 January 2022

JUDGMENT SENT TO THE PARTIES ON

11 January 2022

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