EMPLOYMENT TRIBUNALS

Claimant: Ramachandran Saravanan

Respondent: Acculegal Solicitors (a firm)

Heard at: Watford Employment Tribunal **On:** 19 – 21 March 2018

Before: Employment Judge George
Members: Mrs A E Brown and Ms H T Edwards

Appearances:
Claimant: In person
Respondent: Mr A Aamodt, Counsel

RESERVED JUDGMENT

1. The respondent is to pay to the claimant the sum of £1,369.47 in respect of annual leave accrued but not taken at the termination of the contract pursuant to reg. 13 of the Working Time Regulations 1998.

2. Save as set out in paragraph 1 of the judgment, the claim of unauthorized deduction from wages is not well founded and is dismissed.

3. The claim of detriment on grounds of protected disclosure is not well founded and is dismissed.

REASONS

Procedural history and available documentation

1. The claimant, who worked for the respondent as a solicitor, brought a claim against them on 24 July 2016 (see joint bundle of documents page 1) by which he originally claimed unauthorized deduction from wages (including in relation to holiday pay accrued but unpaid on termination of employment), unfair dismissal, automatically unfair dismissal on grounds of protected disclosure (commonly referred to as whistleblowing) and direct discrimination on grounds of religion and age. The

respondent defended the claim by a response which was entered on 24 August 2016 (see page 31) including on the basis that the claimant had never been employed by them (see page 33).

2. The claimant applied to amend his claim (see page 14) shortly before a preliminary hearing conducted by EJ Smail (see page 58) at which he ordered the trial of preliminary issues to determine the claimant's employment status. On 17 February 2017, EJ McNeill QC determined that the claimant had not been an employee of the respondent within the meaning of s.230(1)(a) of the Employment Rights Act 1996 (hereafter the ERA) and dismissed his claim for unfair dismissal. However, she concluded that the claimant was both a worker within the meaning of s.230(1)(b) ERA and reg.2 of the Working Time Regulations 1998 (hereafter the WTR) (commonly referred to as being a "limb (b) worker" after the relevant provision in the ERA). She also held that he had been an employee within the extended definition of that term in s.83(2)(a) and (4) of the Equality Act 2010. Consequently, the claims for unauthorized deduction from wages, holiday pay, whistleblowing detriment and discrimination were permitted to proceed. At that preliminary hearing the learned employment judge heard oral evidence and made findings of fact which, since unappealed, are binding upon the parties. Where relevant, those findings are set out further below.

3. The claimant withdrew his claims of age and religious discrimination and they were dismissed at a preliminary hearing conducted by EJ Manley. She listed the claim for hearing and defined the issues which are set out in paragraphs 14 – 17 below.

4. At this hearing we have had the benefit of oral evidence from both the claimant and Mr Sunil Bajoori, who was called by the respondent. They each relied upon the witness statements which had been introduced in evidence before EJ McNeill QC (the claimant's dated 12 December 2016 is at page 139; Sunil Bajoori's dated 25 November 2016 is at page 93 and they are hereafter referred to as the PH statements). Mr Bajoori is a partner in the respondent firm and was previously operating under the same name as a sole trader.

5. We were also given a witness statement from Mr Bajoori for the final hearing dated 2 February 2018 as well as two further statements from the claimant. There was one dated 14 September 2017 and a further statement dated 20 January 2018 which included the claimant's "detriments and qualified disclosures" list and a schedule of loss. EJ Manley had ordered the claimant to provide details of the detriments which he alleged had resulted from the particular alleged disclosures (see the particulars of disclosures dated 11 October 2016 at page 46). The list of detriments and qualified disclosures was provided by the claimant as a result. The statements provided for the final hearing will be referred to in these reasons as SB's FH statement and C's FH statement 1 & 2.

6. The claimant told us that his FH statement 2 was sent to the respondent in accordance with the directions of Employment Judge Manley. The respondent told us that they did not receive it in accordance with the directions but only the night before the hearing. Mr Aamodt explained that he himself had only seen it the morning of the hearing. Notwithstanding that, the respondent said that it did not put them to any disadvantage and they did not object to the claimant relying upon it.

7. We were also provided with a joint bundle of documents which originally ran to 666 pages. Page numbers in these reasons refer to that bundle. Additional documents were added during the course of the hearing. In particular, the claimant put before the tribunal (1) a letter from the Employment Appeal Tribunal addressed to him in relation to a Notice of Appeal that he had raised and dated 12 January 2018 and (2) a decision

of the Court of Appeal (Edwin Jerome Lewis v Ramachandran Narayanasamy (T/A Dotcom solicitors) [2017] EWCA Civ 229). Mr Lewis was, at the relevant time, another solicitor working for the respondent and the CA judgment was put before the tribunal as evidence that certain accusations had been made against Mr Lewis within those proceedings. The claimant alleges that one of his protected disclosures concerned the wisdom of the respondent being associated with Mr Lewis in those circumstances. We have labelled those C2 and C3 respectively.

8. The claimant also sought to rely upon other late disclosed documentation, as set out below in the account of the various preliminary issues which were determined during the trial. On the final day of the hearing Mr Aamodt handed in some written closing submissions and did not make any oral submissions. The claimant gave oral submissions. It was explained to him that it was entirely at the parties' election whether they wished to hand in written submissions and this did not give either party an unfair advantage.

9. We have taken into account all of the documents to which we were taken and which was admitted into evidence. It should not be assumed from the fact that a particular document or piece of evidence is not referred to in these reasons that it was not taken into account. These reasons set out the principal reasons for our decision and those findings on the evidence which it was necessary to make in order to make a decision on the issues which the parties asked us to decide.

10. The hearing was timetabled in order that proportionate use of the available time should be made and in order to determine several interim applications made by the claimant yet still complete the evidence and submissions within the original 3-day sitting. At the outset of the hearing, the claimant advised us that the stress of conducting the litigation meant that he had been suffering from mental distress and depression. He was happy with the suggestion that the usual regular breaks during the tribunal day would be sufficient accommodation to make to help him manage this.

11. The employment judge initially informed Mr Aamodt and the claimant that they were each to have two hours in order to cross-examine the claimant and Mr Bajoori respectively. However, she frequently had to rephrase questions when both witnesses were giving evidence in order to make sure that the claimant understood and to make sure that Mr Bajoori answered the question that was asked. Consequently, the tribunal agreed to an application by Mr Aamodt for additional time to cross-examine the claimant and in the end, he cross-examined the claimant for 2¾ hours.

12. The claimant was therefore offered the same amount of time to cross-examine Mr Bajoori. At the end of the second day of the hearing the claimant indicated that he did not feel able to conclude his cross examination that day. It was, by then, about 5.20pm, the tribunal having sat late in order to try to conclude evidence that day. The claimant still had further questions to ask, even though he had by that time exceeded the time limit that had been imposed upon him. The tribunal agreed that he should have an additional 30 minutes to cross-examine in the morning and therefore the evidence was not concluded until the third day. The tribunal sat a little late on the morning of the 21 March because of an unavoidable prior commitment of one of the tribunal members. The claimant then cross-examined Mr Bajoori from 11.05am until 11.38am which meant that he had at least 30 minutes longer to cross examine Mr Bajoori than Mr Aamodt had had to cross examine him. We had a short break between reading Mr Aamodt's submissions and the claimant's submissions. The claimant was told that he needed to conclude his submissions within 40 minutes, in fact his submissions ran for 51 minutes.

13. It is also right to record that the Regional Employment Judge sat in the public gallery for part of the hearing on Day 2. This was part of routine practise in order to observe the tribunal session in the interests of maintaining judicial standards. He took no part in the decision making process.

The issues

14. The issues were recorded by EJ Manley as being as follows (see page 90 with some minor editing of expression):

    1) *Whether there has been an unauthorized deduction of wages for:-*
        a. *The sum of £60,773.24 being the difference between what the claimant says he should have been paid at the rate of £40,000 per annum and what he received under the agreement the respondent says was in place;*
        b. *The sum of £24,000 as overtime*
    2) *Whether the claimant is entitled to holiday pay under the Working Time Regulations and, if so, how much? (The parties will seek to agree this matter as both have made calculations as to what might be due);*
    3) *Did the claimant disclose information which, in his reasonable belief, tended to show one of the categories set out in s.43B(1) ERA? The claimant relies on the following alleged disclosures:*
        a. *An email to Mr Bajoori of 19 April 2016 concerning heating and washing facilities;*
        b. *Raising oral concerns about the security of data transfer to Mr Bajoori in December 2015 or January 2016;*
        c. *Raising oral concerns about cases brought from Srinivasan Solicitors to Mr Bajoori at some point in 2015;*
        d. *Raising oral concerns about Mr Lewis' litigation with previous firm to Mr Bajoori at some point in 2015;*
    4) *If so, did the claimant reasonably believe the disclosure was in the public interest?*
    5) *If so, was the claimant subjected to a detriment on the ground he had made the disclosure.*

15. The four disclosures set out in that List of Issues had come from the 11 October 2016 particulars (page 46) in which the claimant had originally relied upon 6 alleged disclosures but at the 26 September 2017 hearing he refined his allegations to the four recorded in that order which were originally numbers 1 to 3 and 6 in the 11 October 2016 list.

16. The details of detriments and qualified disclosures was first disclosed within these proceedings on 10 October 2017. In it the claimant set out that he alleges that he suffered the following detriments from the respondent:

    16.1. A failure to renew his contract or to assign his certificate of sponsorship in about April or May 2016 (this is said to have been motivated by the alleged disclosure at 3)a. above);

    16.2. A failure to pay him sums due under the contract (likewise said to have been motivated by the alleged disclosure 3)a.;

    16.3. Bullying behaviour by Mr E Lewis (this is said to have been motivated by the alleged disclosures at 3)b. and 3)c. above);

    16.4. 8 detriments are listed as having been motivated by the claimant expressing concern about the risk to the respondent about employing Mr Lewis.

17. Although the respondent originally disputed that the claimant is owed holiday pay, they accept that the consequence of the decision of EJ McNeill QC is that they owe the claimant something so the remaining issue for the Employment Tribunal is quantification.

