# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Christopher Watson

**Respondents:** Wallwork Nelson Johnson (1)
Mr Ian Johnson (2)

**Heard at:** Manchester **On:** 18-22 October 2021 & 20-21 December 2021 (in chambers)

**Before:** Employment Judge Phil Allen
Mrs A Ashworth
Mrs B Hillon

**REPRESENTATION:**

**Claimant:** Ms C Brooke-Ward, counsel
**Respondent:** Mr P Gilroy QC, counsel

# JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not working for the first respondent under a contract of employment at the relevant time.

2. The claimant was a worker who worked under any other contract for the first respondent within the meaning of section 230(3)(b) of the Employment Rights Act 1996.

3. The first respondent did make unauthorised deductions from the claimant's wages. The first respondent is ordered to pay the claimant the net sum of **£2,865.60**.

4. The claimant was not unfairly dismissed by the first respondent. His claim for unfair dismissal claim is dismissed. As he was not an employee of the first respondent at the time of his dismissal, he was not able to pursue an unfair dismissal claim. In any event, the principal reason for the termination of the claimant's contract was not that he had made a protected disclosure.

5. The claimant did not make a qualifying disclosure to the first or second respondent as defined by section 43B of the Employment Rights Act 1996.

6. The claimant was not subjected to any detriment by either the first or second respondent on the ground that he had made a protected disclosure and his claims that he was subjected to a detriment are dismissed.

7. As the claimant was not an employee of the first respondent at the relevant time, the Tribunal does not have jurisdiction to determine his claim for breach of contract under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. The claim for breach of contract is dismissed.

# REASONS

## Introduction

1. The claimant was employed by the respondent as a chartered tax advisor from 4 October 2010. The claimant contends that he remained employed or was a worker in the period from on or around 1 April 2019 until 11 June 2020; the respondent contends that he was a self-employed associate fixed equity partner for that period. The claimant's engagement with the respondent ceased on 11 June 2020. The claimant alleges that he was automatically unfairly dismissed as a result of having made public interest disclosures and/or unfairly dismissed from employment, that he was subjected to detriments as a result of having made public interest disclosures, that there were unlawful deductions made from his wages, and that there was a breach of contract because he was not paid the notice to which he contends he was entitled when his employment was terminated.

## Claims and Issues

2. A preliminary hearing (case management) was previously conducted in this case, on 12 January 2021 by Employment Judge Holmes. A subsequent preliminary hearing was also conducted on 10 August 2021 by Judge Doyle. A previous hearing had also been conducted by Employment Judge Dunlop on 14 July 2020 which determined the claimant's application for interim relief. Her Judgment was provided to the Tribunal (30) and parts of it were emphasised by the respondents' counsel in his submissions, albeit that Employment Judge Dunlop was applying a very different test when determining the interim relief application, to those which were applied by this Tribunal.

3. At the preliminary hearing on 12 January 2021 a List of Issues was identified and appended to the case management order which was prepared. At that hearing the claimant attended in person and the respondents were represented by the same counsel as appeared on their behalf at the final hearing. The order recorded (at paragraphs 16-17) (75) that if the List of Issues did not accurately record all the complaints and issues, the Tribunal and the other party must be notified within 28 days. Neither party brought to the Tribunal's attention any correspondence which raised any issues with the List of Issues or which raised any contended amendment, expansion or refinement to what was recorded (save for that addressed in paragraph 4 below).

4. Following the preliminary hearing, the claimant had made an application to amend his claim to include a breach of contract claim in respect of notice. That

application had not been determined prior to the start of this hearing, but the respondent confirmed that it did not object to the application. Accordingly, on the first day of the hearing, by consent, the claim was amended to include a breach of contract claim for alleged notice outstanding. It was confirmed that this claim could only succeed in the Employment Tribunal if it was found that the claimant was an employee.

5. At the start of this hearing, following the time taken for reading (but on the first day), the parties confirmed that (subject only to the amendments explained) those issues remained the ones which needed to be determined.

6. The 12 January 2021 List of Issues had included, at issue 2, issues relating to time limits. The respondent confirmed that those issues no longer applied to the claim in the light of the confirmation of the dates of the alleged deductions and the alleged protected disclosures relied upon.

7. On the third day of the hearing the respondents' counsel provided a revised List of Issues drafted to reflect what had been agreed and is recorded above. On the final day, the claimant's counsel confirmed that the List of Issues as provided by the respondents' counsel was agreed. The List of Issues as provided did not include any reference to any issues regarding estoppel.

8. At the time of providing the List of Issues, the respondents' counsel highlighted that he had included issue 1.2, regarding the contention that the claimant had worker status, in blue, as the respondent contended that the way the claimant had pursued the case was that he was an employee or self-employed only. The contention that the claimant was a worker was an alternative to the claimant's primary argument which was that he was an employee. Having raised the issue, it was left to be addressed in submissions. Prior to the start of submissions, it was confirmed by the respondents' counsel that the respondents were <u>not</u> contending that the Tribunal was technically unable to determine the issue of worker status (it having been in the agreed List of Issues) but rather it was a point being made in submissions about how the case had been pursued. The claimant's counsel confirmed that the issue was one that needed to be determined.

9. The issues identified and recorded in the respondents' revised List of Issues agreed by the claimant (based upon the List of Issues appended to the case management order following the hearing on 12 January 2021) were as follows:

## 1. Employment status

1.1 Was the claimant working under a contract of employment and therefore an employee of the first respondent within the meaning of section 230 of the Employment Rights Act 1996?

1.2 If not an employee, was the claimant a worker for the first respondent within the meaning of section 230(3)(b) of the Employment Rights Act 1996 in that:

1.2.1 he worked under a contract whereby the claimant undertook to do or to perform personally any work or services for the first respondent, and

1.2.2 the first respondent was not by virtue of that contract a client or customer of any profession or business undertaking carried on by the individual?

## 2. Unfair dismissal

### Dismissal

2.1 If an employee, can the claimant then prove that there was a dismissal? If so,

Reason

2.2 Has the first respondent shown the reason or principal reason for dismissal?

2.3 Was it a potentially fair reason under section 98 Employment Rights Act 1996?

Fairness

2.4 Was the reason or principal reason for dismissal that the claimant made a protected disclosure? If so, the claimant will be regarded as unfairly dismissed.

If not, in the alternative, if there was a dismissal, and it was not for the automatically unfair reason above:

2.5 What was the reason or principal reason for dismissal? The first respondent says the reason was a substantial reason capable of justifying dismissal, namely a manifest and irreparable breakdown in trust and confidence between the first respondent and the claimant.

2.6 Did the first respondent follow a fair procedure?

2.7 Did the first respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

2.8 Would it be just and equitable to reduce the basic award or the compensatory award because of any conduct of the claimant before the dismissal? If so, to what extent?

2.9 Is there any chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

## 3. Protected disclosures

3.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

3.1.1 What did the claimant say or write? When? To whom? The claimant says he made disclosures on three occasions:

**PD1 – 10 March 2020**

**PD2 – 30 April 2020**

**PD3 – 1 May 2020**

3.1.2 Did he disclose information?

3.1.3 Did he believe the disclosure of information was made in the public interest?

3.1.4 Was that belief reasonable?

3.1.5 Did he believe it tended to show those matters pleaded at para. 27 of the Grounds of Claim namely that:

3.1.5.1 the first respondent had failed, was failing or was likely to fail to comply with any legal obligation; and/or

3.1.5.2 information tending to show any of the same had been, was being or was likely to be deliberately concealed.

3.1.6 Was that belief reasonable?

3.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer, should the Tribunal determine that the claimant was an employee or worker of the first respondent.

## 4. Detriment (Employment Rights Act 1996 section 48)

4.1 The alleged acts or deliberate failures to act by the first and/or the second respondent contended to be detriments, as pleaded in para. 29 of the Grounds of Claim, are:

**D1** The claimant's salary being reduced without his consent.

**D2** The claimant being suspended from work.

**D3** The first and/or second respondent refusing to deal with the claimant's grievance until he complied with requests amounting to a retraction of qualifying protected disclosures.

**D4** The first respondent reducing the claimant's net salary

4.2 Did the claimant reasonably see that act or deliberate failure to act as subjecting him to a detriment?

4.3 If so, was it done on the ground that he made a protected disclosure?

## 5. Unauthorised deductions/Breach of contract

5.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted, and when? What sums were "properly payable" on each occasion that the claimant alleges deductions were made?

5.2 How much is the claimant owed?

5.3 Did the first respondent act in breach of contract such that the claimant is entitled to damages in lieu of notice pay?

10. The alleged unlawful deduction from wages related to the drawings or salary not paid to the claimant in the period between the start of April 2020 and the termination of his engagement on 11 June 2020, following the first respondent's decision to reduce the claimant's drawings/salary paid at that time in the context of the Covid-19 pandemic. During submissions, confirmation was sought about the respondents' position on this in the light of what had been said in evidence. It was confirmed by the respondents' counsel that the sum not paid in that period was being held by the first respondent in the claimant's capital account. The claimant confirmed that he still wished to pursue his claim for unlawful deduction from wages (albeit that in any event the first respondent accepted that it held this amount for the claimant).

11. During closing submissions, the claimant's counsel confirmed that the alleged detriments D1 and D4 were the same, that is they were two ways of wording exactly the same contention.

12. In this Judgment the Tribunal has determined the liability issues only, as it was confirmed at the start of the hearing that the liability issues would be determined first (particular with reference to what was recorded in Employment Judge Holmes order which recorded that this hearing was listed to determine all issues in the case "*excluding remedy*" (73)). The remedy issues were left to be determined later, only if the claimant succeeded in his claim (save for issues 2.8 and 2.9 above).

**Procedure**

13. The claimant was represented at the hearing by Ms Brooke-Ward, counsel. Mr Gilroy QC, counsel, represented the respondent at the hearing.

14. The hearing was conducted as a hybrid hearing. Both parties and their representatives, as well as all the witnesses, attended in person at the Employment Tribunal. The Employment Judge was present in-person throughout the hearing. The other members of the panel and some observers attended the hearing remotely by CVP remote video technology.

15. An agreed bundle of documents was prepared in advance of the hearing. The bundle ran to 1019 pages. Where a number is included in this Judgment in brackets, that records the relevant page number in the bundle. A bundle containing all the witness statements was also provided.

16. After the start of the hearing and after discussing the issues and timetable for the hearing, the hearing was adjourned until 2.30 pm on the first day, for the Tribunal to read the witness statements and the documents in the bundle which were referred to in those statements. The claimant's counsel identified some changes to the claimant's statement prior to the Tribunal doing so, predominantly relating to the page numbers in the bundle to which he referred. The respondents' counsel requested that the Tribunal also read the witness statements from the interim relief hearing, which were in the bundle, of: the claimant (105); and Mr Woodburn (173).The Tribunal read only the pages in the bundle referred to and to which the Tribunal were directed by the parties during the hearing.

17. The Tribunal heard evidence from the claimant during the afternoon of the first day (18 October), and the second day of hearing (19 October). He was cross examined by the respondents' representative, before being asked questions by the Tribunal.

18. Mr Howarth also gave evidence having been called by the claimant. He was a former associate partner and equity partner of the first respondent. At the start of the hearing the respondents' counsel did raise a contention that the evidence given by Mr Howarth had no relevance to the issues to be determined and did not constitute similar fact evidence. The respondents were however content for his statement to be read alongside those of other witnesses. Mr Howarth's evidence was heard on the afternoon of the second day (19 October) and he was also cross examined by the respondents' representative, before being asked questions by the Tribunal.

19. The following each gave evidence for the respondents: Paul Woodburn, equity partner; Michael Barker, equity partner; Ian Johnson, equity partner (and the second respondent); and Stuart Iddon, associate partner. Each witness confirmed their statement, was cross-examined, and was asked questions by the panel. Mr Woodburn's evidence was heard for the full third day of the hearing, with the evidence of the other two equity partners being heard on the fourth day, and Mr Iddon's evidence heard on the morning of the fifth day. The respondents also relied upon the evidence of Christine Garner, an employee of the first respondent. On the third day it was confirmed that the claimant's counsel did not intend to ask her any questions and therefore she was not required to attend the hearing.

