RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Fenn**

Respondent: **Parkview Care Limited**

Heard at: **East London Hearing Centre**

On: **23 to 24 May 2018 and 29 to 31 May 2018**

Before: **Employment Judge G Tobin**

Members: **Mr D Kendall**
Dr J Ukemenam

Representation
Claimant: Mr P Worth, Solicitor
Respondent: Peter Collyer, Consultant

JUDGMENT having been sent to the parties on 13 June 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

The case

1. The case was summarised by Employment Judge Brown in her summary of the Preliminary Hearing (Closed) on 13 November 2017. The parties agreed a list of factual and legal issues, which was sent to the Tribunal on 23 January 2018.

The law

Detriments and dismissal for whistleblowing

2. The Public Interest Disclosure Act 1998 ("PIDA") provided for special protection for "whistle-blowers" in defined circumstances. The purpose of the PIDA is to permit individuals to make certain disclosures about the activities of their employers without suffering any penalty for having done so. The PIDA is convoluted at best,

but its aim is to give protection to *workers* (which is wider than *employees*) who disclose specified forms of information using the procedures laid out in the PIDA. That protection is achieved through the insertion of relevant sections into the Employment Rights Act 1996 ("ERA") which focuses on providing protection to workers in cases of action which has been taken against them short of dismissal as well as for dismissal itself following their disclosure of information.

3. Section 47B(1) ERA states that :

> A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

4. In order to gain protection from an alleged unlawful detriment, s43B ERA provides that the protected disclosure in question must be a "qualifying disclosure"; that the claimant must have followed the correct procedure on disclosure; and that the claimant must have suffered the detriment as a result of it.

5. So far as dismissal is concerned, s103A ERA (as inserted by s2 PIDA) states that:

> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for dismissal is that the employee made a protected disclosure.

6. An infringement of s103A ERA will result in an *automatic* finding of unfair dismissal, without any consideration of whether the dismissal was reasonable in the circumstances.

7. In order to gain protection from both unlawful dismissal and an alleged unlawful detriment (short of dismissal), s43B ERA provides that the protected disclosure in question must be a "qualifying disclosure"; the claimant must have followed the correct procedure on disclosure; and the claimant must have been dismissed or suffered the detriment as a result of it.

8. Under s43B(1) ERA a "qualifying disclosure" means one that, in the reasonable belief of the claimant, is made in the public interest and tends to show one or more of the following:

   (a) a criminal offence has been committed or is likely to be so;

   (b) a person has failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject;

   (c) a miscarriage of justice has occurred or is likely to occur;

   (d) the health and safety of any individual has been, is being or is likely to be endangered;

   (e) environment has been, is being or is likely to be damaged;

   (f) information tending to show any matter falling within any of the above has been, is being or is likely to be deliberately concealed.

   In this instance, we are dealing with s 43B(1)(b) ERA.

9. There must be a *disclosure* of *information* and not just a mere general allegation or an expression of opinion. A disclosure could convey information as part of an allegation and thereby be covered by the ERA: see *Cavendish Munro Professional Risks Management Limited v Geduld [2010] ICR 325*.

10. The ERA sets out the ways in which a disclosure may be made in order to gain protection. These are:

    a. disclosures to the worker's employer or other responsible person: s43C;

    b. disclosures made in the course for obtaining legal advice: s43D;

    c. disclosures to a Minister of the Crown: s43E; and

    d. disclosures to a "prescribed person": s43F. The list of prescribed persons is set out in the Public Interest Disclosure (Prescribed Persons) Order 1999 and includes people such as the Information Commissioner, the Civil Aviation Authority, the Environmental Agency and the Health and Safety Executive.

    Where the worker cannot follow the above procedural lines of communication, disclosures that are made are permitted to other people:

    e. in "other cases" which fall within the guidelines laid out in s43G. Essentially these are instances where the worker reasonably believes that the employer will subject him to a detriment if he follows the procedure noted in s43C; or where there is no "prescribed person" and the worker reasonably believes that evidence may be concealed or destroyed; or where disclosures have been made to the relevant people before. The reasonableness of the worker's actions are decided by reference to matters such as the seriousness of the relevant failure, whether the disclosure is made in breach of the duty of confidentiality, etc;

    f. in cases of "exceptionally serious" breaches: s43H.

    S43C ERA is the relevant provision in this case.