Preliminary issues

18. During the course of the hearing between 19 and 21 March 2018 the tribunal decided a number of interim applications by the claimant. In each case, the decision was made and oral reasons were given at the time. By email dated 10 May 2018, the claimant asked that this reserved judgment should include the reasons for the dismissal of his application for disclosure and adjournments.

19. The list of issues having been definitively recorded on 26 September 2017, on day 1 of the hearing the claimant sought to argue that his claim included the allegation that the contract under which he was engaged was void for illegality. When we decided that, on a true and fair reading, that was not an issue raised on the face of the particulars of claim he applied to amend the claim to include it. These arguments were raised in response to the respondent's defence: he argued that if the respondent is right about the terms of the agreement between them then it would be void for illegality.

20. The principles applicable to the exercise of this power were considered in Selkent Bus Co Ltd v Moore [1996] IRLR 661 EAT when it was held that the employment tribunal should consider all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Relevant factors for us to consider include the nature of the amendment, the timing and manner of the application, the explanation for any delay and the applicability of any time limits.

21. The claimant first mentioned that he wished to raise a question of whether the respondent's version of the agreement was void for illegality in a letter to the tribunal dated 11 October 2016 (page 45). In that letter he was requesting case management directions about "whether the contract is a valid one as it contracting out the immigration rules and law". The case had been before Employment Judge Smail on 28 September and neither in the claim form nor in the list of issues as set out by Judge Smail was legality of the contract expressed to be an issue to be decided in the case. The case was then listed for a preliminary hearing to determine the question of employment status. That email of 11 October asking for case management direction in relation to the validity of the contract was sent to the tribunal before the preliminary hearing on 17 February before Employment Judge McNeil.

22. It is regrettable that that piece of correspondence does not seem to have been picked up, but then equally the claimant does not appear to have articulated at the 17 February preliminary hearing (or indeed subsequent hearings) that this was an argument that he wished to run. The issues, as defined by the preliminary hearing as recently as 26 September 2017 by Employment Judge Manley, did not include that point.

23. What the claimant seeks to argue is that if the respondents are correct about the terms on which he was engaged then that is contrary to immigration law and as a result the contract would be void. However, he seems to think that a declaration that the contract was void would only have the consequence that they could not rely on the written documentation as evidence. That understanding is misguided. The question of

whether the contract is void would be completely separate from whether the respondent could rely on particular documentation as evidence of the agreement between the parties. The argument that had that been the arrangement then it would have been void might be put to a witness as a reason why their account of what was agreed should not be accepted because two solicitors would not have agreed something which was contrary to immigration law. However, for the claimant to seek a finding that the contract was void for illegality would perhaps have more detrimental consequences for the claimant than he realises since he bases his money claims upon the same contract.

24. The claimant must, in his application for reconsideration of EJ McNeill QC's judgment, have mentioned the question of legality to judge by the terms of the penultimate paragraph on page 84, within her rejection of the application. Therefore, it is certainly true to say that this point has not been raised only for the first time today, but this is first time that formal application has been made to amend the issues that we have to decide despite as I say those issues having been case managed on a number of previous occasions.

25. The claimant is a solicitor and, even though his practice is not in employment law, it is therefore reasonable to assume that he would have appreciated that if the list of issues which was "definitively recorded" (page 90) by EJ Manley did not include the question of whether the contract was void for illegality then he needed to make an application for an amendment. If there were doubt about that presumption, he has provided a copy of a letter to him from the Employment Appeal Tribunal which is dated 12 January 2018. In page 4 of that letter they referred to the question about the validity of the contractual terms and said that either validity of the contract is an issue to be determined in the full merits hearing (and we have decided that they are not) or they are outside the scope of the existing claim (in which case the appellant would need to apply to amend). Despite that prompting, the claimant did not raise a potential amendment as an issue until Day 1 of the hearing.

26. That is why our view is that, despite the claimant having raised a question about the validity of the contract informally, the actual application has been made late in the day. There is no satisfactory explanation for that. There is no time limit consideration in relation to this application.

27. The balance of hardship is important to our decision on this application to amend. It is not the claimant's main case, it is a response to the respondent's case. If the respondent should succeed in their arguments as to what the terms and conditions actually were as to payment, the claimant alleges that he is still owed money. On that scenario he would need the contract to be valid to enforce it. A finding that the contract was void for illegality would not affect whether the respondent's evidence was admissible. The claimant would not, in our view, obtain the advantage he thinks he would obtain from a finding of illegality and might be disadvantaged by it. Therefore we do not consider that the claimant suffers any prejudice by a refusal to allow him to amend.

28. The respondent would be put to some inconvenience and prejudice were the amendment allowed because they are not in a position to respond to the argument. There is perhaps some complexity in the interrelation between immigration law and employment law and this is already a case that has been timetabled without taking into account the need to deal with such matters.

29. Our decision was to refuse the application to amend because the application was made late and there was more prejudice to the respondent and to the smooth running of the trial if the amendment were allowed than if it were refused.

30. When we announced our decision, the claimant applied for us to reconsider our refusal and, if we refused that, for an adjournment of the hearing so that he could appeal against our decision to refuse his application for an amendment. We explained to the claimant that, notwithstanding this ruling, he would be able to cross-examine Mr Bajoori and suggest to him that it was improbable that, as a matter of fact, his case on what had been agreed between the parties was correct because it would put them in breach of immigration law. That was a permissible line of cross-examination and we could take into account Mr Bajoori's responses to it as part of the relevant evidence from which we would draw conclusions about the terms of the agreement between them. However, we also made clear that, to the extent that the terms of the agreement had already been the subject of a ruling by EJ McNeill QC following cross-examination and argument at a hearing where the nature of the agreement had been in issue then we would not go behind those findings. Following that explanation, the claimant withdrew his application for a reconsideration.

31. On the morning of Day 2, 20 March 2018, the claimant applied for leave to rely on late disclosed documents. We had broken at the end of Day 1 in the middle of the cross-examination of the claimant. That morning, the claimant disclosed to the respondent and to the tribunal a sheaf of documents which he wished to rely upon as evidence of activity on his part on behalf of the firm. His application to rely upon them was dealt with after completion of cross-examination by the respondent but before tribunal questions in order to allow for further evidence by the claimant were his application successful.

32. To the best of his recollection, the claimant thought that the documents showed that there were four clients for whom he had carried out work on behalf of the respondent during the period he worked for them which have not been included by Mr Bajoori in his witness statement. The claimant argued that the documents were relevant to the issue of whether, in the event that we conclude that the respondent's case about the method of calculating payment due to him is correct, what they say was actually due under that agreement is the correct figure or whether, as he asserts, further money is due by way of commission. In addition, the claimant argued that the documents were relevant to the allegation that he had suddenly started using his personal email account for official communications whereas he says that these documents indicate that he was using his personal account for official communications from as far back as 2014.

33. His explanation for the previous non-disclosure of the documents was that although he searched for relevant documentation in his email inbox in order to make disclosure in accordance with the tribunal's directions, he had not found these documents because of the key words that he used to search. He said that he had been mentally distressed by the experience of the litigation and he had been struggling financially which meant that he had other priorities and was not able to prepare this case as well as he would have liked. However, during his evidence on Day 1 the employment judge had asked him whether he accepted that the figures put forward by the respondent for commission due were accurate, assuming for the purposes of the question that their case on the method of calculation of remuneration was found to be correct. He had then searched through his email address book looking for individual client names having refreshed his memory and that is how he found these documents. He claimed that it would take ten minutes for the respondent to find any documentation that they have concerning these clients and to answer the questions that arise out of these documents.

34. Mr Aamodt for the respondent resisted the application saying that real prejudice would be caused to them if the documents were admitted in evidence. His instructions were that the respondent had searched their entire email inbox and had not found any other clients that were connected with the claimant. On the basis of that search, from as long ago as February 2017, when the statements were prepared for the preliminary hearing before Employment Judge O'Neill QC, the respondent had set out in detail in table format the payments which they said were due to the claimant. Mr Aamodt pointed out that were the respondent to be required to give evidence about the documents that had been disclosed this morning, they would have to hunt through paper copies of files to see what billable work, if any, was done for any clients whose names appear on the papers and then compare the results with Mr Bajoori's existing evidence before knowing whether they have or have not already accounted for any commission due to the claimant.

35. In our view, the explanation put forward by the claimant for the previous non-disclosure of these documents was inadequate. Since before the termination of the agreement the respondent had regularly been asking him for details of the work done in order to calculate a terminal payment which they thought would be due. Details of the payments that they made and said were due were set out in tabular form in Mr Bajoori's witness statement of February 2017, over a year before the full merits hearing before us. The question of whether those figures were accepted or not was clearly going to be an issue in the case, albeit one which was subsidiary to that of the terms of the agreement between the parties.

36. The claimant is a solicitor and he would have been well aware of his disclosure obligations. We accepted that he may have been under pressure in the intervening 12 months as he claims. We were mindful of the fact that he also explained on Day 1 that he needed breaks in order to present his case because he was suffering from the effects of pressure and from depression (although there was no particular medical evidence before us of the nature and severity of that condition). Given that the information he provided to us suggested that he was still suffering from that condition as at the date of trial, it could not have been that which prevented him from finding the documentation sooner because he found it overnight between Day 1 and Day 2. It seemed to us that the real reason why the documents had not previously been disclosed was that the claimant did not use the correct words when he was looking for relevant documents in order to perform the obligations that were put upon him by the tribunal. The real reason that we were in the situation of deciding the application to rely upon late disclosed documents was that the claimant did not address his mind to how to carry out a thorough search.

