EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104410/16

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Held in Glasgow on 13, 14, 15, 16 February 2017
& 17 February 2017 (In Chambers)

Employment Judge: **P Wallington QC**
10 **Members:** **Mr I Poad**
Mr A Ross

15 **Mr Steven Glover** — **Claimant**
Represented by:
Mr L Anderson - Solicitor

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McColl's Travel Limited — **Respondent**
Represented by:
Mr S Connolly - Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is as follows:-

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(1) The claimant`s claim of detriment having made protected disclosures is outwith the jurisdiction of the Tribunal by reason that it is time barred.

(2) The claimant`s claim of automatic unfair dismissal pursuant to Section 103A
35 of the Employment Rights Act 1996 is not well founded and is dismissed.

(3) The claimant was unfairly dismissed by the respondent. The Tribunal awards the claimant a basic award of £5,427.00 (Five Thousand, Four Hundred and Twenty Seven Pounds) and a compensatory award of
40 £1,364.27 (One Thousand, Three Hundred and Sixty Four Pounds, Twenty Seven Pence), making a total award of £6,791.27 (Six Thousand, Seven

Hundred and Ninety One Pounds, Twenty Seven Pence). The Recoupment Regulations do not apply to this award.

(4) The claimant`s claim for an uplift in the compensatory award for unfair dismissal pursuant to Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 is not well founded and is dismissed.

(5) The claimant`s claim for a redundancy payment is not well founded and is dismissed.

(6) Pursuant to Rules 75(1)(b) and 76(4) of the Employment Tribunals Rules of Procedure 2013, the Tribunal awards the claimant expenses in the sum of £1,200.00 (One Thousand, Two Hundred Pounds) being fees incurred by the claimant in presenting and prosecuting these proceedings.

REASONS

1. In this case the claimant, Mr Steven Glover, claims against his former employers McColl`s Travel Ltd in respect of his dismissal, with effect from 13 May 2016, from his employment by the respondent as a Bus Driver.

2. The primary claim made by the claimant is of automatic unfair dismissal pursuant to Section 103A of the Employment Rights Act 1996, which applies where the reason or principal reason for the dismissal was that the claimant made a protected disclosure (commonly referred to as a whistleblowing disclosure). In the alternative, the claimant claims that he was unfairly dismissed contrary to Sections 94 and 98 of the Employment Rights Act 1996. In the further alternative, the claimant claims a statutory redundancy payment. An additional claim is made pursuant to Section 48 of the Employment Rights Act 1996 in respect of having been subjected to detriment by reason of having made protected disclosures. In addition to the foregoing claims, the claimant made a claim for an uplift of the

compensatory award for unfair dismissal (whether under Section 103A or Section 98 of the 1996 Act) under Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, on the ground that the respondent had unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures in respect of his dismissal. All of these claims were put into dispute by the respondent in its response.

3. At the commencement of the Hearing of this claim, the Tribunal drew the attention of the claimant`s representative to the lack of specification in relation to the claims based on protected disclosures, and requested the that he provide further specification of the disclosures relied on and the basis upon which they were asserted to be protected, and of the detriments relied on. These particulars were provided, but it was apparent that the particulars raised allegations of detriments other than those pleaded in paragraph 43 of the paper apart to the ET1, which referred to the issuing to the claimant on 3 March 2016 of a letter giving notice of termination of his employment and a separate letter offering re-engagement on different and inferior terms in an enclosed contract, and the dismissal itself.

4. We took the view that the references to further alleged detriments required to be treated as an application to amend the original particulars of the claim. The claimant`s representative submitted that permission to amend should be granted, but this was opposed by the respondent`s representative. We considered, applying the well known criteria for permission to amend set out in the case of **Selkent Bus Co Ltd v Moore [1996] ICR 836**, that the application for permission to amend should be refused, because the balance of prejudice or hardship if the amendment was permitted was greater than if it was refused. We took into account in particular the failure of the claimant to seek to advance the additional detriments now relied on until after the commencement of the hearing, and then only in the context of having been asked for specification, not additions to, his case, and that there would be particular prejudice to the respondent in having to deal with

additional detriments first advised as claims after its principal witness, Mr William McColl, had commenced giving evidence, having regard to the fact that the respondent`s case had been prepared, and its witnesses precognosed, on the footing that the case to be met was that set out in the paper apart to the ET1 only.

5. We add the observation at this point that it was accepted by the claimant`s representative that the effect of Section 47B(2) of the Employment Rights Act 1996 is that dismissal cannot be a detriment for the purposes of a claim under Section 48, and that therefore the only detriment pleaded was the issuing to the claimant of letters giving notice of dismissal and of an offer of a new contract, on 3 March 2016.

6. The Tribunal proceeded to hear evidence on oath from Mr William McColl and Mrs Stephanie McColl on behalf of the respondent, and from the claimant in person. The Tribunal was also referred extensively to a joint bundle of productions, running to nearly 300 pages, half of which constituted pay records of the claimant`s salary during his employment by the respondent.

7. We considered that whilst each of the witnesses was honestly seeking to give truthful evidence to the best of his or her recollection, none of the witnesses was as clear or persuasive as we would have wished. Neither Mr nor Mrs McColl had very good recollection of some of the details of the case, whilst the claimant presented as having a particularly inflexible attitude to his situation and as often being unrealistic in his perception of the respondent`s motivation. Where there were conflicts of evidence, we regarded these as generally a consequence of differences of recollection or perspective, and have sought to resolve such conflicts by reference to the available documentation, and to the inherent probabilities where there was insufficient documentation to resolve such conflicts.

8. Having regard to these comments on the witnesses, we can turn next to setting out our findings in fact.

Findings in Fact

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9. The claimant was employed by the respondent from June 2013,, and before that by its predecessor from July 2006, until 13 May 2016 as a bus driver. The respondent is a family owned firm, which operates bus and coach services under contract, and private hire services, in the Dumbarton area. It 10 is a relatively small company, employing approximately 45 employees, some 20 of whom are bus drivers. The Managing Director, since June 2013, is Mr William McColl Junior. Prior to 2013 Mr McColl was a Manager in the predecessor company, which was owned and run by his parents. The other managers of the respondent are Mrs McColl, Mr McColl`s wife, who has the 15 job title of Engineering & Transport Director, but is not a statutory Companies Act Director, and her father Mr John Gay, who is Traffic Manager.

10. Until 2011, the claimant had worked on a contract held by the respondent`s 20 predecessor with a school, St Andrew's School. From 2011, he worked on a contract held by the respondent with Lomond School, a private school in Helensburgh. The duties required to provide the contracted service to Lomond School were such that the claimant was able to work from 7am to 5pm Mondays to Fridays, which importantly enabled him to collect his son 25 Jamie from after school care. The claimant required to collect Jamie by 6pm, to avoid incurring additional costs charged by the care provider. The claimant`s wife works in employment involving considerable travel, and is was not therefore in a position to collect their son from childcare with any regularity.

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11. During the period that the claimant was working on the Lomond School contract, his contract of employment provided from a minimum of 28 hours a week, and a maximum of 48 hours a week, subject to extension if he had

signed an opt out under the Working Time Regulations 1998, which he in fact had. In practice the claimant`s weekly hours were either 49.25 or 48.75.