11. In respect of causation, the phrase "on the ground that…" in s47B(1) ERA above, means that, once the detriment has been shown, the employer must establish that it was "in no sense whatsoever," connected to the disclosure in order to avoid liability: see *NHS Manchester v Fecitt [2011] EWCA Civ 1190, [2012] IRLR 64*.

12. S17 Enterprise and Regulatory Reform Act 2013 ("ERRA) introduced the requirement that the disclosure must be in the public interest. The standard is the reasonable belief of the worker, which is not a high obstacle. S18 EERA removed the requirement that the disclosure must be made in good faith; although it amended s49 ERA to allow Employment Tribunals to reduce compensation by up to 25% where a protected disclosure was not made in good faith. The burden for showing bad faith rests on the respondent: s48(2) ERA.

<u>Constructive unfair dismissal</u>

13. Section 95(1) ERA provides that an employee is dismissed by her employer for the purposes of claiming unfair dismissal if:

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

14. An employee may only terminate her contract of employment without notice if the employee has committed a fundamental breach of contract. According to Lord Denning MR:

> If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. See *Western Excavating (ECC) Ltd v Sharp [1978] ICR 221.*

15. *Courtaulds Northern Textile Ltd v Andrew [1979] IRLR 84 (EAT)* held that a term is to be implied into all contracts of employment stating that employers will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

16. Brown-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 (EAT)* described how a breach of this implied term might arise:

> To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

17. *Western Excavating* established that a *serious* breach is required. In *Hilton v Shiner [2001] IRLR 727* the Employment Appeals Tribunal confirmed that the employer's conduct must be without reasonable and proper cause. For instance, instigating disciplinary action against an employee would not per se be a breach of mutual trust and confidence if there appeared good grounds for doing so. According to *Morrow v Safeway Stores [2002] IRLR 9* if a breach of mutual trust has been found, this implied term is so fundamental to the workings of the contract that its breach automatically constitutes a repudiation – a Tribunal cannot conclude that there was such a breach but, on the facts, hold that it was not serious.

18. If an employee contends that a particular matter amounted to a "last straw" entitling her to resign, the "last straw" must not be entirely innocuous. It need not be in itself a breach of contract, but it must contribute to the series of events alleged to amount to a breach of the mutual trust and confidence term: *Waltham Forest London Borough v Omilaju [2005] ICR 418.*

19. We have considered whether the claimant has established in the respects alleged by him that there has been a breach of the implied term of mutual trust and confidence caused by the respondent. We have been careful to analyse not only the individual matters relied on by the claimant but also their cumulative effect.

20. S123(6) ERA states that "[W]here the Tribunal finds that the dismissal, which includes a constructive dismissal, was to an extent caused or contributed to by the action of the complainant, it shall reduce the… compensatory award by such proportion as it considers just and equitable having regard to that finding". This

ground for making a reduction is commonly referred to as "contributory conduct" or "contributory fault". There is a wide discretion under s122(2) ERA to possibly reduce the basic award on the grounds of *any* kind of conduct on the employee's part that occurred prior to his dismissal. Therefore, the capacity to make reductions to the compensatory award is more restrictive than in respect to the basic award. Three factors must be satisfied if the Tribunal is to find contributory conduct: (a) the relevant action must be culpable or blameworthy; (b) it must have actually caused or contributed to the dismissal; and (c) it must be just and equitable to reduce the award by the proportion specified.

21. S3(2) Employment Act 2008 inserted the provision of S207A Trade Union & Labour Relations (Consolidation) Act 1992 which provided that an Employment Tribunal may increase an award by up to 25% where the employer fails to comply with the relevant ACAS Code of Practice – which in this instance the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2009) – and that failure was unreasonable.

22. Although the Code of Practice is not legally binding, in itself, Employment Tribunals will adhere closely to the relevant Code when determining whether any disciplinary (or dismissal) procedure was fair. The ACAS Code of Practice represents a common-sense approach to dealing with disciplinary matters and incorporates principles of natural justice. In operating any disciplinary procedure or process, the employer will be required to:

- Deal with the issues promptly and consistently;
- Established the facts before taking action;
- Make sure the employee was informed clearly of the allegation;
- Allow the employee to be accompanied to any disciplinary interview or hearing and to state their case;
- Make sure that the disciplinary action is appropriate to the misconduct alleged;
- Provide the employee with an opportunity to appeal the decision.

