EMPLOYMENT TRIBUNALS

Claimant: **Carole Williams**

Respondent: **Hafod Care Organisation Ltd**

Heard at: Birmingham **On:** 17 & 18 April 2018
(and 19 April 2018 in chambers)

Before: Employment Judge Gilroy QC
Members: Mr N Forward and Mr C Dodds

Representation

Claimant: Mr D Godfrey (lay representative)
Respondent: Mr R Scuplak (consultant)

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. The Claimant's claim of unlawful deductions from wages contrary to s.13 of the Employment Rights Act 1996, "ERA", is well founded and is upheld.

2. The Claimant's claim in respect of holiday pay pursuant to Regulations 13 to 16 of the Working Time Regulations 1998, "WTR", is dismissed.

3. The Claimant's claim of detriment on the grounds of having made a protected disclosure, contrary to s.47B of the ERA, is well founded and is upheld.

4. There shall be a Remedy Hearing in respect of the claims upheld by the Tribunal, on a date to be fixed, in the absence of the parties reaching settlement in respect of those claims in advance of that hearing. In the event of settlement being reached, the parties shall notify the Tribunal of the same as soon as reasonably practicable.

REASONS

1. The Claimant was formerly employed by, and latterly a worker of, the Respondent. She made the following three claims:

Unlawful deductions

1.1. The Claimant claimed, in reliance on the National Minimum Wage Act 1998, ("NMWA"), the WTR, and the National Minimum Wage Regulations 1999, ("NMWR"), that she had suffered unlawful

deductions from her wages, contrary to s.13 of the ERA, in respect of time spent travelling between clients. The reference period in respect of this claim was from 18 November 2014 until 26 July 2016.

Holiday pay

1.2. The Claimant claimed that she had suffered unlawful deductions from her wages in respect of holiday pay. The reference period in respect of this claim was 13 August 2012 until 26 July 2016.

Public Interest Disclosure-related Detriment

1.3. The Claimant also alleged that she had suffered detriments contrary to s.47B of the ERA, on the grounds that she had made a protected disclosure in the form of a letter dated 22 July 2016, which she sent to the Respondent by e-mail on 24 July 2016, and that by reason of that disclosure she suffered detriments in the form of (a) the withdrawal of the offer of hours of work, and (b) the failure and/or refusal of the Respondent to provide the Claimant with alternative hours of work. In addition to s.47B of the ERA, the detriment claims were advanced under s.45A of the ERA (working time) and s.23 of the National Minimum Wage Act 1998, although the factual basis of each such claim was identical.

Evidence and Material before the Tribunal

2. The Tribunal was provided with an agreed bundle of documents **[R1]**, and a Schedule of Loss **[C1]**. At the conclusion of the evidence and for the purposes of giving submissions, both parties produced written skeleton arguments and the Claimant's representative provided copies of the following authorities: ***Whittlestone v BJP Home Support Limited (UK EAT/0128/13/BA)***, ***Chesterton Global Limited (trading As Chestertons)*** and ***Verman v Nurmohamed, Conley King v The Sash Window Workshop Limited (CJEUC-214/16)***, and ***South Yorkshire Fire & Rescue Service v Mansell & Others (UKEAT/0151/17/DM)***.

3. Oral evidence was given on behalf of the Respondent by Mrs Christine Hitchens (Community Care Manager) and Mrs Eleri Perry (Director). The Claimant also gave oral evidence. Statements were provided in respect of each of the three witnesses.

Findings of Fact

4. The Tribunal made the following Findings of Fact:

<u>The Claimant</u>

4.1. The Claimant was formerly employed by, and latterly a worker of, the Respondent. It appeared to be agreed between the parties that the Claimant is still "on the books" of the Respondent as a "bank" care worker, but the last time she provided services to the Respondent was in late July 2016 and for all intents and purposes she is a former worker of the Respondent. The Claimant was originally employed by

the Respondent, and converted to bank care worker status with effect from 13 August 2012.

The Respondent

4.2. The Respondent is a business concerned in the provision of care services for the elderly covering the care home and domiciliary sectors. The Respondent looks after 29 residents in its nursing home and 16 residents in its retirement home, both in Sutton Coldfield, Birmingham, and delivers approximately 500 hours of care per month to around 25 clients in their own homes in the North Birmingham area (both private and local authority funded clients).

Relevant background to the claims

4.3. By letter dated 13 August 2012, the Respondent offered the Claimant work as a bank care worker. The Claimant had requested to be placed onto the bank care worker list as this would provide her with greater flexibility to accept or decline work.

