RESERVED **Case No. 2405786/2019**
Code V

EMPLOYMENT TRIBUNALS

Claimant: Mr W Johnson
Respondent: New Horizons (NW) Ltd

HELD AT: Liverpool **ON:** 15, 16 October 2020 & 10 December 2020 (in chambers)

BEFORE: Employment Judge Shotter

Members: Ms L Heath
Ms P Owen

REPRESENTATION:

Claimant: In person
Respondent: Ms A Famutimi, representative.

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent was in breach of contract, the claimant was wrongfully dismissed and his claim for unpaid notice pay is well-founded. The respondent is ordered to pay to the claimant notice pay in the sum of £338.40 gross less lawful deductions of tax and national insurance.

2. The claimant's claim of automatic unfair dismissal brought under section 103A of the Employment Rights Act 1996 as amended, received on 21 May 2019 was not presented before the end of the period of 3 months beginning with 14 January 2019, the effective date of termination of employment. The Tribunal is satisfied that it was reasonably practicable for a complaint to be presented before the end of that period of 3 months and the complaint was not presented within such further period as the Tribunal considers reasonable. The Tribunal does not have the jurisdiction to consider the complaint, which is dismissed.

3. The claimant's claim of race discrimination brought under section 13 of the Equality Act 2010 was not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done) on 14 January 2019. The balance of prejudice was found in favour of the claimant and in all the circumstances of the case, it considers that it is just and equitable to extend the time limit to 21 May 2019 and the Tribunal has the jurisdiction to consider the complaint.

4. The claimant was not unlawfully discriminated against on the grounds of his race and his claim for direct race discrimination is not well-founded and is dismissed.

5. The claim for unlawful deduction of wages brought under section 13 of the Employment Rights Act 1996 as amended, was presented before the end of the period of 3 months beginning with the operative date from which time starts to run being the end of 31 January 2019, the date the claimant was last paid.

6. The claimant did not suffer an unlawful deduction of wages and his claim brought under section 13 of the Employment Rights Act 1996 is not well-founded and is dismissed.

REASONS

Preamble

1. This has been a remote hearing by video which has been consented to by the parties. The form of remote hearing was Code V: Kinley CVP video fully remote. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are set out in the agreed bundle of bundle of 111 pages together with additional documents that were not numbered, a similar agreed bundle ran to 113 pages, the claimant's witness statement, the witness statements of the claimant, Kathryn Forshaw and Sarah Leahair, a payslip breakdown and agreed amended list of issues dated 15 October 2020. The contents of the documents have recorded where relevant below.

2. The respondent was given leave to amend the bundle with a breakdown of the claimant's payslips and a rota which showed the claimant did not work 16 to 18 December 2019, which were relevant to the issues before the Tribunal.

3. The Tribunal was also provided with an amended list of issues that has been recorded below.

The claims

4. In a claim form received on 21 May 2019 following ACAS Early Conciliation between 24 April and 9 May 2019, the claimant brings two complaints. The first

complaint is that the respondent had discriminated against him because of his race contrary to section 13(1) of the Employment Rights Act 1996 ("the ERA") as follows:

2.1 The respondent failed to relieve/replace him of duty after the incident regarding a child on the night of 13 January 2019, and

2.2 when he had been dismissed on the 14 January 2019. The claimant alleges that had he not been a black person the respondent would not have dismissed him at during the probationary period in all the circumstances.

5. The claimant relies upon the protected characteristics of colour, and on an unnamed actual comparator and hypothetical comparator; a white employee in the role of support worker who had allegedly been assaulted by a service user, called the police and then was allowed to go home for the balance of her shift. The claimant is not aware of the circumstances and finer detail including the name of the employee, date of the incident, and whether the alleged incident had occurred at a similar time of day as the incident with which the claimant was involved. The claimant described himself as a black. The claimant did not plead that he had asked the respondent to go home on the 12 January 2019, and gave no evidence at the liability hearing to that effect.

6. The claimant also brings a complaint of automatic unfair dismissal under section 103A of the ERA, the protected act being a call he made to the police regarding a child subject to a depravation of liberty safeguarding order ("DLSO") on 12 January 2019. The claimant alleged the respondent prefers to avoid the police becoming involved in matters related to children subject to a DSLO as part of a policy seeking to avoid the conduct of children being criminalised, and this was not disputed by the respondent.

7. The claimant alleged the respondent had fabricated the acts of gross misconduct to justify his dismissal. The claimant does not have sufficient service to claim unfair dismissal and the burden to establish the reason for the dismissal rests with the claimant. It is undisputed that the claimant did not make a disclosure to his employer or anyone connected to his employer and the only disclosure relied upon is his call to the police.

8. Finally, the claimant complained that the respondent had made unauthorised deductions from wages contrary to section 13(1) of the Employment Rights Act 1996 as amended ("the ERA") and that he was owed one week's notice.

9. The respondent denies the claimant's claims, maintaining he had been dismissed having not successfully completed his probation period, on the basis of misconduct including falling asleep whilst on duty. The respondent indicated they believed the claimant had less than 4-weeks service and was not entitled to notice having commenced his employment on the 19 December 2018, in contrast to the claimant who asserts his employment commenced on the 5 December 2018. In any event, the respondent will argue the claimant was not entitled to recover his statutory notice entitlement as he had committed an act of gross misconduct by falling asleep whilst on duty. This is one of the issues to be resolved by the Tribunal. The respondent

also disputes that by calling the police the claimant made a protected disclosure, but conceded that by calling the police he had disclosed information to the police that suggested a crime had been committed, was being committed or was likely to be committed in accordance with section 43B(1)(a) of the ERA.

10. A Preliminary Hearing dealing with case management took place on the 15 August 2019 at which the claimant agreed he would provide details of each shift he believes he was not properly paid for, and an explanation of what additional pay the claimant believes he was entitled to.

Agreed issues

11. The parties agreed the issues as follows:

Jurisdictional Issue

1. Has the Claimant presented his claims of Race Discrimination and Automatic Unfair Dismissal before the Employment Tribunal in time?

    1.1. On the respondent's case, time-limit runs from 14 January 2019 when the claimant was dismissed. On the claimant's case, it runs from 31 January 2019.

    1.2. The claimant lodged his claim on 21 May 2019.

    1.3. The claimant instigated early conciliation on 24 April 2020, and a certificate was issued by email on 9 May 2019.

    1.4. Therefore, on the respondent's case, the claimant's claim should have been lodged by 13 April 2020. The claimant's case is therefore nearly 2 months out of time.

    1.5. On the claimant's case, he was dismissed on 31 January 2019, and his claim is therefore in time, given that his claim should have been lodged by 9 June 2019.

2. If the claimant was dismissed on 14 January 2019, and his claims of race discrimination and automatically unfair dismissal are out of time:

    2.1. As regards the automatically unfair dismissal complaint, was it not reasonably practicable for the claim to have been lodged in time?

    2.2. If so, when did it become reasonably practicable to present the claim, and was the claim presented in a reasonable amount of time thereafter?

    2.3. As regards the race discrimination complaint, is it just and equitable for the Tribunal to extend time?

Race Discrimination

3. What primary facts does the Claimant rely upon from which the Tribunal could infer that (in the absence of an explanation from the Respondent) he was treated less favourably because of his race?

4. The Claimant relies upon the following facts:

   4.1 Ms Forshaw didn't make him feel like part of the team;

   4.2 Staff and the young person would whisper when the Claimant entered the room;

   4.3 Staff and the young person would say the Claimant's food smelt;

   4.4 Staff were looking for faults in the Claimant;

   4.5 Sophie McGennity, Gaynor Johnson and Katie Cousins claimed that the Claimant was sleeping at work which is alleged to be untrue;

   4.6 Mr Forshaw informed the Claimant of her concerns regarding him taking a second lunch;

   4.7 He was not provided with all information used to dismiss the Claimant;

   4.8 The Respondent did not do anything regarding the Claimant's concerns;

   4.9 That the respondent failed to safeguard him following the assault by the young person;

   4.10 The Claimant was dismissed.

5. In so far as the above acts are admitted or proven (with the Tribunal assuming jurisdiction to hear the complaints), has the Respondent advanced a non-discriminatory explanation that is capable of defeating such an inference?

Automatic Unfair Dismissal

6. What was the principle reason for dismissal of the Claimant?

7. Was it that he had made a protected disclosure?

   7.1. Did the Claimant make a protected disclosure as set out below?

      7.1.1. The Claimant relied upon him calling the police in relation to the young persons, and therefore risking the criminalisation of her behaviour.

7.2. Has the Claimant confirmed the relevant wrongdoing for the purposes of section 43B(1) ERA 1996?

7.3. Did the Claimant reasonably believe that the disclosure was made in the public interest?

8. It is agreed that disclosure was made to the police.

9. Where a worker decides to make a disclosure to an external organisation, he will have to satisfy four conditions set out in S.43G(1) ERA:

10. Did the claimant reasonably believe that the information disclosed, and any allegation contained in it, is substantially true?

11. Did the claimant make the disclosure for the purposes of personal gain?

12. Section 43G(1)(d) requires that one of three additional conditions specified in S.43G(2) be met. These additional conditions are that:

12.1 at the time of the disclosure, the claimant reasonably believes that he will be subjected to a detriment by the respondent if he makes a disclosure to his employer in accordance with S.43C or to a prescribed person in accordance with S.43F — S.43G(2)(a)

12.2 where no person is prescribed in accordance with S.43F in relation to the relevant failure, the claimant reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to the employer — S.43G(2)(b), or

12.3 the claimant has previously made a disclosure of substantially the same information, either (i) to his r employer or (ii) to a prescribed person in accordance with S.43F — S.43G(2)(c).

