EMPLOYMENT TRIBUNALS

Claimant: Mrs M Wallace

Respondents: Drs Bennekers, Dahanayake and Thullimali t/a The White House Farm Medical Centre

HELD AT: Leeds **ON:** 26, 27, 28 and 31 July 2017

BEFORE: Employment Judge Lancaster
MEMBERS: Mr P R Kent
Mr A J Senior

REPRESENTATION:

Claimant: Mr J Meichen, Counsel
Respondents: Mr B Warne, Solicitor

JUDGMENT

1. The claims of automatically unfair dismissal and of having been subjected to a detriment because of having made a protected qualifying disclosure are dismissed.
2. The claim of breach of contract (alternatively unlawful deduction from wages) succeeds.
3. The Respondent is ordered to pay to the Claimant compensation in respect of 4.5 days accrued holiday pay under the contract untaken and owing at the date of termination in the agreed sum of £396.94.
4. The successful claim concerns a matter to which the ACAS Code of Practice on dismissal relates and the Respondent is ordered to pay to the Claimant a 25% uplift on the award because of the unreasonable failure to comply with this code, namely £99.23.

REASONS

1. The unanimous decision of the tribunal was given orally immediately upon the conclusion of the case.

2. Written reasons having been requested by the Claimant. in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided taken from the transcript of the oral decision.

Burden of proof

3. This is a claim primarily in respect of alleged protected qualifying disclosures made by Mrs Wallace. She claims that as a result of making those alleged disclosures she has been subjected to detriments and also that she has been automatically unfairly dismissed.

4. The claimant did not have two years' continuous employment at the date of dismissal, which was 18th November 2016.On the claim of automatic unfair dismissal it is of course for the claimant therefore to prove that the reason, or if more than one the principal reason, was indeed the making of alleged disclosures.

5. In relation of the claim of being subjected to a detriment, provided the claimant satisfies a primary evidential burden it is, under section 48 of the Employment Rights Act 1996, for the employer to show the grounds on which it acted or failed to act in the circumstances which are alleged to constitute a detriment because of having made a disclosure. If the making of the disclosure was a material factor influencing the action of the respondent that will be sufficient.

6. There is a further claim for unlawful deduction from wages or for breach of contract, which effectively now arises solely in respect of the holiday untaken and for which pay is now said to be due on termination. The claimant must show that this sum was properly payable under a contract.

Protected disclosures

7. In relation to the primary claims under the protected disclosure whistle-blowing provisions there are in fact only two alleged protected disclosures with which we need to concern ourselves.

8. In the course of submissions Mr Meichen for the claimant sought to widen the basis over which she alleged there had been disclosures to include the claimant's assertion that Dr Dahanayake had been un contactable over lunchtime on 25th October 2016. On the pleadings it is clear however that the first alleged disclosure is not made until after about 2.30 on the afternoon of 25th October 2016 and that it was made to the Doncaster Clinical Commissioning Group ("CCG"). That is clear within the narrative of the claim, the ET1. Paragraph 23 of the ET1 asserting that a protective qualifying disclosure has been made to, amongst others, the employer can only be read in the context of the preceding narrative. It does not import a fresh

factual allegation. It had also been the claimant's case throughout this hearing that the first alleged disclosure was to the CCG. She has produced a document in the bundle, her earliest record of events, which clearly states her "first disclosure" is that phoning of the CCG. In the course of internal communications with the partners she also alleged from 31st October onwards that she believed she was being punished for having made that disclosure to the CCG. That is the matter she relies upon, and that is the only matter dealt with in her evidence. So that then is the first alleged disclosure.

9. The circumstances of that do not however need to be explored in any great detail. On the lunchtime of the 25th Dr Dahanayake was the only doctor in the surgery. She left at lunchtime. The Practice attempted to contact her. There was a dispute about how many times messages had been left for her, but she returned to the Practice. She says, and we have no reason to doubt, that she was ill. She was also clearly suffering a great deal of stress at that time. When she left at shortly after 2.00pm in the afternoon she did so giving instructions via internal email that arrangements should be made to provide cover. It was not possible to obtain a locum and therefore shortly afterwards, certainly before 3.45pm probably much earlier, the local Clinical Commissioning Group was informed so that they could make arrangements to divert any phone calls coming into the surgery to the "out of hours" service.

