EMPLOYMENT TRIBUNALS

Claimant: Mr S Rydeard

Respondents: 1. William M Snape Manufacturing Services (UK) Limited
2. William Malcolm Snape

Heard at: Manchester **On:** 15, 16, 17 and 18 June 2021
2 September 2021

Before: Employment Judge Leach
Mr R Cunningham
Mrs J Pennie

REPRESENTATION:

Claimant: In person
Respondents: Mr L Bronze, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claimant was not dismissed. His complaint of automatic unfair dismissal (under s103A and/or 104 Employment Rights Act 1996) is dismissed.

2. The complaint of unauthorised deductions from wages for the period 17 July 2018 to 29 August 2019 was brought out of time. It was reasonably practicable for the complaint to have been made in time and therefore the complaint is dismissed.

3. The claimant's complaint that he was paid less than his comparator engaged in like work for the period from 17 July 2017 to 29 August 2017 was brought out of time is dismissed.

4. The claimant's complaint that he was paid less than his comparator engaged in like work for the period from November 2017 to 6 March 2018 does not succeed and is dismissed.

REASONS

A. Introduction

1. The claimant was employed by the first respondent between 1 October 2018 and 6 March 2019.

2. The second respondent is the sole director and shareholder of the first respondent.

3. The claimant claims to have been dismissed from his employment and that the principle reason for dismissal was that he had made a protected disclosure and/or asserted a statutory entitlement to the National Minimum Wage ("NMW"). He brings claims of automatic unfair dismissal, under s103A and s104 Employment Rights Act 1996 ("ERA").

4. The claimant was also involved in the second respondent's business at an earlier stage, in July and August 2018. The claimant was not paid during that period. He claims that he was an employee/worker during this earlier period and therefore should have received a wage that complied with NMW legislation.

5. The claimant also brings claims of equal pay as follows:-

   (1) claiming that he was paid less than his female predecessor in the role held by the claimant between early November 2018 and March 2019 and that the difference in pay was based on gender.

   (2) Claiming that he was not given a contract of employment (and therefore not paid) for the period 17 July 2018 to 29 August 2018. The claimant relies on the same comparator.

6. The claims for equal pay are brought against the first and second respondent. These are the only claims made against both respondents.

7. The first and second respondents deny all claims. Specifically:-

   (1) They say that the claimant resigned from his employment on 6 March 2018 but in any event the claimant was not dismissed (constructively or otherwise) for the principle reason that he had raised protected disclosure or asserted a statutory right;

   (2) It did not engage the claimant as an employee or worker in July and August 2019. There was no contract between the parties. There was no obligation to pay the claimant at all.

   (3) The claimant's complaints in relation to the period July and August 2018 is well out of time.

   (4) Whilst the claimant's chosen comparator was engaged in like work (as a predecessor) and paid a higher hourly rate than the claimant, there were

good reasons (material factors) for this which had nothing to do with gender.

B. The issues

8. The issues were identified at a case management hearing on 25 October 2019 and are set out below (with some uncontroversial corrections).

Preliminary Issue – Employment Status

1. In the period between 17 July 2018 and 29 August 2018, was the claimant:

(a) Working for the first respondent under a contract of employment;

(b) Working for the first respondent under any other contract whereby he undertook to do or perform personally any work or services for the first respondent, where the first respondent's status was not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the claimant, rendering him a "worker" under section 230(3)(b) Employment Rights Act 1996 and "in employment" under section 83(2)(a) Equality Act 2010; or

(c) Neither of the above?

Unlawful deductions from pay – Part II Employment Rights Act 1996

2. If the claimant was between 17 July and 29 August 2018 an employee or a "worker", did the first respondent make an unlawful deduction from his pay during that period by failing to pay him the amount required by way of the National Minimum Wage?

3. If so, can the claimant show that it was not reasonably practicable for him to have presented his claim within three months (allowing for early conciliation) of the last date upon which the respondent made any unlawful deduction?

Equal Pay – Chapter 3 Equality Act 2010

<u>17 July – 29 August 2018</u>

4. If the claimant was in employment as defined in section 83(1) during July – August 2018, was he employed on like work with a female comparator?

5. If so, was there a breach of the sex equality clause in that period in that the claimant was denied a formal contract of employment whereas his female comparator was provided one?

6. Was his claim brought within the time limit prescribed by section 129?

<u>October 2018 – March 2019</u>

7. Was the claimant engaged between 1 October 2018 and 6 March 2019 in like work to that of his predecessor comparator, Lisa Roberts?

8. If so, were the terms of his contract relating to pay less favourable than the terms of her contract?

9. If so, was there a breach of the sex equality clause in relation to his pay during that period? The respondent relies on a material factor defence, namely that her skills and qualifications were the reason for any difference in pay.

<u>Second Respondent</u>

10. If there has been a breach of the equality clause in either period, is the second respondent personally liable for that breach under section 109 as agent or employee of the first respondent?

Unfair Dismissal – Part X Employment Rights Act 1996

11. On 6 March 2019 did the claimant:

(a) make a protected disclosure to Mr Snape, in that he told him he would be going to ACAS about a breach of the National Minimum Wage legislation, bullying and harassment of staff and the fact the claimant was going off sick with stress, that being information which the claimant reasonably believed tended to show a breach of a legal obligation and a disclosure which he reasonably believed was made in the public interest;

(b) propose to take action with a view to enforcing the right to the National Minimum Wage in the period between July and September 2018?

12. Was the claimant dismissed on 6 March 2019 or did he resign?

13. If the claimant was dismissed, was the reason or principal reason that he had made a protected disclosure or said that he intended to enforce his minimum wage rights, rendering dismissal automatically unfair under sections 103A and/or 104A Employment Rights Act 1996 respectively?

Remedy

14. If any of the above complaints succeed, what is the appropriate remedy? In relation to dismissal the respondent will argue that the claimant would have been fairly dismissed in any event given his behaviour on 6 March 2019.

