EMPLOYMENT TRIBUNALS

Claimant: Ms Marie Green

Respondent: Restore Cleaning Limited

HELD AT: Manchester **ON:** 17 January 2019
9 and 10 April 2019
1 May & 2 July 2019
(in Chambers)

BEFORE: Employment Judge Langridge

REPRESENTATION:

Claimant: In person
Respondent: Mr P Cunningham, Consultant
Mr P Clerk, Consultant

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was a worker within the meaning of section 230(3) Employment Rights Act 1996 during her employment with the respondent.

2. The claimant was entitled during her employment to receive paid annual leave in accordance with the Working Time Regulations 1998 and is entitled to compensation for non-payment of any such leave.

3. The claimant was entitled to be paid in accordance with the National Minimum Wage Act 1998 for all working time including travelling between the respondent's office and its clients or between the respondent's clients' homes.

4. The claimant was not an employee of the respondent and accordingly her claim for unfair dismissal under section 104 Employment Rights Act 1996 fails.

5. The claimant's claim under section 47B Employment Rights Act 1996 in relation to detriment for making a protected disclosure fails because disclosure was not made in the public interest.

REASONS

Introduction

1. The hearing of these claims began on 17 January 2019 and was originally listed for one day. In her application to the Tribunal the claimant claimed she was an employee for the purposes of making an unfair dismissal claim. Although she did not have two years' continuous service she believed her dismissal was automatically unfair because it arose from asserting the statutory right to be paid the National Minimum Wage. The claimant also alleged that she had been subjected to a detriment as a whistleblower, relying on section 47B Employment Rights Act 1996.

2. The claimant's claim relied on the fact that if she was not an employee, she was at least a worker as defined by the Employment Rights Act 1996, and as such entitled to be paid the National Minimum Wage and to be given paid annual leave. During her time with the respondent the claimant had received an hourly rate in excess of the applicable National Minimum Wage rate, but was not paid while travelling for work. The claimant was allowed to take time off but never received any pay during annual leave.

3. In its response to the claim the respondent disputed that the claimant was either an employee or a worker, asserting that if work was not available it was simply not offered to her. Instead, the arrangement between them was that of a company and a self-employed contractor, the claimant paying the respondent a commission of 20% of her earnings as a cleaner under this arrangement. So far as any dismissal was concerned, the respondent asserted that it was the claimant's choice not to continue working under the arrangement they had.

4. The claimant represented herself throughout the hearing. The respondent was represented by a consultancy appointed on 7 January 2019, ten days before the hearing started. On that day the respondent was represented by Mr Cunningham, but when the hearing resumed on 9 April Mr Clerk had taken over the role.

5. At the outset of the hearing on 17 January the issues were clarified with the parties as summarised above. The claimant also made clear that insofar as remedy was concerned she was seeking compensation for future loss over a ten week period only, because after that she was aiming to set up a business and not looking for employment.

6. The claimant gave evidence on her own behalf by reference to a written witness statement. The respondent's witness was Mrs Rachel Seddon, the owner and manager of the business. She relied on two witness statements, the first in the form of a letter to the Tribunal 29 October 2018 and the second being a supplemental statement dated 17 January 2019, the first day of the hearing. While this had the potential to cause difficulties for the claimant, she accepted that the

content of the supplemental statement did not take her by surprise and she felt able to proceed despite its late production.

7. The bundles produced by the respondent were far more problematic. An initial bundle of a little over 100 pages was produced but neither indexed nor paginated consequentially. It contained documents relied on by the respondent in one section, a small number of the claimant's documents in another section, and a number of new documents in a further section. The latter had been added by the respondent but the claimant had not previously seen them. This arose because the respondent sent a previous version of the bundle to the claimant on 4 December 2018. After this the content of the bundle changed and new documents were added by the respondent. The claimant refused to accept the second bundle as she had been working with the original version and produced her witness statement by reference to that. As the respondent had not drawn her attention to the new documents, she was unaware that the second version of the bundle was different. A further problem with the bundle provided to the Tribunal was that some documents were missing.

8. Following lengthy discussion, the Tribunal directed the respondent to correct the bundles by copying the version provided to the claimant and adding to it a handful of new documents (identified and agreed during the discussion). The Tribunal then adjourned to pre-read the papers while the respondent took these steps. All of this took some considerable time and the evidence did not begin until 12.30pm when the claimant gave her oral evidence. Her evidence was completed by the end of that day and arrangements were made for the hearing to be relisted on 9 and 10 April. During the course of the claimant's evidence it became apparent that there were key omissions in the bundle of documents. The Tribunal therefore ordered the respondent to search for and disclose to the claimant copies of all documents relating to the terms agreed with her at the outset of or during their working relationship, plus all work sheets by which jobs were allocated to the claimant on a periodic basis. The Tribunal described these as 'work allocation sheets' and having asked the respondent whether such documents existed, made the order when told that they did. For her part the claimant was ordered to disclose to the respondent copies of her records of time spent travelling from home to the respondent's office or a client's home, and time spent travelling between clients. She was also directed, with her agreement, to compile a note summarising the hours she spent on cleaning duties as it became apparent during her evidence that she had recorded this information in a notebook. The notebook was ordered to be brought to the resumed hearing and made available for inspection by the respondent. Both parties complied with the terms of the order before the hearing resumed.

9. On the morning of 9 April, the respondent produced a supplementary bundle of documents with an index itemising twelve documents at pages 14 to 46. No entry appeared on the index for the first thirteen pages. It then became apparent that the index contained no document evidencing the terms and conditions agreed between the parties, notwithstanding the respondent's assertion at the previous hearing that a template of the terms agreed to and signed by the claimant could be produced, the original having been stolen in a burglary at the office. After yet further debate it transpired that the respondent did have such a template agreement, and a short adjournment was granted so that Mr Clerk could ensure the document was added to the bundle as well as other missing pages which comprised the weekly worksheets.

10. The claimant produced tables estimating her travel time, providing two separate records so as to distinguish between travel to and from home as distinct from travel between clients. Although the respondent had had these records since 14 February 2019 no attempt had been made to review and agree (or dispute) the factual detail. The hearing proceeded on the understanding that the respondent would take some sample entries to illustrate any points of dispute about either detail or principles.

11. During this discussion on 9 April it transpired that the claimant had with her copies of the respondent's documents entitled "Self-employed Earnings". These were variously described by both parties during their evidence as "pay slips", "invoices" and "earnings sheets", but in the interests of clarity and neutrality these documents will be referred to in this judgment as 'earnings sheets'. Since the previous hearing the claimant had realised there were discrepancies between her copies of the earning sheets after she compared them to the respondent's versions in the original bundle. As a result, the claimant's copies of the earnings sheets were copied by the Tribunal and where they differed from the respondent's copies, they were interleaved into the bundle adjacent to the respondent's versions.