23. Under s124A ERA such an adjustment will only apply to the compensatory award. Following *Lawless v Print Plus EAT 0333/2009* the relevant circumstances to be taken into account when considering an uplift will vary from case to case but the Employment Tribunal should always take into account: (a) whether the procedures were applied to some extent or were ignored altogether; (b) whether the failure to comply with the procedures was deliberate or inadvertent; and (c) whether there were circumstances that mitigated the blameworthiness of the failure to comply. The size and resources of the employer may be a relevant factor although this has limited application if the Tribunal assesses that the employer's motives for disregarding the ACAS guidance were deliberate or blameworthy.

<u>Shortfall in wages</u>

24. Section 13(1) provides:

An employer shall not make a deduction from the wages of a worker employed by him…

25. This prohibition does not cover deductions authorised by statute or the contract or where the worker has previously agreed in writing to the making of the deduction: see ss13(1)(a) and (b) ERA.

26. Section 13(3) ERA explains what is meant by a deduction:

> Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated… as a deduction made by the employer from the worker's wages on that occasion.

27. To determine what is *properly payable* on any given occasion will involve the tribunal resolving the dispute over what the claimants were contractually entitled to receive by way of wages from the respondent *on any occasion* and what they did, in fact, receive *on that occasion*.

Our findings of facts and our determination

28. We (i.e. the Employment Tribunal) made the following findings of fact. We did not resolve all of the disputes between the claimant and the respondent, we merely concentrated on those disputes that would assist us in determining the issues as identified in the list of issues. We have set out how we have arrived at such findings of fact where this is not obvious or where, we determine, this requires further explanation. When resolving disputes about contested fact, we placed most reliance upon contemporaneous documents and correspondence unless there were especially strong reasons not to do so. Contemporaneous sources tend to provide a more accurate picture of what occurred rather than after the after-the-event justifications or the recasting or reinterpretation of events following professional advice.

29. At the outset of the hearing, the Employment Judge emphasised to the parties that, as a matter of course, we would not read all of the documents contained in a hearing bundle. He stated that we would read documents referred to us and we may read additional documents that have not been cross-referenced in any statement; however, if a party thought that a document was relevant and important, then he or she needed to bring that document to our attention.

30. Our finding of fact and determination was as follows.

<u>Contractual position</u>

31. The claimant commenced work for the respondent on 4 September 2014. He was employed as a Residential Care Worker, initially at Harbour House Broadstairs Kent.

32. His contract of employment provided for "normal basic hours of work" to be 40 hours per week, in a monthly cycle of 173 hours. The claimant's contract of employment provided for the following:

> <u>Additional Hours</u>
>
> We can expect you to work beyond the hours you normally work…
>
> … Compensation for additional hours will reflect your basic rate of pay…
>
> <u>Renumeration</u>
>
> … Actual pay will be calculated on actual hours worked…

The whistleblowing detriments and dismissal claims

33. The claimant contended that he made a protected disclosure sometime in December 2015. This was during a meeting with Mr Harry Deering (the respondent's Operations Manager) and Mr Denis Shrubsole (another one of the respondent's managers). The claimant did not confirm this disclosure in writing nor did he refer to this in any contemporaneous correspondence. The disclosure amounted to the claimant raising concerns about staffing and a lack of educational activities for the children.

34. Nevertheless, we accept that the claimant made this disclosure because, on balance, we accept his evidence on this particular issue. We did not hear from Mr Shrubsole and Mr Deering was vague and imprecise in his recollection of staff meetings at this particular time. Indeed, the claimant must have, at least, raised some of the issues in his disclosure because part of the respondent's response was to give him explicit duties in respect of "activities co-ordinator".

35. All that is required is reasonable belief, which is a low threshold, and the claimant has established to our satisfaction that he may have had a reasonable belief in the facts contained in the disclosure.

36. We accept that this was both a qualifying disclosure and a protected disclosure (as set out above). There is, of course, a public interest in the protected disclosure as identified at points 2.1 and 2.2 of the list of issues.

37. The claimant says he suffered 2 immediate detriments:
- That he was demoted to activities co-ordinator; and
- That the respondent stopped him attending senior staff meetings.

38. The claimant said that both these alleged detriments happened after his protected disclosure in December 2015. We reject the claimant's allegations in respect of both of the allegations.