9. In addition to the issues noted above, the case management summary also noted the following time limit issue

There are time limit issues in relation to the period between July and August 2018, both in relation to the unlawful deductions from pay complaint, and the Equality Act complaint. These will be addressed at the final hearing.

10. In this decision we refer to the period 17 July 2018 and 29 August 2018 as *Period One* and the period 1 October 2018-6 March 2019 as *Period Two*.

C. The Hearing.

11. The parties raised 2 issues on day one:-

11.1 Mr Bronze for the respondents noted the time limit issue in relation to the first period and proposed that the Tribunal should consider and decide on the issue discretely and initially as a preliminary issue, before then moving on to hear evidence in relation to the remaining issues. We declined this proposal. It was clear from the case management summary document that all issues (including the time limit issue) were to be heard and decided at this final hearing. 2 further preliminary hearings (case management) had taken place before then and such a proposal had not been made. We decided that we should hear evidence on all issues although noted that, in our decision making, we may well decide the time limit point first and before making findings relevant to the complaint of a failure to pay the National Minimum Wage.

11.2 The claimant complained that the respondents had removed a number of documents from the trial bundle, shortly before the final hearing. Mr Bronze accepted that this was the case and that they had been removed because they were protected by privilege. Mr Bronze stated that the documents included correspondence with ACAS and correspondence headed without prejudice. Whilst not all correspondence had been headed without prejudice Mr Bronze asserted that it was clear that there was a "correspondence chain" and that all was covered by without prejudice protection.

12. As for this second issue, we encouraged the parties to reach agreement in relation to the extracted documents. We did not review the documents themselves but attempted to give guidance and some initial views to the parties. We explained to the claimant the public policy principle protecting without prejudice communications. We were also informed that some correspondence that had been removed was between Respondents and HMRC (in its capacity as regulator and enforcer of NMW). We noted our surprise (again without that having reviewed the correspondence) about the removal of such correspondence and Mr Bronze agreed that he would consider the point with his client.

13. Ultimately and in the course of the hearing, these disclosure issues were resolved by agreement between the parties and documents reinserted into the bundle.

14. We first heard evidence from 2 of the claimant's witnesses, one being the claimant's daughter and the other being Mr Travis Brown ("TB") a former employee of the first respondent.

15. For the main part, day 2 was taken up with the claimant's evidence although we also heard from the claimant's third witness, Jordon Parton ("JP").

16. On day 3 we heard from witnesses called by the respondents, being Peter Turner (an installation engineer employed by the first respondent) ("PT") and Rachel Stedman (a Personal Assistant employed by the first respondent) ("RS").

17. Day 4 was taken up with the second respondent's evidence. As this took the whole day, we listed the hearing for a further day so that we could hear submissions and reach a decision.

18. We heard submissions on 2 September 2021. Once we had heard these, we spent the remainder of 2 September 2021 reaching our decision.

D. Findings of fact.

19. We set out our findings of fact which are relevant to the decisions we need to make in this case. We refer to the second respondent (Malcolm Snape) either as "MS" or the second respondent. When we use the term "respondents" we refer to both respondents.

<u>The second respondent's business</u>

20. MS is the director and shareholder of the first respondent which trades as "StormMeister Flood Protection". The first respondent designs, develops and installs flood protection products, for domestic and commercial premises.

The circumstances in which the claimant became involved in the respondent's business

21. Prior to the claimant's involvement in the first respondent, he and MS had known each other socially for a number of years. They drank in the same local pubs and met regularly at a pub called the Withy Trees for a weekly quiz night.

22. Their social discussions over the years included topics of work and business. MS talked about his own business interests and the claimant talked about his, particularly his previous employment at Royal Mail where he held a management position.

23. MS learned from the claimant that the claimant had been dismissed from his employment with Royal Mail in 2012 and that he had brought an Employment Tribunal claim as a result. The claimant would discuss his claim when he and the claimant met up in the pub and would tell MS that he was going to receive a large award.

24. By the end of 2017 the claimant had been out of work for some years. MS spoke with the claimant about business opportunities. The claimant showed interest in becoming involved with MS in business, he would raise the subject with MS on a persistent basis and that he felt some pressure to provide the claimant with something. As we note below, MS eventually discussed with the claimant an option of the claimant being involved in a Spanish property business, and later an option of being involved in a new business providing garage door protectors.

25. MS owned an on-line business with a website called Idealspain.com. This had been established some years previously and the business needed "resurrecting." MS provided the claimant with details and an opportunity to look further into the viability of the business and whether the claimant would wish to become involved. The claimant did consider this but, having undertaken his review of the business prospect, decided against it in early 2018.

26. As 2018 progressed, the claimant and MS continued to meet in local pubs. The claimant continued to ask MS about business or work opportunities. Their discussions included ones about potential new product lines and in mid-2018 the claimant and MS talked about a potential new garage door product that MS hoped to develop. This was more closely linked to the first respondent core business of flood protection. Whilst closely linked to the first respondent's business, MS talked with the claimant about this product requiring a separate entity to develop the business. MS had decided, if he was to engage the claimant in taking this new product forward, he wanted to keep it separate from the first respondent.

27. On 15 July 2018, MS and the claimant met at a pub called the Black Bull in Fulwood near Preston. There was a wish (on both parts) to be clearer about the new business opportunity. Whilst in a pub, this was intentionally not a meeting in their usual local, the Withy Trees. It was a business meeting. It was not such a formal meeting as to result in any sort of note of the meeting, heads of agreement or similar. Even so,

the purpose of the meeting was to discuss the business opportunity with the garage door protector. As for this meeting, we find as follows:-

(1) That MS was not able to launch the new product at that stage. More work needed to be done on its development and new welding machinery was needed for the manufacture/installation of the product.

(2) The intended new company had not been set up.