13. In all the circumstances of the case, was it reasonable to make the external disclosure.— S.43G(1)(e). The assessment of reasonableness in this context is a matter for the tribunal, based on its own objective judgment. In Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73, CA, the Court of Appeal stressed that the question of reasonableness must be assessed as at the time the complaint or concern is raised, not with the benefit hindsight after the complaint has been examined. In reaching its decision, there are six factors the tribunal must take into account. These are:

- the identity of the person to whom the disclosure is made — S.43G(3)(a)

- the seriousness of the relevant failure — S.43G(3)(b)

- whether the relevant failure is continuing or is likely to recur — S.43G(3)(c)

- whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person — S.43G(3)(d)

- in the case of a previous disclosure to the worker's employer or a prescribed person, the response of the employer or prescribed person — S.43G(3)(e); and

- in the case of a previous disclosure to the worker's employer, whether the worker complied with an internal procedure authorised by the employer — S.43G(3)(f).

Arrears of Pay

14. This complaint remains insufficiently pleaded, and as such the Respondent was unable to comprehensively respond until this liability hearing when the claimant confirmed he had been underpaid work carried out of the Christmas period in 2018 and the incorrect hourly rate which should have bene doubled.

15. Is the Claimant owed any monies with respect to arrears of pay or notice pay?

Notice Pay

16. Did the Claimant work for the Respondent for in excess of 1 month?

17. Is the Claimant entitled to receive notice pay?

18. If so, how much is the Claimant owed?

Evidence

7 The Tribunal heard evidence from the claimant on his own account, and on behalf of the respondent it heard from Sarah Leahair, engaged by the respondent in the capacity of semi-independent living and human resources consultant, and Kathryn Forshaw, registered manager of the respondent including Douglas House where the claimant had worked.

8 The claimant was not a credible witness, and the Tribunal found he had exaggerated his evidence with reference to the incident on the 13 January 2019 when he stated he was "scared for his life" and that is why he had called the police. There was no reference to this allegation in any of the claimant's documents including the witness statement and pleadings. The claimant's evidence in this regard was contradictory with his evidence that he had "pleaded" with the police to let the young person go. According to oral evidence given at this liability hearing the claimant was "scared for his life" and yet after calling the police he slept in the property with the young person in question in the house. The claimant's oral evidence is

unsubstantiated by any contemporaneous documentation that he had told his line manger he was “scared for his life” when requesting a move. In evidence given under cross-examination the claimant stated (a) that he had not contacted the line manager with a request to go home, (b) the claimant then changed his evidence and said he told Kathryn Forshaw that his life was in danger and asked her to go home, which was refused.

9 There were a number of conflicts between the evidence given by the claimant, and that given by the respondent’s witnesses which the Tribunal resolved as set out below, preferring on balance the evidence given by the respondent’s witnesses largely supported by the contemporaneous documents which the Tribunal took a great deal of time to consider in detail in preference to the less than credible evidence given by the claimant. Sarah Leahair and Kathryn Forshaw who were found to be credible witnesses giving substantiated by contemporaneous evidence, including the WhatsApp messages produced during this liability hearing inserted within the trial bundle. The Tribunal accepted Sarah Leahair’s evidence that she had been advising Kathryn Forshaw on the claimant’s performance and conduct well before he had called the police at attend the young girl.

10 The Tribunal was referred to an agreed bundle and a number of additional documents, which it has taken into account. It has heard oral submissions made by and on behalf of both parties, which the Tribunal does not intend to repeat, it has attempted to incorporate the points made by the parties within the body of this judgment with reasons and has made the following findings of the relevant facts.

Facts

11 The respondent provides residential care for children and young people based in the North West and employs approximately 44 employees. The young people are particularly vulnerable and require specialist handling via qualified support workers. The young people were in the respondent’s care primarily for their own protection.

12 The respondent owns a number of residential houses including a three-bedroomed house in Southport in which residential care was provided to a sixteen-year-old girl who was subject to a depravation of liberty safeguarding order. She will be referred to as “the young girl” in this judgment with reasons. The DLSO prevented her from going out into the community alone, accessing social media, limited use of a phone up to 30 minutes under supervision and she was attending school on a reduced time table, escorted there and back by two care workers. The sixteen-year-old girl was supported by two care workers at any one time over a 24-hour period, and one care-worker was not to be left alone with her for their safety and that of the young girl. It had been agreed with the local authority that the police could be called if she became overly aggressive. The young girl caused difficulties with neighbours and staff, she could on occasions get out of control and required sensitive handling following a diagnosis of a number of mental and physical impairments including Autism, Oppositional disorder, Foetal Alcohol Syndrome, Disorganised Attachment Disorder and the possibility of a multiple personality disorder.

The claimant's employment

13 The claimant successfully applied for the position of residential child care worker and in an offer letter dated 5 November 2018 the amount of salary was confirmed at £17,680 per annum with a payment of £75 per sleep in. The offer was dependent on a successful six-month probationary period.

14 On the 6 November 2018 the claimant accepted the offer, on the basis that his salary would be reviewed should he successfully pass his probation. The claimant had indicated that as he had "nearly completed his NVQ level 5 Leadership and Management and [had] good senior experience" he should be paid more; between £19,000 to £20,000 per annum.

15 In his written statement before this Tribunal the claimant gave evidence that "I am a highly experienced residential child worker and that is evident in my job offer. Also, the extra pay that was agreed when I took the job doesn't reflect on my wages and that is also part of the money I am owed." The claimant's evidence did not reflect the reality of situation; extra pay was not agreed and the Tribunal concluded the claimant was not a credible witness in this regard and was attempting to bolster up his claim for unlawful deduction of wages, a claim he was unable to support with any independent evidence.

16 It is notable the claimant was highly experienced and qualified to carry out the role of providing care and support for a vulnerable young girl with severe behavioural difficulties; so much so that he believed, as set out under cross-examination, that other staff were envious of him because he held equivalent qualifications and experience as the managers including Kathryn Forshaw, who was also jealous of him. There was a suggestion by the claimant that the alleged treatment he had been subjected to was partly as a result of the jealousy felt by other care workers and managers, which if true, undermined the basis of the direct race discrimination claim and automatic unfair dismissal.

The employment contract and job description.

17 A copy of a contract was produced by the respondent confirming the claimant's employment commenced on the 19 December 2018. The respondent has been unable to provide any supporting evidence showing the claimant was sent a contract and the job description. The copy of the contract in the bundle is unsigned and undated. The claimant denies ever been sent it.

18 Sarah Leahair's evidence was that the respondent's administration team were responsible for issuing all recruitment paperwork and contracts of employment, usually sent via email. There is no evidence of any emails attaching a contract of employment to the claimant, and no evidence he was handed the employment contract during the induction shift. No reference was made to the contract of employment in the offer latter. On the balance of probabilities, despite the less than credible evidence given by the claimant in other matters the Tribunal concluded the claimant had not been sent a contract of employment or job description before or immediately on starting work. However, he became aware and relied on its terms including the enhanced rate of pay

over Christmas and New Year and it is logical to assume at some point during his employment the claimant was aware of the contractual terms he was working under.

19 The claimant attended the "Company's Induction Programme" on the 21 November 2018 following an invite sent by email on 16 November 2018 for which the claimant received pay. There is an issue as to whether this was the day the claimant commenced his employment.

20 The contract of employment set out the claimant's start date as 19 December 2018, and it provided for one month's notice of termination "up to successful completion of your probation period" and under one month's service nil notice.

21 The contract provided for double time Christmas day and New Year Day worked and time and apart for other bank holidays including Boxing Day. It did not specify that working a shift shadowing another employee was to satisfy the respondent of an employee's capabilities and the contract could not commence until shadowing had been successfully passed. There is no reference in any of the respondent's documents to the claimant's employment start date being dependent on a successful induction programme.

22 After completing the induction, the claimant worked a "shadow shift" on 5 December 2018 for which the claimant received his contractual rate of pay. In short, the claimant shadowed another care worker and the respondent was able to assess his capabilities. The claimant was due to be allocated another house that was waiting for OFSTED registration possibly in the New Year and the understanding between the parties that this was when the claimant's employment was due to have commenced. It is undisputed the claimant was originally due to work in one of the respondent's properties Maple House after the OFSTED registration was completed in the New Year.

23 On the suggestion of Kathryn Forshaw, the manager, who was eager for the claimant to start work, she and the claimant agreed an earlier start date whereupon the claimant went to work in Beech and then Douglas House to support the young girl. The shadow shift took place in Douglas House. There are no documents which set out passing the shadow shift was a requirement before the claimant commenced his employment, and the Tribunal concluded as the claimant had worked and been paid a shift his employment commenced on the 5 December 2018, preferring the claimant's evidence on this point to that given by the respondent who argued for the 19 December 2018 start date. The next date he worked a shift at Douglas House was 19 December 2019. Kathryn Forshaw wanted to the claimant to start work earlier because of his experience, and this points away from her feeling any jealousy or dislike towards the claimant on the grounds of his experience and race., but not conclusively given racism has many guises and is often hidden.

24 Given the initial agreement between the parties that the claimant's employment was to start sometime in the New Year upon completion of the OFSTED registration process the claimant undertaking an induction on the 21 November 2018 was not the commencement date of his employment, and so the Tribunal found. The agreement

was varied when the claimant worked the shadow shift followed by other shifts when his commencement date of employment was brought forward.

25 In conclusion, the claimant's employment commenced on the 5 December 2018.

26 The next shift taken up by the claimant was on the 19 December 2018 at Douglas House. The claimant claimed he worked the 17 and 18 December 2018, Christmas, boxing Day and New Year. The Tribunal found his evidence was confused and there were no supporting contemporaneous documents including the rota, time sheet and wage slips which all reflect the claimant's next shift was the 19 December 2018.