37. On the face of it the documents were relevant if they were what the claimant described them to be. A number of the emails appeared to originate from the claimant using the email address ramcorporates@gmail.com and suggested, on their face, that attachments were forwarded to that email address by Mr Bajoori and Mr Tiramula, a partner in the respondent firm who has been unavailable to attend to give evidence at the hearing because he is out of the country. However, the emails raised the following factual questions. First, were any of the individuals named in the emails in fact clients of the firm? One would expect that to be evidenced by more than a few emails; files should have been opened, for example. Secondly, were they contacts of the claimant because, on the respondent's case, that would affect whether the claimant was due to be remunerated at 40%, 30% or 10% of the work billed? Thirdly, was any work carried out for these individuals by the claimant on behalf of the firm, has it been billed for, has it been paid and are these individuals already on the list that it relied on by Mr Bajoori?

38. There was potential for prejudice to the claimant if the documents showed that work had been done by him for the respondent that has not previously been paid for and they were not admitted. However, on the other hand the respondent, through no fault of its own, was potentially faced with details of further alleged clients and, in order to answer the factual questions set out in paragraph 37 above, the respondent would need to look for yet further documentation and investigate the hard copy files. The claimant argued that this could be done in ten minutes. We did not agree with that time estimate. We considered that there was a real risk that if we agreed to the claimant's application the respondent would have to make an application for an adjournment, certainly for the rest of Day 2 if not for the rest of the 19 to 21 March 2018 hearing session in order for them to be able to carry out the work that they needed to do to respond. There would potentially be cost consequences of that.

39. Furthermore, we were of the view that we had not been given sufficient reason why these documents were likely to affect our decision, such that the application should be allowed. By that we mean that the claimant had not done any analysis of the documents that he had produced to show how it would affect the sums that he said should be paid to him. The documents themselves consisted of emails evidencing contact with or otherwise concerning a small number of clients and a scant handful of documents concerning immigration appeals. There were no invoices from the claimant to the respondent or from the respondent to the clients from which it could be inferred that commission was payable by the respondent to the claimant if we were to conclude that that was the basis of remuneration agreed between them. The claimant had only said in very general terms how the documents affected his claim and for the documents to be admitted would necessitate further evidence in chief about precisely what had been done for the clients concerned which, needless to say, was not set out previously in his witness statement. It would also require cross-examination and, potentially, further disclosure by the respondent from files concerning the clients in questions.

40. We took into account the overriding objective which includes dealing with cases in a way that is proportionate to the importance of them and weighed up the potential prejudice that there was on both sides in relation to this application. We decided to refuse the claimant's application to rely upon the late disclosed documentation. We were of the view that there was a real risk that, were we to agree to it that would result in an adjournment of the remainder of the full merits hearing. It was already a case of some age and a further delay in getting to a determination of the issues was not in the interests of justice. It was for those reasons we decided to reject the application.

41. Following our decision not to admit the documents into the evidence, the claimant applied for an adjournment of the hearing in order to appeal against that decision to the Employment Appeal Tribunal. We explained to the claimant that it was entirely his legitimate right to appeal against our preliminary decision not to admit the evidence and it was not necessary for him to seek an adjournment in order to do so. He could appeal against the interim ruling once he had received the written reasons for the decision. We decided to refuse his application for an adjournment of the case.

The Law

42. In the present case there was a preliminary hearing at which the preliminary issue of the employment status of the claimant was determined. In our view, there are certain findings made by EJ McNeill QC in the course of that preliminary hearing which it would not be proper for us to go behind.

43. There are three categories of res judicata: cause of action estoppel, the rule in *Henderson v Henderson* and issue estoppel. (*Divine-Bortey v Brent London Borough Council* [1998] ICR 886 CA)

    43.1. Cause of action estoppel is where the cause of action in the later proceedings is identical to that in earlier proceedings which were decided between the same parties. There is an absolute bar on re-litigating all points decided in the earlier proceedings.

    43.2. The rule in *Henderson v Henderson* extends cause of action estoppel to points which might have been put but which were not raised and decided in the earlier proceedings.

    43.3. Issue estoppel is where a particular issue which is a necessary ingredient of the cause of action in the later proceedings has been litigated and decided in earlier proceedings between the same parties.

44. The structure of the protection against detriment by reason of protected disclosures provides that a disclosure is protected if it is a qualifying disclosure within the meaning of s.43B of the Employment Rights Act 1996 (hereafter the ERA) and is made by the claimant in one of the circumstances provided for in s.43C to 43H ERA. In the present case, the disclosures, if made, were made to the claimant's employer and so the relevant section is s.43C. A qualifying disclosure means,

    "any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—
    (a) that a criminal offence has been committed, is being committed or is likely to be committed,
    (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
    (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
    (d) that the health or safety of any individual has been, is being or is likely to be endangered,
    (e) that the environment has been, is being or is likely to be damaged, or
    (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

45. One of the challenges for the tribunal was that in the present case it was not always clear which of the 6 routes the claimant relied upon when arguing that his disclosures were protected. Taking his case at its highest, it appeared that he was alleging that s.43B(b) and (d) were potentially engaged: breach of a legal obligation or health and safety endangerment.

46. Breach of a legal obligation in this context means more than "immoral, undesirable or in breach of guidance": Eiger Securities LLP v Korshunova [2017] I.R.L.R. 115. In that case, it was held that, in order to fall within s.43B, the tribunal should have identified the source of the legal obligation to which the claimant believed the respondent were subject and how they had failed to comply with it. The identification of the obligation did not have to be detailed or precise but it had to be more than a belief that certain actions were wrong.

47. When considering whether the worker reasonably believed that the disclosure was made in the public interest, the tribunal has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b)

whether, if so, that belief was reasonable: Chesterton Global Ltd v Nurmohammed [2017] I.R.L.R. 837 CA.

48. Statutory annual leave entitlements are set out in the Working Time Regulations 1998 (hereafter the WTR) and the effect of the relevant regulations is to provide that, in default of any other agreement between the employer and the worker, the annual leave year runs from the date of the workers' employment, the worker is entitled to 28 days' holiday each calendar year including bank holidays and leave entitlement does not carry over from one year to the next. The worker is entitled to be paid on termination of employment for any leave accrued but not taken at the time the contract ends.

49. It is accepted by the respondent that the claimant is owed holiday pay. Rights to annual leave and additional annual leave are set out in reg.13 & 13A of the Working Time Regulations 1998. Where a worker's employment is terminated during the course of his leave year then his employer shall make him a payment in lieu of that proportion of his accrued annual leave which has not been taken as at the date of termination: reg.14. In the present case, the claimant took no annual leave because it was disputed that he was entitled to do so. Whether the claimant is entitled to payment in respect of both annual and additional annual leave or only in respect of annual leave will depend upon our findings about the manner in which he was to be remunerated.

50. By reg.16 WTR the rate at which a worker is entitled to be paid is at the rate of "a week's pay" and ss.221 to 224 of the ERA apply for the purposes of that calculation.

51. S.221 ERA provides,

> "(1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.
> (2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.
> (3) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does vary with the amount of work done in the period, the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of the period of twelve weeks ending—
> (a) where the calculation date is the last day of a week, with that week, and
> (b) otherwise, with the last complete week before the calculation date.
> (4) In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount.
> (5)..."

52. We have been directed by Mr Aamodt to the case of Lock v British Gas Trading Ltd 946 CA. In that case the CA approved the first instance employment tribunal decision that it was possible to read the WTR so as to apply to an employee who was remunerated in part by way of results-based commission. The Court also concluded that such an employee would be entitled to paid annual leave under reg.13 WTR and that it should be considered that they fell within s.221(2) ERA, an employee whose remuneration does not vary with the amount of work done. This portion of statutory leave derives from the Working Time Directive (2003/88/EC) and, in order properly to implement EU rights the WTR must be read in that manner.

53. The additional annual leave under reg.13A WTR derives from solely domestic law. In domestic law it is not possible for an employee who is remunerated by way of commission to calculate their holiday pay with reference to commission, but with reference to basic salary only: Evans v The Malley Organisation Ltd [2003] IRLR 156 CA.

54. By reason of s.23(4A) ERA, an employment tribunal may not consider that portion of a complaint of unauthorized deduction from wages which relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

Findings of Fact

55. We make our findings of fact after considering all of the evidence before us, taking into account relevant documents where they exist, the accounts given by all of those concerned about the relevant factual matters from time to time and the witness evidence, both statement evidence and oral testimony. Where it is has been necessary to resolve disputes about what happened we have done so on the balance of probabilities taking into account our assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including with documentary evidence. We do not set out all of the evidence in these reasons; we set out our principle findings of fact on the evidence before us, those which it was necessary for us to make in order for us to decide the issues which the parties have asked us to decide.

56. The background to the dispute between the claimant and the respondent is that in 2011 the former, an Indian National, was in the U.K. studying for an LLM as a Tier 4 general student under which scheme he was permitted to work a certain number of hours a week. He is a practicing solicitor who had qualified in India. A change in the immigration law made it desirable that he find an employer to sponsor him under Tier 2. Ultimately, following his initial request to the respondent firm, the claimant was sponsored by them under an arrangement which EJ Mc Neill QC concluded amounted to that of a limb “b” worker and/or an employee within the extended meaning of s.83(2) EQA.

57. In order to decide the issues before us, we need to make findings about what was agreed to be paid to the claimant by way of remuneration. Was the agreement between the parties for the claimant to be paid a salary? Was he due to be paid commission? Was he entitled to be paid for overtime? The other issues to be decided concern whether or not the claimant made protected disclosures and what were the circumstances in which the agreement between them was terminated.

58. The claimant’s case was that the agreed terms included a guaranteed basic salary of £40,000 gross p.a. and that that could be inferred from the Certificate of Sponsorship (page 263). On the face of that document the dates of the contract between the claimant and the respondent are said to be 8 May 2013 to 7 May 2016; in other words, the claimant’s sponsorship by the respondent would expire on 7 May 2016. The summary of his job description in the Certificate of Sponsorship sets out various aspects of the role of a legal advisor both in the U.K. and India. There is then the following statement in relation to salary (page 265) “Gross salary including any allowances and guaranteed bonuses (in pounds sterling …): 40000.00”.