20. There had previously been an interim relief hearing on 14 July 2020 in which Employment Judge Dunlop had delivered a Judgment in which she refused the application for interim relief (30). For that hearing witness statements had been prepared and they were provided in the bundle for this hearing. The content of the

claimant's statement of 18 June 2020 (105) was largely reflected in his witness statement for this hearing. Mr Woodburn's witness statement for the interim relief hearing of 6 July 2020 (173) contained significantly more detail on many issues than the witness statement prepared by Mr Woodburn for this hearing. It was also referred to in it. When Mr Woodburn was cross-examined, he was cross-examined about some of the content of the interim relief statement.

21. On the morning of the fourth day of the hearing, the respondents' counsel applied to be allowed to ask supplemental questions of Mr Barker and the second respondent about two issues: the delay in providing a partnership deed to the claimant; and the comparison between the claimant's earnings as an associate partner and his earnings as an employee. There was also an application to hand up a document prepared by Mr Barker during the evening of the third day of hearing (20 October 2021) which provided his view of a comparison of the (potential) earnings of the claimant in 2019/20 as an employee and as an associate partner (1020). The claimant's counsel opposed the application. The Tribunal adjourned to consider its decision. The Tribunal's decision was that the supplemental questions would be allowed, and the document could be admitted (albeit on the clear understanding that it was not a contemporaneous document). The questions regarding the delay were questions the Tribunal would itself have asked, therefore it was advantageous in terms of process and the opportunity for cross-examination for the evidence to be given by way of supplemental questions. The document merely assisted the Tribunal with the numbers. The supplemental questions about earnings were considered appropriate. It was emphasised that the supplemental questions should be brief, focussed, and (of course) not leading. Supplemental questions were asked of each of those witnesses on those topics.

*The strike out application*

22. On the afternoon of the fourth day of hearing, after the evidence of the second respondent had been heard. The respondents' counsel made an application for the claim against the second respondent to be struck out under rule 37. He made submissions to support his application. After an adjournment, the claimant's counsel made brief submissions opposing the application. The hearing was adjourned at the end of the fourth day following the submissions and a decision reached by the Tribunal. That decision was delivered to the parties on the morning of the fifth day (Friday 22 October 2021). The decision as provided orally, is recorded in the following paragraphs.

23. The Tribunal carefully considered the application made by counsel to the respondents that the claims against the second respondent should be struck out. The application was made under rule 37 on the basis that either under rule 37(1)(a) the claim was scandalous or vexatious or under rule 37(1)(b) that the manner in which the proceedings had been conducted was scandalous unreasonable or vexatious. If successful, the outcome of the application, made on day four of a five day hearing, would have been that the claims against the second respondent would have ended and the Tribunal would not have needed to determine them on their merits.

24. The Tribunal considered the relevant law including **Williams v Real Care Agency Ltd UKEATS/0051/11** in which Langstaff HHJ considered strike out

applications made mid-hearing (albeit in that case on the basis that the claim had no reasonable prospect of success). In that case it was emphasised that the power to strike out is a draconian one; as there is no way back from it. It means that a Tribunal cannot make a decision upon all the evidence that might be available, because by definition it has not heard matters out that far. He said that it must be recognised that it would be very exceptional indeed, to the point of the instances of it being vanishingly small, that a claim could ever legitimately be struck out mid-hearing on the grounds of evidential insubstantiality. He also highlighted the risk involved in a party being shut out from telling their story in a public forum because the Tribunal refused to hear any more mid-stage and the impact that may have on the parties' perception. Whilst this application was pursued on a different basis, the Tribunal nonetheless saw the Employment Appeal Tribunal's guidance as highlighting the fact that a successful strike out application mid-hearing on any basis will be relatively rare. For a Tribunal to strike out for unreasonable conduct, it must (as the claimant's counsel submitted) be satisfied that the conduct involved deliberate or persistent disregard of required procedural steps or that it had made a fair trial impossible (**Blockbuster Entertainment Ltd v James 2006 IRLR 630**).

25. In considering the application the Tribunal focused, in particular, on what were the actual claims asserted against the second respondent in the grounds of claim, being a document which concluded with the legal claims being clearly spelt out. Those were recorded at paragraphs 29 and 30 of the grounds of claim (21). They were allegations of detriment which were contended to be on the grounds that the claimant made one or more protected disclosures. There were three detriments relied upon: the claimant's salary was reduced without consent/the respondent unlawfully reduced the claimant's net salary; the claimant was suspended from work; and the respondents refused to deal with the claimant's grievance. Those allegations were repeated in the agreed list of issues (89). It was not necessary or appropriate for the Tribunal to determine those allegations when determining the application, but it was important to note that the claimant was informed about the alleged suspension (if that is what it was) in an email of 30 April 2020 (581) sent personally by the second respondent. That email was also sent in response to the claimant's grievance and provided the first response to it from anyone at the first respondent. It did therefore appear to the Tribunal that, of the detriment claims which the Tribunal had been asked to determine, at least two of them arose from an email sent by the second respondent or, at the very least, sent in his name.

26. The application relied upon the assertions made in the claim form that the second respondent was materially responsible for the first respondent's decision making (18), and on the explicit allegation that the claimant had observed a culture of fear perpetuated by the second respondent (19). The respondents' counsel highlighted other passages both within the claim form and the claimant's witness statement where allegations about the second respondent and his culpability for matters which occurred were made. Those matters were not put to the second respondent in cross-examination (unlike the subject matter of the pleaded claims recorded in the list of issues).

27. In her answer to the application, the claimant's counsel explained that a decision had been taken not to cross-examine the second respondent on those matters based upon the claimant's counsel's professional view that those allegations and that evidence were collateral (to those issues which the Tribunal needed to

decide, which were of course addressed with the parties and agreed on the first day of hearing). Her professional view was right. The content of paragraph 13 of the claim form (19) and the related evidence included in the claimant's statement, had only tangential relevance to the issues which the Tribunal needed to determine, relating to the claimant's willingness to raise issues.

28. The Tribunal started by focusing upon the actual allegations made and the issues which it was agreed needed to be determined; those allegations/issues did not include an allegation of detriment arising from what could be generally described as some form of harassment of the claimant. Had there been an allegation which needed to be determined that the second respondent had subjected the claimant to a culture of fear or harassed him in a way relating to such an allegation, it is highly likely that it would have been appropriate to strike out such a claim at the point when the application was determined, albeit more probable that such an application would have been made on the basis that it had no reasonable prospects of success in the absence of any challenge to the second respondent's evidence, rather than on the basis advanced. However, the claims which it was agreed the Tribunal needed to determine were not put in that way, they were limited to claims regarding: suspension; the response to the grievance; and reduction in pay. The Tribunal did not believe it was appropriate to strike out those claims on the basis contended (at day four of a hearing when the evidence was nearing its end).

29. The panel did appreciate the significance of being an individual named respondent in any Tribunal claim. The Tribunal understood the basis upon which the application had been made and noted the absence of any cross-examination on the issues arising from the allegation of the culture of fear which was recorded in the claim form (but was not part of the issues which it was agreed needed to be determined).

30. In terms of the application under rule 37(1)(a), the claims which had been asserted against the second respondent at paragraphs 29 and 30 of the grounds of claim, as recorded in the agreed list of issues (89), were not scandalous nor were they vexatious. Under rule 37(1)(b), the conduct of the proceedings had not been scandalous or vexatious. The Tribunal could certainly see the merits of the contention that continuing to assert throughout the hearing that there was a culture of fear when cross-examination of the second respondent was not going to address the issue (or did not) was unreasonable conduct of the claim for the reasons the respondents' counsel outlined. However, irrespective of any decision as to whether it was, and in focussing on the issues which the Tribunal needed to determine, there was nothing about what had been raised which rendered a fair trial no longer possible on the issues which it was agreed the Tribunal needed to consider. There had not been any deliberate or persistent disregard of required procedural steps. On that basis, the decision of the Tribunal was not to take the draconian step of striking out the claims against the second respondent. Those claims proceeded to be determined on their merits at the end of the hearing (as they have been in this Judgment).

*Other procedural matters*

31. The start of the hearing on the fifth delay was delayed as a result of the respondents' counsel's non-attendance at the time required following a

misunderstanding for which he profusely apologised. The hearing on the fifth day recommenced at 12.30. On the morning of the fifth day the decision on the application was delivered and the evidence of Mr Iddon heard.

32. After the evidence was heard, each of the parties was given the opportunity to make submissions. Written submissions were provided by 2 pm on the fifth day and oral submissions were then made on the afternoon of the fifth day. It had been agreed in advance that no more than one hour per party would be allowed for oral submissions, both counsel having indicated that they would not require that long for their oral submissions. The respondents' counsel slightly exceeded the time allowed; the claimant's counsel completed her oral submissions well within the time.

33. In his closing submissions, for the first time, the respondents' representative raised the argument that the claimant was estopped from asserting that he was an employee (the written submission recorded the argument as contended for employment status only and not in respect of worker status). That was the first time that had been raised as an issue, it having not been pleaded or included in the List of Issues (even the list prepared by the respondents' counsel part way through the hearing). The claimant's counsel was faced with this submission without any advance warning. She submitted that the issue had not been pleaded or raised in advance. In response, in his reply to the claimant's counsel's submissions, the respondent's counsel contended that the argument did not need to have been pleaded or included in the List of Issues and he also made reference to an application to amend if it was required, although no actual application was made or determined. The merits of the argument are addressed in the Judgment below. However, the Tribunal did not understand why such a potentially significant (and novel) argument was only raised at such a late stage and why it had not been included in the List of Issues (at the very least as prepared by the respondents' counsel part way through the hearing).

34. At the end of submissions, the Employment Judge indicated that in reaching its decision the Tribunal would consider the very recent Employment Appeal Tribunal Judgment in **Marten v London Borough of Southwark EA-202-000432** and (as it was referred to at length in that Judgment) the earlier Employment Appeal Tribunal Judgment in **Williams v Michelle Brown AM UKEAT/0044/19** (neither of which had been referred to by either party in submissions). If either party wished to make any additional submissions in the light of those authorities, the opportunity to provide such submissions was given, to be provided to the Tribunal (copied to the other party) by no later than Friday 5 November 2021. The respondents provided by email some additional submissions. The claimant did not do so.

35. The time originally allocated for the hearing was fully utilised hearing evidence and submissions. At the end of the five days there was not time for the panel to consider and reach its decision. Accordingly, two days in chambers were arranged when the panel convened and reached its decision (without the attendance of the parties and by CVP). The dates for that in chambers determination were confirmed to the parties at the end of the hearing. As Judgment was reserved, the Tribunal provides the Judgment and reasons outlined below.

## Facts

36. The first respondent is a regional accountancy practice which was established in circa 1960 and (as at 6 July 2020) employed a total of 35 employees. It undertakes a wide range of accountancy and related services, including auditing and taxation. It has three equity partners: Mr Woodburn; Mr Barker; and Mr Johnson (the second respondent). Mr Woodburn and the second respondent have been equity partners for over twenty-five years; Mr Barker for a shorter period. The Tribunal was not provided with a copy of the partnership deed which contained the agreement between the equity partners. The evidence was that the weight given to each equity partner's vote differed on issues of dispute, albeit the equity partners usually made decisions together.

37. The practice also engages associate partners, being a role the nature of which was an issue in dispute in the proceedings. The firm employs managers and staff. There was also reference during the evidence to the first respondent having in the past engaged salaried partners.

38. The claimant was initially employed on a contract of employment with the first respondent as a Trainee Tax Consultant from 4 October 2010 (258).The claimant was an experienced tax accountant who had spent at least ten years advising others on issues, including whether those they engaged were employees or self-employed.