Unlawful deduction of wages Christmas 2018

27 The payslip details provided by the respondent cover Christmas Day, New Year and Boxing Day matching the hours set out in the timesheet and it reflects the double time and time and a half entitlement was paid and received by the claimant. According to the contemporaneous documents the claimant received all the pay to which he was legally entitled to, and the burden rests with the claimant to prove his unlawful deduction of wages claim and he has been unable to dislodge this burden.

28 Having resolved the conflicts in the evidence the Tribunal concluded the claimant had worked Christmas, New Year and Boxing Day contractual payment for which he had received in full in accordance with the completed timesheets which reflected the claimant worked until 10pm and not midnight as he now alleges.

Issues with the claimant's performance during his probation period

29 In a WhatsApp from GJ, a residential child care worker employed by the respondent who worked with the claimant (who has no interest in these proceedings) sent on 3 January 2019 to Kathryn Forshaw the following message in which the reference to "JJ" was to the claimant; "Just because… [the young girl] is heightened at the mo, is there any way you can have a quiet word with JJ. I don't want to feel vulnerable as he kept falling asleep again on his last shift to the point his snoring was waking him up… [the young girl] noticed it and if she's playing up I want him awake. Pweeeeesssee."

30 Kathryn Forshaw in her response referred to carrying out a supervision with the claimant the next day pointing out she had "a few things to address with him" and in a second WhatsApp questioned GJ "did he fall asleep when on shift with you as well as Kate?" GJ replied, "NYE 4 times at home and in the car, so I can't ask him to drive and he watches his phone constantly."

31 Interpreting the exchange of WhatsApp messages and giving their ordinary common sense meaning, it is clear they were communications between a child care worker and her manager requiring resolution to an issue against a backdrop of safeguarding staff and a difficult young girl whose behaviour was heightened, and not an attempt to get the claimant in trouble because of the fact that he was a black man. There is nothing about the communications which suggests any hint of racial prejudice

or conspiracy as advanced by the claimant, and the clear message was that staff felt vulnerable because of the claimant sleeping on the job, and it is only when she was asked a direct question by Kate Forshaw does GJ elaborated, which suggests she was not motivated by racism and was not colluding. It is notable at the supervision meeting the claimant admitted to falling asleep, which further undermines the claimant's case that GJ complained about him because of his colour.

Supervision meeting 4 January 2019

32 On the 4 January 2019 the claimant was working in the early weeks of his probation period and a supervision was carried out by Kathryn Forshaw regarding a number of concerns she had with him falling asleep whilst at work on "2 separate occasions" in the house and in the car, and excessive use of his mobile phone whilst working. The supervision notes recorded the claimant responded, "Jay was just tired he did not expect to be in New Year's Day and was out the night before so he was tired." Reference was made to the claimant's use of his mobile phone around the young girl and "Jay has a good understanding of… [the young girl] and her emotional well-being."

33 The next supervision meeting was arranged for the 14 January 2019, and this arrangement was direct contrast to the claimant's oral evidence that the 14 January 2019 meeting had been deliberately set up by the respondent to dismiss him in the knowledge that he would be making an Employment Tribunal claim. The claimant's oral evidence was that the respondent fixed the 14 January 2019 date because it was known he would go to a Tribunal, evidence which the Tribunal found to be not credible and was an attempt by the claimant to bolster up his claim. On the 4 January 2019 Kathryn Forshaw had no inkling that the claimant would be dismissed for his conduct, and she was merely putting him on notice of the improvement he was required to make in his probation period.

34 At this liability hearing the claimant denies he had ever slept at work, maintaining the supervision note in respect of this (a) had not been seen and signed by him and then (b) he had signed the written supervision form recoding that he had slept but without reading it, contradicting his evidence which further undermined the reliability of evidence and credibility.

35 The claimant also maintains he had raised the issue of the young girl racially abusing him "numerous times" and he had informed the respondent before the supervision and after in direct contrast to the notes taken of the supervision meeting signed by the claimant which confirmed the claimant had "settled in really well." The claimant made no request to be moved to an alternative home.

36 Tribunal found the claimant's evidence with reference to what transpired at the 4 January 2019 supervision meeting contradictory and not credible; there was no mention of any racial abuse and the notes reflect the claimant had a good understanding of the client. The notes were signed by the claimant as conceded by him, and it is not credible the claimant missed the admission he had made with respect to sleeping at work and his use of the mobile phone at work. It was clear that there were issues with the claimant's performance a few weeks into his probation period,

sleeping at work was a serious matter exposing his colleagues to unnecessary safeguarding risks. The fact Kathryn Forshaw, who was eager to have the claimant working for the respondent, gave the claimant a chance to improve and arrange another supervision meeting for the 14 January 2019 undermines the claimant's allegation that she was motivated by racial prejudice during this period, and his dismissal was an act of direct race discrimination. A white hypothetical comparator in the same position as the claimant would have been treated in the same way; including a monitoring of their performance to see if there was any improvement.

Whispering and cooking smells

37 One the claimant's allegations of direct race discrimination were that "staff and the young girl would whisper when the Claimant entered the room." It is notable no reference was made to this during the supervision meetings or at any stage during the claimant's employment until after it had terminated. In oral evidence under cross-examination the claimant was given the opportunity to clarify his claim in respect of the whispering and cooking smells, and he was unable to provide dates, the names of any other employees, and what if anything he had overheard in whole or in part. The upshot was that the claimant had in his own words a "gut feeling" that he was being talked about, as he heard his name and then the room would go quiet, evidence which undermined the allegation that employees and the client had been whispering about him as an act of race discrimination. The claimant admitted there was no reference to him being a black man at any stage, the basis of his claim was essentially that his colleagues were looking to fault him, and whenever he was on his mobile phone "it was a problem because I am a black man" ignoring the fact that the claimant had been informed by Kathryn Forshaw that his use of a mobile phone was a sensitive issue for the young girl due to her limited access. The uncontroversial evidence before the Tribunal was that access to a mobile phone was used as a carrot and stick for the young girl in question, and clearly the claimant's excessive use of his mobile phone was an issue that had no connection with the claimant's colour. On the evidence before it the Tribunal found on the balance of probabilities there was no instance of any employee whispering with the young girl behind the claimant's back about the claimant at any time during his employment.

38 During this period leading to his dismissal the claimant alleges that the employees who reported such matters to Kathryn Forshaw were discriminatory, and the Tribunal was taken to the WhatsApp messages disclosed by the respondent, which the Tribunal does not intend to record in full. The claimant maintains staff were looking for fault in the Claimant and fabricated that he was sleeping at work despite the claimant admitted he had at the 4 January meeting and conceding on cross-examination that sleeping on duty was a serious matter, and he was unable to point to any WhatsApp messages that suggested acts of unlawful race discrimination.

Contemporaneous weekly records kept by the child care workers

39 Weekly records of what had transpired during every shift were made by staff. In the week commencing 7 January 2019 written records of what had taken place contemporaneously with reference to the young girl was included in the agreed bundle starting from the 7 January 2019 through to the date of the incident when the police

were called. Its clear from the notes that the young girl had major issues, there are references to her not getting on with a social worker, to appearing before a judge in court, shouting at her Mother, throwing the phone on the floor and a glass at the wall that smashed on the floor. The claimant in oral evidence gave evidence that the young girl had tried to smash a glad over his head and that is why he was afraid for his life. There is no reference in the notes to any attempt by the young girl to smash a glass across the claimant's head in any of the contemporaneous weekly records, WhatsApp messages or in the supervision meetings and the Tribunal concluded that this allegation was first raised by the claimant when he was giving oral evidence on cross-examination at the liability hearing in order to strengthen his claim and it was not true.

40 The contemporaneous records reflect that in the events leading to the claimant calling the police the young girl was locked in the house and she shouted out at people in the street to call the police to assist her. The young girl had an issue with the neighbour. Matters settled down, and then the young girl started up again, setting off fire alarms in the house, running amok out of the house and ringing the doorbell, throwing objects and the house was locked again. There are references to the young girl becoming verbally abusive to staff in the plural and not aimed exclusively at the claimant, "hits, kicks and spits at staff blocking her way and calls the police herself." There is a reference to the young girl kicking, spitting and punching the claimant, and the claimant's colleague intervened. There were numerous incidents reported in an objective and factual way that take the young girl's behaviour into the Sunday when she woke up from bed at 13.45 pm before going getting up. The young girl's behaviour deteriorated by 22.10 over a cigarette when the young girl put the house keys down her bra and picked up a set of car keys. The Tribunal has taken the time to read through all of the contemporaneous notes as it was important for it to fully understand the backdrop behind the serious allegations made by the claimant.

<u>The claimant ringing the police</u>

41 Leading to the claimant's decision to ring the police the young girl tried to scratch herself implying the claimant had cut her, and he told her that he would call the police if she did not hand over the keys in response to which the young girl stated she wanted to be arrested. The claimant called the police, who arrived and the claimant handed the car keys to the police and the police left.

42 After the police had left the young girl's behaviour escalated when the claimant took away her cigarette. The contemporaneous notes reflect that she "screamed, striking him hard across the face, spitting at him and then attempting to bite him." The claimant's colleague and not the claimant then called the police the second time, at the claimant's request. It was on the second occasion, after the claimant's colleague had called the police that the young girl was handcuffed and charges were threated. The claimant intervened and "told the police officer that he didn't want the young person to get into any more trouble as he recognised she has a lot going on now and the staff here at the house will put consequences into place." The young person then apologised and the police left.

43 The contemporaneous notes reference that the young girl appeared to want to "taunt JJ all night and every time he tried to answer a question…would laugh

hysterically." The incident finished with the claimant going to bed and the young girl remaining downstairs with one member of staff, who had suggested the claimant rest as he had been on shift the previous night and had little sleep. That ended the incident. At no stage did the claimant raise any issues with the respondent or managers, including Kathryn Forshaw, and he did not request to go home. The claimant never reported to any person that he was frightened for his life.

