EMPLOYMENT TRIBUNALS

Claimant: **Mr AM Ashu**

Respondent: **New Red Planet Limited**

Heard at: **Leeds by CVP** **On: 2-4 June 2021**

Before: **Employment Judge Maidment**
Members: **Ms J Lancaster**
Mr DW Fields

Representation
Claimant: **In person**
Respondent: **Mr P Whelan, Managing Director**

JUDGMENT having been sent to the parties on 7 June 2021 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. The claimant was employed as a temporary worker undertaking assignments particularly focused on the education sector.

2. He complains that he was automatically unfairly dismissed on the ground that he had made a public interest disclosure. The protected qualifying disclosure relied upon is contained in an email he sent to the respondent dated 4 April 2020 regarding the respondent's obligations to check documents showing an employee's entitlement to work in the UK. The respondent does not accept that this communication amounted to a protected qualifying disclosure. The claimant was employed from 14 March 2019 until, at latest, 27 July 2020 so that he does not have the requisite two years' qualifying service in order to bring a claim of ordinary unfair dismissal.

3. The claimant further complains that he was subject to the detriment of not being selected for the Coronavirus Job Retention Scheme (furlough) on the ground that he made the same public interest disclosure.

4. The claimant then brings a complaint seeking damages for breach of contract in respect, firstly, of his notice period and, secondly, in respect of a failure to provide him with at least 350 hours of work in the year.

5. Finally, the claimant seeks a payment in respect of holiday entitlement accrued but untaken as at the date of the termination of his employment.

Evidence

6. The tribunal had before it a bundle of documents numbering some 528 pages. In addition, the claimant had provided his own supplementary bundle of documents consisting of a further 62 pages. The tribunal noted that the claimant appeared to have been employed by the respondent on the basis that he had entered into a contract with an apparent employment business called Principal Resourcing Limited ("Principal") who in turn had their own contractual relationship with the respondent. The tribunal, to understand fully the employment relationship between the claimant and the respondent, considered that it would be helpful for there to be disclosure of the contracts the claimant and respondent had with Principal Resourcing Limited. During an adjournment in the hearing, during which the tribunal was read into the witness statements and relevant documents, those contracts were provided by the parties to each other and to the tribunal.

7. The claimant raised that he believed that not all internal emails about him within the respondent had been disclosed. The respondent's position was that it conducted more than one search of emails and that everything which existed had been disclosed. The tribunal was not in a position to order disclosure of communications which were not in the respondent's possession. The claimant's position was that he could show from the documents which had been disclosed that further documents existed. If that was the case, then he could explore the issue further in cross examination of the respondent's witnesses. That included an issue the claimant had that the respondent had allegedly changed the email address which was actually used in communications with it. Ultimately, that issue was explained to the tribunal's satisfaction in terms of the respondent migrating from one email address to another with a system of auto forwarding set up where the email address displayed at the respondent's end was not necessarily the address to which the communication had originally been sent. In any event, such issues were not ultimately material to the tribunal's considerations.

8. The tribunal heard firstly from Mr Philip Whelan, the respondent's managing director and then from Sara Janicki, the respondent's Operations Manager. At the outset the claimant raised an issue that the witness statement originally produced by Mr Whelan had in fact been amended. The amendment related to the removal of reference to settlement discussions in a timeline which was contained within the witness statement in circumstances where there had been no change to the narrative body of the statement. The claimant was concerned that

there were still page number references to documents which referred to settlement discussions. The tribunal explained that it was mindful that any such discussions were conducted on a without prejudice basis and that such documentation would not be read or considered.

9. The claimant gave evidence on his own behalf and with reference to his own written witness statement exchanged between the parties.

10. Having considered all relevant evidence, the tribunal makes the following factual findings.

Facts

11. The respondent is in business as a payroll provider with a specialty in the education sector, working in partnership with employment businesses and agencies who supply temporary workers to their own clients/end users. The respondent acquired the business of a company known as Red Planet Contract Services t/a Originem pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") on 31 August 2019. There is no dispute as to the actuality and effects of the TUPE transfer and references hereafter to the respondent are intended to cover both employers.