59. In order to understand his argument that for the agreement to be for him to receive anything less than £40,000.00 gross per annum would be illegal, it is necessary to set out some details of the scheme under which he was sponsored, as it appears from the

documents in the bundle. One of the then requirements for Tier 2 sponsorship was that the role should satisfy the minimum earnings requirement. There was some discussion before us about whether, had events prior to the offer of sponsorship by the respondent occurred other than then did this would have been a requirement but this, we find, was not relevant to the case before us because both parties accepted that as things turned out the minimum earnings requirement did apply to the sponsorship by the respondent of the claimant. That, as the name suggests, was a requirement that the role for which the sponsor was being engaged should provide a minimum income, presumably to ensure that the immigrant would not be dependent upon the public purse. This is why the claimant argues that, were the agreement for him to be paid anything less than £40,000 gross p.a., that would put both him and the respondent in breach of immigration law and so a basic salary must have been agreed. Following our decision on the claimant's application to amend his claim, this is an evidential point relied upon by the claimant as a reason for us to conclude that his evidence about what was agreed should be preferred.

60. The claimant exchanged emails with the Home Office in March 2014, after the start of his sponsorship by the respondent, which included an explanation by the Home Office that a Tier 2 sponsor did not need to be a PAYE employer, provided that they were following the rules which included that the Certificate of Sponsorship (hereafter CoS) must include a statement by the sponsor of an amount that the migrant would definitely be paid which must be at least the minimum set out in the relevant Code of Practice. The Home Office stated (page 288) "If the sponsor cannot guarantee a minimum payment of at least the minimum set out in Code of Practice then they will be unable to complete a CoS".

61. The respondent's case is that relevant terms of the agreement between the parties can be found in the written agreement dated 16 May 2013 (page 276) which bears the signature of the claimant and Mr Bajoori (page 281). This describes the claimant as an associate and the terms as to remuneration are found at clause 4,

"4.1 The Associate will be engaged in the Firm on self-employment basis and he shall register with HM Revenue and Customs as a self-employed and comply with all Tax regulations.

4.2. Subject to Clause 4.3 below he shall bill minimum £40,000 per annum or any other amount the Firm agrees with him time to time.

4.3. The Associate will be paid following percentage of fee from each file, upon completion of the relevant file and upon invoiced and settled by the client, after deduction of disbursements, referral fee and taxes:

4.3.1. 40% of the fee from the work/file introduced by the Associate to the Firm where the Associate responsible for conduct of whole file.

4.3.2. 30% of the fee from the work/file allocated by the Firm to the Associate where the Associate responsible for the conduct of whole file.

4.3.3. 10% of the fee from the work/file introduced by the Associate to the Firm and not responsible for conduct of file. This amount is only entitled upon completion of the file and settlement of full fee by the client;

4.3.4. Any other agreed percentage, between the Firm and the Associate, of the fee from the work/file allocated by the Firm to the Associate where the Associate responsible for conduct of part of file.

4.4. The Associate shall invoice the Firm only upon completion of each file and invoiced money settled by the client. …"

62. So the dispute between the parties in this respect is whether, on the one hand, the claimant was guaranteed a minimum of £40,000 gross p.a. regardless of the fees which he generated for the firm or, on the other hand, whether he was to be paid on a commission basis on receipt of invoice and had agreed that he would bill the respondent for commission of a minimum of £40,000 per annum.

63. The written agreement also includes the following term,

    "3.2 The Associate will work such additional hours outside his normal hours of employment if it is necessary to meet the needs of the clients and the business or the Firm considers necessary to protect the best interest of the clients."

64. Some of the findings made by EJ McNeill QC are extremely relevant to the findings which it is necessary for us to make in order to decide the issues in the case. In the section of her judgment headed "Facts" (paragraphs 4 to 21) it is clear that she set out the findings of fact which led to the conclusions at paragraphs 31 to 42. Those included findings about the time and circumstances in which some documents which were central to her conclusions on the nature of the relationship between the parties were produced.

65. In relation to the written agreement (pages 276 to 281) at paragraph 16 (page 71) EJ McNeill found,

    "I weighed up the evidence in order to determine whose account was more probable and concluded that the claimant did sign the contract in around May 2013. It may not have been as early as the respondent said but I concluded that it was close to when he started working for the respondent."

66. Other relevant findings of EJ McNeill QC include the following,

    66.1. At para. 33 "the respondent never paid the claimant a salary and the claimant never asked for a salary."

    66.2. At para.32 "There was a written contract … which provided that the claimant would be self-employed."

    66.3. At para.34 "the claimant had a high degree of autonomy, both in relation to marketing and to the hours that he worked."

    66.4. At para.31 "I could not imply a contract from the Certificate of Sponsorship." See also her findings about the lack of ability in the online form to say if the job was going to be on a self-employed basis (para.12 at page 70)

    66.5. At para.36 the employment judge rejected the claimant's submission that a particular email indicated that he was paid under a contract of employment and found that he had been self-employed with a reference to the claimant billing £40,000 each year.

67. At paragraphs 13 & 14 of her judgment, EJ Mc Neill QC decided that the document which is in the bundle for the final hearing at page 274 was probably produced in May 2013. This is a document in which the claimant set out three options for the basis upon which he might be engaged by the respondent: option 1 (self-employment), option 2 (payroll with a yearly salary) and option 3 (payroll with a monthly salary). It was clear

from the claimant's handwriting on page 274 and EJ McNeill QC held that the claimant himself preferred the option of being self-employed. On page 274 he set out the advantages for himself and for the respondent of that arrangement and also stated that three documents had to maintained for the Border Agency: a contract of employment, proof of payment "as per SOC code", attendance and other reporting documents.

68. The Tier 2 occupational codes of practice valid from April 2011 (page 254) explained that the appropriate salary rate for solicitors depended upon the level of qualification and, at the relevant time, for a newly qualified solicitor in the Greater London area was £39,000.

69. The parties agree that, as a matter of fact, the claimant was paid on a commission basis rather than the same amount every month or year. He seems to have told EJ McNeill QC that he was only due to be paid at the end of each year (para.33 page 73) but she found that he had not asked for his salary. He accepted before us that he had not made any written requests for a guaranteed minimum income during his engagement.

70. In addition to arguing that the terms of the agreement can be inferred from the Certificate of Sponsorship (an argument which EJ McNeill QC rejected) the claimant also alleges that the contract was formed because of a simple offer and acceptance. The respondent advertised for an India Desk Solicitor on 29 January 2013 (page 257) in order to comply with the resident labour market test and in that advertisement mention is made of a salary of £40,000 p.a.. The claimant applied for the job (see page 259) on 18 February 2013. He argues that he was thereby applying for a job which carried a salary of £40,000 gross per annum rather than one where the remuneration was solely commission based. However it is notable that, in his application, he states that

    "I am confident that I will be billing not less than 100000 GBP in the first year and will be able to manage the India Desk as excellent one in the united kingdom"

    If he had billed £100,000 a year of work to clients whom he had introduced to the Firm and where he had done 100% of the work on the file, he would (according to the terms of the written agreement) have been entitled to commission at 40% on those billings or £40,000. Having heard both the claimant and Mr Bajoori, it seems to us that the claimant made that representation because both men knew that he needed to bill at that rate in order to generate the level of commission payments which would amount to the minimum income required under Home Office rules. The particular relevance of that is that it is found in a document which the claimant accepts was sent by him and sent prior to the start of the contract.

71. Chronologically, the next document in the bundle is the application for leave to remain in the U.K. in reliance on the Certificate of Sponsorship (page 263). This was approved on 9 May 2013 (page 270). The Certificate of Sponsorship and permission letter (page 270) both refer to a salary of £40,000. The claimant's evidence (para 5 page 140) is that there was no offer letter. However, there is a letter bearing the date 15 May 2013 at page 275 in which the claimant, on the face of it, thanks the respondent for the offer of employment and states that he would like to start him employment the following day and declares that he would like his employment to be in the form of self-employment. This is consistent with his expressed preference (page 274). However there is a dispute between the parties about the date when this letter was signed: the respondent says that it was signed at about the same time as the written agreement when the engagement started in May 2013 and the claimant says that it was signed in April 2016.

72. The starting point for our fact finding in relation to the written agreement is therefore that it was signed in about May 2013, as found by EJ McNeill QC. In our view that finding that the written agreement was signed in around May 2013 is binding upon us. It was a finding which EJ McNeill QC needed to make in order to reach conclusions about the employment status of the claimant because she was considering whether it was a relevant document from which she might make inferences about the nature of the relationship between the parties. This falls within the third limb of the res judicata rule.

73. However we consider that she did not make concluded findings about all of the terms about remuneration agreed between the parties. Nonetheless, the written agreement is relied upon by the respondent as evidence of it.

74. The claimant's oral evidence before us, notwithstanding EJ McNeill's conclusions, was that the written agreement was signed in April 2016. He also told us that he had no option but to sign it immediately and effectively signed under duress, despite not agreeing with the contents. He also said that he'd signed the final page and that although there had been other pages – he described them as a pile of pages - he didn't see and didn't read them. He denied that the terms set out in pages 277 to 280 represented what was genuinely agreed between the parties.

75. As we say, the claimant also gave evidence that he signed the letter which bears the date of 15 May 2013 in April 2016. This is not an account which he gives in his FH statements of 14 September 2017 and 20 January 2018. In the latter, paragraphs 47 to 49 contain evidence of events in April 2016 but do not include an account of signing page 275 or the written agreement. Instead those paragraphs detail the exchange of certain emails (which are particularized in paragraphs 104 to 108 below) but none of those include a reference to him having signed an acceptance letter or written agreement recently. Nor do they contain complaints about being required to sign a backdated letter.

76. What the claimant does say in his PH statement, which he adopted at the hearing before us, is that the letter dated 15 May 2013 was provided by him at the time when he discussed with the respondent about registering as self-employed for tax purposes (see para 13 on page 142). His evidence in his FH statement 1 appears to be that the letter bearing the date 15 May 2013 was written in about March 2014. That is repeated in his FH statement 2 at paragraph 37.