The dismissal meeting

44 Kathryn Forshaw attended Douglas House on the 14 January 2019 as previously planned but with the intention of dismissing the claimant. On the balance of probabilities, the Tribunal found there was no causal connection between the decision taken by Kathryn Forshaw on the Friday 12 January 2019 before with the claimant reporting the young girl's behaviour to the police.

45 Kathryn Forshaw had been informed by the claimant's colleague (and not the claimant who remained silent) that the claimant had contacted the police on the 13 January 2019, and the incident that had taken place. Kathryn Forshaw thought nothing of the claimant's actions, the young girl's behaviour was not out of the ordinary and it was not an isolated incident. The police were called when the young girl had put the keys down her bra, with the intention of calming things down and the claimant's intervention reflects this. There is no evidence in the contemporaneous notes which set out the events of that weekend in detail that the claimant was frightened for his life. The young girl in question was behaving badly towards everybody, latterly especially the claimant when he took her cigarette away. It is notable that no action was taken against the claimant's colleague who also called the police, and this undermines the claimant's case in respect of the automatic unfair dismissal as both he and his colleague had called the police in order to manage the situation and calm the young girl down.

46 Immediately Kathryn Forshaw arrived on the 14 January 2019 the claimant's colleague complained about the claimant leaving the young person to go upstairs, sleeping for about one hour and watching football on his phone when he had been asked not to. In cross-examination the claimant put to Kathryn Forshaw that she had told him not to use the phone in front of the young person and so he had gone upstairs. He did not dispute it was for a long period of time, and in response to Kathryn Forshaw's evidence that it was the claimant's conduct which resulted in his dismissal, he put to her "the man cannot do anything right." Kathryn Forshaw was concerned that the claimant 's performance had not improved. She had already taken HR advice from Sarah Leahair before meeting up with the claimant and dismissing him. A number of conversations with Sarah Forshaw had taken place before and after the police incident regarding the claimant's performance, including washing his laundry over the weekend of the incident involving the police as Kathryn Forshaw had witnesses a number of bags when she went in. Kathryn Forshaw's concern over the claimant's performance spanned the first and second probationary meeting, and before the 14 January she had taken the decision to dismiss the claimant for his continuing underperformance.

47 Kathryn Forshaw was told by the claimant's colleague who had worked with him that weekend the claimant had left the young girl with her, slept for an hour and watched football. Katherine Forshaw was concerned with this as the report reinforced

her conclusion taken beforehand that the claimant's performance had failed to improve and the decision made earlier to dismiss the claimant.

48 Kathryn Forshaw met with the claimant the morning of the 14 January 2019, and has referred the Tribunal to notes taken of that meeting. Contrary to the claimant's evidence the notes reflect Kathryn Forshaw did discuss with the claimant the weekend incident observing the young girl appeared to be "targeting him." This evidence follows the WhatsApp message sent to her by the claimant's colleague that "she did all sorts to Jay. Feel sorry for him." Kathryn Forshaw was aware of the young girl's behaviour and the fact she acted aggressively to all members of staff, not limited to the claimant, and understood additional acts of aggression were directed towards him. She was aware, as was the claimant, that an agreement had been reached with the local authority if the young girl became overly aggressive the police could be contacted to calm her down, and took the view that in calling the police on this occasion the claimant had acted appropriately. There was also no issue with the claimant's colleague calling the police a second time.

49 Kathryn Forshaw raised eleven issues, including the claimant falling asleep as previously discussed with him on the 4 January, together with his mobile phone use whilst at work. She referred to other incidents that had taken place since 4 January including "frequently goes upstairs to the sleep-in room for 40-minutes to an hour each time when on shift, still using his phone in front of the young person, watch football on his phone loudly on Sunday which was interrupting YP programme. Was told to turn it off but he didn't. Also went upstairs for an hour. Did his personal laundry over the weekend just gone and when I had asked why he had lots of bags he said because he goes to gym. He had to make the journey to his car twice, both times his hands were full of bags." Kathryn Forshaw had witnessed this herself. There was also an earlier issue with the claimant telling Kathryn Forshaw he was at college when he was not, and going off for an hour without informing her during a training day. Kathryn Forshaw did not discuss with the claimant any response he may have to the allegations; she referenced them as the basis for her decision to summarily dismiss that day, a decision taken by her after consultations with Sarah Leahair from the Friday before through to the morning of the dismissal. Kathryn Forshaw had also spoken to a number of the claimant's colleagues over a period a period, unfortunately she had not recorded her discussions or documented them in any way. The claimant denied falling asleep but admitted he would go upstairs to use is phone and not inform colleagues. Kathryn Forshaw was not interested in what the claimant had to say in his defence believing that as the claimant had continued with the same conduct for which he was criticised at the 4 January meeting there was no reasonable prospect of any future improvement and she deemed him unsuitable for the role.

50 Kathryn Forshaw asked the claimant to gather all of his belongings and informed him head office would be in touch about his dismissal. It was at this point the claimant requested to be moved to another home, Maple House, as an alternative to dismissal, and the Tribunal did not find it credible that the claimant misunderstood he was being dismissed. No reference was made to the fact that the claimant and his colleague called the police, and this was not discussed. There was no reference to the claimant stating his life was in danger and he was requesting to be moved as result. However, there was a reference to the claimant, after he had been dismissed, asking

to be given another chance to work in a different home. The meeting finished at 10.30am. On the balance of probabilities, the Tribunal found Kathryn Forshaw would have treated a hypothetical comparator in the same situation as the claimant bar his protected characteristic in the same way i.e. a child care worked with performance and conduct issues working in the early weeks of his or her 6- month probation period who had been given an opportunity to improve and did not, would also have been dismissed.

51 On the balance of probabilities, the Tribunal is satisfied the claimant was orally dismissed at the meeting held on the 14 January 2019, which is the effective date of termination. He was not paid notice because Kathryn Forshaw did not believe the claimant was entitled to notice as he had less than one month's continuous employment, having taken HR advice. There was no reference to the claimant being dismissed for breach of contract arising out of gross misconduct.

52 After dismissing the claimant, who left the house with all of his belongings, Kathryn Forshaw consulted with Sarah Leahair again in order that she could prepare the letter confirming the dismissal, which she did. Kathryn Forshaw discussed the meeting and provided the notes of the meeting, which set out the allegations she had previous discussed with Sarah Leahair when coming to the decision to dismiss. Sarah Leahair had asked Kathryn Forshaw to provide the evidence, and Kathryn Forshaw that afternoon at 15.26 sent a WhatsApp to one the claimant's colleagues referencing another colleague who had witnessed the claimant washing clothes at work. It is notable the second colleague's response was that she had noticed the claimant's boxer shorts being washed and "also he was great in the incident. However, disappeared upstairs for 1 hour yesterday afternoon when [the young person] was up, and stood watching football full blast on his phone…" The reference to the claimant being "great in the incident" undermined his allegations that his colleagues were conspiring to get him into trouble because of his colour and so the Tribunal found.

53 Sarah Leahair prepared the dismissal letter on the 17 January 2019 on behalf of Kathryn Forshaw, who was the sole decision maker in respect of the dismissal. Sarah Leahair was merely carrying out her HR function. There is an issue as to whether the letter was posted to the claimant on the 17 January 2019 first class arriving 2-days later, or according to the claimant arriving on 31 January 2019 when the claimant maintains he first received notice of his dismissal and therefore this was the effective date of termination.

<u>Dismissal letter 17 January 2019</u>

54 The letter confirmed the claimant's dismissal was effective from 14 January 2019, which supports Kathryn Forshaw's evidence that the claimant was dismissed on that day, and it is therefore irrelevant when he received the letter confirming a dismissal as he had already received oral notification. If the Tribunal is wrong on this point, in the alternative it would have found on the balance of probabilities, that the letter was sent out on the 17 January 2019 and would have arrived with the claimant 2-days later in the first-class post, and it did not accept the claimant's evidence that it arrived and was read on the 31 January 2019.

55 The dismissal letter is detailed; it sets out a number of the key allegations which Sarah Leahair took to be most serious from her discussions with Kathryn Forshaw, supported by some form of evidence, which included sleeping on shifts, excessive use of mobile phone whilst on duty and the claimant's lack of improvement since concerns were raised on the 4 January 2019 meeting. Reference was made to the claimant frequently going into the sleep-in room "40 minutes to an hour each time you are on duty" when "the job role entails caring for vulnerable young people, therefore it is expected staff are visible when on site and in a position where they can react to an incident if necessary." With reference to claimant's use of his mobile phone and the high volume when he watched football on 13 January 2019 he was remined "whilst on duty in the homes staff need to be mindful that the place in which they work is in fact the child/children's home, staff must respect this." The final matter referenced was taking the extra hour on the training day without consent and not informing Kathryn Forshaw, who "contacted you to find out your whereabouts."

56 The letter confirmed with reference to the probation period "as there has not been a significant improvement in the existing concerns that were raised with you on the 4 January and further issues have become apparent, I am not able to confirm your employment with the company." There was no right to appeal because as far as Kathryn Forshaw was concerned the claimant had been employed for less than one month and was still in the early days of his probation period. Termination was "with immediate effect" of the 14 February 2019. Giving the close nexus between the claimant ringing the police and the difficulties he personally experienced with the young girl, the Tribunal considered in detail Kathryn Forshaw's decision-making process and motivation, satisfied on the balance of probabilities there was no causal link between the claimant calling the police that weekend and the decision to dismiss. The dismissal arose as a direct result of Kathryn Forshaw's perception that the claimant had not improved from when he had admitted to sleeping whilst on duty, and she was entitled to consider the reports given to her by various employees who had worked with the claimant, and matters that she had witnessed herself e.g. the laundry being carried out in the young girl's home. There was no suggestion in the communications sent to Kathryn Forshaw of a hint of discrimination or collaboration between staff, who appeared sympathetic to the claimant and spoke about him in positive terms following the weekend in question, which he had handled well in their eyes.