39. Mr Deering and Mr Billy Bhogal (Managing Director) on behalf of the respondent denied these allegations and, on balance, we preferred their evidence on this point. If these detriments were significant and supposedly a response from Mr Deering or the respondent, then we would have expected the claimant to have protested strongly. We would have expected such protests to be evidenced by reasonably contemporaneous correspondence or similar documentation. The claimant blames the respondent for not providing notes of staff meetings, but he has never contended that he: made any complaint(s) in writing; sought to raise a grievance; or even reference any concerns in correspondence. The claimant is a reasonable intelligent person and he said that he has been educated to a higher level. He works with children in an environment where is it essential to document important issues. It is not good enough in a complaint of this substance to point to the respondent for supposedly failing to fulfil their disclosure obligations. The claimant must take some responsibility for formally raising these issues. The fact that he only formally referenced these concerns some considerable time after these supposed complaints diminishes his case considerably.

40. There was not one shred of corroborative documentary evidence to suggest that the claimant was demoted in his job description or seniority. Indeed, the little

documentary evidence available to us indicated the contrary as on 7 April 2016 the claimant sent Mr Deering an email in which he resigned as Senior Child Support Officer. 2 things emerge from this email, the fact that the claimant was: (1) "Senior"; and (2) a "Child Support Officer" and not an "activities co-ordinator".

41. The claimant first denied that he sent this email but when pressed on this point he admitted that he did send it.

42. In January 2016 an allegation was made against the claimant in respect of drinking on duty. Mr Deering invited the claimant to an investigatory meeting. Mr Deering wrote to the claimant with outcome of that meeting on 11 March 2016. He said: "I have concluded my investigation… I have found the allegation to be unfounded and I am pleased to inform you that the matter is now closed."

43. He did not attempt to pursue the matter on trumped up or unsustainable allegations – he dismissed this at the first opportunity. But he did not say that the case against the claimant was not proven or on balance that there was not enough evidence or information to proceed. He said the allegation was "unfounded". That was not grudging, he gave the claimant an absolute clean bill of health and he did not need to go this far in the circumstances. Nevertheless, Mr Deering then went even further, he said: "I apologise for any distress this may have caused you…". That demonstrates a degree of courtesy and consideration, which although it might reflect very good practice it does, however, represent behaviour that is not frequently reflected from employer's in the Tribunal environment and experience.

44. This event occurred 3 months after the protected disclosure and, significantly, before the 20 remaining detriments listed on the list of issues. If Mr Deering and/or the respondent wanted to use the opportunity to subject the claimant to a detriment, then this represented a very good opportunity. The argument that Mr Deering could be somehow using this to build positive credentials is frankly ludicrous.

45. We reject the argument that the remaining 20 alleged detriments were occasioned by a protected disclosure from between 4 or 5 months and up to 14 months after the protected disclosure. If there was a causal link between the protected disclosure and these contended detriments after months of apparently normal working relationships, then the causal chain was broken by the events around the disciplinary investigation of January/February 2016.

46. To determine whether or not issue 3.3 was a detriment, i.e. for us to determine that the claimant did not have sufficient budget for a role he now contends that he did not want to do, we would need to establish clearly the duties of the activities co-ordinator's role, the budget allocated for these duties and identify where the shortfall occurred, that the shortfall could be attributed to fault on the respondent's behalf. The first time the claimant made a complaint about this was on 5 May 2017. Even at the hearing he did not get past general grumbling that lacked specifics. Given that the claimant did not raise his concerns whilst in work, so this could be properly addressed – or even resolved – we do not even regard this allegation as reaching the threshold of a "detriment".

47. This pattern is repeated for alleged detriment 3.4 to 3.12. If these were significant problems or detriments, then the claimant did little or nothing to attempt to resolve,

or even to address, these matters. We are not convinced that these issues were raised at staff or one-to-one meetings because we not have seen anything to corroborate that such meetings were in fact held. If the claimant wanted us to draw inferences about what happened at purported meetings, then the first task was to establish that the meetings occurred and when they occurred and who was present. In this instance, we take the view that no minutes can actually mean no meetings.

48. The claimant's protected disclosure was about insufficient budget and insufficient staffing. His statement identifies this at for example paragraph 22 and he identified comparators at paragraph 26 and 27 who have not made protected disclosures. So even if the claimant could establish causation with the protected disclosure, the allegation falls on the claimant's own evidence. He attributes the cause to something other than the protected disclosure and the consequences affected others.