4.4. The Respondent's letter of 13 August 2012, from Mr Tony Perry, a Director, stated as follows:

"Dear Carole

I am pleased to confirm your inclusion on our Bank/Relief/Casual list. At this point in time, you are not employed by this Hafod Care Organisation Ltd., but from time to time, we will call upon you to work for us to cover short term requirements.

Should you accept work from us, you will be employed on each occasion on a fixed term basis for the duration of that period of work only. There will be no continuity or link with any other period of work with us.

You will accrue holiday entitlements pro rata to 5.6 working weeks per year for each assignment and should you wish to take holiday during any assignment, the standard rules and procedures which apply to our employees, and which are contained in our Employee Handbook should be followed. Similarly, you will be bound by the Rules and Policies of the Hafod Care Organisation Ltd., including those in the Employee Handbook".

Mr Perry concluded with the invitation that the Claimant acknowledge receipt of the letter by signing a proforma slip enclosed with it.

4.5. The Tribunal was provided with a copy of a proforma slip headed ***"BANK/RELIEF/CASUALSTAFF"***, upon which the worker's name was specified as *"Cal Williams"*. The document continued:

"I acknowledge receipt of your letter of 13.8.12 and I accept the conditions contained therein.

The document was signed by the Claimant and dated 22 August 2012. The Claimant maintained in evidence that she had signed the proforma slip but that the letter she was acknowledging receipt of was not the above letter. This was disputed by the Respondent. This issue is revisited below.

4.6. The section of the Respondent's Employee Handbook dealing with holidays contained the following*:*

"PLEASE NOTE THAT THE FOLLOWING CONDITIONS APPLY TO YOUR ANNUAL HOLIDAY ENTITLEMENT

You are not allowed to carry forward any part of one year's holiday entitlement to subsequent years. Any holiday pay not taken by the end of the year is forfeit".

No point was taken before the Tribunal that for all material purposes the Respondent was not the *employer* of the Claimant).

4.7. The Claimant acknowledged receipt of the Respondent's Employee Handbook on 10 February 2012.

4.8. The Respondent operates a "take it or lose it" policy on holidays. If employees/workers fail to take up their holidays during the course of any holiday year they cannot carry forward that entitlement to the next holiday year. The Claimant did not book any holidays until the 2016/2017 holiday year and all of her holiday entitlement.

4.9. Mrs Hitchens is responsible for the provision of community care, including the management of the care staff, and dealing with such matters as staff rotas and holidays and liaising with clients. She was the Claimant's line manager throughout the time that she worked for the Respondent. It is Mrs Hitchens' practice to leave it to members of staff to request holidays and to ensure that they take their full entitlement.

4.10. The Respondent's care services are provided as part of a contract for services with Birmingham City Council, based on visits by home carers of 30, 45 or 60 minutes duration. Home carers are paid from the start of their first visit until the end of their last visit. Shifts are allocated on the basis of a "run" (which is industry standard) and which comprise a number of calls to service users at their homes. The Claimant's run normally commenced in the morning and ended in the early afternoon. Visits are often shorter in length than the time allocated, and, accordingly, carers are able to use that time to travel to their next appointment. Carers complete timesheets. If they have worked additional hours or spent additional time travelling or spent additional working time for another reason related to delivering the contracted service, they are required to note that within the timesheet and provide reasons for the additional time spent in order that they can be paid for that time. If the time is not noted or reasons not provided within the timesheets, the time cannot/will not be paid. It was the Respondent's case that all care staff are told at induction and on a regular basis thereafter but if they exceed the allocated time and

wish to claim payment for it they have to claim it by putting an explanation in the comments box.

4.11. The Claimant's work normally involved being allocated a run of client visits, around 6 per day, involving either one or two visits to a particular client in a single day. While the client base was fairly steady and the Claimant maintained a good relationship with the clients, her working pattern did not change much. If the client base changed, with new clients being taken on or existing clients' circumstances changing, perhaps through changed care needs or clients no longer needing care perhaps because they entered a care home or died, or a client wanted a change in carer as sometimes happens and did happen in the Claimant's case, her working pattern might change for a while before stabilising again.

4.12. The Respondent's case was that the Claimant had been paid for all of her working time including her travelling time. The Claimant's case was that the Respondent had a practice of not paying for travelling time, but that petrol expenses were paid to her.