(3) The two talked about a proposal that the claimant would be responsible for and take forward the sales of the new product, be rewarded through a commission scheme (to be agreed) and would become a director of that new company.

(4) The claimant was keen to become involved and wanted to learn about MS's business and flood protection in advance of the new product and company being launched.

(5) It was agreed therefore that the claimant would spend some time in the first respondent business, shadowing MS and gaining an understanding of the flood protector sector and market. Further, it was agreed that the claimant would start to do this the very next day although, due to other commitments that MS had, this was subsequently changed and the claimant did not attend the first respondent's premises until 17 July 2018. MS collected him from his home and took him there.

(6) There was no discussion about what (if anything) the claimant would be paid, no discussions about terms and conditions beyond the vague notion that once the new business was trading, there would be a commission structure in place when the new business was ready to be launched and it being envisaged that the claimant would become a director of that business at some unknown stage.

(7) Whilst no terms had been agreed, there was a general understanding that this was a business opportunity for both individuals. MS would provide the know-how and ability to ensure manufacture and installation of the products but would not need to spend considerable amounts of time on this new business line (the first respondent business required substantially all of his time). The claimant on the other hand, was new to flood protection but had the time to launch the business and engage in successful sales and marketing campaigns. MS described the arrangement as a business partnership. We find that the claimant would not at that stage have disagreed with this description of the intended relationship. However, the nature of the relationship was not well thought through by either party or formalised by them.

<u>Arrangements between claimant and respondents in the period 17 July 2018 - 16 August 2018</u>

28. We make the following findings:-

(8) There was no obligation on the part of the claimant to attend the first respondent's premises during this period. The claimant did so because he wanted to. He volunteered in the expectation that he was observing and learning in readiness for the expected commencement of the new business.

(9) The claimant did not attend the respondent's premises every day. He decided when to attend and when not to attend.

(10) The claimant spent time shadowing or sitting with different individuals including P Turner ("PT"), one of the installation engineers.

(11) On the first day that the claimant attended (17 July 2018) the claimant attended a meeting with a representative from the Department for International Trade when the possibility of the first respondent's involvement in an EU trade mission to Japan was discussed. Following that meeting the claimant spent some time looking into this trade mission and EU funding, although much of that activity was without MS's knowledge.

(12) MS provided a number of tasks for the claimant to undertake whilst he was in attendance at the second respondent's premises.

16 August 2018

29. On 16 August 2018 MS informed the claimant that he was unhappy with the claimant's involvement in the first respondent. MS was concerned that the claimant involved himself in matters that MS had not asked and did not want him to be, and was also concerned that the claimant appeared intent to become more involved. A heated discussion took place between the claimant and MS on 16 August and MS ended the arrangement between them.

17 August 2018 - 29 August 2018

30. On the evening of 17 August, the claimant and MS met in the Withy Trees, moving on to another pub (Princess Alice) to discuss their differences and how the claimant and MS might continue to be involved. This had followed an email from the claimant to MS at 19:22 on 17 August, shortly before the two of them met. At this stage the claimant raised the issue of remuneration. We note the following paragraph from the email:

> *"I do need to better understand my role and potential remuneration going forward, however that's a very separate issue and I would suggest that the fact that I have not prioritised these tells you a little bit about my character and also my respect for you."*

31. The claimant and MS discussed income earning tasks that the claimant could undertake. We find as follows:

(1) That up until this meeting MS's position had been that the claimant would be involved in the new business selling garage protection. We are supported in this finding by the email of 20 August 2018 from MS to the claimant, which includes the following paragraph:

> *"Your role was intended to be launching the StormMeister door protector for garage doors and whilst we haven't got the packaging sorted out yet there is no reason we cannot be doing some groundwork and making the trade aware we will be launching the product."*

32. The two agreed that the claimant could move forward by the claimant undertaking a sales and marketing project in Eyemouth. We note the following from the same email:

> *"However, in the meantime there is Eyemouth and hopefully sales will result in which case it would be something we could role out to other areas. If it turns merely to be an academic exercise then of course we won't be rolling it out."*

33. We accept the evidence of MS that this was a task he was willing to give to the claimant; it was out of the office and MS was comfortable with that. MS arranged for the claimant to be accompanied by a sales employee, Travis Brown, who would be able to assist particularly in identifying properties where the prospects of sales might be highest. Some payment was made to the claimant following his visit to Eyemouth although there is a dispute between the parties as to how much payment was for work and how much for expenses.

34. The claimant's visit to Eyemouth went ahead but Ms was dissatisfied with his work there. There was a difference of views about the claimant's activities in Eyemouth and the success (or lack of success) of that visit. MS once again ended the relationship with the claimant.

35. It is clear from an email exchange (and their evidence at the Tribunal) that these two individuals had very different (and strong) views in relation to Eyemouth. We note the following email from MS (page 10) dated 30 August:

> *"Simon, taking into account all of my various faults listed in your email it would clearly be impossible for you to work with me. It is well to find out now rather than later but be assured there certainly won't be any hard feelings on my hard. Kind regards"*

36. Notwithstanding this email (and other emails in the exchange clearly indicating strong differences of views), the claimant and the respondent did enter into a subsequent relationship, as noted below. This commenced on 1 October 2018.

<u>Agreement to employ the Claimant with effect from 1 October 2018.</u>

37. There is a difference in the evidence of the claimant and MS about how and why the claimant became involved again in the second respondent. The claimant's evidence is that his further involvement followed a chance meeting between the two "around the middle of September 2018" when, according to the claimant, he "bumped into" MS walking between pubs and they had a further discussion at the Withy Trees. According to the claimant, MS told him that he had been forced to cancel the first respondent's involvement in the EU mission to Japan as there had not been anyone willing to go to Japan in the claimant's absence. He also noted there were other opportunities for EU funding and that the claimant could assist by re-applying for these as well as working on a customer database.

