Case Number:- 2601934/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr T Naute

Respondent: Adhar Project Limited

Heard at: Leicester **On:** 15, 16 and 17 July 2019
And in chambers on 8 August 2019

Before: Employment Judge R Clark
Mrs J Morrish
Mr A Wood

Representation
Claimant: Mr R Singh, Solicitor.
Respondent: Mr Joshi, Solicitor

RESERVED JUDGMENT

The unanimous decision of the Employment Tribunal is:-

1. The Claimant's claim of unfair dismissal **fails and is dismissed**.

2. The Claimant's claim of disability discrimination is **dismissed** upon withdrawal.

3. The Claimant's claim of detriments for making protected disclosures **fails and is dismissed**.

4. The Claimant's claim of unlawful deduction from wages **fails and is dismissed**.

5. The Claimant's claim of breach of contract **fails and is dismissed**.

REASONS

1. Introduction

1.1 The Respondent is a charity providing support to individuals who lack mental capacity. The Claimant was employed as a Paid Person Representative ("PPR") and Advocacy Worker. This claim relates to events during the year or so running up to the Respondent's decision to summarily terminate the Claimant's employment on 5 October 2017. The Claimant's claims before us are:-

a) That his dismissal was unfair because the reason was that he had made a protected qualifying disclosure

b) That he has suffered a series of detriments prior to dismissal for making that same disclosure.

c) That he suffered discrimination because at the material time he was disabled.

d) That he has suffered an unauthorised deduction from wages when he was suspended and paid only at the rate of SSP.

e) That the Respondent was in breach of contract for not giving him his contractual notice.

2. Preliminary Matters

2.1 This is now an old claim. It was stayed to allow criminal proceedings involving the Claimant and relating to his employment with the Respondent to take their course. That concluded with the CPS offering no evidence. At the time the stay was lifted, the parties confirmed the previous case management orders had been complied with and this final hearing was listed.

2.2 In fact, not all of the previous case management orders had been complied with. Witness statements were exchanged only on the first morning of this three-day listing and the Claimant had not provided the tribunal with copies of the evidence he relied on. Relying on the parties' assurance that the remaining two days would be sufficient to deal with evidence and submissions, if not also judgment, we agreed to adjourn until day two so that the rest of the day could be used for all to read in to the case.

2.3 The Claimant confirmed he no longer sought to apply to add any of the potential additional Respondents, the claims against whom were originally rejected.

2.4 We made an order under Rule 50 in respect of the anonymisation of any references to vulnerable clients supported by the Respondent although in the event have not needed to refer to that detail.

2.5 We also had to determine whether the respondent was correct to say an application to amend was necessary in respect of the Claimant's claim of deduction from wages. We were of a view that an amendment was not necessary although we accepted the further particulars were confusing. We proceeded on the basis that the misunderstanding was caused by the way the Claimant had set out his unauthorised deduction losses but was not inconsistent with hi claim. We defined the issue as being focused on the contractual entitlement to something more than SSP during his suspension during sickness absence and in view of the Respondent reasonably misunderstanding the Claimant's case, should there be a need for further disclosure and evidence that would be permitted.

3. Issues

3.1 The Claimant's original ET1 claim was made subject to an order for him to provide further and better particulars. That was done although some uncertainty remained. Before us, the Claimant now had the benefit of legal representation. With the agreement of the parties, we limited our determinations to the following issues as they were identified and agreed with the parties.

Protected Disclosure

3.2 Whether the Claimant made a qualifying protected disclosure in his conversation with ward Councillor Abdul Osman in Dec 2016 in which it is alleged he "**referred to data protection breach**". (as set out at paragraph 4, of the further and better particulars [page 22])

3.3 Was this a qualifying disclosure within the meaning of s.43B Employment Rights Act 1996 ("the 1996 Act")

3.4 Was it a protected qualifying disclosure being disclosed in the circumstances provided by 43C – 43H of the 1996 Act.

Detriment

3.5 If the Claimant did make the alleged qualifying protected disclosure:-

a) Did any of the allegations set out at paragraphs 1 – 17 of the further and better particulars (page 22-24) take place?

b) Do they amount to a detriment?

c) What was the reason for the detriment? Was that reason materially influenced by the fact the Claimant made the alleged qualifying protected disclosure?

d) In respect of each claim of detriment, was it presented within 3 months of the act or failure to act?

Unfair Dismissal

3.6 If the Claimant did make the qualifying protected disclosure:-

a) Has the Claimant shown the reason, or if more than one the principal reason, for his dismissal was that he had made the alleged qualifying protected disclosure?

Disability

3.7 Was the Claimant disabled within the meaning of s.6 of the Equality Act 2010 at the material time by reason of the impairment of rheumatoid arthritis.

Direct Discrimination

3.8 Did the Respondent treat the Claimant less favourably because of his disability? The treatment complained of is :-

a) Alan Lo requiring the Claimant to counter sign a letter on 6 September 2017 allegedly signing away his rights.

b) Dismissing him.

3.9 The Claimant relies on a hypothetical comparator in both cases.

Failure to Make a Reasonable Adjustment.

3.10 Did the Respondent fail to make a reasonable adjustment in the following circumstances? -

a) The PCP/physical feature relied on is the requirement for the Claimant to work in an office on the first (or second[1]) floor.

b) The disadvantage is said to be the difficulty in walking up and down stairs.

c) Did the Respondent have, or ought it to have had, knowledge of the disability and knowledge of the disadvantage?

d) Has the Respondent failed to make a reasonable adjustment? The adjustment contended for by the Claimant is to relocate the Claimant's workplace to the ground (first[2]) floor.

[1] The original draft list of issues shared and agreed with the parties stated only first floor. In fact, during evidence it became clear the Claimant's office was on the second floor and he actually sought an adjustment to work on the first floor.

[2] As footnote 1.

Unauthorised Deduction from Wages

3.11 Whether the Respondent made a deduction from the Claimant's wages in paying him at the rate of SSP during his suspension from work.

Breach of Contract – Notice period (Wrongful Dismissal)

3.12 Whether the Respondent has shown that, prior to dismissal, the Claimant was guilty of any conduct entitling it to terminate his employment summarily.

Provision of Written Statement of Main Terms

3.13 If any of the above claims succeed, whether at the time the claim was presented the Respondent was in breach of its duty under ss.1 or 4 of the 1996 Act.