4.13. The Claimant only wanted to do double runs, not single runs. Single runs involve one carer visiting a client alone. Double runs involve two carers attending a client together. The run allocated to the Claimant therefore involved both the Claimant and a colleague. Latterly that colleague was Ms Gail McLanaghan. The Respondent only had two double runs, the rest being single runs. The other double run was undertaken by two other carers on a regular basis. Whenever the Claimant was asked to do the other double run, she used to complain because it was further from her home and she did not get on particularly well with the clients on that run compared to her normal run.

4.14. The timed rota the Claimant received every week showed the clients' times which sometimes ended at the same time as the next one started. The Claimant was expected to leave one job and be at the next at the same time even if the client lived 3 miles away (sometimes more, sometimes less).

4.15. The Claimant continued to work 16 hours or more per week as a bank care worker up to the weekend commencing on Saturday 23 July 2016. Between August 2012 and July 2016, she regularly took unpaid annual leave. She was not aware of her entitlement to paid annual leave. She maintained that she was regularly discouraged from taking leave and that leave taken would regularly result in shifts and hours being withdrawn. There is no need for the Tribunal to make a determination in respect of the latter issue.

4.16. In July 2016, the Claimant started looking into her legal position generally and formed the view that she should have been receiving holiday pay and payment for the time spent travelling between clients.

4.17. On Friday 22 July 2016, Mrs Hitchens completed the rota for the following week.

4.18. It was Mrs Hitchens' evidence that on Saturday 23 July 2016, she took a call from Mr Alan Daniels, who is himself elderly and lives with his very elderly mother. His mother was one of the clients who the Claimant would normally visit twice a day on her normal run. Mrs Hitchens told the Tribunal that Mr Daniels asked her to remove the Claimant from the care of his mother, stating that he was extremely unhappy with her and that his relationship with her had deteriorated to the extent that she was totally ignoring him during her visits to his mother. It was Mrs Hitchens' evidence that she decided that she could not simply ignore what Mr Daniels had told her and so she asked him to put the matter in writing, that he agreed to do so, and that she arranged with him to pick up his letter on Monday 25 July 2016.

4.19. At 3.52 pm on Sunday 24 July 2016, the Claimant sent a letter by e-mail to the Respondent's general admin e-mail address. The letter was dated 22 July 2016 and stated as follows:

"PRIVATE & CONFIDENTIAL

To whom it may concern,

After recently viewing some information on direct.gov.uk, I contacted ACAS for some advice regarding my holiday pay and working hours. I explained that I was a Bank worker but have been receiving regular weekly hours for the past three and a half years.

They advised me to contact you as I currently don't have a contract stating my terms of employment. This by law should include details of my job title, my salary, working hours, sick pay, holiday entitlement, notice period, pension scheme and grievance, dismissal and disciplinary procedures.

They also explained I am entitled to twenty-eight days paid holiday a year, including Bank Holidays even though I am a Bank worker. I have never received holiday entitlements in all the time I have been employed by Hafod Care as a Bank worker. This needs to be rectified as a Bank worker is classed as a worker.

There is also a law stating travel time between back to back visits should be paid. This is due to the fact you pay national minimum wages to me and because you don't pay for travel time, this takes me below the national minimum wage level for my hours worked.

I would appreciate if you would act upon the above points within five full working days and also reimburse any underpayments I am owed whilst I have been in your employment. After this time, I will be seeking legal advice.

Best Regards

Miss Cal Williams."

4.20. The Claimant contended that her letter of 22 July 2016, e-mailed to the Respondent on 24 July 2016, amounted to a protected disclosure.

4.21. It was the evidence of Mrs Hitchens that the Claimant's e-mail of 24 July 2016 (and its attachment) were opened by a member of the Respondent's administrative staff on Monday 25 July 2016. The staff member who was said to have opened the e-mail was not called as a witness at the Tribunal hearing.

4.22. Mrs Hitchens picked up Mr Daniels' written complaint on the morning of Monday 25 July 2016. It read as follows:

"This is my appraisal of hafod care worker Cal.

Whilst I found her to be a caring person, in my opinion she did not like to be asked to do something a different way to how she thought it should be, Seems she knows best not the client, she was often on the phone i.e. checking messages or facebook or whatever. When I mentioned to management for them to say to "All" carer's (sic) that they are here to care!! for my mother not to be answering phones or messaging Etc. The very next day, Cal came and never spoke a word to me just went straight upstairs and did not speak to me again, after what I can only assume she had been spoken to by the office, not a very professional attitude at all. In my opinion, I found her to be very domineering towards the other care staff (likes her own way) namely Gail who she mainly came with, and I felt would intimidate Gail who is an excellent carer. After I had made a comment to her about something or other, Cal said to me "I don't think you want this company Hafod caring for your mother, to which I replied I have no problems with Hafod and the care my mother receives and I have no complaints at all, but if I did, I would discuss it with the manager not the carer's (sic). I would prefer Not to have Cal as one of the care staff for my mother as there is definitely a clash of personalities which I think only creates an air of bad atmosphere between all concerned.