38. The evidence of MS provides a different account. Whilst he agreed that the two of them had a chance meeting whilst out (MS's evidence is that this was Saturday 22 September 2018), the request for the claimant to become involved in the first respondent business was very much from the claimant and not from MS. MS's evidence is that he had tried over the previous weeks to avoid running into the claimant. Late in the evening on 22 September the claimant was continuing to ask for work and, according to MS:

> *"Pity (and drink) got the better of me. It was coming up to Christmas so I tried to think of something he could do on a temporary basis until Christmas. Again looking back, I don't know why I tried so hard. It was I think a combination of feeling sorry for him, wanting to help him if I could and also the persistent badgering, which I thought might stop if I have him an opportunity."*

39. We prefer the evidence of MS. The commencement of employment on 1 October 2018 was not because MS needed help with applications for EU funding and a business mission to Japan. MS offered the claimant temporary employment to undertake a specific and limited task, to put together a computerised customer list. This was an employed position and the claimant would be paid £8.50 per hour.

40. We heard a lot of evidence from the claimant and MS about the claimant's performance in his employment during Period Two, the parties having very different views about this. Those views can be very broadly expressed as being that the claimant has a very high opinion of his performance and contributions to the business of the first respondent during Period 2, and MS much less so.

41. We have not made findings of fact about which of these two individuals is right in relation to the various activities raised (or indeed whether the truth lies somewhere in-between). We have made findings of fact which are relevant to the complaints and that need to make in order to reach our decision on the issues identified and agreed.

42. We make the following findings in relation to the period 1 October to 5 March 2019:

(1) The claimant spent the first few weeks of this period undertaking and completing the customer database task. MS was satisfied with the claimant's work in completing this task, which the claimant finished more quickly than MS had contemplated.

(2) In early November 2018 the claimant started in the role of Progress Coordinator, having been provided with this opportunity by MS on a trial basis.

(3) The claimant's ways of working were very different to those in place at the first respondent. A significant example of this is the claimant's creation and reliance on an excel spreadsheet (a copy of which was at page 240) versus a "whiteboard" (the "Board") which was located on an office wall at the first respondent's premises. The working method in use at the first respondent was to use the "Board" as the list of outstanding customer tasks, identifying where the first respondent was up to with the various customer orders including what parts were awaited from suppliers, dates provided for installations and so on. Data was added to the board and

updated using a marker pen. The Board was to be continuously amended and updated by the progress coordinator so that all relevant employees were able to see what was outstanding and what they were required to do. The claimant did not keep this whiteboard up to date. Our finding on this is supported by the evidence of Peter Turner, MS and RS. Further, RS noted that the claimant decided not to sit at the desk used by the previous Progress Coordinator which was next to the Board.

(4) A key part of the claimant's role as Progress Coordinator was to work closely with installation engineers. The claimant, for whatever reason, did not develop a good working relationship with PT. We considered PT to be a good witness and accepted his evidence.

(5) Other employees of the first respondent regarded the claimant as displaying an air of superiority in the workplace. We found it revealing that the claimant stated in his evidence that he tended to work better when MS was not in attendance at the work premises and "he could be his own boss." He also stated in evidence that he wanted to do things his way. The claimant found it hard to take instructions and apply work methods that he considered were inferior to his own methods of working. This may have started as enthusiasm to bring about change and make an impact but the claimant had insufficient regard to the fact that in Period One he was there to learn and in Period 2, he joined a longstanding, functioning and viable business as a new, junior employee.

(6) At times MS is hasty in forming views about an employee's performance and can appear exasperated and impatient when he considers that an employee has done something wrong, sometimes by raising his voice, shouting and swearing. Our finding is supported by the evidence of the claimant, TP and JP. We also heard a recording of a discussion between the claimant and MS that the claimant had secretly recorded on 5 March 2019 (the day before his employment terminated) and it was clear that MS raised his voice and swore during some of this conversation.

(7) This was not the only discussion between the claimant and MS that the claimant secretly recorded although the only one provided on disclosure in this case and the only one that was played to us.

(8) On one occasion, the claimant spoke with other employees about his irritation at the way that MS was speaking to himself and one other employee, Eli Ma. He displayed his irritation by saying to other employees that he would punch MS although quickly corrected himself to note that this would be in the form of a verbal punch. RS gave evidence of this episode. Although she did not state a date of this incident, we find that it was likely to have occurred near the end of the employment.

(9) When undertaking the work of Progress Coordinator between early November 2018 and 6 March 2019 the claimant was engaged in the same role as had been carried out his predecessor, Lisa Roberts. Whilst we have not been provided with job descriptions, we find that the tasks expected of the claimant and Lisa Roberts were the same/very similar.

Lisa Roberts ("LR")

43. LR was employed by the first respondent between August 2016 and May 2018. She applied for employment through an agency and was interviewed by the first respondent's Office Manager. LR provided a CV (a copy of which is at pages 241-242). This includes details of recent experience, relevant to the progress coordinator role.

44. On commencing employment LR was paid at a rate of £8 an hour, which was then 80 pence above the National Minimum Wage rate of £7.20. LR received a number of increases to this hourly rate during her period of employment with the first respondent. These are detailed at page 292. LR did not receive an increase in the hourly rate until she had been with the respondent for six months. At that stage (24 February 2017) her pay was increased to £9 per hour. Six months later (25 August 20-17) her pay was increased to £9.75 an hour, and six months following then, it was increased to £10.75 an hour.

45. We accept the following evidence provided by MS:

(1) That LR had several pay rises due to her length of service with the company;

(2) LR performed the role to the first respondent's satisfaction, she had built up a knowledge of all of the first respondent's services/products and developed relationships with the fitters and (quoting from MS witness statement) *"had everything running smoothly";*

(3) MS had initially offered to employ the claimant to carry out the creation of the database and he regarded that as a data entry role;

(4) It was only following the claimant's completion of that task that MS provided the claimant with an opportunity of undertaking the Progress Coordinator role;

(5) MS provided the claimant with this opportunity because the claimant was his friend. Had he been an external applicant for the Progress Coordinator role he would not have been able to exhibit the relevant experience and background and would not have been successful in a competitive application process.