4. EVIDENCE

4.1 For the Claimant we heard from Mr Naute and Mr Osman, at the time a Councillor to whom it is said Mr Naute made the qualifying protected disclosure. We received a statement from Shabana Momin who did not attend. We treated it as hearsay, applying only as much weight as we felt appropriate in all the circumstances. In the event, her evidence was largely a statement about her own experience.

4.2 For the Respondent, we heard from Ms Harjit Sandhu, the Respondent's CEO; Mr Aqil, who spoke to his handling of the Claimant's appeal in which he reviewed the actions of Mr Bagga, the dismissing officer and Mr Humphrey, the office manager. We were told how Mr Bagga was no longer involved in the charity following a heart attack.

4.3 All adopted written statements on oath and were questioned. We found the evidence given by Mr Osman and Mr Humphrey to be frank and straightforward. Regrettably, we found the reliability of the evidence of the Claimant and Ms Sandhu at times to be variable across the various issues they gave evidence on. Mr Aqil's evidence was consistent throughout in its unreliability. We placed particular reliance on contemporaneous documentation to reach our findings. In that regard, we were taken to a bundle running to 228 pages after additional disclosure was admitted.

4.4 Despite the assurance of the representatives, the evidence was concluded late on day 3 and directions given to the parties to exchange and submit written submissions and replies. Judgment was reserved. Written submissions were received, and the Respondent chose to reply to the Claimant's submissions. Within the Claimant's written submissions, the claims alleging disability discrimination were withdrawn and have now been dismissed.

5. Facts

5.1 It is not the role of the Tribunal to resolve each and every last dispute between the parties but to make sufficient findings to determine the issues in the case and to put them in their proper context. On that basis and on the balance of probabilities we make the following findings of fact.

5.2 The Respondent is a charity providing advocacy and other advice and support to individuals who lack capacity as derive from the statutory framework set out in Mental Capacity Act 2005 including the application of the deprivation of liberty safeguards ("DoLS"). So far as those to whom the act applies may lack capacity to make various important decision, it ensures their views are included in decision making, that decisions are made in that person's bests interests and that any deprivation of liberty is justified, proportionate and authorised.

5.3 The Respondent is governed by a board of trustees. There are around 15 – 20 staff depending on the level of services being contracted for. The Respondent gets some if not all of its funding from various contracts to provide these services by local authorities, in particular Leicester City Council ("LCC").

5.4 The Claimant was for around 10 years the vice chair of the charity. A role he down played in evidence as being nothing more than "a paper exercise". We find he was well aware of the running of the charity, the contracts it had and particularly the relationships with LCC. He had a view of his status in the organisation that meant he had a high regard for his own skills and competencies, despite not holding any formal qualifications in contrast to a number of others whom he regarded as being less competent than him. We find this put him in conflict with his managers and supervisors due to the low professional regard he had for them.

5.5 In 2016 he was looking for work. In January, Ms Sandhu interviewed him for employment. A little later in 2016 he was offered a post of part time Advocacy and Deprivation of Liberty Worker to start on 9 May 2016. Ms Sandhu sent a letter dated 25 April offering the position. The letter sets out the main terms and conditions, so far as pay and leave is concerned. It also made clear that the position was subject to the Claimant obtaining, at his own expense, the National Advocacy Qualification which we find he neither had, nor did he subsequently obtain it. The letter lists a number of administrative formalities that need to be completed as part of the appointment process. The letter does not refer to his status on the board but it is common ground as a result of taking up paid employment, he had to stand down from his trustee/vice chair position. Neither does the letter mention or in any way refer to the written statement of terms and conditions applicable to the post.

5.6 We find the Respondent does use a standard template contract of employment. We find it does normally use this for appointment of staff. There is no document before us of a written statement compliant with section 1 of the Employment Rights Act 1996 in respect of the Claimant's employment. The Respondent says the Claimant's is the only one missing from its electronic "file lock" document system and

has also been removed from the paper file. The “file lock” is a digital system into which it scans all paper documents. It says it retains the hard copy. We are satisfied there is no paper file record either as we find, on balance of probabilities, it would be in the same place from which Mr Humphrey obtained the hard copy job description which was signed by the Claimant. He also accepted one possible reason why there was no electronic copy of the contract was because one was not issued although he found that unlikely. However unlikely that may be, we find it more likely than the alternative advanced that Mr Naute doctored the electronic file and removed some documents from the paper files. We find, on the balance of probabilities that the Respondent has not issued a statement of main terms and conditions.

5.7 We have found, however, that the template is the standard contract of employment that this employer does ordinarily use. Whilst it was not issued to the Claimant, we are satisfied it reflects the terms of the contract. At clause 7, it sets out the reporting obligations during periods of sickness absence and makes clear that the contractual remuneration during periods of sickness absence is limited to statutory sick pay. Having said that, it is clear that there was an informal discretion to continue to pay full pay during short periods of sickness absence and this discretion was applied to the claimant. We find that during the Claimant’s employment he had received full pay during periods of sickness absence. His absence level was, however, relatively high and by 4 September 2017 he had taken 20 days sickness absence in the preceding 6 months. We find that statistic led the Respondent to give notice to the Claimant that any future sickness absence would be paid in accordance with SSP only.

5.8 The Claimant alleges that his salary should have been increased as between May 16 and April 2017, he says he was doing two jobs and was repeatedly telling Ms Sandhu about it. We reject that contention. The Claimant was employed in one role and the volume of work undertaken was monitored in periodic supervision sessions. Whether the work he did came from one, or more than one, service contract did not alter the fact he had one job. However, it is clear to us that the Claimant continued to hold a view that he was underpaid despite repeated attempts by Ms Sandhu during this period to try to explain to him that he wasn’t and that in fact he was paid more than others doing the same role, and had had his hours increased from the original appointment. The rate of pay and the rate of expenses was a constant issue for the Claimant throughout his employment. At the end of March 2017, the Claimant sent an email to Ms Sandhu headed terms and conditions of employment and other matters. It raised four points which included his mileage rate and pay scale. Ms Sandhu promptly responded reminding the Claimant that she had increases hours and allowed him more flexibility than other staff. There is nothing in this exchange to suggest any prior disclosures made by the Claimant had any bearing whatsoever on the matter there being discussed.

5.9 Sometime in 2016 an issue came to the attention of LCC concerning the use of mobile phone and laptop and a potential data breach. It seems there was an

individual working for both the Respondent and another similar charitable organisation in the same sector. He was using the equipment issued by one employer when working for the other. There was an exchange of correspondence between LCC and the Respondent's solicitors. Over a period of around 4 weeks in or around September 2016, the issue was resolved and the relations between the city council and the Respondent resumed. During that time, LCC maintained the contractual relations with the Respondent. We do not accept the Claimant's contention that funding was suspended although LCC did not send new clients during that time.