39. Mr Howarth was a former associate partner (2005-2012) and equity partner (2012-2016) with the first respondent. He had invested into the practice when he was an equity partner. He had been paid a consistent monthly amount when a partner, the amount having been paid net of tax. As an equity partner his usual monthly drawings had not been paid on a couple of occasions when the overdraft facility had been exceeded. He had been taxed at the time as a partner and not an employee, but his evidence to the Tribunal was that he no longer considered that he had been correctly categorised as a partner during all of his time with the first respondent (including whilst being an equity partner). He accepted in cross-examination that his circumstances were different to those of the claimant. He also explained that at the time that he left the first respondent he had had a grudge against it, but his evidence was that he no longer held that grudge. His statement recorded concerns about the lack of information provided to him as a partner (both when associate partner and equity partner).

40. It was not in dispute that, throughout the majority of the time during which the claimant was engaged by the first respondent, the relationship with him had been a positive one and he was described as hard working and ambitious. The second respondent's evidence was that he had a high regard for the claimant's technical ability. It was also not in dispute that the claimant was employed by the first respondent until 31 March 2019. What was in dispute was the nature of his engagement after that date.

41. The claimant was promoted to the role of associate with effect from 1 June 2018. At that time, he received a £3,000 uplift in his annual salary. The Tribunal was provided with a written amendment to the claimant's contract of employment increasing the notice period to three months (from either party). This was signed by the claimant and the first respondent on 16 August 2018 (342)

42. The claimant accepted that, under the terms of his written contract as an employee, he was entitled to 21 days annual leave per annum and bank holidays. It was the claimant's evidence that he and a colleague had agreed with the first respondent that they would be entitled to a greater amount of leave, following the departure of a previous partner. This was not recorded in writing.

43. As an employee the claimant was paid an annual salary (in monthly instalments), which by March 2019 was £54,000. He had an auto-enrolment pension provided to which the first respondent contributed £1,112 in 2018/19. He was paid overtime based upon the hours he worked in excess of his normal working hours. At the 4 May 2018 Mr Barker recorded that the expected overtime for a year, based on the previous year, was £1,600 per annum. The cost of employer's national insurance contributions referable to the claimant was recorded by Mr Barker as being £6,510 per annum (335).

44. The first respondent wished to consider succession planning and the evidence was that the second respondent and Mr Woodburn had raised the issue of retirement. The first respondent looked at promoting from the existing employees, with the ultimate view of some employees becoming equity partners. Mr Barker was not at that time envisaging retiring and it was his evidence (and that of Mr Woodburn) that he was responsible for addressing promotions to the partnership. The Tribunal accepted the respondents' witnesses' evidence about this succession planning and found that the appointment of the claimant to the role of associate partner was part of this process, with the ultimate intention being that he would have progressed to be an equity partner himself in due course.

45. There were conversations held with the claimant and the other proposed associate partners about the role and the future of the first respondent firm. A meeting was held on 18 April 2018 (333/334) with them all at which the future of the firm and its management was discussed. Mr Barker's evidence was that he was responsible for these discussions with the associate partners. His evidence was that the meeting included discussion about the change in status, but not about the individual terms (including the level of drawings). This was the only meeting held with all of the proposed associate partners together at the same time.

46. As part of his role, prior to April 2019, the claimant was involved in managing the tax department and in making decisions about other employees.

47. On 4 May 2018 Mr Barker emailed the other two equity partners outlining the proposed packages to be offered to the associate partners (335). The proposal that was to be offered to the claimant was stated to be £63,500 per annum (which was substantially more than the amount to be offered to the other three proposed associate partners). The proposal was explained by Mr Barker by identifying the amounts which were being paid to the claimant as an employee (including the proposed uplift in salary in June 2018, overtime, and pension) and adding the potential amount saved in employer's national insurance contributions. That reached a figure of £63,222. What was described as "*MJB Proposal*" was £63,500. In the case of each proposed associate partner the figure to be offered was identified by undertaking the same calculation and then rounding the figure up to the nearest thousand pounds (except in one individual's case where it was rounded up by an additional one thousand pounds). The email went on to propose net drawings for

each individual, which for the claimant was: *"£3,700 (£3,344 including claim for 10.4 hours overtime less Childcare Vouchers of £124)*". At the end of the email Mr Barker said the following:

> "*This shows that even after a month when there has been considerable overtime all 4 would be better off. I think we need to be clear on holidays insofar as each continue to get what they are currently entitled to and continue to accrue additional days as if they were employees subject to a maximum being the equity partners entitlement"*

48. The change of status was delayed, partly due to the need to obtain the relevant accountancy accreditations and practising certificates required.

49. On 6 March 2019 the claimant raised with Mr Woodburn by email the quantum which he would be provided once he became an associate partner, which he said he assumed would be 8 April 2019. Following a discussion on 11 March, the claimant made some proposals in an email (346).

*Deferred salary*

50. It was not in dispute that around 18 March 2019 the claimant approached Ms Garner and asked her to defer the salary he was due to be paid in March 2019. She told him that she could not process this without an email from him and approval from Mr Woodburn. Subsequently this was approved, and the claimant was paid the salary which he had earned during March 2019 after the start of the new tax year, in April 2019. The claimant's evidence was that this was advantageous for him because it meant that he remained below the relevant threshold for child benefit for the tax year 2018/19. The claimant was paid during April 2019 both the salary he had earned in March 2019 and the payment for April 2019. The former was put through the payroll. The latter was not.

*Change in status*

51. In accordance with the rules as they related to accredited accountancy practices, the claimant (who was ACA accredited) was not able to become a partner in the respondent until his affiliate application with the ICAEW was completed.

52. Mr Iddon's evidence was that he believed that he became an associate partner on 6 April 2019 at the start of the new tax year. His evidence was that he changed his job title, including his email sign off on, or soon after, 6 April. Mr Iddon's circumstances were equivalent to those of the claimant at that time.

53. On 9 April 2019 (394) the records team at the ICAEW informed Mr Woodburn that it had received certain documentation and was proceeding with the affiliate applications and a letter would be sent once approved. Mr Woodburn forwarded that to the other partners on the same day (398) saying

> "*We need to sort out the Associate Partner positions. Are we still looking at all four?? I attach a draft agreement – are you happy for me to circulate this? We still need to agree the package (salary)!*"

54. The agreement attached (400) was a template associate partnership agreement which did not have the names of the proposed associate partners included or the details regarding their "*annual salary*" or proposed holiday entitlement.

55. The claimant accepted when questioned that he had received an increase in what he received of at least £9,000 per annum from April 2019 (the first respondent contended that it was more). He also accepted that he ceased to be on the respondent's payroll and no longer received payments to an auto-enrolled pension scheme. The claimant's contention was that his new level of pay was made up of his previous pay, plus the first respondent's savings from the change in national insurance obligations and the saving made from not being required to make pension contributions in accordance with the obligations arising from auto-enrolment.

56. The claimant was issued with a P45 in April 2019 (406). That stated that the claimant's leave date was 23 April 2019. Mr Woodburn's evidence was that the date was determined by the date of the payroll run for April (the claimant being paid salary in April because of his request for deferment of the pay which had otherwise been due to be paid in March). Ms Garner's evidence was that the claimant was marked as a leaver on the payroll software in April 2019. At the time, the claimant raised no issue with the first respondent about the fact that he had been issued with a P45.

57. It was the claimant's evidence that he had informed the first respondent that he would only become a partner if he could review the partnership's accounts and if he agreed to all the terms, stated in his statement to be: remuneration; holidays; notice; and details of how gross salary was to be paid. Mr Barker accepted that the claimant had said that he wanted to agree to the terms of the partnership first. There was no dispute that all these things were not agreed in writing prior to the respondent recording a change in the claimant's status. The claimant accepted in his evidence that he understood the tax implications of becoming a partner and it was his evidence that this was why there was a significant weight on his shoulders after his tax status was changed.

58. During cross-examination, the claimant agreed that if he had been asked, on the day after the P45 had been issued to him, whether or not he was self-employed, he would have said that he was self-employed.

59. At no time, either before or after April/May 2019, was the claimant shown the details of the first respondent's accounts nor was he provided with information about income or liabilities. The claimant was not a signatory to the first respondent's bank account. The claimant did not make any capital contribution, nor was one requested.

60. From April 2019 the claimant ceased to have national insurance or income tax deducted and accounted for to HMRC by the first respondent, when payments were made to him. The first respondent did not pay employer's National Insurance contributions in respect of the claimant after April 2019.The claimant continued to have deductions made from payments for childcare vouchers which were provided to him even after April/May 2019.

61. Each of the first respondent's partners have an allocated net drawings figure. Mr Woodburn's evidence was that the figure was a net one and the firm would then

pay the tax and NI due. There was no separate bank account, but the tax due was accounted for separately. No record of the gross amounts retained for the claimant was identified to the Tribunal. Mr Woodburn highlighted the 15-16 month period available for the payment of tax, as a result of the first respondent's accounting year ending in September 2019. No record was shown to the Tribunal of any tax or NI paid by the first respondent in order to settle the claimant's tax obligations referable to any time when he was an associate partner. There was no dispute that the first respondent was committed to paying the claimant's tax and NI for the period during which he was engaged as an associate partner, the full gross amounts not having been paid to the claimant. Perhaps surprisingly, the Tribunal heard no evidence about how the differences between gross sums due and net sums paid were reconciled after a particular tax year's tax and NI was paid, but in any event it would appear that nothing material to be decided by this Tribunal turned upon that point.

62. The claimant accepted that he did not raise any issues about his status, or concerns about his status, in a document at any time from April 2019 until, at the earliest, November 2019.

63. On 7 May 2019 the claimant emailed Mr Woodburn regarding his holiday entitlement. He said:

> "*Before I book any, and as we are now (or to be) associate partners, can the holiday entitlement be confirmed? Seems odd if holiday entitlement is different for us all and also dependent on previous employment period"*

64. On 10 May (425) the claimant sent an email to Mr Woodburn stating that he was having a meeting with the bank on Saturday in respect of his mortgage because he needed a re-mortgage as soon as possible. He sought confirmation of the figure he should tell the bank as income. What the claimant said in this email about obtaining a mortgage was untrue, something which he accepted in his evidence to the Tribunal. The lie was told by him to obtain a response.

65. In his response, Mr Woodburn suggested £67,500 (425). The claimant responded (424) that he would use that for the mortgage on Saturday (albeit of course in reality there was no such meeting or application). The claimant went on to suggest a slight increase to £70,000, saying he would be happy to leave the increase in the business for the foreseeable future. It was contended that the claimant's email amounted to an agreement to the sum proposed. The claimant denied that the sum was agreed in the context of the chain of emails. The Tribunal does not find that an agreement as to the sum to be paid was reached in that email exchange, in the light of the fact that the claimant's response was to counter-propose an alternative figure, it was not an acceptance of what was proposed.

66. On 26 July 2019 the claimant emailed Mr Woodburn (424) carrying on the email chain from the exchange on 10 May. He asked what evidence he would have in respect of income if he attempted to obtain a mortgage. After Mr Woodburn had responded with a suggestion, the claimant said on 2 August 2019 (423):

> "*In the absence of a Partnership agreement, please could I have a letter which confirms the following:*

- *My gross amount (in view that we have different figures, and not yet agreed, in the interest to expedite this could I suggest 69?)*

- *Confirmation that the Partnership pays my tax liability (i.e. my monthly amount received is not my gross amount)*"

67. On 15 August 2019 (422) the claimant sent an email chasing Mr Woodburn.

68. Mr Woodburn accepted in answering cross examination that there had not been an agreed profit share at that point in time, as they were still negotiating what it would be. His evidence was that £69,000 was agreed in August 2019. In his submissions, the respondents' counsel submitted that, at the very latest, the figure was agreed by January 2020 (as it was included in the draft partnership deed and was not something which the claimant disputed). It is not necessary for the Tribunal to determine when exactly the amount/level of drawings which the claimant would receive as an associate partner was agreed, but the Tribunal accepts the respondents' submission that the sum was certainly agreed by January 2020 and, indeed, it appeared to have been agreed by late August 2019 as the claimant did not challenge the amount in a document thereafter (having done so on a number of occasions prior to that date).