(6) Had the claimant remained in the progress coordinator role for 6 months, with satisfactory performance, then the first respondent would have increased the claimant's pay. Our finding is supported by the fact that this happened to LR (whose rate was increased from £8 to £9 after 6 months employment). RS also received pay rises on average every 6 months as did PT.

Events of 6 March 2019 and the termination of the claimant's employment

46. On 6 March 2019 the claimant and MS had an argument which resulted in the claimant walking out of his place of work. There were no witnesses to the argument itself, although there were witnesses to the claimant leaving the premises and comments made by him as he did so. The argument concerned a large contract that

the first respondent had with a housing association. The contract required flooding doors to be installed at various properties and then a service plan for a number of years following installation. We make no findings as to whether the claimant or MS was right or wrong in the argument or whether the truth lies somewhere in between. We have considered the evidence provided by both parties to this argument. Our findings are as follows:-

(1) The argument took place in a closed office. Other employees did not see or hear the argument.
(2) MS stated that the first respondent was behind on its servicing obligations in the contract with the housing association and that was the claimant's fault as it was his role to ensure that the tasks progressed.
(3) The claimant said that it wasn't and that the first respondent owed money to the housing association.
(4) MS was shouting at the claimant and was firm in his view that he was right.
(5) In turn, the claimant also shouted at MS. He was sure he was right.
(6) Neither was fully in control of their temper.
(7) MS did not (as the claimant alleges) inform the claimant that he was going to proceed with a disciplinary process.
(8) The claimant told MS (in a raised/shouting voice) that MS was a bully he was not prepared to be shouted at, that he was leaving and that he would be in contact with ACAS.
(9) The claimant did not (as he alleges) refer to the NMW in this argument. The argument was between 2 individuals, both convinced they were right about a specific issue, that spilled over into the claimant telling MS he was leaving because he was not prepared to be treated in the way that MS was treating him.
(10) We learned from the claimant himself that he is a physically large individual (standing at 6ft 6 inches) and at some point during the argument, he stood up and leaned over MS. MS did find this physically intimidating and threatening although we find the claimant did not intend his actions to be a threat of physical violence.

47. There were witnesses to the claimant leaving the premises. In his witness statement the claimant states that he told 3 employees (he doesn't name them but identifies "three ladies were in the office together") that he was going sick and that he would be in touch.

48. We find that one of the 3 employees referred to by the claimant was RS. We accept RS's account of what she witnessed on 6 March 2019 as set out in her statement:- *"Simon suddenly threw open the door to the Sales Office, thanked us for all our support and said that we would be hearing from him. I thought it was off that he was thanking us – I am not sure what he was thanking us for. Malcolm had followed Simon across the landing to the door of the Sales Office and was stood behind Simon. It was at this point that Malcolm asked Simon to leave."*

49. The claimant does not live far from the first respondent's premises. He sent an email shortly after his return home (page 14) stating as follows *"Malcolm, as discussed this morning I now consider myself to be off sick with work related stress."*

50. MS replied within an hour stating as follows:-

> *"Simon, when you walked out you indicated you were terminating your employment with threats of ACAS action and in fact told the staff in the sales office you would 'be in touch'. It is with regret that in view of events including your shouting at me this morning within a few inches of my face I confirm your employment (which in any case was never formalised) will remain terminated.*
> *It might be you are entitled to some holiday pay and we will confirm that.*
> *I'm sorry it hasn't worked out and wish you all the best for your future.*

51. We find that
(1) There was no reference in the course of the argument to the claimant becoming absent from work due to work related stress.
(2) The reply from MS accurately describes the events.

52. 7 days later (13 March 2019), the claimant sent a further email to MS

Dear Mr. Snape,
I wish to appeal against my unfair dismissal. The principal grounds for this appeal will include you bullying me in the workplace, failure to treat myself and my colleagues with a duty of care required by and expected from an employer, as well as failure to pay the minimum wage.
Due to my current health condition which I believe is at least partially as a result of severe work related stress, as discussed with the medical team at Fishergate Hill surgery, I would like to request that this appeal be progressed either in writing or at an interview with the presence of a colleague from the workplace.

I have included a link to ACAS guidelines on bullying and harassment at work which you may find helpful.

53. We find that this was the first occasion that the claimant claimed a statutory entitlement to the national minimum wage. He had not mentioned NMW at all in the argument.

54. What then follows are various emails between 2 individuals, previously friends, both with strong views, seemingly intent on having the last word in their disagreement.

<u>HMRC investigation into compliance with NMW legislation</u>

55. At some point following the termination of employment on 6 March 2019, Mr Snape raised with HMRC that he had not been paid the National Minimum Wage. We note the conclusion to HMRC's investigation which is at page 102

> *I've now completed my check of your records. Thank you for your help.*

Based on all the evidence received from relevant parties during the review I am unable to conclude the employment status of Mr Rydeard during the period July to August 2018. I therefore do not propose to take any further action at this time.
I do however reserve the right to make further enquires if I receive any information in the future proving his employment status.
From the information I've seen regarding your other workers, you appear to be paying them at least the correct rate of NMW.
If I receive information in the future that suggests you're not paying any of your workers at least the correct rate of NMW, I may contact you again.

56. In his witness statement, the claimant states that he was told by HMRC's investigator that HMRC was fearful of the respondents and MS had threatened them with legal action. The claimant did not provide any other evidence to support this. The respondents deny any threats were made. We would be surprised that HMRC would be intimidated by the respondents and in the absence of any supportive evidence we do not find that threats were made by the respondent or that HMRC stated that they were fearful in the light of any threats.