5.10 Between May and mid-November 2016 the Claimant alleges he was put under pressure to lie in correspondence to LCC about that data breach matter. This pressure is said to involve Harjit Sandhu putting him under threat of being dismissed and or not being paid. We do not accept that was the case. We have not been taken to any examples of the alleged lies which were not developed in evidence. We found it odd that something of such seriousness did not feature whilst in employment and that, on the Claimant's case, it was left to the very informal exchange with Mr Osman and never again referred to. With the nature of his role as an advocate, and past role as vice chair, we would have expected him to have recorded the issues somewhere and dealt with it, or even chased up Mr Osman. None of which happened. Consequently, we reject the contention that the Respondent was dishonest in its dealings with LCC on this issue or that the Claimant was put under any pressure by Ms Sandhu in respect of it. We suspect that there were discussions about the response to the LCC and that the Claimant may well have had a view which may at times have differed to that of Ms Sandhu. We find he was only asked to do things within the scope of his role and knowledge.

5.11 The only reference to the Respondent's lies to LCC arise in the context of the alleged protected disclosure on which we make the following findings of fact. The Claimant says that in December 2016 he made a disclosure to his friend Mr Osman, who at the time was Assistant Mayor of LCC with responsibility for public health, but not social care. The disclosure was oral and its contents have not been reduced to writing. Mr Naute's case is limited to a broad assertion that it "related to data protection breaches". The details of this claim evolved in the course of pleadings, evidence and submissions and it was difficult to maintain a consistent understanding of what the Claimant was saying was actually said. There is no evidence of any surrounding context of the discussion with Mr Osman beyond the fact that the two men were friends. His witness evidence limits evidence of the facts of the disclosure to one paragraph which states:-

> ***"Harjit Singh is in denial that she was never told about me telling, at the time, Ward Councillor and Asst. Mayor about information breaches. Refer to witness statement of Abdul Osman"***

5.12 Mr Osman's written evidence is similarly brief. He says that he was told by the Claimant that:-

"the Adhar project namely Harjit Sandhu lied to the City Council about an employee using third party computer and mobile"

5.13 Neither witness has attempted to set out any recollection of the actual words used. Mr Osman's witness statement seemed to read as though he had conveyed this fact to the LCC City Barrister. In oral evidence, he accepted that was not the case and he did not convey *this particular* matter to anyone else, he was already aware from his role in LCC about a review being undertaken of voluntary organisations generally, including the Respondent although this was not in his remit of public health. He said how a colleague, Rory Palmer, was leading this and he was not aware of the detail in respect of the Respondent. What he had conveyed to the barrister was something completely unrelated to the Claimant's alleged disclosure. To add to this, on receipt of Mr Osman's written evidence on day one of this hearing, and before his oral concession was made, the Respondent had contacted the City Council's Barrister and Head of Standards who provided a reply confirming the only dealings he had with the Councillor was in respect of a concern about his involvement in the Claimant's investigatory meeting, to which we return later.

5.14 We found Mr Osman was an honest witness assisting his friend. His witness statement had clearly been prepared by Mr Naute, although it had been revised and approved by Mr Osman. Nevertheless, Mr Osman was frank and clear in cross examination on the limits of the discussions he and the Claimant had had and that this had not been taken further. We find it hard to accept that either man believed whatever it was that they spoke about in December 2016 as conveying information tending to show a relevant failure, still less that doing so led to a series of detriments and ultimately dismissal. In fact, both were present at the Claimant´s later investigatory meeting. Neither made any mention of the disclosure. Mr Osman's live evidence was that he understood the victimisation relied on by the Claimant as following the alleged disclosure was solely the prospect of dismissal, not any of the matters now advanced as detriments short of dismissal.

5.15 We find on the balance of probabilities: -

a) A conversation between the Claimant and Mr Osman took place in December 2016. The two were long standing friends and well acquainted. They met frequently and at least monthly. This was a social meeting.

b) Some discussion took place concerning their mutual interest and understanding of LCC and the Adhar Project.

c) Mr Naute was at the time dissatisfied with the Adhar project, and Ms Sandhu particularly, due to his view that he was in a special position and entitled to enhanced remuneration that she had rejected. We find he was likely to be critical of her in any comments made.

d) We would be prepared to find on balance that that discussion touched on the data protection investigation from earlier that year and Mr Naute expressed negative views of Ms Sandhu in that context.

5.16 We cannot make any specific findings of the words spoken as none have been advanced.

5.17 We find this conversation was not repeated to Ms Sandhu, either in its terms, or by reference to the fact of the discussion with Mr Osman. We note, however, that the Claimant frames this part of his claim as a punishment or threat in response to the fact that he regards Ms Sandhu as going back on a promise to pay him more. It seems to us that his personal pay arrangement was inextricably linked to whatever it was he discussed with Mr Osman.

5.18 Whilst we reject Mr Naute's evidence on this point, the fact that he maintains that he told his employer around the time remains relevant to his state of mind in respect of why he did not make his disclosure through any other route.

5.19 We find the Respondent operates a system of staff supervision akin to that adopted in many social services environments. In other words, a periodic one to one meeting to discuss professional practice, case load, development needs, pastoral and other issues. We find this took place approximately every 3 months. The Claimant initially had his supervision with Ms Sandhu. Latterly, this changed and supervision was to take place with his line manager, Mr Alan Lo.

5.20 We have seen supervision records between Ms Sandhu and the Claimant for October 2016, on 14 February 2017 and 10 April 2017. We find they accurately record the topics of discussion, albeit in brief notes.

5.21 In October it is clear the Claimant was to be sent on a training course for DoLS which we find he did attend. He took on a lead for data protection. Other matters and individual cases were discussed. We find the brief notes of the meeting suggests a perfectly amicable and professional relationship. Pay is not mentioned

5.22 In the course of the February meeting, the same areas were covered. One new matter was a reminder to use the correct forms for expense claims. There was also mention of a new contract to be issued this month to reflect the full-time nature of his work. We cannot see that a contract was issued.