Regards

Alan Daniels"

4.23. It was Mrs Hitchens' evidence that, having received the complaint, she felt that she could not allow the Claimant to visit Mrs Daniels again. Because the twice daily visits to Mrs Daniels were integral to the six visit double run that the Claimant had been undertaking latterly and because it was not feasible or sensible for the Claimant to do four of those visits and be replaced by a colleague simply for the two visits to Mrs Daniels, Mrs Hitchens took the view that she would have to remove the Claimant at least temporarily from the entire run. Given that the Claimant was on a bank contract, this was easily done. The Claimant had been scheduled to work that week and had worked as normal earlier on Monday 25 July 2016. Mrs Hitchens tried to telephone the Claimant on that date after her visit to Mr Daniels but the Claimant did not pick up her call. Mrs Hitchens texted her at 2.27 pm, asking her to phone her, but she did not. Mrs

Hitchens texted the Claimant again at 4.52 pm to say that she had tried to phone her and that she would not be needed for work the next day.

4.24. The Claimant received the above text. At this stage she had been provided with a rota for the week, which outlined her regular shifts. No explanation was provided to the Claimant for the withdrawal of this work and she received no further work after the above withdrawal.

4.25. There was an exchange of texts between Mrs Hitchens and the Claimant. Mrs Hitchens asked the Claimant to telephone her on the afternoon of Tuesday 26 July 2016. They did not speak until Wednesday 27 July 2016 (in her witness statement, Mrs Hitchens said *"the next day"* meaning Tuesday 26 July 2016). Mrs Hitchens said to the Claimant that she needed to see her to talk about a couple of matters. She did not say what those matters were but she had intended to discuss the complaint by Mr Daniels and the e-mail letter which the Claimant had sent into the office in the meantime. The Claimant said that she could not speak with Mrs Hitchens and further stated that she had been "*advised"* not to speak with her and that she would only communicate with her by e-mail. Mrs Hitchens told the Tribunal that she was astounded that the Claimant was refusing to talk to her even though she was her line manager but in the light of what she had said, she decided not to press the matter and resolved to discuss it internally to decide on the next steps. She made a file note of the telephone conversation.

4.26. The Respondent produced a typewritten note which was said to have been compiled by Mrs Hitchens. The note stated as follows:

"*Cal phoned on the 27.7.16 to ask if she would be in the next day. I told her that i needed to speak to her but i could not at that moment. Cal said that she had been advised not to talk to us and to communicate through email*".

4.27. As stated above, it was the Respondent's case that the Claimant's letter sent in by e-mail on Sunday 24 July 2016 was opened by one of its administrative staff on Monday 25 July 2016. It was Mrs Hitchens' evidence that she was unaware of that letter when she spoke to Mr Daniels on 23 July 2016 and made arrangements to pick up his letter of complaint on Monday 25 July 2016. She maintained that she was unaware of the letter throughout the Monday when she was trying to telephone the Claimant but by the time of her telephone conversation with the Claimant, which she maintained took place on Tuesday 26 July 2016, but the balance of the evidence suggests took place the following day, she had been made aware of it. According to Mrs Hitchens, thus was now an additional matter that she wanted to discuss with the Claimant.

4.28. By letter dated 27 July 2016, Ms Mary Buckley, the Respondent's Principal Manager, replied to the Claimant's letter of 22 July 2016 in these terms:

"Further to your letter dated 22nd July 2016, I have considered the points that you have raised.

You have a signed Bank Contract which I enclose, which also draws attention to the Employee Handbook which you read on induction and as you know, is permanently kept in the Office. This refers to all aspects of your Bank Contract with Hafod Care Organisation including the holiday booking procedure. You were informed that you were able to take a copy of the Employee Handbook if you wished.

In line with the terms of your Bank Contract and the Employee Handbook you are entitled to book holiday using the correct procedure and any booked holiday will be paid as accrued by each work assignment.

You are reminded that it is solely your responsibility to book holiday within the relevant holiday year as you are not allowed to carry forward any part of one year's holiday entitlement to subsequent years. Any holiday not taken by the end of the year is forfeited. I am satisfied that where holiday has been booked in line with our procedure it has been paid accordingly. However, if you fail to notify the Organisation of your non availability due to holiday, in the prescribed manner, holiday entitlement will not be used and holiday pay will not be processed.