57 The effective date of termination was 14 January 2019.

Law

Direct Discrimination (s.13 of the Equality Act 2010 ("Ea."))

58 S.13(1) of the Equality Act 2010 (Ea.) provides that 'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others'.

59 S.23(1) provides that on a comparison for the purpose of establishing direct discrimination there must be '**no material difference between the circumstances relating to each case'** [the Tribunal's emphasis]. In the well-known case of Shamoon

v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL (a sex discrimination case), Lord Scott explained that this means that 'the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class'. The Tribunal took into account this test when it considered Mr Johnson's claim of direct discrimination.

60 The EHRC Employment Code states that the circumstances of the claimant and the comparator need not be identical in every way. Rather, 'what matters is that the circumstances which are relevant to the [claimant's treatment] are *the same or nearly the same* for the [claimant] and the comparator'— para 3.2.

Burden of proof

61 In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondents and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

62 The Tribunal was referred to the judgment of Lord Justice Mummery in Madarassy v Nomura International plc [2007] ICR 867, CA, it was held: 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.' When considering this test, the Tribunal concluded in Mr Johnson's case there was no overt evidence of direct discrimination and kept in mind Lord Justice Mummery warning not to take a mechanistic approach to the burden of proof where the act is not inherently discrimination and to consider motivation.

63 In Chief Constable of Kent Constabulary v Bowler [EAT] 0214/16 Mrs Justice Simler emphasised that: 'It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.' The Tribunal in Mr Johnson's case took into account all of the evidence before it, including the explanation given by the respondent's witnesses particularly Katherine Forshaw and the claimant's concession that he had slept at work which he attempted to deny at this liability hearing.

64 The Tribunal was referred to the decision made by the Court of Appeal in Khan and anor v Home Office [2008] EWCA Civ 578, CA, held that the rule 'need not be applied in an overly mechanistic or schematic way' and to Network Rail Infrastructure Ltd v Ms A Griffiths-Henry UKEAT/0642/05/CK paragraph 22 of the Honourable Mr Justice Elias (the then President) that; "it is crucial that the Tribunal at the second stage is simply concerned with the reason why the employer acted as he did. If there is a genuine non-discriminatory reason, at least in the absence of clear factors justifying a finding of unconscious discrimination, that is the end of the matter. It would obviously be unjust and inappropriate to find discrimination simply because an explanation given by the employer for the difference in treatment is not one which the Tribunal considers objectively to be justified or reasonable. If that were so, an employer who selected by adopting unacceptable criteria or applied them inconsistently could, for that reason alone, then potentially be liable for a whole range of discrimination claims in addition to the unfair dismissal claim. That would plainly be absurd. Unfairness is not itself sufficient to establish discrimination on grounds of race or sex…" The Tribunal found Katherine Forshaw provided a genuine reason untainted by any discrimination.

65 Section 136 of the Ea. provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

Time limits

66 Section 123(1) [Subject to [sections 140A and 140B] proceedings] on a complaint within section 120 may not be brought after the end of:

a) the period of 3 months starting with the date of the act to which the complaint
67 relates, or
(b) such other period as the employment tribunal thinks just and equitable.
(2) ...
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Continuing acts

68 The Court of Appeal decision in Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA, held when looking at continuing acts, the question was whether that was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed.

Disclosure of information

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

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

71 In Kilraine v London Borough of Wandsworth *2018 ICR 1850, CA*, the Court of Appeal held that 'information' in the context of S.43B is capable of covering statements which might also be characterised as allegations. Thus, 'information' and 'allegation' are not mutually exclusive categories of communication — rather, the key point to take away from Cavendish Munro (above) was that a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a relevant failure. The Court in Kilraine endorsed observations made by Mr Justice Langstaff when that case was before the EAT — Kilraine v London Borough *of Wandsworth 2016 IRLR 422, EAT* — that 'the dichotomy between "information" and "allegation" is not one that is made by the statute itself' and that 'it would be a pity if tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined.'

72 The Court of Appeal in Kilraine went on to stress that the word 'information' in S.43B(1) has to be read with the qualifying phrase 'tends to show' — i.e. the worker must reasonably believe that the information 'tends to show' that one of the relevant failures has occurred, is occurring or is likely to occur. Accordingly, for a statement or disclosure to be a qualifying disclosure, it must have sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f). It is a question that is likely to be closely aligned with the issue of whether the worker making the disclosure had the reasonable belief that the information he or she disclosed tends to show one of the six relevant failures. Furthermore, as explained by Lord Justice Underhill in Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public

Concern at Work intervening) 2018 ICR 731, CA, this has both a subjective and an objective element. If the worker subjectively believes that the information he or she discloses does tend to show one of the listed matters, and the statement or disclosure he or she makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his or her belief will be a reasonable belief.

73 Section 43B ERA defines a qualifying disclosure as 'any disclosure of information' relating to one of the specified categories of relevant failure. The claimant relies on section 43B(1)(a) in relation to the behaviour of the young person in question and not the respondent or anybody employed by the respondent and the Tribunal took the view this was a fundamental weakness in his case.

74 Any disclosure which, in the reasonable belief of the worker making it, is made in the public interest and tends to show that a criminal offence has been committed (or is being committed or is likely to be committed) amounts to a qualifying disclosure — S.43B(1)(a) - disclosing a criminal offence will invariably be in the public interest.

75 A qualifying disclosure within the meaning of S.43B of the Employment Rights Act 1996 (ERA) is not sufficient to confer statutory protection and Ss.43C–43H ERA must be complied with. The range of persons (or organisations) to whom an external disclosure can be includes the police, and stringent rules apply. The claimant must satisfy four conditions set out in S.43G(1) ERA:

(1) the worker must reasonably believe that the information disclosed, and any allegation contained in it, is substantially true, and

(2) the worker must not have made the disclosure for the purposes of personal gain

(3) one of the conditions in S.43G(2) must have been met (see 'Satisfying one of the additional conditions in S.43G(2)' below), and

(4) in all the circumstances of the case, it must be reasonable to make the disclosure.

Automatic unfair dismissal

76 S.103A ERA provides there may be more than one reason for a dismissal. An employee will only succeed in a claim of unfair dismissal if the tribunal is satisfied that the 'principal' reason is that the employee made a protected disclosure. The principal reason is the reason that operated on the employer's mind at the time of the dismissal — Lord Denning MR in Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA. If the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under S.103A will not be made out. Furthermore, as Lord Justice Elias confirmed in the well-known case of Fecitt and ors v NHS Manchester (Public Concern at Work intervening) [2012] ICR 372, CA, the causation test for unfair dismissal is stricter than that for unlawful detriment under S.47B — the latter claim may be established where the protected

disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker, whereas S.103A requires the disclosure to be the primary motivation for a dismissal.

Unlawful deduction of wages

77 Under part II of the Employment Rights Act 1996 (ERA) the general prohibition on deductions is set out. S.13(1) ERA states that: 'An employer shall not make a deduction from wages of a worker employed by him.' This prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction — S.13(1)(a) and (b) which is applicable in the claimant's case.

78 Section 13(3) provides that where the total amount of wages paid on any occasion by the employer to the worker is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purpose of this Part as a deduction made by the employer from the worker's wages on that occasion.

79 The determination of what is 'properly payable' is relevant in this case. The approach Tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188, EAT. It must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion and this requires consideration of all the relevant terms of the contract, including any implied terms (including the implied term of mutual trust and confidence) — Camden Primary Care Trust v Atchoe [2007] EWCA Civ 714, CA.

Conclusion: applying the law to the facts

80 Taking the issues in the same order as agreed between the parties the Tribunal on the balance of probabilities has found the following:

Jurisdictional Issue

81 With reference to the issue has the claimant presented his claims of race discrimination and automatic unfair dismissal before the Employment Tribunal in time, the Tribunal found the claimant's claim of automatic unfair dismissal brought under section 103A of the Employment Rights Act 1996 as amended, received on 25 May 2019 was not presented before the end of the period of 3 months beginning with 14 January 2019, the effective date of termination of employment. The Tribunal is satisfied that it was reasonably practicable for a complaint to be presented before the end of that period of 3 months and the complaint was not presented within such further period as the Tribunal considers reasonable. The Tribunal does not have the jurisdiction to consider the complaint, which is dismissed.

82 The claimant's claim of race discrimination brought under section 13 of the Equality Act 2010 was not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done) on 14

January 2019. The balance of prejudice was found in favour of the claimant and in all the circumstances of the case, it considers that it is just and equitable to extend the time limit to 25 May 2019 and the Tribunal has the jurisdiction to consider the complaint.

83 The claim for unlawful deduction of wages brought under section 13 of the Employment Rights Act 1996 as amended and wrongful dismissal (notice pay) was presented before the end of the period of 3 months beginning with the operative date from which time starts to run being the end of 31 January 2019, the date the claimant was last paid.

84 On the respondent's case, time-limit runs from 14 January 2019 when the claimant was dismissed. On the claimant's case, it runs from 31 January 2019. The effective date of termination was 14 January 2019 and not 31 January 2019 as maintained by the claimant.

85 The claimant instigated early conciliation on 24 April 2020, and a certificate was issued by email on 9 May 2019. The claim form was received on 21 May 2019. The claimant should have entered early conciliation no later than 13 April 2019 and/or his claim should have been lodged by 13 April 2020. The claimant's early conciliation started outside the primary limitation period and his claim issued approximately two-months out of time.