12. In the discussion about what the respondent described as the written contract between the parties, referring to the template document, the respondent initially said this was in the supplementary bundle but Mr Clerk was unable to direct the Tribunal to it. Once he was given time to rectify the missing pages 1 to 13, it was possible to clarify what the respondent intended by the word "contract". This turned out to comprise:

> 12.1 A sheet setting out the claimant's contact details, next of kin, national insurance number and GP surgery, which the claimant confirmed had been completed in her handwriting;
>
> 12.2 A document bearing no date or personalised detail relating to the claimant, beginning with the words "Welcome to Restore Cleaning". In her later evidence Mrs Seddon described this as the respondent's "handbook";
>
> 12.3 An uncompleted template agreement for the appointment of a self-employed contractor, including an unsigned self-employed status certificate.

13. The respondent also produced some handwritten sheets which were said to comprise the work allocation sheets discussed at the previous hearing. They amounted to twelve pages spanning the period May 2017 to November 2017. A handful of messages sent via text or Messenger were also produced to show how the work was allocated. Although the claimant had had these documents since 14 February 2019, she had not checked the accuracy of their content.

14. At the 9 April hearing the claimant was recalled to give evidence explaining how she had compiled her records of travel time, during which she referred to her original notebook which was also made available for inspection by the respondent's representative. The claimant said in her evidence that she had relied partly on the notebook, and also on the earning sheets, some text messages and her memory.

15. The respondent disputed some points of detail such as distances and some of the records of the claimant's travelling time, though it was accepted by the Tribunal and the parties that the main purpose of this stage of the hearing was to deal with points of principle rather than the specifics of any given journey.

16. It was not until the very end of her evidence, in re-examination, that Mrs Seddon tried to suggest that the notebook produced by the claimant was unreliable as a contemporaneous record of the journeys she had done (as distinct from the jobs she had carried out). The Tribunal directed that it was far too late in the proceedings for such a point to be raised, as the point had not been put to the claimant in cross-examination or raised in Mrs Seddon's evidence in chief.

17. After the respondent's evidence the claimant asked permission to give further evidence briefly about a disputed aspect of the work allocation sheets. She had not been cross-examined about any dispute in relation to these, though in fairness it had not been apparent to either of the parties that there was a dispute until the Tribunal asked questions of Mrs Seddon about it. For this reason, and acknowledging the somewhat disjointed nature of the evidence in this case as a whole, the claimant was recalled briefly without any objection from the respondent to give evidence specifically about how the work allocation sheets were dealt with.

Issues and relevant law

18. The claimant's primary claim was that she had the status of an employee as defined by section 230(1) Employment Rights Act 1996 (the 'ERA'). This defines an employee as "an individual who has entered into or works under (or, where the employment has ceased worked under) a contract of employment". Under section 230(2), "contract of employment means a contract of service".

19. If the claimant had employee status she would be entitled to make a claim of automatically unfair dismissal under section 104 ERA on the grounds that she was dismissed for asserting the statutory right to be paid in accordance with the National Minimum Wage Act 1998 (the 'NMWA'). An ordinary unfair dismissal claim would not be available to her since she worked for the respondent for less than two years.

20. The question whether the claimant was an employee could not be decided by using a checklist of factors but instead a multi-factor approach had to be taken in accordance with established legal authorities. The case of Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2QB 497 set out three conditions which need to be fulfilled in order for an employment contract to exist:

(1) The employee agrees that in return for a wage or other remuneration he will provide his own work and skill in the performance of some service for the employer.

(2) He agrees, expressly or impliedly, that in performing that service he will be subject to a sufficient degree of control by the employer.

(3) The other terms of the contract are consistent with it being an employment contract.

21. Another important factor is whether there is an "irreducible minimum of mutual obligation necessary to create a contract of service", as set out in Carmichael v National Power plc [1999] 1 WLR 2042. In other words, does the employer have to offer work and if so, does the employee have to accept it?

22. The requirement for personal service means that there should be either no right to substitute someone else to do the work, or a limited right if the employer consents – Pimlico Plumbers Ltd and another v Smith [2018] UKSC 29.

23. If the claimant was not an employee then her next claim was that she should be considered a worker, as defined by section 230(3) ERA which states that:

> "In this Act "worker" […] means an individual who has entered into or works under (or, where the employment has ceased, worked under) –
>
> (b) Any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual".

24. As a worker the claimant would be entitled to make a claim arising from the NMWA, which entitles both employees and workers to be paid in accordance with the statutory rate prescribed by Regulations. Section 1 of the NMWA provides that a worker:

> "shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the National Minimum Wage".

25. The applicable rates during the claimant's contract were £7.50 from 1 April 2017 and £7.83 from 1 April 2018 until her contract ended. The hourly rate of £8.00 paid to the claimant therefore exceeded those thresholds but only when her time spent travelling for work was excluded.

26. If she could establish that she was an employee or a worker, the claimant also had the right to receive paid annual leave under the Working time Regulations 1998 (the 'WTR'), amounting to 5.6 weeks' leave a year.

27. The final claim was that the claimant was subjected to a detriment as a result of making a protected disclosure under section 47B ERA. This arose from the events of her last day of work when she told the respondent she believed she was entitled to be paid in accordance with the NMWA and had not been, by virtue of not being paid to travel during her working day. The claimant alleged that she was a whistleblower and that the respondent terminated her contract her in response to this conversation.

28. Section 47B provides as follows:

> "(1) A worker has the right not to be subjected to any detriment by any act by his employer done on the ground that the worker has made a protected disclosure.

(2) … This section does not apply where –

(a) The worker is an employee and
(b) The detriment in question amounts to dismissal"

29. Section 43B ERA deals with disclosures which qualify for protection and defines these 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 show that person has failed with any legal obligation to which he is subject". The question of public interest was addressed by the Court of Appeal in Chesterton Global v Nurmohamed [2015] IRLR 614, when four factors were identified:

(1) The numbers in the group whose interests the disclosure served.

(2) The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed. A disclosure affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people and all the more so if the effect is marginal or indirect.

(3) The nature of the wrongdoing disclosed. If deliberate wrongdoing, it is more likely to be in the public interest than inadvertent wrongdoing affecting the same number of people.

(4) The larger and more prominent the wrongdoer the more obviously should a disclosure about its activities engage the public interest.