10. There is no good evidence as to what the claimant actually said to the CCG on that occasion. She says she would of course have told them that a doctor was out of the surgery and that necessarily follows, but at no stage in her witness statement or at any earlier stage in preparation for this case has anyone attempted to drill down and identify precisely what information she is alleged to have disclosed to the CCG.

11. Nor has it been fully articulated on what basis that could be a protected disclosure at all. The CCG is not a prescribed person under the regulations. The only basis upon this could be a protected disclosure is if they were a responsible person standing in the stead of the employer (sections 43C (1) (b) and (2) Employment Rights Act 1996). That may be the case but it has never been fully articulated. So that is the first disclosure with which we are potentially concerned.

12. On 1st November the claimant telephoned the Care Quality Commission ("CQC"). Again there is no good evidence as to what she actually said on that occasion but it appears that she informed them of the situation that had arisen on 25th. The CQC is a prescribed person. However there is no evidence whatsoever that the respondents knew that that phone call had been made. The claimant did not tell them she was going to make it; she did not tell them she had made it, and nor did the CQC tell the respondents that such contact had been made.

13. The next alleged disclosure with which we are concerned is then a disclosure made by all bar two of the staff. On 31st October there was a meeting where various concerns about the way the Practice was run were dealt with. Following that the claimant prepared a minute of the meeting. It was signed by all participants and then one of the staff, not the claimant, ensured that copies were handed to all three of the doctors on 2nd November. Again nobody has analysed in any detail the substance of that document. Although it certainly appears on the face of it they were matters which might properly be described as the disclosure of information which would

come within the provisions of the relevant section of the 1996 Act as being qualifying protected disclosures, most of the concerns minuted are not information at all but general complaints about the situation within the surgery. That document certainly was passed to the employers.

14. Those same minutes were also then emailed by the claimant to the CQC the following day, 3rd November, but once again there is no evidence whatsoever that the respondents knew that that had happened. They were not told it was going to happen. There has been a suggestion that they received a handwritten note accompanying the three separate copies of the minutes given to them on the 2nd but there is no evidence to support that. The doctors deny having received such notification and we accept their account. Nor did the claimant ever indicate, having passed the minutes on to the CQC, that she had done so.

15. The only communication that the Practice had from the CQC was on 9th November, but that was merely phrased in terms of an administrative matter. The CQC had obviously come to know of the incidents on the 25th when the doctor was absent and alternative arrangements had had to be made; in that context they informed the surgery that was a notifiable matter and requested that they comply with their obligations. The following day, having received that missive, that is 10th November, Dr Bennekers, as the senior partner on behalf of the Practice, did duly notify the CQC. But there is nothing in that communication on the 9th to indicate that a complaint had been made, let alone that it was a complaint by the claimant, let alone that it was in any particular terms which would amount to a protected qualifying disclosure.

16. The final matter is on 17th November when the claimant forwarded directly to the CQC a patient complaint sent into the surgery. That is the day before termination, and again there is no evidence whatsoever that the respondents knew that that matter had been reported to the CQC.

17. So none of the complaints to the CQC can have had any bearing on this case because they cannot have been in the contemplation of the respondents because they did not know that those reports had been made. So we are only dealing with two potential protected qualifying disclosures: the phoning of the CCG on the afternoon of 25th October and the passing on by all staff of the minutes recording their concerns and that was on 2nd November.

Automatically unfair dismissal

18. We deal firstly with the claim of unfair dismissal. The claimant has not proved to our satisfaction that the reason or the principal reason for dismissal was the making of either of those disclosures.