49. Therefore, we determine that the claimant was not subjected to any detriment because he made a protected disclosure.

Constructive Dismissal

50. A constrictive unfair dismissal claim is a breach of contract claim. In such a claim we make factual determinations on the contended breach(es) alleged. We take into account the respondent's conduct, but we are not bound by the (ordinary) unfair dismissal test, which is whether the respondent's conduct fell within the range of reasonable responses available to a reasonable employer of similar size with the same administrative resources available. We look at matters through our own prism to assess the conduct of both parties. Our test therefore starts at whether the respondent's conduct amounted to a fundament breach of contract.

51. We are not going to make any factual determinations in respect of Mr Deering purportedly making the claimant's journey more difficult. This allegation was first raised on 10.05.2017. The claimant never complained before this point. It's a case of "he said – he said" with no substance. We were not satisfied with details proffered. Frankly, it is a trivial and undignified dispute that if it did have any impact or relevance ought to have been raised and addressed sooner. But raising such petty matters it diminished the claimant's credibility on other issues.

52. The claimant was never entitled to utilise a company car for his commute. Mr Bhogal said that he permitted the claimant to take a car home occasionally depending upon the circumstances; i.e. if his outreach work took him near his home at the end of his working day. Mr Deering brought this flexibility to an end and enforced the contractual position. The claimant had no right to use car for his convenience. The claimant had a long and difficult commute to Egerton – but he chose to work there. If it was too long and difficult then he could ask his employer for a move or get another job nearer home. This was not the respondent's fault or responsibility.

53. The claimant volunteered to undertake outreach work, from Egerton in Kent. That outreach work came to end at the beginning 2017. As part of the respondent's responsibilities as an employer they were required to take steps to look to ways to avoid any redundancy or reduce the impact of any potential redundancy. Rather than go down a redundancy path Mr Bhogal offered the claimant the role of "maintenance man" as temporary measure. Mr Bhogal anticipated that the

respondent would need further Residential Care Workers in the future. The claimant retained the same pay and similar hours to his contract or employment, though we accept not in respect of the additional hours worked by the claimant in the recent months. The claimant accepted this offer. He made no complaint at the time. If he had concerns, then he ought to have raised these – he did not. It is utterly disingenuous to subsequently complain that this was a demotion. We resoundly reject this contention.

54. The allegation that the claimant was not allowed to eat the respondent's free toast but was allowed free tea and biscuits is preposterous as a constructive dismissal issue. This was wasting our time bringing this issue to an Employment Tribunal hearing when the claimant had never bother to complain about this at any proper stage.

55. In respect of issues 6.17 and 6.8, no action was taken against the claimant and we are not going to resolve a tittle-tattle petty dispute. That is not our forum.

Incident of 19 April 2017

56. The claimant was instructed to collect a computer from Mr Bhogal's house. The claimant started his journey at Whitstable just before 9am and arrived at Mr Bhogal's house at 11.40am. He departed Mr Bhogal's house at 12noon and eventually returned to the respondent's premises at 4.38pm. The respondent was concerned that this journey took a whole day. Various witnesses for the respondent contented that the travel time should have taken anything between 1 to 2 hours each way. We are persuaded that a reasonable travel time would be in the region of 4 hours driving time for the return trip ignoring any stops and allowing for usual traffic conditions.

57. The claimant explained his delays in arriving at Mr Bhogal's house. The delays were not particularly significant. The real significance was the detour the claimant took on the return journey which occasioned a substantial delay. Allowing the claimant a 1-hour lunch break, we assess this delay as around 2 hours, i.e. the claimant was absent from work unauthorised for approximately 2 hours.

58. The claimant was contacted by Mrs MacKelden, on behalf of the respondent, that afternoon. He said that he was stuck in traffic.

59. Mr Deering obtained copy of car tracker. Mr Deering instructed Mr Chris Campbell (Registered Manager) to investigate the claimant's movements on day in question. The claimant's explanation was that he was stuck in traffic. Only when confronted with the tracking record did the claimant say that the car's breaks had developed a problem. The claimant had at least 4 opportunities to report this:

    (1) when problem arose (by mobile phone);
    (2) when Mrs MacKelden rang him to find out his whereabouts;
    (3) when he returned the car; and
    (4) when Mr Campbell asked the claimant for an explanation as to the time it had taken to complete this task.