12. The respondent lost the contract with Lomond School in August 2015, following a retendering exercise by the school.

13. Following the loss of the Lomond School contract, the respondent through Mr McColl sought to arrange for alternative work for the claimant, but it became apparent that this would impact on the hours at which he worked. The claimant responded by raising a grievance, set out in a letter of 20 August 2015 to Mr McColl (page 75). In this letter, the claimant stated:-

> "*Since the start date of my contract … I have been employed between the hours of 7am to 5pm Monday to Friday, and fulfilling other duties (weekend overtime) as and when I was able to help. As you are aware, I have a commitment to collect my son by 6pm from his childcare and this has not changed since the start of my employment*."

14. The claimant went on to ask for the formal grievance procedure to be instigated for three stated reasons:-

> "*(1) Unreasonable proposed changes to my contract given my historic working pattern.*
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> *(2) Employer has not negotiated proposed changes.*
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> *(3) Employer has not made out any other options available to me.*"

15. Mr McColl replied the following day setting out up a grievance meeting, and deferring proposed changes to the claimant`s rostered duties, which had

been due to take effect on 24 August 2015. Following the grievance meeting, Mr McColl wrote again (page 77) indicating that alternative shifts had been proposed including an improved shift from the beginning of November 2015, and that the claimant was to discuss the options with his wife and/or legal advisor, and to give a decision by 28 August 2015. Mr McColl indicated that if the claimant refused the shift offer it would be allocated in any event, but went on to set out the claimant`s right of appeal.

16. Behind this somewhat Delphic response was the fact that the respondent was in the process of making a formal application to the Traffic Commissioners to introduce a scheduled public bus service, route 208, the schedule for which would enable the claimant if deployed to this route to complete his work by 5.30pm each day. However, the notice required to be given to the relevant authorities, namely the Traffic Commissioners and Strathclyde Partnership for Transport, meant that the service would not be able to start until early November 2015.

17. On 27 August 2015, the claimant responded to Mr McColl`s letter (page 78). He reiterated his need to pick up his son from childcare and referred to the proposals he had made at the grievance meeting which the respondent had rejected. These were, first, that the claimant should replace another driver who had appropriate hours (referred to in the letter as "last in first out"), secondly, that he should replace a Mr McGuinness, who was retiring from a day time office job, or thirdly, that he should be made redundant. The letter went on to record that the respondent had proposed that the claimant work on service 207, which was a service provided by the respondent under contract, running between 7.30am and 6.30pm, and explained that this was not acceptable because of the claimant`s childcare requirements. The letter concluded:-

> "*As you have now indicated the service run (207) as being your final decision I have been left no option but to formally appeal your decision for the reasons outlined above*."

18. The respondent did not initiate any procedure for hearing this formal appeal, but in fact made arrangements for the claimant to work on the 207 service with a replacement driver scheduled to take over from him at some point before 6pm, so that he could continue to collect his son from the after school care provider at 6pm. This arrangement continued until the end of October 2015, although on two or possibly three occasions the replacement driver failed to turn up and the claimant was unable to collect his son at the appropriate time. The claimant was then on holiday for a short period, following which he started working on the new 208 service, working from 7.30am to 5.30pm, which was within the parameters of his requirements for collecting his son at 6pm.

19. Unfortunately, the new 208 service proved to be commercially unsuccessful. After a review of the service at the end of the first three months of its operation, the respondent found that it had made a loss during that period of £15,000. This was reported to the Board, and the shareholders of the respondent (the parents of Mr McColl), and a decision was taken to discontinue the 208 service, following due notice to the relevant authorities. Because of the notice requirements, the service would have to continue until the beginning of June 2016.

20. Having taken that decision, Mr McColl appreciated that it was necessary to deal with the consequences for the claimant. Mr McColl still required the claimant`s services, as there was at least one driver vacancy at that time, and therefore did not consider making the claimant redundant, or indeed making any redundancies amongst the driving staff. Mr McColl considered whether any of the rosters being worked by any of the other bus drivers was such that he could ask the person concerned to transfer to other duties and make use of the space in the roster to provide the claimant with alternative work finishing in time to collect his son, but concluded that none of the fixed shift arrangements, which covered about half of the driving staff, would be suitable. The other drivers were employed on a four week rotating shift

pattern, involving early shifts and backshifts in alternation, and Mr McColl considered that the claimant would refuse to work that shift pattern because of the late shifts.

21. At this stage, Mr McColl assumed that the claimant`s position regarding acceptable finishing time remained as it had been in August 2015, and without any attempt to consult the claimant or discuss the position with him, sent him a letter (page 87) dated 3 March 2016. This letter was headed "*Subject: Termination of Employment Contract*" and, as foreshadowed by the heading, gave notice to terminate the claimant`s contract of employment on Friday 13 May 2016. By way of explanation Mr McColl stated that the Board had decided to withdraw service 208 and *"you will be required to work on a rota involving day, night and weekend work in order to meet the needs of the business*". He went on "*as we know this is something you will not agree with, the decision has been made to terminate your current contract with us and offer you a new contract still as a bus driver*." The letter went on to advise that a new employment contract was enclosed "*which is mostly identical to your current contract with the exception of variation of terms previously agreed"*. That, however, was a significant misrepresentation of the contract enclosed. Finally, the letter gave the claimant until 18 March 2016 to appeal against the decision, and stated "*If you have any questions, please don`t hesitate to contact me*".

22. It is necessary to set out in some detail the content of the offer letter and some of the terms of the contract enclosed with it. The offer letter itself (pages 89-90) contained the following introductory statements:-

> "*This offer is subject to the company receiving job/character reference(s) which are deemed to be satisfactory as per your employment application.*

Your employment shall be subject to an initial probationary period of 6 months during which your performance and conduct will be monitored.

This offer is also subject to you providing relevant documents to the Company proving your legal right to work in the UK. On your first day, you should bring your P45 and at least 3 forms of identification 1 of which must be your driving licence (photo card & counterpart). Other forms may include passport, birth certificate, utility bill with current address etc. Copies will be taken of these documents for our records. "

23. The contract enclosed with this letter (pages 91-95) was in most respects in the same terms as the contract the claimant was then employed under, but with two significant differences to which we must refer. The first is paragraph 1, entitled "*Commencement and Job Title*". This makes clear that "*No employment with a previous employer will be counted as part of the Employee`s period of continuous employment*" and that "*The first 6 months of your employment will be a probationary period during which your performance will be assessed. During the probationary period, your employment may be ended either by you giving the Company or by the Company giving you 1 week written notice."* Finally this paragraph set out the notice periods for the contract as being the longer of contractual notice or statutory notice, but clearly indicating the provisions as to statutory notice as intended to apply from the start date of the new contract, 9 May 2016. The practical effect of this contract, if accepted, purported to be that the claimant would lose his continuity of employment, and be employed subject to termination on a week`s notice. Mr McColl did not appreciate that despite the wording of the new contract, the claimant would in fact have statutory continuity of employment and an entitlement to statutory notice on the basis of his nine years of continuous employment.