12. Employment businesses, particularly ones with a relatively small number of potential agency workers on their books, might use the respondent as a cost-effective means of outsourcing their payroll responsibilities. The respondent had licences to use specialist software for ensuring the due processing of payments to temporary workers. The respondent could act as a source of information and advice for the agency workers. The respondent could also take on the responsibility for the workers' employment status in terms of their rights to statutory payments such as sick pay and holidays. The workers could also in turn enjoy the benefit of insurance cover held by the respondent.

13. The respondent had, amongst others, a contractual relationship and partnership with an employment business known as Principal which itself engaged temporary workers on an agency basis to supply them to its own education sector clients. The respondent had no relationship with the end users but indeed relied on third party agencies for the placement of workers.

14. The claimant came into contact with Principal in March 2019 and entered into an agency worker contract with Principal on the understanding that they would seek to place him in work with their clients in the education sector. Before, however, he entered into a contract with Principal, they provided him with an electronic link, through which he accessed contractual documentation issued by the respondent.

15. This included a starter pack, as part of which the claimant then provided to the respondent his personal details including bank details for payment. The document he completed included a box into which he inserted his national insurance number and declared his nationality as Swedish. The claimant's role was described as cover supervisor. He signed a declaration on 14 March 2019 confirming that he had provided his

identification details to his agency (Principal) and satisfied current money-laundering legislation. He gave permission to the respondent to access this information for any purpose.

16. The claimant at the same time signed an employment contract with the respondent.

17. This declared that the respondent was in the business of entering into contracts to perform temporary services and/or supply the services of its employees on a temporary basis to its clients. The respondent wished then to employ the claimant on a permanent basis on terms which were said to be made in compliance with Regulation 10 of the Agency Workers Regulations 2010.

18. Mr Whelan on behalf of the respondent accepted that he understood that this was a reference to the so-called Swedish Derogation in the Agency Workers Regulations. Whilst now repealed, Regulation 10 allowed for a particular type of contractual arrangement to be in place with an agency worker which had the effect of removing the worker's right to claim equality of pay with a comparable worker engaged directly by the hirer. Clause 5 made clear that the effect of entering into the contract was that the claimant had no entitlements to the rights conferred by Regulation 5 (rights in relation to basic working and employment conditions) in so far as they related to pay. The tribunal notes at this stage that one of the conditions of the effectiveness of such an agreement was that the agency worker was paid in between and not just during assignments.

19. Under Clause 7 of the agreement the respondent would seek to arrange assignments for the claimant. Clause 11 provided as follows: "*As your employer, we guarantee that you will be offered at least 350 hours of work at the Pay Rate during each calendar year calculated from your Commencement Date. This guarantee is subject to the termination provisions at clauses 39 and 40 of this Agreement and subject to your Assignment not being suspended (for example, without limitation, in cases where safeguarding allegations have been made).*" It went on to state that the minimum number of hours per week that would be offered would be 6 with a maximum of 48 unless the worker agreed to opt out of the limit on weekly working hours prescribed by the Working Time Regulations 1998. Mr Whelan explained that the provision as to the minimum hours which wouldl be offered was in recognition that it would not be economical or expected for a worker to attend a site to work for only minimal periods of time.

20. Clause 12 recognised that the respondent's obligation to take reasonable steps to find suitable work might be discharged by its engagement of an employment business to seek work on his behalf. Under Clause 13 the claimant agreed to accept assignments offered, continuing that, in the event of a refusal to accept assignments deemed suitable and/or in the event of an assignment being suspended, he would be deemed to be unavailable for work and therefore not entitled to pay between assignments from the respondent. The refusal of a suitable assignment and/or suspension of an assignment might also constitute gross

misconduct entitling the respondent to terminate employment without notice.

