Case No: 2201027/2017

EMPLOYMENT TRIBUNALS

Claimant: **Ms Tracy Robinson**
Respondent: **His Highness Sheikh Khalid bin Saqr al-Qasimi**

Heard at: **London Central** **On:** **12-16 November 2018**
Before: **Employment Judge Goodman** **in chambers 19 November**
Mrs D. Olulode
Ms. M. Jaffe

Representation
Claimant: **Mr D. Stephenson, counsel**
Respondent: **Mr J. Laddie, QC**

JUDGMENT

1. The claims of unfair dismissal, statutory particulars of employment and wrongful dismissal fail for illegality.

2. The claimant was not subjected to detriment for making protected disclosures.

3. Upon counsel for the respondent undertaking that the £28,084.46 deducted from earnings would be paid to HMRC on the claimant's account within 28 days, no order on the claim for unlawful deductions from wages.

REASONS

1. The respondent is the former Crown Prince of Ras al-Khaima, one of the seven United Arab Emirates, now resident in London.

2. The claimant carried out duties as his personal assistant between 2007 and 2017. She has brought claims of unfair dismissal (including for making protected disclosures and for asserting a statutory right), detriment for whistleblowing, unlawful deductions from wages (being amounts withheld for tax but not paid over to HMRC), wrongful dismissal (the notice period) and failing to provide statutory particulars of employment.

3. There is an issue as to the claimant's status – whether she was employed, or a worker, or self-employed. If employed or a worker, the respondent asserts that the contract was illegal in performance because (1) she did not pay tax and (2) she claimed for petrol expenses that had not been incurred.

4. There are seven (originally eight, but one was withdrawn at an EAT hearing) disclosures for which protection is claimed, and which the claimant says concern failure by the respondent to treat her as an employee or worker, to deduct employee tax and national insurance under PAYE, and failure to send her an itemised pay statement and unlawful deduction of wages (grounds of claim paragraph 27).

5. If ether the status issue or the illegality issue were decided against the claimant it would not be necessary to consider her other claims, but as neither had been listed to be taken as a preliminary issue, and in case were wrong about either, we considered all claims

Procedural matters arising during the hearing

6. On the first day of this hearing the Tribunal considered an application to amend to add a claim for holiday pay, on the basis set out in a schedule of September 2018, that is, that she was entitled to carry forward holiday untaken from year to year and should be paid for amounts outstanding at the end of the contract. The application was considered, both in the context of the procedural history of this case, and in the light of **Selkent** principles, and refused, for reasons given at the hearing. Written reasons will be provided if a request is made within 14 days of the decision being sent to the parties.

7. The claimant had made an application for interim relief with her claim. An interim relief order was made by E.J. Paul Stewart on 30 June 2017, appealed to the EAT, which allowed the appeal and remitted the application back to him. There was a further hearing on 23 April 2018. The reserved judgment, again ordering interim relief, was sent to the parties on 13 November 2018.

8. There were several applications in the course of proceedings for disclosure, including disclosure of documents about the claimant's mortgage applications in 2007 and a 2013 remortgage, as relevant to the disputed issues of status, and what was the term of the contract as to remuneration. On day two of the hearing when being cross – examined the claimant said she had a copy of the 2007 application, and on day three she produced it, but sought to disclose a copy redacted to limit what was shown to her declared employment status, and exclude what she said about income. It was ordered that she disclose a copy which did not redact what she told the mortgage lender about her employment income. as refused. Her counsel then asked for an adjournment until the following day so she could seek advice elsewhere on possible self-incrimination. This was refused, on the basis that only questions to elucidate her status and remuneration when working for the respondent would be asked, and none other, in case privilege from self-incrimination might be relevant; inferences, particularly as to credibility, might be drawn from her answers.

Evidence

9. The Tribunal heard live evidence from **Tracy Robinson**, the claimant, from **Peter Cathcart**, a solicitor instructed by the respondent from time to time on property matters, who had discussed terms with claimant at the outset and later in January 2014; he is not an employment lawyer; lastly, from the respondent, **Khalid al-Qasimi**, who was assisted by an Arabic interpreter.

10. There was a trial bundle of over 530 pages; from time to time we were also referred to bundles of correspondence of 830 pages.

Findings of Fact

11. The respondent was Crown Prince from 1958 until 2003, when he left Ras al - Khaima and moved to Oman, then Dubai, then Sharjah (in UAE), where he has a home. He is married with six children, and now, grandchildren. He has owned property in the UK for visits and for his older children to occupy when at university in the UK (as he was for a period), but in 2007 when the claimant was engaged, he had not been resident here for any period. In 2006 he bought a family house in London, together with a flat for staff, and from 2006-9 his daughters attended school in the UK and the respondent and his wife visited London from time to time at the start of school term and in the holidays. He owned another flat in London, which is let, and also property in Oxford and Cambridge, for use by his children when at university, otherwise let.

12. Peter Cathcart had advised the ruling family in Ras al-Khaima on property and commercial matters from 1994 or so, and acted for the respondent in UK matters from 2004. From 2005 or so a personal assistant, Caroline Driver, was responsible for administration of the respondent's property, cars, and family and staff movements in the UK, while living in the Cotswolds; until then the administration was done from an office in Ras al-Khaima. In 2007 Ms Driver wanted to take up full-time employment, and a replacement was sought.

13. The claimant left college at 17, and, starting as a hotel receptionist, has had a long career in the hospitality industry. Her last UK employment before starting work for the respondent was as Business Development Director for a hotel and spa (employment contract starting 5 August 2002), at a salary of £35,000. By 2007, she was living in Spain, selling property, but looking to return to the UK, as her mother was in her mid-70s. She heard about the respondent's vacancy in London through a recruitment specialist friend, and sent her CV to Scott Fishbeck, the respondent's technical adviser, who is resident in UAE. She was identified as suitable, and she came for interview in London.

14. On 5 March 2007 she was interviewed by Mr Cathcart. It is disputed whether Scott Fishbeck was also there, as Mr Cathcart says. He took her through a list of job duties, large and small, that he had asked Caroline Driver to prepare. That evening Scott Fishbeck offered her the job. She was to start at the beginning of April. She worked from home, and initially she lived with her mother while still spending some time in Spain.

15. According to the claimant, she had two meetings. In the first she asked Mr Cathcart if the salary could be higher and was told not, but (according to the claimant, and this is disputed) this was her take home pay. In the second, in the evening, Scott Fishbeck told her she would be paid by bank transfer from Dubai, and the payment would be "grossed up and regularised" when the respondent came to the UK on a more permanent basis.

16. On 23 March Mr Cathcart wrote to confirm the terms on which she was engaged, as she was to start work on 30 March. On the nature of her duties, she was "assuming responsibility for looking after the children…whilst they are in the United Kingdom. You will also be responsible for the management of the properties belonging to His Highness and also looking after staff and making whatever arrangements are necessary for His Highness and Her Highness Sheikha Fawaghi on their trips to the United Kingdom". The list of job duties prepared by Caroline Driver was attached. He went on:

> "You will be paid a management fee for undertaking this work at the rate of £34,000 a year. You will be responsible for your own tax on that payment".

She was told there were no set hours or set place of work. She could recover costs and disbursements incurred. She was to keep a logbook of her travel for which a mileage rate would be paid. She should open a bank account for a petty cash float of £15,000, and report to the respondent and his wife direct on its use. She was "entitled to 4 weeks holiday a year, and "this arrangement is subject to either side having the right to terminate on one month's notice.

17. She was asked to sign and return a copy of the letter, and she did.

The Contract Term as to Remuneration

18. The Tribunal does not accept the claimant's account of the discussion over deduction of tax and grossing up. In our finding it was clear that the term of the contract as to remuneration was that she was to be paid £34,000 per annum gross. Our reasons for preferring Peter Cathcart's evidence and the terms set out in his letter are:

    1. On a schedule she disclosed as attached to a February 2014 email listing staff, her name appeared and her salary was marked as 'net'. It came out in the week before this hearing started that the list disclosed at the time (February 2014) did not have the word 'net'; she explained it had been a "working document", and the word, and the names of a few other staff added innocently, but in view of the history of discussion of her terms, and the lack of relevant contemporary detail on some other additions, we did not believe her. It may have been done in mid-2015, when she mentioned updating the list. This document does not show it was agreed she would be paid net. The usual understanding is that pay is stated gross unless stated otherwise, by adding 'net' or 'after deductions.