69. The respondents' witnesses gave evidence about the year 2019 and why, due to personal circumstances and life-events (which do not need to be expressly included in this Judgment), it was a difficult and different year for them. That evidence was given in explaining the delay in a draft partnership agreement being provided to the claimant. Mr Woodburn's explanation for the delay in providing the agreement was that it was due to poor administration and it shouldn't have taken that long. No draft agreement containing the terms was sent to the claimant at any time during 2019.

70. On 5 November 2019 (428) the claimant sent an email to himself which he then forwarded to Mr Woodburn. In this he said:

> "*The best way to sum my thoughts up is that of being "disillusioned". Donna, Stuart, Matthew and I are supposed to be associate Partners but, as far as I can see, there have been no changes since we were employed and as such I can only surmise that we are still more like employees"*

71. Within his email the claimant went on to give examples of things which supported his view, including the absence of any partner meetings and the fact that he had never seen the accounts. He concluded the email by saying that he wasn't sure how to put it right, but he felt it was impacting on the way he was working. He sought Mr Woodburn's comments.

72. On 13 November 2019 (430) the claimant sent an email to Mr Iddon, Mr Barker, and Mr Matthew Johnson (the son of the second respondent). This suggested that those to whom the email was circulated, as the management team, agree some additional points before a proposed Partner meeting. This raised issues of future management approach. It appeared from the emails that a partner meeting had been proposed for 18 November which would have been attended by all the

associate partners and the equity partners. The meeting was cancelled (443) and never re-scheduled.

*2020*

73. On 6 January 2020 (453) the claimant emailed Mr Woodburn seeking confirmation that the first respondent would pay his tax liability for 2018/19 and some expenses. On 8 January 2020 (452) the claimant sent an email to Mr Woodburn, headed "*Payroll*". The email began by referring to issues at home and work, which the claimant said were taking their toll. What he said included the following:

> "*The lack of any Partnership agreement (verbal or written) since April 2019 when I was taken off the payroll, does still not sit comfortably with me. I note that you have stated that WNJ will pay my tax etc but without the comfort of a written agreement in respect of this, and being removed from other partnership liabilities, the potential prospect of having these liabilities in the future is causing concern… As such, all of the above has made me consider that I have no control, and am taking too much risk, with the current situation I find myself in.*
>
> *Accordingly, I propose the following action should be taken:*
>
> - *A written partnership agreement to be agreed, and signed, before 24 January 2020 in order to remove the perceived risks that I see as having; otherwise,*
> - *Please include me on the payroll for January 2020 until such time that an agreement can be agreed and signed."*

74. In January 2020 the claimant was provided with a draft partnership agreement (455) (this appeared to have been on 14 January 2020 which is the date which was included in the draft agreement). The first respondent did not take legal advice on the drafting of the agreement at the time, they used a template upon which they had taken legal advice when it was first drafted. The agreement was proposed to be one between the claimant and the three equity partners only. Mr Woodburn's evidence was that each associate partner entered into (or in the claimant's case was asked to enter into) an agreement based upon the template with the three equity partners. There was no document which contained any proposed agreement between the associate partners which including the other associate partners. The Tribunal finds that this approach reflected how the equity partners considered the involvement of the associate partners, that is that they were required to agree matters with the equity partners, but they were not considered comparable to the equity partners nor was it considered necessary for any agreement reached to include them all with each other.

75. Of note the draft agreement included the following:

a. Clause 1 recorded that the parties "*shall as from the 1st day of April 2019 carry on in Partnership under the firm name of Wallwork Nelson & Johnson*";

b. Clause 3 recorded that the claimant had no interest in the premises where the partnership practiced;

c. All capital from time to time required was to be contributed by the Equity Partners (being defined in the agreement as the Partners, a definition which did not include the claimant or the other associate partners);

d. Clause 7 provided that the claimant was entitled to a fixed profit share of £69,000 which should be reviewed annually. This was to be paid on a monthly basis, "*less an estimate of the income tax and national insurance liabilities associated with the fixed profit share. The Partners undertake to settle the associated income tax and national insurance liabilities in January and July each year*" (whilst the two sentences are not necessary consistent, the last sentence confirmed what had been agreed, which was that the equity partners undertook to settle the claimant's income tax and NI liabilities);

e. Clause 8 provided that the claimant was not entitled to any share of the capital assets or goodwill of the Firm, was not liable to contribute to any loss, and was to be kept indemnified by the Equity Partners;

f. The claimant was stated to be entitled to five weeks holiday plus statutory holidays each year;

g. The claimant was to devote the whole of his time and attention to the practice and not to be engaged in any other business activity (without consent); and

h. Six calendar months written notice was required to terminate the agreement, to be given on the first day of any calendar month.

76. The claimant raised various issues about the content of the draft agreement in an email of 15 January 2020 (461). As already recorded, the claimant did not dispute the annual figure of £69,000 which demonstrated that the figure had been agreed and certainly was not in dispute at that point in time. Many of the points raised were about the detailed drafting of the agreement, but of note they included the following:

a. A statement that the earliest date of the Partnership agreement was probably the 6 April 2019, as the claimant said he was only taken off the payroll during the 2019/20 tax year; and

b. The claimant sought 30 days annual leave as he said it was lower than his "*current amount*".

77. The partnership deed was never agreed with the claimant or accepted by him. The Tribunal finds that some of the terms of the deed in any event reflected the agreement which had been entered into by the claimant with the first respondent and under which he had been working. Those terms included: the level of payment to the claimant and the fact that it would be paid on a monthly basis (less estimated tax and NI); and the equity partners' obligation to pay the tax and NI due in relation to the net monthly payments made to the claimant. There was no evidence that some other

elements of the terms of the deed were part of the terms agreed between the parties, including: the date when the arrangement commenced; the term as to notice; and the general indemnity provided by the equity partners. As the deed was never accepted or entered into, those terms were never in practice agreed.

78. In terms of holidays, the deed showed that the first respondent operated a practice with partners that there was a defined number of days holidays which they were expected to take. Mr Barker's evidence was that no one counted the number of days holiday taken by a partner and therefore partners were able to take the holiday they wished to (provided the required work was undertaken).

79. On 10 February 2020 the claimant emailed Mr Woodburn (476) asking about the partnership making payments to the claimant's pension scheme in order to reduce the tax otherwise payable for that tax year. The claimant stated he had estimated his tax bill for January 2021 and therefore he asked if there could be a discussion about payments to his pension before 5 April 2020 in order to reduce that tax bill. The claimant acknowledged within the email that the tax bill was his own personal bill.

*Ill health absence and subsequent emails*

80. On 24 February 2020 the claimant commenced a period of ill health absence. He was signed as being not fit to work until 16 March 2020. The claimant attributed the reason for his absence to being stress resulting from the situation with the first respondent.

81. On 25 February 2020 (481) the claimant sent a lengthy email to Mr Woodburn. He referred to the difficulties he would face if he needed to meet the January 2021 tax bill personally. He concluded the email by expressing a wish for some of the risk to be removed going forward. Within the email he said:

> "*As there are no guarantees in life, and I am rather risk averse, relying on the partnership for my personal liabilities is a big risk for me. It doesn't sit comfortably and is one of the reasons I have been pushing for a signed agreement in order to mitigate some of the perceived risk. Due to having no agreement, this is primarily the reason I requested to be an employee again*".

82. On 28 February 2020 the claimant provided his fit note to Mr Woodburn (483). The fit note recorded the claimant as being not fit for work due to a stress-related problem. Mr Woodburn's evidence in the statement for the interim relief hearing (181) was that the claimant had a total of 27.5 days absence up to and including April 2020 on account of sickness absence and compassionate leave. There was no dispute that the claimant continued to be paid the same amount by the first respondent and no reduction was made to reflect sickness absence. The evidence heard by the Tribunal was that employees of the first respondent were only entitled to statutory sick pay during sickness absence, but that the first respondent frequently exercised its discretion to pay full pay during absence for employees.

83. On 2 March 2020 Ms Garner sent the claimant an email which was stated to be sent on behalf of the partners of the first respondent (487) (albeit clear from the evidence that it was sent by and on behalf of the equity partners only). The email

began by referring to the claimant's email to Mr Woodburn (presumably being the email of 25 February 2020) and the claimant's personal circumstances. It then said:

> "*We acknowledge your preference to return to a position of employment and respect your views with regard to risk. You will appreciate that an element of risk is inherent to self-employment and becoming an associate will therefore carry significant risk and rewards. We will need consider further before finalising our position with regard to terms and conditions and how it will affect your role in the future. Given that as a partnership we consider the role of associate to be a stepping stone to full equity partnership, carrying the risk to which you allude, we are prepared to re-instate your position prior to being an associate as at May 2018.*"

84. The claimant replied in an email also of 2 March to the equity partners and Ms Garner (486). His email acknowledged the issues of risk. He went on to say:

> "*Please note that I still have the view that taking me off the payroll without any agreement may still mean I am an employee. Being placed back on the payroll was only if no agreement could be actioned, as, prima facie, this would right the wrong of me being taken off the payroll in the first place. If this proposal is considered, therefore, the payroll records should be adjusted to show that the amounts I received from WNJ, since April 2019, are subject to PAYE. The current situation is that I have no agreement with the Partners and no access or visibility to the finances."*

85. The email went on to address details of the matters raised. The email concluded with a question as to whether there was any reason why an associate partnership agreement could not be agreed and signed.

86. The claimant accepted in cross-examination that by his position in his email of 2 March 2020 he had executed a one hundred and eighty degree manoeuvre from saying he was self employed to saying he was an employee.

87. On 7 March Mr Woodburn emailed the claimant (492). After addressing the approach to tax and risk for partners, he said:

> "*You have expressed a wish to revert to being employed and in the circumstances we think that this is the best way forward which is in no small part due to your health issues…We are of the view that history cannot be rewritten, a view which I am sure you will appreciate. With this in mind you could revert to the payroll in either March or April? We can then hopefully agree the Associate Partnership agreement for your period of self employment"*

*The first alleged disclosure*

88. On 10 March 2020 the claimant sent a further email to the equity partners (491). This was the first alleged public interest disclosure relied upon. In the email the claimant said the following:

> "*This is a rather odd and bemusing situation to find myself in.*

*I was taken off the payroll without any agreement. I seek to obtain an agreement. It isn't forthcoming even after eleven months of request. The lack of any agreement and the resulting uncertainty causes me to be off work. I further seek to obtain an agreement and clarify my position so that I may continue working and, prima facie, it appears you are attempting to demote me.*

*It is not the work or job role that has caused any health issues but the risk to WNJ/myself by not having a partnership agreement in place.*

*I don't think the Partners have fully considered what is at stake here.*

*Are you aware of the potential consequences to WNJ and me from both a tax and employment law perspective??...*

*We could be years down the line and it would only take a simple HMRC PAYE enquiry and they could deem all the payments to all 4 associate partners, since April 2019, to be subject to PAYE due to the fact that there are no agreements in place and the associate partners are only fixed profit shares (i.e. disguised salary)….*

*This is what I mean by being risk adverse. I refuse to take unnecessary risk created by cutting corners. I would never allow a client to take this risk by not correctly documenting their transactions and being open to an easy attack by HMRC.*

*Without any partnership agreement, based on the facts (never seen the business accounts, no capital introduced, fixed profit, no partner meetings), my professional view, and personal opinion, is that I am still an employee"*

89. The email ended with a statement that the claimant did not consider that he needed to sign another employment contract, because his contract from May 2018 was still effective. There was a reference to returning to work.

90. Within the 10 March email from the claimant was a hyperlink to an article. A copy of what was said to be the article was provided on the fourth day of hearing (494A). The claimant introduced the article in his email by saying "*This article may prove useful (note the conclusion)"*. Neither Mr Barker nor the second respondent could recall the article or whether they had pressed on the link. The article was one written by the solicitors' firm Fox Williams headed "*Status symbols – what factors will decide whether your partners are employees*", which addressed the implications of the Court of Appeal decision in **Tiffin v Lester Aldridge** and sensibly highlighted the range of factors which needed to be taken into account when determining whether fixed share partners were genuinely employees (or not). The article concluded with the recommendation that a risk analysis ought to be carried out when partners were engaged and emphasised that firms could protect themselves by ensuring that all partners sign a carefully drafted partnership deed.