5.23 In the course of the April meeting. The Claimant was informed he would in future be line managed by Mr Alan Lo, who had taken the lead on the PPR contracts which was the main area of the Claimant's work. We find the Claimant had little respect for Mr Lo. Mr Lo was a degree qualified social worker. The Claimant acknowledged his academic background but regarded him as junior to him in his professional practice despite the fact the Claimant did not have a degree in social work and had still not obtained the specific qualifications that the Respondent had originally required him to in order to carry out his role. As a qualified social worker,

Mr Lo would undertake best interest assessments and received training in this area, something the claimant did not do and would not need to be trained on. That did not stop the claimant comparing himself to Mr Lo and suggesting Mr Lo was being treated better than him by the employer in sending him on that training. His concern was misplaced.

5.24 We find Mr Naute resisted supervision with Mr Lo. We find the one and only supervision session that did take place between them only took place because Mr Lo acceded to Mr Naute's precondition that it took place at a restaurant of his choice, over lunch time and that Mr Lo paid the bill for his lunch. We find Mr Lo tried to engage with the Claimant and involve him in meetings and supervision. We find he faced resistance at each step which over time began to cause him stress.

5.25 We find Ms Sandhu and Mr Lo both sought to support the Claimant and that they did so despite his difficult and obstructive attitude towards them both. We reject the contention that the Claimant was excluded from meetings or events or had to ask to attend meetings that others were invited to. Mr Naute had a specific role to perform and was included in the organisation´s systems and meetings to the extent matters were relevant to him or his role. We find his background with the organisation may have meant he felt he had more to input that others in similar roles and a greater experience, for example in involving himself in an audit by LCC, butwe are satisfied it was at all times a matter for the employer to decide how to deploy its staff.

5.26 On 5 May 2017, Mr Lo held a team meeting for the new DoLS PPR team he was now leading. The Claimant attended. We find that attendance was reluctant. He is recorded as not providing any case reports to the meeting. As part of his new role as lead for PPR, Mr Lo began checking the expenses being claimed by members of the team. He was not happy with the systems or way of working adopted by the Claimant. At a further DoLS PPR meeting held on 17 July 2017, he raised this. The notes of the meeting record:-

> ***3. Mileage claim.***
>
> ***All PPR were reminded that they could only claim the return journey if they did start from the office and return to the office afterwards. Everyone agreed but Tirathpal challenged that he claimed the same way to the LCC. He assumed there would not be any loss from Adhar. Alan made it clear to all that PPR could only claim the mileage as same as they drove.***

5.27 Earlier in the meeting, the notes record the Claimant's response to an internal direction that PPR staff should not deal with any Court of Protection issues but that they should be reported to the DoLS team. The notes record:-

> ***Tirathpal challenged the above decision in a hostile attitude. He challenged if this was LCC order or DoLS regulations. Alan explained that this was Adhar internal order which also complied with the LCC PPR contract and guidance for PPR***

5.28 We are satisfied that Mr Lo experienced challenging objection from the Claimant from the outset. We also find that the manner in which the Claimant made his expenses claims and extent to which he regarded he had an entitlement to something different to that which Mr Lo was advising caused Mr Lo to begin to look into the Claimant´s expenses claims in particular.

5.29 The two met in their one and only staff supervision meeting on 28 July 2017. Three topics were discussed. The first was a supervision schedule. We find difficulties Mr Lo had experienced meant that he had to spell out the requirement for the Claimant to attend monthly supervision meetings with himself as a requirement of his employment contract. The second related to caseload and mileage and we find is directly linked to Mr Lo's concern about the Claimant's practices when claiming expenses. It required him to submit prompt claims together with caseload and visiting records. It went on to state:-

> ***Alan needed time to check all mileage claims, invoicing to LCC and update the caseload and capacity for the team monthly. He was unable to check all PPR mileage claims and invoicing quarterly.***

5.30 The third matter was a reminder to the Claimant that he could not take any action related to the Court of Protection.

5.31 Almost immediately after this meeting the Claimant commenced a period of sickness absence lasting a number of weeks. The Claimant produced medical fit notes to his employer which described the reason for his absence as both "knee pain" and "rheumatoid arthritis and knee pain". Upon his return, he was required to undergo a return to work interview with Mr Lo. That took place on 4 September 2017.

5.32 The Claimant originally alleged that the Respondent's refusal to allow him to change office was both a failure to make a reasonable adjustment and a detriment for making a protected disclosure. We find the following happened. During the return to work interview, Mr Lo and the Claimant discussed his arthritis and the need to move from the first floor. This was a continuation of a similar conversation the Claimant had had with Ms Sandhu. Mr Lo accepted what he was being told so far as he would have to act on, subject to some confirmation. He asked Mr Naute to obtain a report about his health from his GP. We find any change to office location would have required a short period to organise, in the region of no more than a week or two. We have no evidence to suggest Mr Lo new anything at all about any discussions with Mr Osman. Indeed, it has not been established that Mr Lo had any dealings at all with the data protection issue during the summer of 2016. We find Mr Lo acted in all respects on the evidence before him at the time and only in what he thought was the best way to deal with the issues.

5.33 It was in this return to work meeting that the Claimant was informed that any future sickness absence would revert to the contractual entitlement to SSP, and he would no longer receive the discretionary payment of full pay.

5.34 A solution was found to relocate the Claimant's office to a facility which was already used by the Respondent at that Peepul Centre in Leicester. We find this would have provided an appropriate office base from which the Claimant could have performed his duties. It was a dedicated multi-purpose conference centre with extensive free parking including disabled parking. There were no steps to the entrance and there were at least one if not two lifts to the upper floors. All of that was in contrast to the St Peters Avenue premises which was a converted terraced house with no lifts, steps, and located on a residential street where nearby parking could not be guaranteed. We are satisfied this was a suitable alternative.

5.35 That proposal was being developed in August/September. It was put to the Claimant. The Respondent was dubious about the alleged disadvantage as the experience of Mr Lo and Ms Sandhu was that the Claimant had never expressed any concerns and never displayed any difficulties in using the stairs, indeed Ms Sandhu recalled having to chastise him for running on the stairs in concerned it was a health and safety risk. Even in the course of giving evidence on this point, the Claimant's case developed into a requirement not that he be based in an office without the need for stairs, but that he be moved from the second floor to the first floor.

5.36 The day after the return to work meeting, the Claimant requested Mr Lo type up the notes of their meeting. Mr Lo duly did so. [75]. He sought to obtain the Claimant's agreement to them by presenting them to him to sign. He visited him in his office on 6 September 2017, soon after 10 am. Also in the office was Judy Ndakwa, another PPR although she initially had her back to the two men when Mr Lo entered. We find Mr Lo gave him the document and asked him to sign it.