    2. We doubted her credibility generally after seeing the 2007 mortgage application, as she applied after starting work with the respondent - the

exact date is not known, but the purchase was completed in September 2007. We had expected it would provide evidence of how she understood her pay in 2007, but the application form made no mention at all of receiving income from the respondent, stating instead that she was employed by another business (a transport business in Bedfordshire run by her brother) at a higher rate. This is discussed in more detail below.

3. In her witness statement for the interim relief hearing in 2017 her evidence on a crucial conversation in January 2014 about being paid cash, she agreed the word cash had been used; in her statement for this hearing she firmly denied it. This indicates her evidence is not always reliable.

4. When she got the letter on 30 March 2007 about the terms of engagement she made no challenge to what it said about the level or pay or about who paid tax, just signing and sending it back. Pay is not an unimportant detail. If she thought the letter misrepresented a discussion 3 weeks earlier and understated her gross pay on which she was to pay tax, she would have said so.

5. She did not raise it later either, e.g. when the respondent returned to the UK late in 2008, or again in 2011

6. In 2009 she and Scot Fishbeck sought a meeting with Peter Cathcart to ask for a pay rise. She got an increase of pay to £37,000 in June, backdated to 1 April 2009. She did not ask at the meeting, or when she got the rise, about PAYE, or tax deductions, or grossing up, even though the respondent was now back in country, rather than coming and going, and even though she was with Scott Fishbeck, who she now says was involved in stating her tax would be sorted out later, which might have backed her up if she thought the letter was wrong, or that an oral agreement was not being put into effect.

7. Emails show she had no difficulty approaching Peter Cathcart about other troubles in the relationship, whether in 2012 when told off by the respondent for being too familiar, or in 2013, when she was heavily and suspiciously criticised, probably unfairly, about the petty cash record. If she was concerned about delay setting up PAYE deductions, or that tax was not being paid on her earnings by the respondent (if she thought she was being paid net), she could and would have asked him. This silence suggests there had been no conversation in 2007 about PAYE or net payment of salary. If there had, it would have been something she could ask him about.

8. As is discussed later in these reasons, she did not assert the conversation about net payment until much later, long after the issue had arisen, and despite much correspondence about it.

Employment Status

19. The list of job duties prepared by Caroline Driver and attached to the claimant's contract comprises: all aspects of the daily lives of the children on the rival on each trip through to their departure through the VIP lounges at

London Heathrow, including meeting family members at the airport and seeing them of, arranging transport, notifying the embassy and paying for VIP facilities, tips, meeting staff members who travelled separately and accompanying anti-airport and assisting with checking reaching the driving to London or Cambridge, keeping passports and tickets, applying for visas when required, obtaining passports, claim forms and liaising with UAE on flight bookings. She had to see that all the respondent's UK cars are serviced once a year and kept in good order, and see that MOT and road tax were up to date, pay congestion charges and penalties and parking penalties. She must liaise with Peter Cathcart about car insurance. For accommodation she had a utility bills council tax, repairs of structure and equipment, and by lightbulbs. She had to check staff accommodation was clean, that staff did not cause a nuisance to neighbours, and were aware of UK traffic laws. She must visit each week, more if necessary. She must keep a logbook of mileage. She had to make appointments with the doctor, dentist and hairdresser when required, pay university and college fees and expenses, and check correct enrolment procedures were followed. She had to see utility bills were paid. On sale or purchase of any property she had to coordinate sales and source suitable properties, oversee removals, to the UAE if necessary, and notify relevant authorities. Once a month accounts had to be sent to a named individual, with invoices and receipts for expenses to be reimbursed. Overall, she had to be flexible on issues that arose for the comfort of children, their properties or their guards, which might range from disposing of rubbish to sourcing new educational facilities.

20. This list was drafted to cover anything that might arise, and while some tasks are regular, such as the weekly visit to the properties, others might be very irregular, depending on the family's movements and activities. It is difficult to grasp how much time was engaged. In October 2012, she prepared a list of tasks undertaken (though not the time taken) over the previous 2 weeks, in connection with a complaint to Peter Cathcart about her treatment, when she said "my whole life revolves around them. Nothing is ever too much trouble you know that! I have my phone strapped me at all times. I do anything any time for them all a drop of a hat. I often have to change planned appointments." Items undertaken include, for example, sending registered parcels to Spain, accompanying a maid to departure, making an online application for a driving licence for one of the sons, taking a phone contract, buying a blender for the cook, arranging swimming pool maintenance, selling a computer on e-bay, and so on. There is nothing in her witness statement about how much time was spent. She did keep diaries, which were offered to the respondent in disclosure, but it appears there was some dispute whether or how much they could be copied, and they are not in the bundle.

21. The claimant worked from home in Bedfordshire. She visited London, and for a while, until sold, Cambridge, to see the properties. There were five properties. There were five, latterly three, cars. We know that for a time she accompanied one daughter to Paris for surgery monthly, and that she had attended parent meetings for a school age daughter.

22. Bearing in mind that many duties related to who was in the country, we reviewed the respondent's movements. In 2007 he was only in UK sporadically and many of Claimant's duties arose in response to requests

from his adult children – for cars, staff, phones, for example. At end of 2008 the respondent spent more time here because his wife was here as his daughters were at school. He travelled from time to time. In April 2010 when his father was ill he returned to UAE. When his father died, the respondent and his son Hamad were placed under house arrest, and not until his release in July 2011 was he able to return to UK, where he remained, though he travelled for projects in US, had property in France, and spent Ramadan in Lebanon.

23. The ages of the children are relevant to workload. In 2007 they were 25, 24, 24, 20, 19, 12. The claimant had attended parents' evenings and liaised with school, but did not take the youngest to school. As the children aged, the claimant's duties will have changed, and at least one daughter married and lived away. We know that by the end of her work for the respondent, in 2017, when they were aged between 35 and 22, the two sons Hamad and Mayed had for some years been taking over many duties from her or from their father, for example, in 2014 Mayed was dealing with PWC about staff, and in 2016 he took over cars and allocated this to a business called Quintessential.

24. The claimant was paid monthly by bank transfer. The respondent did not make deductions from the named sum agreed to be paid, or provide payslips, and the claimant did not invoice for her fee.

25. She took holidays over 20 days and was expected to say when she would be on holiday and so unavailable. Other than that her working time was not monitored, and she decided which task she carried out and when, except that she was expected to respond when called on, and had to attend Heathrow for arrivals and departures of family and staff.

26. In September 2016 she was ill with a heart condition. She continued to be paid monthly.

Was the claimant Self-Employed or a Worker?

27. Section 230 (3) of the Employment Rights Act 1996 defines a worker as one who works under a contract of employment, or "any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to personally any work status is not by virtue of the contract for the client or customer of any profession is this undertaking carried on by the individual" .

28. "Contract of employment" means a contract of service or apprenticeship - section 230(2). What is a contract of service was considered in **Ready Mixed Concrete (South East) Ltd v MPNI (1968) 2QB 497**, as requiring the fulfilment of 3 conditions – the servant agreed to provide his own work and skill in the performance of some service for his master in consideration of a wage or other remuneration, second, he agreed that in the performance of that service he was subject to the other's control "in a sufficient degree to make that other his master" and thirdly that the provisions of the contract were consistent with its being a contract of service. In **Carmichael v National Power plc (2000) IRLR 43**, where it was held there was an umbrella contract within which the worker was able to choose whether or not to take work when offered, they must be under legal obligation to each other to work and pay for

work for the whole period for it to be a contract of employment.

29. We considered the employment status of the claimant in the light of this guidance. The agreement is not written in the language of employment and her remuneration was called a “management fee”, but it does not otherwise specify whether she is employed, providing personal services, or self-employed. It refers to the claimant paying her own tax, which indicates the respondent at any rate did not consider that she was employed. She was paid a flat fee, whatever her actual duties, and had to be there when wanted, as well as at some fixed times. This suggests control.

30. In respect of section 230 (3) (b), we not see the respondent was a client or customer of the claimant’s business. She had never marketed herself as being in business as a personal assistant. She had never done this work for others before, nor did she during the currency of the contract. (She did not mention working for others in her witness statements, but in answer to a tribunal member’s question about working for others, she said that for the first couple of months she continued to work for her brother while she was travelling between Bedfordshire and Spain, and that the brother carried on paying her £50,000 until July, but she was not his personal assistant, and it was in no way clear what she was actually doing for him).