Findings of fact

30. The respondent company was at the relevant time owned and managed by Mrs Rachel Seddon. The business provided domestic cleaning services to clients at their homes. Although in her oral evidence Mrs Seddon said the business had approximately 15 cleaners during the claimant's time working there, the respondent's own written records referred to a team of 30.

31. The claimant began working for the respondent on 21 April 2017 after initial contact through social media between her and Mrs Seddon. They exchanged messages about the possibility of the claimant doing some cleaning work. At that time the claimant was looking for work and was not running any business of her own. She required 16 hours' work a week to qualify for tax credits, and needed work which fitted in with her childcare needs and her children's school holidays.

32. The gist of the online messages was that the claimant was interested in the cleaning work, had her own car, and was told she would operate on a self-employed basis. When she asked how this would work the claimant was told that she would do the cleaning, collect her own money from the client and pay the respondent a commission. She would be paid £8 per hour and would be responsible for her declaring her own earnings as a self-employed person. Mrs Seddon told the claimant that "the hours are 9.30-1.30 every week day". Those were the respondent's business hours. Initially the claimant was happy to be treated as a self-employed

person, although later she felt she was being naive. She filed a tax return in her first year before realising she was likely to be a worker, and did so only because she feared she would be fined.

33. The claimant and Mrs Seddon then met in person for an interview at which they reached a verbal agreement on certain terms. The agreement was that the claimant would work for the respondent as a cleaner, providing a personal service by cleaning clients' homes. She would be working 4 hours a day across five days a week. She was told she would have to work every week and that her hours would build up once the respondent had introduced clients to her. There was discussion about the claimant working a 16 hour week averaged out over the year, to allow for some paid time off. In practice this did not happen and the claimant worked 4 hours a day over 5 days each week, Monday to Friday, and was paid only for hours worked. The claimant's working day generally started at 9.30am and she did two domestic cleaning jobs, each lasting two hours. To allow time for travelling between clients, the second job would start at 12 noon and the claimant would finish work at 2pm.

34. At the interview there was a discussion about taking time off for holidays in which case the claimant had to give the respondent at least one month's notice. She was told she was not entitled to any additional payment. No agreement was reached about how much time could be taken, nor was the question of paid leave discussed other than by reference to a suggestion by the respondent that working a 20 hour week included a notional allowance for time off during the year. The respondent kept no records of holiday taken. In practice the claimant was able to take holidays on request, except at busy times such as Christmas and Easter which the respondent had made clear could not be agreed. If Bank Holidays fell on working days the clamant was not paid for them but only for the four days worked.

35. In her oral evidence to the Tribunal Mrs Seddon referred to the discussion about time off and described this issue as "a big one" for the claimant, because she had childcare concerns and needed time off work during school holidays. The claimant worked mainly during term time and in some school holidays when she could get childcare. Mrs Seddon's evidence was that they agreed the claimant would be at work "unless she told me she needed to be off" and disputed that any notice of time off needed to be given.

36. At the beginning of her contract the claimant was given some limited training, accompanying a colleague on a job to see how the respondent liked the work to be done, and to ensure that its particular standards were met. If at any time a customer was unhappy with the work and complained about it, that would be rectified by the respondent who would send an alternative cleaner. In the early days the respondent checked the claimant's work to ensure it met the quality standards that the business operated. On two occasions the claimant's work was corrected by others.

37. In her oral evidence Mrs Seddon said the respondent did not visit properties to check the cleaner's work but instead relied on feedback from clients. She said that if clients were happy then the claimant could "keep them on her list", suggesting the client relationship belonged with the claimant. She then conceded that she might make courtesy calls to clients because the respondent did in fact monitor quality. She said cleaners were not given instructions but "recommendations" in the

respondent's "handbook". This was a two-page document beginning "Welcome to Restore Cleaning" setting out detailed notes about how to carry out a regular clean.

38. At the interview the claimant was told by Mrs Seddon that each week she should collect a cash payment from the customers then come into the office on Fridays to pay the 20% commission due to the respondent and collect her earnings sheet (described on its face as a note of "Self-employed Earnings"). The only records of payments made were these earnings sheets. They showed the work done for clients in a given week (and their addresses), the price for the job (generally £20 representing two hours' cleaning), the amount of "commission" paid to the respondent and the net "earnings" after offsetting the commission. In a column headed "Pay" a figure of £16 generally appeared, representing the deduction of £4 commission, shown in the next column. The final column was headed "Earnings" and matched exactly the column headed "Pay".

39. Both the respondent and the claimant routinely used terminology associated with employment, such as "payslips" and "wages". In a message to the claimant on 22 September 2017 Mrs Seddon said, "Hi, come in for your pay slip, your payslip is done and this is next week. Thank you". She was referring also to a handwritten work allocation sheet which she scanned and sent to the claimant via Messenger to give her instructions on the jobs to be done the week following.

40. The claimant had no personal control over when or where the work was done but rather provided services to the respondent's clients and attended them as directed by the respondent. The way the work was allocated to the claimant was by the weekly work allocation sheets supplied by the respondent either on a Friday afternoon when the claimant called into the office, or on a Sunday evening via Messenger if they were not ready then. The work allocation sheets were not prepared every week, though more often than the twelve examples produced by the respondent in the evidence. Initially the claimant received a work allocation sheet every week, and once she knew where to go for her regular jobs the frequency tailed off. It reached a point where no such sheets were sent and she and Mrs Seddon relied on text messages only to communicate changes to the regular routine.

41. The claimant was told at interview that her travel time between clients would not be paid for, but no mention was made about who would pay for fuel or mileage, it being assumed by both parties that the claimant would bear this cost, which she did. At some later date the claimant asked Mrs Seddon about fuel payments but was told she would have to treat this as part of her expenses as a self-employed person.

42. The respondent provided the claimant with all the cleaning equipment and materials she needed for her to do her work. It was the respondent who covered the cost of any damage or breakages, and it had its own insurance cover in place to cover that.

43. The respondent asserted that the claimant signed a written contract as a self-employed contractor though the claimant disputed this. No signed contract was produced in evidence by the respondent, and Mrs Seddon explained that the document – which had not been provided to the claimant at the time – had been stolen or destroyed as a result of a break-in at the respondent's office. When the hearing resumed in April the Tribunal was given a copy of a template agreement for

the appointment of a self-employed contractor, unsigned, whose terms were clearly intended to describe a self-employed arrangement. However, the only document completed by the claimant was the contact details sheet, which the respondent had retained. The Tribunal accepted the claimant's evidence that she signed no formal agreement.

44. Some important aspects of the working arrangement were not touched on at the interview. For example, the question of what would happen if the claimant was off sick was not discussed, and there was no agreement that she would receive any payment if unable to work for that reason. At some point the claimant became aware that if she was ever unwell she would let Mrs Seddon know before 9am. The respondent would then make arrangements to cover the job through another cleaner, rearrange the appointment for when the claimant would be available, or cancel the job on that occasion. This was its practice with all cleaners.

