EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104468/2018

Final Hearing Held at Aberdeen on 26 and 27 November 2018 and 17 January 2019, deliberation day on 21 February 2019

Employment Judge: Mr A Kemp
Members: Mrs S Taylor
Ms V Lockhart

Mr W Allan	**Claimant** **Represented by:** **Mr D McGregor** **Lay Representative**
Mr N Buchan	**First Respondent** **Represented by:** **Mr W Lane** **Solicitor**
Miss E Buchan	**Second Respondent** **Represented by:** **Mr W Lane** **Solicitor**
N Buchan (Ceilings)	**Third Respondent** **Represented by:** **Mr W Lane** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is:

(i) The Claimant was employed by the Third Respondent, being the firm of N Buchan Ceilings, of which the partners were Norman Buchan

(the First Respondent), Anne Ritchie Buchan and Elaine Buchan (the Third Respondent).

(ii) The effective date of termination of the Claimant's employment was 2 May 2018.

(iii) That termination of employment was a dismissal.

(iv) The reason for the dismissal was redundancy.

(v) The dismissal was unfair.

(vi) The Claimant was entitled to a statutory redundancy payment from the Third Respondent and an award therefor in the sum of FIFTEEN THOUSAND TWO HUNDRED AND FORTY POUNDS (£15,240) is made.

(vii) The Claimant is awarded the sum of SIX THOUSAND NINE HUNDRED AND TEN POUNDS TWENTY SEVEN PENCE (£6,910.27) as a compensatory award against the Third Respondent.

(viii) The Third Respondent made unlawful deductions from the wages of the Claimant (a) in the sum of ONE THOUSAND EIGHT HUNDRED AND FORTY EIGHT POUNDS FIFTY SIX PENCE (£1,848.56) as to wages in the period 1 April 2018 to 2 May 2018 and (b) in the sum of ONE HUNDRED AND THIRTY TWO POUNDS FOUR PENCE (£132.04) as to holiday pay accrued to 2 May 2018 and awards for those sums are made.

(ix) The Third Respondent did not provide the Claimant with a statement under section 1 of the Employment Rights Act 1996, and he is awarded the sum of TWO THOUSAND AND THIRTY TWO POUNDS (£2,032) in respect thereof.

(x) The Third Respondent did not provide the Claimant with itemised pay statements under section 8 of the Employment Rights Act 1996, and he is awarded the sum of TWO THOUSAND AND THIRTY TWO POUNDS (£2,032) in respect thereof.

(xi) The Respondents were in breach of contract and the Claimant is awarded the sum of FOUR THOUSAND FOUR HUNDRED AND

NINETY SIX POUNDS SEVENTY FIVE PENCE (£4,496.75) for damages for the breaches.

(xii) There was no relevant transfer to the Second Respondent under the Transfers of Undertaking (Protection of Employment) Regulations 2006 and the claims in relation to those Regulations are dismissed.

REASONS

Introduction

1. A Final Hearing was held into this case over two days in November 2018 and one day in January 2018. A Preliminary Hearing had taken place to determine the issues in the case, which was set out in a Note dated 25 September 2018. Mr McGregor, who is a lay representative, again appeared for the Claimant and Mr Lane, Solicitor, again appeared for all the Respondents at the Final Hearing.

2. The Claim had been brought against "Mr N Buchan", being Mr Norman Buchan, who is the First Respondent. The Response was submitted on behalf of Miss Elaine Buchan, his daughter, who is said in the Response Form to be the proper Respondent and was the Second Respondent. That however was not accepted by the Claimant as being accurate, and the firm of N Buchan Ceilings was added as the Third Respondent.

3. The Claimant had sought in correspondence prior to the Final Hearing a strike out of certain parts of the Response and in relation to the issue of mitigation. That application was however withdrawn by Mr McGregor at the start of the hearing.

Issues

4. The issues had been identified at the Preliminary Hearing, subject to any matter that arose at the Final Hearing. No further issue did arise, although some slight changes to the way in which they were expressed has been made. The issues were:

(i) What is the correct identity of the Respondent or Respondents as employers?

(ii) When was the effective date of termination?

(iii) Was the termination of employment a dismissal, either an actual dismissal under section 95(1) (a) or, as it is normally referred to, a constructive dismissal under section 95(1)(c) of the Employment Rights Act 1996 ("the Act")?

(iv) If there was a dismissal, what was the reason for that?

(v) If potentially fair, was it fair or unfair under section 98 of the Act?

(vi) If there was a dismissal, was the Claimant entitled to notice pay under section 86 of the Act?

(vii) If there was a dismissal, was the Claimant entitled to a statutory redundancy payment under section 135 of the Act?

(viii) Did the Respondents make unlawful deductions from the wages of the Claimant under Part II of the Act in respect of

(a) Arrears of pay?

(b) Holiday pay?

(ix) Does the Tribunal have jurisdiction to consider such claims?

(x) Were the Respondents in breach of contract in not paying the Claimant his entitlement to wages in the period from 1 January 2017 to the date of termination of employment?

(xi) Did the Respondents provide the Claimant with a written statement of terms and conditions under section 1 of the Act?

(xii) Did the Respondents provide the Claimant with all itemised pay statements or a standing statement of fixed deductions under sections 8 and 9 of the Act?

(xiii) Was there a relevant transfer of the employment of the Claimant to any of the Respondents under Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the Regulations")?

(xiv) If so when was that, and did the Respondents fail to inform or consult with the Claimant under Regulation 15 of those Regulations?

(xv) In each respect, what is the amount of the Claimant's loss or the sum properly to be awarded?

(xvi) Has the Claimant mitigated his loss?

Evidence

5. Each of the parties had prepared a bundle of documents, most of which were spoken to during oral evidence. Some of the documents were duplicated in each of the two bundles. It was difficult to follow the documentation, which had not been produced chronologically, and a single bundle had not been provided. The documents were also supplemented by additional documents lodged at the start of or during the hearing, being a contract of employment said to have been issued to the Claimant, and forms P60 that the Respondents had provided to the Claimant's representative. The Claimant objected to the contract of employment being produced, as it was late in terms of the Order referred to below. On the final day of the hearing the Respondents produced a letter relating to pension provision, and the Claimant a letter from HMRC dated 21 November 2018, both of which were received without objection. The Claimant was permitted to extend cross examination in respect of that HMRC letter, again without objection.

6. After consideration the Tribunal received the contract of employment provisionally, subject to hearing evidence about the manner in which they had been produced, after which a decision was taken to admit them in evidence. The assessment of that evidence is referred to below.

7. The parties had agreed between them a Statement of Agreed Facts.

8. The Tribunal had granted an Order on 25 September 2018 following a Preliminary Hearing. It included the following order for the production of documents:

> "No later than 19 October 2018 the Respondents or any of them shall provide to the Claimant all written documentation, emails, copies or other such records for the period from 1 January 2017 to 31 May 2018 (save for item (viii) below where the period is as specified there) which shows or tends to show:
>
> (i) The formation of the firm of N Buchan (Ceilings)
>
> (ii) Any changes to the constitution of that partnership including its termination
>
> (iii) Any transfer of the assets and liabilities of the firm to Miss Elaine Buchan
>
> (iv) The employer's liability certificate of insurance held by any of the Respondents covering the Claimant
>
> (v) The bank account or accounts from which the Claimant was paid his wages
>
> (vi) The calculation of the sum of £3,013.31 paid to the Claimant on or around 15 May 2018
>
> (vii) The HMRC Form P45 applicable to the termination of the Claimant's employment with one or more of the Respondents
>
> (viii) The HMRC Forms P60 in respect of the Claimant or each tax year from 6 April 2012 to 5 April 2018
>
> (ix) Records of all pay, including holiday pay, and all deductions therefrom for income tax, national insurance contributions and pension contributions in respect of the Claimant.
>
> (x) A letter sent by any of the Respondents to their accountants in respect of the resignation from the firm by Mr N Buchan and Mrs A Buchan in or around March 2018, together with any reply sent by those accountants to such letter."

9. Oral evidence was given by the Claimant, and Miss Elaine Buchan the Second Respondent, who is also a partner in the firm that is the Third Respondent. The Tribunal understood that the First Respondent and his wife, Mrs Anne Ritchie Buchan, were both in ill health.

Facts

10. The Tribunal determined that the following facts had been established:

11. The Claimant is Wallace Allan.

12. His date of birth is 18 September 1956. He was employed as a suspended ceiling fixer by the firm of N Buchan Ceilings.

13. N Buchan Ceilings is a trading name. The business was started in about 1977. Originally, there was a partnership formed between Norman Buchan and his wife Anne Ritchie Buchan which conducted that business. That partnership did not have a written partnership agreement. It was not apparent from documents produced by the business that the partners were Norman Buchan and Anne Buchan. The firm of N Buchan Ceilings is the Third Respondent.

14. Norman Buchan is the first respondent. He established the business of N Buchan Ceilings and managed the business in its initial years.

15. Mrs Anne Buchan was a partner in the firm trading as N Buchan Ceilings but did not play a significant role in its operation. She did however assist with some administrative and financial tasks.

16. The Claimant was employed by the firm of N Buchan Ceilings when he first started employment with the firm in about 1978. He was not aware that there was a partnership, and thought that the business was conducted by Norman

Buchan as a sole trader. He worked well with Mr Buchan, and regarded him as a friend. They called each other by their first names.

17. The business conducted by N Buchan Ceilings was the supply and installation of suspended ceilings. The Claimant both installed suspended ceilings and carried out smaller maintenance works as the private property of Norman Buchan from time to time. He was the only employee of the firm for at least the last ten years of his own employment. He was the only person who installed suspended ceilings save for occasional use by the firm of self employed sub-contractors if they were particularly busy.

18. For a period of time after about 1978 the Claimant had been employed by the firm, but left that employment, working initially offshore, later returning to work for the firm of N Buchan Ceilings as a self-employed person. When he worked as a self-employed person he instructed an accountant to act for him, and to advise on accounting and tax issues.

19. On 5 April 1997 the Claimant again became an employee of the firm of N Buchan Ceilings. The date on which, for the purposes of the present Claim, his continuous employment with the firm commenced is that date.

20. When he commenced employment at that point there was no written contract of employment provided to him, nor was a statement of terms and conditions of employment then or later issued to him under section 1 of the Employment Rights Act 1996 ("the Act").

21. At some time in about 1997 Miss Elaine Buchan, who is the daughter of Norman and Anne Buchan, and the Second Respondent ("Miss Buchan"), started to work for the firm of N Buchan Ceilings. She carried out administrative and financial work, taking over the work that her mother had done. She worked in the office at 12A Kirk Street, Peterhead. That office is part of a building owned by Norman Buchan. Miss Buchan was at that time an employee of that

business. Mrs Anne Buchan ceased at around that time to have any practical involvement in the running of the business, but remained a partner.

22. In 1998 Miss Buchan was assumed as a partner in the firm of N Buchan Ceilings. No written partnership agreement was created for the partnership between Norman Buchan, Anne Buchan and Elaine Buchan, nor was there any written document to evidence the assumption of Miss Buchan as a partner.

23. The documentation used by the firm of N Buchan Ceilings for business correspondence continued as it had been before that assumption. It did not list the partners of the firm.