31. She had to provide personal service: while the contract is silent on this specific point, it is hard to see how the respondent would have accepted a substitute if one had turned up at Heathrow in her place, and if she had arranged for a lettings agency, say, to make the weekly visits to properties in her place, we anticipate the respondent would have complained if she had not sought his prior approval. There is no evidence she ever did, and although in law that does not establish she could not, it does not help prove she could substitute. She did provide petty cash invoices for expenses incurred on the respondent’s behalf, but this is not determinative, as a self-employed solicitor might work for a client on a retainer, doing tasks from time to time, and be reimbursed for disbursements on the client’s work. She did not invoice for her monthly payment of fee. However, she did not keep accounts, as she might if the respondent was her client or customer, and she bore no financial risk, as would occur if she was in business on her own account. We concluded she was a worker, and we go on to consider whether she was within the category of workers, who are employees employed under a contract of service, rather than a contract for services.

Was she an Employee?

32. We considered the extent to which the respondent controlled her activity: she had to turn up when wanted for family members arriving at Heathrow, and more regularly, given the frequent rotation from UAE to UK and back, for staff. Once she did not because she had booked holiday, and the respondent asked her to tell them in future, so they could arrange their travel dates round her – this sounds like a classic employer -holiday issue, but more particularly, this indicated that subject to arrangements for taking her 20 day holiday, she was expected to be there when required, and this was not an arrangement like **Carmichael** where she was free to take on a task or refuse it when it was offered. She could get others to do work- mend cars, or repair flats, for example – as she was not expected to use tools, but it is clear she was

expected to see it was done – to manage - and to make arrangements. She was paid holiday and sick pay. Holiday pay is consistent with being a worker as well as an employee, but paid sick leave 7not.

33. Her hours varied according to need, but it was clear that it was not consistent with the agreement that she could decline to (say) turn up at the airport because she was doing something else, or working for another. Employees can work for others outside working hours, though sometimes subject to contractual restrictions (e.g. competitors, or requirements for permission). It is not known if she worked for anyone else between 2007 and 2017, but provided she discharged her duties properly and when required, that was not contrary to the agreement, and could have been done by any employee with a second job. The control, together with the requirement to be on hand whenever wanted, subject only to notified holidays, 20 each year, indicated to us she was an employee. As for control, she was rarely directly supervised, but neither is a kitchen worker if hot and timely food is put on the table. She was subject to control, as in the direction on when she was to appear to present her petty cash accounts, or as in the rebukes which led to her appeals to Peter Cathcart, and principally by being expected to eb on hand whenever required outside agreed holidays.

34. We concluded she was an employee under a contract of service, rather than a worker. We return to the narrative of facts.

Tax Investigation

35. From about 2011, the respondent engaged specialist employment solicitors (B P Collins LLP), and tax consultants (Price Waterhouse Cooper - PWC) to set his UK financial affairs in order. This may have been because he returned from house arrest in July 2011 and his wife was looking at a UK investor visa so they could stay for longer than permitted on a visit visa, or because of Employment Tribunal claims made in 2010 by two cooks. The cooks obtained default judgments on 9.6.11, as the respondent did not respond to the claims, but the judgments were set aside in November 2011, and later settled, or possibly withdrawn, as one was conditional on proving the right to work in the UK.

36. In 2011 the respondent's employment solicitors supplied specimen contracts of employment for domestic staff, and asked to see the claimant's contract too. The claimant was appointed primary point of contact on staff matters.

37. On 8 August 2013 HMRC wrote to PWC seeking information on 9 points – one of these points (the rest are redacted) asked for "a schedule of domestic staff employed to include their names, addresses, any benefits and expenses provided together with a note detailing how their salaries were paid and any tax/national insurance accounted for". The claimant was asked to draw up a list.

38. While the list was being prepared, in January 2014, she asked Peter Cathcart for a meeting to discuss (according to him) her employment status, or, (according to her), new grievances about workload. It was their first meeting since she had sought a pay rise in 2009. It was probably on 30 January 2014.

39. Peter Cathcart says he expected, in view of the ongoing enquiry into staff terms, that she was going to make a case for being self-employed (because of the financial advantages), and he told her he thought PWC's advice was that she was likely to be deemed an employee by HMRC, and if so deductions would have to be made from her pay at source. He was then surprised to be told: "but I'm paid cash". He says he was confused, and pointed out she was not paid cash but by bank transfer. She repeated "no, I'm paid cash". He said: "It dawned on me she was suggesting she was being paid "under the table", so to speak". He asked if she meant she did not pay tax on her income. She confirmed she had not paid any tax. He was horrified, and did a rough calculation, and told her the unpaid tax for seven years could be £50,000, and with penalties, £100,000. He told her it needed to be sorted out as soon as possible, as delay would make it worse. She asked if the respondent would pay it for her, as she did not have the money to pay it, and he said not, as it was her responsibility.

40. The claimant's version is that she went to talk to him about workload, and out of the blue he asked if she had any problems with HMRC – had she registered with them, and she asked why would she? (This is the conversation where her 2017 statement says she talked of cash payment and the 2018 statement denies it was said). She had been waiting for the respondent to regularise her position, which she kept being promised. Told she would have to register and pay back tax, she said she was not self-employed and should not be the one to pay or be fined.

41. After the meeting Peter Cathcart wrote to the claimant. He attached the signed agreement of 30 March 2007. He said they were obtaining advice on how to manage staff who come and go, "but your status will also have to be reviewed". PWC will want to see the contract and advise:

> "in relation to how we deal with the work you undertake on behalf of the family in the future. The agreement provides that you are self-employed and you are responsible for your own tax on the payments you receive from the family. Based on what we have heard so far PWC will advise that you need to be put on the PAYE system. In terms of your own tax position you need to regularise your status with HM revenue and Customs. That means disclosing, in so far as you have not already done so, the income you have received from the family since March 2007."

She was urged to take independent advice, as tax returns were meant to be filed by the end of January each year, and was asked to confirm she had done so.

42. We accept Mr. Cathcart's account of this meeting, meaning we do not think his remark came out of the blue and that she did want to discuss her employment status. We already have reason to doubt the accuracy of the claimant's evidence when not in contemporaneous written form; in particular, at this stage the claimant was aware of the PWC investigation, and had picked up that she may now come onto HMRC radar and it be found she had not paid tax for a long time. She had reason to worry about how her position would be treated. She has never said what the workload issue was that she wanted to speak to him about.

43. What did she mean by "cash"? She did not mean she received notes and coin. In her witness statement for this hearing she has denied she spoke of cash at all, but in her statement for the interim relief application in 2017 she said did, and that when she did she had meant she was being paid net – it was money she could spend (and we know people sometimes speak of "cash in hand", which *can* mean after deductions). We also recognise another very common definition of "cash" as one which does not go through the books (the meaning Mr Cathcart apprehended), as when builders or mechanics offer to do a job for cash at one price, which is lower than if it is recorded in writing in some way, because notes and coin can be handed over without any written record, and so avoid payment of VAT and income tax. We consider it was this she had in mind.

44. We came to this conclusion because if she meant it was a net payment ("cash in hand"), we do not believe she can genuinely have held this view. She had a long history of employment, and said she had never been self-employed. She will have expected a P60 each year, if she thought tax was being paid, or payslip to show deductions. If she was waiting for the respondent to come to the UK, before it was regularised, he had been there for 18 months or so until April 2010, and had been back for good from July 2011, yet had not queried the tax position.

45. "In this world nothing can be said to be certain, except death and taxes". We all know that in the UK tax has to be paid on income, with a few exceptions and tax-free allowances. The claimant had the 2007 letter of engagement, that said in plain terms she was responsible for paying her tax. It cannot be read as meaning: "we will pay your tax later". She never queried that this was different to her understanding of the terms on which she was engaged. She may not have known what to do to pay tax, if she had always been an employed earner, but she could have asked her brother (a businessman with several establishments and no doubt access to tax advice), or checked with HMRC online or by telephone how she did this, or gone to the CAB. We had been inclined to think it possible she may have let inertia take over, until we saw the mortgage application. At a time (completion was in September 2007) when she would want a lender to know she was financially sound, she declared employment for just over two years in sales, at a salary of £50,000, in her brother's transport business in Bedfordshire, (asked the previous day if she was paid by him while working for the respondent, she told us the money was not transferred to her, at least after March 2007, but set against a debt she owed him). She made no mention of any income from the respondent, employed or self-employed, although she would have been able to evidence receipt from bank statements and the letter of engagement, even if she was without payslips. We reluctantly concluded that she wanted to keep the earnings as "cash", so not on any official radar. She had chosen not to declare it.