5.37 It is in the course of this brief discussion about signing the notes that Mr Naute alleges he was assaulted by Mr Lo in the form of an aggressive shoulder barge. Mr Lo denied any such physical contact. We have explored what we have before us on this matter. It seems to us that we do not need to make a finding one way or the other as to whether physical contact took place. There are reasons why we might except the Claimant's account, particularly as he went on to report the matter to the police. On the other hand, Mr Lo's account given to the employer seemed consistent with Ms Ndakwa's account. She had her back to the two men and was only distracted from her work by the sound of loud banging on a desk. This caused her to turnaround she then described seeing the two arguing and said words to the effect of "one of you must leave". Mr Lo left the room. She does not describe in any sense either of them coming towards the other in any physical way. The Claimant then proceeded to telephone the police to allege an assault. We note Ms Ndakwa refused to speak to the police when the Claimant sought her support for his complaint on the basis she did not see what happened. Although she did not see all of the exchange, the part she did witness, after the banging on the desk, was when the Claimant alleged the occurred.

5.38 This event marked a breaking point in the already strained relationship between the two men. For the Claimant, he went home and commenced a period of sickness absence. For Mr Lo, enough was enough and he lodged a grievance about this and all the earlier times when he had experienced obstruction and difficulties from Mr Naute accepting his authority [206/207].

5.39 Whether or not this event brought forward the work Mr Lo had been doing to analyse the Claimant's expenses, we find this work was in hand and, on 7 September 2017, the second day of the Claimant's sickness absence, a letter was drafted and sent to him suspending him from work. This was in respect of an allegation that he had made fraudulent mileage claims and recording PPR visits that had not in fact been undertaken. The pay term of his suspension was said to be "on contractual pay".

5.40 We find the Claimant received the letter of suspension on the morning of 8 September 2017. In response to receiving this, he wrote his own grievance about Alan Lo alleging assault [77].

5.41 The Respondent therefore had both a disciplinary investigation, a grievance and a cross grievance to deal with. It set about investigating all issues.

5.42 The investigation into the Claimant's allegations of assault commenced promptly and the Claimant was invited to attend a grievance investigation meeting on 13 September 2017 in order that Ms Sandhu could fully understand his complaints. We find the Claimant did not attend that meeting.

5.43 Ms Sandhu considered the evidence she had. She had Mr Lo's account in his own grievance and she had also obtained a statement from Ms Ndakwa. She concluded that the Claimant's account was not true. We find she reached that conclusion based only on the evidence she had before her. She was also increasingly concerned about the Claimant's own allegations of her arising in the course of their own discussion on 6 September 2017 which the Claimant characterised as uncaring and unconcerned.

5.44 Despite not attending or participating further in the grievance process, the Claimant appealed against the outcome on the ground he was not in attendance. A trustee by the name of Shadene Sang considered the appeal that same day and replied stating that the Claimant´s appeal letter "does not provide any additional evidence as to why you are appealing the decision. Before we can consider your appeal please can you provide this to us in writing". We find no appeal took place.

5.45 On 19 September 2017 the Respondent's focus returned to the disciplinary allegations. A letter was sent to the Claimant inviting him to investigation meeting to be held on 21 September 2017. That meeting took place chaired by Ms Sandhu. The Claimant attended together with councillor Osman. By this time the Respondent had prepared some detailed analysis of the Claimant's most recent mileage claims which

we find did show that he had claimed mileage for a number of visits that he appeared not to have undertaken. This included mileage being claimed when he was on annual leave. In another case it included a visit to a resident who had died a number of days earlier and the fact of that death appears to have been available to the claimant (which we find is not always the case meaning PPR´s could attend a home to find the client had recently died) . Ms Sandhu went through the prepared questions for each of the mileage claims giving rise to concern. We have seen the notes of that meeting which are not in dispute. The questions and answers cover five pages of small type. The answer Mr Naute gave to every single question asked by the employer was simply “No comment”. At the end of the meeting the employer asked for the return of the office laptop, diary, mobile phone and charger which he had removed from the premises on his last day of attendance on 6 September 2017. He repeatedly refused to return the items despite a colleague attending on number of occasions to try to recover the Respondent’s property. At the end of the investigation meeting he stated he would like the opportunity to reply to the allegations. He didn’t.

5.46 Nowhere within that meeting does the Claimant or Councillor Osman suggest that the disciplinary process was happening because of an alleged disclosure.

5.47 The Claimant was sent a letter dated 22 September 2017, but not arriving with him until 25 September, inviting him to attend a disciplinary hearing to take place on the 27 September. The disciplinary charges had by this time grown. In addition to the allegation that he falsely claimed mileage expenses, the allegations now included breach of policies procedures and a regional management instruction in his refusal to answer questions during the investigation; theft of the company laptops, phone and diary; breach of confidentiality in respect of the same and an allegation that he had secretly entered the Respondent’s premises and removed and replaced items in his personnel file. The Claimant was sent an accompanying bundle of documents relating to the allegations. One of these documents was a lengthy list of the questions asked at the investigation hearing inviting the Claimant to provide written answers, as he had himself indicated he would.

5.48 On 25 September he indicated he was still off sick and would not be attending the disciplinary hearing which was, in any event, short notice. In response, the Respondent sought to distinguish being unfit for work with being unfit to attend a hearing. Should he be unfit to attend, it sought to provide alternatives to exploring the Claimant’s response to the allegations. These included provision of a written response; being represented or attending by telephone. The Claimant provided a GP letter on 29 September confirming he was unfit to attend the hearing. The Respondent wrote indicating the hearing would go ahead with the various options already given. The Claimant sought a postponement of the hearing so that his representative could attend.

5.49 The disciplinary hearing was eventually held on 2 October 2017. The Claimant had not submitted any written submissions or replied to the 24 written questions asked of him. It was assumed that he was not attending but, as he had indicated, that he would be represented. No one attended. Mr Bagga considered the evidence and concluded that the Claimant was guilty of all the concerns put to him. He concluded these were so serious that the sanction had to be dismissal.

5.50 After the scheduled hearing had concluded, the Claimant's representative, Mr Singh, attended the premises about 50 minutes late. He was told the decision had been made.