91. Mr Woodburn accepted that, in his view, the claimant was saying in his email that tax and NI had been applied incorrectly. The second respondent accepted in

cross examination that it was the claimant's opinion being expressed in the email that tax and NI had not been deducted appropriately.

*Lockdown*

92. The first national lockdown arising from the Covid-19 pandemic commenced in March 2020. This resulted in significant issues for the first respondent in terms of workload and the requirement for payroll advice to clients. An important element of the pandemic was the furlough scheme which, in summary, could not be used for those not on the payroll as an employee at the relevant time (irrespective of whether or not the decision not to place the worker on the payroll had been correct). The first respondent faced considerable uncertainty regarding the business and its viability in and around the end of March 2020, in common with many organisations (as a result of the uncertainty at the time).

93. On 21 March 2020 Mr Woodburn asked the claimant to cover payroll (503) (that is to be managerially responsible for the department, not to undertake the work itself). The claimant objected to doing so. Despite the claimant's objections, he was still told to do so. As with many organisations, the first respondent's staff and partners predominantly worked from home during the early stages of the pandemic. The claimant worked from home throughout this period. On 25 March 2020 (507) the claimant raised issues regarding the equipment available and also some personal matters.

94. In a text message on 25 March 2020 (637) the claimant said that he had been criticised by the second respondent for looking after his daughter the previous day (whilst working from home).

95. The Tribunal was shown a very lengthy text message which the claimant sent to Mr Barker on 26 March 2020 (511). Amongst the things said by the claimant in the message he said: "*If you wondered why I want a partnership agreement, and why it caused me to be off work, please remember your conversations with me. But you seem to be* [the second respondent's] *spokesperson whenever he asks. I believe a lot of the issues, which you criticised me for – saying you have deep concerns, are NOT my fault and perhaps it's closer to others. What's worse – a dictator or someone who carries out the dictator's wishes*".

96. On 31 March 2020 (525) the claimant sent an email raising issues relating to the first respondent's business and the pandemic, to which the second respondent responded by saying the issue did not require further consideration at that stage (524). Later on the same day, the claimant also sent an email to Mr Woodburn which contained a scenario, effectively being a narrative story-telling of a situation akin to the claimant's position with the first respondent (527).

97. The Tribunal was shown emails sent during April 2020 about business related issues. On 22 April 2020 emails were exchanged between the claimant and Mr Barker about the Covid legislation in place at the time and the claimant's position that he did not have a reasonable excuse for going to work as was required for him to work in the office (570). In his email to the claimant, Mr Barker explained that the claimant had asked him to get the second respondent to apologise for his approach (569)

98. On 22 April 2020 the claimant sent Mr Barker a further narrative email containing a story, this time about football teams and managers (1017). The Tribunal found both this and the previous narrative email to be somewhat unusual. The Tribunal found those emails, and the emails and text messages around the same time, as being indicative of a deteriorating relationship between the claimant and the first respondent. The narratives demonstrated the claimant's focus on his circumstances and his personal dissatisfaction with the first respondent, his role, and the position regarding the partnership deed.

*The reduction*

99. On 28 April 2020 Mr Woodburn sent the three associate partners an email which recorded a decision made by the equity partners to reduce each associate partner's drawings for April 2020 "*until the situation returns to normal*" (247). The reduction was to £2,725 per month. As a result of the level of monthly drawings, the impact of this differed for each of the associate partners. The reduction in drawings which was applied to the associate partners did not affect Mr Iddon, as the amount to be paid had been reduced to the level paid to Mr Iddon. It had some impact on Mr M Johnson (the second respondent's son) but had a more significant impact on the claimant. The email ended with the statement "*Hopefully, this will be agreeable to you all*". The reduction was applied two days after the notification was sent. Mr Woodburn's evidence was that what was said in this email was definitely up for negotiation as, if the claimant (and others) had come back and said sorry they needed a higher amount, the first respondent would have agreed to that. The Tribunal accepts Mr Woodburn's evidence, albeit the very limited time involved before the reduction applied meant there was little time for such a discussion.

100. In his statement prepared for the interim relief hearing, Mr Woodburn stated that the reduction in the claimant's drawings from April 2019 was temporary. In answer to a question asked during this hearing, Mr Woodburn explained that the claimant was on a profit share and the reduction was just about the payment of cash at the time, and it was always intended that the claimant would receive his drawings down the line. There was no evidence that the claimant had ever been paid the shortfall in his drawings for the period during which he was an associate partner. In submissions the respondents' representative stated that it was the respondents' position that the sum not paid in that period was being held by the first respondent in what he described as the claimant's capital account. The Tribunal accepts that the money has been held for the claimant by the first respondent (albeit it is not clear why it has not been paid to the claimant in the two and half years since it was first not paid).

*The grievance email (the second alleged disclosure)*

101. On 30 April (579) the claimant sent an email to the equity partners which was headed as being a formal grievance - salary reduction. This was the second alleged protected disclosure. The first paragraph confirmed that the claimant wished to lodge a formal grievance "*In respect of the unilateral and unlawful action taken by the Partners to reduce my monthly income in April 2020 and proposed reductions thereafter, without my consent*". The email went on to say that the claimant would be working under protest until the grievance and appeal was exhausted. The claimant

referred to having taken legal advice and his view that he would be entitled to resign and claim constructive dismissal.

102. Within the email the claimant said:

> "*I have previously said that I consider myself to be nothing other than an employee since I started in 2010 and, on the basis of the facts to date, the legal advice received has also confirmed that for employment law and tax/NICs purposes, I would be deemed to be an employee as at today's date. This, of course, means that I have employment rights. As such, the unilateral reduction of my net monthly salary from £3,950 to £2,725 is a breach of contract. It is also an unlawful deduction from wages contract to Part II of the Employment Rights Act 1996. I also note that it is planned that my monthly salary will remain at £2,725 for the foreseeable until such times are deemed "normal". Each time a lower sum is paid to me than that to which I am entitled (without my consent) the partnership will be in breach of contract and will be making further unlawful deductions from my wages."*

103. In the email the claimant criticised the manner in which the reduction had been imposed. He contrasted the reduction with payment during good earning years. He explained that he was the most affected in cash terms. He confirmed his right to be accompanied. He stated that an ACAS Early Conciliation certificate would be obtained so that he could commence Employment Tribunal proceedings without delay.

104. The response to the grievance email was sent to the claimant by the second respondent, copied to the other equity partners (581). The second respondent's evidence was that, following legal advice, he sent the email for and on behalf of the partners. The second respondent drafted the email with the assistance of legal advisors. The email started by saying that a reply would be sent when advice had been taken from the first respondent's solicitors. The email asserted that the claimant had been self-employed since 1 April 2019. The claimant was told not to attend the first respondent's premises until matters were resolved. The next paragraph of the email informed the claimant that the equity partners would take immediate control of all aspects of the management of the Tax and Payroll departments. The email concluded with the following:

> "*For the record, it is our opinion that your current stance in asserting that you are an employee constitutes a breach of your fiduciary duties as a Partner. You have accepted drawings as a Partner and built up a Capital Account. Unless your statements are retracted your position within the firm will become untenable"*

105. The claimant's evidence was that he read the email as meaning that he had been suspended. The respondents disputed that was the case; the second respondent's evidence being that the claimant was simply being told to continue to work from home as he had been. It is noted that the word suspended was not used and the precise meaning of the email was somewhat unclear (in the context of a time when the claimant and most workers were working from home and not attending the premises in any event). The Tribunal finds that, whatever label is attached to it, the email clearly removed some of the claimant's responsibilities and told him to remain

away from the first respondent's premises. The Tribunal finds that the claimant understood the email to mean that he was suspended. It was reasonable for him to do so (it is particularly noted that the email did not spell out what the claimant could or should do). In the light of the first respondent's responses to the claimant's subsequent emails seeking clarification about suspension (see below), the Tribunal also finds that the impact of the email was that the claimant was effectively suspended as an associate partner in reality (whatever had been intended when the email was written).

*The third alleged disclosure*

106. On 1 May 2020 (584) the claimant responded to the second respondent's email, by an email sent to the equity partners. That was the third alleged protected disclosure. After addressing the apparent absence of legal advice taken by the first respondent, the claimant said:

> "*I am an employee and always have been since I started working for the firm. No paperwork has ever been issued to me which would suggest that I am a partner and not an employee. My last contract was a contract of employment. I am not a party to any partnership deed and I am not treated as a partner. I take no part in partnership decision-making and attend no partners' meetings. The reality of the situation is that you are seeking to treat me as a self-employed partner so that you can save employer's National Insurance contributions and use that saving to fund the relatively nominal pay increase you provided me with last year.*
>
> *As I am sure you know, even if HMRC were prepared to accept that I am self-employed for tax purposes (which I say they would not be) then that is not determinative of my status for employment law purposes."*

107. The email went on the highlight the absence of a capital account for the claimant. It explained that the claimant believed that the email appeared to suspend him and explained why the claimant thought that he had been suspended. It explained why the claimant thought the second respondent's reference to fiduciary duties made no sense. It said:

> "*As an employee, I have of course made a protected disclosure under the whistleblowing legislation and you therefore have a duty not to subject me to any detrimental treatment as a result*".

108. The letter stated that the claimant did not propose to retract any statements and asked for the grievance to be investigated in accordance with the first respondent's procedures. The email concluded by stating that if the claimant was to remain away from work, he did so under protest.

109. The claimant's grievance was never investigated or addressed under the first respondent's procedures. Prior to 15 May, none of the equity partners responded to the claimant's statement that the previous email appeared to suspend him, to explain that the claimant had not been suspended.

*The alleged disclosures generally*

110. In his evidence to the Tribunal the claimant stated that at the time he made each of the alleged disclosures he considered that chartered accountants should not create sham arrangements or conceal information that might lead HMRC to decide that there were tax and NI contributions lawfully falling due. He also stated that he considered that it was in the public interest to set this out. In her submissions the claimant's counsel emphasised this, highlighted that her submission was that the email of 1 May 2020 stated that the treatment of the claimant as a self-employed partner was a sham to avoid paying NI contributions and submitted that the claimant's compelling evidence under robust cross examination was that the claimant's moral and professional ethics had stepped in in 2020 and that at the time he made the disclosures he believed that asserting that not paying the correct tax and NI in breach of the legislation, was inherently in the public interest.

111. When looking at what the claimant said in the alleged disclosures, the Tribunal did not find that what was said demonstrated that the claimant believed he was disclosing information in the public interest. The email of 10 March was focussed upon the risk of HMRC reaching a determination and the adverse consequences of such a determination. The claimant referred to the impact of an HMRC enquiry years down the line and the possibility that could result in an adverse outcome. This was placed in the context of the claimant being risk averse. The attached article was one which highlighted the risks for partnerships generally and made recommendations (which the claimant emphasised in his email) which were focussed upon partnerships not being vulnerable to an HMRC enquiry, rather than addressing what the right amount of tax and NI should have been. The 30 April grievance email was focussed on the claimant, the payments to which he was due, and his legal rights.

112. The Tribunal finds that what was said in the emails evidenced the claimant's belief and focus on the claimant's risk and that of the first respondent. The content showed that the information which the claimant was disclosing was all about addressing gaps in the arrangements and governance structure to avoid the risk of: needing to pay more tax or NI; or being found not to have paid the right amounts. That is, the content was not about the public interest and the importance of ensuring that a higher amount of tax and NI was paid in the public interest. Rather the information being disclosed focussed upon what was not in the public interest, that is closing down the possibility that a greater amount of tax or NI might be found to be due. In the emails the claimant was not in fact asserting that the first respondent had engaged in unlawful transactions or that more tax should have been paid to HMRC, his focus was (save for one line in 1 May email) entirely upon asking the first respondent to document what had occurred more thoroughly in order to avoid HMRC being able to challenge what had occurred. In practice what the claimant was proposing was the opposite of being in the public interest, because he was arguing that the parties should protect themselves more from the risk of being required to pay more tax. In the last email, the content was clearly written with proceedings in mind.