46. The claimant sent the list of employees to PWC on 7 February 2014. She included her own name at the top, stating the amount she was paid as £3,038 per month (which is £37,000 per annum). She did not assert then this figure was net, or gross it up for tax and national insurance the respondent was liable to pay, even though this came after the "cash" discussion with Peter Cathcart. (We have already mentioned there was another version of the list disclosed by the claimant which added 'net'. This was not the list she sent at

the time; the claimant said this was because it was a working document she updated, but after examining the other changes to it, we do not believe her, and think she "improved" it to strengthen her case, because (1) the weak detail of later personnel changes (no pay information, a cook's name is wrong) indicates she could no longer recall the detail when she added the names; (2) there is no email evidence she ever sent any updated list to anyone , even though the issue was under investigation for some time.

47. A week later she asked if she could come to the meeting with PWC set for the following week: "to attend the bit relevant to myself". Mayed al-Qasimi said however he would attend and brief her afterwards. This suggested to us she was now worried her non-payment of tax might become known to HMRC.

48. **Protected disclosures**

49. We have now to review the claimant's protected disclosures, and decide whether each qualified for protection. Section 43B of the Employment Rights Act 1996 says 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 go one or more of the following… " This includes a criminal offence committed, or that person is failing to comply with any legal obligation to which he is subject.

50. It has to be more than a mere allegation, and must disclose information – **Cavendish Munro Professional Risk Management Ltd v Geduld (2010) IRLR 38.**

51. The words "in the public interest" were inserted in 2013 to reverse **Parkinson v Sodexho**, to the effect that a worker could claim whistleblower protection even though the matter raised was purely personal, and concerned only his own contract. In **Chesterton Global Ltd v Nurmohammed (2017) EWCA Civ 979**, a case about whether a complaint about the claimant's position was in the public interest if a number others were also affected, and which concerned an allegation of deliberate misstatement of profit figures which had the effect of reducing office managers' commission payments, the Court of Appeal held that the tribunal must ask (a) whether the worker believed, at the time he was making it, that the disclosure was in the public interest, and (b) if so, whether that belief was reasonable. Where the disclosure related to the employee's own contract, there might still be features of the case that made it reasonable to regard disclosure being in the public interest as well. The number of those involved was not of itself determinative. There may be more than one reasonable view on whether a disclosure was in the public interest. The reasons why the worker believed the disclosure was in the public interest need not have been articulated at the time, provided the subjective belief was objectively reasonable, though if the worker could not explain, it might be doubted if he in fact believed the disclosure was in the public interest.

First Disclosure

52. The first disclosure pleaded is the claimant's request on 14 February 2014 to attend the PWC meeting to discuss her own position. It is hard to see what information is disclosed in this request. It is a response to Peter Cathcart's

email of 30 January, when he had told her she was likely to have to go on PAYE, and should take steps to regularise her tax. The respondent cannot have understood, even taken with her earlier conversation with Mr Cathcart, that it was being alleged they were in breach of an obligation to deduct tax from her payments, and set up a PAYE scheme, though that is what PWC was investigating on his behalf. At that stage the claimant had not said it was a term of her contract that her pay figure was net of tax. All she had done was add her name to the staff list. We conclude this disclosure does not disclose information or make any allegation. It is not protected.

53. The PWC advice to the respondent on the claimant's status appears in a letter they sent to Mayed al-Qasimi, the respondent's son liaising in the issue, on 25 March 2014, saying how they proposed to deal with "any self-employment issues". PWC recorded: "You have advised us that you took your own advice which indicates that Tracy is self-employed". PWC said HMRC would look at all the circumstances, not just the contract, but he (Mayed) had advised PWC "that you are comfortable that Tracy is self-employed", and PWC would proceed on that basis, especially as HMRC were not currently looking at sub-contractors or self-employed people, but if they did, this was:

> "a difficult area of negotiation. There is a risk that HMRC will view the amounts paid as amounts to an employee and the risk is heightened given that no tax is bring paid in the UK on these amounts".

Reading between the lines, PWC's advice was that the claimant was employed, and the respondent did not accept that advice.

54. The staff list prepared by the claimant in early February shows 12 drivers, 10 of them employed in UAE, paid there, and receiving accommodation and pocket money in the UK, and on call 24/7; there is one driver paid by the hour as required, and another non-UAE paid £2,500 per month. Then there are 21 maids, of whom 17 are paid from UAE on the same terms as UAE drivers, and four more paid £12 per hour as required. The evidence is that the hourly paid staff received cash on the day. Finally, there are 7 cooks, 6 on UAE terms and one paid £250 per week. The UAE staff were said to rotate from UAE (one of the claimant's duties was to meet them at Heathrow and see them through immigration). PAYE deductions concerned the local staff only.

55. Later in February 2014 the respondent recruited a London based driver, Robert Ambersky, and he had a contract of employment with Hamad al-Qasimi, the respondent's son. Deductions for tax were taken from his wage, but he did not get a pay slip. The claimant took up his case on 31 March with Mayed al-Qasimi, saying:

> "I have been asked by Robert, for a second time regarding perceived discrepancies in his wages, and regarding the delay in the establishment of the PAYE scheme, to which he has already expressed he feels quite uncomfortable. Do you have any news on the progress on the scheme, so if he asks I can update him?"

Meanwhile she had told the driver she understood PWC were setting up a PAYE scheme and while it was being established, it was early days. We know that Robert Ambersky left at the end of May, protesting that money was being

deducted for tax but not paid to HMRC. The respondent returned the money to him when he left.

Second Disclosure

56. At this stage the claimant took advice from a Mr. Stefan Kitching who had some knowledge of tax, though we do not know his qualifications. He prepared a letter dated 19 May 2014, noting she had been told by Peter Cathcart "in recent days" that "the family will not put you on PAYE, neither ongoing, nor retrospectively", and: "You have evidenced manipulation of the tax system certainly to avoid PAYE dues if not actually to evade them, by obfuscating lists of employees into 'ad hoc' categories and overriding competent accountants' input in your case"; he referred to an abrupt change in her job specification commensurate with the reversion of her role to one of performing "inconsequential miscellaneous services, the better, you believe, to pass you off hours, and you to pass muster as a self employed operative. Such matters are a very disturbing development in the way this cookie is crumbling". There are six more pages setting out why she was an employee, and that in the matter of the written contract, she had been led by the nose by Peter Cathcart, as the contract did not say she was self-employed. While her role was now being altered to look like self-employment, "others can be called ad hoc employees, and PWC will never know the half of it. No names, no lists, no obligations, more cash". He advised her to see a tax lawyer.

57. Making the second protected disclosure, the claimant sent this to Peter Cathcart with an email on 2 June, and said,:

> "I do not believe that I have ever been self-employed much as you would now have it so, and I do hope that there is an easier way through the situation and presently seems possible. I am now seeking reassurance, for my own personal situation, that I will be put on a PAYE scheme with immediate effect, and that the historical position will be made good by my employer as required by law. The situation is not acceptable as it stands, and asking you to please put it right".

The claimant's case is that she believed there was breach of the obligation to deduct tax under PAYE, both in her own case, and for others, and that she was asserting there was "manipulation of lists" showing who was employed and on what terms, so as to avoid having to register with HMRC as an employer and operate PAYE.

58. In our finding this is a disclosure qualifying for protection. The information is that the respondent is avoiding setting up PAYE by altering terms of employment, or more underhand means. This is a breach of legal obligation if the respondent employed staff. It is in the public interest that people pay tax and national insurance, otherwise public services could not be provided. In our finding the claimant believed this was happening: she knew in January it was thought that PWC were going to recommend she went on PAYE, but she had not been so treated, and she knew there had been a PAYE issue with Robert Ambersky. There is also an email to her from the respondent of 8 May requiring her to attend the house once a month to present petty cash accounts, but otherwise to communicate only by phone and email. We understand this is the distancing referred to, as the claimant does not otherwise say what changes

were made to her duties in this period. Without making a finding about whether there was tax evasion, we hold her belief was reasonable, meaning there were objective grounds on which she could hold it. In **Babula v Waltham Forest** an employee could be wrong on whether there was a breach, but succeed if there were reasonable grounds for the belief.

59. In reply to the Stefan Kitching advice the claimant had sent, the respondent's employment lawyers wrote to her on 1 July. Summarising 5 pages, they stated the arrangement was one of self-employment. More particularly, it said that until her email 2 June, she had never disputed that the contract was self-employment, and added that Peter Cathcart had been "horrified" to learn that she had not been paying tax. She was asked to "reconsider your position and account for the tax due on your earnings". If she did not confirm she had done so within 7 days they would take the initiative. In the meantime,

> "going forward, further payments will be made less deduction of the sum equivalent to the tax and National Insurance that you would pay to HMRC as a self-employed individual, which would be placed in a separate account, so "that situation is not compounded".

This is what happened, from then until the end of the contract in 2017.