5.51 A letter was sent the following day confirming the outcome.

5.52 On Saturday 7 October at 9:30 pm the Claimant sent an email setting out his appeal against dismissal. We record the exact time as the next contemporary document is a letter from Mr Aqil dated Monday 9 October 2017 which states:-

> ***I deny you an appeal.***
>
> ***You attended an investigatory meeting and you could have attended the disciplinary or sent written submissions to the questions.***
>
> ***You have had ample opportunity to counter the allegations that were made against you and led to your dismissal but you failed to do so***
>
> ***I therefore uphold Adhar Projects decision to dismiss you.***

5.53 We initially read this letter as a refusal to hold an appeal and it seemed a preliminary view was taken that an appeal would be futile in view of the history. The witness evidence seemed to suggest there was a hearing which the claimant failed to attend. After hearing the evidence, we were in no doubt whatsoever that our initial understanding was, in fact, what happened. Mr Aqil maintained in evidence that there was an appeal hearing at 11:30 am on the Monday morning to which the Claimant had failed to attend and that he had gone on to consider the evidence and, only after doing so, his decision was to dismiss the appeal. Against the overwhelming weight of evidence to the contrary, the lack of any contemporary evidence in support and the sheer implausibility of this being the case, he maintained not only that the Claimant had failed to attend the appeal which had concluded in his absence, but that his representative Mr Singh then belatedly attended, 50 minutes late, to be told it was too late. There was no contemporary evidence explaining how the Claimant would have known of the hearing to have been in a position to instruct his representative and the fact it was suggested he not only attended late for a second time in 7 days, but by exactly the same 50 minutes as was recorded at the disciplinary hearing, we found to be beyond coincidence.

6. Discussion and Conclusions

(PID)

6.1 The first issue for the Tribunal is to determine whether there was a protected disclosure. Section 43A of the Employment Rights Act 1996 defines a "protected disclosure" as:

> ***"[…] a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."***

6.2 Section 43B provides, so far as is material:

> ***"(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—***
>
> ***[…]***
>
> ***(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; "***

6.3 The disclosure must be "of information". (Cavendish Munro Professional Risk Management Limited v Geduld [2010] ICR 325), that is conveying facts as opposed to allegations although a disclosure may also make an allegation and the distinction is not necessarily binary.

6.4 We have first considered the nature of what it was that was said to be disclosed. We can be satisfied that somewhere within the social meeting between Mr Naute and Mr Osman, Mr Naute said something about his negative view of Ms Sandhu. This was against the background of him being refused a pay rise. We are satisfied that within the conversation the Claimant conveyed an allegation that Ms Sandhu had lied. Beyond that, we have no evidence of what it is that is said to inform that belief and Mr Osman learned only the Claimant's opinion of Ms Sandhu. We cannot detect in the evidence before us any information that was conveyed beyond this mere allegation. The fact it was an expression of opinion seems to be reinforced by the absence of either men taking any other action. Had there been information conveyed which showed that a previous statement to LCC was false, we expect Mr Osman would have acted on it.

6.5 Information disclosed must "tend to show" one of the relevant failures set out in s.43B(1)(a)-(f) of the Act and the nature of the failure must sufficiently identify the relevant failure, albeit it need not be in strict legal language (Fincham v HM Prison Service UKEAT/0991/01) and in some disclosures the nature of the failure may be perfectly obvious from the context. It is tempting to try to apply this to a bald allegation that Ms Sandhu had lied but we remind ourselves that it is the information conveyed in the disclosure which we must have in mind when considering whether it tends to show the relevant failure. In the absence of the information, we cannot say whether the relevant failure is established.

6.6 Moreover, we are not convinced that Mr Naute's belief was a reasonable one or that whatever was disclosed was disclosed in the public interest. The requirement that the worker has a 'reasonable belief' means that the belief need not be correct

but only that the worker held the belief and it was reasonable for him to do so. Accordingly, it can be a qualifying disclosure if the worker reasonably but mistakenly believed that a specified malpractice was occurring: (Darnton v University of Surrey). The reasonableness of the belief is the worker's subjective belief, not an objective assessment. In this case we are concerned that the Claimant was himself involved in drafting letters to LCC which are said to be on instructions to lie yet we have nothing to explain what the lie is. There is no contemporary reference to this and no explanation in the evidence before us. The surrounding context shows Mr Naute's relationship with Ms Sandhu to have deteriorated and that they had recently been in conflict over his remuneration. The Claimant simply hasn't established the evidence on which we could determine the information was reasonable for him to believe to be true. What we do have does not support a reasonable belief that Ms Sandhu had lied in any responses to LCC.

6.7 Whether a disclosure made after 25 June 2013 is made in the public interest (as opposed to in good faith) depends on whether a section of the public benefits or has an interest in the matter of the disclosure which can include private contractual matters. (Underwood v Wincanton PLC). There is a strong sense to be gained from the surrounding circumstances that the exchange with Mr Osman was no more than the Claimant venting his own disapproval of Ms Sandhu following his dispute over pay. If there was a disclosure of information, it would appear to have been for that personal reason. There is no explanation why such information was not conveyed to LCC directly or followed up with Mr Osman after the event it, as is now advanced, this disclosure was something more than him expressing his personal dissatisfaction with Ms Sandhu.

6.8 We have concluded therefore that the Claimant has failed to establish the initial necessary elements of a protected disclosure but if we are wrong, and there is information conveyed in the simple assertion that Ms Sandhu has lied, and which tends to show a relevant failure in the public interest, we need to consider the route by which this disclosure was made and whether any "protected" disclosure becomes a "qualifying" protected disclosure.

6.9 Sections 43C – G provide the persons to whom, and circumstances in which, a disclosure may be made so as to render it a protected qualifying disclosure. There are essentially 6 statutory routes available to a worker through which their disclosure can be made. Most will be made to their employer. That is not so here. Nor was the disclosure made to a legal adviser, minister of state or proscribed person within the list or bodies and relevant matters defined in the Public Interest Disclosure (Prescribed Persons) Order 2014. The Claimant can only establish a qualifying protected disclosure if he can bring the circumstances of his disclosure within either section 43G, the scheme for "other cases" or 43H, the scheme for "exceptionally serious cases".

6.10 Section 43G provides the circumstances for disclosure in other cases.

(1)A qualifying disclosure is made in accordance with this section if—

(a). . . . . .