45. On one occasion when the claimant was unwell it was the respondent who rang the client and arranged for the claimant to do the work another day that week. Cleaners provided cover for each other as sometimes noted on the work allocation sheets. Mrs Seddon said that would happen because a cleaner might refuse to do a clean or ask another cleaner to cover for them. The only examples she gave of somebody refusing to do a clean was in the context of a cleaner not liking the client or not getting along with them. If a client was unhappy with a cleaner then the respondent would offer to replace them.

46. Mrs Seddon never made the claimant aware that she could send someone else to do the work if she could not do it herself, and the claimant had no such power to provide a substitute cleaner. All new cleaners had to meet and be interviewed by Mrs Seddon before starting work.

47. In her oral evidence Mrs Seddon insisted the claimant (like all the cleaners) could do other work, including in their own businesses, but in reality the claimant had no such business at that time and her 16-20 hours a week with the respondent was the upper limit of her working week. Mrs Seddon asserted to the Tribunal that most of the cleaners who worked for the respondent were doing some other kind of work and had their own businesses which they were free to work for. When asked whether she would ever take on a cleaner whose other work was also a cleaning business, Mrs Seddon insisted that she would, provided the cleaner operated on her own rather than with staff. The Tribunal did not accept that evidence and finds that the respondent did not permit cleaners to deal directly with clients or work in competition with its business.

48. The way the respondent operated made clear that, contrary to Mrs Seddon's oral evidence, the client relationships belonged to the company and not the individual cleaners. Mrs Seddon took numerous steps to protect the business by making cleaners, including the claimant, aware that they could not work for others or have their own clients. From the outset she told the cleaners they could not keep the clients' contact details, instructing them not to exchange phone numbers with clients but instead to ensure that any communication was done through the business. The "handbook" provided at the start of the contract explicitly stated:

> "Cleaners are not permitted to provide the customer with their contact details, nor take the customers contact details."

49. The respondent swapped its cleaners between clients from time to time, and twice a week was not unusual. Sometimes the claimant was taken off a job and was sent back to that client on another occasion. Although the respondent asserted that it was simply in the business of introducing cleaners to clients, that was not the case. One of the reasons the respondent swapped cleaners around was that Mrs Seddon did not want clients getting used to the same cleaner or developing a relationship with her such as to undermine the business and its 20% share of the charge.

50. At no time during the claimant's contract with the respondent was there any explicit agreement that she could refuse work offered. She embarked on the arrangement in the expectation of being given regular work, and she was. For her part, Mrs Seddon had every expectation that she could rely on the claimant to turn into work every day subject to changes in the routine when client jobs changed.

51. In practice work was allocated to the claimant initially through the weekly work allocation sheets and later more informally. Any changes to the expected regular arrangements which developed were communicated by the respondent to the claimant via Messenger or text messages. These arrangements meant the claimant did not need to contact the respondent to ask whether any work was available, because she already had a list of jobs for the week which for the most part gave her a regular four hours' work each day between Monday and Friday. The claimant collected cash payments from the clients and on Fridays went to the respondent's office where she was given an earnings sheet. The claimant handed over 20% of the cash to the respondent and retained the rest as her earnings.

52. The respondent did offer the claimant work each week in term time during the working relationship, and the claimant almost always accepted that work but not without exception. In a text message dated 21 November 2017 the claimant asked Mrs Seddon: "Have you got anything for me today?" and in reply was told, "I haven't anything I am sorry". The claimant's reaction was to say, "Ok no worries". The claimant accepted the response and did not make any complaint about being denied work. Although most of the earnings sheets showed a consistent pattern of working Monday to Friday, on some days they showed that no work was done.

53. This important question was the subject of disputed evidence. When asked what would happen if a cleaner refused a job, Mrs Seddon said she would ask another contractor to do the work, or tell the client no-one was available. She said cleaners and clients could say that they did not want to work with each other, though this was more of an issue about whether they got along. This did not actually arise with the claimant because, as Mrs Seddon said, she had "a good work ethic".

54. The claimant had a different understanding of her ability to turn down work, believing that if she had done so, she would have been told to find another job. Again, this situation did not arise in practice, though other examples of flexibility in the arrangements did occur. For example, in an exchange of (undated) text messages the respondent wanted to send the claimant to another job after she had worked three hours for one client. The claimant declined as she was unsure she could fit in this other job. In reply the respondent suggested she do another job which

was closer to home, and the claimant agreed. This was not about the claimant declining to work at all that day but rather in the nature of an employer asking an employee to do voluntary overtime which the parties discussed and agreed. In another exchange of text messages (also undated) the claimant contacted the respondent to say her children's school was closed due to snow, and asked about contacting the client. The respondent then rearranged the work with the client. This was not uncommon as the respondent would make arrangements to ensure that another cleaner would cover a job if one of her colleagues could not.

55. On 13 June 2017 the respondent sent a text message to the claimant asking if she could go to another job that morning, which she agreed to do. Again, that was in the nature of voluntary overtime. Whenever a short notice request of this kind was made, the claimant did have the choice whether to accept it or not.

56. In early June 2018 the respondent sent out a notice to customers providing an update on its services. The notice made clients aware that the business was turning "fully eco-friendly" and in this context referred to a "team of 30 cleaners". It went on to announce an increase in charges in the following terms:

> "Due to minimum wage rises and rises in other costs from 1 July 2018 our hourly rate will be £11 per hour".

57. The notice introduced a new manager who would be "keeping regular checks on our customers to ensure every customer is happy with the service we provide". It stated:

> "Please do not contact your cleaner direct we like to keep all contact through our management team."

58. The content of this document was consistent with other documents produced by the respondent. A letter to cleaners also sent out in early June 2018 introduced the new manager, who was starting on 11 June, and announced the use of eco-friendly products in the future. under a heading "Price Change" it said this would take effect from 1 July. The letter stated: "Hourly rate is – £11 per hour" and under the heading "Your wages – hourly rate" it said:

> "From 1 August your hourly pay will rise to £8.10 per hour, in line with our price rise, minimum wage and basically as I think all my cleaners should get more money from 1 August you will be paid £8.10 per hour."

59. This letter enclosed a new subcontractor agreement which was said to be a replacement for the original agreements signed when cleaners first started work. After asking the cleaners to read this carefully so that everyone would be signed up on a 12 month contract, the letter went on to say:

> "Please read Section 5 Secrecy carefully. No phone numbers are to be taken from any of my clients and your phone number should not be given out to any clients for any reason at all. Restore Cleaning need to manage all client queries including cancellations, booking more hours, complaints or anything else. I have a massive problem with this at the moment.