86 In oral evidence the claimant explained that he did not have access to the relevant information on time limits, there was no legal advice or help and he had no internet at the time as his phone did not have internet connection or broadband and nor was he engaged in social media. The claimant confirmed he had spoken to family and friends after his dismissal and obtained information from them, but could not have obtained the information before April 2019. Ms Famutimi in oral submissions made the point that the claimant's evidence could not be relied upon, he was not credible and evasive when giving evidence; the Tribunal agreed. One of the fundamental issues against the claimant's underperformance during his probation period was the use of his phone, and in evidence before this Tribunal the claimant referenced being treated unfairly because it had been agreed he could use his phone in the sleep-in room away from the young person. Ms Famutimi referred the Tribunal in oral submissions to documents in the bundle which reflect the claimant was using a Gmail account and consequently, had internet access, and to WhatsApp messages in the bundle which prove the claimant engaged in WhatsApp and Social Media. The Tribunal was satisfied that the contemporaneous documentation revealed the claimant had access to the internet and used WhatsApp to manage shifts, and the claimant in any event could have spoken to family members earlier.

87 The Tribunal found the claimant's evidence was not credible; he used his phone to access the internet at work, and even if he had no intent access there was always the possibility that he could access all other information on the internet concerning time limits for automatic unfair dismissal and race discrimination claims via his friends and family. It is inconceivable that nobody had access to the internet at the time.

88 The claimant presented as being aware of his legal rights, and made a number of references to how he had been discriminated against on the grounds of his race in society in general including by the police, The claimant emphasised to the Tribunal his managerial expertise and the Level 5 course he was undertaking with a view to setting up his own home/business looking after vulnerable children and the Tribunal did not find it credible the claimant was unaware of the possibility that time limits existed in discrimination and whistleblowing cases.

89 With reference to the automatically unfair dismissal complaint, there was no evidence before the Tribunal that it not reasonably practicable for the claim to have been lodged in time, it was reasonably practicable, the Tribunal has no jurisdiction to consider the complaint and the claim is dismissed. In the alternative, the Tribunal has proceeded to deal with the complaints as recorded below in the event of it being wrong with reference to the time limit issue.

90 With reference to the race discrimination complaint, there is no evidence of any continuing act extending over a period of time in accordance with the guidance set out in Hendricks above.

91 With reference to the issue is it just and equitable for the Tribunal to extend time, the Tribunal found that it was despite the claimant's lack of a credible explanation as to why the complaint was lodged outside the time limit and the problems he had in pinpointing when the alleged acts of direct race discrimination set out in paragraphs 4.2 and 4.3 had taken place. The Tribunal took into account the balance of prejudice between the parties, and found the claimant would be more prejudiced that the respondent if his claim could not proceed, bearing in mind at this liability hearing the Tribunal granted to respondent leave to adduce evidence of some WhatsApp exchanges which the witnesses had forgotten about. Therefore, any prejudice resulting from memory loss and delay (of which there was no evidence) was rectified at this liability hearing and the respondent who had prepared for this liability hearing could present its case in full, with no prejudice to it. Leave has been granted to the claimant to file his complaint of direct race discrimination outside the limitation period and an extension granted to the 21 May 2019 taking into account the balance of prejudice notwithstanding the claimant's less than credible evidence as to why his claims were out of time.

Direct race Discrimination

92 In oral submission that claimant stated he was dismissed because of racial discrimination and protected disclosure and, for no other reason. He maintained the allegations were all false and there with no evidence. The 4 January supervision notes were fabricated and the witnesses treated the claimant like a "criminal and paedophile," with staff "making my life hell." The Tribunal found the claimant exaggerated and made a number of serious allegations in his oral submissions; at no stage during these proceedings had he complained the respondent treated him as a paedophile and evidence did exist of the claimant's misconduct which he had signed with his written signature.

93 The claimant further submitted that it was a problem for him to eat and wash his clothes when white individuals were allowed to. The Tribunal found these submissions had no merit; the claimant gave no evidence to the effect that an actual comparator had washed bags of their clothes in work and the cogent evidence before the Tribunal was the claimant cooked without issue and at times shared the cooking with a colleague.

94 The Tribunal agreed with the claimant's oral submission that in 2020 he did not have to be called a "black African man" or "nigger" for racism to occur, and racist acts can take place by treatment when a person is not listened to or given the opportunity to put his case forward. The problem for the claimant is that this did not happen; he was listened to and given an opportunity to improve which he failed to do. The claimant referred to "what my people face in this country and the world, we have to fight one thousand percent to be accepted and I was never accepted" by the respondent who did not contact the claimant to see if he was alright when he feared for his life.

95 The claimant also submitted that he had the same qualifications as managers and the respondent did not "like I had level 5, my energy, ambition and that I was a black man." The Tribunal found no evidence of this, the reverse as Kathryn Forshaw was eager to get the claimant working before the January and according to the early exchange of emails with the respondent there was the possibility of increasing the claimant's salary after he had passed the six-month probation period. At the 4 January meeting the claimant confirmed he had settled in when asked the question by Kathryn Forshaw evidence that he was "accepted" and it was important to Kathryn Forshaw that he was happy at work.

96 It is notable in oral submission the claimant touched upon the events of the 14 January 2020 maintaining he had been assaulted "all through Saturday to Sunday" following which when doing handover "taking bags and bedding and handing in keys" Kathryn Forshaw "turned around and dismissed me," totally undermining the evidence he had given to the Tribunal concerning when he was dismissed and the pleaded case. The claimant further submitted "the opportunity presented itself on the 14th – the final straw, they were not happy…no way is it gross misconduct for me to take a call, go to my own staff sleeping room in the house I live."

97 With reference to the issue what primary facts does the Claimant rely upon from which the Tribunal could infer that he was treated less favourably because of his race, the Tribunal found there were no primary facts that gave rise to such an inference, and the burden of proof has not shifted to the respondent. There is no hint of any race discrimination, and the close nexus between the claimant calling the police and his dismissal does not assist him. There was an issue with the claimant's performance that occurred in the early days of his probation period and he had admitted to sleeping on duty as evidenced by his signature on the 4 January 2019 Ad Hod supervision notes when the claimant's poor performance was discussed after he had worked only a short time for the respondent. It is for the claimant to make out his case on different treatment and he has failed to do so on the factual matrix found by the Tribunal above.

98 In arriving at this decision, the Tribunal acknowledged Mr Johnson's submission that discrimination can be hidden. Bearing in mind that it is rare to find direct evidence of an intention to discriminate, a point made by Mr Johnson during oral evidence and submissions, employees who discriminate may not advertise or even be aware that they are prejudiced. In the well-known test set out by Lord Nicholls in the House of Lords Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065, HL. A tribunal must ask: why did the alleged discriminator act as he or she did? What, consciously or unconsciously, was his or her reason? The reason why was fundamental and the Tribunal's decision was influenced by the credibility of witnesses. Unlike the claimant when he gave evidence, the respondent's witnesses gave straight-forward answers, did not avoid or divert the question, dealt with the relevant point and accepted obvious and non-controversial propositions. In contrast, the claimant prevaricated, diverted, was found to have been an inaccurate historian for the reasons stated above, for example, denying the validity of the supervision notes despite having signed them with his signature.

99 In the alternative, had the evidential burden of proof shifted to the respondent to provide an adequate explanation, the Tribunal found it to have been adequate and not tainted by race discrimination. In relation to the young girl it is apparent all staff had difficulties managing her and the respondent cannot be held responsible for the actions of a sixteen-year old with special needs in their care. The claimant in the way he was managed following legitimate concerns raised by colleagues who were concerned with safeguarding breaches as a result of the claimant's actions, was treated no differently than any hypothetical comparator would have been. The undisputed evidence before the Tribunal was that Kathryn Forshaw actively encouraged the claimant to start work earlier than envisaged; she wanted him working in the team and had the opportunity to dismiss on the 4 January 2019 after it had been brought to her attention the claimant was sleeping whilst on duty. By the time it came to the Friday before the weekend in which the claimant called the police Kathryn Forshaw on getting HR advice, decided to dismiss the claimant because she believed his poor performance would not improve, despite being given an opportunity to do so. The Tribunal looked closely at the reasons given by Kathryn Forshaw for acting as she did culminating in the claimant's dismissal, looking to see whether any inferences of unlawful discrimination could be inferred; and there were none. The claimant was dismissed for a genuine non-discriminatory reason and there was no evidence of unconscious discrimination. Clearly, the procedure adopted by Kathryn Forshaw was not a fair one, and had the claimant two years continuity of employment a procedural unfair dismissal may have resulted. The claimant was a few weeks into his employment, this is the nub of Kathryn Forshaw's decision-making process and the explanation of why she did not follow a procedure which complied with the ACAS Code of Practice for example, provide the claimant with an opportunity to respond to the allegations and given him the right to appeal the dismissal.

100 Turning to the specific allegation of unlawful race discrimination set out in paragraph 4 the Tribunal reached the following conclusion:

101 Paragraph 4.1 - there is no satisfactory evidence Kathryn Forshaw did not make the claimant feel like part of the team. The claimant was included in team training on the 7 January 2019. At the meeting on 4 January 2019 the claimant was asked by

Kathryn Forshaw how he was getting on and his response was “feels he has settled in well” which followed a discussion how she would actively support his attendance at college and work the rota around two college days. There is an example referred to above of Kathryn Forshaw covering the claimant’s shift in order that he could attend college. It is notable at the 14 January 2019 meeting the claimant asked to be given another chance working in a different home rather than be dismissed, which points to the claimant enjoying his work with the respondent. There is no reference to any issues raised by the claimant amounting to race discrimination against Kathryn Forshaw, his colleagues or any other employee/worker at the respondent, allegations which came to light only after the claimant’s dismissal as part of these proceedings which were submitted months after the alleged events.

102 Paragraph 4.2 that staff and the young girl would whisper when the claimant entered the room; the Tribunal has dealt with this allegation above, and found on the balance of probabilities there was no evidence staff whispered behind the claimant’s back as he entered the room. The claimant accepted that nothing was said or done to him about him being a black person, and he was unable to say if the alleged whispering related to him or not. Contrary to the claimant’s belief, the respondent could not be held responsible for the behaviour and actions of the young girl, and a child care worker with the high level of training held by the claimant who considered himself to be working at a managerial level, would fully realise that the young people in their care were troubled individuals who required the protection of the adults looking after them.