24. The Claimant was not informed by the Third Respondents or any of its partners that Miss Buchan had been assumed as a partner, and continued to believe that he was employed by Norman Buchan as a sole trader.

25. On 1 June 2009 Norman Buchan disponed a part of the subjects at 12 King Street, Peterhead which he was the heritable proprietor of to a carpet company, and retained in his sole ownership what was the office used by the business of N Buchan Ceilings at 12A King Street, Peterhead.

26. For the period from 5 April 1997 onwards the Claimant was paid an agreed gross wage, from which statutory deductions for income tax and national insurance were made. The agreement was that the Claimant be paid that set gross figure, whether he was working that week or not. By 2010 the Claimant's gross earnings were approximately £550 per week, which is about £28,600 per annum. His gross earnings remained at that level for the remainder of his employment.

27. From that gross wage the Third Respondents deducted sums for tax and Employee National Insurance Contributions ("NIC"). They made Employer National Insurance Contributions. The Claimant's net earnings, after

deductions for tax and NIC were approximately £416.35 per week in 2010 and into 2011. The Third Respondent paid National Insurance Contributions in respect of the Claimant to HMRC, which totalled £2,246.35 in the year to 5 April 2010.

28. When working to install a suspended ceiling the Claimant travelled to the premises and carried out that work alone. He worked across the United Kingdom, and very occasionally abroad. When working, he might work 7 days per week. When not working, he would spend the periods of time at home. He regarded himself as on call, waiting to be told about the next job. Instructions for the next job came either by telephone or by text message.

29. The hours of work varied depending on the overall workload, and varied from about 60 hours per week when the work was busy, to no hours if he was at home waiting for a call for the next job. On average at that time he worked about 40 hours per week. His equivalent hourly rate of pay on a gross weekly wage was therefore about £13.75.

30. The Claimant did not receive any written notice of amendment to terms and conditions of employment from any of the Respondents at any time.

31. The Claimant continued to believe that he was paid a gross wage of about £550 per week throughout the period of his employment.

32. The Claimant did not report the hours that he worked to any of the Respondents at any stage.

33. In the year to 5 April 2011 the National Insurance Contributions made by the Third Respondents to HMRC in respect of the Claimant reduced to £920.55. In the year to 5 April 2012 those payments reduced further to £31.38. In the year to 5 April 2013 those payments reduced to nil.

34. In about 2013 the health of Norman Buchan deteriorated. He was admitted to hospital, latterly having renal failure and commencing on kidney dialysis. His role in the business of N Buchan Ceilings reduced materially as a result. Miss Buchan commenced to undertake more of the work of the business, both operational and administrative, at about that time and onwards, but had assistance from her father from time to time for issues such as the pricing of more major jobs. Norman Buchan also attended at the office premises from time to time.

35. On 16 July 2013 a certificate of employers' liability insurance for a period of one year was issued to "Norman, Anne & Elaine Buchan t/a N Buchan Ceilings". The certificate which was produced referred to the requirement to display the certificate, which can be electronically, at each place of business, and adds "The employer is strongly encouraged to retain all records relating to this insurance."

36. The Third Respondents became subject to the auto-enrolment provisions for pension in December 2016.

37. In about April 2017 Miss Buchan informed the Claimant orally that he would be entitled to a pension and that she would commence to deduct about £5 per week from his wages for his contribution. The Claimant agreed to that. He noticed that his net earnings reduced to about £402 per week, and assumed that the reduction was for that auto-enrolment pension provision.

38. £0.35 per week was being deducted from the Claimant's wages by the Respondents, for pension provision, from at least January 2017, and paid to an external pension provider.

39. The net payments of the Claimant's wages in early 2017 vary, but generally show a reduction from around £413 per week to around £407 per week in about April 2017.

40. The Claimant's net earnings in the period from November 2017 taken from the records submitted by the Respondents (the total of which was not in dispute but the calculation of which to arrive at that total was) are as follows

Date	Net amount
2.11.17	404.80
9.11.17	406.80
16.11.17	404.80
23.11.17	404.80
30.11.17	403.90
7.12.17	403.80
14.12.17	402.60
21.12.17	403.90
28.12.17	404.00
4.1.18	404.80
11.1.18	403.80
18.1.18	408.90
25.1.18	402.70
1.2.18	401.90
8.2.18	398.59
15.2.18	399.60
22.2.18	402.60
1.3.18	402.90
8.3.18	400.10
15.3.18	400.20
22.3.18	400.60
30.3.18	400.40

41. The sums recorded above however failed to take account of sums that were not paid timeously to the Claimant on 2 November 2017, 14 December 2017, 22 February 2018 (which was underpaid by £100) 1 March 2018 (also

underpaid by £100), and 8, 15, 22 and 30 March 2018 as referred to further below.

42. The Claimant was provided with a work's van by the firm. It was kept on his driveway when not being used. It contained his work tools and was used for carrying out work when required. It was also used occasionally for his personal and private tasks, such as taking materials to a static caravan in Stonehaven. The petrol for that van was paid for by the employers.

43. The Claimant had the use of that van until 31 January 2018. On that date it was deposited at a local garage for maintenance as it required repair, on the instructions of Miss Buchan who sent the Claimant a text message. It was not returned to him.

44. On 3 March 2018 Miss Buchan texted the Claimant to collect the charger he used for that vehicle, saying that she was going to need it.

45. The level of work carried out by the Claimant reduced in the period from about 2010. By 2017 it was materially reduced from the level it had been previously, such that the Claimant was working less than 40 hours per week on average.

46. The last piece of work that the Claimant performed for N Buchan Ceilings was at 21 Shore Street, Macduff on 31 January 2018. The Claimant had been given the instruction for that by a text message sent by Miss Buchan to his mobile telephone.

47. After carrying out that work, the Claimant remained at home, waiting for the next work instruction to be received. No such instruction was sent to him after 31 January 2018.

48. There was no intimation to the Claimant at any stage that the constitution of the firm of N Buchan Ceilings had been changed, or that the partnership had ceased to exist and that Miss Buchan was to be his employer as a sole trader.

49. The Claimant was paid on a weekly basis. In mid-March 2018 he noticed that some of his wages had not been paid. He sent a text to the Claimant on 19 March 2018 referring to the "quite a few pays not put in up until last week could you get in touch ASAP to let me no if I still work for you I will be going down to job centre to see what's going on".

50. Miss Buchan replied the same day by text to state that as far as she knew everything had gone through and she would need to look into it. She did not respond to the matter of whether he still worked for the business.

51. On 20 March 2018 she sent a further text to the Claimant stating that she had checked and only one payment was missing, from December 2017, but that the "bank has made an error and has been short a few weeks if there are anymore you will need to provide me with dates so I can look into it more".

52. On 21 March 2018 the Claimant replied to give as the dates "week ending 28 July, 3 November, 1st December, 2nd February and March".

53. No payment of wages was made to the Claimant on 10, 17, 24 or 31 March at the time such payments would ordinarily have been due.

54. The Claimant sent further texts to Miss Buchan to seek a reply from the Claimant on 23, 26 and 29 March, and on 3 April in increasingly strident terms, with the last message stating "Don't know if you are just ignoring me or not but I need to no what your planning to do about paying me…" She did not reply to any of them.

55. On 5 April 2018 the Claimant sent Miss Buchan a text stating that he had "been online about tax [and] national insurance" and indicating that she had caused her father a problem, using an expletive doing so. The Claimant did so as he had checked online and discovered that his employer had not paid what he understood the appropriate sums for income tax and NIC to be.

56. Miss Buchan replied to the Claimant the same day asking for an email address, stating that she would give him reference numbers and that they would prove that she sent all that he was claiming not to have received. She did not respond with regard to the online discovery.

57. She then sent a series of texts with reference numbers on that date. The Claimant replied, also on 5 April 2018, stating "There is nothing into my bank since 5 March".

58. Miss Buchan replied by text on the same day being 5 April 2018 stating "As you can see I have payment references for all of the above and therefore you have been paid so you have not been paid off. The bank are still in the process of tracing these and as soon as I have the further information I will pass them on."

59. On 9 April 2018 the Claimant attended at the Bank of Scotland, which he knew to be the bankers of the firm, to seek to progress matters, and after doing so sent a further text to Miss Buchan the same day asking her to contact her bank, who had told him that it could be sorted out in 2 minutes. She did not reply, or contact her bank at that stage.

60. On 10 April 2018 the Claimant sent a text to Miss Buchan asking for his P60. That is an HMRC Form which records annual gross pay and deductions for the tax year. The tax year had ended on 5 April 2018. She did not reply.

61. He repeated the request on 16 April 2018 by text. She did not reply.

62. On 18 April 2018 the Claimant also wrote a letter to Norman Buchan, believing him to be the employer. He asked if he was still employed and listed the dates for payment of wages he claimed were missing. If no longer employed he asked for a redundancy payment. By a separate letter of the same date he asked for P60s and payslips. He did not receive a reply to either letter.

63. The holiday year was 5 April to 4 April. In the period to 4 April 2018 the Claimant had taken five weeks' holidays, and had public holidays. No holidays were taken by him after February 2018, save for public holidays.

64. On or about 2 May 2018 the Claimant learned that Miss Buchan had made enquiries of Maskame and Tait Limited, a local company, with regard to getting someone who worked there to carry out work for them on a self-employed basis.

65. On 2 May 2018 the Claimant sent a text to Miss Buchan stating "So you are getting other people to do your work so I must be paid of[f] interesting". The Claimant decided at that point that his employment had terminated, either actually or constructively.

66. The Claimant did not receive a reply to the text of 2 May 2018.

67. At no stage in the period from the commencement of the period of continuous employment until 2 May 2018 did the Claimant contact an accountant for advice on any of his wages or other remuneration.

68. The Claim Form was sent to Norman Buchan, the first Respondent, by letter from the Tribunal on 10 May 2018.

69. On 15 May 2018 a sum of £3,031.13 was paid to the Claimant. It had been instructed by Miss Buchan on 12 May 2018. It was stated to be "Wages". It was

paid to his bank account from an account maintained by Miss Buchan at Santander, and was an online account. That account was not the normal bank account used by the business of N Buchan Ceilings.

70. The payment was in respect of the following wages which had not been paid when due:

Date	**Amount**
27 July 2017	£404.61
2 November 2017	£404.80
14 December 2017	£402.60
22 February 2018	£100.00
1 March 2018	£100.00
8 March 2018	£400.10
15 March 2018	£400.20
22 March 2018	£400.60
30 March 2018	£400.40

The payments were all a weekly sum of wages for the week to the date given, save for those on 22 February 2018 and 1 March 2018 which were underpayments of wages by the sum of £100 on each occasion. No wages were paid to the Claimant for the period from and after 31 March 2018.

71. The Claimant made a claim for Job-Seekers Allowance in about May 2018. He was refused this and was informed that that was because there were insufficient class 1 national insurance contributions made on his account.