> Regular clients will be monitored by myself Nicola on a regular basis, the cleans will be rotated as we see fit, the full house cleans are going to continue and be monitored as usual.
>
> Can I ask that all contracts are handed back in, I will also go through your weekly client list and have a key check with you when handed in, I need to make sure all the keys are properly labelled".

60. This letter was sent around three weeks before the events of 26 June 2018 which brought the claimant's contract to an end. Contrary to Mrs Seddon's evidence that her business aimed to introduce cleaners to customers, such that they could enter into a regular weekly arrangement between themselves if they wished, the letter made plain that the new manager would be attending one-off cleans more often in the future, partly to ensure that standards had been met and also because if "the customer wants to sign up weekly we will be there to sort it out". Finally, in a section of the letter under the heading "Payments" Mrs Seddon referred to late payments of commission about which she was very unhappy. She said "All commission is taken weekly and all wages are paid out weekly".

61. The new subcontractor agreement was provided to the claimant in draft but never agreed to or signed by her. Like the earlier template the document was entitled "Appointment of self-employed contractor" and used terminology consistent with self-employment. The agreement was drafted such that the respondent would offer an assignment to a contractor who then had the choice to accept it or not, and who would be paid a fee for their services and account for tax on a self-employed basis. This agreement was different from the previous template version in one important respect, as it included a new clause 5 as follows:

> "5. Secrecy
>
> The Contractor shall *never* reveal, disclose, publish or use for any purposes other than those of Restore Cleaning, confidential information that he may acquire in relation to the business or affairs of Restore Cleaning gives written authority.
>
> The Contractor shall not communicate with any of Restore Cleanings customers.
>
> 5.1 Other than face to face when in direct contact with the customers, the Contractor shall never give any of Restore Cleaning customers their contact details.
>
> 5.2 Never contact Restore Cleaning customers when a Contractor at all by phone or Social Media.
>
> 5.3 If the Contractor comes out of contract with Restore Cleaning the Contractor shall not contact Restore Cleaning customers at any point after the contract is terminated".

62. The respondent's attitude towards protecting its business was also apparent from a post made by Mrs Seddon's husband on Facebook on 18 June 2018 in

response to an announcement from a rival cleaner that she had a new business venture using eco-friendly cleaning products. Mr Seddon categorised his post as a "little tale of dishonest people", and complained that his wife had been making changes to her business to use eco-friendly products and was upset and annoyed by hearing that a person who used to work for her was also taking this step. The Facebook post [reproduced as written] stated:

> "One of our recent ex-employees who has been constantly around what my wife has been planning, smelling and trying the products has now decided to copy everything Rachel has done and got in first on Facebook and declared it has her own work!!! I'm truly gobsmacked and the ex-employer on the day she left the company even has the cheek to ask my wife for advice on how to set up on her own i.e. insurance etc!!".

63. On 26 June 2018, a few weeks later, the claimant phoned Mrs Seddon to ask about not being paid minimum wage for travel time. By this time she had become unhappy about her status at work and had been advised by HMRC that she was in fact a worker and not a self-employed contractor. She told Mrs Seddon that she had taken advice from HMRC to this effect. Mrs Seddon became angry and spoke aggressively to the claimant. She told her she would have to leave unless she was prepared to sign the new contract. She wanted the claimant to come into the office to sign the new contract and give back some keys, but the claimant said no. In response Mrs Seddon said the claimant would not be working for the respondent any more. She was concerned for her clients and wanted to keep them. During this conversation the claimant also referred to a potential accident claim.

64. Mrs Seddon sent the claimant a text message shortly afterwards, saying:

> "So your saying your employed
> When the reason you are off today is you were just off and you told me that Friday. You can come and go when you want Louise and I have no control over you. If you would have been prepared to come in and speak to me properly in the office instead of refusing to come near me at all we could have moved on. But I am concerned for my clients.
> I'll come for the key at 4.30.
> Thanks"

65. The reference to concern for her clients was that Mrs Seddon wanted to keep her relationship with them. In response to the above message the claimant replied:

> "If I come and see you you will still be saying that I am not a worker so I don't see any point.
> I can't be refusing to come near you or I would say no to you coming for the keys, being at your office is irrelevant".

66. The conversation continued with a further message from Mrs Seddon:

> "Your not a worked Louise you never have been
> You are a sub-contractor on a self-employed basis.
> If you wont come in ill just need the keys then its up to you what you do after".

67. Finally, the claimant responded at 4:07pm by saying:

> "So do I tell HMRC that they are wrong?"

68. In two final messages from Mrs Seddon, she recorded the fact that the claimant had not had any accident and none had been recorded, and her final message stated:

> "I have no idea what you are on about Louise
> Thank you for all your hard work as a sub-contractor at Restore Cleaning. I feel we can no longer use your services as you have seemed to have had a change of heart.
> Good luck in the future.
> Rachel"

69. Two further messages were sent by Mrs Seddon on 26 June at 1.39pm:

> "Louise we need the keys back by 4pm or we will be ringing the Police as its theft
> Please take me to court.
> If you would feel more comfortable with sending someone else with the key".

70. Some of the evidence about what was said on 26 June was disputed. In her oral evidence Mrs Seddon said the claimant rang her saying, "The pay is wrong". She felt she was erratic and rude. She asked whether someone had said something to her and in response the claimant said she had been told by HMRC that she should take the respondent to the Tribunal. She said the claimant threatened to tell the respondent's clients that it did not pay properly. She invited the claimant to come and speak to her. She said the claimant had said that she had sacked her and she would not come into the office to see her. Mrs Seddon alleged that the claimant said she wanted to take the respondent to court in respect of an accident. The claimant said she did not see any point in coming in to the office.

71. When dealing in her witness statement with the ending of the contract, Mrs Seddon said the claimant referred to dismissal because she was more interested in putting in a claim than continuing to work for her. She made no mention of the claimant making threats to contact the respondent's clients, which emerged only in her oral evidence.

72. The Tribunal accepted the claimant's version of this phone call as the more reliable one. During the conversation and in the exchange of text messages which followed, the claimant did not make any reference to contacting the respondent's clients, either with a view to obtaining their business or in order to do damage to the respondent's relationship with them in some other way. By this time the claimant was contemplating setting up a new business of her own, not a cleaning business and not in competition with the respondent.

73. Mrs Seddon did not reply to the claimant's message about HMRC being wrong, nor did she make her own enquiries with HMRC to find out whether the claimant's assertion had any merit.