103 Paragraph 4.2 that staff and the young girl would say the Claimant’s food smelt; there was no satisfactory evidence that staff criticised the claimant for cooking “food that smelt.” The evidence was that the claimant cooked rice in the microwave and he also cooked a Nigerian dish with the assistance of another member of staff. The claimant has been unable to point to any specific incident or person in relation to this allegation, despite being given leave to provide further and better particulars. It is notable that the claimant put this allegation in his claim form as follows; “[a] racist comment had been made via the service user, was to go back to my country and that my food stinks.” There is no reference to any of the respondent’s employees making the comment, for which the respondent could have been held vicariously liable, and the claimant’s complaint appears to be limited to the young girl to whom no vicarious liability attached to her making such comments or observations. As indicated above, the respondent cannot be held liable for the behaviour and actions of a sixteen-year old girl who clearly has many behavioural issues so severe at times it was recognised by the local authority and respondent that the police may be called to control her.

104 With reference to paragraphs 4.4 and 4.5 that staff were looking for faults in the claimant, the Tribunal has dealt with this above in its findings of fact. It considered the allegation in detail looking at the factual matrix and how the WhatsApp messages fitted in to the facts. It is apparent the WhatsApp messages are critical of the claimant in that he exposed staff because of his behaviour, for which the claimant was dismissed on the 14 January 2019. The WhatsApp message also refers to the claimant in positive terms, and reflect employees were seeking managerial support and not vindictive. In one message a colleague asked for a “quiet word” to be said to the claimant because she felt vulnerable. In cross-examination the claimant conceded the complaints were serious. The Tribunal found the claimant had admitted to sleeping at work when

Kathryn Forshaw criticised him as a result of colleagues who provided a photograph of the claimant sleeping taken on a phone, which was not in the bundle and the Tribunal has not seen. It was not apparent from the evidence before the Tribunal that a raft of the claimant's colleagues was conspiring against him because of his colour, and the Tribunal found there was no evidence of this, actual or by inference. The issue throughout was the claimant, his performance and the risk he put his colleagues under when they were dealing with a vulnerable young girl who was capable of criminal acts why resulted in police being called, and causing self-harm in order to blame staff as she threatened to do with the claimant on the weekend of 13 January 2019.

105 In oral submissions Ms Famutimi pointed out at no stage did the claimant raised the issue that staff were looking to fault him, particularly at the 4 January 2019 supervision meeting when the claimant had ample opportunity to bring up the issue that staff did not like him because of his colour, and he failed to do so. The Tribunal is aware that can be difficult for employees working a probation period to complain about race discrimination conducted by an existing team and it does not necessarily follow that any silence on the part of an employee undermines the possibility of discrimination taking place. On the 4 January 2019 the claimant far from raising the possibility that staff had it in for him, for whatever reason, confirmed that he had settled in well. The claimant signed the record and the Tribunal concluded the contemporaneous ADHOC supervision notes contradicted the claimant's evidence that he believed himself to have been discriminated against when told about the issues of him falling asleep and using his "personal mobile phone."

106 At no point did the claimant inform Kathryn Forshaw the sleeping at work alleged was untrue, the Tribunal did not accept the claimant's evidence and preferred the evidence of Kathryn Forshaw supported by a contemporaneous document signed by the claimant confirming to her had slept at work.

107 With reference to paragraph 4.6 Ms Forshaw informed the Claimant of her concerns regarding him taking a second lunch; the evidence before the Tribunal was that Kathryn Forshaw had a genuine issue with the claimant which resulted in her trying to find him and make contact, and this had no bearing on the claimant's colour.

108 With reference to paragraph 4.7 on the balance of probabilities the Tribunal preferred Kathryn Forshaw's evidence that she had discussed all of the matters listed in the note of the meeting held on the 14January 2019, and therefore the claimant had been provided with all the information used as a basis for his dismissal, and the fact that Sarah Leahair set out key allegations in the dismissal letter of 17 January 2019 does not undermine this. The dismissal process was poor and fell short of the ACAS Code of Practice but it cannot be inferred from this discrimination took place given the genuine reasons for the decision to dismiss an employee early on in his probation period.

109 The disciplinary process was poor as admitted by Ms Famutimi during oral submissions. Kathryn Forshaw put the allegations to the claimant and then dismissed without reference to the actual evidence she had obtained of the claimant's misconduct. For example, she had spoken to individuals but not taken notes. The meeting of 14 January 2019 should be viewed in context; there was no hint that the

claimant believed himself to have subjected to any acts of race discrimination, the claimant was less than 4 weeks into his probation period and dismissed for the reasons given, namely the claimant's underperformance/conduct and the decision to dismiss had already been made.

110 With reference to paragraph 4.8, namely, that the Respondent did not do anything regarding the Claimant's concerns; the Tribunal found there was no evidence that the claimant ever raised any concerns, even though there were numerous opportunities, for example, at the 4 January 2019 supervision meeting. It is notable the incident regarding the young girl was reported to Kathryn Forshaw by another colleague and not by the claimant, and she asked the claimant how he had felt about it at the meeting on the 14 January.

111 With reference to paragraph 4.9, namely, that the respondent failed to safeguard him following the assault by the young girl; the Tribunal found the claimant had not asked to be safeguarded at any stage for the reasons set out above, and his evidence that he was frightened for his life was not credible. The claimant was a highly experienced childcare worker, and would have realised that if there was an issue with the child in his care it was the claimant's personal responsibility to raise it with the respondent. As indicated above, the claimant's evidence that he had raised the concern of his life was in danger at the meeting held of the 14 January supervision was not credible, and the Tribunal found this evidence to be untruthful. The claimant accepted in cross-examination that the point of supervisions was to raise concerns. The Tribunal preferred Kathryn Forshaw's evidence that no issues regarding the claimant's own safeguarding was ever raised with her or the respondent at any stage, and safeguarding issues were raised against the claimant by colleagues.

112 With reference to paragraph 4.10, namely the dismissal, the Tribunal found on the balance of probabilities Kathryn Forshaw had taken the decision to dismissal prior to the 14 January 2019, and by the morning of the 14 January having learnt about the claimant staying in the sleep-in room for 40-60 minutes, and using his mobile phone to watch football loudly in front of the young girl, she took the view his performance was not likely to improve and her decision to dismiss was reinforced. The fact the claimant was black and/or had called the police did not factor into her decision-making process. The Tribunal found taking into account Kathryn Forshaw's motivation and decision-making process, the respondent advanced a non-discriminatory explanation that can defeat any inference of unlawful race discrimination. A hypothetical comparator in the same circumstances in all material respects as the claimant save for his colour, would have been treated exactly in the same way from being given a chance to improve on the 4 January through to 10-days later a dismissal on the 14 January 2019 when there was no improvement.

Automatic Unfair Dismissal

113 With reference to the issue what was the principle reason for dismissal of the Claimant, the Tribunal found on the balance of probabilities that it was conduct for the reasons set out above, and there was no causal connection between Kathryn Forshaw's decision-making process and the fact the claimant had called the police on the one occasion only.

114 With reference to issue 7, namely, was it that the claimant had made a protected disclosure, the Tribunal found that he had not. The Claimant relied upon him calling the police in relation to the young girl, and therefore risking the criminalisation of her behaviour, and the Tribunal took the view that this was not a protected disclosure made in respect of the respondent's behaviour to which no criminal liability could be attached. The claimant's intention was to call the police to control the young person and this was his sole objective at the time. An agreement had been reached with the local authority the police could be called to manage the young girl when she was out of control, and the claimant was aware of this. There were no issues with the respondent that the police could not be called, evidenced by the fact the claimant's colleague also had no problem calling the police a second time. The key issue for the Tribunal is that the claimant in calling the police was not reporting criminal activity on behalf and the respondent, and he was not "blowing the whistle" on the respondent's activities.

115 With reference to issue 7.2, namely, has the Claimant confirmed the relevant wrongdoing for the purposes of section 43B(1) ERA 1996, the Tribunal found the wrongdoing was that of the young person and not the respondent.

116 With reference to issue 7.3, namely, did the Claimant reasonably believe that the disclosure was made in the public interest, the Tribunal found the claimant's sole motivation was to control the young person and there was no public interest in respect of the respondent.

117 There is no requirement for the Tribunal to consider the remaining issues having found the claimant had not disclosed information for the purposes of S.43B as explored by the EAT in the well-known case of Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325, EAT and Kilraine v London Borough of Wandsworth *2018 ICR 1850, CA*, the Court of Appeal held that 'information' in the context of S.43B is capable of covering statements which might also be characterised as allegations. Thus, 'information' and 'allegation' are not mutually exclusive categories of communication — rather, the key point to take away from Cavendish Munro (above) was that a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a relevant failure. The claimant when calling the police to assist him manage the young girl was not providing information that tends to show' that one of the relevant failures has occurred, is occurring or is likely to occur, the claimant relying on section 43(B)(1)(a) a criminal offence when there was none in relation to his employer.

118 As set out by the Court of Appeal in Kilraine went on to stress that the word 'information' in S.43B(1) has to be read with the qualifying phrase 'tends to show' — i.e. the worker must reasonably believe that the information 'tends to show' that one of the relevant failures has occurred, is occurring or is likely to occur. Accordingly, for a statement or disclosure to be a qualifying disclosure, it must have sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f). It is a question that is likely to be closely aligned with the issue of whether the worker making the disclosure had the reasonable belief that the information he or she disclosed tends to show one of the six relevant failures. Furthermore, as explained by

Lord Justice Underhill in Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA, this has both a subjective and an objective element. If the worker subjectively believes that the information he or she discloses does tend to show one of the listed matters, and the statement or disclosure he or she makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his or her belief will be a reasonable belief. The Tribunal took the view that when calling the police Mr Johnson did not have in mind the information he gave to the police concerning the behaviour of the young girl tended to show any of the matters listed in section 43B in respect of the respondent, and he could not have held any reasonable belief that information he disclosed tended to show one of the six relevant failures on the part of the respondent.