Third Disclosure

60. The third disclosure is a letter of 9 July from the claimant's tax advisers, Controlled Tax Management Ltd (CTM). It is a reply to the solicitors' letter of 1 July, and in 17 pages with six appendices, conducts a legal analysis to argue that the claimant was and had always been an employee, further, that the written contract was not evidence of the real agreement. At paragraph 28 it is stated:

> "the contract is capable of only one reading. Ms Robinson was told she would be an employee from the outset. It would therefore be absolutely reasonable for her to expect tax will be paid by HH and that the money received would be her net pay".

61. In the context of our finding as to the agreed terms of 2007, we note the letter does *not* say that the claimant remembered a conversation in March 2007 promising her PAYE would be dealt with later, nor that she was told the payment would be net, nor does it address the instruction to pay her own tax. It is a construction of the text of the letter. Nor is there mention of how others were treated, nor is it said that there had been deliberate tax avoidance or manipulation to avoid PAYE. However, in our view it can be read as a disclosure of information tending to show breach of legal obligation to make PAYE deductions when read in the light of other disclosures, though on its own, it is just part of a debate as to whether she was or was not, in law, an employee. Importantly, it is the first time the claimant was explicit that the respondent should pay her tax *in addition to* £37,000 per annum.

Reference to HMRC

62. At this point, on 18 July 2014, the respondent's solicitors wrote, on his instructions, to HMRC. It was stated that the claimant had been engaged under

a contract for services and enclosed a copy. He had recently learned the claimant had not paid tax, and she had been urged to report her position. The respondent had now learned that she had not reported her position, and now disputed her employment status. He had therefore asked them to bring the matter to their attention, and:

> "in the interim, he is withholding from payments made to Ms Robinson the amount he believes she would be liable to pay by way of income tax and national insurance contributions on a self-employed basis. Such payments will be paid into a separate account on his return to the UK following Ramadan."

63. HMRC replied on September 2014, noting they had not been asked for an opinion on whether she was employee or self-employed, but if an opinion was sought, they would need answers to four questions, which were set out. The respondent did not reply.

64. The claimant's tax advisers, CTM, wrote to HMRC on 23 October 2014 "on the matter of an alleged non-payment of PAYE and NIC by Ms Robinson", enclosing correspondence between the claimant and respondent about whether she was or was not an employee, and asking for an officer to be assigned "so that we are able to remedy the situation as soon as possible".

65. After being supplied with further information (but not all the attachments to the letter of 19 May 2104), HMRC told CTM on 1 May 2015 that applying their tests for personal service, control, financial risk, ability to profit by good management, responsibility for other staff, and other status indicators, they concluded that she was engaged under a contract of service and an employee.

Fourth Disclosure

66. The fourth protected disclosure came on 13 October 2015 when the claimant emailed Peter Cathcart attaching: (1) the HMRC opinion of 1 May 2015 and (2) her grievance letter of 13 October. Judging by the style, some of this letter may have been drafted by Mr. Kitching, but the claimant adopts it as her own.

67. It began:

> "as you know, from early 2007 with the family's children, the nature of my employment was that a full-time PA. I was on various occasions assured that my tax status would be regularised as soon as his Highness arrived permanently in the country, and I always understood that a net amount would be paid monthly into my bank account, which it was"

This is the first mention we can find that the claimant said she had been assured that her tax status would be regularised at a later date. It does not state she was *told* the amount she received was net).

68. She then related the history of investigation of employee status, and referred to the February 2014 list when she put her own name top of the list of employees who needed to go on the scheme, adding:

> "there have been many more that have come and gone which I have added to this list. I had demanded, however, and everyone including myself was designated as "ad hoc", irrespective of PwC's recommendations. I never suspected status was about to manipulated to my disadvantage".

She had approached HMRC direct; they had concluded she was an employee. She proposed that to regularise her situation she should get a written statement of particulars of employment pursuant to section 1 of the employment rights act 1996, an itemised page statement pursuant to section 8 March 27 to date, to include on PAYE returns, to stop unlawful deductions from her salary each month as have been happening since July 2014.

69. In our finding this discloses information showing a breach of legal obligation (her own statutory rights as an employee) but more particularly, that there had been "manipulation" to represent her – and others -as self employed when she was not. We find she had a genuine belief in the manipulation, for the same reasons as before, and even if there was in fact no illegality, it was reasonable - she had grounds for her belief. There had been an additional query from a cook in June 2015 about deductions being made from pay without a pay slip.

Fifth Disclosure

70. No change occurred. Nine months later, on 21 July 2016, the claimant wrote to the respondent and his wife direct, in what is the fifth disclosure. She began by saying that it was a delicate matter, but it concerned her tax status, past and present. She went on:

> "as you know, at the very outset of my employment with you, Peter Cathcart employed me on a part-time basis with no particular hours, but with an understanding whilst initial job description continued that I would pay my own tax. That initial job description lasted no more than 3 months by which time I found myself working full-time for the family, and my tax status slipped being self-employed to employed. The implications of a change of employment status would never addressed. The nature of my work became specific to employee status; PC discussed remuneration it always had the implication employment status. Thus he spoke a salary not fees, expenses not charges, mileage not travel. I have paid annual leave (only by your approval) plus sick pay. I was less worldly in matters of employment status than PC and when he spoke of salary I presumed I was employed, and that my tax position like the other staff would be regularised renew (his Highness) sorted out his UK tax affairs".

71. She moved on to the PwC investigation and the list she had submitted.

> "It is merely seems to happen (e.g. when new drivers joined your employment and asked about PAYE (always having good faith that it would be sorted out along with that of the other staff, so I drifted along, but somehow it never did".

We comment that the claimant asserts initial self employment which slips

into employment – a new case – and does not say she was *told* affairs would be regularized later, only that she *assumed* they would.

72. She then moved back in time to refer to the January 2014 conversation with Peter Cathcart. She says that at that time she had believed she was employed. By October 2015 she had taken advice at great expense, and sent it to Peter Cathcart, with the result that he "suggested reducing the time I spent in my role with less control over me to the extent I could be considered ad hoc". (It is not clear when she meant this occurred). The deduction for pay from July 2014, "as though it was tax", "felt like a dagger in my heart". Her employment lawyer "has pushed me through ACAS and obtained the necessary certificate to involve the tribunal". The respondent's solicitor had informed her she was no longer required and was seeking a settlement proposal. She did not want to go to a tribunal. She understood from a conversation with respondent's wife that they continued to be happy with the work as she would otherwise have been informed. She would like respondent to have BP Collins regularise the contract, and PwC put her on a PAYE scheme.

73. In our finding this is a disclosure of information about her own contract status, and about the need to be placed on PAYE. It suggests manipulation of her own role to make her seem "ad hoc", with the implication this will avoid having to pay PAYE, and makes some reference to others. In the context of earlier disclosures it can be read as a belief in wrongdoing, but couched carefully, given she was writing to someone who expected to be treated with deference. We hold that it is a protected disclosure. She believed there was wrongdoing, in the respondent's reluctance to set up PAYE payments for staff, though we recognize that the driver for all this was worry that if not employed on a net salary payment she had a large tax bill looming.

74. The letter could be ready as an invitation to negotiate, and on the claimant's evidence there were some discussion with Mayed, who wanted her to sign a contract for services, and suggested his parents might contribute to her tax bill.

Sixth Disclosure

75. The sixth protected disclosure is a letter of 23 January 2017 from the claimant's solicitors, Geofrrey Leaver LLP, to the respondent's new employment solicitors, Neumans LLP. It refers to a meeting between the parties on 11 January 2017, and that the claimant had been asked to prepare a contract for services. It was suggested, in case it was new to them, they should be aware of the previous correspondence, so they sent copies of the HMRC letter of 1 May 2015, saying she was an employee, and the claimant's letter to Peter Cathcart of 13 October 2015, and to the respondent on 21 July 2016, and said: "the purpose of the letter is to repeat the previous demands that our client has made for HH to comply with statutory rights. To date none of them are being complied with. Your request for our client to produce a self-employed contract for services indicates a complete lack of willingness by HH to acknowledge her employment status and comply with the statutory rights".