I have reviewed your timesheets and I know that you have often not used the full allocation of time at the client's house (presumably with their permission) and this has offset the amount of travelling time between back to back appointments. I am satisfied that you have therefore been paid for travel time between back to back appointments. However, should you wish me to comment on specific examples, then please raise them with me.

I trust this resolves your concerns".

4.29. In her witness statement for the Tribunal hearing, Mrs Hitchens said this:

"As well as the complaint from Mr Daniels, however, there was also the letter received from (the Claimant) herself. In the course of investigating both matters, I spoke with Gail McLanaghan during the course of the following week and obtained a statement from her".

4.30. Mrs Hitchens told the Tribunal that she was asked to look at the Claimant's timesheets or rather those which were still retained following a flood of the Respondent's premises in April 2016. There were not many. Those that were available were produced in the Tribunal bundle. According to Mrs Hitchens:

"They begged more questions than they answered and Cal had refused to come in and talk to me about them".

4.31. The Respondent produced a copy of an undated statement signed by Ms Gail McLanaghan, one of the Claimant's care worker colleagues. It read as follows:

"I am not happy to work with Cal Williams, she is late for calls on a daily basis, fashionably late as she puts it is normally five minutes but sometimes longer, on two occasions as late as forty minutes. When in calls, she will be messing with her phone and when I tell her about it she ignores me, even when assisting with feeding residents she is not giving the resident her full attention. On one occasion she was downstairs and ready to go before the end of our time and shouted for me to come when I was double checking the book, she made me feel uncomfortable and can be quite intimidating.

Cal has fallen out with a relative of a regular client which created a bad atmosphere. She refused to speak the relative and encouraged me to do the same.

I don't feel that she does her fair share of the work. She always insists on me showering a particular client and she sits in the kitchen on her phone. She leaves most of the personal care to me generally. I feel that she is a different person when relatives are around, she plays up to them.

On one occasion, Cal had not turned up for work so the manager Chris was working with me instead. We turned up at different clients for the first call, as it turned out, that Cal had been switching the calls to suit herself as it was just around the corner from where she lived.

Cal hardly ever turned up in uniform and on one occasion she was dressed in a revealing short dress and open shoes, totally unsuitable for using a hoist. I felt that she was just waiting to go out. Again, this made me feel uncomfortable.

I feel that our attitude to work and professionalism is totally different and I am unable to work with her. We have had several conflicts in the past and I can't see it improving".

4.32. In her witness statement, Ms Perry stated that one of the reasons arrangements were made to interview Ms McLanaghan was (albeit indirectly) because of the Claimant's letter attached to her e-mail of 24 July 2016. Ms Perry said this in her statement:

"… we had arranged to interview Gail McLanaghan, the Claimant's colleague. This was primarily in connection with the complaint received from Mr Daniels <u>but indirectly also in relation to the Claimant's own complaint</u>. I say indirectly because we did not think it appropriate to address the Claimant's own complaint which was essentially a complaint against management with a work colleague".

(Emphasis added).

Ms Perry said in her witness statement:

"It fell to me"

to deal with the situation concerning the Claimant in late July 2016.

In her oral evidence she said this:

"The decision to take the Claimant off all of the runs was absolutely not because of her complaint".

4.33. The Respondent produced copies of its "Holiday Books" in respect of the period from January 2014 until December 2016. It would appear that the Respondent's Holiday Book for any given year contains sheets which are filled out by employees and workers specifying their holiday dates. The only sheet on which the Claimant features is the sheet for June 2016 where she is marked down as being on holiday from 11 to 19 June 2016 inclusive. She booked holiday for that period and duly received holiday pay in respect thereof in the sum of £169.20.

4.34. It was the Claimant's case that when she started working for the Respondent working regular full time hours, she encountered many problems having her annual leave authorised and she gave notice in August 2012 that she was leaving because her annual leave would not be authorised. It was the Claimant's case that for the period of approximately four years after she became a bank care worker with the Respondent, it was her practice to give notice of her holidays but she did not realise that she was entitled to holiday pay during that period.

4.35. Despite the fact that the Claimant remained a bank care worker with the Respondent after the events of late July 2016, the Respondent provided no further shifts to her, notwithstanding multiple adverts placed by the Respondent for carers to undertake work of the nature performed for the Respondent by the Claimant.