21. Clause 15 recited an agreement that the respondent's obligations under Regulation 10 (1)(c)(iii) of the Agency Workers Regulations - the provision entitling the worker to a minimum amount of remuneration in between assignments – *"apply only where you are not working for a Client/End User but are available to do so. Whether you are available for work will be determined upon all relevant circumstances, including but not limited to your compliance of any obligations contained within this Agreement, your continued contact with us and the factors set out in the non—exhaustive list at clause 16 below."*

22. Listed circumstances in which the claimant would be considered to be unavailable for work then included periods on an assignment, periods working for a third-party and circumstances *"in which you have failed to maintain regular contact with our officers or failed to respond to any contact from us… or have indicated that you no longer wish to work through us, whether via a request for a P45 or otherwise*". In addition, the claimant would be regarded as unavailable for work following a refusal to accept an offer of suitable work.

23. Clause 40 allowed the respondent to terminate employment *"immediately in the event of gross misconduct or serious or persistent breach of the terms of this Agreement, in particular, any failure by you to advise us of your unavailability for work…"* Otherwise employment was terminable by giving the minimum statutory notice. Pursuant to Clause 41 the respondent was further entitled to terminate employment should there be a period of 4 weeks in aggregate in which he was not working for a client but was available to do so.

24. Having gone through the process of agreeing to these contractual documents with the respondent, the claimant entered a separate agency worker contract with Principal. He was then offered and performed work for clients of Principal during a total of 7 weeks set out in the table below showing amounts received from the respondent and an additional amount paid to him in respect of rolled up holiday pay calculated at the rate of 12.07% of time worked (representing pro rata the claimant's entitlement under the Working Time Regulations to 5.6 holidays per week).

Pay date	Gross pay	Net Pay	Holiday Pay
23/05/19	£234.98	£179.90	£20.81
30/05/19	£289.46	£216.84	£26.76
13/06/19	£70.00	£56.00	£5.95
27/06/19	£134.00	£107.20	£11.89
27/09/19	£40	£32.00	£4.31
04/10/19	£134.00	£134.00	£14.43
27/12/19	£194.73	£188.21	£20.97

25. The claimant also managed to obtain and performed work through other agencies not associated with the respondent. Through one agency he had earned two separate gross amounts of £65 for the weeks ending 12 April and 26 April 2019. For a further agency he earned the gross sum of £32.49 for the week ending 10 May 2019. From a final agency he earned the gross sums of £279.22, £295.98 and £68.72 for the weeks ending 6 December 2019, 13 December 2019 and 7 February 2020.

26. The claimant accepts that when he commenced his engagement with Principal, he provided to them identification documents including his passport to enable them to check that he was eligible to work in the UK. There is indeed no dispute that the claimant was so eligible. The tribunal also accepts that the respondent was informed by Principal that it had conducted these checks. There is again no dispute that the respondent did not conduct any checks of its own, but relied on Principal to undertake this legal requirement.

27. The claimant accepts that, shortly after completing the contractual documentation with the respondent, he received a phone call from its offices essentially by way of an introduction.

28. The claimant then received by email a letter from Mr Whelan as managing director of the respondent on 3 September, but dated 31 August 2019, notifying him that his employment was being transferred to the respondent from 31 August as a result of a purchase of the business pursuant to TUPE.

29. The claimant responded on 3 September saying that he did not understand from where Mr Whelan had obtained information about him and asking on behalf of which agency he was acting. Mr Whelan responded on 4 September stating that the respondent would process the pay for his recruitment company and that if he was being paid weekly his pay would be processed in the same way as previously. The tribunal has seen that the respondent did issue revised contractual documentation under its own (new employer) name which the claimant did not sign and return. The respondent does not seek to argue that the claimant's employment in any event continued other than on his original terms and conditions.

30. Thereafter, the claimant made no contact with the respondent until 1 April 2020.

31. On that day the claimant copied Mr Whelan into an email sent to Principal referring back to the letter informing him of the August 2019 TUPE transfer. He raised a failure to comply with the notification requirements under TUPE. He then stated that it was not until 31 March that he became aware that the respondent was his employer when it appears that he raised with Principal that he had not been paid when he had reported as sick. At that point it appears that Principal referred the claimant to the respondent. He also stated that Principal remained the data controller of his personal information and he was concerned that a law had been

broken. He said that if he did not hear from Principal and/or the respondent within 15 days he would have no option but to take the matter to an employment tribunal.