77. This discrepancy between his oral evidence and his witness statements is unexplained. Given EJ Mc Neill's findings about the handwritten options document (page 274) and the agreement being signed sometime close to May 2013 we reject C's suggestion that the page 275 letter is not contemporaneous with those documents. He has not explained his inconsistent evidence about that allegation. Furthermore, he is inviting us to draw the conclusion that he, a solicitor, created a document in April 2016 which purported to be a letter signed in May 2013. We find that the letter at page 275 was signed at around the date it bears.

78. It is clear that the Tier 2 scheme permitted the sponsorship of those who would be classified as self-employed for tax and national insurance purposes. As early as 29 November 2012 (page 246), the claimant (who had been pressing the respondent to sponsor him under Tier 2) wrote to Mr Bajoori to explain that a Tier 2 employee can be self-employed. He included with that letter (page 247) Immigration Rule 536 which says that if a migrant is working on a self-employed basis, there must be a contract which clearly shows "an indication of how much the migrant will be paid". This information was repeated in an email from the home office to the claimant dated 10

November 2013 at page 284. That email continues that the sponsor (in the present case the respondent) would still be responsible for the individual and for making sure that they meet the reporting duties, "If they feel they are unable to do this with a self-employed individual then they would not meet their duties and should not offer this arrangement."

79. In cross examination, the claimant was taken to a series of emails which the respondent argued provided an opportunity to ask for the balance of the salary or guaranteed income had it then been the claimant's case that it was owing. The claimant's general position was that he had been afraid to ask Mr Bajoori for the balance because he was in fear that that would lead to the revocation of his sponsorship and the removal of his family from the U.K.. The claimant made general allegations that he had been subjected to those threats by Mr Lewis and had been afraid that Mr Bajoori would carry out those threats. He did not give evidence about specific threats made on particular dates.

80. We reject these generalized allegations. That is, in part, because the claimant's evidence is too unspecific to be tested but mostly because we consider these allegations to be reminiscent of the allegations which the claimant makes that a particular email at page 362 (about which see below at para 112) caused him to fear that Mr Bajoori would have him, the claimant, put in prison, not sponsor him and cause his family to be deported. Although these documents post date the start of the sponsorship and the date by which, as EJ McNeill QC found, the written agreement was signed, they shed light upon the terms of the agreement because, as evidence of what the parties did, they are evidence of what they considered their rights and obligations under the contract to be.

81. On 22 March 2014 (page 289), the claimant forwarded to Mr Bajoori the advice received from the HO. In his email, the claimant set out the advantages to him of being self-employed in strikingly similar terms to those at page 274. There is no suggestion that this email was sent under duress. Nor does it require the salary to be paid. The fact that the claimant was writing in those terms in March 2014 suggests that at that time he regarded that to be an advantageous arrangement.

82. His tax returns for the financial years ending 5 April 2014, 2015 and 2016 (pages 463 to 468) are consistent with his case that he was supposed to be paid £40,000 guaranteed. His evidence, which we accept in this respect, was that they were prepared on an accruals basis. He declared income that on any view he hadn't received (and was not making written requests for) on three consecutive tax years. So in the year to 5 April 2014 he declared £36,670 gross, in the year to 5 April 2015 he declared £37,508 gross and in the year to 5 April 2016 he declared £37,504 gross. However, the tax returns are equally consistent with an expectation that he would generate enough income for the firm that he would be able to bill the respondent for commission of a minimum of £40,000 per annum. We are mindful that this was the minimum income required for the sponsorship to comply with Home Office rules.

83. As we say, his explanation for the declared income being more than he had received was that he was paying tax on an accruals basis. The other main element of his money claim is for overtime. The claimant did not, in his witness statements, give evidence of a specific agreement that he should be paid overtime. If his case that he should be paid overtime was based upon an agreement to that effect then he should have accrued his overtime as well as his allegedly guaranteed income whether he had been paid for it or not. Therefore his tax returns are inconsistent with his case that there was an agreement to pay him overtime.

84. The tax returns are also consistent with the respondent's case that it was agreed that he should not be paid holiday pay. It is true that the respondent now accepts that the holiday pay is due. The fact that the claimant does not set out accrued income by way of holiday pay supports the respondent's case that what was agreed was that he shouldn't, as a self-employed person, be paid holiday pay.

85. All of this is consistent with the terms of the written document. Indeed, the fact that the claimant declared income of close to £40,000 on an accruals basis is not inconsistent with the written agreement which contained an agreement that the claimant would bill a minimum of £40,000. The tax returns do not therefore point to one parties' version of what was agreed rather than the other's.

86. Three of the alleged protected disclosures relied upon by the claimant were said to have been made some time between January 2015 and January 2016 (see issues *3)b. to d.* above).

87. What he explained about the second disclosure in his particulars of protected disclosures (page 45 at 47) was that he discovered in about January 2015 that the respondent's computer was being accessed from abroad by Mr Edwin Lewis. His evidence was that "I cautioned Mr Sunil Bajoori that unless there is proper safeguards there is every chance of data's misuse." He explained that he was particularly concerned because the computer was being accessed from Malaysia which is a non-EEA country and that clients' data was being transferred to a non-EEA country without their consent. This, he argues, he reasonably believed to be in breach of the Data Protection Act 1997. He alleges that he was subjected to unreasonable criticism and bullying by Mr Lewis because he warned Mr Bajoori against this practice (see disclosures and detriments document attached to the claimant's witness statement).

88. Mr Bajoori's evidence about this (his paragraph 39(ii)) is that the software used by Mr Lewis when working remotely from Malaysia does not permit the data to be transferred off the computer and server which are in the respondent's premises in London. According to Mr Bajoori, this was not raised by the claimant until his email of 2 June 2016 (page 403) after the conclusion of the contract and had the claimant raised it sooner, Mr Bajoori could have reassured him that his concerns about the treatment of clients' data were groundless. We have not been taken to an earlier written complaint.

89. In relation to protected disclosure 3 the claimant states that files were transferred from Srinivasan solicitors to the respondent without the consent from a client and that money payable to Srinivasan solicitors had been transferred to the personal account of Mr Srinivasan which caused his firm to be in breach of a duty to account for the funds. The claimant says that he was bullied and harassment by Mr Lewis because he had drawn attention to this failure.

90. In cross-examination he was taken to page 529 and it was put to him that it was an agreement on file transfer between Mr Srinivasan and Mr Lewis which includes at paragraph 1 the statement that

    "The parties hereby agree that as at 31st March 2013 as the respective client(s) have agreed to follow Edwin Lewis to Messrs Acculegal Solicitors, the following files will be transferred"

    and a list of 17 files one of which shows Mr Lewis to be the client.

91. Page 531 is, on the face of it, a letter on the headed notepaper of Srinivasans enclosing two cheques in favour of the respondent in respect of the only credit balances shown on the client accounts on page 529. A further agreement in respect of a different client

is at page 536. Then at page 537 there is a letter and copy cheque which appears to indicate that fees paid by one of the clients transferred to Acculegal were being shared with Srinivasan, the client's former solicitors. The letter, which is dated 27 January 2015, has a cheque attached to it which is made payable to Mr Srinivasan personally.

92. When asked about the apparent file transfer the claimant denied that he had been aware of it and denied that it was valid because, he said, Mr Lewis was not working in the firm as at 31 March 2013. When it was put to the claimant that he had never raised this as a concern he said that his concern had been about the risk in the file and fact that the payment was made to Mr Srinivasan personally. However we are satisfied from Mr Bajoori's evidence (and from the face of the File Transfer Agreements) that Mr Srinivasan was a sole trader and there was no reasonable basis for the claimant to conclude that in paying money by a cheque made out to Mr Srinivasan personally, the respondent was acting in breach of any legal obligation to account for that money to the firm of Srinivasans solicitors. The apparent consent of the clients to having their files transferred to the respondent would have been readily explained had the claimant asked for confirmation of it. We find that he did not seek that explanation. Therefore even if, which we doubt, he believed that the clients had not consented to their files being transferred, that believe was not a reasonable one.

93. Finally, in relation to protected disclosure 4 the claimant refers to litigation between Mr Lewis and his previous firm "Dotcom Solicitors" in which Mr Lewis was a party and the respondent firm was on record as acting but Mr Lewis was the solicitor with conduct. What the claimant says about a disclosure in relation to this matter is

> "I raised the risk with the sunil. If the cost implications or any other breach including money laundering regulations violations are there the firm will become responsible and there is every change of SRA Intervening and public interest is at risk."

94. His oral evidence was to the effect that he had advised Mr Bajoori not to take on Mr Lewis because, he alleged, the latter was corrupt. It seems to be the case that allegations made against Mr Lewis by his former employer within litigation between them included allegations of fraud made against Mr Lewis, which he denied.

95. However, this is not how the protected disclosure 4 was put in the particulars provided on 11 October 2016 (page 48). There the claimant says that what he warned Mr Bajoori about was that Mr Lewis was conducting a personal matter and that risk assessments to the respondent could not be carried out independently. In our view, as originally pleaded, this does not raise any matter which could amount to a qualified disclosure within s.43B of the ERA.

96. Mr Bajoori's evidence was that the claimant had not warned him against taking Mr Lewis on because Mr Lewis had been working for him before the claimant was sponsored. He also explained that the allegations against Mr Lewis had been historic from a time when Mr Lewis worked in Malaysia and had been brought up by the former employers within the litigation that had been disposed of by the High Court in 2016 with no adverse findings against him. He, Mr Bajoori, considered that Mr Lewis had been open with him about the allegations.

97. We accept Mr Bajoori's evidence about the lack of warning about employing by Mr Lewis by the claimant. The claimant has fundamentally changed the nature of the warning he alleges that he gave to Mr Bajoori.

98. As to the alleged detriments which the claimant claims to have been subjected to, he asserts that as a result of the disclosures the respondent did not provide him with the

opportunity to be interviewed for a post which they had advertised and which he, the claimant, was qualified for; they refused to renew his contract; refused to pay salary and overtime due; refused to pay holiday pay and sick pay, refused to repay £10,000 which the claimant had advanced to Mr Bajoori; forced him to work late in cold weather and on Sundays and holidays; threatened to withdraw the sponsorship and deport the claimant and his family and withheld his reference letter which was given very late.