113. Contrary to what was submitted by the claimant's counsel, the Tribunal found the claimant's evidence not credible about what he believed when he made the disclosures. The claimant was not a credible witness generally. The Tribunal found

him to be someone who was untruthful where he believed it was in his interests. He was somebody who admitted to lying when sending an email to the first respondent on 10 May 2019 (425), in order to obtain a drawings figure. The claimant referred to that in evidence as a white lie. The Tribunal found the claimant's credibility to be entirely undermined by his willingness to tell an untruth in writing. Other evidence heard by the Tribunal demonstrated that the claimant was somebody who was focussed on paying less tax and NI if he was able to do so. The requested change to the dates of payment of his salary from April 2019 to May 2019 demonstrated to the Tribunal someone who had no qualms about taking steps to improve his own personal tax position, when the steps were not in the broader public interest. The claimant's approach to his negotiations with the first respondent were all about maximising his drawings. The claimant had been paid as a self-employed partner for almost twelve months without deductions for employee tax and employee NI having been made, when the emails were written. He was an expert in employment status and tax, a senior tax accountant, and yet it took him almost twelve months to raise any issues. Previously, at the end of tax year 2018/2019, the claimant had been quite prepared to work the system in order to minimise his tax exposure. The Tribunal found that when the claimant made the disclosures contained in his emails, he did not believe that they were made in the public interest at all. The Tribunal did not find the claimant's evidence that he believed the disclosures to be in the public interest to be credible at all, and determined that the evidence did not support what the claimant said he believed.

114. The Tribunal also found that: the first respondent did not appoint the claimant and the other associate partners to that role as a sham or as a means of reducing the NI costs; and the claimant did not genuinely believe that to be the case. The appointments were genuinely made by the first respondent as part of a process of planning for the future and succession planning for retiring equity partners. Whilst there might have been some contention about whether the arrangements put in place did, successfully and applying all the relevant factors, ensure that the associate partners appointed were genuinely partners (and not employees), the Tribunal did not find that there was any genuine evidence that the appointments were made as a sham or to reduce NI payable. The first respondent could certainly have introduced a partnership deed much earlier and could have taken other steps to ensure that the associate partners were more clearly partners not employees, but (based upon the evidence heard by the Tribunal) its failure to do so was not as a result of any sham or intent to deceive HMRC. The three appointments were made as part of a process of potentially transitioning those employees to ultimately be equity partners in the future.

*Subsequent correspondence*

115. The claimant sent a further email on 4 May (586). He again highlighted that he believed he had been suspended.

116. On 6 May 2020 a letter was sent to the claimant on behalf of the first respondent by solicitors instructed on its behalf (721). The letter stated that the position of the first respondent was that the claimant had been self-employed since at least 6 April 2019. It stated that the assertion in the claimant's email of 30 April 2020 that he was an employee had been something of a surprise to the first respondent. It explained various factors which the solicitors contended indicated the

true status of the claimant including: the tax position; the fact that the claimant was effectively head of the tax department and allocated work; that the claimant had had the final say on employing members of the tax team; the claimant had attended partners meetings and participated fully (although it contained no detail about when those meetings were contended to have taken place); the treatment of holidays; and the maintenance of drawings during sickness absence. The letter concluded:

> "*in the event that a resolution cannot be reached, the Partnership will have no option but to take steps to preserve its position, given that your stance goes to the heart of the relationship between the Partnership and yourself*".

117. An email was sent in response by the claimant on 11 May (723). That highlighted the inconsistency in the dates being asserted for the commencement of the claimant's self-employment and explained at some length why the claimant was asserting that he was an employee. He highlighted that his role and responsibilities as head of the tax department had been in place since 2017, prior to the date when it was asserted that the claimant had become self-employed. The claimant also explained that there had been no partners meetings which had been attended by all the equity partners.

118. On 14 May the claimant emailed Mr Woodburn as clients had been contacting him. He explained that "*I have been suspended*" (590). Mr Woodburn responded on the 15 May (589) and said "*We aren't of the opinion that you are suspended*". The claimant responded on the same day "*Ian's email stated that I was not allowed to be on the business premises and I am no longer managing the tax department. Please confirm how this is not being suspended when it means that I am unable to do my job*".

119. Further emails were sent by the claimant on 28 May (592) and 2 June (593), both of which sought confirmation about what the first respondent required him to do. Mr Woodburn responded on 3 June (595) to explain that the partnership had resolved to deal with matters through its solicitors and a detailed response to all points would be received the following week. Mr Woodburn did not explain to the claimant what it was that he was, or was not, required to do.

120. A brief holding response was sent by the solicitors instructed on the first respondent's behalf to the claimant on 14 May 2020 (726).

*The termination*

121. Mr Woodburn's statement for the interim relief hearing (187) stated that on 11 June 2020 there was a meeting held between the partners at which a discussion was held and a unanimous conclusion reached that the correspondence issued by the claimant be accepted as communication of the claimant's intention to bring the agreement of April 2019 to an end and terminate his involvement in the partnership. When asked about who the partners were in this statement during cross-examination, Mr Woodburn stated that he was not clear who it was but probably he thought it was the equity partners. He also accepted that the correspondence referred to must have been the email of 1 May 2020 (729). There were no notes or minutes taken of this partners meeting and when asked about the reason for this, Mr Woodburn explained that he guessed that the first respondent was not great at the

taking of minutes at partners' meeting. He appeared unable to recall how the meeting had taken place. The recollection about this meeting of all the attendees who gave evidence was somewhat lacking and therefore there was no reliable evidence about what exactly was discussed and agreed. The second respondent's evidence was that the meeting lasted about ten minutes and he placed particular emphasis on the legal advice received being the basis for what was determined, rather than providing any genuine explanation himself for the basis upon which the decision was made.

122. Two letters were sent to the claimant by the solicitors instructed on the first respondent's behalf on 11 June 2020 (727) and (731). Those letters addressed the issues raised by the claimant regarding his status. It was explained that as the claimant was a partner in the practice, the grievance policy did not apply to him. It was said that no grievance process would be followed, although the claimant was informed that the first respondent was prepared to convene a partners' meeting to enable the claimant to express his dissatisfaction. Under the heading "Partnership Participation", the letter said:

> "*Upon any reading your correspondence, it is evident that you have no wish to remain within the partnership and/or retain partner status within the practice. Our clients have therefore treated your email of 1 May 2020 as a notice of retirement from the partnership. Arrangements will now be made for the termination of your involvement with the practice upon this basis. The details of the measures which will now be implemented will be communicated to you by separate letter."*

123. The separate letter (731) said "*We are expressly instructed to serve this notice on behalf of the Partnership in the light of the position with Covid-19*". The letter stated that the first respondent was satisfied that in April 2019 an oral agreement had been reached "*whereby you expressed your desire to make the transition from employee to salaried partner status*". The letter stated that since then the first respondent had attempted to record the detailed terms of the agreement in writing, but despite their efforts, that had not been possible (but it was stated that this did not affect the transactional reality of the oral agreement which had been reached). The letter stated that it was apparent that:

> "*1. You have no wish to remain with the Partnership or retain Partnership status within the practice; and*
>
> *2.You wish to relinquish that status.*
>
> *Our client has attempted to provide you with assurances. However, their efforts have been met with serious and unsubstantiated slurs on the character and integrity of the Partnership. Given this position and with significant reluctance, our clients hereby confirm their acceptance of your notice of intention to withdraw from the partnership and the practice.*
>
> *In line with customer and practice and standard terms applicable to fixed share partners, our clients have resolved that your participation within the partnership and the practice will come to an end on 12 June 2020, thereby reflecting the provision of notice by you to the Partnership on 1 May 2020* "

*Post termination events*

124. The claimant received his last payment from the respondent in June 2020. The claimant was paid a sum equivalent to the drawings which would have been paid pro rata for the period of June during which he was engaged (but applying the reduction which had been notified to the claimant on 28 April 2020).

125. The claimant's submission was that the shortfall in net payments to the claimant made as a result of the 28 April email (that is the difference between the normal net payments and those made after the reduction was applied) was £2,865.60 (being £1,225 in each of April and May and £415.60 for the period of June during which the claimant was engaged).

126. On 13 July 2020 the claimant notified HMRC (683). In his letter the claimant stated that he believed he should have had tax deducted by PAYE as an employee. He referred to his Employment Tribunal claim. He stated (as he did in his claim form) that his status as an associate partner had been nothing but a sham. He also made reference to an alleged culture of bullying by the second respondent.

*Other evidence*

127. There was no dispute that throughout the entire period of the claimant's engagement he was: required to work in the office (until the impact of Covid-19 changed the position); and dress smartly in a suit and tie.

128. As part of the proceedings the first respondent provided a written response to requests for information made by the claimant (1785). Within that document the first respondent stated that the claimant had become an associate partner with effect from 24 April 2019 and the claimant received net monthly drawings of £3,950 based on the figures it was said had been discussed between the claimant and Mr Woodburn as representing £67,500 per annum gross. The first respondent also stated later in the document that the claimant retained an ongoing capital account with the first respondent which represented his annual drawings of £69,000 against which £3,950 was drawn each month (1786). The £69,000 was stated to be the agreed gross drawings, where agreement had been reached ultimately after lengthy discussions and negotiations. The first respondent stated that the P45 evidenced the end of the claimant's employment with the first respondent on 23 April 2019.

129. In his evidence, Mr Woodburn stated that the claimant would not have been expected to contribute to any debt of the first respondent and that the joint liability of partners would not have been a problem for the claimant. The Tribunal accepts the evidence as being the view that Mr Woodburn had, albeit in fact the exposure of the claimant to any liabilities of the first respondent in practice would appear to have been the default arrangement under the Partnership Act (in the absence of any written agreement) irrespective of what the first respondent's partners assumed would have been the case in the absence of such an agreement having been concluded. Indeed, the first respondent's partners appear to have been somewhat naïve in their approach to appointing partners without a written agreement having been concluded.

130. In the grounds of claim, in his letter to HMRC, and in his evidence, the claimant asserted that the second respondent perpetuated a culture of fear. This was not something put to the respondents' witnesses. Aside from the claimant's assertion, the Tribunal finds that there was no evidence whatsoever that such a culture existed or was perpetuated by the second respondent. The Tribunal finds that there was no such culture. It finds that the second respondent did not perpetuate such a culture. The Tribunal found the second respondent to be straightforward and clear in his evidence and found him to be a credible and balanced witness who engaged with what was asked. The evidence heard by the Tribunal demonstrated a professional approach taken by the second respondent.

131. The Tribunal accepted the respondents' evidence that the primary decision-maker for most of 2019 regarding the appointments of the associate partners and the process followed, was Mr Barker. He was the equity partner who was would remain in the future under the first respondent's succession plan. Accordingly, the key decision maker for that period was not the second respondent.

132. The Tribunal also understood and appreciated the particular pressures and difficulties faced by all businesses, and the first respondent in particular, in the early part of 2020 in the early stages of the Covid-19 pandemic. The evidence heard by the Tribunal was that the first respondent was inundated with queries from clients at the time. All the first respondent's partners and senior employees were very busy from March 2020 with new and novel issues and were faced with the challenges arising from alternative ways of working.

**The Law**

*Employment status*

133. The starting point to issues of status are the definitions of employee, contract of employment and worker in section 230 of the Employment Rights Act 1996. They say:

> *"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."*
>
> *"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."*
>
> "*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 on by the individual*"

134. Section 212 of the Employment Rights Act 1996 says that any week in which an employee's relations with his employer are governed by a contract of employment, count towards computing the employee's period of employment.