32. After receiving a holding response from Principal, the claimant sent a further email copied to Mr Whelan saying that previously documentation from the respondent had been sent to him – he had not requested it. He said that he had no option but to complete it to get his wages, but he did not believe his contract would transfer to the respondent and would never have signed the form had he known that at the time. He concluded: "I want to opt out!"

33. The respondent replied to the claimant's email which had been head "complaint" on 1 April explaining, amongst other things, that the respondent was the payroll provider for Principal. The claimant responded with his further comments.

34. The respondent operates a practice of generating a weekly schedule of all of its employed workers who have not undertaken any work in the preceding 12 week period. The names of such individuals are then shared with the agency which has previously been providing them with work asking for confirmation that they are content for the respondent to issue notices terminating the employment of those individuals. The claimant's name appeared in such an exercise conducted at the end of March in circumstances where his last payment date had been 27 December 2019. However, in circumstances of the claimant now making contact and raising a complaint, the respondent thought it inappropriate to issue a letter of termination and that it should seek to find a solution to the issues the claimant was raising.

35. Further, the coronavirus pandemic had resulted in a national lockdown including the closure of schools to the majority of pupils from the last week of March 2020. The respondent, which has a small staff of only 5 office-based employees, was inundated with queries from workers regarding the situation and their entitlements. To answer queries in the most efficient manner the respondent sent updates of a generic nature to all of those still on its database of workers.

36. Thus, on 3 April the claimant received such an update which referred to current and continuing uncertainty regarding the details of the Coronavirus Job Retention Scheme. It stated that whilst they were waiting for updates from the government, they would be working with the workers' agency to identify which workers were eligible to be furloughed. It stated: *"this will be based on certain criteria, such as being on our payroll week ending 28 February 2020 and having worked on an assignment recently for your agency."* The claimant accepted in cross examination that he could not maintain that he had worked on a *"recent"* assignment.

37. The claimant next emailed Mr Whelan on 4 April. He repeated his complaints as to how he had come to enter into an agreement with the respondent and a lack of compliance with the requirements of TUPE. He complained about the sharing of personal information. In his 7th numbered point he stated: "*it strikes me odds to know I am in employment*

with Originem but Originem did not check my right to work documents; something that every employer is required by law to do before employing someone." He then raised a number of questions which included one asking whether the respondent believed it was lawful to employ someone and pay them wages without having to see a copy of their right to work documents. If not, why, he asked, did the respondent employ and pay him wages without having to verify his right to work documents. He said he was concerned that the Data Protection Act had been breached.

38. The respondent subsequently corresponded with the claimant about his statutory sick pay entitlement. In an email of 8 April, he was asked if he would like the respondent to close his complaint and delete his information from the system. He responded asking them to stop asking if he wanted his personal information to be deleted saying that this would eventually happen *"as there is lack of confidence and trust*".

39. On 9 April a further standard email from the respondent was received by the claimant regarding furlough. Guidance was still being sought by the respondent. On that day the claimant reminded the respondent of his deadline for a response to his complaint of 1 April. On 15 April he reminded the respondent about his deadline for a response to his 4 April email. He referred to the matters disclosed being under the Public Interest Disclosure Act 1998 and that the Home Office made it clear that employers could be fined up to £20,000.

40. The respondent emailed the claimant on 16 April. As regards the question as to whether it was unlawful for the respondent not to see a copy of right to work documents, the respondent replied that: "*we feel confident in our process*." It asked whether there was any reason to believe that the claimant should not be working in the UK. The claimant replied saying that he would now proceed to the next step required under the Public Interest Disclosure Act.

41. He then emailed Mr Whelan on 16 April referring to the respondent's whistleblowing complaint procedure, if any, asking to know which organisation he should take his concern to as he was not satisfied by the respondent's response. If he did not hear from the respondent by 17 April, he said that he would take his concern to an appropriate organisation. In a separate email that day he repeated a complaint about the sharing of personal information. The respondent replied that he would be aware that the application pack he sent to the respondent contained all the personal information that the respondent held on him. At no point did the respondent need to share that information. On 17 April the claimant emailed regarding an intention to lodge a County Court claim in respect of breach of contract and breach of TUPE. On 19 April he emailed saying that there would be a new allegation regarding unlawful deductions from wages.

