EMPLOYMENT TRIBUNALS

Claimant: Mrs M Topping

Respondent: Frewco Services Ltd t/a Community Life Choices (in liquidation)

HELD AT: Liverpool **ON:** 14 February & 29 March 2019.

BEFORE: Employment Judge Shotter

MEMBERS: Mrs F Crane
Mrs C Ormshaw

REPRESENTATION:

Claimant: Written representations
Respondents: Written representations

JUDGMENT

The unanimous judgment of the Tribunal is as follows: -

1. The claimant was not automatically unfairly dismissed and her claim for unfair dismissal brought under section 103A of the Employment Rights Act 1996 as amended is not well-founded and is dismissed.

2. The claimant did not suffer a detriment under section 47B or of the Employment Rights Act 1996 and this claim is dismissed.

3. The claimant did not suffer a detriment under section 23 of the National Minimum Wage Act 1998 and her claim for detriment is not well-founded and is dismissed.

4. The claimant was not automatically unfairly dismissed for asserting a statutory right and her claim brought under section 104(1)(b) of the Employment Rights Act 1996 is not well-founded and is dismissed,

5. The claimant was not automatically unfairly dismissed for proposing to act enforce her right to a national minimum wage and her claim brought under section 104A of the Employment Rights Act 1996 is not well-founded and is dismissed,

6. The claimant's complaint of unlawful deduction of wages allegedly incurred in May 2015 is out of time, proceedings were lodged on 15 October 2017 following the ACAS Early Conciliation Certificate issued on 20 September 2017, and the Tribunal does not have the jurisdiction to consider this complaint, which is dismissed.

REASONS

Preamble

1. By a claim form received on 15 October 2017 following ACAS Early Conciliation between 4 September 2017 and 20 September 2017, the claimant brings complaints of automatic unfair dismissal under section 103A of the Employment Rights Act 1996 as amended (the "ERA"), unfair dismissal for asserting a statutory right under section 104 of the ERA, and for proposing to take action to enforce her right to the National Minimum Wage under section 104A of the ERA. The claimant also brings a claim of detriment under section 47B of the ERA, and for proposing to take action to enforce the National Minimum Wage under section 23 of the National Minimum Wages Act 1998.

2. The claimant also complains that she suffered an unlawful deduction of wages and the respondent was in breach of contract when it allegedly breached the grievance procedure.

3. The claimant does not have 2-years continuity of employment to bring a section 98 ERA claim of unfair dismissal and the burden of proof lies on her to prove she was automatically unfairly dismissed as alleged.

4. In its response the respondent denied the claimant was paid less than the national minimum wage and as she used a specially adapted vehicle owned by a commissioning local authority and maintained by the respondent and the local authority (who also paid for fuel) the claimant incurred no travel expenses. In addition, when the claimant did incur travel expenses "for any temporary contracts of services…where the respondent felt the claimant was travelling an unfair distance from their home address to the temporary place of work" she could claim £0.20 per mile. There is no issue between the parties that £0.20 per mile was the contractual rate in relation to mileage expenses, the claimant's argument was that this should have bene increased to £0.45 the AA rate.

5. The respondent denied it acted unfairly in imposing a cancellation charge for non-attendance of training course and maintained it paid employees "out-of-pocket expenses." It disputed it had dealt with the claimant's grievance in an unfair way. With reference to the new contract the respondent maintained it sought the views of

the workforce before implementing the new terms, and denied it was in breach of contract enabling the claimant to treat herself as constructively dismissed. Despite the claimant pleading she was claiming unfair dismissal due to public interest disclosure and complaints, this was not dealt with in the ET3 Response, and the Tribunal has taken the respondent's lack of response into account, applying the law to the facts gleaned from the contemporaneous documentation.

6. At a preliminary hearing held on 17 December 2017 attended by both parties, the issues agreed are set out below:

Agreed issues

7. The issues agreed between the parties are as follows:

Preliminary Issues

1. Can the claimant show that in the circumstances identified in paragraph 9 of the grounds of claim she made a protected disclosure within Part IV A Employment Rights Act 1996 ("ERA") in that:

(a) she disclosed information;

(b) which she reasonably believed was in the public interest because it affected her colleagues as well; and

(c) which she reasonably believed tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject? The claimant relies on the obligations of the respondent not to receive a payment from a worker under section 15 ERA and on the obligation to pay the National Minimum Wage.

2. Can the claimant show that in the circumstances identified in paragraph 9 of the grounds of claim she alleged that the respondent had infringed a relevant statutory right, namely the right not to have to make a payment to the respondent under section 15 ERA and her right not to have unlawful deductions from her pay, and that this assertion was made in good faith?

3. Can the claimant establish that she proposed to take action with a view to enforcing her right to the National Minimum Wage within the meaning of section 23 National Minimum Wage Act 1998 ("NMW") and/or section 104A ERA?

Unfair Dismissal – Part X Employment Rights Act 1996

Dismissal

4. Can the claimant establish that her resignation should be construed as a dismissal in that:

(a) The respondent committed a fundamental breach of the implied term of trust and confidence through a combination of some or all of the following:

(i) requiring the claimant to bear some of the mileage costs of her work travel in her own vehicle;

(ii) paying the claimant in respect of mileage at only £0.20 per mile instead of £0.45 per mile;

(iii) requiring the claimant to attend mandatory health and safety training on 19 April 2017 at the respondent's registered office rather than a location closer to the claimant's home and normal place of work;

(iv) advising that an employee who did not attend the training would face an unauthorised charge of £50.00;

(v) failing to deal with the claimant's emails as grievances;

(vi) threatening the claimant with disciplinary proceedings if she persisted in her complaint about the training or charges;

(vii) issuing a new contract which the claimant was required to sign within four days which contained clauses requiring the claimant to work such hours as necessary to complete her duties without overtime payment, and ruling out additional pay for travel time, and authorising deduction of an administration fee for health and safety training costs;

(b) That breach was a reason for the claimant's resignation; and

(c) The claimant had not lost the right to resign by delaying or otherwise affirming the contract after the breach?

Reason/Fairness

5. If the claimant establishes that her resignation was a dismissal, what was the reason or principal reason for the respondent's breach of contract which caused her to resign? Was it:

(a) a protected disclosure, in which case dismissal is automatically unfair under section 103A ERA;

(b) the assertion of a statutory right, in which case dismissal was automatically unfair under section 104 ERA;

(c) that the claimant proposed to take action to enforce her right to the National Minimum Wage, in which case dismissal is automatically unfair under section 104A; or

(d) some other reason, in which case the Tribunal has no jurisdiction to consider the unfair dismissal complaint as the claimant does not have two years of continuous employment required by section 108 ERA?

Detriment in Employment

6. If the claimant establishes that she made a protected disclosure and was subjected to one or more detriments by any act or deliberate failure to act on the part of the respondent as set out in paragraph 4(a) above, can the respondent show that the ground for any such act or deliberate failure to act was not that the claimant had made a protected disclosure contrary to section 47B ERA?

7. If the claimant establishes that she proposed to take action to enforce the National Minimum Wage and that she was subjected to a detriment by any act or any deliberate failure to act by the respondent as set out in paragraph 4(a) above, can the respondent show the ground on which any such act or deliberate failure to act was done and that it was not because the claimant had proposed to take action to enforce her right to the National Minimum Wage?

8. In so far as any of the acts or deliberate failures to act for which the claimant seeks a remedy under these provisions occurred prior to 5 June 2017, can the claimant show that the act or deliberate failure to act formed part of a series of similar acts or failures, the last of which occurred on or after that date?

Unlawful Deductions from Pay – Part II Employment Rights Act 1996

9. Can the claimant show that on any occasion she was paid less than the amount properly payable to her because taking account of the position in relation to travel time and mileage expenses the claimant was paid less than the National Minimum Wage applicable from time to time?