First alleged disclosure

19. In relation to the first we find that it was not in fact a protected disclosure because all the claimant did was to comply with her responsibility, under the existing protocols for managing the absence of a doctor, to make arrangements for diversion of calls to the Clinical Commissioning Group. She was simply doing what her job required her to do, not disclosing information which in her reasonable belief tended

to come within any of the provisions of the 1996 Act. Indeed that is supported by the claimant's own internal emails in relation to that matter when she informed all staff and the doctors that she had contacted the CCG and indicated, therefore, that all matters had been addressed, that there was nothing to worry about and that appropriate arrangements had been made.

20. Even if it were a protected disclosure there is no contemporaneous evidence to indicate that the respondents ever took issue with the claimant making that phone call on the afternoon of the 25th. There is no evidence they ever said anything to her about it, and nor is there any evidence in the internal communications which have been disclosed passing between the doctors at the material time to suggest that had any bearing whatsoever upon their decision making. There was an issue between the claimant and Dr Dahanayake about whether Dr Dahanayake had indeed received a number of missed calls prior to the report to the CCG. That was addressed in communications between them, including a very lengthy reply from the claimant couched in defensive terms. Clearly Dr Dahanayake was upset at the suggestion that she had not been contactable, but that has nothing to do with any report to the CCG to arrange for call diversion

21. The claimant, as we have already said, formed a view almost immediately that she was being punished for having phoned the CCG but there is no evidential basis for that, apart from the fact that she thought she was subjected to detrimental actions within a short time of her having done so. In the course of this hearing there are two subsequent matters that have been relied upon but neither of them substantiates the claimant's contention that this phone call was the real reason for her dismissal.

22. After the claimant had already been dismissed in December 2016 and following on from the staff meeting where concerns had been raised the doctors, in a letter drafted by their solicitor, invited the staff to an informal meeting to address those concerns. We cannot and do not draw any inference from the fact they wanted to deal with that matter informally for the assertion that that indicated that they were somehow unhappy with the claimant going to the CCG on 25th October. Similarly, when there was a meeting on 9th December to deal with the action plan to review the events of the 25th, the fact that there is no express reference in the action points to contacting the CCG does not and cannot, in our view, lead to any inference that that meant the respondents were unhappy at what the claimant had done. Indeed there is unchallenged evidence that the respondents in recruiting for a new Practice Manager, or indeed two Practice Managers, made it a condition of their interviewing that they should evidence familiarity with the appropriate protocols and be prepared to report matters in similar circumstances.

Second alleged disclosure

23. Nor is there any evidence that the claimant, having been a signatory to the complaints by staff on the 31st communicated on the 2nd, was then dismissed because she had been a party to that action.

24. This matter is properly dealt with simply by looking at the chronology. Unfortunately, there had been a breakdown in relationships between the claimant and her employers. Prior to these events one of the partners, a Dr Bandaru, had left the Practice. Although the reasons for that are not entirely clear there is certainly

evidence to suggest that tensions between that doctor and the claimant formed part of the reason why he considered he could not continue in practice. And indeed the claimant in responding to his notification of resignation indicated that she would be prepared to resign if that meant he would stay. That clearly seems to be an acknowledgement that she knew there was some tension between the two of them that ought to have been addressed.

25. More particularly, from 8th August Dr Thullimali considered that the claimant behaved inappropriately towards him, he talked in terms of discrimination amongst other matters, and indicated that he wished to therefore take advice from the LMC, that is the Local Medical Committee. That was communicated on 8th October to his fellow partners.

26. There was a meeting with Dr Eggitt of the LMC on 19th September with all the partners present, and it was to discuss the souring relationship with the Practice Manager. Although it was felt that she was a hard worker, and maybe a good manager, it appeared to all doctors that she was a bad Practice Manager due to a number of issues that were identified already by that stage. That pre-dates any alleged protected disclosure.