4.36. Eleven out of 12 disclosed timesheets demonstrated that the time the Claimant worked exceeded the time for which she was paid when spent travelling between clients was taken into account.

Submissions

5. Both parties produced written closing skeleton arguments and made oral submissions. The parties' respective submissions are not set out here. Reference is made to the respective skeleton arguments for the detail of the parties' submissions.

Conclusions

6. It was agreed with the parties that in relation to the unlawful deductions claim and the holiday pay claim, the Tribunal would issue a determination as a matter of principle and that in the event of either such claim being upheld, the amount of each such claim would be determined at a remedy hearing.

Unlawful deductions

7. The Respondent accepted that the Claimant was a worker for the purposes of all of her claims.

8. The burden is on the "employer" to prove that the national minimum wage has ben paid to an employee or a worker.

9. It was agreed that the relevant pay reference period was a month. It was further agreed that travelling time was working time for the purpose of the NMWR. The Respondent's case was that the Claimant had been paid for all of her working time including her travelling time. As stated above, the Claimant's case was that the Respondent had a practice of not paying for travelling time and that petrol expenses were paid to her. Such a payment does not form part of remuneration for the purposes of the NMW (see NMWR Regulation 10(1)). It was not asserted by the Claimant that Regulations 11 to 15 of the NMWR had any applicability to the facts of this case.

10. Regulations 34(1) and 27(1)(c) of the NMWR provide that travelling time shall be counted as work if the worker would otherwise be working, except where the travel is between the worker's home and the workplace or a place where an assignment is carried out.

11. The Respondent's case was that the Claimant was paid time for which she worked which included travel time between appointments provided this was noted within the timesheet submitted to the Respondent and the reasons for any additional time claimed were provided. Home carers were paid for their shifts and any additional time (including travel time) had to be claimed and noted as such on the timesheet. Further and alternatively, the alleged deductions claims (which were denied) were out of time. The alleged deductions were not part of a series or in the alternative there was a gap of three months between alleged deductions. Further, it was reasonably practicable to lodge any claims out of time "within time". The Respondent's position was that workers were paid not according to the time recorded on the timesheet submitted but according to the allowed time for each visit. This was because the timesheets, though possibly accurate insofar as they recorded starting and leaving times, may include non-working time and because the relatively short travel times between could normally be accommodated within those allowed times as most client visits fell short of the allowed time. Where workers were claiming more than the allowed time, this should be noted in the comments section of the timesheet and they would be paid for it. The Claimant never noted anything in the comments section of the timesheet and was paid only the allowed times for each visit which was assumed to include her travel time between visits (but not to her first and from her last visit of the day). The Claimant was seeking to make historic claims on the basis that her timesheets were completed accurately when they had not been accurately completed. This was evidenced by the high level of rounding to 5 minute intervals, never recording herself as being late (contrary to the statement of Ms McLanaghan) and by including non-working time (according to the complaint from Mr Daniels). Furthermore the Claimant had extrapolated under payments claimed for a small number of weeks to the whole period of her claim with no evidential basis for that extrapolation.

12. The Tribunal concluded that the Claimant's claim of unlawful deductions from wages in relation to the non-payment of travelling time was well founded.

12.1. The burden of proof was on the Respondent to demonstrate that the Claimant had been in receipt of the national minimum wage.

12.2. The Claimant accepted that she changed the order of client visits such that it increased her travel time within her working hours and reduced her travelling time outside of her working hours. She maintained that the Respondent was aware of this but the Respondent denied this.

12.3. The Claimant was a time worker and was paid according to time recorded on weekly timesheets.

12.4. Eleven out of 12 disclosed timesheets demonstrated that the time the Claimant worked exceeded the time for which she was paid when spent travelling between clients was taken into account.

12.5. The Claimant relied upon ***Whipplestone v BJP Home Support Limited UK EAT/012A/13/BA***, where Langstaff P said this (at paras. 61 and 62):

"61……Travelling time is time work, except where incidental to the duties being carried out and the time work is not assignment work. It is clear that if the work which the Claimant was doing was properly split regarded on the facts as "assignment work" the travelling time which she spent should have been remunerated. Here the general principle must be that for someone working the hours as indicated on the Respondent's Schedule, to which I have already referred, the fact that the contract called each separate visit a "shift" does not have the consequence that this was the same arrangement as if the Claimant had been starting work at her employer's premises at the start of an 8 hour shift or thereabouts and returning home after. She was on the rota and obliged to visit each Service User in turn during the course of the day, and there inevitably was travelling time between them.