42. As regards the right to work documentation, following the claimant raising the issue, Mr Wheelan checked the respondent's practice and that it was in accordance with what he understood to be its legal obligations. He understood that if it had not been sufficient to meet legal requirements, there would have been an obligation to review and change it. He said that

he was confident before the review that they were meeting the legal obligation and this was confirmed on his further enquiries. Whatever their contractual or customary arrangements with Principal had been, he understood that if the respondent's practice was in breach of legal obligations it would have to change. He said that he took no displeasure at the claimant raising this issue. He referred to the respondent's whistleblowing policy which encouraged employees to raise concerns and in fact provided that they might be subject to disciplinary action if they did not disclose wrongdoing. The policy recognised that if an investigation found the complaint to be unsubstantiated, but the employee was still not satisfied, they could complain to prescribed persons.

43. On 30 April a standard email was sent to the claimant regarding the removal of Regulation 10 from the Agency Workers Regulations with effect from 6 April 2020.

44. On 1 May the claimant complained to Mr Whelan regarding a notification he had received from HMRC which seemed to indicate that his employment with the respondent had ended on 5 April 2020. The claimant was advised to contact HMRC by the respondent on 5 May. There is no evidence that the HMRC notification to the claimant arose out of any action taken by the respondent.

45. The claimant emailed Mr Whelan on 6 May 2020 asking for the eligibility criteria to furlough employees. He said that it appeared that he was being unfairly treated as a result of the whistleblowing concerns he had raised. On 7 May he emailed Mr Whelan saying that he needed to know whether he had been put on furlough and if he was still employed by the respondent. In a separate email he said that if a response was not provided he would have no option but to resign and claim constructive dismissal. He felt that the only possible reason he was being treated unfairly was because of his whistleblowing complaint. He threatened to take the matter further to an employment tribunal.

46. The respondent's decision on who to furlough was based on who had been paid for a recent assignment and whether the respondent felt there would still be an assignment waiting at the end of the furlough period. Mr Whelan's evidence is accepted and there is no evidence of any other employee in the claimant's situation being treated differently. The decision was taken that nobody would be furloughed who had not been paid in the 2020 calendar year on the basis that that would reflect that they had not had any recent assignment. As the claimant's last payment date through the respondent was 27 December 2019, no furlough was offered to him. Mr Whelan described a very difficult situation in late March/early April 2020 where the majority of schools were closed and the respondent's income was seriously affected. There was a cost in retaining employees on furlough which in fact came to around £50,000 to the respondent. It was considered reasonable to look at the 12 week report so that if people had not worked in the last 12 weeks or been in touch and had no assignment upcoming their contract would be terminated. They decided not to furlough anyone who had not been paid in 2020 as it was unlikely that there would be future assignments for them and so that the respondent could still function as a business. It was only because of the

generosity of the furlough scheme, Mr Whelan said, that the respondent was able to function. It was only because of the claimant's contact at the beginning of April that his contract was not terminated.

47. The claimant made contact with ACAS regarding a potential tribunal complaint.

48. On 27 July 2020, the respondent emailed the claimant stating: "*please find your P45 attached as requested."* There is no dispute that no specific request was made by the claimant for his P45. The P45 provided for a termination of employment date of 17 July 2020. Mr Whelan told the tribunal that he believed the claimant's previous communications evidenced a wish/intention on the claimant's part to resign from his employment.

49. Mr Whelan's evidence was, again, that ordinarily the claimant's employment would have been terminated in April. There then followed a very busy and disruptive period for the respondent and the claimant then was taken off the report which would have ordinarily generated a letter of termination. There was then an understanding that the claimant was resigning from his employment and, if that was not the case, the respondent had to revisit the 12 week cycle against which the claimant was an individual who was flagged as someone who had not worked for such period. He was adamant that the claimant's disclosure regarding right to work documents had no bearing on his decision.