72. He enquired in relation to his account, using an online facility to do so, and discovered that there was then no record for the tax year 2017-18, but that for previous years the position was as follows, with reference to the shortfall being to the sum required to lead to the full contribution and entitlement to benefits (the year 16-17 refers to the tax year to 5 April 2017, and the same principle applies to the earlier years):

Year	Contributions paid	Shortfall
16-17	nil	£733.20
15-16	nil	£733.20
14-15	nil	£722.80
13-14	£108.54	£601.46
12-13	nil	£689.00
11-12	£31.38	£682.34
10-11	£920.55	
09-10	£2,246.35	
08-09	£2,509.54	
07-08	£2,724.26	
06-07	£2,205.26	
05-06	£2,181.89	

73. The Claimant sought employment with companies locally following the termination of his employment, under advice from the Job Centre in Peterhead. He became subject to a measure of depression. On 30 July 2018 he consulted his General Practitioner. He was advised that he was unfit to work for a period of two months, and a fit note was provided to that effect.

74. The Claimant applied for a role at Peterhead Port Authority in August 2018, and was successful. He commenced in that role on 4 September 2018. His gross pay is £404 per week and his net pay is £340 per week. He is paid at the rate of £10.10 per hour. He works as a Port Operative/Bridge Operator. After three months of employment he became entitled to pension payments from that employer.

75. On 16 October 2018 the Third Respondent issued a Form P45 in respect of the Claimant stating the employer as “N Buchan Ceilings” and providing a date of termination of 30 March 2018. Forms P60 for the tax years from 2014-15 to 2017-18 were also provided. They were not accurate. They were all in respect of PAYE reference 961 1026049.

76. The Claimant made enquiries of Her Majesty's Revenue and Customs in relation to payment of income tax. On 17 October 2018 HMRC wrote to the Claimant stating that they expected further submissions regarding pay and national insurance contributions for each employee adding "The payroll administrator is contacting the Accountant for further advice regarding this matter." The author could not give a timeframe to resolve matters but confirmed that "action was being taken to resolve this matter".

77. By letter of 22 October 2018 the Claimant was informed by HMRC that "We confirm that we have never received any pay submissions from your former employer Norman Buchan."

78. During his employment with N Buchan Ceilings the Claimant did not receive a statement under section 1 of the Employment Rights Act 1996, or an itemised pay statement under section 8 of that Act.

79. The Claimant had not received any state benefits following the termination of his employment.

80. The Claimant had worked for Maskame and Tait for weekends in March and April 2018 as a favour to them, and in return received an item of equipment valued at £300 in lieu of any payment for doing so.

81. The Claimant's mobile telephone records are accurate, and there is no record within them of any call from or to the Claimant's number between 27 March and 3 April 2018. The records of texts sent from and to that phone correlate with those text messages produced by the Claimant.

82. On 25 November 2018 the VAT record maintained by HMRC for the VAT number used by the business of N Buchan Ceilings that the persons involved

in that were “Norman Buchan and Anne Ritchie Buchan and Elaine Buchan t/a N Buchan (Ceilings).”

83. Certain of the payments made by N Buchan Ceilings in relation to the Claimant had been made to the wrong National Insurance Number. The correct number is YY436771B, but the number YY436772B had been used.

84. Miss Buchan had been a director of Villagers Ltd and Buchan Ceilings Ltd. The former business became insolvent, and the latter business did not trade. The former business was dissolved on 8 November 2016, the latter on 21 April 2015.

85. The business of N Buchan Ceilings continues to trade. It has no employees, and as and when it receives instructions to do so, sub-contracts the work to install suspended ceilings to self-employed persons.

Submission for Claimant

86. Mr McGregor provided a helpful written submission, and the following is a summary of that. He argued that there had been a constructive dismissal by the removal of the company vehicle, the cessation of payment of wages on 1 March 2018 and the claimant discovering on 5 April 2018 that the Respondents had not paid proper tax or national insurance contributions over several years. The Respondents had failed to pay, or underpaid, the Claimant during the period 17 June 2017 to 2 May 2018. ***Buckland v Bournemouth University [2010] IRLR 445*** was founded on for the principle that an employer in fundamental breach cannot cure that by subsequent actions, and ***Cantor Fitzgerald v Callaghan [1999] IRLR 234*** for the principle that not being paid can be grounds to claim constructive dismissal.

87. The alleged goodwill or extra payments were made without his knowledge and breached the term as to trust and confidence. Reference was made to ***Woods***

v WM Car Services [1981] ICR 66, Mahmud v BCCCI [1997] ICR 606 and ***Malik v BCCI [2014] IRLR 510***.

88. The Respondents stopped paying the Claimant without notice of doing so or of termination. The alleged change in constitution of the firm from three partners to a sole trader was disputed. The Respondents had not made PAYE submissions since 2011, and there was a liability for tax and National Insurance contributions.

89. The Claimant was redundant, and the Respondents had sought to avoid their obligations to him. No statement of terms, or of pay statements, was ever received. The P45 and P60s were wrong. The Claimant had mitigated his loss, and had obtained new employment.

Submission for Respondents

90. Mr Lane also produced a written submission, and copy authorities, and spoke to that. The following again is a summary. He denied that there had been either an actual or constructive dismissal. There was insufficient evidence for the former. For the latter, the Claimant had accepted in cross examination that he had not resigned. Under reference to ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978***, there had not been any resignation, and the other aspects of the test were not met. Events after dismissal could not be the cause of any resignation. The Respondents position was that the Claimant had resigned on 30 March 2018 during a telephone call with Miss Buchan.

91. If there was a dismissal that was for some other substantial reason, and was both potentially fair and in fact fair.

92. Notice pay was not due as there was not termination by the employer. There was no entitlement to a statutory redundancy payment for the same reason, and in any event the Claimant was not redundant.

93. All wages had been properly paid to the Claimant when the bank transfer of £3,013.31 was made from the account of Miss Buchan. No further sum was due. All holiday pay had been paid.

94. There was no breach of contract, and any failure to pay tax, national insurance contributions or pensions contributions was not a breach of contract. A written statement of particulars in the form of the contract had been given to the Claimant, and by letter of 20 March 2017. Itemised pay statements had been provided. The making of them as available to the Claimant was sufficient, under reference to ***Anakaa v Firstsource Solutions Limited [2014] NICA 57.***

95. There had been a resignation of Norman Buchan and Anne Buchan on 26 February 2018, but that did not amount to a relevant transfer under the Regulations as it was a technical dissolution of the partnership, and not a general dissolution whereby the business of the firm is wound up. Reference was made to ***Rose v Dodd [2005] EWCA Civ 957***. In any event, the claim was in respect of a failure relating to employee representatives, and no claim arose, under reference to ***Seawell Limited v Ceva Freight UK Limited UKEATS/0034/11/BI.***

Law

Dismissal

96. Section 95(1) of the Employment Rights Act 1996 provides:

> **"95 Circumstances in which an employee is dismissed**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—
>
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
>
> ……or

(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."

97. The first issue is whether the contract of employment was terminated by resignation by the Claimant, as the Respondents contended, or by the Respondents' acts or words which amounted to a dismissal under section 95(1)(a) as the Claimant contended, and secondly and alternatively whether there had been a constructively dismissal under paragraph (c), as the Claimant contended. The onus of establishing a dismissal where that is denied by the employer falls on the employee, whether that is for an actual or constructive dismissal.

98. The ***IDS Handbook on Unfair Dismissal*** has the following commentary at paragraph 1.6

> "A resignation is the termination of a contract of employment by the employee. It need not be expressed in a formal way, and may be inferred from the employee's conduct and the surrounding circumstances – ***Johnson v Monty Smith Garages Ltd EAT 657/79"***.

99. That case concerned a young female employee who lived in a flat owned by her employers. Following discussions about a young man who had been dismissed by the Respondents for theft, who had visited both her employers' premises and her flat, she thought firstly that she had been dismissed, but secondly that she could not work for the employers any more in light of the nature of that discussion which had reduced her to tears. The Industrial Tribunal dismissed her claim. On appeal the EAT found that there had been a constructive dismissal, stating:

> "Provided that the facts and circumstances show that the party whose contract has been repudiated acts in such a way as to show that that repudiation is accepted, then that will be sufficient, whether or not the acceptance was expressed in any formal way."

100. The EAT also quoted the following passage from ***Walker v Josiah Wedgewood and Son Ltd [1978] IRLR 105***:

> "No one suggests that any formal assertion to that effect is necessary or appropriate. The question has been whether it is sufficient merely to act in such a way as to indicate that the contractual relationship will not be continued or whether it is necessary to do more than that, namely to indicate that the reason why it will not be continued is the conduct of the employer which is regarded as unjustified by the employee. If that is the effect of what is done, however informally it is done, then on any analysis it must be sufficient."

101. The EAT agreed that the mere fact that an employee had remained absent from work did not constitute an effective resignation. She had also returned to collect her wages and P45 and stated that she would not have worked for the Respondents ever again. The EAT held that there had been a resignation in such circumstances, but that there had been a constructive dismissal.

102. ***Oram v Initial Contract Services Ltd EAT 1279/98*** concerned an employee who had been employed by the Respondent for 23 years, and failed to return to work after a disciplinary penalty had been reduced from dismissal to a final written warning. She did not accept the Respondent's proposals for her return and instead sent a letter setting out matters that concerned her. The Respondent replied that it would deal with the issues she had raised upon her return, but she never did return. She claimed she had been dismissed but the Respondent maintained that she had resigned. The EAT agreed with the employment tribunal that she had resigned. The employer had written a letter to state their position, recorded as follows:

> "If the appellant did not come to work they would have to assume that she had decided to resign."

103. The Tribunal had decided that that was what happened, and the EAT considered that they were entitled to come to that conclusion, adding:

> "This resignation was not caused by any statement by the respondents such as occurred in the London Transport Executive case, but rather is simply an analysis of what the appellant did namely that she left her employment."

104. The following passage from ***Harvey on Industrial Relations and Employment Law in Division DI paragraph 230*** summarises the test to be applied in the context where language used as to either dismissal or resignation may be considered to be ambiguous:

> "Unfortunately the authorities do not speak with one voice as to the answer. There is one rather ambiguous Court of Appeal decision, ***Sothern v Franks Charlesly & Co [1981] IRLR 278*** and the following reported decisions of the EAT: ***B G Gale Ltd v Gilbert [1978] IRLR 453, [1978] ICR 1149*** (in which the EAT reviewed two earlier EAT decisions, ***Tanner v D T Kean Ltd [1978] IRLR 110*** and ***Chesham Shipping Ltd v Rowe [1977] IRLR 391); Martin v Yeoman Aggregates Ltd [1983] IRLR 49, [1983] ICR 314; J & J Stern v Simpson [1983] IRLR 52; Barclay v City of Glasgow District Council [1983] IRLR 313***. It is submitted that the following propositions can be drawn from these cases:
>
> (1) The intention of the speaker is not the relevant test. It is true that in ***Tanner v Kean*** the EAT suggested that the crucial question was to find the speaker's intention, but none of the other authorities support this view, and it is submitted that it is wrong in principle, for why should the speaker be able to rely upon his undisclosed intentions when they are at variance with the words he has used? As Arnold J commented in the case of ***Gale v Gilbert:***
>
> > "It is of course well-known that the undisclosed intention of a person using language whether orally or in writing as to its intended meaning is not properly to be taken into account in

> concluding what its true meaning is. That has to be decided from the language used and from the circumstances in which it was used."

that 'the non-disclosed intention of a person using language as to his intended meaning is not properly to be taken into account in determining what the true meaning is.' This narrows it down to (in the jargon) the subjective or objective approaches.