10. Can the claimant establish that she was paid less than the amount properly payable to her in relation to online training done in May 2015?

Breach of Contract

11. Can the claimant establish that the grievance procedure formed part of her contract of employment?

12. If so, did the respondent breach the grievance procedure?

Remedy

13. If any of the above complaints succeed, what is the appropriate remedy? Issues likely to arise include:

(a) the basic award for unfair dismissal;

(b) the compensatory award in respect of financial losses after an unfair dismissal;

(c) an award for injury to feelings in the detriment complaints;

(d) a possible uplift to awards if the respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2011;

(e) the amount payable in respect of any unlawful deductions from pay; and

(f) the amount payable as damages for breach of contract, if any, in relation to the grievance procedure.

Jurisdiction

1. The Claimant's complaint was presented to the Employment Tribunal on 15 October 2017a and there are time limit issues to be decided in relation to the detriments allegedly suffered.

2. The Tribunal is required to consider whether any detriments that the Claimant is found to have suffered as a consequence of having made a protected disclosure are part of a series of similar acts. If they are, then the Claimant's complaints are within time (section 48(3)(a)). If they are not part of a similar series of acts or failures, then they are out of time (section 48(3)(a).

Witness evidence

8. The Tribunal heard no oral evidence from any of the parties, it having been agreed the liability and remedy hearing (if applicable) would proceed on the papers alone, the respondent having ceased to trade in late 2018 with allegedly no assets or funds. The claimant and Ms Quinn, her legal representative, are currently living in Australia The Tribunal considered the pleadings, correspondence, the claimant's witness statement, supplemental statement and submission together with the bundle of documents. It adjourned the 14 February 2019 hearing as the witness statements of Solay Findlay and Alan Frew were missing in breach of the Case Management Orders, and these have since been provided.

9. There exists a conflict of evidence between the parties concerning whether the claimant used her own vehicle or the specially adapted vehicle provided by a commissioning local authority and maintained by the respondent and the local authority, who also paid for fuel. The claimant maintained she used it "once or twice only" and did not have access to it at the time of resignation as she was working with Warrington BC clients and not Halton Borough Council who had allegedly provided the bus for one child. The Tribunal took the view that this was an unresolvable conflict without testing the evidence, and it was on the face of it, less than credible that the respondent would keep idle a specially adapted vehicle/bus unless it was being used for the one specified child. There was also a conflict in the evidence as to whether telephone conversations took place between the claimant and Solay Findlay on 21 March, 26 May and 30 May 2017 that requires the evidence to be tested. Also in dispute was the claimant's use of the Halton bus for transportation, making travel expenses claims, the new contractual terms and the claimant's reasons for her resignation set out in Solay Findlay's statement in response to which the claimant maintained "none of this happened," all matters that required the evidence to be tested by cross-examination.

10. The Tribunal considered the following evidence in addition to the general party-to-party correspondence concerning the claimant's grievance:

7.1 Claimant's witness statement signed but not dated, supplementary witness statement also signed and not dated, and an unsigned and undated witness statement relating to remedy sent to the Tribunal and respondent on 6 March 2019 in accordance with the 14 February 2019 case management order.

7.2 Statement of Alan Frew, managing director, signed and dated 4 April 2018 received by the Tribunal 6 March 2019.

7.3 Statement of Solay Finley, human recourses manager employed by the respondent signed and dated 4 April 2018 received by the Tribunal 6 March 2019.

7.4 Claimant's list of documents and copy bundle together with a substantial number of documents that have not been inserted into a bundle including numerous wage slips.

7.5 With reference to the documents setting out a number of call logs, the Tribunal was unable to understand these to the full, no duration was recorded and it was unclear who the claimant was or was not talking to. Oral evidence was necessary given the conflicting evidence before the Tribunal as to what transpired and when calls allegedly had or had not taken place. The burden rests on the claimant and she has failed to discharge this.

11. The Tribunal having considered the pleadings, documents, the oral and written evidence and written submission presented by the claimant (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), it has made the following findings of the relevant facts. The Tribunal has had to spend a considerable amount of time sorting through and numbering a vast array of documents in this case; there was no agreed bundle and neither party appears to have complied with the case management orders made on 19 December 2017 with the result that the consideration of this claim based on the paperwork has been made increasingly difficult.

Facts

12. The respondent provides outreach care and support to disabled children and was engaged under local government contracts to do so.

13. The claimant was employed as a support worker from 10 August 2015 until she resigned on 24 June 2017 alleging she was constructively unfairly dismissed. The claimant worked approximately one hour's drive from the respondent's office base in Preston.

The first contract

14. The claimant signed an undated contract confirming her employment commenced on 7 August 2015. The bold emphasis is that of the Tribunal's, and the relevant clauses are as follows:

15.1 **The normal place of work was the employers address in Preston**. The rates of pay varied from £8.10 per hour for daytime work, £9.00 per hour for weekend work and £10.00 per hour for night time work. There is no reference in the contract how training and travelling would be dealt with. On the face of the contract the respondent met its minimum wage obligations and so the Tribunal finds.

15.2 At paragraph 14 of the contract a grievance procedure was set out that had contractual effect. It provided "**you should initially aim to resolve any problems you have informally with the employer**…. If you feel you have a grievance you should follow the procedure…(a) write a letter…giving them details of your grievance... Once your employer has received your grievance they will investigate the matter and invite you to a meeting…after the meeting the employ will write to you without unreasonable delay with their decision…you have the right to appeal…" No time limits were set out for any of the actions. The grievance has contractual effect and the respondent would be in breach of contract if it failed to adhere to it and so the Tribunal found as its starting point.

15. From the date she commenced her employment the claimant was required to drive between client's homes, and drove the children she cared for to various activities. There is a conflict in the evidence as to whether the claimant used her own car, the specially adapted vehicle/bus or a combination of the two, that the Tribunal resolved in favour of the claimant on the basis that there must have been occasions when the claimant used her own car given the respondent's advice to the claimant on 3 March 2017 to offset mileage against tax. The Tribunal is unable to establish the number of occasions the claimant used her own car instead of the adapted vehicle/bus provided by the respondent.

16. There is a conflict in the evidence concerning whether the claimant was told to use the adapted vehicle/bus, which the Tribunal decided in favour of the respondent on the basis that it was not credible the adapted vehicle/bus available for the use of clients would be limited to Halton children only, especially given the fact that the respondent was contributing towards its upkeep and petrol. The Tribunal is unable to establish when the claimant used the adapted vehicle/bus. The unresolvable problem for the Tribunal is its failure to establish with any certainty via the evidence before it, when the claimant used her own car, when she used the respondent's vehicle, and its impact on the claimant's hourly rate. Without the opportunity to question both the claimant and respondent's witnesses, the Tribunal is not able to identify whether the claimant using her own vehicle brought her under the minimum wage, and if it did, how often and by how much. The burden of proof is on the claimant, and she has failed to discharge that burden in respect of her claim that she was paid below minimum wage.

<u>Training</u>

17. The claimant was required as part of her role to undertake training provided by the respondent. She was subject to a General Social Care Code of Practice (the "Code"). The claimant, as part of the regulations she worked under, was required had to comply with the respondent's health and safety policies. The Tribunal took the view that manual handling training comes within the ambit of health and safety. The Code also provided the claimant was required to "meet relevant standards of

practice and working in a lawful, safe and effective way." The respondent was within its contractual right to insist the claimant attended a manual handling course, it was a reasonable management command and it was reasonable to instruct the claimant to travel to Preston, her contractual place of work. In this respect the Tribunal found there was no issue that the respondent was in breach of contract.