24. The second provision of significance is paragraph 3, headed "Hours of Employment", which provided "*There are no normal hours of work. You will be informed by your line manger at least one week before your working days and hours. … These will not be more than 48 hours per week*." The other provisions of this paragraph related to the Working Time Regulations, the option to sign an opt out, and the possibility of the claimant being required to work such additional hours as were reasonable to meet the requirements of the business. This paragraph was accepted by Mr McColl in evidence as creating a zero hours contract. It was the contract under which any new driver recruited by the respondent would be employed.

25. The claimant exercised his right of appeal, by way of a letter of grievance (page 97) dated 16 March 2016. In this letter the claimant restated his commitment to collect his son, which had not changed since the start of his employment, and asked that the formal grievance procedure be instigated for the three reasons that had been given in his August 2015 grievance appeal, of which the claimant stated this grievance was a continuation, reminding Mr McColl that he had not responded to the letter of appeal of 27 August 2015.

26. Mr McColl responded on 31 March 2016 setting up a grievance meeting for 7 April 2016; this was subsequently postponed until 14 April 2016. As with other formal meetings held by the respondent with the claimant, no minutes or notes were taken of the meeting, and the evidence before the Tribunal of what was said during the meeting was therefore limited to what the witnesses present could recall and the correspondence setting out the outcomes of the various meetings.

27. In the case of the meeting of 14 April 2016, Mr McColl set out his conclusions in a relatively lengthy letter of 20 April 2016 (page 99). This addressed each of the three issues identified by the claimant, explaining that the cessation of the 208 service meant that the hours the claimant worked no longer met the needs of the business, justifying the failure to

respond to the claimant`s 27 August 2015 grievance appeal on the basis that arrangements were made which were satisfactory to the claimant, and rebutting the assertion that no other options had been made out. The letter went on to reject the claimant`s proposal that he be made redundant, and to remind the claimant of the need to sign the new contract for his employment to continue, and setting a deadline of 6 May 2016 for this. Finally, Mr McColl set out the claimant`s right to appeal against the decision, with any appeal to be sent to Mrs McColl within five days, and offering the claimant the opportunity to discuss the content of the letter.

28. The claimant had not, either in his grievance letter or in the course of the meeting with Mr McColl, raised any of the issues regarding the terms of the new contract, or the covering letter, which we have set out above, save for the issue of the new contract being a zero hours contract. Mr McColl had responded to that point by saying that this was the standard contract offered to new drivers. He had offered the assurance that the claimant would be engaged for a full working week, but had not offered to change the wording of the contract.

29. Mr McColl`s evidence to us was that he would have amended the contract if the claimant had asked, and that he would not have expected the claimant to serve a probationary period or provide references or produce documentation as required in the covering letter, but he accepted that as the claimant had not raised these issues no reference to them was made. In relation to the contract treating the claimant as a new starter for continuity of employment and notice purposes, Mr McColl`s evidence was that he did not appreciate that this was a mis-statement of the legal position; however he did not suggest that he would have amended these provisions of the proposed contract if challenged on them.

30. The claimant exercised the right of appeal offered in the letter from Mr McColl, by a letter dated 25 April 2016 (page 102; the letter was actually dated 2015 but this appears to have been a typographical error). In this

letter the claimant essentially reiterated his points on each of the three issues of unreasonable proposed changes, failure to negotiate and failure to offer other options, and asked for a response to these points within seven days.

31. In a separate letter to the respondent of the same date (page 104), the claimant set out a complaint of harassment. This referred back to a previous harassment grievance he had raised in November 2012, and the fact that there had been discussion of harassment at the grievance meeting in August 2015, when the claimant stated that he had voiced his concern at having been threatened and intimidated by the constant threat of losing his job. Part of the complaint of harassment set out in the letter of 25 April 2016 was the further continuation of the claimant`s concern that his job was under threat. In addition, he raised an issue about his midday break arrangements whilst working on the 208 service, and a separate issue concerning an incident where Mr Gay had allegedly made reference to a medical procedure the claimant had undergone, in the presence of a number of fellow employees, which had left the claimant "*utterly shocked and completely humiliated*". The letter concluded that it was a formal grievance on the grounds of harassment

32. In response to these two letter of 25 April 2016, Mrs McColl responded by letter of 30 April 2016 (but which was signed on her behalf by her husband) setting up a meeting to hear the appeal on 4 May 20 16, and stating that the harassment complaint would be discussed at the same time (page 108).

33. The hearing of the claimant`s appeal on 4 May 2016 was conducted by Mrs McColl. Mr McColl was in attendance as the Appeal Officer, ostensibly to present the respondent`s case. The claimant was accompanied by Mr Watt. Prior to the appeal meeting, Mr McColl had briefed Mrs McColl, whose duties do not include significant contact with drivers, or involvement in the fixing of driver`s rotas, as to the context for the appeal. During the hearing, Mr McColl explained the position leading to the appeal, and deal with the

issues and questions raised by the claimant. Mrs McColl did not ask any questions, but took notes (which however were not produced to the Tribunal). After the appeal hearing, Mr McColl spoke further with Mrs McColl about the matter, but then left her to consider her decision.

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34. Mrs McColl duly reached a decision. We are satisfied that she reached the decision unaided. However, we are equally satisfied that the way in which the appeal hearing was conducted conveyed the clear impression to the claimant, entirely understandably in the circumstances, that Mr McColl was chairing and in charge of the hearing, with Mrs McColl adopting a more subordinate role. This perception can only have been reinforced by the fact that the letter dated 6 May 2016 relaying Mrs McColl`s decision, which was to reject the appeal, was signed on her behalf by Mr McColl (page 112).

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35. Also on 6 May 2016, Mr McColl emailed the claimant, in an email timed at 18:49, stating that his wife was awaiting feedback from the respondent`s lawyer regarding the outcome of the grievance appeal, and indicating that she expected to email the claimant on Monday 9 May 2016. In this email, Mr McColl went on to refer to the deadline for receiving the claimant`s new signed contract, which was that day, and stating that as he had not received the new signed contract, the claimant`s final day of employment would be Friday 13 May 2016. Thus this email reaffirmed the original notice of termination of employment given to the claimant on 3 March 2016.

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36. Within her decision letter of 6 May 2016, Mrs McColl referred to the claimant`s separate grievance about harassment. She commented that she found it difficult to understand why he did not raise a grievance at the time of the alleged incident, and that she agreed with Mr McColl that it seemed that the claims were made due to the impending termination of the claimant`s contract and "*had no real claim*." With reference to the specific allegation about Mr Gay, Mrs McColl suggested that the claimant should raise this as a new grievance which would be investigated accordingly. She provided no explanation to the Tribunal as to why the matter could not have

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been dealt with on the basis of the very specific allegations set out in the claimant's earlier letter, without the necessity for the matter to be raised again in a separate grievance.