76. This disclosure has embedded in it earlier disclosures we have found protected, and so is itself protected.

77. BP Collins, now re-instructed by the respondent in employment matters, replied on 23 March 2017 pointing out that the claimant now accepted her relationship had started as self-employment, that she had been paid in accordance with the contract, she was not asserting that when her relationship slipped after 3 months, she had a salary increase to £48,000 (the equivalent of £30,000 grossed up for tax); the respondent was not resident in the UK in 2007, and it was her responsibility to account for tax. From July 2014 money had been set aside for tax liabilities, whether employed or self-employed, so the dispute was about the period before June 2014. Even if the respondent should have deducted tax and National Insurance, the claimant was ultimately liable, and the respondent had a right of restitution against her if HMRC made a claim against him. Whatever the rights and wrongs of her status, she had: "significant unpaid tax and national insurance obligations that must ultimately be met by her". He was in an invidious position: she asserted the deductions were unlawful, if he continued to make them, but if he stopped, and the claimant did not account for tax, he was committing a criminal offence by being party to a fraud on the Revenue.

> "In the circumstances, he will have no option but to terminate your client's contract unless she agrees to account for tax due on the payments made to her".

78. The letter went on to make an assertion that her duties were not as extensive as had been thought, as had been discovered when Mayed took over some of the tasks recently, and "while your client will undoubtedly claim this is reflective of the deliberate policy to sideline her, the reality is that as our clients children have grown up (and in some cases married in the way) your client's role has just has diminished". Examples were given. Therefore even if the respondent was not obliged to terminate her clients contract on grounds of illegality, in continuing to engage her, her role was no longer required and alternatively, she had been fraudulently claiming petrol expenses. (This is because it seems she was claiming a standard £200 per month for small journeys, and only claiming exact mileage for specific trips in addition).

Seventh Disclosure

79. The claimant's seventh, and final, disclosure is a short reply to this from her new (and current) solicitor, Jacqueline McGuigan of TMP, dated 28 March 2017. She disagreed, and said her provisional view was the claimant was either an employee or worker, and she would demonstrate this when she had read all the documents. She had not seen evidence of illegality on the part of the claimant, and even if she had mis-labelled her employment status, there was no evidence of fraud. On 24 April she emailed to say she was working on the matter and would be in touch. She did not write again before the claimant was dismissed on 19 May.

80. If read as a continuation of the correspondence about manipulation of employee information to avoid a PAYE system, it is protected; insofar as it is about the respondent failing to put her on PAYE and pay tax, it is capable of being in the public interest, though we do not believe that when the claimant asserted she was an employee who wage was £37,000 net of tax she believed this was in the public interest.

Dismissal

81. Having heard no more following the dismissal warning on 23 March if the claimant did not agree to account for tax due on the respondent's payments to her, on 19 May 2017 the respondent dismissed the claimant by letter.

82. It said she had been warned on 23 March that there was no option but to terminate the contract unless she agreed to account for the tax due. Action had been delayed pending a response from her new solicitor, but he had not heard anything.

> "As set out in my solicitor's letter of 23 March 2017, I cannot continue to allow you to work for me while you are failing to account for the tax due on earnings. I have delayed taking action for some 3 years in the hope that you will sort out the situation, but you have failed to do so".

He went on to say it had become clearer the last few months that her responsibilities had diminished since the children had grown up so that they no longer required someone to carry out her role. She had also disparaged Mayed to one of the tenants in an entirely unacceptable way. They were not investigating expense claims but:

> "if you felt that they were some form of extra salary (an assertion I do not accept) they too are liable to tax".

In the circumstances he had no alternative but to terminate the contract with immediate effect and she was asked to return the belongings and personal information. As for money deducted in relation to tax payable "we will release these to HMRC we receive your instructions to do so", but not to her personally given her reluctance to accept liability for tax and national insurance.

83. Disparaging Mayed is a reference to an email the claimant had recently sent sent to a tenant who had been expecting a curtain to be repaired. She told him it had all been set up, but "unbeknown to me Mayed (landlord's son) decided to handle it himself and countermanded at short notice the arrangements made", and she had not known that. She was deeply embarrassed. He should take it up with Mayed. We understood how any employer might take badly the disloyalty of exposing internal disagreement to a client or customer.

84. The respondent was questioned on his real reasons for dismissal. He said it was not really about her duties diminishing, or about travel expenses being overclaimed, or about the comment about Mayed. He said it was about her trying to pass her tax bill on to him, and sidestep it, perhaps for ever:

> "she is after us to pay her tax".

He referred to being met by the claimant at Heathrow when she tried to raise her status and tax, and his wife took her aside and said if she just sorted out her tax she could come back and work for them. This episode is undated and

features in neither side's witness statements. We are satisfied the claimant wanting him to pay her tax bill from 2007, whether on a grossed-up salary for the whole ten years, or on the actual salary, paid gross, for seven years, is the real reason for dismissal. Through his lawyers, he understood he was in cleft stick as regards taking action himself on tax deductions.

85. A reason is a set of facts or beliefs known to the respondent. Section 103A of the Employment Rights Act provides for automatically unfair dismissal if the reason or if more than one the sole or principal reason, was a protected disclosure. Was any of the protected disclosures the sole or principal reason for the dismissal?

86. The disclosures, taken as a group, covered two topics: firstly, putting her on PAYE, and secondly **s**uggesting deliberate avoidance of PAYE responsibilities by manipulating lists of employees and altering their duties to make it appear that they were employed rather than self-employed. The first area is close to the reason for dismissal, her failure to pay tax whether self-employed or employed for 2007-2014. Can they be distinguished? We reviewed the discussion in the caselaw about taking care not to diminish statutory protection for whistleblowers by accepting arguments about there being a different reason, such as **Aziz v Trinity Street Taxis, (1988) ICR 534, Bolton School,v Evans (2017) IRLR 140, Martiin v Devonshires (2011) ICR 352** (approved though itself a victimisation case) , **Panyiotou v Hampshire Police (2014) IRLR 500, Woodhouse v North West Homes Ltd (2013) IRLR 773** and **Parsons v Airplus International Ltd (2017) UKEAT/0111/17**. We noted that the disclosures went back to 2014, three years before dismissal. There had been long intervals - months, nearly years, when she carried on as normal and without comeback, when if the respondent objected to suggestions from someone in a position of trust that he was deliberately manipulating evidence of status, he might be expected to have acted earlier. Matters may have intensified when she approached him direct, in writing and then face to face, but any difficulty however about lack of deference, or being suspicious of her (and everyone else) not being careful of his money, was well in evidence before any disclosure. We also noted that in raising PAYE at all, she was following on something the respondent or his advisers had already initiated from 2011. Her disclosures were nothing new and do not appear to have changed anything with respect to investigation or the risk HMRC would find he should make PAYE deductions. It was the respondent who approached HMRC, not the claimant.

87. On the face of it she was dismissed because the respondent did not want to agree she was an employee and that PAYE applied. In reality we think the dispute, and the reason for dismissal, was not about whether she should be on PAYE currently, but about who should pay her tax for 2007-2014, which was really a dispute whether her agreed term was for £34,000 gross or net. If an employee back to 2007, the respondent might have to pay the tax, and though he could then recover from her, it might take some time and be very difficult. They had retained sums from 2014 to cover the bulk of the liability. To that extent, the only disclosures causing dismissal was either her telling the respondent through Peter Cathcart in January 2014 she had not paid tax, for which she does not claim protection, or the assertion that in reality, (whatever the contract said) she was entitled to believe the respondent was paying her net. The essential dispute was not whether she was an employee,

but whether her gross pay was £34,000 or around £45,000. That particular point was not, in our view, a matter of public interest. She was not dismissed because of any protected disclosure.

88. For the same reasoning we do not find she was dismissed for asserting a statutory right to payslips, statutory particulars of employment, or being on PAYE, where the test under section 104 is whether it was the reason, or if more than one, principal reason. She was dismissed for asserting the respondent should pay tax over and above £34,000 (later £37,000) per annum.

Detriment for Protected Disclosures

89. We must consider the detriments pleaded as occurring because she had made protected disclosures. The test – **NHS Manchester v Fecitt (2012) ICR 372** -is whether they were materially influenced by disclosures, rather than sole or principal reason.

90. The detriments are:

(1) On 14 February 2014 Mayed told the claimant his parents they thought she was a thief because she had not paid her tax. This followed the first disclosure, but on our finding it had disclosed no information. In any case it seems to have been prompted by Pater Cathcart reporting she had paid no tax, rather than her asking to see PWC about her position.

(2) On 23 March 2017, the respondent's solicitor asserting she committed fraud on the Revenue. This is the letter warning her of dismissal, which speaks of an apparent fraud on the Revenue. In our view, this is a reference to the claimant saying in January 2014 she had not paid tax from 2007 onward. It is not a detriment but a statement of the respondent's view, on advice. It was about what the claimant said on 30 January to Peter Cathcart. Even if it was a detriment, it was not materially influenced by the claimant making disclosures, but by the earlier discovery that she had not paid tax on any basis.