(2) If the words used by the speaker are on their face ambiguous, then the test is how the words would have been understood by a reasonable listener. Provided the listener honestly and reasonably construed them as a dismissal or resignation, he should be permitted to rely upon his construction even if that was not the intention of the ……Support for this proposition is found in the dictum of Arnold J in ***Gale v Gilbert*** quoted above, and from the two EAT decisions in ***Martin v Yeomen Aggregates*** and ***J & J Stern v Simpson***. Indeed, in the last mentioned case the EAT preferred to state the test as being

> "to construe the words in all the circumstances of the case in order to decide whether or not there has been a dismissal'

rather than as being to apply an objective test to ambiguous words. But with respect, there would appear to be no distinction between these two formulations: by focusing on the surrounding circumstances rather than seeking to discover the actual intention of the speaker or the honest understanding of the listener, an objective test is inevitably involved."

105. The majority decision of the Court of Appeal in ***London Transport Executive v. Clarke [1981] IRLR 166*** addressed the issue of repudiatory conduct. In that case the Claimant had gone abroad for seven weeks without approval, his earlier application for that leave having been refused. There was correspondence from his employers after that, which his wife replied to. After that, the employers removed him from their list of those employed. The employers argued that there had not been a dismissal, and that he had

dismissed himself. The issue was whether the employer or employee had terminated the contract. Lord Justice Templeman stated the following, which I set out at some length:

> "The general rule is that a repudiated contract is not terminated unless and until the repudiation is accepted by the innocent party; see ***Boston Deep Sea Fishing & Ice Co v Ansell 39 Chancery Division 339*** at pages 364, 365. That case itself illustrates that contracts of employment cannot provide a general exemption to that rule because it would be manifestly unjust to allow a wrongdoer to determine a contract by repudiatory breach if the innocent party wished to affirm the contract for good reason……..
>
> I can see no reason why a contract of employment or services should be determined by repudiation and not by the acceptance of repudiation at common law……..
>
> ……..
>
> If a worker walks out of his job or commits any other breach of contract, repudiatory or otherwise, but at any time claims that he is entitled to resume or to continue his work, then his contract of employment is only determined if the employer expressly or impliedly asserts and accepts repudiation on the part of the worker. Acceptance can take the form of formal writing or can take the form of refusing to allow the worker to resume or continue his work. Where the contract of employment is determined by the employer purporting to accept repudiation on the part of the worker, the Tribunal must decide whether the worker has been unfairly dismissed."

106. Having found that there had been a dismissal by the employer, the court concluded that that was not unfair given the circumstances, and the claim was dismissed. The acceptance of repudiation in that case was by the employer, and could take the form of refusing to allow him to continue at work if he sought to return.

107. The conclusion that if there is a repudiatory breach that does not automatically terminate the contract but requires acceptance from the employer (referred to as the elective theory) was confirmed by the decision of the Supreme Court in ***Geys v Société Générale, London Branch [2013] 1 AC 523.*** These cases indicate that whether there has been a resignation or dismissal is a matter determined by considering all the circumstances, including the words used, and the context in which there were acts or omissions by the parties.

108. Very general but still helpful guidance on the issue of whether there was a dismissal or resignation is given from the comments by Sir John Donaldson in the case of ***Martin v Glynwed Distribution Ltd [1983] IRLR 198*** in which he stated:

> "Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, 'Who really ended the contract of employment?'"

109. The second aspect of the claim for dismissal is that it was a constructive dismissal under section 95(1(c) of the Act. From the leading case of ***Western Excavating v Sharp [1978] IRLR 27***, followed in subsequent authorities, in order for the employee to be able to claim constructive dismissal, four conditions must be met:

    (1) There must be a breach of contract by the employer, actual or anticipatory.
    (2) That breach must be significant, going to the root of the contract, such that it is repudiatory
    (3) The employee must leave in response to the breach and not for some other, unconnected reason.
    (4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may have acquiesced in the breach.

110. In every contract of employment there is an implied term derived from ***Malik v BCCI SA (in liquidation) [1998] AC 20***, which was slightly amended subsequently. The term was held in ***Malik*** to be as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

111. In ***Baldwin v Brighton and Hove City Council [2007] IRLR 232*** the EAT held that the use of the word "and" following "calculated" in the passage quoted above was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met such that the test should be "calculated or likely". That was reaffirmed by the EAT in ***Leeds Dental Team Ltd v Rose [2014] IRLR 8***:

> "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

112. More recently in ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833*** the Court of Appeal gave guidance in what are "last straw" cases which included as one of the tests to apply whether there was a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence. The court summarized the law at paragraph 55 as follows:

> "I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in ***Omilaju)*** of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)6 breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para [45], above

(5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy."

113. Early case law indicated that the employee must make it clear that he or she left employment with the employer as a result of a breach of contract by the employer that was repudiatory, and do so without delay to avoid an argument as to acquiescence (known as affirmation in English law). For example ***in Walker v Josiah Wedgwood & Sons Ltd [1978] IRLR 105***, the following was said:

"… it is at least requisite that the employee should leave because of the breach of the employer's relevant duty to him, and that this should demonstrably be the case. It is not sufficient, we think, if he merely leaves … And secondly, we think, it is not sufficient if he leaves in circumstances which indicate some ground for his leaving other than the breach of the employer's obligation to him'.'

114. That was followed and approved by another division of the EAT in ***Norwest Holst Group Administration Ltd v Harrison [1984] IRLR 419.***

115. In a decision of the High Court in England in an action about a restrictive covenant, ***Spencer v Marchington [1988] IRLR 392***, it was held that conduct which is as consistent with the contract being kept alive as it is with an acceptance of the repudiatory breach will not constitute the clear acceptance of the repudiatory breach. This was said:

> "If it was a repudiation I am not able to find any acceptance of it by Mrs Spencer. In staying away she was only doing what she was asked, so that would as much indicate that she agreed to Mr Marchington's request to do so as that she rejected it."

116. The requirement to give the reason for leaving employment at the time was later restricted, but the requirement remained to leave employment. In ***Weathersfield Ltd v Sargent [1999] IRLR 94***, an employee was instructed by a senior employee that when considering hiring a vehicle to a customer she was to tell 'any coloureds or Asians' that no vehicles were available. She felt resigned without stating any reason at that time. Shortly afterwards however she wrote to the employers giving her reason for the resignation that instruction. In the Court of Appeal Lord Justice Pill stated:

> "I reject as a proposition of law the notion that there can be no acceptance of a repudiation unless the employee tells the employer, at the time, that he is leaving because of the employer's repudiatory conduct. Each case will turn on its own facts and, where no reason is communicated to the employer at the time, the fact finding tribunal may more readily conclude that the repudiatory conduct was not the reason for the employee leaving. In each case it will, however, be for the fact finding tribunal, considering all the evidence, to decide whether there has been an acceptance.

> Acceptance of a repudiation of a contract of employment will usually take the form of the employee leaving and saying why he is leaving but it is not necessary in law for the reason to be given at the time of leaving."

117. In its commentary on that case, ***Harvey on Industrial Relations and Employment Law*** stated the following:

> "In shifting the emphasis to the reason for the employee leaving the employment, rather than on the acceptance of the repudiation being communicated to the employer, and in stressing the fact finding role of the tribunal, the approach of Pill LJ has much to commend it and its common sense approach dovetails comfortably with the underlying purpose of the statutory provisions."

118. That reference to leaving the employment is consistent with the reference to "leaving" in case law. It supports the general principle behind a claim of constructive dismissal of this kind that the breach of trust and confidence is sufficiently material that the employee cannot continue in employment with the employer and leaves that employment as a result.

119. In ***Hogg v Dover College [1990] ICR 39*** a teacher who was employed on a full time basis was told that his contract was terminated but he was offered a contract on part-time hours because of ill health. He made it clear that he treated that as a dismissal by the employers, but that pending his claim for unfair dismissal he would continue to work on the part time basis offered to him. The EAT held that his contract had been terminated by the employer or, alternatively, that he had been constructively dismissed and that his subsequent conduct did not constitute or create an agreed variation of the contract. He was able therefore to pursue the Claim for unfair dismissal against his current employer. The following comments were made, after a discussion of the issue of a dismissal by the Respondents:

"It seems to us, both as a matter of law and common sense, that he was being told that his former contract was from that moment gone. There was no question of any continued performance of it. ….

Even if we were wrong about that, we would take the view that there was a constructive dismissal under section 55(2)(c) [now section 95(1)(c) of the 1996 Act] because the industrial tribunal found, and this is also a matter of law, that there were fundamental changes in the terms offered to the applicant — I will not repeat how fundamental they were. The question then arises whether he accepted the employers' conduct as a repudiation of their obligations to him or whether it has to be said that by his conduct there was, in the event, no acceptance or indeed, an affirmation. Of course, one asks: affirmation of what? It could only be of a totally different contract. This is not the affirmation of the continuance of the contract where one term has been broken; this is a situation where somebody is either agreeing to be employed on totally new terms or not at all. I have already drawn attention to what happened — his solicitors wrote on 4 September alleging that he had been dismissed; on 7 September they wrote again, in the terms which I have already read out, saying that he would accept the new terms without prejudice to his claims and on 19 October he issued his It1. When he dealt with the matter, in evidence, he said:

"I do not think I could have worked full-time when I came back after illness. I worked 11 periods at first and then after January 1986, went up to 16 periods. When I received the letter of 31 July, there had been no previous discussions on those points. I took the view that I had been sacked from Dover College and offered a part-time job. The offer made to me was marginally better than receiving social security benefits; by taking the part-time employment, that did not alter my view that I had been dismissed."

We wholly concur with that summary of the situation. It seems to us to represent the legal reality of what in fact happened……

> At the end of the day, the position seems to us perfectly clear. There was here a dismissal. If we are wrong in our view in that respect, there was clearly a constructive dismissal because the applicant accepted the employers' conduct as repudiatory and cannot, by his subsequent conduct, be said to have affirmed the original contract or any original contract as varied."

120. In the case of ***Mostyn v S and P Casuals Ltd UKEAT/0158/17***, at paragraph 3 the comments of the then President of the EAT on the sift were noted, which included the following:

> "Whether a breach is a repudiatory breach or not does not depend on whether it is fair to change the terms of the contract, but whether the contract is broken in a sufficiently serious way. Langstaff J then referred to the decision of the Court of Appeal in ***Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, [2011] 1 QB 323***, in particular at paragraph 28. He said that a reduction in pay is almost always, if not always, repudiatory unless it is consented to."

121. At paragraph 44 the comments of Lord Justice Sedley in ***Western Excavating*** are quoted, part of which is as follows:

> "Take the simplest and commonest of fundamental breaches on an employer's part, a failure to pay wages. If the failure is due, as it not infrequently is, to a major customer defaulting on payment, not paying the staff's wages is arguably the most, if indeed the only, reasonable response to the situation. But to hold that it is not a fundamental breach would drive a coach and four through the law of contract, of which this aspect of employment law is an integral part."

122. A dismissal may arise constructively, but there is a separate question as to what the reason for that was, whether it was potentially fair, and whether in fact

there was a fair dismissal under section 98(4). A dismissal can be constructive, but fair.

The reason

123. It is for the Respondents to prove the reason for a dismissal under section 98 of the Employment Rights Act 1996 ("ERA"). The burden is on the employer.