<u>The claimant's previous employment history and experience .</u>

57. A copy of the claimant's CV is at pages 393 and 394. We note the following extracts:-

"Expertise

- *Front Line Management*
- *Transactional HR Management*
- *Industrial Relations*
- *Recruitment and Interviewing*
- *Manpower Planning*
- *Payroll*
- *Financial Data Analysis*

"Career Highlights

Introduction of a full office duty structure revision with a 10% reduction in headcount to meet budgets and focusing on staff being dedicated to shifts and work areas.
Communication and publication of proposals. Held meetings to inform staff of changes to shift patterns, voluntary redundancies, cessation of temporary contracted staff, and impact on earnings through reduction of scheduled overtime. Post Implementation Reviews with an emphasis on continuous improvement allowing for further reductions with minimum disruption to staff working patterns and targeted to individual work areas."
……
Carried out recruitment interviews from low to mid-level, interviewing for deputy managers positions, permanent and temporary full time staff positions, recruitment to specialist posts and securing the services of casual employees."

> *I was employed by Royal Mail between 1990 and 2012 working my way up from a part— time indoor postman to HR and Front Line managerial positions between 2003 — 2012. I was also a Union Representative between 1995 — 2003."*

58. It is apparent from the CV that the claimant has considerable management experience including on personnel matters. The claimant was responsible for recruitment as well as termination of employment with a large employer. Whilst the claimant denies this, we find that he will have received training and information from Royal Mail about the potential for employment liabilities to arise (including employment tribunal claims) as part of his instruction about how to carry our (and not carry out) these important tasks.

59. Further, we find that he will have received training on employment claims in the 8 years he spent as a trade union representative.

60. In addition and as noted earlier in our findings, the claimant had the experience of bringing and running his own employment tribunal claim against Royal Mail.

E. Submissions

61. We received written submissions from Mr Bronze and from the claimant which we considered and we thank both for their documents. Mr Bronze has referred us to a number of authorities, some of which we refer to in the next section of this judgment.

62. In his submissions document the claimant provided the following narrative under the heading of whistleblowing

> *"Mr. Snape admitted that although he was aware that some customers (Hardwood & Composite Door buyers at the time) were being sent invoices claiming that they had been flood tested in accordance with BSI standards in fact no such testing had taken place at the time, and that he had taken no action prior to this being put to him at tribunal. Mr. Snape claims that these products were tested later but there is no evidence of this. Of course the whistleblowing aspect also relates to Mr. Snape's behaviour and breach of duty of care towards staff, as well as his abject failure to consider contractual status, minimum wage or otherwise, and of course treatment of customers.*

63. This is different to the description of the alleged protected disclosure in the agreed List of Issues, a point that was, understandably, raised by Mr Bronze.

64. We also note that there is no reference in the claimant's witness statement to false claims by the respondents that doors supplied by the first respondent, met BSI standards. The claimant does state in his witness statement that he had not previously made a huge issue out of Mr Snape's treatment of customers but that examination of documents *"will further support the whistleblowing aspect of my claim."*

F. The Law

Time Limits – relevant to unauthorised deduction claim

65. The time limit issue is relevant to the complaint that the claimant was paid less than the NMW in Period One. This complaint is made under Part II of the ERA ("Protection of Wages").

66. The time limit applicable to a clam under Part II is at section 23 ERA. This section (read together with section 207B ERA) requires:-

- a claimant to contact ACAS under the statutory Early Conciliation ("EC") process within 3 months of the alleged unlawful deduction. Where a claimant alleges a series of deductions then contact with ACAS needs to be within 3 months of the last of the series of deductions.

- Under section 23(4) *"where the employment tribunal is satisfied that it was not reasonably practical for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."*

67. The claimant accepts that he did not contact ACAS within 3 months of the last of the deductions (non-payments) and therefore we have focussed on the provisions of s23(4) and the *"not reasonably practicable"* test.

68. We note the following case law guidance:

62.1 *"the relevant test is not simply a matter of looking at what is possible but to ask whether, on the facts of the case as found. It was reasonable to expect that which was possible to have been done."* (**Asda Stores v. Kansen EAT 0165/07**) (**Asda**)

62.2 Where a claimant claims that it was not reasonably practicable for him to present his case in time because he was ignorant of his rights, the Tribunal should also consider whether the claimant ought to have known of his rights (**Porter v. Bandbridge Limited 1978 ICR 943**). **(Porter)**

Time Limits relevant to Equal Pay

69. Section 129 EQA states as follows:-

(*1) This section applies to:-*
(a) A complaint relating to a breach of an equality clause or rule
(b) An application for a declaration referred to in section 127(3) or (4)
(2) Proceedings on the complaint or application may not be brought in an employment tribunal after then end of the qualifying period.

70. Qualifying Periods are then set out in a table which forms part of section 129. The claimant's case is a "standard case" for the purposes of that table and as such the relevant Qualifying Period is *"the period of 6 months beginning with the last day of the employment or appointment."*

Worker/Employment Status

71. We may need to decide whether the claimant when engaged by the respondent met the test of "worker" under section 54(3) NMWA.

72. We note that the definition of worker for the purposes of the NMWA is the same as under s230(3) ERA, on which there is significant case law and guidance

> *(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
>
> *(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*
>
> *(3) In this Act 'worker' (……..) means an individual who has entered into or works under (or, where the employment has ceased, worked under) –*
>
> *a. a contract of employment, or*
>
> *b. any other contract, whether express or implied and (if it is express) whether oral or in writing whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried out by the individual;*
>
> *and any reference to a worker's contract shall be construed accordingly."*

Worker status

73. **Bates van Winkelhof v Clyde & Co and another (2014) ICR 730**. In this case the Supreme Court decided that an equity partner in an LLP could be a worker under section 230(3)(b) of the ERA for the purposes of bringing a protected disclosure detriment treatment claim. In her Judgment, Lady Hale noted "there *can be no substitute for applying the words of the statue in every case".* The statute requires Tribunals to consider and decide on three elements:

> (1) The existence of a contract between individual and the other party;
>
> (2) Under which the individual undertakes to perform work personally for that other party (a requirement for personal services);
>
> (3) That the other party must not be in the nature of a client or customer of the individual or business undertaking of the individual.