(3) It is said her duties were removed, by removing authority for petty cash, sending all expenses to Mayed instead, by passing responsibility for cars to Mayed or a company, by ceasing to meet the family in the Heathrow VIP suite when they arrived, and by handing accommodation duties to an agency or Mayed. We have combed the witness statements for detail of when or why these occurred. We can find the email of 8 May 2014 to the claimant requiring her to get prior approval for all contracts before payment, but this predated the first disclosure we have found to be protected, and there is no further mention of accounts. The claimant says her last VIP duty was in September 2016 when she approached the respondent direct about her position. We know that preceded a hospital stay, we do not know for how long. The respondent's solicitor mentioned Mayed being asked to take over duties in November/December 2016, in connection with the duties changing because the children were growing up. Was this detriment? It is an employer's right to decide what an employee does. She was still paid. She must however have felt mistrusted and excluded. Was it materially influenced by making protected

disclosures? Part was, we accept, that the sons were now in their thirties and were being asked to assume responsibility, while the youngest child had left school some years before. Part was however that the respondent was unhappy (his wife's comment at the airport that she just had to pay her tax) that he was expected by the claimant to pay her substantial tax bill on the basis that she was to be paid net, which in our view was not a matter of public interest. The detriment was not because of protected disclosures.

(4) The claimant says she was sidelined by being cut out of normal communication with contractors "since the disclosures". We do not otherwise know when this occurred, and we know she was still dealing with a tenant in May 2017. Otherwise, we know that in October 2014, four months after the third disclosure and a year before the next one, she was told to speak to Hamad rather than his parents direct. It is hard to see this on its own as detriment when she continued to meet them on VIP duties, and an employer is in our view entitled to alter reporting lines, which is all it appears to be.

(5) The final detriment alleged is that the respondent made unlawful deductions from salary from 1 July 2014. This is a detriment if she is not an employee (though at the time the claimant said she was). It can also be a detriment if the money is not paid to HMRC but retained for the employer's own purpose; it was held in a special account dedicated to the tax equivalent deductions from her salary; the bank statements show around £28,000 in total. As tax had to be paid on £34,000, whether employed or self-employed, it is hard to see this as detriment. It is only so if the term was to pay £34,000 *net,* and we have found this was not the case. As to causation, the prompt for action was the claimant's disclosure of Mr. Kitching's opinion, but the reason for it was not to appear to be colluding in her failure to declare any tax, going back to 2007, not because she raised a matter of public interest.

Unfair Dismissal

91. We consider the claim for unfair dismissal. Under section 98 of the Employment Rights Act, there are potentially fair reasons for dismissal. They include at (2) (d):

> "the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment".

We understand the respondent's reason to fall into this category, the duty imposed under an enactment being that of paying tax on earnings, whether as an employed or as a self-employed person, and if employed under a contract of service, under PAYE. If we are wrong, we would find this was some other substantial reason justifying dismissal, that the respondent was at risk of participating in a fraud on the Revenue if he did not deduct her tax when she said she was an employee. Was this a sufficient reason to dismiss? We have found she was an employee. He did not agree and would deduct tax under PAYE for that reason, though from 2014 when he learned she was not paying tax he made deductions. Ig that was the reason it would have been unfair,

because she was an employee and should have been on PAYE. However, the reason was not being on PAYE, but the term as to remuneration (£37,000 plus tax, not before tax, a substantial difference), and that the respondent should pay that going back to 2007. It was not unfair to dismiss because there was deadlock over that, so that in her view he could not make lawful deductions from £37,000.

92. Under section 98(4) the tribunal must consider whether the respondent acted fairly or unfairly in treating this as sufficient reason to dismiss, having regard to size and administrative resources of the employer's undertaking, and to equity and the substantial merits of the case. A body of case law indicates that fair employers warn employees, so they have an opportunity to put matters right, investigate wrongdoing, give the employee a chance to be heard, usually at a meeting, and then consider whether any other course of action can be taken. On the face of it, the respondent had sufficient resources to hold a meeting, for example with Mayed, or Hamad, or Peter Cathcart, for example. The claimant had a warning, but after so many months and years of exchange of letters between advisers, it is possible she may not have appreciated she really had reached the end of the road, from the respondent's point of view. Nor was she offered an appeal, to put right any errors, there having been no meeting by 19 May. To that extent, the dismissal was unfair.

93. However, we can see no reason to think claimant would have said anything at that meeting that would have made any difference to the decision. The issue had been gone over with different advisers for a long time, and she had not reviewed her stance even after a warning some weeks earlier. She would not have agreed to pay her tax or register with HMRC. She would have continued to maintain that it was a term of the contract that her remuneration was £34,000 (now £37,000) per annum *plus* tax and national insurance, not before deductions. At best she may have remained in employment another month or so while there was a meeting.

Illegality

94. At this point, having made decisions on the claims in any event, we must consider the illegality argument. If there was illegality she cannot claim in contract, which will include the claims of unfair dismissal, wrongful dismissal, and unlawful deductions from wages. If there is illegality, they must fail.

95. The respondent has defended the claim on grounds of illegality – stated as "no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act" - Lord Mansfield in **Holman v Johnson 1775**. As a matter of public policy, the court will not assist him. As this has developed in contract claims: "a contract may be prohibited by a statute, or it may be entered into for an illegal or immoral purpose, which may be that of one or both parties, or performance according to its terms may involve the commission of an offence, or it may be intended by one or both parties to be performed in a way which will involve the commission of an offence" - **Patel v Mirza (2017) AC 467**, though that is not a case about contract.

96. In employment cases, illegality in making or performing the contract usually arises through not paying tax, or a worker lacking immigration status. In **Newland v Simons and Willer (Hairdressers) Ltd (1981**) **IRLR 359** an

employee was paid net, without being given the annual P60 certificate of tax deductions, and the issue was whether the employee knew or should have known that the Revenue was being defrauded. If she did not, she could enforce the contract of employment. In **Hall v Woolston Hall Leisure Ltd (2000) IRLR 578** a claimant had knowingly turned a blind eye to tax not being deducted from her earnings. Her claim of sex discrimination succeeded however because it was based not in contract but (statutory) tort, to be read to conform with the EU Equal Treatment Directive, and she did not need to rely on the contract to claim, but the judgment doubted that the strict approach outlined in **Hall** was right – it was said there must be some "active participation" in the deception to bar an employee from enforcing the contract. **Enfield Technical Services Ltd v Payne (2008) RLR 500** was a case where the illegality was that the claimant was treated by both as a self-employed subcontractor, though later the Tribunal held him to be an employee; a related case (**Grace**) involved a change in status and how that affected continuity of employment. While self-employed they paid tax on that basis. The Court of Appeal noted that "a decision as to whether a relationship is one of employment or the person performing the services is self-employed will often be very difficult...Predictions as to the side of the line on which a particular relationship will be held to fall are notoriously difficult to make". A genuine claim (to be self-employed) "unaccompanied by false representations as to the work being done or the basis on which payment is being made" does not necessarily amount to illegal performance of a contract of employment.

97. In **Quashie v Stringfellows UKEAT/0289/11** the EAT considered findings that a claimant who had declared earnings as self-employed, and then brought a claim on the basis that she was in fact employed, was not barred by illegality in performance of the contract, and observed that "the battleground over which this allegation was fought was the claimant's relationship with the Revenue" - she had reported that taxable salary was non-taxable expenses. The EAT rejected an argument that how the claimant declared her earnings to the Revenue had nothing to do with the respondent or performance of the contract. It was held that this case fitted the public policy considerations of Lord Mansfield's dictum:

> "The claimant who seeks the protection of the Employment Tribunal in the enforcement of her rights against the Respondent should pay the taxes properly due upon the earnings which themselves support the administration of the tribunal system. If she is not paying her way, why should she be entitled to free access to the administration of justice?"

She had knowingly made false returns (understating her income and overstating her expenses), it was not a small error, and they were capable of making the contract illegal in performance and so not to be enforced (with this guidance, the issue was remitted back to the Tribunal, along with employment status).

98. Applying this law to the circumstances of this case, while the claimant submits that the illegality is the initial arrangement to treat her as self-employed and require her to pay the tax, our view is that the illegality is that she did not declare and pay any tax at all, whether as employed or self-employed. This is not a contract illegal from its inception, but in performance. It is not a case where the parties sought to avoid paying tax altogether by arranging a net payment, or

representing deductions were being made when they were not. The contract states plainly that it was for the claimant to pay tax on the "management fee". **Autoclenz** discusses where a tribunal can go behind the contract as written, but this was not a case of a worker facing a large employer with "armies of lawyers", but a small employer (looking at the number of people working for him and his family in the UK, though his resources were not small)) with one lawyer, and a lawyer whom the claimant found sufficiently approachable to be able to ask for a pay rise, and to raise difficulties in the relationship with the respondent. She could have had no difficulty asking why she was to pay the tax, not have it withheld, as employers do, or how she should go about it. There is no reason to find that the written contract did not accurately state the agreement as to pay, that it was, as is usual in employment, stated gross.