124. In ***Abernethy v Mott Hay and Anderson [1974] ICR 323***, the following guidance was given by Lord Justice Cairns:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

125. These words were approved by the House of Lords in ***W Devis & Sons Ltd v Atkins [1977] AC 931***.

126. In ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748,*** Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision.

127. If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law.

Fairness

128. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act and

> "depends on whether in the circumstances…..the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

129. There is no onus on either party to prove fairness or unfairness under the terms of section 98(4). The onus under that part of the section is neutral. In any consideration of fairness, the importance of consultation has been stated many times, for example Lord Bridge in ***Polkey v AE Dayton Services [1988] ICR 142*** stated:

> "Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by [what is now section 98(2) of the Act]. These, put shortly, are: (a) that the employee could not do his job properly; (b) that he had been guilty of misconduct; (c) that he was redundant. But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation; in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to

take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness posed by [s 98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of [s 98(4)] this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under [s 98(4)] may be satisfied'.'

Redundancy

130. If the reason for the dismissal is redundancy, there is an entitlement to a statutory redundancy payment under section 135 of the Act. The definition of dismissal for that purpose is found within section 136 of the Act, and includes a constructive dismissal.

131. The definition of redundancy is found within section 139 of the Act, and states:

"**139 Redundancy**

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish."

132. There is a statutory presumption of redundancy under section 163 of the Act:

"163 References to employment tribunals

(1) Any question arising under this Part as to—

(a) the right of an employee to a redundancy payment, or

(b) the amount of a redundancy payment,

shall be referred to and determined by an employment tribunal.

(2) For the purposes of any such reference, an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy."

Unlawful deductions from wages

133. The right not to suffer unauthorised deductions is found in section 13, which commences;

"13 **Right not to suffer unauthorised deductions**

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract"

134. There are certain excepted deductions within section 14 that are not relevant to the present Claim. The right to present a claim for unauthorised deductions is found within section 23 of the Act.

135. Wages are defined in section 27 of the Act as follows:

"**27 Meaning of 'wages' etc**

(1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,……

but excluding any payments within subsection (2).

(2) Those payments are—

(a) any payment by way of an advance under an agreement for a loan or by way of an advance of wages (but without prejudice to the application of section 13 to any deduction made from the worker's wages in respect of any such advance),

(b) any payment in respect of expenses incurred by the worker in carrying out his employment,

(c) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office,

(d) any payment referable to the worker's redundancy, and

(e) any payment to the worker otherwise than in his capacity as a worker……..”

Breach of contract

136. If there was a dismissal, there is then an entitlement to notice in the absence of repudiatory conduct by the employee which would entitle the employer to terminate the contract summarily. That claim for pay during notice is a breach of contract claim, and the statutory minimum period of notice is 12 weeks for someone with the Claimant’s service under section 86 of the Act. Whether or not any other terms were breached depends on the terms of contract, and the circumstances.

137. The Tribunal has jurisdiction to consider such a claim by virtue of the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994, which includes the following provision:

> "3 Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum……..if:
>
> …..
>
> (d) the claim arises or is outstanding on the termination of the employee's employment".

138. That Order was made under the terms of section 3 of the Employment Tribunals Act 1996, the relevant provisions of which are as follows:

> "The appropriate Minister may by order provide that proceedings in respect of -
>
> (a) any claim to which this section applies…..
>
> (2) Subject to subsection (3) this section applies to -…..
>
> (c) a claim for the recovery of a sum in pursuance of any enactment relating to the term or performance of such a contract."

Paid annual leave

139. The entitlements for paid annual leave, or holiday pay, are derived from the Working Time Directive EC/203/88, implemented into UK law by the Working Time Regulations 1998 as amended. Regulations 13 and 13A provide for a total of 5.6 weeks of paid annual leave which is capped at 28 days. Regulation 14 has provision for payment in lieu where leave has accrued at date of termination of employment. The Regulations require to be construed in accordance with their purpose where they implement the Directive (as they do for four weeks of annual leave), and having regard to the case law of the Court of Justice of the European Union. The remedy is a Claim to the Tribunal under Regulation 30.

Statement of written terms of employment

140. An employee is entitled to a written statement of terms of employment within 8 weeks of commencing that employment under section 1 of the ERA, and then to receive written notice of any changes under section 4. If not, compensation of up to four weeks' pay is payable under section 38 of the Employment Act 2002.

Itemised pay statement and statement of fixed deductions

141. Section 8 of the Act contains the right to a pay statement with particulars of, to summarise the salient points for this case –
(a) gross pay
(b) deductions and their purpose
(c) net pay
There are related provisions under section 9 for deductions.

TUPE

142. The Transfer of Undertakings (Protection of Employment) Regulations 2006 implement and extend the rights created under the Acquired Rights Directive 2001/23/EC. A relevant transfer is defined in Regulation 3, and includes either a transfer of an undertaking, business or part thereof "to another person where there is a transfer of an economic entity which retains its identity", or a service provision change. Regulation 4 sets out the effect of a relevant transfer, which is that the contract of employment is not terminated but has effect after transfer as if made between the employee and transferee. Regulation 13 and 13A sets out the requirements for the provision of information and consultation, which include the fact of transfer, its date, and the reasons for it. Breach of Regulation 13 is provided for in Regulation 15.

Observations on the evidence

143. There was a stark conflict in the evidence between the Claimant and Miss Buchan. Each accused the other of lying. The Claimant alleged that Miss Buchan had fabricated documents. It was suggested to the Claimant that he may have changed the records of phone calls made.

144. The Tribunal required to consider which of the two witnesses it preferred, and the extent to which the evidence of either or both of them was credible and reliable. That is never an easy task when there are only two witnesses. The Tribunal was unanimous in its decision.

145. At the heart of the case were three factual issues, firstly whether the parties had agreed an arrangement of reduced hours, at a fixed rate of pay, and a separate payment described as either a goodwill or extra payment, to maintain net income at the then existing level of a little over £400 per week, secondly whether the employing entity had changed to Miss Buchan as a sole trader, and thirdly whether the Claimant had made calls to Miss Buchan on 28 and 30 March 2018 during which he had said words that amounted to resignation which she had accepted. All of those matters alleged were disputed by the Claimant.

Was there an agreement for reduced pay and a goodwill payment?

146. Miss Buchan claimed in her evidence in chief that in about 2013 she had had a conversation with the Claimant, at a time when the volume of work had fallen. At that point she accepted that he could have been made redundant, but she said that the firm did not do so she said as the business did not have the funds to pay the entitlements to notice pay of 12 weeks or the statutory redundancy payment, which she thought (when asked by the Tribunal) was about £15,000 to £20,000. She said that doing so would make the business “bankrupt”. She also alleged that the Claimant had said that he would sabotage the business,

or go off ill, or take it to a Tribunal, if he had such reduced income. She said that although there was less work available, the firm needed the Claimant to do the work that did exist.

147. She claimed that it had been agreed with the Claimant at the time, in 2013, on which advice had been taken from her accountant, that the Claimant would be guaranteed pay of 20 hours at £7.85 per hour, and paid more if he did work over 20 hours at that rate, but that she would make a further payment, referred to as a goodwill payment, to make up the total to a sum of about £400 per week which had been his net earnings at that point. She claimed that it had been agreed that the Claimant would meet any tax or national insurance liability for that, and that her accountant told her that he was content with that arrangement because the employee accepted such liability.

148. The Claimant simply denied that any such agreement had been reached, and maintained that he had believed all the time that he was receiving a gross wage of about £550 per week, less deductions for tax and national insurance contributions and latterly for pension contributions under auto-enrolment that led to a net wage of between about £415 and £400 per week. He denied having received letters or a contract from the Respondents that the Respondents had produced with relation to such an alleged agreement, or for other matters as referred to below.

149. It was notable that neither in the Response Form, nor in an email sent on 21 November 2018 from the Respondents solicitor in relation to alleged extra payments was there any mention of the Claimant having made threats to sabotage the business, become ill so as not to be able to work or take the Respondents to a Tribunal which was, it was alleged, the reason for the extra payments arrangement.

150. The arrangement alleged by Miss Buchan was at the very least a highly unusual one. The absence of written material from the Claimant to indicate his

consent was telling. The absence of written material from the Respondents and from the time of the alleged arrangement in 2013 was also telling. The Tribunal however considered that matters were more difficult for the Respondents than that. The alleged advice from the accountant was not confirmed in writing, and the accountant did not give evidence. The alleged advice was at the very least highly surprising. If the arrangement was as described, it would be expected to have been the subject of written confirmation of variation of terms and conditions of employment under section 4 of the Employment Rights Act 1996. There was no evidence of that.

151. Miss Buchan claimed when questioned by a Tribunal member on the final day of evidence that either she or her father had produced a draft contract initially in about July or August 2010 after the Claimant issued a first threat against the business, and after advice had been taken from ACAS. She alleged that the Claimant ignored it when she tried to give it to him. She claimed that essentially the same contract with a different date was provided in late February or early March 2011, but immediately placed in the wastepaper bin by the Claimant. She claimed that similar contracts were provided by her to him annually thereafter, but ignored by the Claimant. When giving evidence in chief, however, she had said that the contract was produced at the stage of the new terms with reduced hours and an extra, or goodwill, payment in 2013. That is one example, and there are others referred to below, where the evidence of Miss Buchan changed to a material extent.

152. No letters were sent to the Claimant's home address by post, nor was any statement of terms under section 1 of the 1996 Act sent to him if, as was claimed, he refused to agree to a contract. The Respondents claim to have taken advice both from ACAS and their accountant. The advice said to have been given by each does not appear to the Tribunal to be credible. If there was a threat to the business as alleged, the Tribunal consider that ACAS would be very likely indeed to have referred to the Code of Practice on Disciplinary and Grievance Procedures, and not to have only given advice to issue a contract.

The accountant's advice, for what on the face of it may have not led to payment of Income Tax and National Insurance Contributions at required levels, did not appear to the Tribunal to be such that a competent accountant was likely to give. The explanation given by Miss Buchan, that as the Claimant was not paid for work but paid the goodwill sum as described meant that it was not taxable as employment income and it was sufficient that the employee met the risk on that, did not appear to the Tribunal to be credible.

153. Miss Buchan produced in evidence a letter she claimed had been delivered to the Claimant dated 31 March 2014 from her father stating

> "This is to let you know that I Norman Buchan due to illness am no longer able to have anything to do with N Buchan (Ceilings) and that Elaine Buchan has full control over all day to day running of the business and any decisions required, please contact her only".

154. The Claimant denied that he had received that letter. Its terms did not appear to the Tribunal to be those one would expect in such a situation, and to be closely related to a later letter allegedly sent by Miss Buchan on 26 April 2018 referred to below.