60. Only when confronted with the tracker did the claimant make up a story about going to friend's business premises who knew something about cars so as to fix vehicle. A number of features emerge from this:

- The claimant supposed improvised car repair was against the respondent's company car policy.
- The claimant has never properly identified his friend. He did not produce a letter, statement or some form of inspection report.
- Mrs MacKelden corroborated that there was an ongoing squeaking of breaks in that car. Yet the claimant chose to take car knowing this. He did not act on this supposed problem on way to Mr Bhogal's house nor did he mention it to Mr Bhogal.
- The claimant organised an MOT test the following day and the car passed.

61. For the above reasons, we do not believe the claimant in his account on these events. It is plain that Mr Deering did not believe him. But the respondent never identified any of these points.

62. Possibly of greater significance, at the investigatory meeting, the claimant twice raised concerns that he was targeted by Mr Deering, which was recorded in the respondent's minutes. We accept that this allegation did not come out of the blue. Given Mr Deering's disproportionate reaction to a trivial absence (i.e. 2-hour or so), we regard that there must have been some animosity between the two, especially given the dispute over the claimant's travel arrangements, company car policy, the *toast* issue and the care plan/team player comments. If those matters where petty and childish this represented a significant escalation of a dispute between Mr Deering and the claimant.

63. Mr Campbell referred the outcome of investigation to Mr Deering, who we determine directed that Mr Campbell to suspend the claimant. No further investigation was undertaken into index incident. Mr Campbell ignored the claimant's 2 complaints against Mr Deering.

64. Some 11 days later Mr Campbell wrote to the claimant to confirm his suspension. He said that the claimant was "suspended pending an investigation" which was not true – and which Mr Campbell must have known was not true. Suspension is supposed to be a neutral act. The respondent breached its own disciplinary procedure. There was no reason to suspend the claimant. The respondent had prejudged the matter, so suspension was not a neutral act. This amounted to a breach of contract.

65. The delay in the disciplinary process was because the respondent was directed by external human resources providers. Throughout this time the claimant was suspended without explanation on frankly a trivial substantive matter. This was a significant detriment in the circumstances, although we determine that it was not a detriment in relation to the claimant's whistleblowing disclosures.

66. On 2 May 2018 Mr Campbell instructed the claimant to attend disciplinary hearing for gross misconduct. The allegations were:

- Unauthorised use of the company vehicle on the 20th April 2017[sic].
- Fraudulent claim for hours worked on the 20th April 2017[sic].
- Taking unauthorised breaks[sic] of 3 hours on 20th April 2017[sic].

67. There was no allegation that the claimant lied in his account of his movements of 19 April 2017. Other than an allegation that the claimant lied about his whereabouts, which arguably could have been gross misconduct, the basis of the offences that

the respondent chose to pursue were not gross misconduct offenses. The basis of the claimant's offences were not gross misconduct either according to the respondent's disciplinary procedure (which was contractual) or by any application of common sense.

68. The disciplinary hearing conducted by Mr Chris Holland. This hearing serves as an example of how not to conduct a fair hearing. The claimant produced a letter raising a grievance against Mr Deering's conduct effectively saying that Mr Deering was out to get him. The ACAS guidelines provides that the respondent should stop the disciplinary process to hear and determine this grievance. That is a matter of fairness. However, the claimant had raised his complaints against Mr Deering at the investigatory stage of the respondent's process. This makes it more unfathomable as to Mr Holland's response to ignore the claimant's grievance. Mr Holland proceeded with hearing, he concentrated on side issues. He did not focus on issues we have identified above in this determination. This helped us formulate the view that the claimant was never going to get a fair hearing. After 45 minutes Mr Holland said he was going to break so he could speak to Mr Deering. He then broke for around 50 minutes (i.e. long that the hearing had lasted to that point) during which he sent Mr Deering the claimant's grievance against him and spoke to him on 2 or possibly 3 telephone calls. Mr Holland asked Mr Deering what he should do with the grievance against Mr Deering. This is astonishing. This can no way be described as a fair hearing.

69. To add insult to injury Mr Holland reconvened the disciplinary hearing and advised the claimant that he would pass on the minutes of the hearing to Mr Deering for his consideration (i.e. his determination).

70. On 9 May 2017 Mr Holland wrote to the claimant giving him a first and final written warning. We reminded ourselves that we are not dealing with range of reasonable responses test in this instance (either for outcome or procedure); nevertheless, so that the respondent can properly understand the impact and consequences of this behavior, we say that we are satisfied that the respondent would fail this lower test. No reasonable employer would have conducted itself in this matter. The substantive offenses identified by the respondent amounted to skiving off work when on another job. According to the respondent's own disciplinary procedure this was a matter that met the definition with an appropriate outcome of Informal Counselling.