62. That time was within the general control of the employer who was arranging the assignments. The finding seems inescapable in the present case that with the exception of those periods, none of which were clearly identified in the decision, when the Claimant might have had so long between the end of one assignment and the next as to return home, such that the time would not be travelling time because it would be removed by Regulation 15(2)(b) from consideration, the work would be assignment work. It could be nothing else within a common sense meaning of the word "assignment".

12.6. On the basis of the 12 disclosed timesheets, the Claimant could demonstrate that for each hour of time claimed, she worked on average an additional 3.03 minutes that was unpaid. She therefore claimed 3.03 minutes for each paid hour during the reference period. The Tribunal concluded that this claim was valid.

12.7. None of the Claimant's claims were presented out of time, given the date of the receipt by the Tribunal of her claim form (18 November 2016) and taking account of the early conciliation period. This sub-

paragraph of the Tribunal's reasons applies to all three of the Claimant's claims.

Holiday pay

13. Whilst it had previously been suggested by the Claimant that the holiday pay claim was also linked to travelling time issue, the Claimant's representative confirmed at an early stage of the proceedings that this was not the case. There were three elements to the holiday pay claim. The Claimant asserted that she had taken holiday but not been paid for it. She asserted that the Respondent had failed to pay her for accrued holiday on the termination of employment and she asserted that she had had the right to carry over holiday from previous leave years because she was unable to take the holiday and payments should be made for those years also. The Claimant's representative submitted that the circumstances in which accrued leave could be carried over and specifically whether it applied to an inability to take leave because of sickness absence or applied more widely was dealt with by the CJEU in the ***Verman v Nurmohamed, Conley King v The Sash Window Workshop Limited (CJEUC-214/16)***.

14. The Respondent's position was that the Claimant had the contractual entitlement to take 5.6 weeks' paid holidays, but failed to exercise that right until May 2016. The contractual right arises from the letter issued to her on 13 August 2012 and acknowledged by her as being received on 22 August 2012. This letter referred to the Employee Handbook which provided that holiday entitlement cannot be carried forward from one holiday year to the next and that untaken holiday is "forfeit". If the Tribunal concluded that the Claimant was issued with the letter dated 13 August 2012, then Claimant's claim must fail in its entirety. It was the Respondent's position that the Claimant could only succeed on her holiday pay claim if the Tribunal concluded that Mr Perry's letter of 13 August 2012 was a fabrication and what the Claimant acknowledged as having received on 22 August 2012 was an entirely different letter of which nobody had a copy. The Respondent also maintained that this claim was overstated in the Claimant's Schedule of Loss on two counts, namely (1) it calculated holiday pay by reference to 6 weeks' timesheets, extrapolating that to the whole of the holiday year and then assumed that the working hours in each holiday year were precisely the same, and (2) it used the final pay for each holiday year as the appropriate factor.

15. The Claimant maintained that she was unable for reasons beyond her control to take paid annual leave, and that her leave from previous leave years should consequently carry over. It was her position that there would be no reason for her not to have taken paid leave if she had known that she was able to do so.

16. The Tribunal concluded that the holiday pay claim was not well founded.

    16.1. The Claimant was unable to identify any piece of correspondence dated 13 August 2012 from the Respondent other than the letter from Perry referred to at paragraph 4.4 above.

16.2. The Tribunal concluded that the letter the Claimant acknowledged receipt of on 22 August 2012 was the letter from Mr Perry referred to at paragraph 4.4 above.

16.3. ***Sash Windows*** is authority for the proposition that

"… Any practice or omission of an employer that may potentially deter a worker from taking his annual leave is … incompatible with the purpose of the right to be paid annual leave".

That is not the position here. The Claimant did not fail to take up her paid holiday entitlement due to

"circumstances beyond her control".

16.4. The Tribunal concluded that the holiday pay claim was not made out.

Public Interest Disclosure detriment

17. The Respondent maintained that the Claimant's allocated shifts were removed because of a complaint from a service user's son, Mr Daniels, regarding the Claimant. It had been alleged that the Claimant had had an argument with Mr Daniels resulting in a complaint to the Respondent. Mr Daniels had requested that the Claimant not be allocated to provide care to his mother. The Respondent contacted the Claimant and asked her to attend a meeting in order to discuss this issue and she refused to attend. It was the Respondent's case that it was as a result of this complaint, the Claimant's conduct and her refusal to attend a meeting to discuss the issue that allocated shifts were removed and no further shifts were allocated. The Claimant did not wish to undertake single runs (working at a Service User on her own) but only wished to work on double runs (working at a Service User with another carer). There were only four carers engaged in double runs. The other double run was full and in any event the Claimant did not wish to work on that run. The Claimant could not attend the existing run for the reasons outlined. Subsequently, the other carer (with whom the Claimant worked on her double run) raised a complaint about the Claimant.