(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2)The conditions referred to in subsection (1)(d) are—

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a)the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f)In a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

6.11 We have already expressed our conclusion on whether the Claimant held a reasonable belief in the manner necessary to establish a protected disclosure. A worker relying on this section to make the disclosure also has to reasonably believe

the information and any allegation to be substantially true. We are not satisfied that has been established. In any event, it is also necessary to satisfy at least one of the conditions in subsection (2). Here we see an insurmountable obstacle for Mr Naute. It is not disputed there were no prior disclosures such that subsection (2)(c) is of no assistance. The remaining two conditions relate to the worker's reasonable belief in one or other form of immediate consequence if the employer was told. That is, either evidence being destroyed or detriment to himself. We have to determine firstly whether that fear explains why s.43G was used and, secondly, it was reasonable for the worker to hold that fear. We have concluded it was not a factor at all in Mr Naute's choice of how to make the disclosure. Moreover, although we rejected it as a fact, Mr Naute's own case was that he immediately repeated the fact of the disclosure made to Mr Osman to Ms Sandhu. It follows, therefore, that there was no fear on Mr naute's part of any immediate retribution or destruction of evidence nor can we see from the surrounding circumstances how such a fear could have been reasonably held.

6.12 It follows that section 43G is not engaged. The final route is section 43H which qualifies a protected disclosure made in respect of exceptionally serious failures. It provides:-

> ***(1)A qualifying disclosure is made in accordance with this section if—***
>
> ***(a) . . . . . .***
>
> ***(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,***
>
> ***(c) he does not make the disclosure for purposes of personal gain,***
>
> ***(d) the relevant failure is of an exceptionally serious nature, and***
>
> ***(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.***
>
> ***(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.***

6.13 The key to this route is that the substance of the information conveyed must engage the concept of an exceptionally serious failure. The use of the word "exceptionally" demonstrates the circumstances will be rare and connote a failure which is more than a merely a serious one, but an exceptionally serious one. We have not been taken to any authority on this but note how Harvey [CIII,6,G [82]] describes it as a failure which is "so serious that the public interest in its disclosure is of overriding importance". Similarly, Tolleys Employment Law Service [W6023] identifies examples from the public concern at work consultation and other cases, sexual abuse, people trafficking for prostitution and serious public health risks.

6.14 In the absence of any information conveyed it is artificial to make an assessment of the disclosure against this test but, if we put it at its highest, the

allegation of a contractor lying about data protection breaches to the other contracting party in the context of data protection breach is not an example of an exceptionally serious failure where the public interest in the disclosure overrides compliance with the other means of making a protected disclosure.

6.15 It follows that any protected disclosure that was made to Mr Osman was not a qualifying protected disclosure.

Detriments

6.16 It follows that as there was no qualifying protected disclosure, none of the alleged detriments can have been on the ground that the Claimant made it even to the relatively lower threshold that the disclosure materially influenced the detriment occurring. All claims of detriment for that reason must, therefore, fail.

6.17 In any event, there are other reasons why some if not all of the detriment claims would not have succeeded, not least because we were not satisfied as a fact that Ms Sandhu or any of those alleged to have subjected the Claimant to detriments knew of the alleged disclosure. Beyond that, we have concluded either that the detriments did not take place, were not detriments or had legitimate reasons as to why they occurred. The first allegation that the Claimant was put under pressure to lie in correspondence to Leicester City Council about data breaches is said to take place between 1 and 7 months before the alleged disclosure. It cannot, therefore, be causative. Similarly, the allegation that the Claimant was not paid for the extra work he was doing under two jobs occurs before the alleged disclosure. Moreover, we do not accept there is a detriment when an employer declines a request by an employee to something to which he is not entitled.

6.18 We do not accept as a fact that the Claimant was given “the cold shoulder” by Ms Sandhu and to the extent that there was any change in their interpersonal relationship, this was entirely due to the Claimant’s interaction with her over wanting more money.

6.19 We do not accept the Claimant was refused training, or that others were sent on training in preference to him, or that he was refused a request to undertake IMCA work when he later found out that he was in fact already qualified. These detriments show a confusion on the Claimant’s part both about the extent of his qualification, the nature of the work he and others were doing and, in some cases, he has conflated technical areas of Mental Capacity Act work. The roles of IMHA and IMCA are conceptionally similar but derive from different statutes and support individuals in different situations. The training in best interests was a course for qualified social workers which he was not. There is evidence that training was a regular feature of supervision sessions and that the Claimant was sent on training particular to his role. The fact that he may have had suggestions for new lines of business which were not taken forward is not in itself a detriment.

6.20 We do not accept the Claimant suffered any detriments in the course of the supervision sessions with Ms Sandu generally and, specifically, the one held on 10 April 2017. The Claimant was not told he was incompetent, there was no failure to engage with him over his repeated requests for more money or to increase his expenses rate and Ms Sandhu, and later Mr Lo, was entitled to explore his client case load and make decisions about that which could include the redistribution of clients within any caseload. There is no detriment in a worker being asked to provide information to his employer about his clients or caseload. The brief notes of the supervision meetings we found to be accurate and fair. Similarly, we rejected as a fact that the Claimant was excluded from meetings or audits by LCC.

6.21 We rejected as a fact the contention that the Respondent refused the Claimant's request for a change of office.

6.22 It follows that had there been a qualifying protected disclosure, we would in any event have dismissed the detriment claims either because there was no detriment or there was a legitimate reason for the actions, unrelated in any material way to the alleged disclosure.

Dismissal

6.23 Section 98 of the Employment Rights Act 1996 ("the 1996 Act") states, so far as relevant:

> ***"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—***
>
> ***(a) the reason (or, if more than one, the principal reason) for the dismissal, and***
>
> ***(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.***
>
> ***(2) A reason falls within this subsection if it—***
>
> ***(b) relates to the conduct of the employee"***

6.24 Section 103A of the 1996 provides:-

> ***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 made a protected disclosure.***

6.25 The question of fairness in this case rests entirely on the reason or principal for dismissal. If it is the automatically unfair reason, the claim succeeds. If it is the potentially fair reason of conduct relied on by the Respondent, the claim fails. We are not bound to choose between the two if the evidence supports a third explanation but a conclusion of any reason other than the making of a protected disclosure means the claim will fail. The legal burden of proving the reason falls on the Claimant simply as he has insufficient qualifying service to bring a claim of ordinary unfair dismissal (Smith v Hale Town Council 1978 ICR 996 CA).

6.26 Clearly, as we have concluded there was no qualifying protected disclosure, this claim must fail. Beyond that, we are in any event entirely satisfied that the reason for the dismissal was, principally, the belief in the fact that the Claimant had made false mileage claims. That was the reason and it was in no way whatsoever influenced by the alleged disclosure.