18. The Tribunal finds the claimant, on the basis of the written contract, would not have been contractually entitled to receive travelling expenses to and from her home and contractual place of work in Preston. There was no evidence an oral contractual agreement or variation had been reached to the effect that the claimant would receive travelling expenses to and from her contractual place of work, and the claimant does not even claim in her written evidence or in any contemporaneous documents she had been promised such a payment. This gives the Tribunal further difficulties in ascertaining exactly how much the claimant should have received by way of travelling expenses, given the evidence before it that the claimant rarely travelled to Preston. It appears she travelled in the main from her own home to the clients, which was a much shorter journey. It also appears that some expenses for mileage had been offered in respect of attending training as set out below, but it is unclear on what basis the offer had been made i.e. whether contractual or ex gratia, a further matter that required oral evidence.

<u>On-line training May 2016: the alleged unlawful deduction of wages</u>

19. In the claimant's written submissions, she indicated an unlawful deduction had taken place after the claimant attended training on May 2016. There is no contemporaneous documentation from May 2016 relating to this training. In the claimant's original statement, she did not refer to the May 2016 training or deduction. In the claimant's email of 1 June 2016, she referred to not being paid for "on-line training 2 months ago." In written submissions reference was made to the claimant "repeatedly raising written grievances in emails on 19 November (copy not provided to the Tribunal) and 19 December 2016, which was. The 19 December 2016 email referred not to training in May, but online training in March 2016. The burden falls of the claimant to prove her case, and she has not done so as the training could have been in March or May 2016, and the Tribunal is unsure whether it has been provided with the correct number of hours worked. The claimant maintained she undertook online training for 6-hours, and the respondent's evidence is also unsatisfactory as it gives different dates for when the claimant was allegedly paid for this training, including 30 November 2015 before the training could have been undertaken. Neither party have their dates in order, and the correct date(s) cannot be gleaned from the documentation to which the Tribunal was referred to assist it to resolve the evidential discrepancies, and nor has the claimant provided any reason why she was out of time in respect of her unlawful deduction complaint. In an email sent 8 June 2016 by the claimant she wrote "I don't know how many hours the training was in total…" The claimant's last email on the training pay discrepancy was 11 August 2016 where she stated, "hopefully it will be paid at the end of next week" in response to a 10 August 2016 email from the respondent promising to look at the issue.

20. In an email sent 1 June 2016 from the claimant to the respondent reference was made by the claimant driving the adapted vehicle/bus on 21 May, and in respect of work carried out on 22 May she submitted a claim for mileage incurred on the 22

May. This revealed to the Tribunal the claimant used the adapted vehicle/bus and her own car, she made claims for mileage expenses to payroll, a fact that makes it very difficult for the Tribunal to establish whether the claimant was paid less than the minimum wage or not.

21. Following a questionnaire sent to employees on 17 October 2017 concerning the workforce, employees indicated they did not want a zero hours contract and a task group was set up in January 2017, referred to by the Tribunal as a committee of employees below.

27 October 2016 threats to charge for course in the event of non-attendance

22. On the 27 October 2016 the claimant and a number of colleagues were instructed by the respondent in emails to attend a compulsory moving a handling of children training at Preston. All were told "you may be charged if you do not attend this course... You will be paid for the hours that you are actually training – in terms of travelling- I would suggest you look at potential car sharing" which the claimant did, but unsuccessfully.

23. The claimant attended the training on 1 November 2016 and received her full payment for 3-hours attendance, the duration of the training. The Tribunal accepts the claimant's written evidence she received no payment for travel time or expenses. However, given the terms of the contract and the contents of the 27 October 2016 email the Tribunal is not satisfied, on the balance of probabilities, the claimant was contractual entitled to such payment, her contractual place of work located where the training had taken place in Preston.

24. On the 10 January 2017 Solay Finley attended a branch meeting at which 4 volunteers employed as community support workers came together to form a task group/employee committee aimed at updating and redrafting the contracts of employment. The claimant was not a volunteer, but there is no evidence one way or another to the effect that she was unaware of what was going on at the time. It is notable the claimant does not dispute this evidence. A number of meetings took place to discuss the draft contract in January, the final version shared on 31 January 2017. This was the contract sent to all support workers, including the claimant, on 3 May 2017 attached to an identical letter.

January 2017 training

25. In January 2017 training took place by telephone on the respondent's "PASS" system for which the claimant received payment. The training was originally to have taken place in Preston, but as a result of the claimant's email sent 23 January 2017 in which she had written "I think it's unreasonable to expect me to drive to Preston for this training…will I be paid a reasonable travel allowance and some travelling time…paying more in petrol than I will earn" the training took place by phone. It is notable the claimant was not offered or told she was entitled to payment for travelling time and/or travelling expenses prior to the agreement reached for training on the telephone to take place.

26. The respondent emailed all staff on 3 March 2017 informing them about Mileage Allowance Relief to be claimed via HMRC as the respondent does "not pay mileage allowance." Presumably, the reference relates to travelling to and from work and home, but as the parties were not present this could not be clarified. In her written evidence before this Tribunal the claimant makes the point that she did not earn enough to claim Mileage Allowance Relief because she could not claim tax relief. The position was far from clear to the Tribunal, given the fact that the claimant had clearly been submitting mileage claims as set out in the contemporaneous documents, and the respondent's acceptance that £0.20 per mile was paid. In an email sent 2 June 2016, the respondent's payroll department had reminded the claimant that she would be paid mileage "for KD…next week" and was told that she had to submit her mileage forms on a weekly basis…as stated the mileage was for the 22/5/16 which is nearly 2 weeks ago." The Tribunal took the view it was unable to conclude one-way or another that the claimant was not paid mileage as she alleged in her claim, on the basis it was clear on some occasions mileage was claimed by her paid. The burden of proof is on the claimant to establish that it was not paid, and she has failed to discharge that burden.

<u>April 2017 training and threat to charge for non-attendance 20 March 2017</u>

27. On the 20 March 2017 the claimant and colleagues were instructed to attend "essential" moving and handling training in Warrington by an email sent 16.39 from Solay Findlay who wrote "it is essential you attend as part of your support worker role and more than enough notice has been given." The claimant responded at 17.12 asking for the venue to be in Halton and Warrington nearer her home. In an email sent 17.17 Solay Findlay stated it was not possible to change the venue and "you will be able to claim mileage for your travel." Solay Findlay emailed all the employees required to go to the training stating "I forgot to mention of you don't attend the manual handling training you will be charged £50.00." In an email sent at 17.51 the claimant responded to the 17.17 email "**We haven't been able to claim mileage in the past** [the Tribunal's emphasis] …there is also the issue of travelling time" seeking half a day's pay." At 18.30 the claimant replied to the 17.21 email that "words fail me. By what right are you able to charge us the arbitrary sum of £50. I would like to suggest some staff training myself i.e. how to communicate courtesy." She did not complain that the email sent by Solay Findlay was "intimidating," as the claimant now alleges, and given the tenor of her emails in response the Tribunal took the view that had the claimant found the communications to have been intimidating, she would have said so in no uncertain terms. If follows therefore, the claimant did not find the emails intimidating and so the Tribunal finds on the balance of probabilities due to the lack of contemporaneous evidence supporting the claimant's assertion that she had been caused a detriment which the Tribunal dis not accept.

28. The Tribunal finds the respondent's threats of charging employees for non-attendance at training events was not new, it had been raised some five months previously on 27 October 2016 albeit without any reference to the amount involved, and this had not been objected to.

The threat of disciplinary

29. Chantel O'Reilly, business development manager, responded to the claimant in an email sent at 19.24 "It's my decision to charge all of you if non-attendance due to the amount of time children support staff choose not to attend classes. Please reframe [refrain] from emailing my staff member the way you have its conformational [confrontational] and aggressive and I won't allow this and if it continues you may well face disciplinary…we will pay a small mileage fee. It's part of your responsibility to attend courses **and in fact we don't have to pay for you to attend nor for mileage this is just something we do for all support staff** [the Tribunal's emphasis]."

30. Deconstructing this email and giving it an ordinary common-sense meaning on the face of the evidence, it appears there was no contractual agreement to pay the claimant any travel time or mileage costs from her home to Preston when she attended training. The Tribunal finds the claimant was not threatened on the bases of her asserting a statutory right in relation to any unlawful deduction, but because her email was confrontational and aggressive. The head of Human Resources, Solay Findlay had merely sent out an email "apologies, I forgot to mention" the £50.00 charge, it was not a confrontational email and reflected the working practice at the time, albeit without a specified charge referenced previously. Looking at the facts objectively, it was not unreasonable for the respondent to view the claimant's response as confrontational and aggressive; drawing on the Tribunal's industrial experience it is not the sort of response an employer would expect to see exchanged between an employee and manager, even considering the acerbic nature of some of the earlier emails sent by the claimant for which she had not been pulled up on. Chantel O'Reilly correctly stood up for a member of staff, and the Tribunal found there was no causal link between the threat of disciplinary and the claimant asking what right the respondent had of charging a £50 sum, which in the Tribunal's view did not in any event amount to an assertion that a statutory right was being breached as there is no suggestion the amount was going ever be deducted from the claimant who turned up to the course. It is the arbitrary figure of £50 that upset the claimant, not the fact that employees would be charged for non-attendance as she aware of this practice and so the Tribunal finds on the evidence before it.

Alleged grievance and protected disclosure 21 March 2017

31. In an email sent at 16.51 on 21 March 2017 to Chantel O'Reilly the claimant raised the following concerns:

(1) The way she was being managed "regarding the requirement to attend training, putting me under undue pressure."

(2) The email inviting the claimant to training was "intimidating" with reference to "more than enough notice has been given" which has "undertones". The claimant did not elaborate on what undertones she was referring to, and the Tribunal were non-the clearer after it had considered the evidence.

(3) The threat of financial penalty.

(4) Stating the claimant's email was confrontational and aggressive.

(5) The claimant used the words deductions from pay as follows; "May I draw your attention to ACAS guidelines on deductions from pay" setting out the law.

(6) The claimant referred to the employee Handbook and entitlement to 3 days paid training per year (which the Tribunal has not seen as it was not in the papers before it),

(7) On 1 November 2016 because of 2-hours travelling she was paid less than minimum wage. The claimant wrote; "I was given 3-hours pay for this training and yet it took up to 5 hours of my time, neither was I paid any mileage fee…looking back at my payslip for the relevant week when you take account of the 2-hours spent in travelling my hourly rate for that week fell to **£6.32** below the minimum wage."

(8) In her last sentence the claimant wrote "finally, please would you explain to me why it is necessary for me to repeat this training and hopefully we can move on from this episode."

32. The claimant completed the training on 19 April 2017. There was no issue about any unlawfully deduction being made and no other contemporaneous documents before the Tribunal until the new contract was sent to the claimant by Solay Finley on 3 May 2017.

Alleged breach of contract: grievance procedure

33. For a period of some 6-weeks since sending the alleged grievance/disclosure email it appears the client worked as normal and was silent on the matter. At no point did she raise the fact that the 21 March 2017 email was a grievance to which she expected a response. It appears to the Tribunal the email reflects the claimant's general annoyance at the prospect of employees being charged £50 and the valid criticisms levied against her concerning her attitude to management. The only matter she expressly sought a response to was the explanation sought as to why there was a need for her to repeat the training. As she did complete the training, it can be inferred that whatever response was given persuaded her to do so. Without exploring this issue further with the parties in front of it, the Tribunal was not satisfied on the balance of probabilities that the respondent understood the 21 March 2017 email amounted to a grievance brought under the contractual Grievance Policy, and the Tribunal is not satisfied, on balance, it was in breach of contract as informal resolution formed part of the grievance procedure. In the alternative, had the Tribunal found otherwise, causation is an issue as the claimant has not established on the balance of probabilities the respondent failed to deal with the email as a result of her disclosure and/or asserting a statutory right bearing in mind the background in which acrimonious exchanges had been made previously. The claimant has thus not discharged the burden of proof.

34. As indicated above, Solay Findlay's statement referred to a working group of employees involved in producing the new contract, and this was not disputed in the claimant's written evidence or in the supplemental statement when she deals with the statements exchanged on behalf of the respondent. The Tribunal finds that many meetings and discussion took place between the employee working group and Solay Findlay prior to when the new contract was cascaded to employees, including the claimant. The new contract arose as a result of employees were seeking clear contractual terms, and it is more likely than not, given the fact consultation took place between the respondent and employee working group, the final draft contract was a product of this process. It would be very surprising had the claimant been totally unaware of this process, but as she was not available to question, the Tribunal is unable to come to any firm conclusion about her knowledge. The new contracts were distributed to all employees with an accompanying letter, and there was no evidence whatsoever the claimant was singled out in any way as a result of her making a disclosure or asserting a statutory right and so the Tribunal found.

The new contract

35. A letter dated 3 May 2017 accompanied the contract that "constitutes amendments to your original contract…we have to provide written confirmation of any changes, 28 days before the change takes effect…the changes will take effect from Monday 29 May 2017." On behalf of the respondent it was requested a copy should be signed by 26 May 2017 by all support workers.

36. In the Grounds of Complaint and closing submissions, the claimant complained about clauses 6, 8 and appendix 1 and 2 included within the new contract. Clause 6 set out the hours of work and provided "you are required to work such hours as are necessary to complete satisfactorily your duties. There are no overtime payments." In contrast, the original contract provided "any time worked more than standard hours will be paid at the above rates" [in section 7.] The result of the new contract appeared to be the claimant was not entitled to overtime payments, but there was no evidence before the Tribunal she had ever been paid overtime and that she was going to lose out as a result. The contemporaneous documents make no reference to any overtime, the claimant was working beneath the tax threshold, she was on a zero hours contract and there was no evidence in the payslips before the Tribunal the claimant ever worked overtime. From the wage slips it appears the claimant worked a relatively small number of hours weekly, the maximum amount 27 hours a week which does not suggest overtime was ever worked. Without the claimant resolving this issue by oral evidence, the Tribunal is not able to make additional findings. It was however, satisfied, should the claimant work overtime in the future she would not be paid, in contrast to the original employment contract she had entered.

37. The claimant complained about clause 7 in her witness statement and Grounds of Complaint that "all community care services are commissioned with ten minutes inclusive travel time per visit, the employer does not provide any additional pay regarding travelling time to and from services unless specifically agreed at the time of the assignment. Children and Family Services have an inclusive first ten-mile payment included in the hourly rate." On the face of this evidence it appears

therefore the first ten minutes and first ten miles travelled were included contractually when payment was made for the claimant to visit clients, and this had been the case from the outset of her employment. Reference was made to timesheets and mileage record logs submitted to payroll. The claimant complains to the Tribunal that the unpaid travel time resulted in her being paid below National minimum wage; this was not supported by any of the evidence. The Tribunal was unable to assess whether there had been any shortfall in the claimant's pay; the burden was on the claimant to be specific about the time she travelled and as result of that travel, paid less than her hourly contractual rate and the minimum wage by way of a schedule supported by contemporaneous documents. There was no such evidence, and the claimant failed to discharge the burden of proof on the balance of probabilities. The new contract did not change the position on travel during work-time.

Reimbursement of training costs undertaking

38. Finally, with reference to Appendix 1 and 2 "Undertaking and Agreement to Repay training costs Incurred" this document was separate to the contract of employment and required the signature of the claimant as evidence of her agreement to the "undertaking". It referred to mandatory training and required the employee to undertake to reimburse appropriate costs if they "voluntarily withdraws from or terminate(s) the training course early without the Employer's prior or written consent." Reimbursement could also occur on dismissal, and resignation within 12-months of the end of the training course."

39. The effect of this was that any employee, if they resigned, could face a substantial deduction from wages for a number of training courses undertaken during that year of employment. This was in effect a penalty for resignation and it had never been applied previously (unlike the requirement that a charge would be made if an employee did not attend the training) and there was no such reference in the original contract. The Tribunal questions how the working group had agreed to such unfavourable terms as those set out within this undertaking, and for which there was no consideration, but it is unable to take this any further given the evidence before it was that the contractual documents were agreed with the working group.

40. It is notable in Appendix 2 reference was made to the amount of £50 for a course fee and administration fee of £50.00, notably £150 for an employee induction programme with the result that a new employee who had undergone induction would be liable even if the job did not suit them. The respondent sought to justify these fees in appendix 1 as follows: "the amount due to the Employer under the terms of this agreement is a genuine attempt by the employer to assess its loss as a result of the termination of the employee's employment and takes into account the derived benefit to the employer." It expressly stated, "this Agreement is not intended to act as a penalty on the employee on termination of his employment." The respondent's view that the undertaking was not a penalty is in direct contrast to that taken by the Tribunal, which was that it was a penalty, the respondent taking advantage of the poor bargaining power between employer and employee within the employment relationship, particularly those working on minimum wage and zero hours contracts.

41. The claimant alleges the changes were made in direct response to her grievances and were a detriment to her, and the Tribunal concluded, looking at the

matter objectively, the main body of the contract was not detrimental to the claimant but Appendices 1 & 2 were detrimental to her and others given they were applicable to all relevant employees. Given the history of how the amended contract and appendixes came into force, the Tribunal found as a matter of fact, there was no causal link between the claimant raising her complaints and those specific changes to the contract as these had, on the face of undisputed written evidence, been agreed by the task group involved in preparing the new contract that was eventually issued.

42. On the 22 May 2017 the claimant raised queries and sought clarification of paragraphs 4,6, 8, 9 and the Appendices. In the relation the later she legitimately asked, "what protected am I afforded as an employee on termination of employment?" There appeared to be no response from the respondent. Soley Findley in her witness statement referred to telephone calls that had taken place, but these were after the resignation and irrelevant to the Tribunal. The claimant resigned with one months' notice on 25 May 2017 making it clear "I do not agree with the terms of the new contract…and will not be signing." Had the claimant waited until the contract came into force and not made the position clear that she was rejecting it, the appendices would have come into full effect. Understandably, as far as the claimant was concerned, had she waited much longer before resigning she could have been deemed to have accepted it and found herself having payments deducted. The Tribunal found the claimant, as she had taken part in approximately 6 training courses over the last 12 months, would have been facing the prospect of a deduction of wages amounting to £600.00, a substantial amount of money for an employee on a low wage who does not meet the tax threshold.

43. The resignation email referred to the contract as follows "regressive and oppressive terms and conditions being imposed…are unacceptable to me. Therefore, I feel I have no option but to resign purely as a direct result of these imposed conditions." Reference was also made to the outstanding payment for the "online training completed in May 2016." There was no reference to the claimant ever having made a protected disclosure in the public interest, and the Tribunal was unable to understand why a key part of her claim had been omitted in a fundamental letter. On the balance of probabilities based on the contemporaneous evidence before it, the Tribunal found the claimant's concerns was exclusively with her own contractual position and employment, there was no public interest and as a consequence, no reference to whistleblowing.

44. The effective date of termination was 24 June 2017. Other correspondence then followed form the claimant regarding the unpaid online training and at no stage was there a reference to whistleblowing, constructive dismissal, or the claimant being caused a detriment as result or making a protected disclosure or asserting a statutory right.

Law

Public Interest Act Disclosure

S47B Employment Rights Act 1996

45. S.47B(1) Employment Rights Act 1996 ("the ERA") provides- "(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

46. S.47B(1)A ERA provides "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done (a) by another worker of W's employer in the course of that other worker's employment, or (b) by an agent of W's employer with the employer's authority, on the ground that the worker has made a protected disclosure.

47. S.47B(1B) Where A is subjected to detriment by anything done or mentioned in subsection 1(A) that thing is treated as also done by the worker's employer.

48. S47B(1C) for the purpose of subsection 1(B) it is immaterial whether the thing done is with the knowledge or approval of the worker's employer.

Qualifying disclosures

49. S43A and B sets out the meaning of qualifying disclosures as defined by S.43B ERA.

50. S.43B(1) provides in this part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure; tends to show one or more of the following: (a) criminal offence, (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; (c) miscarriage of justice, (d) that the health and safety of any individual has been, is being or is likely to be endangered, (e) environmental damage, and (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed. The claimant is relying on (a) and (b).

51. Section 43B ERA defines a qualifying disclosure as 'any disclosure of information' relating to one of the specified categories of relevant failure.

52. What amounts to a 'disclosure of information' for the purposes of S.43B was explored by the EAT in Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325, *EAT*. The EAT noted the lack of any previous appellate authority on the meaning of 'disclosure of information', and observed that S.43F, which concerns disclosure to a prescribed person draws a distinction between 'information' and the making of an 'allegation'. In its view, the ordinary meaning of giving 'information' is 'conveying facts'. The solicitor's letter had not conveyed any facts; it simply expressed dissatisfaction with G's treatment. For that reason, it did not amount to a disclosure of information and could not be a protected disclosure.

53. In Kilraine v London Borough of Wandsworth [2018] ICR 1850, CA, the Court of Appeal held that 'information' in the context of S.43B is capable of covering statements which might also be characterised as allegations. Thus, 'information' and 'allegation' are not mutually exclusive categories of communication — rather, the key point to take away from Cavendish Munro Professional Risks Management Ltd v Geduld (above) was that a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a relevant

failure. The Court of Appeal in Kilraine endorsed observations made by Mr Justice Langstaff when that case was before the EAT that 'the dichotomy between "information" and "allegation" is not one that is made by the statute itself' and that "it would be a pity if tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined."

54. The Court of Appeal in Kilraine went on to stress that the word 'information' in S.43B(1) has to be read with the qualifying phrase 'tends to show' — i.e. the worker must reasonably believe that the information 'tends to show' that one of the relevant failures has occurred, is occurring or is likely to occur. Accordingly, for a statement or disclosure to be a qualifying disclosure, it must have sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f). It is a question that is likely to be closely aligned with the issue of whether the worker making the disclosure had the reasonable belief that the information he or she disclosed tends to show one of the six relevant failures. Furthermore, as explained by Lord Justice Underhill in Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731, CA, this has both a subjective and an objective element. If the worker subjectively believes that the information he or she discloses does tend to show one of the listed matters, and the statement or disclosure he or she makes has a sufficient factual content and specificity such that it can tend to show that listed matter, it is likely that his or her belief will be a reasonable belief.

Public interest and reasonable belief

55. Public interest is a real issue in the claimant's case. It is not sufficient for a worker to have made the qualifying disclosure in order to gain protection; the disclosure must fall within one of the six the requirements set out under ss.43C-43H ERA.

56. S43(C) provides for the disclosure to his (a) employer or other responsible person. The Enterprise and Regulatory Reform Act 2013 s 18 ("the 2013 Act") removed good faith as a formal requirement in Ss 43C and Ss. 43E-43G with effect from 25 June 2013, although under S.s 49(6A) and 123(6)(A) ERA the Tribunal has the power to reduce damages arising out a detriment where the disclosure was not made in good faith. Providing a worker has met the public interest test it is possible he or she may have ulterior motives but still hold a reasonable belief that the disclosure is made in the public interest. The public interest requirement has not been conceded by the respondent, it applies to all types of relevant failure, including breach of a legal obligation under S.43B(1)(b). The requirement was introduced in 2013 to excluding private employment disputes from the scope of the protected disclosure provisions. In respect of the claimant the Tribunal found the claimant did not hold a reasonable belief the disclosure was in the public interest, she was exclusively concerned with her own employment and the contractual obligations the respondent owed to her.

57. Section 43B (1) ERA requires that, in order for any disclosure to qualify for protection, the person making it must have a 'reasonable belief' that the disclosure 'is made in the public interest'. This requirement applies to all cases where the disclosures were made on or after 25 June 2013.

58. The leading case is Chesterton Global Ltd cited above, which concerned a number of disclosures about accounting practices at CG Ltd. The EAT observed that the words 'in the public interest' were introduced to do no more than prevent a **worker from relying on a breach of his or her own contract of employment where the breach is of a personal nature and there are no wider public interest implications.** In the EAT's view, a relatively small group may be sufficient to satisfy the public interest test. In the present case, the Tribunal concluded on the cumulative evidence before it that the person the claimant was most concerned about was herself and she had no one else in mind contrary to the suggestion that she was not just making an assertion about her own terms and conditions, but about other issues which affected all employees.

Detriment

59. In a claim for detriment the claimant must prove that she has made a protected disclosure and that there has been detrimental treatment on the balance of probabilities, the burden is then on the respondent to prove the reason for the treatment. S.48 ERA sets out the burden of proof, s48(2) provides that on a complaint of detriment in contravention of S.47B it is for the employer to show the ground on which any act, or deliberate act, was done — S.48(2). Once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.

60. If the Tribunal find that the worker was subjected to a detriment it is necessary for the claimant to establish that the detriment arises from an act, or a deliberate act, by the employer. In the well-known EAT decision in London Borough of Harrow v Knight [2002] EAT/0790/2001 it clearly established that the question of the "ground" on which the employer acted in victimisation cases requires an analysis of the mental processes (conscious or unconscious) which caused him so to act. The Tribunal were limited in its consideration of the mental process of the respondents in relation to the detriments alleged by the claimant by the fact that no oral evidence was given. The Tribunal has therefore relied upon the undisputed evidence set out in the witness statements and the documentary evidence.

61. The term "detriment" is not defined in the ERA, but it has been construed in discrimination law which is applicable to S.47B detriment claims. A detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them in all the circumstances had been to their detriment. It is clear from case law reporting a worker to a professional body can amount to a detriment and on behalf of the respondent this point was conceded.

62. In Aspinall v MSI Mech Forge Ltd UKEAT/891/01 and NHS Manchester v Fecitt [2012] IRLR 64. In the case of a detriment, the Tribunal must be satisfied that the detriment was "on the ground that the worker has made a protected disclosure" (section 47B (1), ERA 1996). The EAT has held that the detriment must be more than "just related" to the disclosure. There must be a causative link between the protected disclosure and the reason for the treatment, in the sense of the disclosure being the "real" or "core" reason for the treatment. In the claimant's case there was

no satisfactory evidence before the Tribunal the changes made to all employee's contract of employment were materially influenced by the claimant's disclosure. The changes were made following consultation with the committee of employees, all of whom who were then subsequently affected in addition to the claimant.

63. In Fecitt cited above**,** the Court of Appeal held where an employer satisfies the Tribunal that it acted for a legitimate reason, then that necessarily means that it has shown that it did not act for the unlawful reason being alleged. One of the main issues before the Court of Appeal concerned the causal link between making the protected disclosures and suffering detriment, and it was held that s.47B will be infringed if the protected disclosure **materially influences (in the sense of being more than a trivial influence)** the employer's treatment of the whistleblower. "Where a whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical – indeed sceptical- eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed to genuine explanation…if the reason for the adverse treatment is the fact that the employee has made the protected disclosure, that is unlawful."

64. Lord Justice Elias at paragraph 41 set out the following: "Once an employer satisfies the tribunal that he has acted for a particular reason – here, to remedy a dysfunctional situation – that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the tribunal considers that the reason given is false (whether consciously or unconsciously) or that the tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the Igen principles." This test is particularly relevant to the present case and was applied by the Tribunal when considering the written evidence.

Automatic unfair dismissal

65. Section 103A ERA renders the dismissal of an employee automatically unfair where the reason (or, if more than one reason, the principal reason) for his or her dismissal is that he or she made a protected disclosure without any consideration of whether the dismissal was reasonable in the circumstances. The two-year minimum period of qualifying service necessary to bring an 'ordinary' unfair dismissal claim, and the statutory cap on the amount of compensation that can be awarded for an 'ordinary' unfair dismissal, does not apply.

66. With reference to causation, the approach in detriment whistleblowing claims is different from that adopted in claims of unfair dismissal: S.47B will be infringed if the protected disclosure materially influences the employer's detrimental treatment of the worker, **whereas S.103A requires the protected disclosure to be the reason or principal reason for dismissal.** In the pivotal case of Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA, the Court of Appeal rejected the argument that the approach to causation in Ss.47B and 103A should be the same, instead taking the view that the different tests are a consequence of Parliament's decision to integrate the protected disclosure provisions with existing protections against detriment and unfair dismissal in the ERA.

Automatically unfair dismissal for asserting a statutory right

67. Under S.104 of the Employment Rights Act 1996 (ERA), an employee's dismissal is automatically unfair if the reason or principal reason for the dismissal was that: (1) the employee brought proceedings against the employer to enforce a relevant statutory right — S.104(1)(a), or (2) the employee alleged that the employer had infringed a relevant statutory right — S.104(1)(b).

68. It is irrelevant whether the employee actually had the statutory right in question or whether the right had been infringed, but the claim to the right and its infringement must have been made in good faith — S.104(2). Good faith does not appear to be an issue for the respondent in Mrs Topping's case. It is sufficient that the employee made it reasonably clear to the employer what the right claimed to have been infringed was; it is not necessary actually to specify the right — S.104(3). In a claim brought under S.104, there are three main requirements: (1) the employee must have asserted a relevant statutory right, (2) the assertion must have been made in good faith , and (3) the assertion must have been the reason or principal reason for the dismissal. If one of these reasons is established, the employment tribunal *must* find the dismissal unfair if the prohibited reason was the reason or principal reason for dismissal. If it was, then there is no option but for the Tribunal to find the dismissal unfair.

69. The leading case is Mennell v Newell and Wright (Transport Contractors) Ltd 1997 ICR 1039, CA, where M, an HGV driver, refused to sign a draft contract that would have allowed his employer to make deductions from his wages on termination of employment in order to recoup training costs. M was told that he would be sacked if he did not sign. The EAT held in the light of S.104(2), it was sufficient that the employee had alleged in good faith that the employer had infringed a relevant statutory right; there was no requirement for the employer to have actually infringed the right in question. The Court of Appeal agreed with the EAT that S.104 is not confined to cases where a statutory right has actually been infringed. **It is sufficient if the employee has alleged that the employer has infringed a statutory right and that the making of that allegation was the reason or the principal reason for the dismissal.** The allegation need not be specific, provided it has been made reasonably clear to the employer what right was claimed to have been infringed. **The allegation need not be correct, either as to the entitlement** to **the right or as to its infringement, provided the claim was made in good faith** [the Tribunal's emphasis]. The important point is that the employee must have made an allegation of the kind protected by S.104; if he or she did not, the making of such an allegation could not have been the reason for his or her dismissal.

Detriment section 23 National Minimum Wage Act 1998

70. Section 23 provides (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer, done on the ground that—

(a) any action was taken, or was proposed to be taken, by or on behalf of the worker with a view to enforcing, or otherwise securing the benefit of, a right of the worker's to which this section applies…

Time limits unauthorised deductions of wages

71. As set out in the IDS Handbook the EAT in Arora v Rockwell Automation Ltd EAT 0097/06 set out three types of unauthorised deductions: a straightforward deduction; a payment that is alleged to be a shortfall of what is actually due; and a complete non-payment. Turning to the first type, the EAT stated that the relevant time limit was contained in S.23(2)(a), this provides that a complaint must be presented to a tribunal before the end of the three-month period beginning with the date of the payment of wages from which the deduction was made. An actual deduction in breach of contract, or one where the payment from which the deduction is made has been tendered by the employer, would clearly fall within this subsection.

72. The Tribunal took the view that the alleged underpayment of Mrs Topping's travel time/expenses was a non-payment within the meaning of S.13(3), and it followed that the three-month time limit in this case began to run on the date of payment of the wages from which the single deduction was made back in 2015/2016. Therefore, the time limit did not begin to run from the date of termination of the employment as the time begins to run when the contractual obligation to make a payment arises. A claim for an unlawful deduction from wages arises when an employer fails to pay a sum due by way of remuneration at the appropriate date — i.e. the date on which payment is due under the contract. Under the terms of the claimant's contract, payment could be made approximately two-weeks after the mileage expense claim form was submitted, and it was only once that date had passed that it could be said that the company was refusing to pay money allegedly due under the contract and so it was only then there could be said to be an unlawful deduction from which the time limit for presenting a claim began to run.

73. Guidance for employment tribunals on the question of time limits for protection of wages claims was provided by the EAT in Taylorplan Services Ltd v Jackson and ors 1996 IRLR 184, EAT. The correct approach, said the EAT, was for the tribunal to ask itself the following questions: (1) Is this a complaint relating to one deduction or a series of deductions by the employer? (2) If a single deduction, what was the date of the payment of wages from which the deduction was made? (3) If a series of deductions, what was the date of the last deduction? (4) Was the relevant deduction under (2) or (3) above within the period of three months prior to the presentation of the complaint? (5) If the answer to question (4) is in the negative, was it reasonably practicable for the complaint to be presented within the relevant three-month period? (6) If the answer to question (5) is in the negative, was the complaint nevertheless presented within a reasonable time? In Mrs Topping's case there was no evidence that it was not reasonably practicable for her to have brought the claim within the statutory time limits.

Conclusion – applying the law to the facts

Dismissal

74. With reference to the first issue, namely, can the claimant establish that her resignation should be construed as a dismissal, the Tribunal found she had for the reasons set out above. Taking into account the case law above, on the balance of probabilities the Tribunal found that respondent had committed a fundamental

breach of the implied term of trust and confidence in accordance with its findings below:

74.1 There was no satisfactory evidence the claimant was required to bear the mileage costs of the work travel in her own vehicle. It was apparent from the contemporaneous evidence that the claimant used the respondent's fully expensed vehicle and she also claimed travel expenses when her own vehicle was used.

74.2 The contractual obligation on the respondent was to pay to the claimant in respect of mileage £0.20 per mile, there was no obligation for it to pay £0.45 per mile as a matter of contract. There was no satisfactory evidence that the respondent was in breach of contract; an employer can pay £0.20 per mile if this figure was agreed, which it was between the parties. The only issue was if the claimant could prove, on the balance of probabilities, that the respondent in paying the claimant £0.20 per mile paid her below the national minimum wage, and she was unable to discharge this burden.

74.3 It was a term of the claimant's employment that she attends training, and requiring the claimant to attend mandatory health and safety training on 19 April 2017 at the respondent's registered office rather than a location closer to the claimant's home and normal place of work was not a breach of contract. The claimant's contractual place of work was the respondent's office in Preston, and as such she would not have been entitled to any travel expenses unless they were agreed on an ex gratia basis as reflected in the evidence.

74.4 It was not a breach of contract to inform employees who did not attend the training would face an unauthorised charge of £50.00. Employees were made aware on 27 October 2016 that a charge for non-attendance would be made if a training course were not attended by them, although the amount was unspecified. As the claimant attended there was no such issue, and the claimant has never been charged for any course during her employment or after its termination.

74.5 As indicated above, the claimant's letter of 27 March 2017 was mainly concerned with her being asked to attend training, the threat of financial penalty, payment for training and the amount of time it cost her to travel up to the respondent's office. The claimant had complained of these matters before, her letter is not on the face of it a formal grievance, and under the respondent's contractual grievance policy it is a contractual requirement that the problems were initially to be resolved informally –clause14 of the contract. The claimant attended the training she questioned in the 27 March 2017 letter, which suggests some form of communication followed between the parties had followed that satisfied the claimant who attended as a result. Due to the parties not being present the Tribunal was unable to take this any further. It noted however, as set out above, the claimant did not chase up the 27 March 2017 email, she continued to work as normal and had she raised a grievance, as she now alleges, given the tenor of earlier correspondence, the Tribunal took the view she would have confirmed to the respondent she had raised a grievance and it had not been dealt with under the contract.

74.6 There was no evidence of any threat to the claimant with disciplinary proceedings if she persisted in her complaint about the training or charges; the very clear contemporaneous evidence was the claimant had sent a less than polite letter to Solay Findlay on 20 March 2017, which Chantel O'Reilly interpreted as confrontational and aggressive and the threat was that the claimant "may" face disciplinary action of she continued sending such correspondence. The threat of disciplinary action had not causal connection with training or charges, it concerned the claimant's disrespectful attitude towards her manager and the less than respectful correspondence i.e. by the claimant suggesting her manager went on staff training on how to communicate with "courtesy".

74.7 Finally, with reference to the respondent issuing the claimant with a new contract which the claimant was required to sign within four days, which contained clauses requiring the claimant to work such hours as necessary to complete her duties without overtime payment, ruling out additional pay for travel time, and authorising deduction of an administration fee for health and safety training costs, the Tribunal found was a breach of the express terms of the claimant's original contract even taking into account the fact the contract, to all intent and purposes, had previously been agreed between the staff committee and respondent before forwarded to individual employees. The claimant was not required to sign the contract within 4-days as she alleged. The letter of 3 May 2017 that accompanied the contract provided the changes would take effect on 29 May 2017 and a copy should be signed by 26 May 2017. Given the wholesale changes to the contract and the appendix it referred to, the Tribunal took the view that even though there was no evidence the claimant worked ever overtime, should she have done so in the future this would almost certainly have resulted in the claimant, who was not on a salary but minimum hourly wage, being paid less that the legal minimum. In addition, the training cost reimbursement was not limited to the individual cost for non-attendance, which could be quantified via the actual training costs incurred, but a blanket cost of £100 including an administration fee and included courses undertaken in the year before termination, which could be deducted out of the final salary payment. The Tribunal took the view that the respondent exploited employees who had very little power, working at minimum wage originally on a zero hours contract, and the threat of deducting £100 was more akin to an illegal fine, with the claimant facing, had she resigned later than she did when the contractual changes came into effect, a deduction of wages totalling some £600.00, a considerable amount of money for an employee on a low wage.

74.8 With reference to the issue, namely, was the breach a reason for the claimant's resignation, the Tribunal found that it was and she had not lost the right to resign by delaying or otherwise affirming the contract after the breach. Had the claimant's claim been one of ordinary unfair dismissal she would have succeeded in her claim, but as she did not possess the necessary continuity of employment such a claim could not be brought and she is restricted to claiming automatic unfair dismissal. In a constructive unfair dismissal claim the claimant must discharge the burden of proving she resigned in response to the respondent's repudiatory breach of contract, and that the respondent's actions related either to her assertion of a statutory right, the protected disclosure or both.

Protected disclosure

75. The Tribunal is required to consider whether the claimant raised a protected disclosure and/or asserted a statutory right and/or proposed to take action to enforce her right to be paid a minimum wage.

76. With reference to whether or not the claimant had made a disclosure, the Tribunal concluded on the balance of probabilities she had in her letter of 21 March 2017 when she complained of the threat of a financial penalty, referred to the ACAS Guidelines on the deductions from pay and being paid less than the minimum wage by £6.32 on 1 November 2016. The Tribunal accepts the claimant reasonably believed (even though she was incorrect in her belief) that making the disclosure tended to show the respondent was failing to comply with a legal obligation. It had sufficient factual content to can tend to show this, and given the claimant's earlier correspondence concerning monies/pay owed as a result of her attending training, she genuinely believed the respondent had paid her less than the minimum wage as a result of the travelling time and cost.

75 The claimant is required to establish that the disclosure was made in the public interest for it to qualify as a protected disclosure and she has failed to do so on the balance of probabilities. Her disclosure is personal in nature, it exclusively relates to her own contract of employment as set out above. There was no evidence other employees had the same concerns as the claimant; and on the face of the contemporaneous documentation, it appears other employees had agreed the contractual changes which included no payment for travel expenses.

76 It is notable that the Court of Appeal in Chesterton Global Ltd referred to above, rejected the company's argument that, for a disclosure to be in the public interest, it must serve the interests of persons outside the workplace, and that mere multiplicity of workers sharing the same interest was not enough. In the Court's view, even where the disclosure relates to a breach of the worker's own contract of employment (or some other matter where the interest in question is personal in character) there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest, as well as in the personal interest of the worker. In this regard, the following might be relevant; the numbers in the group whose interests the disclosure served. In the claimant's case this evidence was unavailable to the Tribunal, however, on the facts before it, it is apparent the new contracts were agreed by a group of employees whose task was to help draft and agree the new contract, which in turn suggests there did not exist a multiplicity of workers sharing the claimant's interests given the lack of any evidence that other employees had refused to be bound by the new contractual terms. Had the parties attended the hearing this may have bene a matter that could have been explored further.

77 In Chesterton Global Ltd the Court of Appeal was not prepared to discount the possibility that the disclosure of a breach of a worker's contract 'of the Parkins v Sodexho kind' may be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees shared the same interest. The broad intent behind the 2013 statutory amendment was that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers, even where more than one worker is involved

and there was no satisfactory evidence before it that other workers had taken the same stance as the Mrs Topping given the backdrop behind which the new terms of the contract was reached. In short, there was no evidence whatsoever any other employee(s) of the respondent disputed the terms and conditions of employment and as a consequence, the claimant's personal concern over contractual matters could not constitute matters in the public interest. Complaints about contracts of employment and working conditions can still attract protection, however, in Mrs Topping's case the Tribunal found she had not established she held a reasonable belief in the existence of a public interest aspect to the disclosure.

Automatic unfair dismissal

78 The claimant has established that her resignation was a dismissal. However, the reason or principal reason for the respondent's breach of contract which caused her to resign was not a protected disclosure and the dismissal was not automatically unfair under section 103A ERA.

79 The reason or principal reason for the respondent's breach of contract which caused her to resign was not the assertion of a statutory right, and her dismissal was not automatically unfair under section 104 ERA for the reasons set out above.

80 The reason or principal reason for the respondent's breach of contract which caused her to resign was not that the claimant proposed to act to enforce her right to the National Minimum Wage, in which case dismissal is automatically unfair under section 104A for the reasons set out above.

81 In short, it was for some other reason, namely an agreement reached with a committee consisting of employees to change the contractual terms, in which case the Tribunal has no jurisdiction to consider the unfair dismissal complaint as the claimant does not have two years of continuous employment required by section 108 ERA.

Detriment in Employment

82 For the avoidance of doubt, the Tribunal finds the new contractual terms were detrimental to the claimant for the reasons already set out in its findings of facts. Had the claimant established (which she did not) that she made a protected disclosure and was subjected to one or more detriments by any act or deliberate failure to act on the part of the respondent as set out in paragraph 4(a) above, the next issue that required resolution by the Tribunal was; can the respondent show that the ground for any such act or deliberate failure to act was not that the claimant had made a protected disclosure contrary to section 47B ERA. In the alternative, in relation to this issue the Tribunal would have found that it could on the balance of probabilities, as there was no causal nexus between the new contractual terms and protected disclosure.

83 With reference to the issue, if the claimant establishes that she proposed to take action to enforce the National Minimum Wage and that she was subjected to a detriment by any act or any deliberate failure to act by the respondent as set out in paragraph 4(a) above, the Tribunal found the claimant had not established this as there was no suggestion she intended to enforce the National Minimum Wage in the

email sent 21 March 2017. A reference to her belief that she was underpaid by £6.32 cannot be interpreted as informing the respondent that she proposed to take action. In the alternative, if the Tribunal is wrong in its analysis, on the balance of probabilities the Tribunal would have gone on to find the respondent had not produced the new contract because the claimant had proposed to act to enforce her right to the National Minimum Wage, as there was no causal nexus between the new contractual terms, assertion of statutory rights and protected disclosure.

84 With reference to the issue, namely, in so far as any of the acts or deliberate failures to act for which the claimant seeks a remedy under these provisions occurred prior to 5 June 2017, can the claimant show that the act or deliberate failure to act formed part of a series of similar acts or failures, the last of which occurred on or after that date; the Tribunal found she cannot based on the factual matrix it found.

Unlawful Deductions from Pay – Part II Employment Rights Act 1996

85 Can the claimant show that on any occasion she was paid less than the amount properly payable to her because taking account of the position in relation to travel time and mileage expenses the claimant was paid less than the National Minimum Wage applicable from time to time, the Tribunal found the claimant cannot show this and she has not discharged the burden of proof in this regard.

86 Can the claimant establish that she was paid less than the amount properly payable to her in relation to online training done in May 2015, the Tribunal has found that she has not for the reasons set out and in any event, this claim is out of time for the reasons already mentioned and those set out below.

Breach of Contract

87 With reference to the issue, namely, can the claimant establish that the grievance procedure formed part of her contract of employment, as set out above, the Tribunal found that it was a contractual term but the respondent was not in breach of the grievance procedure. Had the Tribunal found otherwise, in the alternative, given the 6-week period in which the claimant did nothing and worked as normal, it would have gone on to find (a) the breach was not the reason for the claimant's resignation, and (b) she had lost the right to resign by delaying or otherwise affirming the contract after the breach.

Jurisdiction

88 The Claimant’s complaint was presented to the Employment Tribunal on 15 October 2017. There are time limit issues in relation to claim for the unlawful deduction of wages allegedly incurred in May 2015, the claimant having issued proceedings on 15 October 2017 following ACAS Early conciliation commencing on 4 September 2017 and finishing 20 September 2017. The complaint must be presented to a Tribunal before the end of the three-month period beginning with the date of the payment of wages from which the deduction was made, it was not and there was no evince it was not reasonably practicable to meet the statutory time limit. The Tribunal does not have the jurisdiction to consider the complaint of unlawful deduction of wages.

89 In conclusion, the claimant was not automatically unfairly dismissed and her claim for unfair dismissal brought under section 103A of the Employment Rights Act 1996 as amended is dismissed. The claimant did not suffer a detriment under section 47B of the Employment Rights Act 1996, the claim is not well-founded and is dismissed. The claimant was not automatically unfairly dismissed for asserting a statutory right and her claim brought under section 104 of the Employment Rights Act 1996 is not well-founded and is dismissed. The claimant was not automatically unfairly dismissed for proposing to act enforce her right to a national minimum wage and her claim brought under section 104A of the Employment Rights Act 1996 is not well-founded and is dismissed. The claimant's complaint of unlawful deduction of wages allegedly incurred in May 2015 is out of time, proceedings were lodged on 15 October 2017 following the ACAS Early Conciliation Certificate issued on 20 September 2017, and the Tribunal does not have the jurisdiction to consider this complaint, which is dismissed.

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Employment Judge Shotter
15.4.19

REASONS SENT TO THE PARTIES ON

24 April 2019

FOR THE SECRETARY OF THE TRIBUNALS