18. The Tribunal held that the Claimant's claim under s.47B of the ERA was well founded.

18.1. The burden of proof is on the employer in relation to a claim of detriment contrary to s.47B of the ERA (see s.48(2) of the ERA).

18.2. The Claimant alleged that she made a protected disclosure in her letter dated 22 July 2016. The Tribunal concluded that in that letter she disclosed information which, in the Claimant's reasonable belief, tended to show that the Respondent had failed to comply with a legal obligation to pay the national living wage and allow its staff to take annual leave given that she was only paid petrol allowance for the time spent travelling between clients which took her overall hourly rate below the national minimum wage.

18.3. The Tribunal concluded that although the Claimant was raising matters which patently affected her personal position, she

nevertheless reasonably believed that her disclosure was made in the public interest.

18.4. Disclosures relating to private contractual obligations between an employer and an employee can be made in the public interest (see ***Chesterton Global Limited and Another v Nurmohamed UK EAT/0335/14/DM*** at para. 24).

18.5. The numbers of those affected by a matter which forms the basis of a disclosure is also not of singular importance in determining whether or not a qualifying disclosure is in the public interest (see para. 25 of ***Chesterton****.*

18.6. The question under s.43B(1) of ERA is not whether the disclosure per se is in the public interest but whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest (see paras. 28 and 29 of ***Chesterton***).

18.7. The public interest test can be satisfied where the basis of the public interest disclosure is wrong and/or there was no public interest in the disclosure being made provided that the worker's belief that the disclosure was made in the public interest was objectively reasonable (see para. 34 of ***Chesterton***).

18.8. The Claimant's letter of 22 July 2016 was a qualifying disclosure for the purposes of s.47B of the ERA, s.45A of the ERA and s.23 of the NMWA see ***Chesterton Global Limited and Another v Nurmohamed UK EAT/0335/14/DM***.

18.9. The Tribunal concluded that the Claimant was, on the ground of having made her protected disclosure, subjected to detriment by the Respondent by work being removed from her and no alternative work being offered to her.

18.10. The Claimant submitted that the proximity between receipt of the her letter of 22 July 2016, transmitted on 24 July 2016, and the decision to remove her hours indicated a causal link.

18.11. The Tribunal agreed with the Claimant that the explanations put forward by the Respondent were not credible.

18.12. Reference is made to the evidence of Ms Perry at paragraph 4.32 above. She admitted, perhaps inadvertently, that one of the reasons arrangements were made to interview Ms McLanaghan was (albeit indirectly) because of the Claimant's letter attached to her e-mail of 24 July 2016. In the circumstances, the Tribunal simply could not accept her oral evidence that

"The decision to take the Claimant off all of the runs was absolutely not because of her complaint".

18.13. It is not for the Tribunal to speculate as to the precise sequence of events. The Tribunal accepts that the letter from Mr Daniels was a genuine letter. The Tribunal does not, however, accept that Mr

Daniels made an unsolicited complaint to the Respondent about the Claimant. On the balance of the evidence, and in particular the evidence of Ms Perry referred to at paragraphs 4.32 and 18.12 above, the Tribunal concluded that the Claimant's letter of 22 July 2016 had come to the Respondent's attention no later than the morning of Monday 25 July 2016, (probably the attention of Mrs Hitchens), and that she then visited Mr Daniels who provided her with his letter, that the letter was solicited by Mrs Hitchens, and that the statement from Gail McLanaghan was then also solicited. The Tribunal concluded that the Respondent's actions in this regard were motivated by the fact that the Claimant had sent the Respondent her letter of 22 July 2016.

18.14. The Tribunal was satisfied that the claim under s.47B of the ERA was made out. There was no need for the Tribunal to make any determination on the claims under s.45A of the ERA or s. of the NMWR because the facts pertaining to those claims (including the detriments) are identical.

19. There shall be a Remedy Hearing in respect of the claims upheld by the Tribunal, on a date to be fixed, in the absence of the parties reaching settlement in respect of those claims in advance of that hearing. In the event of settlement being reached, the parties shall notify the Tribunal of the same as soon as reasonably practicable.

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Employment Judge Gilroy QC

_____

Date 04 October 2018