Conclusions

74. The claimant presented her case on the understanding that she had at all times been a worker engaged by the respondent to provide services to its clients. She included a claim that she was an employee with greater protections than a worker, notably protection against unfair dismissal. However, this point was not pursued particularly forcefully. The claimant's main objective was to be compensated for the fact that she had not been paid the national minimum wage once her travel time between clients' homes was factored in. She also sought holiday pay for the time she worked.

75. The respondent maintained that the claimant was a self-employed contractor and that its role was simply to introduce the cleaners to clients, after which they could work together as long as the respondent received its 20% commission. These assertions flew in the face of the respondent's own documents, though that did not stop Mrs Seddon from trying to present a different picture in her oral evidence. Her written witness statements contained little if any relevant evidence on the key factors relevant to employment status, and that evidence had to be drawn out during cross-examination by the claimant and through lengthy questioning by the Tribunal.

76. Having heard both witnesses the Tribunal had no hesitation in accepting the claimant's evidence as truthful and accurate. By contrast, the manner in which Mrs Seddon gave evidence did not help the respondent's case as she was both uncooperative and unimpressive. She was so determined to avoid making any concessions about her degree of control over the working relationship that she presented a set of facts which were contradicted even by the respondent's own documents.

77. It is clear from the well-established authorities on the question of employment status that no single test or factor will determine the question, which has to be assessed in light of all the available evidence and the overall circumstances of the case. In order for the claimant to have been an employee as defined by section 230(1) Employment Rights Act 1996 certain factors would have to be present.

78. The factors include the provision of a personal service with either no right to substitute someone else to do the work or a limited right if the employer consents (as dealt with in Pimlico Plumbers). That clearly describes the present case, as the claimant did provide her cleaning services personally and could not send someone else in her place. On the few occasions when she could not do the work herself, the respondent arranged to send another cleaner.

79. The question whether there was a sufficient degree of control over what work was to be done, how, when and where is one of the factors identified in Ready Mixed Concrete. Here, the respondent instructed the claimant as to the tasks she should carry out at clients' homes, the manner in which they should be carried out, and the time and date when the work was to be done. The respondent exercised a degree of control over the manner in which the work was done, through its "handbook" setting out specific guidelines about how to clean.

80. Mrs Seddon's evidence on the question of her control over the cleaners was extremely unsatisfactory as she was determined to repeat the mantra that she had

no such control in an effort to defeat the claimant's arguments. She said there were no consequences if someone refused to do the work because she had "no power over them". When it was suggested that she did have the power to withdraw offers of work in the future, even to self-employed contractors, Mrs Seddon disagreed. Her insistence on this point was wholly implausible. When asked to explain why in that case the self-employed contract permitted either party to terminate the contract at any time, Mrs Seddon avoided answering the question. This was again because she was trying to avoid any suggestion that the respondent might have sufficient 'control' over a contractor in the sense that it could choose to offer no work or could terminate the agreement. She was so intent on distancing herself from the notion that she had any control, that she could give no explanation for this.

81. Other features of the control test can include deciding when somebody can take holiday, granting permission for such time off, and the degree to which the cleaner's attendance or hours were monitored. In this case the Tribunal is satisfied that the claimant was able to take holiday, but only on notice to the respondent and with the respondent's permission, with the restriction that holidays could not be taken at busy times for the business such as Christmas and Easter. That said, there was no evidence that any failure to attend work would lead to management steps being taken, whether informally or under any disciplinary policies and procedures. Although the claimant feared that if she refused work or did not attend work she would no longer be working for the respondent (which fear may well have been well-founded), there was no suggestion that she was subject to any power to discipline. The management of the claimant's working hours and her attendance at the client's premises was done so as to ensure the provision of a smoothly running service and subject to expected courtesies such as informing the respondent if the claimant was unable to attend work due to illness or childcare problems.

82. This leads to the important question of mutuality of obligation, in the absence of which a relationship of employment can founder. Applying this to the facts of the case, it is clear that the claimant had an expectation that the respondent would provide work and pay her for it on every weekday between 9.30am and 1.30pm, mainly during term time, unless the claimant had previously indicated she was unavailable. The claimant expected to accept such work and the respondent shared that expectation. However, although the arrangement operated consistently with those mutual expectations, there were a small number of occasions when that mutuality of obligation was absent. The Tribunal does not consider that the examples of the claimant notifying the respondent she could not work because her children's school was closed on a snow day, or that she had to be at home with an unwell child, are determinative of the question. This is because such a scenario is also consistent with an employment relationship. An employee who is unable to attend work due to illness or for childcare reasons would similarly notify their employer. and in this case Mrs Seddon's own evidence was that she expected to be told by 9am if there were problems attending work that day. The respondent, not the claimant, would then take responsibility for making other arrangements for the work to be covered or rearranged, as would an employer in those circumstances.

83. This aspect of the case was in dispute. Mrs Seddon described the discussion at interview as being about the respondent finding clients for the claimant and said the hours "were not set in stone" because clients sometimes cancelled or work was not always available. She said that although the claimant did work regular hours,

sometimes she did not have work for her. This was inconsistent for the most part with the earnings sheets, although in a few cases no jobs were entered on some days of the week. The Tribunal was given no evidence to be able to assess accurately whether that was because the claimant had asked for time off or whether the reason was an absence of work. Nevertheless, the claimant's evidence was that she felt unable to refuse work, though she did not deny that there were occasions when work was not provided.

84. Mrs Seddon's evidence was that when the claimant asked at interview about guaranteed hours, she was told if a job was cancelled there would not necessarily be any work to replace it. Despite this, she was expecting the claimant to be available for work every day, and when asked to clarify that this was her expectation Mrs Seddon was extremely evasive in her answers. She said the claimant would message her on a Sunday evening asking whether she had any work, suggesting this was routine, but when asked whether the respondent had any examples of text messages offering work Mrs Seddon conceded there were none. The claimant's text of 21 November 2017 enquiring whether any work was available was the only concrete example of such a communication. This occasion was a rare event but nevertheless significant because the claimant's response was wholly inconsistent with the mutuality of obligation required to be present in an employment relationship. She did not complain that she was being improperly denied work. The Tribunal is not therefore satisfied that the essential feature of mutuality of obligation existed in a sufficient degree to create an employment relationship.