99. The allegation in relation to the interview concerns the application for a vacancy as a Litigation Solicitor by Jayachandran Pillai in March 2016 (pages 563 & 564). Ultimately, he was appointed with effect from 1 May 2016 and he was also sponsored under Tier 2. The claimant argues that this was a job for which he could have applied. We accept Mr Bajoori's evidence that the two posts did not involve similar areas of expertise and that that was the reason why the claimant was not interviewed. The application made by Mr Pillai was clearly for someone involved in Corporate, Shipping and Insurance Litigation (page 563). The attendance note of the interview with Mr Pillai (page 560) sets out his relevant experience with previous firms whereas the claimant's experience was in immigration and a number of other fields set out in his c.v. and covering letter from July 2011 (pages 152 to 154). He did not profess to have experience in shipping and insurance. Furthermore, the respondent had an allocation for 2 unused CoS's (page 567) so, had the claimant satisfied Mr Bajoori's requirements that he finalise his billing (page 338), then the respondent would have been able to sponsor both men.

100. The claimant alleges that the respondent delayed in providing him with a reference. His evidence was that he had asked for a reference on 22 April 2016 (page 351) but, in fact, that email simply asked for time off to attend an interview and did not ask for a reference. He then said that he could not remember when he had asked for the reference. It may have been requested orally because it was provided by Mr Bajoori on 25 April 2016 (pages 352 & 353). There was no delay in providing this reference.

101. On 17 February 2016 (page 318), Mr Bajoori wrote to the claimant expressing dissatisfaction with his failure to attend work without explanation and alleging that he did very low or limited work in the office. He stated that the claimant had not opened a file since 3 October 2015 and warned

> "I fear any further continuance of this relationship would affect the firm in two ways non-compliance with regulatory requirements and failure to comply with sponsor duties as you are a Tier 2 sponsored employee of the firm."

Our conclusion is that Mr Bajoori was, by that email, expressing concern that low fees generated by the claimant would mean low billings of commission which would mean that the firm was not able to certify that the claimant's income would be above the minimum required amount. It appears that he had probably, by then, been reminded by the Home Office that the CoS would expire soon if no application was made to renew (see email dated 22 March 2016 at page 565 which states that it is the third time the Home Office have written to notify Acculegal that they could renew the CoS).

102. The claimant's responded to this letter (page 319) saying that he had forgotten his key and been unable to access the office and then had had an attack of cold and fever which meant that he could not come to work. Although the claimant says "I am also in need of money", he does not complain that he has not been paid the guaranteed income which he now says was due.

103. In late March 2016 (28 and 29), the claimant emailed Mr Bajoori to complain that the locks to the office had been changed and he did not have a key (page 321 and

322). He adds (page 321) "as I my leave [sic] is ending in may [sic] I like to know about my extension and assignement of certificate of sponsorship also." Mr Bajoori replied to these emails on 1 April 2016 (page 327) refuting the allegation that he had discriminated against the claimant by not giving him a key to the office and again complaining of erratic attendance. He did not respond to the question about the extension of the claimant's sponsorship. These emails show increasing frustration on part of Mr Bajooli about the claimant's attendance (pages 332 and 336). The claimant responded (page 337) on 15 April 2016 asking for a reply about his request for a "further extension and assignment of CoS" and raising his payments, which appears to be a reference back to page 335 when the claimant asked that Mr Bajoori "end my billing this week" because he had certain sums to pay.

104. Mr Bajoori's substantive response is at page 338. In that email dated 18 April 2016 (approximately a month before the sponsorship was due to expire on 21 May 2016) Mr Bajoori told the claimant,

104.1. That he, Mr Bajoori, had been asking for the claimant to complete his billing since before Christmas 2015 so that the files could be audited "and [I can] plan how to proceed with your extension" but although it was now after Easter the claimant had not provided his billing

104.2. That he, Mr Bajoori, "have already told you clearly on 31st March and 4th April that I do not have any intension to request for the renewal of CoS until your current billing is finalised.";

104.3. "I have always been lenient on your engagement with the firm and your billing for any year since you were sponsored in May 2013 was far less than £40,000 per year (as stated in your CoS)." Mr Bajoori complained that the work and billing in the office do not match the time apparently spent by the claimant in marketing.

104.4. That he had frequently reminded the claimant about "your billing and meeting Tier 2 criteria" and been reassured by the claimant that he had contacts and would reach his billing before extension time.

105. The claimant's first response to this detailed explanation of Mr Bajoori's concerns (page 341) was on 18 April 2016 and asks for a meeting. The following day (page 342) at 07:36 the claimant sent an email which he alleges contains a protected disclosure. By that email the claimant denied that he had not provide the closed files and goes on to say,

"Please note that the website of the firm was developed very recently. It took more than one year to provide business cards. There is no software or no library. There is no proper heating systems and even wash rooms in the office. There is not even a single paralegal or receptionist available".

Essentially, he complained that the lack of infrastructure means that the firm is unable to get business and corporate clients, rather than that being due to him not converting his contacts into clients.

106. The claimant also complained in his email of 19 April 2016 that "Unfortunately I heard the words like stupid, bastard, Non Sense etc regularly in the office." He gave evidence to us of similar comments being made but gave no details of dates or anything from which it could be inferred that the reason for those comments was his alleged protected disclosures.

107. It is agreed between the parties that there is no central heating in the office but Mr Bajoori's evidence was that there is a small heater under each desk. The claimant's evidence was that there were only small heaters for the partner and Mr Bajoori and not for him. However he did accept that, by the time he wrote his email complaining about the washroom on 19 April 2016, improvements had already been made to it. He was therefore complaining to Mr Bajoori about a state of affairs which had already been rectified.

108. The claimant's responses to these emails of concern from Mr Bajoori did not include any requests for payment of salary. His explanation for that omission was that he was in fear that, were he to do so, the respondent would terminate the CoS. However that is not a logical response to the respondent's emails which link their reluctance to renew the CoS with the claimant's low billings to them of commission owed because that would mean non-compliance with the Tier 2 sponsorship requirements. The emails at pages 318 and 338 clearly ask the claimant to explain how he is going to overcome the issue with low billings in order to justify the renewal of his CoS. The claimant replied to the effect that it is not his fault that he has been unable to generate sufficient work. He does not reply to the effect that the respondent is obliged to pay him £40,000 per annum in any event.

109. Then, on 19 April 2016 at 12:51 Mr Bajoori wrote "further to our conversation this afternoon" and confirmed the termination of the claimant's contract with the firm in accordance with clause 10.1 (which provided for termination on expiry of 3 years). After that, the claimant continually tried to persuade Mr Bajoori to extend the CoS. He did asked Mr Bajoori in writing "to release the payments" but did not, in terms, demand £40,000 let alone the balance of £120,000 which is the subject of this claim. The claimant said that he was afraid to ask for the money because he thought that it would lead to revocation of sponsorship but this could not be the case after the clear notice of termination of the engagement. Furthermore, the concerns expressed by Mr Bajoori about the risk that the low billings would not cover the minimum earnings (see, for example, at page 318) only make sense if the claimant was only to be paid on a commission basis that the total commission was not likely to be more than £40,000 per annum. Mr Bajoori's emails are entirely consistent with the respondent's pleaded position on what was agreed whereas the claimant's are not.

110. It is not until after Mr Bajoori's email terminating the sponsorship, that the claimant emailed (page 347) to say that he suspects that someone is accessing the system from outside the premises and is reassured by Mr Bajoori (page 349). This is not relied upon by the claimant as a protected disclosure, but we note that he does not refer in that email to having raised this issue as a problem the previous year which is what he has alleged before us.

111. After the notice of termination, Mr Bajoori worked through the files that he had and asked for other specific files to be handed over (page 355 and 359 dated 6 and 9 May 2016). The claimant still did not reply with a demand for the balance of £40,000 per annum. In his email of 9 May (page 360) he made no reference to any sums owed and asked "Please inform me finally whether you are going to sponsor and extend my visa or not willing".

112. In oral evidence he explained that the reason for this omission was "unless I hand over the files, he had already sent an email saying they were missing. He would complain I had stolen them." This is with reference to a detailed email sent by Mr Bajoori on 10 May 2016 (page 362) in which he set out what information he has about a list of 24 files which he had previously asked to be handed over and also detailed of

"all the files for which your share of fee has been transferred to your account". In the course of that email he said "Please note that the files are the firm's property. The clients can obtain a copy of the files or request the firm to transfer to the files to other firms however you cannot personally remove the files physically away from the firm." Mr Bajoori also described the claimant as "reluctant" to give his invoices to the respondent.

113. In his response to this very detailed letter on 11 May 2016, the claimant didn't ask for the balance of his salary but accused Mr Bajoori of accusing him of theft (see last paragraph on page 366). We consider this to have been a provocative act if, as he claims, he was trying to appease Mr Bajoori. In his oral evidence he explained that he made that accusation in response to the statements "I could not find the following files" and "please note they are the firm's property" (page 362). There was nothing in that from which it was reasonable to infer that the claimant could not demand his lawfully due salary for fear of being accused of theft. Indeed in the email at page 367 he said, in relation to the billings, that he will have to consult his accountant before billing. That is an inexplicable statement except in the context of a commission based agreement. In our view, the claimant's credibility as a witness is adversely affected by such an extreme reading of the respondent's email because it suggests a man who puts forward a conclusion which is not supported by the evidence on which he relies.

114. On 14 May 2016 (page 374), 16 May 2016 (page 376) and 18 May 2016 (page 378) the claimant asked again about whether the respondent would extend the CoS but then, for the second time, on 19 May 2016 he accused Mr Bajoori of discrimination in relation to the failure to extend his sponsorship. However, he still did not demand the money which he now says was owing (see page 379). The tone of that last email is completely at odds with the picture which he now seeks to paint of a worker who is in fear of his employer and we reject that assertion. We do not think that that was the reason why he did not make written demands to be paid £40,000 per annum in each of the three years 2013 to 2016 at the time.