5 37. The claimant responded to the appeal decision letter by an email to Mrs McColl of 11 May 2016 (page 114), in which he indicated his disagreement with the decision, and the fact that he had made it clear that the harassment grievance relating to Mr Gay was a separate issue, and that "*as such, I shall not resubmit a further letter on this subject as suggested, as I consider this* 10 *issue outstanding*". The letter went on to set out the claimant`s position, and concluded that "*I look forward to a fully independent conclusion on these matters in the near future*".

38. Following the termination of his employment, the claimant sought to sign on 15 for Jobseeker`s Allowance, but this was refused, for reasons to which we need to return in due course. He was successful in obtaining temporary employment as a bus driver with Wilsons of Rhu Ltd, lasting for 18 weeks. He then obtained full time employment, again as a bus driver, with Allandale Coaches Ltd; however, both these posts had, and in the case of the latter 20 still has, a slightly lower rate of pay. As it was not in dispute that the claimant had taken sufficient steps to mitigate his loss, the Tribunal did not hear evidence relating to the steps taken by the claimant to obtain these two posts. As will appear later, the parties were able to agree the quantification of the claimant`s net financial loss following his dismissal.

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39. A further aspect of this case now requires to be set out, relating to the amounts of Income Tax and Employee National Insurance contributions payable by the claimant, deducted from his salary and paid over to HM Revenue and Customs, and recorded in his HMRC records. In September 30 or October 2012, the claimant became aware that it appeared that either the respondent had not been paying over to HMRC the correct amounts of Income Tax and NICs on his pay, or that these had not been correctly recorded in his records with HMRC.

40. The claimant approached the respondent to seek clarification of the position and to obtain copies of payslips. In a letter to Mr McColl dated 22 November 2012, a large part of which related to discussions about changes in the claimant`s terms of employment which were then under discussion (page 67), the claimant stated "*Following consultations with my legal advisor, I have been advised to request a full statement of wages for tax years 2011/2012 and 2012/2013 with all relevant information i.e gross pay, tax/national insurance deductions and net pay outlining my hourly rate based on my full time employment*". The statement requested this information by 30 November 2012.

41. Mr McColl replied on 4 December 2012 (page 69), dealing first with the contractual issues and then responding to the request for a full statement of wages. He stated that "*you have already been provided this information in the form of the statutory P60 at the end of each financial year. We are unable to provide a statement for 2012/2013 as we are still progressing in the payroll year. If you require any further clarification, please do not hesitate to contact me".*

42. The contractual issues were subsequently resolved, and the claimant was made a goodwill payment of £600. In connection with this payment, he was asked to sign a document accepting the payment, which contained the statement "*I confirm that McColl`s Coaches Ltd [the name of the predecessor of the respondent] have paid the correct income tax and national insurance contributions since the start of my employment as stated on my terms of employment contract at 28 hours per week*." The statement went on to impose an obligation of confidentiality on the claimant (page 70).

43. Nothing further was raised between the claimant and the respondent regarding the tax issue after the signing of this document, until September 2015. However, as was confirmed by HMRC in a letter dated 10 October 2016 (page 134), the records held by HMRC of the claimant`s pay and tax

deducted for the years ending April 2012, 2013, 2014 and 2015 all appear to be significantly lower than the amounts the claimant was in fact paid and the tax recorded on his payslips as having been deducted. We have no means of knowing how these apparent errors have come into being; however we have no reason to believe that it is due to any error or default on the part of the respondent, and infer the probability to be that errors have been made by HMRC in the attribution of information and payments made to the account held for the claimant.

44. In September 2015, the claimant received a statement from HMRC, together with a substantial tax rebate, which appeared to be based on incorrect information regarding the level of earnings he had received in 2014/2015 and the amount of tax that should have been remitted to his account during that period. Both were substantially below the figures he believed (rightly, as we find) to be the correct figures. The claimant either had not received, or had lost, his P60 for that year. He approached the respondent by an email dated 19 October 2015 (page 80) raising this matter, setting out his records and the figures quoted by HMRC for 2014/2015, and indicated that he had returned the cheque for the tax rebate of nearly £1,000, and in response HMRC had requested a copy of his P60 for 2014/12015. In his letter the claimant went on to say "*I would appreciate your help in clearing up this misunderstanding to ensure my continued contribution at the higher rate for my pension*" and the claimant requested a copy of his P60. This letter is relied on as the first of the claimant`s protected disclosures, and it is accepted as such for the respondent.

45. The claimant did not receive a written response to this letter, or a copy of his P60, and wrote again to Mr McColl on 7 December 2015 (page 85) pursuing the matter. He concluded his letter with a request for the P60, and stating that if he did not have a written response by 15 December 2015 he would pass proof of earnings by way of weekly payslips to HMRC and ask them to deal with the respondent directly. This is accepted to be the second protected disclosure made by the claimant.

46. In response to this letter, Mr McColl spoke to the claimant and explained to him that once a particular tax year had been closed on the respondent`s payroll system, as was the case for 2014/2015, the software did not allow for the printing off of a duplicate P60, with the consequence that the respondent was not in a position to provide the claimant with a copy. A check was made of claimant`s file, but there was no copy of the P60 on the file to give him.

47. In addition, Mr McColl placed the matter in the hands of the respondent`s accountant, as had been done in 2012, but on this occasion with a new firm of accountants. The accountants verified the correctness of the respondent`s records, which showed the levels of earnings, deductions and net pay for the claimant in accordance with the figures that the claimant himself had quoted, and they attempted to resolve the discrepancy between this and HMRC`s figures through direct contact with HMRC. However, owing to HMRC`s policy on taxpayer confidentiality, and as they were not the appointed representatives of the claimant, they were unable to make progress with HMRC about the matter.

48. There was no further contact between the claimant and the respondent about this issue during the remaining period of the claimant`s employment, and it was not raised by either party in the course of the various exchanges on paper or at meetings in relation to the attempted introduction by the respondent of new terms and conditions of employment, and the termination of the claimant`s employment.

49. As foreshadowed in his letter of 7 December 2015, the claimant contacted HMRC whistleblowing hotline, to report his concerns about the discrepancies between the records held by HMRC as to his earnings, tax and the figures shown in his payslips. HMRC did not pass on any information relating to this whistleblowing action to the respondent, and the respondent remained unaware that the whistleblowing had taken place until

the commencement of these proceedings. No documentation was provided in relation to this whistleblowing report. It was nevertheless relied on by the claimant, and accepted by the respondent, as the third protected disclosure made by the claimant.

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Relevant Law

50. In relation to the claimant`s claims of automatically unfair dismissal and of detriment for having made a protected disclosure, the law relating to protected disclosures is set out in Part IVA of the Employment Rights Act 1996. A protected disclosure is a qualifying disclosure made either under section 43C to the disclosing employee`s employer or under section 43F to a prescribed person. Prescribed persons are those organisations set out in the Public Interest Disclosure (Prescribed Persons) Order 2014, as amended, and include for relevant purposes HMRC. A qualifying disclosure is defined in section 43B of the Employment Rights Act 1996 as 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 a number of matters, including that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

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51. The three matters relied on by the claimant as protected disclosures were accepted as such by the respondent in the course of submissions, and it is not therefore necessary for us to set out in further detail the considerable case law that has shed further light on the scope of the definitions referred to. We are content to accept, for the purposes of the further consideration of the claimant`s public interest disclosure claims, that the disclosures were within the terms of section 43B, read together with section 43C or 43F as the case may be.