Automatic Unfair Dismissal

74. The claimant claims that he was automatically unfairly dismissed contrary to s103A and/or 104 ERA.

75. Section 103A ERA states:

> *"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."*

76. Section 104 ERA states:

> *104. 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—*
>
> *(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or*
>
> *(b) alleged that the employer had infringed a right of his which is a relevant statutory right.*
>
> *(2) It is immaterial for the purposes of subsection (1) —*
>
> *(a) whether or not the employee has the right, or*
>
> *(b) whether or not the right has been infringed; but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.*
>
> *(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.*
>
> *(4) The following are relevant statutory rights for the purposes of this section —*
>
> *(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal.*

77. The claim that the claimant was entitled to be paid the NMW for the period 17 July/29 August 2018 (and, as a result of him not been paid, there were unauthorised deductions from wages) is a right "conferred by this Act" (for the purposes of s104(4)(a) above.

78. The protections provided by section 103A ERA require a claimant to have made one or more protected disclosures. The definition of a protected disclosure is at Part IVA ERA.

> ***43B Disclosures qualifying for protection.***
>
> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—*
>
> *…*

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

……

(d) that the health or safety of any individual has been, is being or is likely to be endangered.

79. We note for completeness that section 43B lists a number of additional categories (a-f) of information being disclosed. Here, we refer to the 2 categories that appear may be relevant in this case.

80. In considering whether there has been one or more qualifying disclosures in this case we have considered guidance provided by a number of cases:-

(1) Chesterton Global Limited v Nurmohamed [2017] IRLR 837 ("Chesterton"),

(2) Parsons v Airplus International Limited UKEAT/0111/17.

(3) Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4 ("Korashi");

(4) Wharton v Leeds City Council EAT 0409/14;

(5) Kilraine v London Borough of Wandsworth [2018] ICR 1850.

(6) Kuzel v. Roche Products [2008] ICR 799 ("Kuzel v. Roche")

(7) Cavendish Munro Professional Risks v. Geduld UKEAT/0195/09 ("Cavendish")

81. Having regard to the terms of the ERA and the case law referred to above, the following is relevant:

(1) The worker making a disclosure has to reasonably believe that it is made in the public interest and also has to reasonably believe that it "tends to show" one or more of the subject matters listed at 43B(a) to (f) ERA.

(2) The terms of section 43B ERA require a reasonable belief of *the worker making the disclosure* (our emphasis). This wording provides a mixed objective and subjective test. The test is not whether there is a reasonable belief on the part of a reasonable worker; rather the test is whether the particular worker making the disclosure has a reasonable belief.

(3) There is a difference between making the disclosure of information and merely making an allegation (Cavendish). In Cavendish, a director and employee of a company was removed from the office of director having fallen out with other directors. The employee instructed solicitors who wrote to the company expressing concerns about the fairness of the treatment of their employee client and threatening legal action in the

absence of a solution. Whilst the Employment Tribunal decided that the terms of this letter amounted to a protected disclosure, this decision was overturned on appeal to the Employment Appeal Tribunal (EAT).

(4) There is not a rigid distinction between the making of allegations and the disclosure of information. Information can be disclosed at the same time as allegations are made. ("Kilraine").

(5) The question whether a disclosure is in the public interest depends of the character of the interest served by it rather than simply on the numbers of people sharing the interest (Chesterton - paragraph 35).

(6) The question as to whether the particular worker has a reasonable belief that there is or is not a disclosure in the public interest is a question to be answered by the Tribunal on a consideration of all the circumstances of the particular case.

(7) There must be some objective basis for the worker's belief in order for that belief to be reasonable. Some evidence is required; rumours, unfounded suspicions, uncorroborated allegations and the like will not be good enough to establish a reasonable belief (Korashi).

(8) The information disclosed only has to "tend to show" one or more of the matters set out in (a) to (f) of section 43B. It does not have to prove the matter and information may, in the reasonable belief of the worker "tend to show" one or more of the matters at section 43B(a) to (f) even if the worker is in fact mistaken. (Kilraine)

(9) Where a claimant relies on breach or likely breach of an unspecified legal obligation as the relevant failure, that claimant may have difficulty in persuading a Tribunal that his or her belief was reasonable (Kilraine).

(10) Where a Tribunal cannot identify the grounds on which a respondent subjected a claimant to a detriment, it does not automatically follow that the claimant's claim – by which he or she asserts an unlawful reason for the detriment – is successful (Kuzel)

Equal Pay

82. The relevant parts of the EqA provide as follows:-

"65 (1) For the purposes of this Chapter, A's work is equal to that of B if it is -

(a) Like B's work.

……..

(2) A's work is like B's work if -

(a) A's work and B's work are the same or broadly similar

(b) such differences as there are between their work are not of practical importance in relation to the terms of their work.

(3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to -

(a) the frequency with which differences between their work occur in practice, and

(b) the nature and extent of the differences."

……

66 (1) If the terms of A's work do not (by whatever means) include a sex equality clause they are to be treated as including one.

(2) A sex equality clause is a provision which has the following effect-

(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;

(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term."

……..

69 (1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which –

(a) does not involve treating less favourably because of A's sex than the responsible person treats B; and

(b) if the factor is within subsection 2 is a proportionate means of achieving a legitimate aim.

(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.

……

(6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's."

83. It is not disputed that the claimant and Lisa Roberts were employed on Like Work. We have focussed therefore on the genuine material factor defence issue.

84. The House of Lords in **Glasgow City Council v Marshall [2000] IRLR 272** ("Marshall") provided guidance on the consideration of material factor defences.