27. There was then further contact with the LMC, this time with their legal adviser Dr Gibbons. That was on 28th September. At that stage some action against the claimant was clearly being contemplated. In anticipation of that Dr Gibbons required sight of the claimant's contract of employment and job description so that he could advise properly. He also gave advice that a proper line management structure should be put in place, there had been none previously. Dr Thullimali was then assigned to line manage the claimant but appraisals were to be conducted by all three partners. Those decisions were taken at a meeting convened by the partners shortly after their meeting Dr Gibbons, that was on 4th October. That meeting is minuted. That document records a number of concerns that the respondents had with the claimant and sets out the new structure for appraising her. There was communication with Dr Thullimalu and Dr Gibbons some time before 11th October again dealing with those procedural matters, how to progress the management of the concerns the partners had about the claimant. This is all part and parcel of the ongoing discussions with the LMC and the meeting between the partners themselves on 4th October. The documented minutes, were not however communicated to the claimant herself until 27th October. We are satisfied that there was simply a delay in ensuring that all partners agreed with its contents, that the matters had indeed been discussed on the 4th in response to the advice given from the LMC, and it had nothing whatsoever to do with the fact that the claimant two days before receiving that document had had to call in the CCG on 25th October.

28. Over the days immediately following the events on 25th October we have seen an exchange of internal communications between Dr Thullimali and Dr Dahamayake, Dr Bennekers being away at that point. As we have said, none of that internal communication makes any reference to the events of 25th October. What it does concern is an issue which had also been identified at the meeting on 4 October, concerns about the authorisation for the claimant's payment of overtime, the amount of time in lieu she was claiming and arrangements for her annual leave. Clearly in the course of the communications between the two of them Dr Thullimali formed the view that the claimant “needed to go from this Practice” and that the partners should

work upon it. On the documentation that decision by Dr Thullimali is clearly predicated upon his perception of the way the claimant was dealing with financial matters and nothing to do with any disclosure: it, of course, predates the disclosure on 2nd November.

29. From that point he then escalated matters with the LMC so that on 31st October he contacted again Dr Gibbons saying, "Things have cropped up since we last spoke". That previous contact was some 20 days earlier, but we accept Dr Thullimali's evidence that what had cropped up in the meantime was his realisation that the claimant had been paid a substantial amount of overtime without prior notification of the sum she was going to put through the payroll. Following that a further meeting was arranged at short notice with Dr Gibbons so that he was spoken to again over the telephone by Dr Thullimali on 3rd November. In anticipation of that meeting and again as discussed in the internal emails between Dr Dahanayake and Dr Thullimali, the request to obtain a copy of the contract of employment with a view to setting the parameters for future actions was then communicated to the claimant on 2nd November. On 29th October the claimant had already been expressly informed in an internal email that Dr Thullimali considered that in light of what he thought was the unauthorised payment of monies to herself the matter should be escalated again to the LMC and/or to Peninsula, the respondent's advisers. Matters were certainly coming to a head, but they were coming to a head - on the documentation- only because of the concerns, particularly in the mind of Dr Thulllimali, about the unauthorised payments. They were nothing to do with the events of 25th October whatever the claimant in her own mind may have thought.

30. From there, matters progressed rapidly . We pause to observe that the convening of the staff meeting on 31st October, if it was indeed called by the claimant, may therefore potentially have been a reaction to the notification on 29th October that the respondents were considering taking action against her. But that is not directly material to our further considerations. Matters were already in step by the time the respondents were informed that meeting had taken place, which was on 2nd November. That was the day before the pre-arranged meeting with Dr Gibbons and Dr Thullimali. So Dr Thullimali added to the agenda for that telephone discussion his concern that that meeting had been called, as he saw it, by the claimant. However his concerns were not about the substance of any complaints about the way the Practice was run but only about the disclosure of what he thought was confidential information which can only have come from the claimant, passed on to the rest of the staff. His agenda item for discussion with Dr Gibbons was expressly headed "breach of confidentiality" and it was about the fact that the staff had apparently discussed the fact that there was no proper partnership agreement in place and were also given indications as to the inability of the partners to draw what they thought was a proper remuneration from the business. Those are the only matters identified by Dr Thullimali in the agenda with Dr Gibbons that related to that meeting.