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52. By section 103A of the 1996, a dismissal is automatically unfair if the reason or principal reason for the dismissal is that the employee made a protected disclosure. By section 47B of the 1996, 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. Section 48 of the Act provides for remedy by way of complaint to an Employment Tribunal, inter alia of a contravention of section 47B.

53. Section 48(3) provides that an Employment Tribunal shall not consider a complaint under section 48 unless it is presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates, subject to qualifications not material to this case, or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. Section 47B of the Act contains provisions relating to detriment which include, at section 47B(2), that the section does not apply where the worker concerned is an employee, and the detriment in question amounts to dismissal.

54. Turning next to unfair dismissal more generally, by section 98 of the 1996 Act, where an employee has been dismissed and has the right not to be unfairly dismissed (as is the case in this case), the first stage in determining the fairness of a dismissal is that it is for the employer to show the reason (or if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employer held. Reasons within section 98(2) include, so far as relevant to these proceedings, that the employee was redundant.

55. In applying the statutory provision relating to some other substantial reason, we bear in mind the guidance given by the case of **Willow Oak Developments Ltd v Silverwood [2006] ICR 1552** that it is not necessary at this stage for the employer to show that the reason relied on did justify the dismissal of the employee, but rather that it was a reason of a kind such as to justify the dismissal.

56. If the employer shows a potentially fair reason within section 98(1) or (2), the question of fairness is then to be determined in accordance with subsection (4) of section 98, the burden of proof at this point being neutral. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer`s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. This is to be determined in accordance with equity and the substantial merits of the case.

57. In applying the statutory test in section 98(4), the Tribunal must not substitute its own view for that of the employer. We have directed ourselves accordingly. Rather, the Tribunal is to apply the "range of reasonable responses" test, that is whether the dismissal was, in the circumstances and in the manner in which it was implemented, within the range of reasonable responses open to a reasonable employer. This embraces both the substance of the reason for dismissal and the procedure by which the dismissal was effected.

58. With specific reference to dismissal for some other substantial reason, which is the reason advanced by the respondent in this case, we refer further, in the course of setting out the reasoning behind our decision that the dismissal of the claimant was unfair, to the various authorities cited by the parties` representatives in support of their submissions on this issue.

59. In the event that a dismissal is held to be unfair, the claimant is entitled to a basic award, in accordance with section 119 of the 1996 Act. The parties are agreed that the basic award in this case, subject to what follows, is £5,427.00.

60. The basic award may be reduced in certain circumstances in accordance with section 122 of the 1996 Act. The circumstances potentially relevant to this case, and relied on by the respondent, are that under section 122(2), where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the award accordingly. In order for conduct of the complainant to fall within this category, the conduct must carry at least an element of culpability.

61. In addition, the claimant if unfairly dismissed may be entitled to a compensatory award, by reference to the net loss sustained by the claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer (section 123(1)). In determining the amount of the compensatory award, if the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it must reduce the amount awarded by such proportion as it considers just and equitable having regard to that finding (section 123(6)). Again, to justify a reduction in the Tribunal's award, the conduct of the claimant must involve at least an element of culpability.

62. The case of **Polkey v A E Dayton Services Ltd [1988] ICR 142** establishes a further potential limitation on any compensatory award. If the Tribunal is satisfied (the onus being on the employer to establish this) that if the employee had not been dismissed in the manner and at the time that he or she was in fact dismissed, he or she nevertheless either would or might have been fairly dismissed, at the same time or at some later date, the tribunal should reduce the amount of the compensatory award to reflect this possibility or probability.

63. An employee is entitled to a statutory redundancy payment, subject to having been continuously employed for two years at the effective date of

termination, if the reason for dismissal was redundancy. Dismissal will be for redundancy where it is attributable, inter alia, to the fact that the requirements of the employer for employees to perform work of a particular kind have ceased or diminished or are likely to cease or diminish: this is provided for by section 139 of the 1996 Act. The Court of Appeal authority of **Johnson v Nottinghamshire Combined Police Authority [1974] IRLR 20** establishes that the phrase 'work of a particular kind' refers to the nature of the work itself, not the time of day at which the work is to be performed, so that if an employer requires the same number of employees to perform a particular category of work, but needs it to be done at different times of the day than hitherto, a dismissal attributable to that fact does not attract a redundancy payment.

64. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 gives the Tribunal power to increase the compensatory award in an unfair dismissal case by up to 25% if it finds that the employer has unreasonably failed to comply with an applicable ACAS Code of Practice. The relevant Code is the Code of Practice on Disciplinary and Grievance Procedures (2015 version). **Phoenix House Ltd v Stockman [2016] IRLR 848** establishes that the ACAS Code does not apply to dismissals for some other substantial reason, at last where the reason is not to some extent disciplinary, and the employer has not applied its disciplinary procedure.

Conclusions: Detriment

65. Following the refusal by the Tribunal of the claimant's application for permission to amend his claim to add further detriments, and the concession by the claimant's representative that he cannot rely on the dismissal of the claimant itself as a detriment by virtue of section 47B(2) of the 1996 Act, the only detriment pleaded by the claimant which requires to be considered is the sending by the respondent of the two letters and enclosed contract on 3 March 2016. We would have no difficulty in concluding that that was a detriment. However the claimant did not present

his claim until 31 August 2016. He submitted his case to the ACAS Early Conciliation service on 16 May 2016, and the Early Conciliation Certificate was issued on 16 June 2016.

5 66. It was agreed between the parties that the effect of the legislation providing for mandatory early conciliation is in this case to extend the time limit for presenting a claim based on a detriment occurring on 3 March 2016 to a date one month after the issue of the Early Conciliation Certificate, i.e. 16 July 2016: see section 207B(4) of the 1996 Act. (There was some 10 suggestion in the respondent's submissions that the date might be 15 July, but we do not consider it necessary to resolve that slight discrepancy.)

67. It follows that the claim of detriment was presented some six weeks after the expiry of the applicable time limit, and unless the claimant establishes 15 that it was not reasonably practicable to present the claim in time, it is time barred. The claimant sought to argue that it was indeed not reasonably practicable for him to present his claim in time. However the evidence adduced in support of this was limited to the single point that he was not aware of his right to bring such as claim at the time of the receipt of the 20 letters of 3 march 2016. No evidence was given of when he first contacted the solicitors who have acted for him in these proceedings, or why, if it be the case, he did not contact them before the time limit for this claim had expired. No evidence was given as to what information or advice he received from the Early Conciliation service, which he contacted with 25 exemplary promptness following his dismissal. There was also no evidence whether he sought advice from any other source; this falls to be considered in the context that he had previously sought and obtained advice from Citizens Advice.