*Employee?*

135. The key starting point in determining whether someone is an employee is the Judgment of McKenna J in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433**, where he said the following:

> *"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service ….*"

136. The right approach to determining whether someone is an employee is to weigh up all the factors. None are necessarily determinative. The claimant's representative in her submissions highlighted: personal service; mutuality of obligation; control; and other factors. Some other relevant factors can include: how the parties themselves describe the relationship, which is potentially a significant factor, but is not determinative; the amount of remuneration and how it was paid; the arrangements for income tax and NI (and in this case childcare vouchers); the arrangements re risk; and what was agreed regarding sick pay and holiday pay.

137. In interpreting the agreement between the parties, including any documents which record the relationship, the question the Tribunal must ask is what was the true agreement between the parties? The claimant's representative submitted that the label attached to a job role is not conclusive. The terms of any written agreement can assist in determining this, but sometimes in employment the terms do not reflect the reality. The claimant relied upon **Autoclenz Ltd v Belcher *[2011] IRLR 820*** in which Lord Clarke said that "*the question in every case is…what was the true agreement between the parties*" and*:*

> "*So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."*

138. The respondent's counsel placed emphasis on the decision of the Employment Appeal Tribunal in **Williamson & Soden Solicitors v Briars UK EAT/0611/10,** a case involving the status of a salaried partner who was a solicitor. At paragraphs 25, 27 and 30 the EAT said:

> "*The question to be determined for the purposes of jurisdiction is not whether a given individual is a partner; it is not whether he is self-employed. It is*

*whether he comes within the definition of employee. The rights which he claimed were rights which could only be accessed by an employee, so defined by s 230 of the Act. Section 230 may have an element of circularity about it in that a contract of employment is defined as a contract of service, and "employee" defined in relation to contract of employment: but it is clear that, whatever the circularity may be, a contract is essential. Therefore the question is: what is the nature of the agreement? As to this, there are too many cases here to review, but it is worth reminding oneself of the requirements concisely stated as to a contract of employment by Stable J, using one sentence in Chadwick v Pioneer Private Telephone Co Ltd*: *"A contract of service implies an obligation to serve, and it comprises some degree of control by the master.""*

*"The determination of those issues involves the determination of matters of fact. It has been established by* Carmichael v National Power plc*, in the House of Lords, that if the entire relationship of the parties is contained in documents then the construction of those documents is a matter of law for the courts. But in so far as it is not, then it is a matter of fact for the determination by the tribunal as to precisely what the relationship is. Thus the way in which the parties conduct themselves where the documentary evidence may not be full or clear is evidence upon which a tribunal may properly found its conclusions, always provided that it has approached the matter correctly in law….It is up to the tribunal how best logically to address the specific questions that arise for determination in its particular case upon the particular circumstances of that case when it deciding whether the individual is or is not an employee, which is the overall question it has to resolve."*

*"All these extracts demonstrate these propositions: first, that what it is essential to focus upon is the true nature of the relationship; secondly, that will primarily be a matter for the determination evaluation of fact; thirdly, as to that, the labels that parties place upon the relationship may be relevant factors, but are in no sense determinative. I note that in Tiffin Silber J described some of the "different types of partners" that could exist; demonstrating, again, that such are the differing roles that persons occupy within undertakings whilst being described as "partners" that the words are at best an unreliable guide to whether they fulfil the definition of "partner" under the Partnership Act or "employee" under the Employment Rights Act. There is no clearly defined litmus test; everything must necessarily depend upon all the facts and circumstances."*

139. The respondents' representative also placed reliance upon **Massey v Crown Life Insurance Company [1978] 2 All ER 576**; **Young and Woods Limited v West [1980] IRLR 201.** The former was in particular relied upon as showing that parties to an agreement could agree a change in status or, at least, that there was no reason why the parties could not agree a change in status where there was a genuine intent to do so.

140. The respondents' representative in his submissions emphasised that a formally concluded written partnership agreement did not need to be concluded for an agreement to have been reached. The absence of such a written agreement, did not prove that the parties did not intend to be legally bound (as is required for a

legally binding agreement). He did however accept that it is a basic principle of contract law that in order for an agreement to have contractual force it must not be so vague and uncertain that no definite meaning can be given to it without adding further terms. That is there must be certainty about essential terms, and in this case, he accepted that one such term was pay. He submitted that agreement was not required on all terms. He placed reliance upon **Attrill v Dresdner Kleinwort Limited [2013] 3 All ER 607** in which a promise to establish a minimum bonus pool was legally binding, notwithstanding that an individual employee could not point to any specific amount payable to him out of the pool.

141. The status of the claimant in this case needs to be considered in the context of the first respondent being a traditional partnership. **Cowell v Quilter Goodison Co Ltd [1989] IRLR 392** is authority for the fact that if someone is genuinely a (traditional) partner they are not an employee. It is in the very nature of genuine partnership that it is different from an employment relationship as a person cannot be his own employer.

142. Under section 1 of the Partnership Act 1890, a partnership is described as the relationship that subsists between persons who carry on a business, in common, with a view to profit. The claimant's representative also placed reliance upon a number of sections of the Partnership Act. Section 2 contains the rules for determining the existence of partnership (which the Tribunal took into account but which will not be re-produced in this Judgment).She also relied upon: section 5; section 24 which sets out the rules which apply to partnership, subject to special agreement; section 25; and section 28. Section 9 provides that every partner in a firm is liable jointly with the other partners for all debts and obligations so far as they remain unsatisfied. Section 19 provides that all the mutual rights and duties of the partners, including those under the Partnership Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.

143. The claimant relied upon **Stekel v Ellice [1973] 1 All ER 465** as being the key authority on this issue in which Megarry J said the following:

> *"I have found it impossible to deduce any real rule from the authorities before me, and I think that, while paying due regard to those authorities, I must look at the matter on principle. It seems to me impossible to say that as a matter of law a salaried partner is or is not necessarily a partner in the true sense. He may or may not be a partner, depending on the facts. What must be done, I think, is to look at the substance of the relationship between the parties; and there is ample authority for saying that the question whether or not there is a partnership depends on what the true relationship is and not on any mere label attached to that relationship. A relationship that is plainly not a partnership is no more made into a partnership by calling it one than a relationship which is plainly a partnership is prevented from being one by a clause negativing partnership: see, for example, Lindley h. If, then, there is a plain contract of master and servant, and the only qualification of that relationship is that the servant is being held out as being a partner, the name 'salaried partner' seems perfectly apt for him; and yet he will be no partner in relation to the members of the firm. At the other extreme, there may be a full partnership deed under which all the partners save one take a share of the*

> *profits, with that one being paid a fixed salary not dependent on profits. Again, 'salaried partner' seems to me an apt description of that one: yet I do not see why he should not be a true partner, at all events if he is entitled to share in the profits on a winding-up, thereby satisfying the point made by Lindley i on s 39. However, I do not think it could be said it would be impossible to exclude or vary s 39 by the terms of the partnership agreement, or even by subsequent variation (see s 19), and so I think that there could well be cases in which a salaried partner will be a true partner even though he would not benefit from s 39. It may be that most salaried partners are persons whose only title to partnership is that they are held out as being partners; but even if 'salaried partners' who are true partners, though at a salary, are in a minority, that does not mean that they are non-existent. If I am right in this, then it seems to me that one must in every case look at the terms of the relationship to ascertain whether or not it creates a true partnership.*

144. **Tiffin v Lester Aldridge LLP [2012] IRLR 391** was not referred to by either party in their submissions, but was emphasised by Employment Judge Dunlop in her judgment in this case when determining the interim relief application. She also referred to **Briggs v Oakes [1990] ICR 473**.

*Worker?*

145. With regard to worker status, the Tribunal must determine the question by applying the wording of section 230 of the Employment Rights Act 1996, cited above. The Tribunal must consider whether the claimant carried on a profession or business undertaking. The Tribunal must consider whether the status of the first respondent was, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the claimant. The Tribunal must decide whether the work done for the respondent was in the course of such profession or business. In reaching its decision the Tribunal must have regard to all the relevant facts and circumstances of the particular case. Guidance can be found in both the Court of Appeal and the Supreme Court judgments in the case of **Pimlico Plumbers v Smith [2018] UKSC 29** and **[2017] IRLR 323**. Lord Wilson's Judgment in the Supreme Court at paragraphs 35-49 dealt with the question of whether someone was a client or customer and he highlighted the difficulty with the worker provision:

> "*It is unusual for the law to define a category of people by reference to a negative – in this case to another person's lack of a particular status. It usually attempts to define positively what the attributes of the category should be. In Byrne Bros (Formwork) Ltd v Baird [2002] IRLR 96 (para 16) Mr Recorder Underhill QC (as Underhill LJ then was) described as clumsily worded the requirement that the other party be neither a client nor a customer. It is hard to disagree*."

146. The respondents' representative submitted that the way the case had been pursued meant that it was essentially an all or nothing case. The claimant was either an employee or he lacked status to bring any of his claims. However, as already recorded in this Judgment, it was confirmed by the respondents' counsel that the respondent was <u>not</u> contending that the Tribunal was technically unable to determine the issue of worker status (it having been in the agreed List of Issues) but rather it was a point being made in submissions about how the case had been pursued.

Whilst the Tribunal notes this submission, it does not find that the way in which the claimant may have pursued his arguments and the fact that his primary focus was on employment status, precluded a determination that he was in fact a worker. However, the claim was argued at its various stages, the Tribunal was still required to consider and determine whether the claimant was a worker applying the statutory test (if it did not decide that he was an employee).

147. The claimant's representative placed reliance upon **Clyde & Co LLP v Bates Winkelhof [2014] UKSC 32**. The Supreme Court in that case held that the partner in an LLP was a worker and was able to pursue a detriment claim. Lady Hale in her judgment in that case agreed that there was no single key to unlocking the words of the statute in every case, and she emphasised that there was no substitute for applying the words of the statute to the individual case. She said there was no magic test. As this case did not involve an LLP, that Judgment did not provide significant assistance, save for providing an example of the Supreme Court finding that worker status existed in circumstances which bore some broad comparison with the circumstances being considered in this claim. Indeed, Lady Hale expressly stated in her Judgment in that case that she would express no opinion on some of the complex arguments around the status of traditional partners when delivering her Judgment on the status of an LLP member. The respondents' counsel in this case did not place any reliance upon what was said by Lady Hale in that Judgment.

*Estoppel*

148. In his submissions the respondents' representative raised for the first time an argument which had not been pleaded or identified in the List of Issues. He relied upon a case involving tax issues (and not employment or worker status) **Tinkler v Revenue and Customs Commissioners [2021] 3 WLR 697** to contend that estoppel by convention arose in this case and that the status of the claimant from April 2019 was incompatible with the existence of a contract of employment continuing after April 2019. He argued that estoppel by convention arose where (in terms taken from the head note in that Judgment):

> "*(i) there was a common assumption of fact or law by the party raising the estoppel ("C") and the party against whom the estoppel was raised ("D") and it was made clear by words or conduct that could be said to have crossed the line between them, that they shared the common assumption,*
>
> *(ii) D had conveyed to C that D expected C to rely on the sharing of the common assumption such that D might be said to have assumed [some] element of responsibility for C's reliance on the common assumption,*
>
> *(iii) C had in fact relied on that common assumption rather than merely upon its own independent view of the matter,*
>
> *(iv) that reliance had occurred in connection with some subsequent mutual dealing between C and D, and*
>
> *(v) C had thereby suffered some detriment, or D received some benefit, in such a way as to make it unconscionable for D to assert the true legal or factual position.*

*Public interest disclosures*

149. Section 43A of the Employment Rights Act says:

> "*In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.*"

150. Section 43B says (as relevant to this claim):

> *"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(f) that information tending to show any matter falling within one of the preceding paragraphs has been, or is likely to be deliberately concealed"*

151. Section 43C provides that a disclosure to a worker's employer is a qualifying disclosure.

152. Section 48(2) provides that for a detriment claim it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

153. The word "*likely*" in section 43B requires more than a possibility or a risk that a person might fail to comply with a legal obligation etc, the information had to show that it was probable or more probable than not, that there would be a breach (**Kraus v Penna PLC [2004] IRLR 260**).