85. The Tribunal took into account other considerations in reaching its decision, and examined whether the other terms and conditions of the contract were consistent with employment or not, such as the payment of a regular wage or salary, the provision of tools and equipment and the degree to which the person is integrated into the structure of the business and whether they receive holiday pay and sick pay. Here, the terms and conditions of the agreement, whether expressly agreed verbally or implied by conduct, are consistent with employment status. The claimant received a regular payment which both parties routinely referred to as a "wage" and she was provided with tools and equipment to do the work. If she was not available to work for any reason the respondent, not the claimant, took responsibility for ensuring the service was provided to the client. The respondent's efforts to protect its relationship with clients, to the point of forbidding the exchange of phone numbers with individual cleaners, was such that – despite Mrs Seddon's protestations – the client relationships undoubtedly belonged to the respondent. It cannot be said that the claimant was in business on her own account, having simply had the benefit of an introduction to new clients by the respondent.

86. The power to discipline has already been dealt with above. Turning to the power to terminate the contract, this factor may be less significant on the question of employment status since many contracts may be ended under their terms, and this may apply even for a self-employed contractor. Despite Mrs Seddon's strenuous efforts to protest the point, quite unnecessarily given that the ability to terminate a contract may be considered neutral, it is clear from the evidence in this case that the respondent had the right to bring an arrangement to an end. Its own written contract included explicit termination provisions.

87. One feature of the terms and conditions which was inconsistent with employment is that the claimant was responsible for her own tax and did in fact an account to HMRC by completing a tax return. She did so in order to protect her position and in ignorance of whether this was actually the correct way to deal with it. She did not raise an invoice to the respondent but rather the respondent produced a document (the earnings sheet) which identified the work done, the rates paid per hour and the commission deducted. That aside, all other financial aspects of the arrangement were at the respondent's risk or the respondent's responsibility. It was the respondent which insured the claimant's work against breakages or damage.

88. Although the labels attached to the relationship by the parties would not in themselves be determinative of the question, it was notable that in the respondent's own documents Mrs Seddon used the terminology of wages payable to workers or employees. In the notice to customers dated June 2018 she explained the increase in charges explicitly by reference to the National Minimum Wage, and did so again in her letter to the cleaners sent at around the same time. The fact that she had the NMWA hourly rates in her mind when awarding a pay rise was revealing of her true understanding of the relationship. This was also very evidence from the new secrecy clause in the June 2018 contract, which unambiguously treated the client relationships as belonging to the respondent as opposed to self-employed cleaners. This reinforced the nature of the contract with the claimant from the outset, when she was instructed not to exchange contact details with clients.

89. In a similar vein, the claimant was not free to work in competition with the respondent despite Mrs Seddon's assertions to the contrary, and it was clear from the steps taken in June 2018 that it valued highly its ability to protect its client relationships. The terms of Mr Seddon's Facebook post made plain that the respondent did not tolerate such competition.

90. Having reviewed all of the evidence and the relevant factors, the Tribunal was not satisfied that the claimant had the status of an employee. The financial arrangements and the accounting for tax were factors suggesting this was not an employment relationship, though the Tribunal was mindful of the fact that an employer might mask such a relationship by deliberately setting up the arrangements in this way. Although a number of factors were consistent with employment, the absence of mutuality of obligation weighed against a contract of service.

91. The next question for the Tribunal was whether the claimant was a worker as defined by section 230(3) ERA. If she was genuinely a self-employed contractor then she would have such an unfettered right to send a substitute to do the work in her place, but that did not apply here. She would also bear some, if not all of the financial risk and be paid according to profits, again not the case. She would provide her own tools and equipment and would be free to work for other competing businesses, none of which happened. In this case the claimant did nothing by way of undertaking financial risk, or arranging insurance against risk.

92. The claimant did not receive holiday pay nor was she paid when off sick, though neither of those factors was particularly helpful in determining the claimant's status. Firstly, there is no statutory or common law right to received normal contractual wages during sickness absence, only a right to statutory sick pay provided certain conditions are met. This never arose during the lifetime of the

claimant's contract with the respondent. If she was ever unwell, it was for no more than a day or two and statutory sick pay would not have applied. As for holiday pay, the absence of any right to paid holidays might favour a self-employed arrangement, but the Tribunal is mindful of the fact that an employer might deliberately avoid paying holiday pay in order to support a self-serving argument that the relationship was that of a self-employed contractor.

93. Some further aspects of Mrs Seddon's evidence are relevant here. In her pre-prepared statement she said the arrangement was a self-employed contract from the outset, and that the commission paid to the business was for finding the client and for the rental of equipment and products. She said it was not the claimant who invoiced the respondent but rather the respondent who invoiced the claimant for the commission payments, referring to the earnings sheet. Nothing on its face suggested this was an invoice, though when asked to clarify, Mrs Seddon said the respondent's accountant was quite comfortable with treating the earnings sheets as invoices even though they are entitled "Self-employed earnings".

94. As far as time off for holidays was concerned, Mrs Seddon said that "any time off was granted", suggesting that it was in her power to agree or refuse such holidays. It was not in dispute that the claimant never received any payment for holidays.

95. Mrs Seddon's supplementary witness statement added little on the key tests about the claimant's status. She said she gave the claimant a sheet on which to record her contact details and alleged that she had signed a contract, which she was unable to produce because it had been stolen. The first time this explanation was given, Mrs Seddon said through her representative that the paperwork had been stolen in a burglary at the office. When giving evidence on the second day of the hearing she said it had been thrown out of the office by burglars into the street where it was damaged. Nevertheless, the contact details sheet had survived.

96. In the absence of any evidence of the contract terms when this hearing began, the Tribunal ordered the respondent to produce at least an example of what the claimant was said to have signed. The result was the contact details sheet, the "handbook", and an unsigned version of a self-employed contractor's contract. When asked about this contract Mrs Seddon said these were the only written records because "it was just a verbal agreement". That said, she also insisted that a signed document had been completed and witnessed by a colleague (who was not asked to give evidence at the Tribunal), but no copy was ever given to the claimant.

97. In her efforts to say that the claimant was in business on her own account, Mrs Seddon tried to suggest that the claimant could have brought someone else in to do a cleaning job for her. This was mentioned for the first time only in response to questions from the Tribunal. She said that some other cleaners had brought a friend to do the work alongside them, so they could complete it in half the time. Although she was trying to give the impression this was an official arrangement, it became clear that this was not the case when Mrs Seddon said that if cleaners got someone else to do the work, she wouldn't know about it. That falls short of the respondent agreeing this was part of the expected arrangement or the business model.

98. Overall, Mrs Seddon's oral evidence was evasive and inconsistent. She repeatedly showed her evidence to be unreliable. For example, when it came to light that some of the claimant's copies of the work allocation sheets were different from the respondent's, Mrs Seddon initially disputed the claimant's versions. This was despite being unable to support her argument when cross-examined about the documents. It transpired as the questioning progressed that the claimant's versions were in fact the accurate ones. Mrs Seddon, who was the author of both versions, conceded that her own copies had sometimes been superseded by events such as changes to the scheduled hours or cancellations.