6.27 We would add a note, however, that as the question of fairness was limited to the reason for dismissal only, we have not given any consideration to the types of factors that would engage under s.98(4) of the 1996 Act. If there had been jurisdiction to consider that type of unfair dismissal claim, we have noted a number of aspects in the procedure adopted which would have caused concern.

Breach of Contract

6.28 There is no dispute that the Claimant was entitled to one week's notice of termination and there is prima facie a breach of contract in dismissing him summarily.

6.29 The only question before us, therefore, is whether the Respondent was entitled to dismiss without notice. If we are satisfied on the balance of probabilities that the Claimant was guilty of gross misconduct, his claim fails. It does not matter whether or not that misconduct, or the full nature or extent of it, was known to the Respondent at the time of dismissal (Boston Deep Sea Fishing And Ice Co V Ansell (1888) 39 ChD 339). If the Respondent fails to satisfy us of that, then the breach of contract claim succeeds in full.

6.30 The necessary conduct entitling the employer to dismiss summarily is usually restricted to conduct said to amount to gross misconduct. The classic statement of what constitutes gross misconduct is that of Lord Jauncey in Neary v Dean of Westminster [1999] IRLR 288 where it was said that the conduct in question: -

> ***'must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment'.***

6.31 It is therefore a matter for us to assess whether the allegations against the Claimant are, firstly, made out in fact such that I accept them on the balance of probabilities and, where they are made out, that their nature and gravity is such as to fall within the ambit and meaning of gross misconduct.

6.32 Of the matters relied on by the employer to dismiss the Claimant, we are not satisfied we have been provided with evidence of his alleged unauthorised entry to the premises during suspension and that he removed and deposited various documents from and in his personnel file. Similarly, whilst we can accept as a primary fact that he did not engage in the disciplinary investigation meeting when he refused to answer the employer's questions, we cannot accept this conduct amounts to gross misconduct in the absence of an express contractual obligation to answer

questions. It is an odd response within the context of an employment investigation and may be based on the source of any legal advice he had received from those whose practice is in the criminal courts. Nevertheless, as odd as it his response was, it has to be seen in the context of an investigation into allegations and we simply do not accept that it would in itself justify summary dismissal.

6.33 It is therefore only in respect of the mileage claims and the removal and retention of the employer's property that the necessary facts and gravity can entitle the employer to dismiss summarily.

6.34 In respect of the mileage claims, we have considered this carefully. The absence of the Claimant's response was material to the employer's decision that the allegations were made out. That is also relevant to us, but first we must be satisfied that the evidence before us does in fact show misconduct in the manner of the expenses claims. We are satisfied that it does. There are clearly a number of dates on which mileage was claimed when the Claimant was not at work. The manner of some of the claims shows times and distances of the journeys as recorded could not have physically taken place. There are claims made for journeys with no accompanying record of attendance on a client. The fact that a claim was made to visit a client who had died offers an apparently clear-cut example of a dishonest claim and appears to be the headline example which brought about the criminal investigation. However, and somewhat ironically, this is the only example which has a possible explanation justifying his attendance, as it seems the Respondent may not always be notified of a death in time to prevent a pre-planned visit taking place although in this case it seems the respondent was told. That aside, we are satisfied that the evidence of mileage claims does show a prima face case of false claims. It is possible that some of those claims could have been explained by the Claimant but he chose not to engage with the employer and, significantly for this claim which requires us to reach a primary finding of fact, he has not persuaded us of a legitimate explanation. We are satisfied that there is evidence of a number of false claims.

6.35 We have given consideration to whether that conclusion necessarily meets the gravity of conduct to bring it within the scope of a repudiatory breach entitling the employer to dismiss summarily. We are satisfied it does. The claim of breach of contract therefore fails.

Unauthorised Deduction

6.36 The issue in this claim is that when he was suspended on 7 September 2017 and continuing until his dismissal, the Claimant was paid only at the applicable rate for SSP.

6.37 In any claim of unauthorised deduction from wages, the starting point is to determine that which was "properly due" to the worker under the terms of his contract of employment or otherwise by law.

6.38 We have found, and it is not in dispute, that the Claimant went off sick from 6 September, the day before his suspension and remained off sick until his dismissal. The Claimant relies on the terms of both the letter of suspension and the employment handbook both of which refer to suspension being “on contractual pay”.

6.39 The Claimant makes two submissions that lead to that being interpreted as full pay. The first is that contractual pay simply means normal pay. The second is that even when off sick he should receive full pay. His argument for the latter was that he had always had full pay whenever he worked in other organisations such as local government. The Respondent says contractual pay means pay due under the contract and at the time, he was entitled only to SSP.

6.40 We prefer the Respondent’s argument. It may be that in most cases where an employee is suspended under these terms, the relevant contractual pay to be paid during suspension will be the same as normal pay. But the notion of contractual pay isn’t an independent concept, it is explicitly fixed by reference to the underlying operation of the contract at any time. For example, an employee suspended over a period within which a pay rise was implemented would be entitled to receive the increase whilst suspended. The pay during suspension simply refers back to how the pay would be calculated but for the suspension at the applicable time. In this case the Claimant was off sick before he was suspended and at that time entitled to pay calculated on the basis of SSP. There was no contractual entitlement to full pay. There was a discretional practice of paying full pay for occasional or short-lived periods of absence to help support an employee’s return, but this had been explicitly withdrawn in the Claimant’s case in August due to his level of sickness absence. There is no basis in law or the surrounding facts for implying any term to the effect that he was entitled to full pay when absent due to sickness. It follows that neither route to full pay advanced by the Claimant succeeds.

6.41 Mr Naute was paid that which was properly due. There was not, therefore, a deduction from wages.

Failure to Provide a Written Statement

6.42 The Claimant seeks an award under s.38 of the Employment Act 2002 alleging that at the time he commenced these proceedings, the Respondent was in breach of its duty to provide a written statement of main terms of employment. We have found that a written statement or contract of employment was not provided to the Claimant. The Claimant has our positive conclusion on this aspect of his claim but, in the circumstances of this case, it affords no practical benefit as the right to a remedy under s.38 applies only where another claim succeeds. Where no other claim succeeds the Tribunal has no power to make a stand-alone award under this provision.

EMPLOYMENT JUDGE R Clark

DATE 11 August 2019

JUDGMENT SENT TO THE PARTIES ON

……...……..

AND ENTERED IN THE REGISTER

……...……..

FOR SECRETARY OF THE TRIBUNALS