155. The pay records produced by Miss Buchan and spoken to her in evidence, which followed an Order relating to such records and other matters, were pre-printed forms, with some details for the employee shown, and boxes completed with either numbers or in some cases lines drawn to indicate nil. The form has columns and rows, with there being pre-printed descriptions for the rows for matters such as gross pay, pension, tax due this period and net pay. Some boxes were left empty. Those records purport to break down those payments. The columns are written on a weekly basis, with the date added by hand. The figure for gross pay for each week is given as £157 that being £7.85 per hour at 20 hours. There is then a deduction from that for pension at £0.35, for example for 1 February 2018, the date after the last work performed by the Claimant, the figure for pension is £0.35. There are no deductions shown for

tax or national insurance shown, with the rows for taxable pay to date and tax due to date with a line across added in hand, indicating nil, with the same for the row for total deductions. There is then a figure for net pay, being the gross pay less pension contribution and for 1 February 2018 is £156.65. After that is a row titled "extras". The amount of that varies around the sum of about £243 per week, and for 1 February 2018 was £244.55. There is then a row for "total amount payable", which for 1 February 2018 is £401.90. The figures for total amount payable are those given in the preceding paragraph. For the reasons provided for in this Decision, the Tribunal did not regard those records as reliable, or that they had been prepared, as Miss Buchan had claimed, at the time. It was for example the Respondents own position that they had not paid wages in certain weeks in July, November and December 2017, but the entries for the weeks when the payment had not been paid did not so state.

156. Miss Buchan also produced in evidence a letter said to have been handed to the Claimant dated 20 March 2017 stating

> "Dear Mr Allan
>
> This is confirmation of our conversation today that I have reviewed the situation from last year and things have not improved so your hours of work will remain guaranteed 20 hours per week and still remain that if we can give you more then I will and pay you accordingly, also your rate of pay this year will be £7.85 per hour. Again your demands remain in place and again I will try to continue to pay what was your take home pay for as long as I can as a lump sum redundancy payment is still not possible, you would still be responsible for your own tax and National Insurance on the extra amounts of monies. I also confirm that you were offered an employment contract, but again you refused to sign this document. I am aware that this situation is far from ideal and I will continue to monitor the situation and hopefully things will change.
>
> Yours faithfully
>
> N Buchan (Ceilings)"

157. She claimed that she had done so to protect herself after the conversation referred to. She claimed that the Claimant had earlier threatened that he would go on the sick, sabotage jobs, or take a claim to the Tribunal. The Claimant denied that such a conversation had taken place, or that he had received any such letter.

158. Such allegations of threats of sabotage or going on the sick, or taking a Tribunal claim, had not been pled in the Response Form, nor were they part of an explanation for payment of "extra" sums in an email from the Respondents' solicitor dated 21 November 2018 which had said

> "I have also taken instructions on the sums labelled as "extra\" on the individual pay records. I am advised that the Claimant previously received pay of approximately £400 per week from the Respondents, before his contractual arrangements changed. Notwithstanding the change in contractual arrangements, the Respondents were willing to make goodwill payments to the Claimant each week, so that he continued to receive at least £400 per week. These goodwill payments – which are labelled as "extra" – were not remuneration for work that the Claimant had carried out. They were therefore not subject to income tax or national insurance contributions."

159. Miss Buchan also submitted in evidence the contract of employment that has been referred to. It had been provided late, after the date set out in the Order, and was received subject to consideration of whether or not to do so as referred to above. She explained that she had found it on an old computer and had printed it out, discovering it after the due date for responding to the Order. That did not appear to the Tribunal to be a credible explanation. She claimed that it was the template for contracts she had used in earlier years obtained from the same website of an organization called Law Depot, although she could give no details with regard to them, updating the date each year she did so. None of those earlier contracts were produced, however. The Tribunal were prepared

to accept it into evidence, but were concerned as to whether it was a document prepared when Miss Buchan said it was, and was one that was provided to the Claimant as had been alleged.

160. The contract was a standard form one, with a schedule with particulars for the Claimant himself. It stated that the commencement date, and date of continuous employment, was 5 April 2017. That was not accurate, the actual date of commencement of continuous employment not being disputed. Miss Buchan could not explain that wrong date. It also stated that the hours of work were 8am to 12 noon, and that the position was permanent part time. That was also not explained in the evidence of Miss Buchan. The final page had a copyright mark on it for the period 2002 – 2018.

161. The evidence of the Claimant was that he was unaware of any change to his wages, that he had not seen any of the documents tendered, including that contract, that they had been fabricated, and that had he been asked to accept reduced terms of 20 hours per week at the hourly rate in that contract he would have refused them. The reduction in effective hourly rate was very roughly 40%. The purported agreement to reduce gross pay to £157 per week, but immediately top it up with an extra or goodwill payment was not one that equated with common sense. There were not many people who carried out the work of a ceiling fixer, and there was no dispute that prior to the alleged new arrangement the Claimant had been paid a gross weekly wage of about £550 per week.

162. Miss Buchan was asked to explain the sudden drop in National Insurance Contributions from a level which had regularly been above £2,000 per annum to less than £1,000, and then to small sums before being nil, and said she could not without looking at the records. The matter was not addressed any further, and there was no re-examination. The reduction in NIC occurred earlier than in 2013, when the arrangement was said to be put in place, the reduction starting in 2011. No explanation has been provided for that, although it was

accepted that the Claimant had prior to the arrangement had gross pay of about £550 per week.

163. The individual payments made to the Claimant varied, by small amounts. If there was a standard sum of guaranteed hours, and a standard sum to top that up by way of goodwill, one would expect the payments to be the same, save for any tax or pensions changes that were required. Miss Buchan could not explain why the sums did vary. It was not therefore clear on what basis the whole alleged agreement was constructed. It made no sense against the background of the Respondents' evidence of an agreement to maintain net earnings at a particular level.

164. The Claimant had had accountancy advice when self-employed, but he did not take such advice after returning to employment with the Respondents. He had not understood there to have been a reason to do so. That supports his own evidence that he was unaware of any of the steps that the Respondents were taking with regard to NIC payments, tax or otherwise. His own evidence was that he had not received P60s, nor any wage slips, but generally continued to receive his net pay at about the level he expected, such that he was not aware of the potential for any difficulty.

165. Taking all the evidence into account, both on this issue specifically as set out above, and on other issues as referred to below, the Tribunal did not consider that that alleged contract was in fact given to the Claimant at any stage, and did not consider that there had been any agreement to change the terms from a gross weekly wage of £550 per week.

Constitution of the employer

166. The position of Miss Buchan was that after the resignation of her parents, she was a sole trader, and it was she who became the employer of the Claimant.

Miss Buchan submitted in evidence two letters, one from each of her parents and bearing the date 26 February 2018, stating:

> "I [name and address] resign as a partner of N Buchan (Ceilings) with immediate effect. I am due no income from the Partnership or the remaining Partners."

167. That was the only evidence of any change in the constitution of the partnership. The evidence of there having been a partnership of three partners, Norman Buchan, Anne Buchan and Elaine Buchan, came from the certificate of employer's liability insurance for 2013-14, as well as HMRC records. Miss Buchan did not tender any further certificates as to such insurance, although on her own position the Claimant remained an employee until 30 March 2018. She alleged that she had destroyed them, despite the terms of the certificate set out above advising against that, in effect. She did not however produce any accounting information to show payment of premiums for such insurance, as she could have done had they been paid.

168. Miss Buchan stated in her evidence that there were accounts for the firm throughout the period of its operation, including draft accounts for the most recent financial year, but accounts were not tendered in evidence, despite the terms of the Order. There was no evidence, or letter, tendered from the Accountants, acknowledging receipt of the letters purported to have been signed on 26 February 2018 or confirming that the resignations had been put into effect. There was therefore no other evidence of such resignations, either in writing or given orally, save the two letters and the evidence of Miss Buchan that they had been prepared on the advice of the accountants who, in effect, dictated the terms used. The Claimant had admittedly not been told of the resignations, at a time very shortly before the present disputes began to occur. It was in early March 2018 that payment of wages started not to be paid when normally paid. The Tribunal did not consider that the terms of the letters of resignation were likely to have been provided by an accountant. They were unusual in their style, and made no reference whatsoever to each partner's

capital account. Even allowing for the fact that this was a family partnership, that absence was at the least surprising. Also surprising was the apparent failure to consider the tax implications of the changes proposed, as the firm, being a separate entity for legal and tax purposes, would then cease to exist. A new entity, being Miss Buchan as a sole trader, would then be created, and that required intimation to HMRC, and potentially a new tax code for a different tax return.

169. The reference numbers for Income tax and VAT documents were the same throughout. Miss Buchan said initially that the Accountant should have changed that position and she would take that up with him. When she returned to give evidence on the final day no further evidence on that issue was tendered. She said in evidence during cross examination that she had not been aware of any provision requiring notification of a change of the constitution of a partnership to HMRC within 30 days. There was no evidence that she had done so at any time.

170. The Tribunal had serious concerns in relation to that evidence. It would have been within the terms of the Order to lodge accounts, and correspondence, assuming that they existed as was claimed, and as would be expected. It would have been possible to lead as a witness the firm's accountant, or at least to tender something in writing. It would have been possible to produce tax returns for the firm, a letter to HMRC informing them of the cessation of the firm, or some similar written evidence. The absence of any of that evidence, coupled with the other concerns over the evidence of Miss Buchan set out above and below, led the Tribunal to the conclusion that the two letters allegedly signed on 26 February 2018 were not likely to be genuine. The conclusion was reinforced by the concern that the date on each appeared to be in the same handwriting. That date was shortly before the dispute between the parties arose and the Tribunal did not consider that to be coincidence. The Tribunal did not accept that there had been any change to the identity of the employer and that it remained the firm.

Did the Claimant resign on 30 March 2018?

171. Miss Buchan alleged that there had been calls from the Claimant to her on, amongst other dates, 28, 29 and 30 March 2018, in which he had used abusive language, and intimated in effect a resignation on 28 March by stating that she "could stick" her job, asking for a P45 which confirms the termination of employment, that on 30th he had said he did not work for her any more and asked for his P45. She claims that she had accepted that resignation in terms. But those dates do not accord with the telephone records the Claimant produced. The Respondents did not produce any telephone records of their own. The Tribunal accepted the accuracy of the Claimant's records, and concluded that the alleged calls had not been made. That fact alone meant that the Tribunal did not accept the credibility and reliability of Miss Buchan's evidence that there had been a resignation.

172. In addition however, there were many texts that Miss Buchan had not replied to when a reply would be expected. The message she did accept was sent by her on 5 April 2018 said that he had not been paid off. Whilst it was argued that that meant that he had not been dismissed because that was the claim, or was not redundant, the natural meaning of the words, particularly in the context of whether wages have or have not been paid, is that employment continued. It was not credible that the words used meant what Miss Buchan claimed. They were not consistent with her claims of a resignation by the Claimant about a week beforehand.

173. The Tribunal were further troubled by the letter said to have been sent by the Bank of Scotland, and produced by Miss Buchan and spoken to in her evidence. It was said to be a letter sent to N Buchan (Ceilings), not addressed to an individual, on 10 May 2018 from the Bank of Scotland which stated:

"Dear Miss Buchan

Account:800938 00246251
Account Title: BUCHAN N (CEILINGS)

With reference to our recent conversation we confirm that payments made to Mr W Allan on 26/07/2017, 02/11/2017,09/03/2018
Did come out of your account, however were not paid into Mr Allan's account, all other dates you asked about are confirmed as paid.
Yours sincerely

Manager
Enc."