50. The claimant would ordinarily have been entitled to 1 week's notice but the respondent did not consider that he had complied with his contract of employment and that any notice was due.

Applicable law

51. Section 43A of the Employment Right Act 1996 provides that a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of the Sections 43C to 43H. Section 43B of the Employment Rights Act 1996 provides as follows:-

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

52. It is clear that a disclosure must actually convey facts and those facts must tend to show one of the prescribed matters. The making of an allegation or the expression of opinion or state of mind is insufficient.

53. As regards the public interest requirement, the tribunal refers to the case of **Chesterton Global Limited v Nurmohamed [2017] IRLR 837** where Underhill LJ cited following factors as a useful tool in determining whether it might be reasonable to regard a disclosure as being in the public interest as well as in the personal interest of the worker:

    (a) "*the numbers in the group whose interests the disclosure served…..;*
    (b) The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
    (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
    (d) the identity of the alleged wrongdoing –… "The larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest…"

54. Section 103A of the Employment Rights Act provides that:

    "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

55. This requires a test of causation to be satisfied. This section only renders the employer's action unlawful where that action was done because the employee had made a protected disclosure. In establishing the reason for dismissal, this requires the tribunal to determine the decision making process in the mind of the dismissing officer which in turn requires the tribunal to consider the employer's conscious and unconscious reason for acting as it did.

56. The issue of the burden of proof in whistleblowing cases was considered in the case of **Maund v Penwith District Council 1984 ICR 143**. There it was said that the employee acquires an evidential burden to show – without having to prove – that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason that he or she is advancing. However, once the employee satisfies the Tribunal that there is such an issue, the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal. However, there is an important qualification to this which applies, as in the current case, where the employee lacks the requisite

two years' continuous service to claim ordinary unfair dismissal. In such a case the claimant has the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason.

57. Nevertheless, it is appreciated that often there will be a dearth of direct evidence as to an employer's motives in deciding to dismiss an employee. Given the importance of establishing a sufficient causal link between the making of the protected disclosure and the dismissal, it may be appropriate for a tribunal to draw inferences as to the real reason for the employer's action on the basis of its principal findings of fact. The Tribunal is not, however, obliged to draw such inferences as it would be in any complaint of unlawful discrimination.

58. This case also involves allegations that the claimant has been subjected to a detriment in not being furloughed on account of his having made a protected disclosure.

59. Section 47B of the 1996 Act encapsulates a worker's rights (in circumstances other than where the worker is an employee and the detriment in question amounts to dismissal) providing at subsection (1) that:-

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

60. Again, the issue of causation is crucial and, if the other necessary elements of a whistleblowing detriment claim are made out, it is for the employer to show the ground on which any act, or deliberate failure to act, was done The Tribunal refers to the case of **NHS Manchester v Fecitt and others [2001] EWCA Civ 1190** and in particular the judgment of Elias LJ. His view was that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. He said:

> *"Once an employer satisfies the Tribunal that he has acted for a particular reason – here, to remedy a dysfunctional situation – that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the Tribunal considers that the reason given is false (whether consciously or unconsciously) or that the Tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the **Igen** principles".*

61. The tribunal deals with the principles involved in the claimant's monetary/contractual complaints in its discussion of them in the conclusions below.

Conclusions

62. The claimant's contract of employment was designed, legally, to take advantage of the Swedish Derogation in the Agency Workers Regulations, but, to do so, it had to provide for a form of retainer or

guaranteed minimum payment in periods in between assignments. It provided for a guarantee minimum offer of 350 hours. This was subject to the termination provisions in the contract of employment. Importantly it was also subject to clause 15 which provided that the minimum payments were no longer to be made if, for example, the claimant was working for a third-party or if he was unavailable for work.

63. The claimant commenced his employment on 14 March 2019 which gave rise (on the contractual wording) to a minimum entitlement to 350 hours in the period to 13 March 2020. The reference was to the calendar year from commencement which can not therefore be interpreted as designating 1January to 31 December as the relevant period for calculation of hours.