115. Our conclusion is that the correspondence between February and May 2016 supports the respondent's case on the basis upon which it had been agreed remuneration would be calculated for the following reasons:

115.1. Their concern that they could not satisfy the requirements of the CoS is only consistent with them believing that they were not obliged to pay the claimant £40,000 per annum unless he had earned commission of at least that sum and that he had undertaken to be in a position to bill that amount;

115.2. Mr Bajoori's emails during that period are only consistent with it being his understanding that there was no minimum guaranteed income, regardless of the claimant's billings;

115.3. The claimant did not, despite ideal opportunities to do so, request in writing that the respondent pay him the allegedly guaranteed sum of £40,000 per annum until 26 May 2016 and his emails are therefore not consistent with his present adopted position;

115.4. The claimant's explanations for not demanding the sums he now claims were due are not credible and not consistent with the tone of his challenges and responses to Mr Bajoori.

116. We also rely upon the binding finding of EJ McNeill QC first as to the dates on which the written agreement and the options negotiation document were signed or

written and also that it was not possible to infer a contract of employment from the CoS. The evidence, in particular from the last 3 months of the engagement, suggests that, in practice, the claimant's income was generated on a commission basis alone. This is consistent with the written agreement relied upon by the respondent. In any event, it has been held that this was signed by both parties at about the time it came into effect. We therefore conclude that the written agreement does set out the terms which had been agreed between the parties about remuneration including those about payment of overtime.

117. Mr Bajoori wrote to refute the claimant's allegations on 26 May 2016 (page 390). In that email he states that the reason why he had decided not to sponsor the claimant further was

> "due to your failings and to avoid your further exploitation of this firm … it was never a promise from me that I would give you work. In fact it was you who promised that if I sponsor you, you assure me that your strong client base and Indian corporate contacts would generate sufficient billing to meet the Tier 2 earning criteria."

118. The claimant replied by email (page 394) later the same day (26 May 2016). In it, among other things, the claimant complained about bullying and alleged that it was only after he had complained about the heating and washroom facilities that the respondent had refused to extend his job. It was later the same day (page 395) that the claimant first alleged in writing that the respondent should pay him £120,000 in total for the previous three years' service.

119. Final relevant correspondence is at page 411 in which Mr Bajoori provided another list of commission due to the claimant upon provision of invoices. The claimant asked for payment but said (as he has maintained before us) on 1 July 2016 that this was not the balance owing (page 413). However he has not provided any different calculations to those done by Mr Bajoori, either in the 2016 correspondence or in his evidence to the Tribunal. Nor did he challenge the detail of the calculations made by Mr Bajoori in his cross examination of him.

120. By contrast, Mr Bajoori sets out in paragraph 24 of his witness statement the payments which he says were made to the claimant. In his paragraph 37 he set out the hours which he says he estimates the claimant worked in the two years immediately before the termination of his engagement on the basis of the work carried out on particular files. The claimant's attendance has been described as "erratic" by EJ McNeill QC (her paragraph 18) and he did not work a regular 5 day week with normal office hours. Mr Bajoori estimates that the claimant worked 307 hours in the year 22 May 2014 to 21 May 2015 and 75 hours during the year 22 May 2015 to 21 May 2016.

121. The claimant makes a generalized allegation that this is inaccurate and underestimates the hours which he worked. However, to the extent that he has explained his activities on behalf of the respondent as marketing and developing contacts there is no evidence that he was able to convert those into fee earning opportunities.

122. As late as 18 September 2017 (page 451) the claimant wrote to the respondent making an open offer that if they are willing to re-instate him then he will withdraw the unfair dismissal claim. We conclude that he must be exaggerating the extent to which he suffered bullying and unreasonable pressure on account of his immigration status since he was clearly willing to return into the respondent's employment.

Conclusions on the issues (1) remuneration and overtime

123. In his closing submissions the claimant argued:

123.1. that we, as the tribunal at the final hearing, could, under the Rules of Procedure 2013 rule 70 & 71 reconsider the finding of EJ McNeill QC that the written agreement was signed in May 2013 and that it was not possible to infer a contract from the Certificate of Sponsorship.

123.2. that the offer of the job had been as advertised at a salary of £40,000 per annum (page 257). He described that as the offer. He argued that he had, with his application (page 257), made a counter offer which the respondent had accepted. As he put it "there the contract concludes". This, he argued, created a binding contract for the respondent to pay a guaranteed rate of £40,000 per annum. The documents at pages 274 and 275 dated from March or April 2016, were provided under threat of revocation of his sponsorship and should not be considered relevant to the terms agreed in May 2013.

123.3. He relied upon the exchange of emails set out at page 288 where the Home Office informed him that the requirements for a Tier 2 migrant included that the sponsor should state on the Certificate of Sponsorship an amount that the migrant will definitely be paid. This, argued the claimant, meant that the CoS should be taken as a representation by the respondent that he would definitely be paid £40,000.

124. The claimant continued to argue that the written agreement at page 276 had not been read by him before signing, that he had only seen the final page, that it did not represent the agreement between him and the respondent and that it was presented to him when he had applied for another job. His case was that he had no option but to sign it and then Mr Bajoori had immediately send him the notice of termination of employment.

125. As we have explained above, EJ Mc Neill QC made binding findings that the written agreement was signed in about May 2013 and she considered that a contract could not be inferred from the Certificate of Sponsorship. Even were those not binding conclusions, they are ones with which we agree.

126. We reject the claimant's argument that a binding agreement to pay him £40,000 p.a. was formed from the advertisement and application. The advertisement had apparently been drafted by the claimant, and it is not the only evidence of the arrangements for payment. It must be set alongside all the other relevant evidence, including the written agreement. It would be an unacceptable stretch of construction to view the advertisement as an offer. It is in the nature of an advertisement that it is directed towards the world at large, even if the expectation was that the claimant would be the only applicant, and it did not have the effect of offering the job to the claimant at a specific rate of pay because it should not be taken in isolation. We take into account the representation made by the claimant within his application letter and our conclusions on it (see para 70 above). We reject the argument that a binding agreement to pay the claimant £40,000 p.a. was formed by him applying for the job in response to the advertisement. There was no written offer by the respondent and the claimant's letter of 15 May 2013 accepting the post is consistent with the written terms which we accept were signed at about the date which they bear.

127. As to the claimant's argument that rules 70 and 71 allow us to reconsider the facts found by EJ McNeill QC in our view, a challenge to the facts found by an employment judge cannot be made by an application for reconsideration. In the first place the

claimant has already applied to EJ McNeill QC herself for her to reconsider her decision (pages 77 - 85) and she declined for the reasons she gave. That was the appropriate procedure for a reconsideration. Secondly, the Rules of Procedure 2013 make plain that the application should be heard, where practicable by the employment judge who made the original decision. Another judge can carry out a reconsideration where directed to do so by the regional employment judge (rule 72(3)) and that is only where it is not practicable for the original judge to preside. Finally, the limited circumstances in which a decision can be reconsidered do not include a challenge to a finding of fact. That can only be done by appeal on the basis that the finding was perverse, such as where there was no evidential basis for it.

128. On the other hand, the evidence which points towards a commission-based agreement with no guaranteed minimum includes,

128.1. The terms of the agreement which was signed in about May 2013;

128.2. The terms include not only the breakdown of commission in clause 4 but at clause 2.1.19 a statement that the claimant understood the requirement for annual earnings requirement and that he guaranteed that he would meet that requirement;

128.3. The fact that payments were made in accordance with the written agreement;

128.4. The absence of written requests made by the claimant for payments to bring him up to the alleged guaranteed minimum either at end of each year or when he had been told that the sponsorship was to end;

128.5. The representation in the claimant's application for the role (which he accepted was contemporaneous) about the expected level of his billings which would, if achieved, have entitled him to be paid £40,000. In our view this was because both men knew that in order to meet the requirements of the Home Office the claimant would need to be generating the sort of income which would make the respondent's statement that his income would be £40,000 true;

128.6. The fact that all of the respondent's other caseworkers were self-employed and paid by commission.

129. We have concluded that the terms of remuneration were as set out in clause 4 of the written agreement. We have considered the evidence provided by Mr Bajoori in his witness statement about the fees generated by the claimant and the commission payable on those fees and accept it. The claimant has been paid everything which he was due by way of commission under the terms of his engagement. The respondent is not liable to pay him anything by way of unpaid remuneration or commission.

130. Our conclusion that the written agreement does represent the terms which were actually agreed between the parties means that the claimant was not entitled to be paid for any overtime worked: clause 3.2 is entirely clear.

131. The unauthorized deduction from wages claim is therefore dismissed insofar as it relates to basic remuneration and overtime.

Conclusions on the issues (2) detriment on grounds of protected disclosure

132. As for the claim of detriment on grounds of protected disclosure we first consider whether any of the 4 alleged disclosures were protected under s.43C of the ERA.

133. In relation to alleged disclosure 1, that there was no proper heating in the firm and no proper washroom facilities, the claimant relies upon a complaint about the washrooms made on 19 April 2016 when the washrooms had already been refurbished in March 2014 (see receipts for the work done at pages 611-613). In our view, this does not amount to a disclosure of information that the health and safety of any individual has been endangered or that any legal obligation had not been complied with because it did not convey sufficient facts. Furthermore, it is not made in the public interest when the alleged failing has already been rectified. Therefore this was not a qualifying disclosure. So far as the heaters are concerned, to the extent that there is a conflict between the evidence of Mr Bajoori and the claimant about this we prefer the former. We accept that there were fan heaters under each desk and even if that did not provide the level of heating which one normally expects in a modern office we do not consider that the complaint about the heaters provides information that the health and safety of a person was being endangered and the disclosure was not made in public interest. The claimant did not have a reasonable belief in the asserted facts which are also too vague to tend to suggest any of the breaches specified in s.43B ERA. The email of 19 April 2016 did not amount to a protected disclosure.