30 68. In these circumstances we have no doubt that the claimant has failed to establish that it was not reasonably practicable to present his claim in time. In addition we would have been concerned that six weeks is a relatively long period to be considered as a reasonable further period for presentation

of a claim in a case where it is shown that it was not reasonably practicable to present it in time; and the claimant offered no explanation for the passage of that further period of time before the claim was finally presented. We would therefore have found that the claim was not presented within a reasonable period after the expiry of the primary time limit.

69. Accordingly this claim is time barred, and the tribunal has no jurisdiction to determine it.

Conclusions: automatically unfair dismissal (section 103A Employment Rights Act 1996)

70. As noted above, a dismissal is automatically unfair if the reason or principal reason for it is that the employee had made a protected disclosure. In this case the protected disclosures are not in dispute, but the respondent submits that there is no evidence at all to support the claim that the disclosures made by the claimant regarding the inaccuracies in his HMRC tax records had anything to do with the respondent's decision to dismiss him; to the contrary it is submitted that the respondent has shown that the reason for dismissal is that the respondent considered it necessary to change the hours worked by the claimant and dismissed him because it (correctly in the event) believed that the change proposed would be unacceptable to him.

71. We are satisfied, on the evidence presented to us, that that was indeed the reason for the dismissal of the claimant. There is nothing at all in the evidence to suggest that the respondent, or Mr McColl in particular, held any ill-feeling towards the claimant because he had raised a legitimate query about apparent errors in the recording by HMRC of his earnings and the tax and NICs deducted from them. Mr McColl had asked the respondent's accountants to try to resolve the problem and had thereafter had no further correspondence or involvement in the matter. He was not

even aware of the third of the claimant's disclosures, to the HMRC Whistleblowing Hotline.

72. By contrast, the decision to discontinue the 208 service was taken for perfectly genuine commercial reasons: the service had not proved to be the profitable venture the respondent had hoped, but was heavily loss making. There was no other driving work for the claimant that fitted in with the hours he worked on the 208 service, and Mr McColl assumed, as matters transpired correctly, that the claimant would not be willing to work shifts that would not enable him to collect his son from childcare at 6 pm. A reason for dismissal is no more than a set of facts known to, or beliefs held by, the employer which leads him to dismiss the employee. The reason for the decision to issue the notice of termination which took effect as the dismissal of the claimant was the facts known to Mr McColl that the service 208 was imminently going to be discontinued and that none of the other driving work available to offer the claimant would enable him to finish in time to collect his son at 6 pm, and his belief that shifts which did not enable the claimant to pick up his son at 6 pm would not be acceptable to him.

73. For these reasons the claim under section 103A of the 1996 Act has no factual basis, and we dismiss it. We have every sympathy with the claimant for the fact that HMRC's records were at the time of his dismissal, and it would appear still are, seriously adrift from the respondent's records of what was actually paid and deducted (which we do not doubt are accurate), particularly so since it was the claimant's allegedly insufficient record of class 1 NICs paid in the tax year 2014-5 which led to him being refused Jobseeker's Allowance in May 2016. However it is pure speculation to link that with his dismissal, and the evidence is overwhelmingly against the claim.

Conclusions: unfair dismissal under section 98 Employment Rights Act 1996

74. The first step in determining the fairness of a dismissal under section 98 of the 1996 Act is to determine whether the employer has shown the reason or principal reason for the dismissal, and that that reason is a potentially fair one. We have set out at paragraph 72 above our finding as to what was the reason for the dismissal of the claimant.

75. Mr Anderson, the claimant's representative, submitted that the reason given was not sufficient to constitute a potentially fair substantial reason. He referred in support to the decision of the Court of Appeal in **Hollister v National Farmers' Union [1979] ICR** 542, as authority for the proposition that changes in contractual terms may not be imposed for arbitrary or capricious reasons. Whilst we accept the point made by the **Hollister** case, we do not consider that it assists the claimant in relation to the categorisation of the reason for dismissal in this case. We conclude that the respondent has shown a substantial reason of a kind such as to justify the dismissal of an employee in the position of this claimant. As we have noted under reference to the **Willow Oak** case, it is not necessary at this stage in the analysis that the reason was *in fact* sufficient to justify dismissal. It is clear to us that the fact that there is no work of the kind performed by the employee and which can be performed working at hours such as would be (or are believed to be) feasible for that employee, is a reason of a kind such as to justify dismissal: an employer cannot be expected to continue to employ an employee if there is a fundamental mismatch between the times at which the employer needs work to be done and the times at which the employee is prepared or able to work.

76. The question whether the respondent acted fairly or unfairly in relying on this reason as justifying the dismissal of the claimant is both more complex and less clear cut. We remind ourselves that we have to make an objective assessment of the matter, and not substitute our view for that of the respondent. What has to be decided, the burden of proof at this stage being

neutral, is whether the employer's actings were, both by reference to the substance of the decision and the procedure followed, such as it was within the range of reasonable responses open to a reasonable employer to have adopted the course in fact adopted.

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77. We were assisted by references in both parties' submissions to decisions of the Employment Appeal Tribunal applying the section 98(4) test in cases where the employer dismissed with an offer of re-employment in order to impose changes in terms of employment that the employees concerned would not accept voluntarily. The cases concerned, **St John of God (Care Services) Ltd v Brooks [1992] ICR 715** and **Catamaran Cruisers Ltd v Williams [1994] IRLR 386** are authority for the point that there is a balance to be struck between the parties' positions, but that it does not follow that because the employee acted reasonably in rejecting the changes, the employer is to be regarded as having acted unreasonably in imposing them. The second case also makes it clear that it is not necessary for the employer to establish, in effect, that adverse changes imposed are needed for the survival of the business.

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78. However in both of these cases there is one significant feature that is missing from the present case: the employers had sought unsuccessfully to negotiate changes in terms, and had only then offered the new contracts for signature by the employees concerned, and had then only issued notices of dismissal, with offers of re-employment on the new terms, to those employees who had not accepted the new terms voluntarily. The contrast is with the respondent's action in the present case in issuing the notice of dismissal with no prior attempt to secure the agreement of the claimant, and on the assumption that his circumstances, and position, on the times at which he could work, had not changed since August 2015.

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79. We consider first whether the respondent acted reasonably in issuing the notice of dismissal and offer of a new contract without prior consultation with the claimant. Under normal circumstances we do not consider that a

reasonable employer would act in this precipitate way. What makes this case less clear cut is that Mr McColl believed that he knew what the claimant's position on hours of work would be, based on the fact that he had made his position very clear only six months previously. It is certainly arguable that any reasonable employer would have taken the simple step of checking whether the claimant's circumstances had changed or were about to change (and as it happens, the claimant's requirement to pick up his son from childcare would only continue until the summer, when he was due to transfer to High School and would be able to make his own way home after school each day). That said, we would not go so far as to hold the dismissal to be unfair for this reason alone, because Mr McColl clearly envisaged that there was an opportunity to revisit the situation if the claimant's circumstances had changed, since he made express provision in the letter of dismissal for an appeal. The approach of 'dismiss first, appeal later' was inept and unfair, but not so outwith the range of reasonable responses that it rendered the whole process unfair in the statutory sense.