119 Briefly dealing with the requirement that the claimant in making a disclosure to the police must satisfy four conditions set out in S.43G(1) ERA, had the Tribunal found such a disclosure was made (which for the avoidance of doubt it did not) it would have gone on to conclude the claimant did not at the time of the disclosure, believe that he will be subjected to a detriment by the respondent if he makes a disclosure to his employer in accordance with S.43C or to a prescribed person in accordance with S.43F — S.43G(2)(a). The possibility of a detriment did not enter his mind because his sole objective was for the police to assist him controlling the young girl. The Tribunal took the view that the claimant could not have reasonably believed he would be subjected to a detriment if he had reported the behaviour of the young girl to the respondent. The respondent knew precisely how difficult she was, there was a pre-existing agreement with the local authority that the police could be called and there were no consequences to the claimant's colleague who also called the police the second time. For avoidance of doubt, there would no issue with the claimant informing the respondent that he had called the police, evidenced by the fact that he was spoken about in positive terms. Calling the police was not a disciplinary offence, the claimant was not disciplined and there was no evidence that anybody else in the company had been disciplined in similar circumstances involving difficult uncontrollable young people who needed specialist handling due to a myriad of reasons as a result of psychological and other health/mental health issues.

120 There was no evidential basis for the Tribunal to find the claimant reasonably believed that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he made a disclosure to the employer — S.43G(2)(b), for the reasons set out above, and the Tribunal found this was not the case. The claimant had not previously made a disclosure of substantially the same information, either (i) to his employer or (ii) to a prescribed person in accordance with S.43F — S.43G(2)(c).

121 In conclusion, whilst the Tribunal accepts the claimant reasonably believed the young girl was committing a criminal offence when he rang the police his sole motive was to control her behaviour, which had nothing to do with the respondent or anything the respondent had done. It was the young person's criminal activities the claimant was disclosing to the police, not that of the respondent or any of the respondent's employees. The respondent was not linked to the relevant failing in any way and the claimant's disclosure did not demonstrate that any relevant failing on the part of the respondent was likely to continue. For example, there was no suggestion the

respondent or its employees/workers were mismanaging the young person and that linked into her criminal behaviour, which is unsurprising as the claimant was one of the child care workers on duty during the incident, and he took control of the situation evidenced by the written records i.e. when matters had quietened down the claimant took a cigarette from the young person and her behaviour immediately deteriorated and escalated an incident which flies in the face of the claimant being "frightened for his life" by the sixteen year old girl he and his colleague were responsible for safeguarding.

122 Had the Tribunal found the claimant made a disclosure about the respondent, which it did not, there was the insurmountable problem with causation and the separate matter of his motivation i.e. it was to control the young girl and he was unable to establish a causal link between his dismissal and the fact he had called the police. The Tribunal was satisfied that it did not influence Kathryn Forshaw's decision-making process in any way, the decision to dismiss was made before the alleged disclosure and when she informed the claimant that he was summarily dismissed at the meeting of 14 January 2019 there was no material influence and the fact the claimant had called the police was an irrelevance to her.

Arrears of Pay

123 The burden was on the claimant to prove that an unlawful deduction of wages had taken place, and he had failed to discharge that burden, having changed the basis of his claim and did not produce any evidence in support of it, other than the claimant's less than credible oral evidence. Ms Famutimi in oral argument incorrectly submitted the claimant accepted there was no unlawful deduction of wages; this was not the case. At no stage did the claimant accept he had no evidence, and this claim was continued through to oral submissions.

124 With reference to paragraph 14, namely, is the Claimant owed any monies with respect to arrears of pay the Tribunal found that he was not.

125 The determination of what is 'properly payable' the Tribunal must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the claimant on the relevant occasion and this requires consideration of all the relevant terms of the contract, including any implied terms (including the implied term of mutual trust and confidence) —Camden Primary Care Trust v Atchoe cited above. For the purpose of this exercise the claimant has accepted the contractual provisions set out in the contract referred to above, one which he did not apparently receive but was still aware of its terms. The Tribunal accepted that at some stage in his employment, despite the contract not having been signed, the claimant was made aware of its terms and worked to those terms. For the purposes of calculating any arrears of pay the unsigned contract sets out the agreement reached between the parties.

126 The claimant's case of unlawful deduction claim is confused; the schedule of loss claims £330 calculated at 33 hours allegedly unpaid over Christmas, New Year, induction and shadow shift. The claimant's hourly was not £10 per hour as he claims, and in oral evidence the claimant's evidence shifted, and he indicated he had not been

paid the correct overtime rate and that was his claim. The claimant believed he was entitled to a double rate for Christmas, New Year and Boxing Day.

127 In accordance with the employment contract working on a Boxing Day was calculated at 1.5 the hourly rate, and the claimant was incorrect that he should have received twice the hourly rate. The claimant also alleged the timesheet was incorrect and he had worked until midnight when the timesheet showed 10pm. The claimant maintained he had started work early afternoon at "around 2pm. I started mid-day I think…I started and slept at work" and when it was put to him that his basic salary had been enhanced the claimant's response was "not clear to me. We should move on" asserting he was owed 7-hours double pay without any contemporaneous documentary evidence to support his claim. The claimant in oral evidence contradicted himself, and the Tribunal preferred to rely on the documents produced by the respondent as to the hours the claimant worked and pay he received.

128 The burden is on the claimant to establish he suffered an unlawful deduction of wages, which he has failed to discharge claiming in excess of his contractual hourly rate and hours worked when they were not shown on his timesheet.

Notice pay

129 With reference to paragraph 16, namely, did the Claimant work for the Respondent for in excess of 1 month, the Tribunal found that he had and was consequently entitled to receive notice pay. The claimant commenced his employment on 5 December 2018 and dismissed on the 14 January 2019, and was employment for just over one month. Under the contract, which the claimant disputes he received, and yet relies upon as the basis for his unlawful deduction of wages claim in respect of the double time over the Christmas period, he is entitled to one week's contractual and statutory notice pay and that claim is well-founded.

130 The respondent pleads that the claimant was guilty of gross misconduct and was not entitled to notice pay. This was not a matter to which Kathryn Forshaw addressed her mind when she dismissed the claimant without notice because he did not have sufficient continuity of employment, but this is irrelevant to the Tribunal's consideration as it is required to consider whether the claimant was in breach of contract such that is conduct might be considered repudiatory. Ms Famuttimi's oral submissions concentrated on the continuity of employment issue and no reference was made to whether the claimant was in fundamental breach of contract or not and this did not appear as one of the agreed issues despite the respondent's pleading.

131 It is undisputed under the contract the claimant was entitled to the statutory maximum of one week's notice pay. The Tribunal asked itself was the claimant guilty of conduct so serious as to amount to a repudiatory breach, concluding on the balance of probabilities that whilst the claimant's actions amounted to underperformance and misconduct, for example use of phone and sleeping at work, they did not amount to a repudiatory breach of the whole employment contract entitling the respondent to summarily terminate the contract despite the claimant's past conduct when he had slept whilst on duty before and not been dismissed or threatened with dismissal. The Tribunal has taken into account the exception circumstances of the weekend 13 and

14 January 2019, which could provide some explanation as to why the claimant behaved as he did at the end of it.

132 The claimant earned £8.46 per hour gross, £17600 gross per annum. The claimant worked a 40 hour per week that totals £338.40 and not the sum of £412.50 as set out in the claimant's schedule of loss. In conclusion, the respondent was in breach of contract, the claimant was wrongfully dismissed and his claim for unpaid notice pay is well-founded. The respondent is ordered to pay to the claimant notice pay in the sum of £338.40 gross less lawful deductions of tax and national insurance.

133 The claimant's claim of automatic unfair dismissal brought under section 103A of the Employment Rights Act 1996 as amended, received on 21 May 2019 was not presented before the end of the period of 3 months beginning with 14 January 2019, the effective date of termination of employment. The Tribunal is satisfied that it was reasonably practicable for a complaint to be presented before the end of that period of 3 months and the complaint was not presented within such further period as the Tribunal considers reasonable. The Tribunal does not have the jurisdiction to consider the complaint, which is dismissed.

134 The claimant's claim of race discrimination brought under section 13 of the Equality Act 2010 was not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done) on 14 January 2019. The balance of prejudice was found in favour of the claimant and in all the circumstances of the case, it considers that it is just and equitable to extend the time limit to 25 May 2019 and the Tribunal has the jurisdiction to consider the complaint.

135 The claimant was not unlawfully discriminated against on the grounds of his race and his claim for direct unlawful race discrimination is not well-founded and is dismissed.

136 The claim for unlawful deduction of wages brought under section 13 of the Employment Rights Act 1996 as amended, was presented before the end of the period of 3 months beginning with the operative date from which time starts to run being the end of 31 January 2019, the date the claimant was last paid.

137 The claimant did not suffer an unlawful deduction of wages and his claim brought under section 13 of the Employment Rights Act 1996 is not well-founded and is dismissed.

Employment Judge Shotter
8.1.2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

25 January 2021

FOR THE SECRETARY OF THE TRIBUNALS

RESERVED **Case No. 2405786/2019**
Code V

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: 2405786/19
Mr W Johnson v New Horizons (NW) Ltd

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 25 January 2021

"the calculation day" is: 26 January 2021

"the stipulated rate of interest" is: **8%**

MR S ARTINGSTALL
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at
www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.