99. For seven years she did not declare any tax at all. It is argued on her behalf that she did not misrepresent the position to HMRC, but there were no representations to misrepresent. Even if it could be argued she was in doubt from 2011, when the employment status of the respondent's staff was coming under scrutiny, there was still four years when she did nothing, and another three when she did not query her own position. We do not accept she was told the tax would be sorted out when the respondent came to live in the UK. There is no evidence from Scott Fishbeck, who ceased to work for the respondent in 2011 and with whom the claimant is still in touch, and Mr. Cathcart denies it. It is hard to see how this could have been said in 2007, when the respondent did not anticipate coming to live in the UK. When there was a conversation about tax in 2014, restated to her in writing that year and later, she did *not* assert there had been an agreement to pay net with a promise to set up PAYE deductions later, and despite the issue running from then on, did not say so until much later, and even then said only that she *assumed* pay was net of deductions, not that she was told so, contrary to the written agreement. The assertion that the £34,000 was to be a net payment is based on the claimant understanding that there would be a gross figure from which deductions would be made. (On our calculation, that would have been about £46,000, allowing personal allowance in 2007/8 of around £5,000, basic rate tax at 22% and 8% NI, though a small proportion would have put her in a higher rate band for a small slice of this income). We have already given reasons why someone who had been employed all her life could not have believed for so long that tax was being paid for her.

100. We concluded that the contract was illegal in performance, because the claimant was paying no tax, and this was not because the respondent had represented to her that they were making deductions for tax, nor because they colluded to avoid tax being paid. If it is argued that the respondent misled her as to her employment status, we would be inclined to follow **Enfield v Payne** as to such cases being hard to call with accuracy, given that her predecessor had operated the same arrangement, (and is said by Mr Cathcart to have had other clients), but in any case, it was not the case that Mr. Payne failed to pay tax at all when "self-employed", only that he and Mr Grace paid tax on a self-employed basis. The respondent having said the claimant was to pay the tax, the claimant should have known someone had to be paying tax, and if she genuinely believed the respondent should pay, she should have said so when she got the letter of engagement, or she should have queried it when she never received a pay slip showing deductions, or any annual P60 certificate.

101. We considered whether the position was altered by the respondent's actions when the tax position came to light in 2014, or in 2015, when HMRC stated she was an employee. They began to make deductions equivalent to tax, but did not pay anything to HMRC, instead holding the money to order to pay HMRC, as they did, for a much shorter period, for Robert Ambersky. The claimant has submitted that the respondent "has committed and sustained employment law breaches", by paying cash to staff not paid from UAE, and displaying a "stubborn to regularize the tax position for the staff that worked for him locally".

102. We do not have the benefit of expert guidance on the tax position, but our understanding of it is this. Income from employment or self-employment must be declared for income tax. The self-employed benefit from a more generous treatment of the expenses of earning income, and those who set up service companies can also benefit by drawing salary to the limit of the tax-free personal allowance and taking the rest as dividend income, taxed at a lower rate. The liability to declare and pay is that of the taxpayer. Those who are employed under a *contract of service* (ITEPA 2003, section 4) are also subject to the PAYE scheme, set up during the Second World War to ensure more efficient collection of taxes, which requires employers to withhold tax and national insurance, and pay it direct to HMRC. Our understanding is that the money remains the employee's, as if too much is deducted in any tax year, the employee can claim a refund, and if too little, he must pay the extra himself (There are provisions to adjust tax codes to collect or pay the over or underpayments from ongoing salary, but the responsibility for paying is the employee's).

103. The position is complicated by the fact that worker status (with the accompanying rights to claim unlawful deductions in employment tribunals rather than the courts, and holiday pay) does not feature in tax law, and the tax regime and employment rights are not always aligned. If the Tribunal had held the claimant was a worker, under a contract for services, rather than an employee, under a contract of service, our understanding is that the respondent would not have been required to make deductions under PAYE, and the claimant would have had to complete a self-assessment tax return and pay tax to HMRC direct. Since the recent lead cases on worker status, the government Office of Tax Simplification has suggested there should be a facility for PAYE to save workers the administrative burden of filing a tax return, (and no doubt there might be a benefit to the state in the increase in tax receipts) but it is not (yet) law.

104. We had some concern that the respondent, when advised the claimant was an employee, did not set up a PAYE scheme for her or other local staff, nor pay the money to HMRC. We do not know whether this was because of genuine legal uncertainty, or fear the respondent may become liable for tax payments for 2007-2014 when they believed the claimant was accounting for tax; we have no evidence on the point. We recognise that the reluctance *may* have been a reluctance to pay tax, and with it employer national insurance contributions, now 12% of income, so a considerable payment over the gross salary, at all. This might make it unattractive to bar the claimant from claiming, but does not restore the claimant's access to the tribunal to enforce her employment contract, when she never declared her earnings, even on a self-employed basis. Any illegality there may have been in arrangements for deduction of tax

from staff wages on the part of the respondent does not cure the claimant's own failure to pay tax on any basis.

105. We conclude she cannot succeed in unfair dismissal as it relies on the contract.

Wrongful Dismissal

106. For the same reason the claim for notice pay fails. But for illegality, the respondent should have given her 10 weeks' notice, rather than dismissing with immediate effect. If they could not continue to employ her lawfully, they need not perhaps give her notice, but they had put up with this for a long time now, there was no reason why the position was suddenly worse, and notice would have right. Neither side submitted that the letter of 23 March was itself notice subject to a condition.

Statutory Particulars of Employment

107. The letter of 23 March 2007 contained all the matters required under sections 1 and 2 of the 1996 Act save that it did not state the respondent's address, and it did not say there was no pension scheme, nor whether there was any provision for sick pay. In all other respects it was compliant. A reference under section 11 does not include any award. Under section 30 of the Employment Act 2002 if there is a finding in the employee's favour on other relevant claims we must make an order of 2 week's pay. We have not found in her favour because of illegality, so there is no award. If we had, (1) this claim would be void for illegality as it relates to the contract of which the particulars of claim are evidence of terms, or (2) we would not have made an award because of section 30(5) – it would be inequitable to make an order when there had been substantial compliance by the respondent, and she failed to declare and pay tax on her earnings throughout the ten years she worked for the respondent.

Unlawful Deductions

108. Finally, the unlawful deductions claim. Under sections 13-23 of the Employment Rights Act 1996, if the claimant was a worker (under a contract for services) or self-employed, an employer could not lawfully make deductions without the claimant's prior written authority, which he did not have. If an employee -which the respondent did not accept, but acknowledged was possible - he was obliged to make deductions under PAYE and pay them to HMRC, which he did not, as he did not accept she was employed. The money is hers, though it may be due to HMRC. It should be returned to the claimant. By reason of illegality this claim too must fail.

109. In the courts, the claimant could bring a claim of quantum meruit or unjustified enrichment, for return of this money. The Tribunal cannot so order, our jurisdiction being statutory and limited to claims in contract under the Extension of Jurisdiction Order, or the wages provisions of the Employment Rights Act 1996. We have considered whether to make an order relying on the definition of wages in section 27 of the 1996 Act, on unlawful deductions, as "emolument referable to his employment, whether payable under his contract or otherwise", and whether we could make an order for the money to be paid

to her as payable “otherwise”. We have little guidance on this. The money was due under the contract, whether it was of employment or for services, and it appears artificial to determine it was due “otherwise”, unless that is for unjust enrichment. Counsel for the respondent has offered the Tribunal an alternative solution, by giving an undertaking, during final submissions, that the respondent would pay the retained sum to HMRC so that the respondent should not profit from any illegality. As we have held the claimant was an employee, rather than a worker, the money is due to HMRC for tax and national insurance. If we had not so held, it was still clear, given our finding on the term of remuneration, that she owed more than £28,000 in tax.

110. Consequently, we accept counsel’s undertaking. He did not specify when this would be done. We hold it was implicit this would be done in a reasonable time, which is 28 days from this judgment being sent to the parties.

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Employment Judge Goodman

Date 21 November 2018

JUDGMENT SENT TO THE PARTIES ON

26 November 2018

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FOR THE TRIBUNAL OFFICE