64. Looking at the period of his employment he carried out work for the respondent, through Principal, on days in May, days in June, nothing in July and August (but in circumstances where the schools would be closed due to the Summer break), then again worked in September, October and December 2020. At no stage during this period did the claimant make contact with the respondent other than in response to the notification of a TUPE transfer. It is notable however that at no stage did the respondent seek to raise with the claimant that he was not complying with any obligation to make contact or enquiring as to his availability for work. The claimant never for instance would have been flagged up on the respondent's system as inactive on the basis of the generation of the 12 week reports. There were no significant gaps (given its temporary assignment nature) unexplained by school closures in the claimant's provision of work.

65. The last payment received by the claimant was on 27 December 2019 and the tribunal notes the timing again in terms of school holidays. The tribunal considers that the claimant cannot have been (and was not) regarded as unavailable for work for a period thereafter and, including in circumstances where the respondent reserved the right to terminate employment after 4 weeks of inactivity, considers that any unavailability arose only 4 weeks after that last payment date.

66. From 28 January 2020 the claimant could be termed as unavailable for work arising out of a lack of contact. That situation did not change from 1 April onwards in circumstances where the communications from the claimant were not regarding an availability for work or desire to take up work but in fact suggested an unwillingness and unlikeliness of a continuation of a relationship at all with the respondent, subject to being technically employed for the purposes of furlough.

67. Calculating the guaranteed minimum of 350 hours on a pro-rata basis up to 28 January 2020, the claimant ought to have been provided with 45 weeks of work at the minimum rate giving a total of 302.88 hours. He in fact was provided with 108.50 hours of work based on him having worked for the respondent on 15.5 days each of which, on the evidence, was equated to 7 hours. For each complete day of work he was paid at a rate not materially different from £70. The principle behind the arrangement was for the claimant to be paid for not less than one day of work for each

week such that the guaranteed minimum of 350 hours represented 6.73 hours per week and therefore an hourly rate of £10.40 when the daily rate of £70 is divided by that figure.

68. The claimant would therefore be entitled to receive a sum of £2021.55 in respect of a shortfall of hours of 194.38. However, from this sum must, as the claimant accepts, be deducted the earnings he obtained during the period when working for third parties - a sum of £737.69 (the claimant's third-party earnings in February 2020 falling outside the relevant period). This leaves a sum due to the claimant in the gross amount of £1283.86.

69. There is no entitlement to any payment for accrued but untaken holiday entitlement in circumstances where, at the same time as the claimant was paid for all of his hours worked for the respondent, he was paid an additional sum representing his Working Time Regulations holiday entitlement. As at the ending of his employment there was no accrued amount unpaid or outstanding. Regulation 16(1) provides for an entitlement to be paid in respect of periods of annual leave. Regulation 16(5) provides that any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability to make payments. Holiday pay should be paid at the time when leave is taken. However, employers are not precluded from setting off genuine holiday payments paid under a rolled-up method provided such sums have been paid transparently and comprehensively. Here a payment of holiday pay was made on each pay date which was clearly identified in contractual documentation and payslips and constituted a genuine additional payment to the claimant calculated by a formula which satisfied the claimant's statutory entitlement. The tribunal heard no argument from the claimant to the contrary.

70. As regards the claimant's complaints of whistleblowing the tribunal accepts that the claimant's email of 4 April 2020 amounts to a protected qualifying disclosure. There is no argument in this case that there was a provision of information to the respondent in that email. The tribunal accepts that the claimant had a reasonable belief that the respondent was in breach of a legal obligation in not having conducted its own pre-employment checks regarding his right to work. Employers have to conduct such checks and it was not unreasonable for the claimant to believe that this could not be satisfied by his agency (Principal) having conducted the checks rather than the legal entity which employed him. It is not relevant whether the claimant was right or wrong in his belief and indeed this has not been considered by the tribunal.

71. The tribunal on balance accepts that the claimant made his disclosure holding a reasonable belief that the disclosure was in the public interest. The claimant certainly thought it was in his personal interest in the sense that he was arguing against his employment status with the respondent and queried how he could be employed by a body who had not conducted the checks. However, also in his mind was that this was a legal requirement to prevent illegal employment and that this was a matter of interest to the Home Office and in respect of which an employer might be fined. He was also mindful that the respondent operated in the education sector and therefore with public authorities. Certainly, the claimant had

and knew that he had the legal right to work in the UK himself so that any suggestion that checks were not being carried out did not impact on the legality of his own employment but might show malpractice in a more general sense.