80. We take a different view of the terms of the offer of re-employment. No reasonable employer, in our judgment, faced with a need to secure a relatively long-serving employee's agreement to necessary changes in his terms of employment, would have issued a letter in the terms issued, including the requirement for references, the imposition of a probationary period, a requirement (for an employee already working for the respondent as a bus driver) to produce his driving licence, removal of accrued service and notice rights, and above all the conversion of his contract from one guaranteeing at least 28 hours' work a week to a zero hours contract. None of these conditions was either necessary or remotely appropriate. All that Mr McColl needed from the claimant was an agreement to work different hours. It is nothing to the point that the claimant did not make an issue of the matters other than the zero hours contract. Whilst the respondent is not a large employer it had access to legal and Human Resources advice, and the contract itself was clearly professionally drafted. Mr McColl could offer

no credible explanation in evidence for what presented to us as a gratuitous downgrading of the claimant's status and terms of employment.

81. With reference to the zero hours provision, the explanation given for its inclusion in the new contract was that this is the basis on which the respondent's permanent drivers are recruited. In addition, when the point was raised by the claimant at his first appeal, Mr McColl told him that in practice he was assured of a full working week. However, neither point justifies the loss of a contractual guarantee of at least 28 hours a week. We find it surprising, to say the least, that the respondent should think it appropriate to employ full time staff working regular shifts, in a business with reasonably stable requirements for the particular work, on a zero hours basis; but even if such arrangements could be justified for newly recruited staff, to impose them on a long serving employee with no prior consultation and in the context of proposed adverse changes to his times of work in our view goes well beyond the range of reasonable responses of a reasonable employer. In our judgment no reasonable employer would have handled the situation in this way.

82. In deciding whether a dismissal was fair or unfair, the whole of the process up to the conclusion of any appeal must be considered. In this case there were two appeals, the first to Mr McColl, the second to Mrs McColl. We accept that in a relatively small family-owned business there are significant limits on how practicable it is to provide an avenue of appeal to a more senior level of management than the person taking the decision to dismiss. Mr Anderson submitted that an appeal to an independent person such as the respondent's solicitor or accountant should have been arranged.

83. We do not accept this. Such an arrangement might have been necessary where there was an issue of a disputed allegation of serious misconduct, when an external appeal would give the person hearing it an opportunity to evaluate the evidence independently. In this case a knowledge of the operations of the business was essential to any assessment of whether it

was reasonable to insist on working hours which the employee was unable or unwilling to work. It might have been possible to arrange for Mr McColl's father, who had run the respondent's predecessor and was still a Board member, to take the appeal, but it was well within the range of reasonable responses of a reasonable employer for Mr McColl junior not to go so far. There was nobody else in a position to hear an appeal apart from himself, his wife, or Mr Gay, and the latter was effectively ruled out by having been made the subject of allegations of harassment.

84. However we consider the conduct of the two appeals was in several respects unsatisfactory. At the first appeal, Mr McColl failed to offer to withdraw or amend the zero hours provision in the contract when the claimant objected to it. The second appeal was conducted in such a way that it appeared to the claimant that it was in reality being conducted, or at least led, by Mr McColl: Mrs McColl asked no questions during the hearing, and it was left to Mr McColl to respond to the claimant's points whilst she took notes. Even the decision letter was signed by Mr McColl, ostensibly on his wife's behalf in her absence; the impression this must have created, bearing in mind that she was less senior than him in the business, would inevitably be that Mr McColl was the dominant player in the appeal against his decision - itself a decision on appeal from his own original notice of dismissal.

85. Our concerns about the appeal process are reinforced by the fact that Mr McColl briefed his wife both before and after the appeal hearing. This may have been made necessary by her unfamiliarity with the work of the drivers, and rostering arrangements in particular, but that serves to underline how far the appeal process fell short of an independent review of the original decision. Mrs McColl assured us in evidence of her independence, describing herself as 'the most headstrong person' working for the respondent, but she was in no real position to make an independent judgment with her knowledge and understanding of the issues deriving so much from the person against whose decision the claimant was appealing.

86. The question for the tribunal, where it is argued that an appeal has cured any earlier unfairness in the process, is still the single question: was the dismissal fair or unfair, applying the test laid down by section 98(4)? (See **Taylor v OCS Group Ltd [2006] ICR 1602**.) Our conclusion is that the answer to the question is that the dismissal was unfair. A reasonable employer would not have issued a notice of dismissal with no attempt at prior consultation; would not have offered a new contract with such inferior and inappropriate terms; and would have made more of an effort to provide an appeal with the appearance of fairness. The claimant's claim of unfair dismissal under section 98 of the 1996 Act is accordingly well-founded.

Conclusions: remedy for unfair dismissal

87. The parties were able in the course of the hearing to agree the amount of the basic award that would be due to the claimant, subject to any reduction, as £5,427.00. It was also agreed between the parties that the net loss of earnings attributable to the claimant's dismissal amounts to £3,115.06, again subject to any reduction. No claim was made for pension loss. In the course of the hearing the respondent's representative, Mr Connolly, accepted that the claimant had not failed to take reasonable steps to mitigate his losses. The claimant's only other claim is for loss of statutory rights, for which he claims £600.00, whilst the respondent submits that the correct figure is £350.00.

88. In relation to the basic award, the respondent submitted that there should be a reduction in the award to reflect the claimant's contribution to his dismissal. Mr Connolly submitted that the claimant had unreasonably failed to raise with Mr McColl the matters relating to the new contract which were inappropriate, apart from the zero hours point, and had not asked for the contract to be changed. It would in Mr Connolly's submission be just and equitable to reduce the basic award to reflect this, albeit the level of fault was not particularly high. Mr Connolly proposed a reduction of 25%.

89. We do not accept this submission. The purpose of section 122(2) of the 1996 Act is to allow for a reduction in the basic award where there was some culpable act or omission on the part of the claimant, which either contributed to or preceded the decision to dismiss, or was not discovered until subsequently, and so falls within the ambit of the principle established in **W Devis & Sons Ltd v Atkins [1977] ICR 662**. The common feature is of an element of culpability. We do not consider that the claimant was culpable in not raising the objectionable features of the contract offered to him; it is entirely understandable that he concentrated his fire on the hours issue and his belief that there had been failures to investigate alternatives to an enforced change in his working hours.

90. The respondent also submitted that there should be a reduction in the compensatory award under the principles established by **Polkey v A E Dayton Services Ltd [1988] ICR 142**. The basis for this submission was that even if the respondent had acted reasonably in relation to the terms on which the new contract had been offered, had consulted the claimant before issuing a notice of dismissal, and provided a fair appeal, the outcome would still inevitably have been dismissal, either at the same time as in fact occurred or within a short period (quantified at two weeks) thereafter.

91. The onus is on the respondent to make out a case for the counter-factual situation of a fair procedure having been followed. We are satisfied that the respondent has made out a case that it is more probable than not that if procedural issues which have led to our finding of unfair dismissal had been avoided, the claimant would have been dismissed, and the dismissal would have been fair. The claimant remained firm in his position that he needed to be free to collect his son at 6 pm. Prior consultation would in our view most probably have confirmed that to be the case rather than led to a change of mind on the claimant's part. The offer of a new contract without the loss of guaranteed hours and continuity of employment and without conditions of probation and the supply of references etc. would also probably not have

changed the claimant's position; and the outcome of a fair appeal would in all probability have been to uphold the decision to dismiss.