134. In relation to alleged disclosure 2, The statement in the email of 2 June 2016 that "a computer was working without a person" is similar to the claimant's evidence that this was what had alerted him to Mr Lewis working remotely. In this instance we accept that the claimant may have mentioned this to Mr Bajoori orally on an earlier occasion despite his failure to reference it in the later email. However, in our view, this statement does not amount to a disclosure of information that a person is failing to comply with a legal obligation, which is the construction which the claimant now seeks to put upon it. We consider this to be another example of the claimant drawing a conclusion from his observations which are not objectively merited by the facts. We are therefore of the view that the alleged second protected disclosure is not protected because the information conveyed does not tend to suggest a relevant breach and because the claimant's belief that he was informing the respondent about a failure to comply with a legal obligation was not a reasonable one. There is nothing to substantiate the claimant's allegation that data was being transferred out of the EEA (as protected disclosure 2 is described at page 47) nor that the respondent's software licences were not up to date (which is what this allegation developed into). If he had made that allegation, the respondent could have just shown the claimant the licences and therefore, even if the claimant believed and made those statements they were not reasonable beliefs to hold.

135. In relation to alleged disclosure 3, if the claimant had questioned whether clients which had come to the firm from Srinivasans had consented to the transfer, he could have asked and would been shown the transfer dated 31 Marcy 2013 which contained a statement to that effect (pages 529 and 536). His case is that he expressed those concerns in 2015 which was approximately 2 years after the transfer. We do not find it credible that 2 years after the event the claimant would have been expressing concerns about whether the clients had consented or not and we therefore find that he did not make the alleged disclosure. Furthermore, he made no reasonable enquiries about whether they had or had not consented and therefore if, contrary to our finding, he did express concern about whether they had consented, he did not have a reasonable belief in what he was stating.

136. The height of the claimant's case in relation to alleged protected disclosure 4 is that he advised Mr Bajoori that there was a risk to the respondent firm because Mr Lewis was accused of corruption in litigation in which he personally was involved. He did not say when he raised these concerns and said that he did so orally. The statutory

test requires more than that an allegation should be raised; it requires that there has been a disclosure of information which, in the reasonable belief of the person making the disclosure, is made in the public interest and tends to show that (for example) a criminal offence has been committed (or is or is likely to be committed but in the context of this alleged disclosure the claimant was informing about an allegation about past conduct). In any event we reject the claimant's account that he warned about the allegations of corruption against Mr Lewis (see paragraph 93 to 97 above).

137. Notwithstanding the findings we have made about the alleged protected disclosures, we next set out our conclusions about the alleged detriments. The claimant's allegation that he had not been repaid £10,000 related to loans which Mr Savanandran made to Mr Bajoori when he had had to travel urgently to India because his father was seriously ill. Both parties agreed that £9,000 had been advanced by the claimant to Mr Bajoori. The claimant alleged in his ET1 that the money had not been repaid. However, in cross examination, he accepted that he was, in fact, repaid £10,000 in three installments of £3,000 (on 12 November 2014 page 622), £2,000 (on 24 November 2014 page 623) and £5,000 (part of the £8,420 paid on 18 December 2014 page 624). Lest there be concern that there is any double counting here and confusing between commission payments and repayment of the loan, the balance of the payment of £8,420, namely £3,420, is credited to the claimant as commission (see paragraph 24 of SB's statement for the FH and also the letter from the respondent's accountants at p.511 paragraph 2).

138. Mr Bajoori stated in paragraph 29 of his statement that he repaid £10,000 (rather than the £9,000 which had been lent) out of gratitude. The claimant alleges that this was simply to pay his salary but we are satisfied by the detailed accounts prepared by Mr Bajoori and his accountant that they accounted for the commission which was owed separately. We are quite satisfied that the money lent by the claimant has been repaid and this allegation is false. The claimant did not suffer this detriment, let along on grounds of any protected disclosure. In fact, on exploration, it appeared that the claimant's case boiled down to the payments having been made by the firm account (which at the time was a sole trader) rather than by Mr Bajoori personally. We are satisfied that the payments we have listed were made to repay the claimant's loan.

139. The reference letter was provided by Mr Bajoori within a sensible time after the request (no more than 3 days) and we find that there was no detriment to the claimant in relation to this.

140. Furthermore, we reject the claimant's assertion that the respondent did not pay him the salary and overtime due or pay holiday pay and sick pay because of any protected disclosures which he made. The terms of the agreement were for him to be paid commission and he was paid in accordance with it. He was not paid overtime because he was not entitled to be paid for it. Although he should have been paid holiday pay, the reason why he was not paid it was entirely due to what the respondent believed his rights to be and not because of any protected disclosure. The terms of the written agreement at clause 5.1 and 6.2 stated that the claimant was not entitled to holiday pay or sick pay.

141. We are also satisfied that the reason why the claimant was not interviewed for the Litigation Solicitor: Corporate, Shipping and Insurance position and Mr Pillai had nothing to do with any protected disclosure. It was entirely due to the fact that Mr Pillai had relevant experience for the role which the claimant did not have.

142. The final detriments alleged by the claimant are that he was forced to work late in cold weather, was threatened with withdrawal of his sponsorship and ultimately the

contract was not renewed because he, the claimant, had made the alleged protected disclosures. We accept Mr Bajoori's evidence, which is supported by the emails complaining about the claimant's irregular attendance at work and by the limited file activity, that the claimant did not work long hours. The only specific complaint made by the claimant about the weather was an occasion when he complained that, because he had been unable to get into the office, he had taken cold. We find that this alleged detriment did not happen as a matter of fact.

143. We find that the reason why the respondent terminated the contract was that the CoS needed to be renewed and the claimant was not going to bill enough to comply with the minimum income (see email of 18 April 2016 at page 338). The respondent's warnings about the consequences of low billings predate the claimant's email of 19 April 2016 (which he relies upon as a protected disclosure). The termination had nothing to do with the email.

144. We also find that the most that the respondent did was warn the claimant that if his billings were not at a level which meant that his commission met the minimum earnings requirement then his sponsorship would not continue (for example on 17 February 2016 at page 318). This is very far from the claimant's allegation of threats to deport him and was quite appropriate, given the risk to the respondent's ability to sponsor other employees if they gave a false or misleading certification to the Home Office. There was no detriment to the claimant in relation to these warnings and the reason for them was the claimant's low billings.

Conclusions on the issues (3) - Holiday Pay

145. The respondent's submissions on the quantification of holiday pay are contained in their written submissions. The claimant did not make submissions about how much the quantum of the claim should be.

146. The respondent's approach was

146.1. that there should be a long stop of two years from the date of presentation of the claim;

146.2. that the claimant is only entitled to holiday pay under the Working Time Directive (2003/88/EC) and therefore only to 20 days' leave and not the additional leave under reg.13A of the Working Time Regulations 1998;

146.3. A rate for a day's work can be calculated by dividing the total paid to the claimant in the last two years of employment by the total number of available working days (see paragraph 13)c) of Mr Aamodt's written submissions). Mr Aamodt suggested a daily rate of £37.05 and therefore that the amount payable for (what he argued were) 35.8 days' holiday pay owing was £1,342.50;

146.4. It was also argued on behalf of the respondent that there had been an overpayment of £1,000 to the claimant and that credit should be given for that under s.25(3) ERA.

147. The £1,000 alleged overpayment is set out in paragraph 28 of Mr Bajoori's witness statement. However the reason for it appears to be explained in paragraph 29 where he said, in relation to the repayment of the loan advanced at the time when his father in India was ill "I repaid him a total of £10,000 in gratitude for his assistance during my family emergency." It seems to us that at the time when Mr Bajoori paid the additional £1,000 (back in December 2014) he did not expect to have it returned to him and it

was in the nature of an ex gratia payment. We are therefore of the view that it should not be deducted from any sums due by the respondent to the claimant now.

148. According to the written agreement, the claimant's normal hours of work were 9.30 am to 5.30 pm Monday to Friday (clause 3.1). Given our findings that the claimant was remunerated solely by way of commission, the claimant's situation is materially indistinguishable from that of Mr Lock and the value of a week's pay falls to be calculated with reference to s.221(2) ERA. He is entitled to that element of his holiday which derives from EU Law in accordance with the decision of the Court of Appeal in Lock v British Gas Trading Ltd [2016] IRLR 946. That is the 20 days' leave which has been transferred into domestic law in reg.13 WTR.

149. He brings his application for a payment in lieu of annual leave accrued but not taken on termination of employment under s.23 ERA and therefore the two year long stop set out in s.23(4A) applies. We then need to calculate a week's pay. Although someone in the claimant's position falls within s.221(2) as a person whose remuneration does not vary with the amount of work done, but with the results of that work, the standard situation under that subsection is an employee who is paid a basic salary. It might be tempting to consider taking a 12 week reference period, as if it were a s.221(3) case, however, that is a little difficult in the present case. This is because the work and the billings are not generated evenly over the period of the engagement. Indeed, to judge by paragraph 37 of Mr Bajoori's statement, only two files were opened in the last 6 months of the contract. We do not have the information about when the fees were collected.

150. In those circumstances we adopt Mr Aamodt's suggestion that an appropriate way to calculate a weeks' pay is to take the total number of possible working days in the two years preceding the presentation of the claim and divide that into the total commission earned. The total number of work days is 207 days from 24 July 2014 to 21 May 2015 (less weekends and 8 bank holidays) plus 253 days from 22 May 2015 to 21 May 2016 (less weekends and 8 bank holidays). The total paid to the claimant in that period was £17,263.02. His remuneration for a days' work was therefore £17,263.02/460 or £37.53.

151. There are a total of 666 days between 24 July 2014 and 21 May 2016. The annual leave which would have accrued under reg.13 WTR would be 666/365 multiplied by 20. That is 36.49 days. Therefore the value of the claimant's holiday pay accrued but not taken on termination of employment is £1,369.47.

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Employment Judge George

13 June 2018

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Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
14 June 2018

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FOR EMPLOYMENT TRIBUNALS