174. The purported letter had not been signed. It did not have the Bank of Scotland logo. It was addressed to the firm, but then commenced "Dear Miss Buchan". Its reference to "Enc" was to an enclosure but no such enclosure was present. At the foot of the page there was "Page 1 of 1". It had an error in that "Did" started a new line with a capital letter but followed from the third date given and was not the start of a new sentence. In all the circumstances, the Tribunal were not prepared to accept that it was likely to be genuine.

175. Miss Buchan further alleged that a letter from HMRC referring to her, as payroll administrator, contacting the accountant was wrong as she had not had such a conversation. It appeared to the Tribunal very unlikely that HMRC would not have accurately recorded such a simple matter. That cast further serious doubt on Miss Buchan's evidence.

176. Miss Buchan alleged that she had delivered a letter to the Claimant dated 26 April 2018, on headed paper, replying to the Claimant's letter. It complained that the letter had been sent to her father, said that she had accepted his resignation on 30 March 2018, that the investigation into the payments was still ongoing, and that he had personally told her that he had resigned so no redundancy payment was due, nor was any holiday pay due.

177. It was notable in any event that although the letter referred to Norman Buchan it did not claim that there had been a cessation of the firm and that she, Miss Buchan, was a sole trader, such that it was further evidence of inconsistency in Miss Buchan's evidence.

178. A further source of serious concern for the assessment of all of the evidence was how many matters had not been put to the Claimant in cross examination, but were stated by Miss Buchan in her own evidence. There can be occasions where questions are not put in cross examination in error, but the Tribunal concluded in the light of all the evidence that the reason for that is that Miss Buchan had not told her solicitor of these details, and had given them in answer to questions so as to assist her case, rather than give honest and accurate evidence. They included the following;

(i) Norman Buchan had told her that he had given the Claimant a contract in 2008 or 2009 after he had walked off a site, and he had refused to accept it (this being stated in answer to questions by a member of the Tribunal on the final day of evidence, and not consistent

(ii) A carbon copy of the alleged payroll records was always taken, and was available at the office for the Claimant to collect, which copies were hand delivered to him monthly.

(iii) The Claimant spoke to Miss Buchan when the issue of outstanding payments for wages was being discussed around 21 March 2018 (no specific date was given in evidence but that is the date of an exchange of texts about missing payments), she had offered to pay him in cash or wait for matters to be completed, and he had agreed to wait for payment until the bank had completed investigation, but a few days later he phoned and said he didn't want to wait, didn't want cash and wanted a bank transfer

(iv) After she had picked up his voicemail on 26 March when he had asked for a P45, (which was put in cross examination) she had then phoned him that day or the day after, and asked if he was serious about the P45. He had said "I want my pay by noon or I'll teach you a lesson you won't forget"

then put the phone down. What was put in cross examination was that she had telephoned the next day, 27 March 2018, to say that the bank were still looking into it, and that he had called her a “lazy bitch” and that he had told her he would teach her a lesson.

(v) 30 March 2018 he called and said that he was no longer working for her, if she hadn’t paid him by the end of the day that’s it, she will regret it, (which was put in cross examination) that she had responded “Fine I’ll accept your resignation”.

(vi) On 30 March 2018 he was ranting and raving. She said to him that she was sick of the way he was speaking to her, and that she would not put up with it anymore. She had added that if he spoke in an adult civilised manner he could feel free to contact her at any time..

(vii) The wage slips for the payments in March 2018 were included in the letter dated 26 April 2018, which was in an envelope, and this was the same way she had done so for the last 20 years.

179. There were other factors that were relevant to the assessment of credibility and reliability. They are:

(i) She had not disciplined the Claimant in any way after the alleged threats, nor taken any other action, including taking a file note. Yet she claimed that she expected him to withdraw his resignation on 30 March 2018, and said then that she would speak to him if he spoke in an adult and civilised manner.

(ii) She claimed that the accountants said she didn’t need to provide a P11D. That appeared to the Tribunal not to be credible. A P11D is a document to record any benefits that may be taxable.

(iii) Paying additional sums of about £243 per week for over 5 years, at a cost of over £50,000 instead of a redundancy payment of about £20,000, made no business sense, but her evidence was that it was sensible.

(iv) In cross examination of the Claimant it was suggested that a conversation he had held with Miss Buchan about the bank conducting an investigation was during the second week in March 2018. That timing was not

accurate, as the information about specific sums not paid was not given until 21 March 2018.

(v) The P45 was issued only in October 2018, despite a termination she alleged was on 30 March 2018. If there had been a resignation on that date, one would expect a P45 to be issued shortly afterwards, and also have that confirmed in writing.

(vi) The P60 details that were provided in the forms she produced Miss Buchan accepted in her evidence were wrong, but in effect she blamed HMRC for that and claimed that they had told her what to put on those forms. The Tribunal did not regard that as credible.

(vii) Miss Buchan accepted it was prudent to have any agreement recorded in writing, and claimed to have written to the Claimant in March 2017 precisely to have a record of matters, but there was no letter or text from her to the Claimant recording that he had agreed to defer pay, or to refer to that agreement when he asked for pay by text, or that he had resigned, or that she had accepted his resignation, when he asked for clarification of matters. She also failed to reply to many of his own texts, which contained claims about the situation. The failure to dispute that at that time is surprising if they were not correct. The failure to set out her own position at the time, given the messages received, is surprising.

(viii) The texts the Claimant sent were generally consistent with someone exasperated at not being paid, and the lack of reply to messages, then concern over what had been found out from HMRC. They had a “ring of truth” about them.

(ix) Miss Buchan accepted that the non payment of wages on or around 14 December 2017 was an error on her part, but that issue was not remedied until 15 May 2018, despite her having been aware of that in late March 2018.

(x) There were underpayments of wages by £100 on two occasions in February and March 2018, which were not explained in evidence by Miss Buchan but likely to have been because of cash flow problems.

180. The Tribunal also considered the manner in which each witness had given evidence, and their demeanour when doing so. The Claimant, the Tribunal considered, answered questions clearly and candidly, and was generally consistent when he did so. He did not appear to the Tribunal to be the kind of person who had made the threats alleged of him. He was relatively mild mannered in his evidence. He spoke of his being ill after the termination of employment, difficult home circumstances at that time when his doctor signed him off work, in a straightforward and unvarnished way. He made concessions in his evidence on a number of matters when it was appropriate to do so.

181. Miss Buchan however was not similarly candid. On occasion (as noted above) she would say that she needed to look at records rather than answer a question. She disputed all issues put to her in cross examination. The inconsistencies in her evidence were many and substantial, as referred to above. There were changes in her own evidence, and important matters were not put to the Claimant in cross examination again as noted above.

182. The weight of the evidence as a whole was strongly against the Respondents. In addition the Tribunal took account of the lack of pleading or notice of some aspects, the unusual nature of an arrangement and advice regarding that without written evidence from the Claimant or any evidence from the accountant and concerns over documentary pieces of evidence including the HMRC letter and bank letter, which as a whole built up to an extent that the Tribunal did not consider that the evidence of Miss Buchan was either credible or reliable. It was accepted where supported by other evidence, but in general terms where there was a dispute between the evidence of the Claimant or Miss Buchan the Tribunal concluded that it was highly likely that the former was the more credible and reliable.

Conclusions

The employer

183. The evidence disclosed that the firm was constituted with three partners, and that continued. The evidence of the certificate of employer's liability insurance in 2013 was accepted as being reliable, and confirmed the oral evidence given on that point by Miss Buchan. Whilst the Claimant thought that his employer was Norman Buchan as a sole trader, that was his understanding, and did not derive from any document. It is true that the use of a trading name, and lack of partner names on documentation used by the firm, did not clarify matters, and that the same code for tax and VAT purposes was used. There is one entry referring to Mr Buchan trading as N Buchan Ceilings, and the trading name itself may indicate to a layman that the entity is that of Mr Buchan alone, but the evidence overall was clear which was that the employer was a firm of three partners being Norman Buchan, Anne Ritchie Buchan and Elaine Buchan. For the reasons given above the Tribunal did not accept that there had been adequate evidence tendered of a change to that, and in any event none was intimated to the Claimant.

Effective Date of Termination

184. The Tribunal did not accept the evidence of Miss Buchan as to calls made, including on 30 March 2018. There was no written material to support that, and the telephone records contradicted her. She did not write to confirm termination, and the P45 was not issued until October 2018. Further, her email of 5 April 2018 stated that he "had not been laid off". Whilst it could be interpreted as only a response to a question on redundancy, if he had in fact resigned less than a week earlier, that was the opportunity to state that. The fact that the text did not do so, and was equally consistent with continuing employment, is a significant factor in the assessment of the evidence. Indeed the Tribunal regarded the natural meaning of that text from Miss Buchan, in the context of the earlier messages, as indicating continued employment.

185. The date of termination the Tribunal decided was on 2 May 2018 when the Claimant referred to the enquiry made as to work for others, and referred to his having been "laid off". At the same time he had approached ACAS for early conciliation, and the certificate is dated 30 April 2018. The evidence overall indicates that the date on which he communicated to the employer that the repudiation was accepted was 2 May 2018. The Tribunal does not consider that the Claimant can be criticised on the issue of a specific date when the Respondents had not been clear in their own communications, ignored many of his own, and both stopped paying him or providing him with work to do. They had admittedly not paid him sums properly due, and it was only on 15 May 2018 that the payment for those matters were received in his account.

Was there a dismissal?

186. The Tribunal concluded that in all the circumstances there was a dismissal. It is possible that it was an actual dismissal under the terms of section 95(1)(a) of the Act, arising from all the circumstances, particularly:

(i) the outstanding pay from November and December 2017, and the underpayment of wages on 22 February 2018 and 1 March 2018

(ii) The failure to pay wages timeously on 8 March 2018 and thereafter

(iii) The lack of replies from Miss Buchan to messages sent to her regarding the payments outstanding

(iv) The Claimant discovering in April 2018 that the Respondents had not paid NIC for a period of at least three years at all, and lesser sums than had been the case, as set out above

(v) The enquiry made by Miss Buchan to have another person carry out work for the Respondents that the Claimant learned of on 2 May 2018.

187. It is not necessary that such a dismissal arises by use of the words "you are dismissed" or similar. The dismissal can be inferred from the facts and circumstances. The Tribunal did not consider that the withdrawal of the use of the firm vehicle amounted to a fundamental breach, and it was not material in

the Tribunal's assessment. The Claimant's submission had not however focused on an actual dismissal under section 95(1)(a) of the Act, and the Tribunal did not consider that there was a need to address that issue.

188. The Tribunal was entirely satisfied that there had been a constructive dismissal under section 95(1)(c) of the Act. The Respondents were in fundamental breach of contract in respect of the issues set out above, each of which was a repudiatory breach, the Claimant accepted that on 2 May 2018 when he referred to the fact that he must have been paid off, and his acts at and about that time were consistent with his having accepted that his employment had ended following that repudiatory breach. It is not necessary to use words such as "I resign". It is clear from all the facts and circumstances that the Claimant regarded the employment as having terminated by the Respondents breaches, the last of which was when he learned that another person had been contacted to carry out work. He did so at a time when wages were not paid to him, and the attempts to resolve that matters were inadequate, if there were any. The Tribunal concluded that the test for a constructive dismissal had been met. It is also clear that the payments made on 15 May 2018 which was after the termination did not "cure" the fundamental breaches.

What was the reason?