31. Matters then continued to progress very quickly. There was further communication with Dr Gibbons about possible future action, but in any event the respondents then determined they would in fact take legal advice and they did that by seeing their solicitor, Mr Warne, on the afternoon of 9th November. Incidentally the doctors had already left Doncaster for Sheffield before the communication from the CQC was received and it cannot therefore have had any bearing on the consultation. Following that advice a provisional decision was taken that the claimant would be

dismissed, although in reality it seems clear that Dr Thullimali, who on the internal documentation was clearly taking the lead in these matters, had already effectively come to that decision at least by 27th October.

32. There was then some delay in finalising the matter. As at 27th October Dr Thullimali, having determined the claimant had to go from the Practice, had said to Dr Dahanayake that he would then set his mind to identifying what the reasons to justify the decision would be. That is a "back-to-front" process but it does not mean that the real reason was, impermissibly, that the claimant had made a protected disclosure: again the expressed intention of Dr Thullimali to formulate reasons for dismissal predates the a making of any protected disclosure on 2nd November. There was obviously further discussion as to how the matter would be phrased, and ultimately a letter was drafted by the solicitor which was the termination letter handed on 18th November. Upon legal advice, given the lack of qualifying service, a decision was evidently taken that the claimant could and should be dismissed without going through any disciplinary process. Although earlier discussion with the LMC had contemplated that a procedure would be followed there is no evidence from which we could infer that that change in approach was because of the making of any disclosure. It was simply that the respondents' resolve to terminate the employment had crystallised. Indeed The respondents have waived any privilege and given evidence that they were expressly advised to consider if there was any potentially automatically und fair reason for dismissal. That they nonetheless went ahead with dismissal in this fashion is some corroboration for the finding that the alleged disclosures did not in fact impact on their decision making: they did not apparently consider that they were subjecting themselves to any risk of unfair dismissal proceedings.

33. We are satisfied that the claimant has not established that the principal reason for her dismissal had anything to do with the making of any disclosures. It was because of the growing breakdown in relationships with the partners and particularly culminating in Dr Thullimali's perception that there was some financial irregularity. In respect of her self-authorising of large overtime payments. The respondents do not need a good reason provided it is a reason unconnected with the making of any disclosures, and that is the situation here.

34. Further support for that contention is found in the events shortly before the termination, where certainly Dr Dahanayake was concerned as to the effect of dismissal upon the claimant in her personal circumstances. To put it colloquially she may be thought to have been having "cold feet". There is then frantic communication between her and her other partners and ultimately she agreed that they had come to a decision that the situation could not be allowed to persist; the claimant would have to go. That, too, is indicative of the fact that Dr Dahanayake was not motivated by any ill-will arising from concerns relating to any disclosures; she was following the lead, particularly of Dr Thullimali, which was principally in relation to the financial issues.

Detriments

35. Similarly, in relation to the alleged detriments, we are satisfied that the making of any disclosure was not a material factor..

36. The respondents have shown that the appointment of Dr Thullimali as her line manager and the decision to have an appraisal by all three doctors was nothing to do with the report to CCG on 25th October, even it had been the making of a disclosure . It followed their ongoing discussions with the LMC as to how properly to manage the position.

37. There is evidence from the claimant that she believed that the doctors were avoiding her after 27th, but again we are satisfied that if there was any such avoidance the reason was not because she had made any disclosures but because this was when matters were coming to a head regarding the breakdown of the relationship. The request, communicated on 27th October, that the claimant submit any request for overtime, leave or time in lieu to approve at a partners' meeting again is not because she had made disclosures but because the respondents were seeking to regularise an inadequately documented position.

38. It is pleaded that the holding of the meeting on 4th October without the claimant or a minute taker is a detriment. It is no detriment to the claimant that the doctors hold a private meeting, but in any event this complaint is a nonsense because it pre-dates the disclosure on 25th October.

39. Informing the claimant that external assistance had been sought to resolve matters without particularising what those matters were is not properly a detriment at all. This relates to the request for a copy of her contract of employment, but again the reason for requesting that is because the LMC had advised that that be obtained before taking further action in respect of matters. That also pre-dated the disclosure on 2nd November.