72. The claimant's complaint of detriment is that the respondent failed to place him on furlough because of his protected disclosure. The tribunal rejects that contention. The tribunal accepts that the reason for the claimant not being furloughed was that he had not earned any income from the respondent in 2020. There is no evidence of anyone who had not performed work in that period, yet who was furloughed. The evidence is in fact that had the claimant not been in touch with the respondent, slightly earlier than his protected disclosure, on 1 April (not a communication seeking work), his employment would in fact have been terminated. The tribunal notes that the respondent had a whistleblowing policy and that Mr Whelan investigated the claimant's concerns and wished to ensure that the respondent had effectively a clean bill of health. The raising of this issue, one of a number of issues raised by the claimant, did not give him any particular concern and certainly did not put him in difficulties regarding any contractual arrangements the respondent had with Principal. The whistleblowing policy recognised that individuals could take such matters to external authorities. The tribunal does not consider that the failure to furlough the claimant was in any sense whatsoever influenced by his disclosure.

73. As regards the claimant's complaint of unfair dismissal, given his lack of 2 years' continuous employment, this must be based on it being for a proscribed reason - in this case again his protected disclosure. The tribunal concludes that the claimant was dismissed. The claimant's communication of 7 May 2020 could not be interpreted as an unequivocal resignation bringing employment to an end at any particular point in time. It was a form of threat or indication as to future intention, but nothing more. Had the respondent considered this to be an unequivocal resignation at the time, it would have processed the claimant as a leaver at an earlier date.

74. Nevertheless, the tribunal concludes that when the respondent did terminate employment on 27 July 2020 (by the issuing then to the claimant of his P45) it was not at all influenced by the protected disclosure of 4 April, but did so in circumstances where in the ordinary course of the claimant's employment, he would in fact have been dismissed by mid-April. He was in fact terminated around the point of the next 12 week cycle looking back at whether an individual had been engaged and if not whether an automatic letter of termination was to be generated. The claimant's employment ended in circumstances where he had not worked for that period, where he had not been available for work or seeking work and where there was no prospect of future work for him at that time. That is the reason why he was dismissed. There has been reference made to schools looking for employees from September, but not to any continuation or revival of any work the claimant had been involved in performing. Again, had the claimant's complaints not been raised he would in fact have been dismissed at an earlier point in time. The tribunal

refers again to the attitude of Mr Whelan to the claimant's disclosure and the absence of any difficulty created to the respondent by it.

75. The claimant's final complaint is in respect of his notice period. The tribunal has to consider the wording of the termination provisions in the contract of employment. There is no suggestion that the claimant was guilty of any act of gross misconduct. The claimant had been previously in serious and/or persistent breach of the agreement in failing to advise the respondent regarding his unavailability for work, but the respondent had in fact chosen not to terminate employment in April 2020 on that ground. In fact, by the date of termination, the situation was not one of the claimant advising of unavailability for work but of the claimant raising employment issues with the respondent not least including a wish to be included as part of the furlough scheme. In such circumstances, employment was terminable only upon giving the period of 1 week's statutory minimum notice. Statutory minimum notice rights require that to be paid out in accordance with the relevant calculation of the value of a week's pay. The tribunal must in the circumstances look back over the last and only 7 weeks during which the claimant worked for the respondent and determine the weekly average wage. That gives an average gross weekly wage of £156.74.

76. The respondent is therefore ordered to pay this gross sum to the claimant together with the gross sum of £1283.86 in respect of the guaranteed minimum pay between assignments.

77. There is no basis for any uplift in award arising out of a failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. No basis for such uplift has been advanced by the claimant.

78. However, the claimant's complaint of whistleblowing detriment, unfair dismissal and holiday pay fail and are hereby dismissed.

Employment Judge Maidment

Date 23 June 2021