92. However we consider, first, that it would have required a reasonable period of time for the respondent to consult the claimant before the letters sent on 3 March 2016 could have been sent; we agree with Mr Connolly that a reasonable period would be two weeks. Further, whilst we consider it probable that a fair procedure would have had the same outcome, it is far from certain. In particular we attach weight to the fact that when asked whether he would have accepted the new contract if it had been in the same terms with respect to minimum guaranteed hours as his then current contract, the claimant's response was 'I don't know'. It is inevitable that any assessment of the degree of probability that a fair dismissal would have ensued is to some extent speculative. Our best estimate is that there is a 75% probability that the claimant would have been fairly dismissed, but two weeks later than in fact occurred.

93. Accordingly the compensatory award should be two weeks' net loss of wages, plus 25% of the balance of the agreed figure for net loss, plus 25% of an amount for loss of statutory rights. The agreed figure for a week's net pay is £332.00, so that two weeks' net pay is £664.00. That leaves a balance of net loss of (£3,115.06 - £664.00) = £2,451.06. 25% of that sum is £612.77. On the issue of loss of statutory rights, we prefer the figure relied on by the respondent, £350.00, as more accurately reflecting current levels of awards. This sum too has to be reduced by 75%, giving £87.50. Thus the total compensatory award is:

(£664.00 + £612.77 + £87.50) = £1,364.27

This is the sum to be awarded, subject to the issue of uplift, which we address next.

Conclusions: Uplift under section 207A Trade Union and Labour Relations (Consolidation) Act 1992

94. The claimant seeks an uplift to the compensatory award under section 207A of the 1992 Act, on the ground that the respondent unreasonably failed to comply with a relevant Code of Practice, namely the ACAS Code on Disciplinary and Grievance Procedures. Mr Anderson accepted, under reference to the **Phoenix House** case cited above, that the disciplinary provisions of that Code have no relevance to dismissal for some other substantial reason (although that point has been qualified in some circumstances not relevant for present purposes). He based his submission instead on the respondent's failure to deal in accordance with the grievance provisions of the Code with the separate grievance headed 'Harassment' submitted by the claimant on 25 April 2016 (page 104).

95. We accept that this grievance was not handled appropriately, but consider that it was a separate issue from the appeal process then under way, and whatever failings can be laid at the respondent's door are not failings in relation to provisions of the Code mandating how the dismissal process and any appeal should be handled; not least for the reason that there are in this case no such provisions of the Code. Whilst recognising the force of the points made by Mr Anderson about how the harassment grievance was handled, we conclude that the provisions of section 207A are simply not engaged, and we have no power to award an uplift.

Conclusions: Redundancy

96. As an alternative esto case in case his primary claim that his dismissal was unfair was rejected, the claimant claimed that the reason for his dismissal was redundancy, and that he should therefore be awarded a redundancy payment. The short answer to this claim is provided by the Court of Appeal's decision in the **Johnson** case cited earlier in this judgment. Redundancy is defined, so far as relevant, by reference to the employer's need for

employees to perform work of a particular kind, and **Johnson** makes it clear that it is the nature of the work, not matters such as the time of day at which the work is to be performed, that matters. There was no diminution in the respondent's requirements for employees to drive its buses, merely the loss of a particular route the operating hours for which meant that the person driving the bus serving that route could work from 7.30 am to 5.30 pm. The respondent's requirement for bus drivers was undiminished. This was therefore not a redundancy situation.

Expenses

97. The claimant incurred fees of a total of £1,200.00 to present his claim and have it listed for hearing. He seeks an order that the respondent pay this sum by way of expenses. The tribunal has the power to make an award of expenses, including, under rules 75(1)(b) and 76(4) of the Employment Tribunals Rules of Procedure 2013, an award of any sums incurred as fees. In this case the respondent accepted that if the claimant succeeded in his claims, we should make an award of expenses in respect of the fees incurred. Whilst the claimant has not succeeded in all of his claims, the fees incurred are the same as would have been incurred had he only presented the claim of unfair dismissal under section 98, which has succeeded. in these circumstances we consider that the proper exercise of our discretion is to make an award of expenses covering the full amount of the fees incurred; the claimant is accordingly awarded expenses of £1,200.00.

Summary

98. In summary, we find that the claimant's claim of detriment for having made protected disclosures is time barred. The claim of automatically unfair dismissal is rejected: we find that the claimant's protected disclosures did not form any part of the respondent's reasons for dismissing him. The claim of unfair dismissal under section 98 of the 1996 Act is however well-founded, and we award the claimant a basic award of £5,427.00 and a

compensatory award (reduced to reflect a 75% probability that he would have been fairly dismissed in any event, but two weeks later than in fact occurred) of £1,364.27. The total award is therefore £6,791.27. Because the claimant was refused Jobseeker's Allowance, the Recoupment Regulations do not apply. The claimant's claim for an uplift for the respondent's failure to adhere to the provisions of the ACAS Code is refused, as is his esto claim for a redundancy payment. The claimant is awarded expenses of £1,200.00 by way of reimbursement of the fees incurred in prosecuting his claims.

Endnote

99. One aspect of this case which has caused us particular concern is the claimant's tax records as held by HMRC. We are satisfied by the extensive documentation we have seen that the claimant has been paid a gross wage of some £400 a week regularly, at least since the business was acquired by the present respondent in June 2013, and has had income tax and class 1 NICs deducted at the appropriate rates. We have no reason to doubt that the sums deducted were remitted to HMRC, or indeed that this was the case prior to the acquisition of the business by the respondent. However HMRC's records purport to show, for every tax year from 2011-12 to 2014-15 inclusive, significantly lower total earnings and remissions of income tax. At least for 2014-5, the records held by HMRC of NICs paid must also be seriously deficient, since the claimant was refused Jobseeker's Allowance because, as it was asserted, he had made insufficient contributions. That cannot have been the case if the NICs deducted from his pay were credited to his HMRC account.

100. This is a matter of concern not just because of the JSA issue, but also because of a potential effect on the claimant's pension rights. But it is of much greater concern that the matter was raised with HMRC as long ago as December 2015 by the respondent's accountants, but has not been resolved. We were informed that HMRC refused to deal with the accountants because of taxpayer confidentiality (they not being his agent);

but the accuracy of records of tax and NICs remitted to an individual's account is equally a matter of legitimate concern to that individual's employer, who is entitled to know that money it has paid to HMRC has been correctly attributed. The matter should have been followed up and resolved by HMRC in December 2015. We do not have the power to direct an investigation; however it is our expectation that if the matter is again raised by the claimant, whether directly or through his solicitors or Member of Parliament, it will be resolved promptly, and the position confirmed both to the claimant and to his former employer.

Employment Judge: Mr Peter Wallington
Date of Judgment: 23 February 2017
Entered in the register: 27 February 2017
And sent to parties