40. It is right that the request for the claimant's password and key words on 10th November was a precursor to her dismissal but that had been determined at the meeting with the solicitor a day earlier and had nothing to do with the making of disclosures. Although there was a degree of disingenuousness on the part of the doctors in not disclosing fully what they intended, that does not mean that it was a detriment because of the making of the disclosures, most particularly the disclosure of the minutes. The working and personal relationship between the claimant and the respondents had evidently broken down by this stage, irrespective of any alleged disclosure, and Dr Bennekers was reduced to tears after this altercation over the passwords with the claimant and Ms Samways.

41. So these claims in relation to protected disclosures are dismissed in their entirety.

Fairness of the dismissal process

42. However, we make this observation. The purported reasons for dismissal in the letter of 18th November are in relation to conduct. Had this been a conduct dismissal where the claimant had two years' continuous employment we are unanimously agreed that those reasons are wholly inadequate and they would not have borne scrutiny in this Tribunal. In particular the allegation that the claimant had taken unauthorised payments would not have been substantiated. The claimant when she first started work was not entitled to overtime. That situation was changed on 22nd April 2016. That was in anticipation of the claimant being required to carry

out substantial additional work in respect of a CQC inspection that was to take place. Although there is an internal communication from Dr Dahanayake of 25th April which indicates that matters in relation to the claimant's overtime should go to partners' meetings, no proper or structured procedure was put in place as to how that should happen. So it is wholly unclear whether the partners anticipated the claimant would go to a full meeting of all of them before actually undertaking any overtime, or whether she should simply have the matter countersigned at a partners' meeting before putting it through payroll, or practically how the matter should be dealt with at all. In the event the claimant did submit a claim for a substantial amount of overtime, just short of £2,000. It is not necessary for us to determine whether or not that was indeed discussed orally with Dr Thullimali and Dr Bennekers prior to it going through payroll. There is no dispute that the claimant had put in substantial hours. There is a potential issue as to whether she should have claimed double time for Bank Holidays as she did, but again there was no express agreement as to how the overtime would be paid or at what rates. We accept that the claimant assumed that ordinary practice would entitle her to double pay for Bank Holidays. That may or may not have been the case but the doctors failed to put any proper procedure to regulate what they intended to happen.

43. The claimant then continued to make claims. There were no finance meetings held over the summer of 2016 so these matters were not addressed in that forum. We assume the doctors would have had access to the accounts and seen what the claimant was putting through. But it certainly became an issue for Dr Thullimali who considered that the matters should be approved by a partners' meeting and required the claimant to "bring it to the table". He was also concerned that this may be impacting on the financial strength of the Practice and it is apparent from the documentation that he was somewhat agitated by the fact that he was not himself able to draw as much as he would like from that Practice, and thought the claimant's actions may be impinging upon his own earning capacity.

44. The matters only came to light as at the end of October when a new claim was put in. It is accepted at that stage the claimant had not given any prior notification by email or otherwise as to the significant sum she was going to claim for that month, but absence any proper procedures yet having been put in place by the respondents it cannot be said that she was acting improperly. Any suggestion that this was an unauthorised payment with a hint of dishonesty is wholly unfounded and the claimant was entitled to feel aggrieved at any such implication. This observation is nonetheless immaterial to the principal claims.

45. Also, of course, there was no proper procedure in relation to any conduct dismissal. None whatsoever.

46. It may be that at around this time, or if not then shortly thereafter, the respondents would have been able to make out a fair dismissal on the grounds that the relationship of trust and confidence had broken down between them and their Practice Manager. There are expressions of that on the part of all doctors that the claimant had burnt too many bridges and that they could not co-exist, and indeed subsequently they told the staff in December that it possibly was coming a situation where it was either her or the doctors, and that if she had not gone the Practice may have folded and that would have had implications for all the staff. Clearly this was a very unhappy ship being steered at this stage.