189. In his submission Mr Lane referred to the issue of some other substantial reason, but he did so with little further elaboration. There was little if any evidence from the Respondents on the reason for their actions. The inference from the evidence was that there were cash flow problems with the Respondents. The level of work had admittedly reduced, and continued to do so. There was a failure to pay wages due in November and December 2017. There were further failures in February and March 2018, and in April 2018. When payment was made, that was after the Claim Form had been sent out and came from the personal account of Miss Buchan not the business account at the Bank of Scotland. The evidence was clear that work for fitting suspended

ceilings, which the Claimant was undertaking as the sole employee doing so, was reducing, and that still less work was available in the early months of 2018. By about April 2018 it had reduced to be very little indeed, and the work that was carried out was not by an employee but by a self-employed sub-contractor.

190. The Tribunal concluded that the reason for what it held to be the dismissal was redundancy.

Fairness

191. There was no consultation of any real kind, no meetings were held, and there was in truth a lack of engagement by Miss Buchan in the issues that arose. Payment of wages was not made. The allegation that that was by bank error, at least partly, was not accepted by the Tribunal, with its concerns over the letter purportedly sent by the bank as set out above, and the lack of any further evidence to support that beyond the evidence of Miss Buchan. The dismissal was unfair having regard to the terms of section 98(4) of the Act.

Notice

192. If the Claimant was redundant he was entitled to notice, which under the terms of section 86 of the Act is to 12 weeks. The Respondents were in breach of contract and the measure of the loss therefor is also the 12 week notice period under the Act.

Statutory Redundancy Payment

193. For the same reason the Claimant is entitled to a statutory redundancy payment. The amount is referred to below.

Unlawful deductions re (i) arrears of pay (ii) holiday pay

194. The Claimant was not paid any wages for the period 1 April 2018 to 2 May 2018. They remain outstanding, and are payable as calculated below. The Claimant alleged that, in addition to the payments he received on 15 May 2018, there were other aspects of his pay that had not been received, including in October 2017 and February 2018. He did not however tender sufficient evidence in relation to the same, and the Tribunal is not satisfied that it has a basis on the evidence to make any further award in respect of such claims.

195. The Claimant accrued entitlement to holiday pay for the period of employment from 1 April 2018 to 2 May 2018, which amounts to 2.3 days pay under the 1998 Regulations.

Does the ET have jurisdiction?

196. The challenge had initially been on whether the claims fell under the unlawful deduction from wages provisions, but the Tribunal also considered whether it had jurisdiction in respect of a claim for breach of contract. Jurisdiction is an issue of which the Tribunal requires to take notice of its own initiative. The Tribunal noted that in so far as wages were concerned, in the sense of pay during a period of employment, they were sums payable to the employee. Employers National Insurance Contributions however are payable to HMRC. They are for the benefit of the employee at least in part and at least potentially, however they are required by statute to be deducted and paid to HMRC, and the Tribunal concluded that they did not fall within the definition of wages not least as they were not payable to the employee himself, which is what the statutory definition of wages requires. The assessment of what to award the Claimant in respect of other aspects of unlawful deductions is dealt with more fully below.

197. Again, in so far as the issue of employer National Insurance Contributions are concerned, the Tribunal considered whether it had jurisdiction by way of a claim for breach of contract as distinct to one for unlawful deduction from wages. If they were not paid when they ought to have been, the sum not paid could potentially amount to a claim for damages outstanding at termination so as to fall within the terms of the 1994 Order, having regard also to the terms of the Employment Tribunals Act 1996 quoted above. The Tribunal considered that it did have jurisdiction to consider the claim for breach of contract. But whether there had been a breach of contract was a separate matter, and is addressed separately in the next section.

Breach of contract

198. The Claimant had a contract which included earnings at the rate of £550 gross per week. If sums were deducted for income tax or national insurance contributions and paid to Her Majesty's Revenue and Customs pursuant to income tax or national contributions legislation, those deductions were lawful and would not amount to a breach of contract. In the present case the evidence was clear that although national insurance contributions were properly deducted initially, in the period to 2009- 2010, without the knowledge of the Claimant they were not for later years deducted at the rate that they required to be for earnings at the level of £550 gross per week. It appeared to the Tribunal that the failure to make proper payment to HMRC for the income tax or national insurance contributions, or not to pay the due earnings to the Claimant, was a breach of contract. In either respect, there was no lawful basis for the Respondents to keep those funds themselves. They were in breach of contract in doing so.

199. In so far as income tax was concerned that was not a loss to the Claimant, but to HMRC itself. The issue did not arise therefore for this Tribunal. In so far as national insurance was concerned, there was a loss to the Claimant, as he lost the ability to claim benefits, and will lose pension rights. The amount of that

loss was set out in a letter to the Claimant which noted the sums he required to pay to make good the sums not paid. That is the amount of the loss the Tribunal holds was proved from the breach, and is in the sum of £4,162 being the total sums identified as a shortfall. It may be that the full amount of national insurance contributions was not paid by the Respondents but that is, beyond the sums identified as a shortfall, not an issue for this Tribunal.

200. In so far as pension contributions are concerned, there was a letter produced which confirmed that the Claimant was in one scheme initially, but no evidence of what the employer contribution for that was. For the period from December 2016 onwards the evidence from that letter was that the Claimant was enrolled in the People's pension to conform to auto-enrolment requirements. The Tribunal concluded from that letter and the evidence of actual contributions made that there was a term of the contract of employment as to pension, and that from December 2016 the amount of employer pension contributions changed to equate to that under auto-enrolment provisions, which is 1% of gross salary for the Claimant. His own contributions for pension are not a loss, as they would have reduced the net pay awarded to him above, but he has lost the benefit of those 1% of gross pay for employer contributions. They are in the sum of £5.50 per week, less the £0.35 that was paid in fact, leading to a loss of £5.15 per week, over a period of loss of 65 weeks, leading to a loss of £334.75. The total losses are £4,496.75.

201. The Claimant also sought sums for a potential liability to tax, but firstly the Tribunal considered that there was no basis for jurisdiction or an implied term for the same reasons as for NIC, secondly it did not have it considered adequate evidence to assess the same, and thirdly as the Tribunal understands matters, if there is a liability for unpaid tax, the primary liability falls on the employer. The Tribunal did not accept that there was the arrangement alleged by the Respondents, whereby there was a payment made for goodwill or as an extra. Should HMRC pursue a claim for tax, or in respect of National Insurance Contributions, and should the Respondents seek indemnity for that

from the Claimant, that will require to be resolved in separate court proceedings between the parties but again is not a matter on which the Tribunal considers that it has jurisdiction to determine.

Statement of terms

202. The Tribunal does not accept that any statement of terms, or contract, was provided to the Claimant, and the maximum award of 4 weeks pay is made under section 38 of the Employment Act 2002.

Itemised pay statement

203. The Tribunal does not accept that pay statements were provided to the Claimant, and the maximum award of 4 weeks' pay is made.

Relevant transfer

204. The Tribunal did not have adequate evidence to hold that any transfer from the firm of three partners had taken place. For the reasons given above, the Tribunal did not accept the evidence of Miss Buchan, and was not prepared to consider that the letters purported to be from her parents were reliable. The absence of any supporting evidence, when such evidence could have been obtained, indeed fell within the terms of the Order, but was not produced, was material. The Tribunal concluded that the employer remained the firm comprised of three partners. The claims in that regard are therefore dismissed.

Remedy

205. The Claimant is entitled to a statutory redundancy payment. The basic formula for calculating that is at section 162 of the Act. At termination he had 21 years of continuous employment and he was 61 years of age. His gross wage was £550 per week. That requires to be capped at £508 per week, and the period

of service is capped also at 20 years, for each of which his entitlement is to one and a half weeks pay. The entitlement is to the maximum of £15,240, being 30 x £508.

206. The dismissal has been found to be unfair. There is no basic award, in light of the statutory redundancy payment. In so far as a compensatory award is concerned, that is calculated in accordance with section 123 of the Act the relevant part of which provides:

> "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."

207. The Tribunal accepted that the Claimant had mitigated his loss. He had held the same employment for a very lengthy period. He had had depression and seen his GP. He had been unable to work for a period, but secured new employment reasonably quickly. He had been unemployed until commencing the new position on 4 September 2018. His new net pay is £340 per week. His former net pay at the Third Respondent had been £401.86. He is also entitled to employer contributions to pension as referred to below, which for the period after termination are quantified at £5.50 per week.

208. For the first period, 2 May 2018 to 3 September 2018 when the new employment arose, the losses are 17.7 weeks at a rate of £401.86 per week for pay, and £5.50 per week for pension contributions, a total of £407.36 per week for 17.7 weeks. The loss is £7,210.27.

209. The second period is from 4 September 2018 to the day of this Judgment. The third period is future loss thereafter.

210. The Tribunal considered that the evidence was clear that there was a reduced, if any, need for employees given the reduction in work, and that there would have been a fair dismissal had the Respondents consulted with the Claimant over that issue adequately in and after May 2018That may have taken 2-3 weeks, to about the end of that month, after which there would then have been notice of termination given of 12 weeks, terminating towards the end of August 2018. In light of that, it appeared to the Tribunal that it was not appropriate to award any sum for the second period after the Claimant started his new role, or for any future loss being the third period, under the principle in ***Polkey v AE Dayton Services Ltd [1987] IRLR 503.***

211. The Claimant accepted that he had received a benefit in kind after working for Maskame and Tait as referred to above, and that that benefit in the sum of £300 required to be deducted from his losses.

212. The total compensatory award is the sum of £6,910.27.

213. The termination was on 2 May 2018, and the Claimant was not paid for the period from 1 April 2018. The period is of 4.6 weeks, and a sum of £1,848.56 is due for the same. The Claimant further accrued a period from 1 April 2018 to 2 May 2018 for holiday pay under the 1998 Regulations referred to above. That amounts to 2.3 days' pay, which at a net sum of £401.86 per week is the sum of £132.04. Both those sums were unlawful deductions from the wages of the Claimant.

214. The Claim for breach of contract in respect of notice pay, or in respect of unpaid wages which the Claimant also made is covered by the awards made above, such that no additional award is appropriate, and the sums in respect of national insurance contributions and pension are set out above.

215. The awards for the failure to provide a statement of particulars or itemized pay statements are in each case of four weeks' pay, which for gross pay of £550 is capped at £508, and the sum of £2,032 is awarded in each case.

216. For the reasons set out above, the Tribunal is not in a position to make any award in respect of potential tax liability. The Tribunal does not consider it competent to make an award for incorrect, or late, forms P45 or P60.

217. The Tribunal accepted the evidence of the Claimant that he did not receive benefits following the dismissal, and the Recoupment provisions are not therefore engaged.

218. The sums awarded to the Claimant hereunder are set out in the Judgment. The sums are payable by the Third Respondents, of which the First and Second Respondents are, with the First Respondent's wife, partners.

219. It will be apparent that not all the of the statutory provisions or case law applied in this decision were referred to by the parties in submissions. If either party considers that this causes injustice and they wish to make further submissions in respect of the applicable legal principles or case law, this may be done by way of an application for reconsideration under rule 70.

Employment Judge: **Alexander Kemp**
Date of Judgment: **28 February 2019**
Entered in register: **28 February 2019**
and copied to parties