> *"The scheme of the Act is that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be due to the difference of sex. The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge this burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine, and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a 'material' factor, that is, a significant and relevant factor. Third, that the reason is not 'the difference of sex'. This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied upon is or, in a case within s.1(2)(c), may be a 'material' difference, that is, a significant and relevant difference, between the woman's case and the man's case.*

85. The recent Court of Appeal decision in **BMC Software Limited v Shaikh [2019] EWCA Civ.267** comments on material factor defences. Paragraph 19 of the judgment includes the following:-

> *"If an employer is going to seek to justify a pay disparity based on a factor such as the comparator's promotion or superior "merit" or "market forces" it needs to be able to explain with particularity what those factors mean and how they were assessed and how they apply in the circumstances of the case."*

86. **Cadman v HSE [2006] IRLR 969**, is a decision of the ECEU relevant to the material factor defence of length of service. The key issue in that case was to what extent a differential in pay based on length of service had to be objectively justified. The ECJ decided that as a general rule, using length of service as a factor in determining pay, rewards experience which enables an employee to do his or her job better and that an employer applying such a factor does not have to objectively justify each individual case.

87. In **MOD v Armstrong [2004] IRLR 672**, the EAT noted that it was not necessary to adopt too formulaic an approach in determining whether there has been discrimination in pay.

> *"What matters is whether, in any particular case, a tribunal is satisfied on the evidence before them and the facts found that the pay difference is caused by a factor or factors which are related to the difference in sex between the applicant and her comparator."*

(see paragraph 42 of the Judgment).

F. Discussions and Conclusions

Time limits – Period One.

88. We note here that there is no arguable time limit issue in relation to the Equal Pay claim in Period One. That period ended on 23 August 2018. Contact with ACAS was not until 31 May 2019. Section 129 (2) EQA requires that a claimant must have been employed within 6 months of the date that their application is made to the Employment Tribunal. Here, the contact with ACAS was well outside of this 6 month period. The only equal pay complaint to be considered and determined therefore is the one relating to the period October 2018 to March 2019.

89. As for the claim made under the ERA (unauthorised deduction from wages):

(1) On the basis of monthly pay the last deduction would have been 31 August 2018. Contact with ACAS therefore should have been made by 30 November 2018
(2) ACAS was not contacted until 31 May 2019.
(3) It was reasonably practicable for the claimant to have presented his claim in time. The claimant has the skills and experience to undertake the basis online research h that is required to understand that time limits are applicable to legal claims. We have taken in to account his managerial and HR background and his many years as a trade union representative. We have applied the tests set out in the Asda and Porter cases noted earlier.

90. Given our findings on time limits, it is not necessary for us to make findings on worker status for the purposes of the claimant's claim to NMW and his complaint of an unauthorised deduction from wages.

Equal Pay – October 2018-March 2019.

91. The claimant was employed in like work to his comparator and it is necessary for us to decide whether there were material factors justifying the difference in pay.

92. We find that there were. The claimant and his comparator "arrived" in the Progress Coordinator role via different routes. The claimant was employed to carry out data entry duties which were very different. He completed these duties and was only then provided with the opportunity of a trial period in the coordinator role, simply because he was a personal friend of MS.

93. the comparator was appointed following a competitive application process, via an agency. Even so, her starting salary was comparable at £8 per hour with the claimant's starting salary (given that he started a few years later at 8.50 per hour) (but starting a few years later. MS was pleased with the comparator's performance and after 6 months in employment, he raised her pay to £9 per hour. As for the claimant, MS was not satisfied with his performance and, further, the claimant was not employed for as long as 6 months. He did not receive any increase in his pay. We are satisfied that this explains the differences between the rates of pay and that these differences having nothing to do with the gender of the claimant and that of the comparator.

Did the claimant make a protected disclosure on 6 March 2019?

94. We have confined our consideration of this issue to the allegation that the claimant raised protected disclosures by informing the claimant on 6 March 2019 that he was a bully and that he failed to comply with NMW legislation. That, according to the claimant's witness evidence is what he said on 6 March. He has not given evidence that he raised issues about false claims over BSI standards. This allegation appears only to have arisen in the course of submissions. We also note the clear and agreed wording in the List of Issues.

95. We have made a finding of fact that the claimant did not raise NMW issues in this conversation. We have confined our consideration therefore to the comments about bullying.

96. During the discussion on 6 March 2019 the claimant complained to MS about MS's shouting and bullying behaviour. This complaint was about behaviour which the claimant found unacceptable. We have considered whether the claimant was merely stating an opinion or whether it amounted to a disclosure of information. We find that the claimant was stating an opinion that the respondent's behaviour was unacceptable and that he was doing so in the course of a heated discussion (an argument). Even on the claimant's version in his witness statement (which we do not wholly accept) he claims to have said that he is going off sick with stress and that he is going to complain to ACAS about MS's bullying behaviour. These are statements about what the

claimant is going to do and where he is going to complain, rather than the disclosure of information.

97. Further even if an allegation of bullying behaviour, amounts to a disclosure of information, we do not find that the claimant at the time reasonably believed that the information tended to show a breach of a legal obligation or that the health and safety of any individual was being endangered. Whilst the claimant disagreed with MS's style of management and at times found it objectionable, having complained in heated terms that the claimant was a bully, he then stated that he was going to ACAS. Again, this was simply a statement of what he was doing and probably also a threat of an intention to take legal action. It disclosed no more information than a statement by an individual that he/she is going to instruct their solicitor.

Was the claimant dismissed on 6 March 2019 or did he resign?

98. Even if our conclusion about the alleged protected disclosure is incorrect, the claimant was not dismissed. He resigned. He walked out having complained about MS's behaviour, because he found MS's behaviour unacceptable and he was not prepared to put up with it any longer. On that basis alone his complaint under s103A ERA fails.

Employment Judge Leach

Date: 4 October 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

6 October 2021

FOR THE TRIBUNAL OFFICE