Holiday pay

47. That leaves the final claim. Under the written contract the claimant was not entitled to carry forward holiday from one leave year to the next. That is set out in the employee handbook: although we have not seen the relevant provision it is not disputed either that that is what is t says or that is incorporated into her contract. The holiday year is from 1st April to the end of March the following year. On 4th March 2016 the claimant had not been able to take up her full holiday allowance which contractually was 30 days plus Bank Holidays. She notified the partners of that in an internal email. She indicated that she had had to cancel two days that she had booked and that she still had a further three days. Although the email is somewhat ambiguous that is how we interpret it. As at the end of that financial year on 31st March, the leave year, she still had five days outstanding. She indicated quite clearly on 4th March that she intended to carry forward her unused holiday allowance. There is unchallenged evidence coming from the claimant that Dr Bandaru similarly carried forward holiday at that point.

48. No-one took exception to that email of 4th March. Had there been an issue there would still have been time for the claimant to take a further five days' holiday before the end of the leave year as she was entitled to. Alternatively the respondents might have made arrangements to pay her in lieu. That would have been permissible as she had already exceeded her statutory working time allowance. That did not happen.

49. From then on, throughout the next holiday year, the claimant submitted her requests on a pro forma to which she had added that she was claiming an additional five days carried forward. At no point on any occasion when that leave request was circulated was any exception taken. The matter first came to light as at the meeting on 4th October where it is minuted that it usually would not be allowed to carry forward leave time, but the claimant's leave forms indicated that she had done so. Even at that stage, and even when passing on those minutes on the 27th, the respondents did not say that they were disputing her entitlement to have carried forward that time, however unusual. In those circumstances we are quite satisfied that we can imply by conduct on the part of the respondents a consensual variation, in this instance, to the ordinary terms that would not have allowed to carry forward any holidays due. So she was able to carry forward five days into the next holiday year. We are quite satisfied that the appropriate implication is to say that therefore the first five days that she took within that year are attributable to the preceding year.

50. Up to the date of termination the claimant had taken 18 days' holiday. The first five of those are attributable to the previous year, and that means she had taken 13 days in the current holiday year. Applying the terms of the contract, on the seven completed months up to termination the claimant had accrued 2½ days for each month, that is 17½ days. She had only taken 13 of them. There are a further 4½ days to which she was entitled. That 4½ days entitlement is not accounted for in the final payments to the claimant, and it is payable to her whether expressed as a breach of contract claim or as an unlawful deduction from wages claim does not particularly matter.

51. There is one further matter that arises from this. The claim for accrued holiday pay on termination concerns the claimant's summary dismissal with payment in lieu

of notice. Therefore applying the wording of section 207A of the 1992 Trade Union and Labour Relations (Consolidation) Act, that claim, be it for unlawful deduction of wages or breach of contract, concerns a matter, namely the dismissal, the termination which gives rise to that entitlement to payment for accrued holiday, to which a relevant Code of Practice applies. That is the ACAS Code of Practice on Dismissal. We are satisfied that there has been a wholly unreasonable failure to comply with the terms of that Code, and that the amounts awarded under this head of claim should therefore be increased by the maximum 25%. Under her own contract of employment the claimant was entitled to a disciplinary procedure which she was denied. That reinforces our view that the concurrent breach of the ACAS Code requires the maximum uplift. As we have said, the reasons put in the letter were essentially matters of conduct that would not bear close scrutiny. Those charges were never properly articulated. The claimant was given no opportunity to defend them, she was not provided with any written evidence, she was not called to a meeting and she was not given a right of appeal. So she is entitle to recover for 4½ days' accrued holiday uplifted by 25%.

52. That then is the only matter on which her claim succeeds. The tribunal fees payable in respect of that claim alone would have been £390.00. The judgment of the tribunal announced orally was that "the Respondent is ordered to pay the Claimant's costs of £390 in partial reimbursement of the Tribunal fees incurred by her". As however the effect of all fees having been declared unlawful is also to render void any provision as to costs in respect of such fee this would not be a valid judgment. It is therefore omitted form the written decision.

Employment Judge Lancaster

Date 3rd August 2107