71. Mr Holland offered the claimant right of appeal – to Mr Deering. So, Mr Deering:

- directed the investigation.
- took the decision to suspend the claimant in breach of contract.
- determined to issue the claimant with a final written warning.

Then, in breach of contract the respondent provided that Mr Deering would hear the appeal.

72. It was obvious from even Mr Holland's stilted perspective that the claimant was furious about how he was he was treated. He immediately resigned when he got the outcome of disciplinary hearing. His letter of 10 May 2017 complained about other matters and said:

My suspension and the subsequent conduct of and process (or lack of process) applied to the allegation of gross misconduct (which I denied and demonstrated was not made out) represent the last in the line of a series of events which I believe were designed to force me out of the organisation.

73. For reasons we say above, the respondent's application of the disciplinary procedure to the claimant was not caused by his protected disclosure and the claimant's resignation had nothing to do with his protected disclosure.

74. In respect of constructive dismissal, there must be a fundamental breach of contract. The breach can be in respect of express terms or implied terms. The claimant relies upon alleged breaches of the implied terms of trust and confidence. The claimant raised the "last straw" principle. Each alleged act – even the final straw does not have to amount to a fundamental breach of contract – but cumulatively these must amount to a fundamental breach of contract.

75. Whereas we reject the veracity of all matters before the incident of 19 April 2017. Quite clear to us that the claimant has established that the acts identified at issues 6.19, 6.20, 6.21 and 6.22 made out and individually and cumulatively amounted to a fundamental breach of contract upon which he relied.

76. The respondent's application of its disciplinary procedures caused the claimant constructive unfair dismissal. There was no minor defect in the respondent's application of its disciplinary procedures, its defects were fundamental and profound. The claimant was never going to get a fair hearing in view of Mr Deering animosity and involvement in the process. That said, the respondent did go through the motions of as proper process in that there was an investigation and a separate disciplinary hearing. Although we give the respondent some credit for this, it was merely window dressing to a fundamentally flawed process. We determine a 20% uplift for the respondent's failure to follow the ACAS procedures is appropriate in the circumstances.

77. We also determine that it appropriate to make a deduction in respect of contributory conduct. This is. to a large extent, an arbitrary assessment. We need to arrive at a decision which we think is fair in the circumstances. the claimant was culpable or blameworthy in skiving-off work for 2 hours or so. More significantly, when questioned he lied to his employers in his account. Not providing a correct account of his movements led to the disciplinary proceedings and ultimately the claimant's constructive dismissal. We determine that having balanced all of the relevant factors, it is appropriate to make a gesture to signal our disapproval of the claimant's behaviour in this regard. It is just and equitable to deduct any compensation payable (under S123(6) ERA only) by 5%.

78. Overall this brings the value of any uplift to 15% which we feel is proportionate and just and equitable in the circumstances.

<u>Unlawful deductions of wages claim</u>

79. The claimant was paid an allowance for sleeping-in. That is not what contract allows. The contractual position is set out above. The key question in respect of this matter was whether sleeping-in amounted to "actual work"?

80. According to Simler J in *Focus Care Agency Ltd v Roberts 2017 ICR 1186*, "even in periods where a worker is permitted to sleep, he or she may nevertheless be

working by virtue of being present in the workplace… whether or not provided with sleeping accommodation".

81. There is a multifactorial test. The authorities identify a number of relevant factors, for example: the purpose of sleeping-in; whether this is in to comply with a statutory, regulatory or other legal requirement; the regulatory of being disturbed; whether the worker could be called upon to some extent to work in their expected capacity or merely contact another to undertake the work which occasioned the disturbance. No single factor is definitive and the weight each factor carries (if any) will vary according to facts of particular case.

82. The claimant meets virtually every factor of test. He was employed in a responsible position to safeguard the welfare of a looked after child. It was a local authority requirement that a sleep-in provision was provided. If disturbed then the claimant was required to deal with the issue initially, in accordance with his substantive work arrangements. The claimant sleeping-in amounted to actual work and he demonstrated a continuing and ongoing entitlement to be paid for sleeping-in.

Remedy

83. We gave the parties some guidance on quantifying compensation and they we cable to agree appropriate figured. As the computation for the award was agreed, we do not provide further written reason in respect of compensation.

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Employment Judge Tobin
Date: 12 November 2018

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE