



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104494/2018

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**Employment Judge: Shona MacLean
Members: Ms E Farrell
Mr P O'Donnell**

10 **Ms A McNeill**

**Claimant
Represented by:
Ms L Neill
Solicitor**

15 **Elite Energy Limited**

**Respondent
Represented by:
Mr R Morton
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's claims under sections 47 and 103A of the Employment Rights Act 1996 are dismissed.

REASONS

Background

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1. In the claim form sent to Tribunal's office on 4 May 2018. The claimant indicated in section 8.1 that she was claiming unfair dismissal and was owed notice pay and arrears of pay. In section 8.2 the claim set out that she was dismissed on 25 February 2018 because she made a protected disclosure to Jason Beak on 16 February 2018 about fraudulent activity in the organisation.

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The claimant believed that making the protected disclosure influenced subsequent treatment which led to her dismissal. The claimant said that she was dismissed by phone call on the evening of 25 February 2018 with no notice or pay in lieu of notice. She also claims £2,147 in "unpaid wages owed" and "compensation for unfair dismissal and unlawful deductions". In section

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9 the claimant stated if successful she wanted financial compensation and £2,147 for wages owed”.

2. In its response, the respondent denied that the claimant was owed arrears of pay as it had made deductions for “overtaken holidays not accrued but taken and for commercial losses due to the negligence of the claimant.” The respondent denied that the claimant was entitled to notice pay. It was denied that the claimant and Mr Beak had any conversation constituting a protected disclosure on 16 February 2018 or any other date. It was denied that the claimant was dismissed by a phone call on Sunday 25 February 2018. The respondent said that her line manager made a call but it was not answered. The respondent said that the claimant resigned on 26 February 2018 when she came into the office and cleared her desk and made insulting remarks.
3. A preliminary hearing for case management took place on 13 July 2018 at which both parties were represented. The claimant agreed to provide additional information about the alleged protected disclosure and alleged detriments. She also agreed to provide a schedule of loss.
4. In the additional information the claimant said that the unlawful deduction of wages claim was for “payment of holiday pay and notice pay”.
5. At the final hearing the claimant was represented by Ms Neill. The claimant gave evidence on her own account and her mother, Maureen McNeill gave evidence on her behalf. Mr Morton represented the respondent. Bryan Booth, Managing Director and Jason Beak, Operations Director gave evidence for the respondent.
6. Christopher Kennedy, a current employee of the respondent was to give evidence for the respondent on a voluntary basis. On the second day of the final hearing the Tribunal was informed that Mr Kennedy refused to attend because he had but threatened by someone whose identity he refused to disclose. The Tribunal issued a witness order for day three of the final hearing. Mr Kennedy did not attend work or the final hearing. The Tribunal was informed that Mr Kennedy’s son was unwell.

7. The parties produced a joint set of productions. A supplementary set was produced by the claimant.

8. Mr Morton advised the respondent accepted that in relation to the alleged commercial loss they had no entitlement to make a deduction. Accordingly, it was accepted that money may be due to the claimant, but it was for her to quantify this. Ms Neill said that the claimant did not wish to disclose to the respondent any details about new employment. She was making no claim in respect of notice or holiday pay. She agreed to provide an updated schedule of loss by lunchtime.

10 **Relevant Law**

9. Section 43A of the Employment Rights Act 1996 (the ERA) defines a “*protected disclosure*” as qualifying disclosure as defined by section 43B. Section 43B of the ERA defines a qualifying disclosure as any disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to disclose one or more shows one of the six relevant failures which include:

- a. that a criminal offence has been committed, is being committed or is likely to be committed;
- b. that a person has failed or is failing or is likely to fail to comply with any legal obligation which he is subject; or
- c. that the health or safety of the individual has been or is likely to be endangered.

10. Section 47B of the ERA provides that a worker has a right not to be subjected to any detriment by any act or any deliberate failure to act by her employer done on the ground that the worker has made a protected disclosure.

11. Section 103A of the ERA provides that an employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee has made a protected disclosure.

The Issues

12. The issues to be determined by the Tribunal were:
- a. Did the claimant make a protected disclosure on 16 February 2018?
 - b. Did she suffer a detriment because of making a protected disclosure?
 - 5 c. Was the claimant dismissed or did she resign?
 - d. If the claimant was dismissed was the reason or principle reason because she made the protected disclosure?
 - e. Did the respondent make an unauthorised deduction from the claimant's wages?
 - 10 f. What remedy, if any should be awarded to the claimant?

Findings in Fact

13. The Tribunal makes the following findings in fact.
14. The respondent is a limited company of which Bryan Booth is minority shareholder and Managing Director. It is an approved installer for the ECO scheme and provides access to support grant funding for homeowners and tenants. Anesco Limited the respondent's Managing Agent/funding partner to whom the respondent's work packages are submitted for compliance. The ECO scheme is overseen by Ofgem.
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15. Jason Beak is the respondent's Operation Director. He works closely with Mr Booth. Christopher Kennedy is the respondent's Installations Manager.
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16. Keiron Alexander was engaged by the respondent as an Engineer to install boilers. Mr Alexander was a close friend of Mr Booth. The respondent paid for Mr Alexander to attend a training and certification course to attain Gas Safe registration following which an ID card was issued in the respondent's name with the company registration number, Mr Alexander's registration number, his name and photograph (the ID Card). In early 2017 Mr Alexander ceased working for the respondent. Mr Alexander and Mr Booth are not on speaking terms.
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17. Mr Booth has been friends with the claimant for around 12 years. The claimant has known Mr Alexander for around seven years.
18. Around August 2017 the claimant was looking for employment. Mr Booth contact her about a vacancy with the respondent as a Submissions Administrator. He invited for the claimant a chat following which she was offered the position.
19. The respondent employed the claimant from 5 October 2017 as a Submissions Administrator. She was paid £20,000 gross per annum. At that time, the respondent had five employees including two other Submissions Administrators (Kim and Rosslyn).
20. The claimant reported to Mr Beak. It was practice for her to communicate with Mr Booth, Mr Beak and colleagues via email, text and WhatsApp.
21. In December 2017, several employees, including Rosslyn left the respondent's employment.
22. The claimant was promoted to the position of Submissions Manager in January 2018. She received a salary increase to £25,000 gross per annum.
23. In early January 2018, the claimant and Mr Booth had a text exchange about the amount of annual leave and sick absence taken by the claimant in 2017. There was a lack of clarity whether the claimant had taken approved annual leave and if any absences were to attend hospital. The claimant was paid for all absences from the office.
24. Around 26 January 2018 the respondent issued the claimant with a contract of employment which neither party signed.
25. While working in the office the claimant noticed the ID Card and she presumed that Mr Alexander worked for the respondent. When she met Mr Alexander socially in January 2018, the claimant commented that they both worked for the same employer. Mr Alexander did not understand as he had not worked for the respondent for some time. The claimant said that she had seen the ID Card in the office. Mr Alexander questioned why his ID Card was

being used. There were implications if the boiler was wrongly fitted; he could lose his certification and there may be health and safety issues.

26. The claimant told her colleague Kim about the conversation with Mr Alexander. Kim was not surprised.

5 27. Around 16 February 2018 the claimant told Mr Beak that she had met Mr Alexander who she thought worked for the respondent because she had seen the ID Card in the office. She told Mr Beck that Mr Alexander said that he did not work for the respondent. she said that Mr Alexander was concerned that the ID Card was in the office when he no longer did work for the respondent.
10 Mr Beak shrugged his shoulders.

28. The claimant had an approved sick absence on 21 February 2018 for an operation of which the respondent was aware. The claimant was unexpectedly unwell on 19 February 2018. She messaged Mr Beak to say that she was telephoning the doctor and would come in later if feeling better.
15 Following a consultation with her doctor the claimant messaged Mr Booth and arranged for one of her parents to collect a laptop so that she could continue working from home. The claimant messaged Elaine Anderson, Executive Assistant about the laptop and passwords. Mr Beak was aware of this as he messaged the claimant asking what passwords she was looking for.

20 29. Over the next few days the claimant continued to message Mr Booth about work related matters on which she was working including requesting a printer with a scanner so that she could work from home on the Thursday. She also messaged Ms Anderson about work and confirmed that a colleague (Aimee) should call or text if she had queries.

25 30. On 22 February 2018, the claimant messaged Mr Booth about submissions. She explained that the hospital WIFI connection was poor and she would submit the work to the portal when she returned home on Friday. The claimant also informed Ms Anderson that she would not be home from hospital until Friday lunchtime. Ms Anderson confirmed that she would let Mr
30 Beak know.

31. The claimant returned home from hospital on the afternoon of 23 February 2018. She did not contact the respondent nor did the respondent contact her.
32. Mr Booth's wife gave birth to a premature baby. Between 20 February and 25 February 2018, he was visiting them in hospital.
- 5 33. Between 12.54 and 16.11 on 25 February 2018 Mr Booth telephoned Mr Beak's mobile telephone on three occasions and spoke for around 45 minutes.
34. The claimant was in the process of moving to a new house. On the evening of 25 February 2018, she went to the new house with her mother and friend,
10 Debbie Cohen to await a joiner. Around 7pm the claimant noticed a missed call from a number that she did not recognise. She sent a text to Mr Beak asking if it was the office and if he knew why she was being telephoned. A text exchange followed in which Mr Beak said that the claimant had not been in touch and would not answer calls. The claimant said that she had been in
15 hospital, it was Sunday night and she was busy. She was not working and had one missed call. Mr Beak said that had placed four calls and sent a screen shot of his desk handset.
35. The claimant forwarded the message to Mr Booth on WhatsApp at 19.46 and asked what was going on. Mr Booth did not respond.
- 20 36. The claimant sent a text message to Mr Booth at 20.10 asking him to telephone or check his WhatsApp messages. The claimant asked Mr Booth to, "*at least have the decency to have a conversation with me since there is obv something wrong. Just went to email you and I see Jason has cut me off my emails now. If I'm gonna get treated like this then I'm not gonna do nothing*".
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37. A WhatsApp message typed by the claimant at 20.24 was deleted.
38. Between 21.06 and 21.17 Mr Booth telephoned Mr Beak's mobile telephone on three occasions and spoke for around 25 minutes.
39. At 21.39 the claimant sent the following WhatsApp message to Mr Booth:

5 *“Honestly can’t believe this is how you’ve treated after me staying when everyone else left. You clearly don’t want me working there anymore. No idea why cause I was nothing but loyal when everyone else left. You’ve clearly put Jason up to it rather than having a conversation with me to discuss what the actual problem is.”*

40. At 21.40 Mr Booth telephoned Mr Beak’s mobile telephone and spoke for around six minutes. No further calls were placed from Mr Booth’s mobile telephone to Mr Beak’s mobile telephone that evening.

41. At 22.29 Mr Booth sent a text message to the claimant as follows:

10 *“Amy - I am in hospital with Louise and have been since Tuesday, I have bigger things on my mind at the moment.*

I do not put anyone up to anything, Jason does what he knows is best for the company off his own back.”

42. The claimant sent the following text to Mr Booth in reply:

15 *“I’ve also had bigger things on my mind but no one takes that into consideration. There is no way Jason has done this off his own back – I’ve done nothing wrong. You call the shots in there so it’s came from you. All since I called out Chris in an email. Who by the way was shouting about going for Jason the other week when you didn’t want any of the new staff to know their had been grief – who lets be honest will leave because of Jason soon enough. You also have Aimee who is going travelling with her boyfriend. So good luck finding people who are gonna be loyal. You’ve left me no choice but to take this further now.”*

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43. The claimant attended the office on 26 February 2018. She was upset. The claimant returned her pass and removed her personal belongings.

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44. The claimant sent a text to Mr Booth at 9.18 on 26 February 2018 requesting her wages and lying time. She said that *“everything had been passed to a lawyer this morning”*.

45. Mr Beak sent an email to the claimant on 27 February 2018 at 20.05 referring to the claimant clearing her desk and leaving the office on 26 February 2018. He continued that, *"I am writing to confirm that we have accepted your resignation and that we note that you have neither offered, nor attempted to work any period of notice"*.
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46. The claimant replied by email sent on 27 February 2018 at 20.56 asking Mr Beak not to contact her with *"fabricated lies"*. She continued, *"You told me on Monday I was sacked so nothing will be deducted from my wages as I did not resign. You also told staff that you were phoning me to sack me on Sunday night and held interviews for my position while I was off sick."* The email concluded, *"I have been contacted regarding you fraudulently using an installers ID Badge (Kieron Alexander) to pass off jobs by unqualified installers, which I will be happy to take further. My number as well as previous staff was passed onto the funder who are looking into this."*
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47. When the claimant's employment with the respondent ended she was 31 years of age. The respondent had employed her for four months. She earned £2,083 gross per month which equated to £1,690 per month net.
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Observations on Witnesses and Conflict of Evidence

48. The Tribunal felt that this case was unusual in number of factual disputes between the parties. The Tribunal considered both parties were being less than candid about what happened in February 2018. Given the parties' behaviour and demeanour at the final hearing the Tribunal's impression was more was happening than was disclosed in evidence. That said the Tribunal could only make findings based on the evidence before it.
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49. The Tribunal considered that despite the claimant's concern at the final hearing about being present in the same room as Mr Beak and Mr Booth she gave her evidence confidently and robustly especially under cross-examination. The Tribunal felt that the claimant's recollection of events had become her reality and it was not always consistent with contemporaneous documentation.
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50. The considered that Mrs McNeill gave her evidence in an understated manner. Although she is the claimant's mother and was undoubtedly supportive of her, the Tribunal did not consider that Mrs McNeill was being dishonest when giving evidence.

5 51. Mr Booth gave his evidence in a composed and calm manner. The Tribunal considered that while Mr Booth consulted by Mr Beak, it was Mr Booth who was in charge and took decisions concerning the business. Mr Booth had an informal friendly management style and left Mr Beak to address office issues. The Tribunal's impression was that Mr Booth had a good personal relationship with the claimant. Although she had several absences in 2017 10 Mr Booth paid the claimant her full salary. He promoted the claimant in January 2018 and gave her a significant increase in salary. Mr Booth was content for the claimant to message him and their discussions referred to other employees including Mr Beak. While Mr Booth appeared to have no 15 difficulty engaging friends to work in the business he was also prepared to sacrifice friendships if it interfered with business.

52. The Tribunal appreciated that Mr Booth was preoccupied around 20 February 2018 with family matters but was unconvinced that Mr Booth was not fully aware of what was going on during the evening of 25 February 2018. The 20 Tribunal noted that despite being at the hospital Mr Booth made several telephone calls to Mr Beak. The Tribunal considered that it was inconceivable that Mr Beak did not discuss his exchange with the claimant with Mr Booth before Mr Booth replied to the claimant.

53. The Tribunal considered that Mr Beak's evidence was verbose when the 25 question suited him and pedantic at other times. In the Tribunal's view the claimant and Mr Beak had little respect for each other. It was Mr Booth who recruited the claimant and they had a long-standing friendship. Mr Beak said in his text exchange with the claimant on 25 February 2018 that he had seen the messages that she sent to Mr Booth. The Tribunal considered it more 30 likely than not that Mr Beak was aware of the claimant's views of him as Mr Booth would have told him.

54. The Tribunal then considered the following key factual disputes.

The contract of employment and pay slips

55. The claimant said that she did not receive pay slips when she was employed. The claimant also said that she did not sign the contract of employment that the respondent produced. She did not think the one that was produced was the contract of employment that she was asked to sign in January 2018. She had not seen the employee handbook to which it referred.
56. Mr Booth said that the contract of employment that was produced was from a template prepared by legal advisers and issued to all employees. The claimant was given the contract when she started working for the respondent. An updated version which was produced was given to the claimant in January 2018 and to which she referred in messages. Both Mr Booth and Mr Beak referred to payslips being prepared internally and then outsourced. Both witnesses were equivocal about the timing.
57. The Tribunal's considered that the respondent had a high turnover of employees. Given its size and resources in October 2017 the Tribunal was unconvinced that a contract of employment was issued to the claimant when her employment commenced. The Tribunal thought it was more likely than not that the contract of employment produced was issued to the claimant in January 2018 as at that stage it was probably envisaged that she would stay in the respondent's employment.
58. While the employee handbook might exist, the Tribunal considered that it was highly unlikely that the employees were aware of its terms. The procedures for holiday and sick absence were not followed.
59. The Tribunal considered that it was highly likely that if the payslips existed at the time (which was doubtful) they were issued to the claimant. Had this been so the Tribunal considered that there would be payslips for October 2017 and February 2018 showing relevant deductions and payment of statutory sick pay.

The alleged protected disclosure and detriment

60. The claimant's evidence in chief was that she spoke Mr Beak on 16 February 2018. She said that she told him that she had bumped into Mr Alexander and "told Mr Beak the story". When asked by the Tribunal to be more specific about "the story" the claimant said told Mr Beak that she bumped into Mr Alexander. She had not seen Mr Alexander in the office and he replied that he did not work there. The claimant said to Mr Alexander that there were jobs his name. He responded that he had not done any jobs and asked why his card was being used. The claimant said that Mr Beak shrugged his shoulders. There was no further discussion. The claimant said that Mr Booth was aware of the conversation from Mr Beak. The claimant did not explain why she believed this.
61. Mr Beak denied that the conversation took place on 16 February 2018 or at all. He initially said that he became aware of the issue of the ID Card in June 2018.
62. Mr Booth was not asked about his awareness or otherwise of alleged conversation on 16 February 2018 about the ID Card. The Tribunal found it surprising given her friendship with Mr Booth that the claimant did not speak to him about her conversation with Mr Alexander especially as at that point the claimant knew that the ID Card "was in the office" and Mr Alexander no longer did work for the respondent.
63. While Mr Beak's evidence was that he was not involved in the submissions, the Tribunal was unpersuaded. From the documents produced it is apparent that Mr Beak was involved in training the Submissions Administrators. The Tribunal considered was it was highly unlikely that he would not be involved in supervising the process and the Submissions Administrators particularly before the claimant's appointment as Submissions Manager. The Tribunal therefore considered that it was likely that the claimant told Mr Beak that she had spoken to Mr Alexander.
64. The Tribunal did however consider that the claimant's evidence about what she said to Mr Beak on 16 February 2018 was vague and unconvincing. The

clamant knew that the ID Card was “*in the office*” but she did not elaborate where it was kept or on what basis she believed before 16 February 2018 that “*jobs were in*” Mr Alexander’s name. The Tribunal’s impression was that she assumed the ID Card was being used when submissions were made.

5 The claimant did not suggest that either she or her colleague Kim had used the ID Card. The inference was that Mr Beak used it. However, at 16 February 2018 the Tribunal did not understand that the claimant knew that to be so or indeed that any submissions had been made using the ID Card. The Tribunal felt that it was significant that the claimant’s email sent on 27 February 2018

10 made no reference to the discussion on 16 February 2018. It therefore concluded that any discussion with Mr Beak on 16 February 2018 would be restricted to telling him that she had spoken to Mr Alexander and he was concerned about the ID Card being in the office when he no longer did work for the respondent.

15 65. In the Tribunal’s view Mr Beak’s response of shrugging his shoulders was consistent with his view that the ID Card belonged to the respondent. He was not told that it had been used in submissions and even if he had the Tribunal’s impression from the evidence both oral and written was that the submissions often contained administrative errors. The respondent was aware of this and

20 had a rather offhand approach towards it.

66. The claimant said that after this discussion which took place in the morning of 16 February 2018 Mr Beak treated her differently. The claimant did not return to work as she was sick absent. She said that Mr Beak called her at

25 home on the evening of Sunday 25 February 2018. The claimant referred to Mr Beak previously calling people at the weekend and sacking them. Mr Beak was not asked about his behaviour towards the claimant on 16 February 2018 after the alleged discussion. He said that he had placed four calls to the claimant and then a text exchange followed.

30 67. The Tribunal considered that Mr Beak was indifferent to the information provided about Mr Alexander. The Tribunal did not consider that the claimant’s evidence about the alleged detriments was convincing. The

Tribunal was not satisfied that the claimant was treated differently by Mr Beak on 16 February 2018. The Tribunal also considered that while the respondent knew the claimant was to be discharged from hospital on 23 February 2018 the claimant had not confirmed that this had happened, and she was returning
5 to work on 26 February 2018. The Tribunal could therefore understand why Mr Beak might want to clarify the position. According to the claimant's evidence it was not unheard of for Mr Beak to telephone employees at the weekend. The Tribunal therefore could not find that she had suffered a detriment because of her discussion with Mr Beak on 16 February 2018.

10 *Alleged telephone conversation on 25 February 2018*

68. The claimant's evidence was that about half an hour after her text exchange with Mr Beak on 25 February 2018, she received a call from a withheld number which she answered as she assumed it was the joiner. When the claimant realised that it was Mr Beak she put the call on the loudspeaker. Mr
15 Beak said, "*You no longer work for us. Tomorrow hand in your pass and collect your stuff*". The claimant said that her mother and friend Debbie heard the call. The claimant accepted that certain telephone records had been produced by the respondent but said the respondent uses several telephones.

20 69. Mrs McNeill said that on the Sunday night (25 February 2018) sometime after 8pm while waiting for the joiner she had been in the bedroom so did not hear all the telephone conversation. What she did hear when she came through to the living room was a man's voice saying that the claimant was to hand in her pass and clear her stuff. Debbie was present. The claimant was upset. Mrs
25 McNeill asked who had been speaking and the claimant said it was Jason.

70. Mr Booth said that he spoke to Mr Beak after 11pm when he returned from hospital. Mr Booth said that he had no reason to believe that Mr Beak dismissed that claimant. Mr Beak told him that he had not managed to contact the claimant, but it did not look as if the claimant was coming back. Mr Booth
30 considered that the claimant's texts were aggressive and pointed at him

rather than Mr Beak. He also felt the claimant was selfish contacting him at that point.

71. Mr Beak said that he had tried to contact the claimant by telephone on 25 February 2018 but was unsuccessful. There was a text exchange which he was not willing to continue. It was a waiting game to see if the claimant would turn up the next day. The claimant arrived dishevelled and fuming. She went to her desk and started clearing it. She said, *"You're all fucked. I'm going to take this further. I can't believe this is happening to me. You have done this to me."*
72. The Tribunal's impression was that neither the claimant, Mr Booth or Mr Beak were being candid about what happened on the evening of Sunday 25 February 2018. During the claimant's absence in the week commencing 19 February 2018 she remained in contact with the respondent and endeavoured to far as possible to continue working despite being hospitalised for longer than expected. While it would have been courteous to confirm that she was returning to work on 26 February 2018 it was certainly implied.
73. From the text exchange the Tribunal felt that Mr Beak was frustrated with the claimant as she had not processed some submissions on the Friday and had not contacted him to say that she would be at work on Monday. The Tribunal considered that Mr Beak's frustration was compounded by the claimant texting rather than speaking to him. He was aware via Ms Anderson of the claimant's circumstances. The Tribunal was not persuaded that he needed to contact the claimant on the Sunday evening because of new start on Monday; according to Mr Beck's evidence he did not speak to the claimant and her position was not clarified in the text exchange.
74. The Tribunal also noted that the claimant had been *"cut off"* from her emails. The Tribunal was not convinced by Mr Beak's evidence that this was related to passwords. Mr Booth had reset the claimant's password earlier that week.
75. The Tribunal accepted that despite requests for telephone records from the respondent the claimant was unable to produce evidence that a call had been placed to the claimant's mobile telephone from the respondent's office or

mobiles registered to the respondent. However, as the number was withheld the call could have been place from anywhere. The Tribunal could not understand why the claimant would have reacted in the manner that she did if she was not told that her employment was terminated on Sunday 25 February 2018. On the claimant's own evidence which was not challenged Mr Beak was known for his arbitrary attitude to employees which Mr Booth sanctioned. The Tribunal did not agree with the respondent's submission that Mrs McNeill would say anything for her daughter. Mrs McNeill's evidence was in the Tribunal's view understated. She did not claim to hear all the telephone call; she did not know if Debbie was present throughout as Mrs McNeill had been in the bedroom; she did not know who was speaking and sought clarification from the claimant.

76. The Tribunal acknowledge that the claimant's messages to Mr Booth did not refer to her dismissal. However, the Tribunal considered that if the only treatment being complained about was being contacted about work on a Sunday evening it was ironic given that was what the claimant was doing to Mr Booth. The Tribunal considered it more likely that dismissal was not referred to because the claimant considered that Mr Beak did nothing in the business without Mr Booth's authorisation. The claimant was also aware from Mr Anderson that when it came to business Mr Booth would sacrifice friendship.

77. The Tribunal was mindful that the claimant's email sent on 27 February 2018 did not expressly state that Mr Beak dismissed her on 25 February 2018 but that he told her "*on Monday [she] was sacked*". The Tribunal considered that had the claimant's exchange ended as Mr Beak suggested and it was imperative to know if the claimant was working on Monday, Mr Booth, who had time to speak to Mr Beak for around half an hour between 9pm and 10pm would have clarified the position with the claimant when messaging her at 10.30pm. The Tribunal considered that Mr Booth's message was more consistent with knowing that the claimant's employment had terminated and not wanting to engage with her. The Tribunal also considered that it was highly unlikely that Mr Beak would have stayed clear of the claimant and

allowed her to behave the way that he alleged she did on 26 February 2018 if he had not already told her that she was to leave. Had that conversation not taken place the Tribunal felt that a line manager would have diffused the situation on the Monday; asked the employee to come into their office and discuss the situation calmly.

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78. On balance the Tribunal concluded that it was more likely than not that Mr Beak did speak to the claimant and told her that she no longer worked for the respondent and she was return her pass and collect her belongings.

Respondent's Submissions

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79. The only issues remaining for the Tribunal to determine relate to the claimant's claim for automatically unfair dismissal under section 103A of the ERA and the detriment claimed under Section 47B of the ERA because the claimant has already withdrawn her claims for holiday and notice pay and those items appear to be the only items that form part of the claimant's unlawful deduction for wages claim under section 13 of the ERA.
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80. The claimant made no application to amend her claim or any attempt to supplement the information provided in the further and better particulars. Accordingly, the claimant has sought to raise entirely new items during the final hearing which do not form part of the claimant's claim and therefore do not fall to be determined. Further the respondent has not had fair notice that the claimant intended those items to form part of her claim.
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81. The respondent's primary position is that no disclosure was made to Mr Beak on 16 February 2018 as alleged by the claimant. The Tribunal was invited to prefer the respondent's evidence in this regard. In any event if there was a disclosure based on the claimant's own evidence and what she alleged was said to Mr Beak on 16 February 2018, her knowledge of both the Gas Safe Registration process and/or the respondent's funding arrangements of their gas installations at that time that disclosure was not substantial enough to justify protection under the ERA.
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82. There is no evidence presented by the claimant to support the claim that she suffered a detriment as a result of making a disclosure. The Tribunal was therefore invited to dismiss this as aspect of the claim.
83. The respondent denies that the claimant was dismissed on 25 February 2018 or in any event was dismissed because she had made a protected disclosure on 16 February 2018. The Tribunal was invited to prefer the evidence of the respondent to that of the claimant. If the Tribunal preferred the claimant's evidence then she was treated no differently by the respondent than of other employees who as far as she was aware had not made protected disclosures.
84. The respondent's position is that it is not necessary for the Tribunal to consider remedy in this case.
85. If the Tribunal considers that the claim of unlawful deduction from wages remains live then the Tribunal must consider the appropriate quantification of that claim. No evidence has been led by the claimant on how she quantifies the claim at £2,147. It is not for the Tribunal to go looking for that evidence but for the claimant to prove her case. he failed to do so.
86. Any of the other heads of loss are only applicable if the claimant succeeds her claim for automatically unfair dismissal and detriments. In that case rather curiously the claimant has not put a claim for loss of earnings from which she says was automatically unfair dismissal. Any award in respect of injury to feelings should be for a minimal/notional value.

Claimant's Submissions

87. The Tribunal was invited to prefer the claimant's evidence to that of the respondent. The Tribunal was referred to section 103A of the ERA which relates to questions:
- a. Was the making of the disclosure the reason for the dismissal and
 - b. Was the disclosure in question a protected disclosure within the meaning of the ERA?

88. In accordance with *Abernethy v Mott* [1974] ICR 323 the answer to the first question, there must be a first enquiry into the facts or reasons that caused the decision maker to decide to dismiss. The respondent has failed to provide an explanation for the claimant's dismissal aside from the whistleblowing conversation the claimant had with Mr Beak in a matter of days prior to her dismissal. It is the respondent's position that the claimant resigned with little warning in a flurry of swearing and threats despite the Tribunal having heard evidence that she was capable of exerting her statutory rights when they were being denied. An unprovoked irrational resignation does not gel with what was heard. The claimant and her mother gave evidence that she had just moved and presumably incurring much expense why would the claimant choose to leave her employment at that moment.
89. The second question it is also the respondent's position that the information to which their attention was drawn by the claimant on 16 February 2018 was not protected. External bodies have later deemed the incorrect use the ID Card to have been "an administrative error". It was clear that the claimant considers the acts of the respondent to be fraudulent and a potential health and safety danger.
90. As a result of their conversation of 16 February 2018 Mr Beak's attitude towards the claimant was as became hostile and suspicious questioning the medical procedures for which she had requested time off refusing to accept that she had been working during this time despite the Tribunal hearing evidence to the fact that she had borrowed a laptop and submitted work during this time. The trust in this relationship had broken down irrevocably following the protected disclosure on 16 February 2018. These actions were also indicative of the further detriment experienced by the claimant in her employment which occurred in addition to her dismissal.
91. The claimant collected her belongings from her employment on 26 February 2018. The respondent claims that Mr Kennedy would be able to testify to the events of that day but he has not come to give evidence citing intimidation as

his reason for non-attendance rather than he simply was not present on the day as is the claimant's position.

- 5 92. The information raised by the claimant was of a sufficiently serious and illegal nature to cause great concern to the respondent who had pursued an agenda to the claimant's detriment. Unfortunately, this agenda has not stopped following the claimant's dismissal. She has been required and requested to provide medical evidence on her ill-health and the question regarding her whereabouts and actions following her employment and we have heard evidence that she had from a third party that she was being followed. This matter has caused her immeasurable distress to the point that she has been unable to stay in the court room to give instructions. The respondent has continued to intimidate her beyond her period of employment.
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- 15 93. The claimant highlighted by e-mail prior to the proceedings beginning and during her evidence the respondent require to provide the full e-mail evidence requested at the PH. Also the full complement of payslips in her employment were not produced.
- 20 94. Payslips and the contract of employment were created subsequently after the claimant's employment terminated.
- 25 95. In terms of loss the claimant has certainly suffered to the extent that it would seem reasonable to award her £5,000 in compensation. She remains concerned about the respondent discovering where she might be applying for jobs to this date. The claim for £2,147 is in compensation for unlawful deduction of wages. Having provided no payslips by the respondent and being aware of her salary being approximately £25,000 the claimant entered this figure into her claim form taking it to be approximately pay for six weeks of unpaid wages subject to tax. The gross figure for this calculation being £2,884.64 it does not seem an unreasonable belief or calculation. The six weeks' wages being due of the claimant's salary for February 2018 and two weeks' of unpaid lying time which Mr Booth confirmed how staff were paid.
- 30 The claimant claims for holiday pay and notice pay having been withdrawn due to mitigation outweighing those claims. Having now been provided with

the claimant's January payslips and therefore being reflective of her wage after her promotion it can be seen what is being complained after deduction is in fact lower than the actual calculation of six weeks' wages this figure being £2,351.07. The claimant did not work for the final three days in February 2018 so the wages claim has been reduced to reflect this.

Decision

Did the claimant make a protected disclosure on 16 February 2018?

96. The Tribunal referred to its findings in fact. The Tribunal found that there had been a discussion between the claimant and Mr Beak on 16 February 2018. However, for this disclosure to be a protected disclosure it must disclose information; be a "qualifying" disclosure i.e. one that in the claimant's reasonable belief is made in the public interest and shows one or more of the six "relevant failures" has occurred and is made in accordance with one of the six specified methods of disclosure.

97. The claimant's position was that she verbally disclosed facts to Mr Beck on 16 February tending to show there was fraudulent behaviour or that health and safety had been endangered. From its findings the Tribunal was not satisfied that what the claimant told Mr Beck on 16 February 2018 disclosed information about fraudulent activity or health and safety of any individual being endangered. The Tribunal's impression was that on 16 February 2018 the claimant's focus was on the ID Card being in the office and Mr Alexander no longer working for the respondent. She gave no information at that stage that the ID Card had been used in submissions. This information appears to have come to light sometime after the claimant's employment came to an end. There was also no information about work being carried out by engineers who did not have the appropriate qualifications. The Tribunal was not satisfied that the claimant had made a qualifying disclosure on 16 February 2018.

Did she suffer a detriment because of making a protected disclosure?

98. Even if the tribunal was wrong and the claimant did make a protected disclosure on 16 February 2018, the Tribunal was not satisfied that on the

evidence before it the claimant suffered any detriment because of it. It was the claimant who volunteered to work while being absent on sick leave. On her evidence Mr Beak was known to contact employees at the weekend. It was also on her evidence that Mr Beak treated employees in a cavalier fashion.

99. Having reached the conclusion that that the claimant did not make a protected disclosure and in any event was not subjected to a detriment for having done so the Tribunal dismissed the claimant's claim that she subjected to a detriment on the ground that she made a protected disclosure.

10 *Was the claimant dismissed or did she resign?*

100. The Tribunal found that it was the respondent who terminated the claimant's employment on 25 February 2018.

If the claimant was dismissed was the reason or principle reason because she made the protected disclosure?

15 101. Even if the claimant's disclosure on 16 February 2018 was a protected disclosure the Tribunal was satisfied that it was not the reason for the claimant's employment being terminated. The Tribunal's impression from the contemporaneous text on 25 February 2018 was that even the claimant did not believe her discussion on 16 February 2018 was the reason for her dismissal. She believed that Mr Booth was behind her dismissal. Indeed, she
20 thought that the respondent's action was in response to an e-mail that she had sent about another employee which had nothing to do with the alleged protected disclosure.

25 102. The Tribunal dismissed the claimant's claim that the reason or principle reason for her dismissal was that she made a protected disclosure.

Did the respondent make an unauthorised deduction from the claimant's wages?

103. The Tribunal then considered whether the respondent had made an unlawful deduction from wages.

104. The Tribunal was mindful that it had to consider the claim which was before it. The Tribunal agreed with the respondent's submission that the claim form lacked detail as to the basis and quantification upon which the claimant claimed "*£2,147 in unpaid wages owed*". The claimant was unrepresented when she sent the claim form. She was represented at the preliminary hearing when she was offered an opportunity to provide further details of this claim which she did. That additional information made no reference to six weeks' non-payment of wages. To the contrary under the heading "*unlawful deduction of wages*" it stated, "*The claimant claims payment of holiday pay and notice pay.*" At the start of the final hearing the claimant's representative stated that the claimant was no longer pursuing holiday pay and notice pay. Given the statement of claim and additional information the Tribunal understood that the claimant was effectively withdrawing this head of claim.
105. The updated schedule of loss produced in the afternoon of the first hearing day referred to "*Unlawful deduction of wages: £2,147*" but provided no detail calculation or explanation. While the respondent was aware of the head of claim at the final hearing there was no clarity in the schedule of loss on the basis upon which the sum contained was calculated. Despite being aware of the respondent's position and what the Tribunal understood to be the claim before it the claimant made no application was made to amend the claim form.
106. The Tribunal accepted that the claimant did not receive payslips at the time and the pay slip for October 2017 and February 2018 were not produced at the final hearing. However, the claimant must have been aware what wages she received each month. The Tribunal had difficulty understanding why there would be a lying time of two weeks given that the claimant's salary accrued from day to day. While the respondent accepted that it did not pay the claimant in February 2018 and alluded to overpayment of holiday pay and losses suffered as a result of the claimant's negligence none of this was quantified.

107. The Tribunal agreed with the respondent's submission that having withdrawn the claims in respect of holiday pay and notice pay which were stated as being the unlawful deductions from wages there was no other claim of unlawful deductions before the Tribunal.

5 *What remedy, if any should be awarded to the claimant?*

108. In the circumstances the Tribunal decided that it was not appropriate to make an award.

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Employment Judge

Shona Maclean

Date of Judgment

19 February 2019

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**Entered in register
and copied to parties**

20 February 2019

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