99. In a similar way, it was only during her re-examination that Mrs Seddon raised a serious challenge to the integrity of the claimant's notebook, a point which had not been raised previously and on which the claimant was not cross-examined. Yet Mrs Seddon accepted when she was cross-examined by the claimant that all the notes taken by way of example from the notebook were in fact accurate.

100. As mentioned above in the context of employee status, the terminology in the respondent's own documents suggested an employment or worker relationship. When asked about the reference to "your wages" in the June 2018 letter to cleaners, Mrs Seddon said, "People called it a payslip a lot". When asked about the reference to a pay increase she said, "Obviously it's gone up again because of April, a change in the law for a living wage", clearly meaning the annual increase in the National Minimum Wage rates.

101. Although this was contrary to much of her oral evidence and the respondent's own documents, Mrs Seddon maintained that the claimant could have had her own clients as well. She said that "probably all my cleaners have their own business and clean as a top up". When questioned by the Tribunal about other cleaners having their own businesses, she was able to give only one example, a part-time nurse who was available to do cleaning work two days a week.

102. The respondent would take bookings in the office and then ask cleaners if they wanted to go to that particular clean but Mrs Seddon said that "usually the cleaner deals with the clients, their wants and needs". This is completely at odds with the secrecy clause in the new contract and the letter to cleaners in June 2018.

103. When asked about the addition of the secrecy clause to the June 2018 version of the contract Mrs Seddon said this was done because "I struggle with people taking my clients for themselves". When asked to clarify whether or not she saw the clients as belonging to the respondent, Mrs Seddon was extremely evasive and made every effort to avoid agreeing with that proposition. She insisted that the respondent simply found clients for the contractors. She said the claimant was free to swap contact details with clients and take them with her. She also said that someone could market their own cleaning business to clients because "I had no control over that", again making a determined effort not even to acknowledge the power to stop offering work to cleaners or the power to terminate their contracts.

104. Taking into account the evidence as a whole, and the many features of this case which are close to suggesting a relationship of employment, the Tribunal is in no doubt that the claimant was not a self-employed contractor in business on her own account. She was in fact a worker within the meaning of section 230(3) ERA

because she worked under a contract with both express and implied terms whereby she undertook to perform personally services for the respondent, and the respondent was not a client or customer of the claimant's.

105. Having found that the claimant was a worker during her contract with the respondent, the Tribunal went on to consider the merits of her remaining claims. As a worker the claimant was entitled to be paid annual leave in accordance with the Working Time Regulations 1998, Regulation 13 of which provides that a worker is entitled to 5.6 weeks' annual leave each year which may include the eight statutory bank holidays. Although the claimant was able to take time off during her time with the respondent, she was not paid on any occasion for that leave. The respondent therefore breached the right to paid annual leave and the claimant is entitled to be compensated accordingly.

106. As a worker the claimant was also entitled to be paid in accordance with the National Minimum Wage Act 1998. She was paid £8 an hour, more than the National Minimum Wage rates at the time, but when she travelled from the respondent's office to a client's home or between the homes of clients, the claimant was working and not paid. The Tribunal is satisfied that if that travel time were factored into the overall hours worked, the amount paid to the claimant was less than the National Minimum Wage rate. The time spent travelling between home and the respondent's office, or when travelling directly to a client from home, would not count as working time.

107. The claimant alleged that the reason her contract came to an end was that Mrs Seddon was annoyed and upset at being challenged about the right to be paid the National Minimum Wage. Having assessed the evidence, particularly the oral evidence given by both parties, the Tribunal is satisfied that Mrs Seddon was indeed angry about this question being raised, and she was not prepared to entertain the possibility that the advice the claimant had obtained from HMRC might be right.

108. At the end of the contract the claimant asserted that she was a worker and had been advised as such by HMRC. When the Tribunal asked Mrs Seddon whether she had contacted HMRC for herself, she said she had not and that she asked her accountant to do this, though she produced no evidence that this was done. She added that Avensure, her advisers, had advised that it had no weight. She did not obtain anything in writing from her accountant on the subject. The Tribunal does not accept that Mrs Seddon made enquiries of HMRC through her accountant or that she took any advice at the time of the conversation on 26 June 2018 to try and understand whether there was any merit in the claimant's point. Instead she issued the claimant with an ultimatum to sign the new self-employed contractor agreement as a condition of their relationship continuing. Since the claimant was not prepared to sign that agreement, the contract ended because Mrs Seddon made it plain that the claimant was not welcome to continue working for the respondent.

109. The claimant alleged that this was an automatically unfair dismissal under section 104 ERA, in that she was dismissed for asserting her statutory right to the National Minimum Wage. That claim might have had merit on the facts, but in order to make an unfair dismissal claim, the claimant would have to establish that she was an employee, which she has not been able to do. Her unfair dismissal claim does not therefore succeed.

110. This leaves the remaining claim which was brought under the whistleblowing protection contained in the ERA. The claimant relied on section 47B, which protects workers from being subjected to any detriment on the ground that they have made a protected disclosure. The claimant alleged that she made a protected disclosure under section 43B, which was in the public interest and tended to show that the respondent had failed with the legal obligation to pay her the National Minimum Wage. She said the disclosure was made in the telephone conversation with Mrs Seddon on 26 June 2018.

111. It was clear from the circumstances of this case that the claimant did make such a disclosure in the reasonable belief that the respondent was not paying her correctly. However, the Tribunal has to take into account the requirement for the disclosure to be made in the public interest. While it is undoubtedly in the public interest that employers comply with the NMWA, the claimant's disclosure on this occasion related to her own personal entitlement and her own personal interests. Applying the guidelines in Chesterton Global on the requirement for a public interest, the Tribunal is not satisfied that that element is made out and for these reasons the claim to have suffered a detriment by virtue of making a protected disclosure does not succeed.

112. A remedy hearing shall be fixed to determine the claimant's entitlements to be paid for annual leave and to be paid in accordance with the National Minimum Wage for all her working time in the period between 21 April 2017 and 26 June 2018.

113. The parties are directed to cooperate with each other in an effort to agree the calculations, bearing in mind that the claimant has already produced records of the relevant travel time, and the rates of pay for this and for annual leave are a simple matter of calculation. If agreement is reached, the parties must notify the Tribunal at the earliest opportunity so that a remedy hearing may be avoided. If agreement cannot be reached, then the remedy hearing shall be listed for one day.

_____
Employment Judge Langridge

Date 21 August 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

23 August 2019

FOR THE TRIBUNAL OFFICE

[JE]