154. The necessary components of a qualifying disclosure were summarised by HHJ Auerbach in **Williams v Michelle Brown AM UKEAT/0044/19/OO**:

> "*It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held. Unless all five conditions are satisfied there will not be a qualifying disclosure.*"

155. The first stage involves a consideration of whether there has been a disclosure of information. The correct approach to the disclosure of information is set out in the decision of the Court of Appeal in **Kilraine v London Borough of Wandsworth [2018] ICR 1850.** The claimant's representative cited **Cavendish Munro Professional Risks Management Ltd v Gelduld UKEAT/0195/09** but that decision has been considered in and effectively overtaken by what was said by Sales LJ in **Kilraine** (upon which the claimant's representative also relied):

*"I agree with the fundamental point made by Mr Milsom, that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the judgment below [2016] IRLR 422, para 30, set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. Indeed, Ms Belgrave did not suggest that Langstaff J's approach was at all objectionable.*

*On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.*

*In my view, Mr Milsom is not correct when he suggests that the Employment Appeal Tribunal in Cavendish Munro at para 24 was seeking to introduce a rigid dichotomy of the kind which he criticises. I think, in fact, that all that the appeal tribunal was seeking to say was that a statement which merely took the form, "You are not complying with health and safety requirements", would be so general and devoid of specific factual content that it could not be said to fall within the language of section 43B(1) so as to constitute a qualifying disclosure. It emphasised this by contrasting that with a statement which contained more specific factual content. That this is what the appeal tribunal was seeking to do is borne out by the fact that it itself referred to section 43F, which clearly indicates that some allegations do constitute qualifying disclosures, and by the fact that the statement "The wards have not been cleaned [etc]" could itself be an allegation if the facts were in dispute. It is unfortunate that this aspect of the appeal tribunal's reasoning at para 24 is somewhat obscured in the headnote summary of this part of its decision in [2010] IRLR 38, which can be read as indicating that a rigid distinction is to be drawn between "information" and "allegations".*

*I also reject Mr Milsom's submission that the Cavendish Munro case is wrongly decided on this point, in relation to the solicitors' letter set out at para 6. In my view, in agreement with Langstaff J below, the statements made in that letter were devoid of any or any sufficiently specific factual content by reference to which they could be said to come within section 43B(1). I think that the appeal tribunal in Cavendish Munro was right so to hold.*

*However, with the benefit of hindsight, I think that it can be said that para 24 in the Cavendish Munro case was expressed in a way which has given rise to confusion. The decision of the employment tribunal in the present case illustrates this, because the tribunal seems to have thought that Cavendish Munro supported the proposition that a statement was either "information" (and hence within section 43B(1)) or "an allegation" (and hence outside that provision). It accordingly went wrong in law, and Langstaff J in his judgment had to correct this error. The judgment in Cavendish Munro also tends to lead to such confusion by speaking in paras 20-26 about "information" and "an*

> *allegation" as abstract concepts, without tying its decision more closely to the language used in section 43B(1).*
>
> *The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in the Cavendish Munro case did not meet that standard.*
>
> *Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in Chesterton Global Ltd v Nurmohamed [2018] ICR 731, para 8, this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."*

156. It is necessary to consider whether the employee holds the belief that the disclosure tends to show one of the relevant forms of wrongdoing and whether that belief is reasonable. This involves subjective and objective elements. The test of what the claimant believed is a subjective one. Whether or not the employee's belief was reasonably held is an objective test and a matter for the Tribunal to determine. The test is what the disclosure "*tends to show*" (**Babula v Waltham Forest College [2007] ICR 1026** a case upon which the claimant's representative relied).

157. In **Chesterton Global Ltd v Nurmohamed [2018] ICR 731** Underhill LJ held that the same approach, involving both the objective and subjective elements, applies to the requirement that in the reasonable belief of the worker making the disclosure, it is made in the public interest. Underhill LJ considered the situation in which a worker discloses information that relates to his or her own contract of employment and whether that precluded the employee also holding a reasonable belief that the disclosure was made in the public interest:

> "*The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the Parkins v Sodexho kind may nevertheless be in the public interest, or*

*reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.*

*Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case*"

158. The mental element required imposes a two stage test: (i) did the clamant have a genuine belief at the time that the disclosure was in the public interest; if so (ii) did he have reasonable grounds for so believing? In relation to motivation, in **Chesterton** Underhill LJ said:

"*while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise….the new sections 49 (6A) and 103 (6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it"*

159. **Ibrahim v HCA International Ltd [2019] EWCA Civ 2007** highlighted this passage and emphasised that motive was not the same as belief.

160. The respondents' representative drew the following propositions from **Chesterton**:

a. The question whether a disclosure is in the public interest depends upon the character of the interest served by it rather than simply on the numbers of people serving that interest. That is the ordinary meaning of "in the public interest";

b. The criterion does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed so to be.

c. Where the disclosure relates to a breach of the worker's own contract of employment (or some other matter where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker.

d. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case.

161. The claimant's representative placed reliance upon the guidance of the Employment Appeal Tribunal in **Lucas v Chichester Diocesan Housing Association Ltd UKEAT/0713/04**; **Doherty v British Midlands Airways Ltd [2006] IRLR 90**; and **Meares v Medway Primary Care Trust UKEAT/0065/10**. However for the issues which the Tribunal needed to determine, it did not need to address or consider any argument around good faith, as whether or not a disclosure was made in good faith did not impact upon whether it was a protected disclosure (albeit it might be relevant to remedy, something which the Tribunal has not decided).

162. The structure for determining whether there is a qualifying disclosure involves the Tribunal considering the five potential questions HHJ Auerbach identified in **Williams.** The decision of HHJ James Tayler in **Marten v London Borough of Southwark and another EA-202—000432-JOJ** highlighted the importance of following the five questions and undertaking a structured analysis of the qualifying disclosures, whilst also observing that it did not mean that in every case it is necessary to decide each question. In the email sent on 5 November 2021 the respondents' representatives emphasised the importance of considering each of the five principles as they applied to this case and also emphasised what HHJ Auerbach stated in **Williams**:

> "*Unless all five conditions are satisfied there will be not be a qualifying disclosure. In a given case any one or more of them may be in dispute, but in every case, it is a good idea for the Tribunal to work through all five. That is for two reasons. First, it will identify to the reader unambiguously which, if any, of the five conditions are accepted as having been fulfilled in the given case, and which of them are in dispute. Secondly, it may assist the Tribunal to ensure, and to demonstrate, that it has not confused or elided any of the elements, by addressing each in turn, setting out in turn out its reasoning and conclusions in relation to those which are in dispute.*"

163. Section 47B of the Employment Rights Act 1996 provides that 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. Under section 48(2) it is for the employer to show the ground on which any act, or deliberate failure to act, was done (where it is asserted that it was on the ground of having made a public interest disclosure). The employer must prove on the balance of probabilities that the act, or deliberate failure, was not on the grounds that the employee had done the protected act.

164. In determining whether a claimant has suffered a detriment as a result of having made a public interest disclosure, the Tribunal must focus on whether the disclosure had a material influence, that is more than a trivial influence, on the treatment - **NHS Manchester v Fecitt [2012] IRLR 64.**

165. The correct approach is to place the burden of proof on the claimant in the first instance to show that a ground or reason (that is more than trivial) for detrimental treatment is a protected disclosure; then by virtue of 48(2) Employment Rights Act 1996 the respondent must be prepared to show why the detrimental treatment was done and if they do not do so adverse inferences may be drawn against them.

166. In a detriment case, determining whether a detriment is on the ground that the worker has made a protected disclosure, requires an analysis of the mental processes (conscious or unconscious) of the employer acting as it did. It is, of course, not sufficient to demonstrate that 'but for' the disclosure, the employer's act or omission would not have taken place. The protected disclosure must have materially influenced the employer's treatment of the worker.

167. A worker is subject to a detriment if he is put at a disadvantage, as confirmed in **Jesudason v Alder Hey Children's NHS Foundation Trust [2020] IRLR 374**:

> "*It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment."*

168. For dismissal and section 103A of the Employment Rights Act 1996, the question is whether the principal reason for the dismissal is that the claimant made a public interest disclosure. That is a different test to the one which applies for the claims for detriment.

169. In relation to both detriments and dismissal, the respondents' representative emphasised the importance of the claimant needing to demonstrate the causative link between any public interest disclosure and the detriment or the dismissal. That is, of course, correct. He emphasised other correspondence (which did not contain the alleged protected disclosures relied upon) from the claimant which raised matters which were materially similar to the protected disclosures themselves, and he submitted that the claims must therefore fail because it was said there was no conceivable basis upon which the claimant could legitimately invite the Tribunal to discount the possibility that the detriments or the dismissal occurred because of the correspondence which did not contain the protected disclosures.

170. That submission had some merit for the dismissal claim, but it had considerably less merit for determination of the detriment claims. The test outlined in **Fecitt** regarding detriment requires a disclosure to only have a more than trivial influence on the treatment. Clearly a disclosure may be a material influence (meaning more than a trivial influence) on treatment, even if other correspondence also had a material and causative influence. For dismissal the submission made by the respondents' representative had more merit, as there can only be one principal reason for dismissal.

*Other legal issues*

171. It is not necessary for there to be any detailed account in this Judgment of the law as it applies to ordinary unfair dismissal, contributory fault, **Polkey**, unlawful deduction from wages or breach of contract, such law being uncontroversial and not the subject of submissions in this case.

172. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for the reason relied upon, here some other substantial reason. If the respondent fails to persuade the Tribunal that it dismissed the claimant for that reason, the dismissal will be unfair. If the respondent does persuade the Tribunal that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. The Tribunal must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

173. A claim for unlawful deductions from wages under section 23 of the Employment Rights Act 1996 can be brought by a worker or an employee, relying upon the right not to suffer unauthorised deductions from wages under section 13. Section 13 of the Employment Rights Act 1996 provides that:

> "*An employer shall not make a deduction from the wages of a worker employed by him unless:*
>
> *(a) The action is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract; or*
>
> (b) *The worker has previously signified in writing his agreement or consent to the making of the deduction*."

174. Section 14 of the Employment Rights Act 1996 provides that section 13 does not apply to a deduction from a worker's wage made by his employer where the purpose of any deduction is the reimbursement of the employer in respect of an overpayment of wages.

175. A breach of contract claim can only be brought in the Employment Tribunal if the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 applies. That Order only applies to claims by an employee and where the claim arises or is outstanding on the termination of the employee's employment.

## Conclusions – applying the Law to the Facts

*Was the claimant an employee?*

176. The first question which the Tribunal determined was whether the claimant was an employee of the first respondent at the material time for the claims brought. That is, whether the claimant was working under a contract of employment and was therefore an employee of the first respondent within the meaning of section 230 of the Employment Rights Act 1996?

177. The claimant's representative in her submissions correctly highlighted that what was required was not a mechanical exercise of running through items on a checklist to see whether they were present or absent. However the Tribunal approached the question by looking at the factors present and identifying them into three broad categories; those which supported the argument that he was an employee; those which supported the argument that he was not an employee; and those which were broadly neutral or of limited value in undertaking the evaluation required.

178. As recorded when considering the law above, the Tribunal understood the importance of considering these factors in the context of a partnership setting or arrangement, when deciding whether the claimant was working under a contract of employment.

179. The Tribunal identified the following factors as being the ones which supported the argument that the claimant was an employee:

a. It was agreed that the claimant was an employee of the first respondent prior to any contended change in 2019 and, in practice, nothing much changed in terms of duties and responsibilities before and after the change in status/title in 2019;

b. The claimant was required to provide personal service and could not provide a substitute. Whilst this would have been a significant factor had he been able to send a substitute, it was considered to be only a factor of very limited importance in the context of this case and when considering the status of a professional;

c. There was an obligation on the claimant to undertake work for the first respondent, and there was an obligation on the first respondent to pay him for doing so;

d. The claimant was paid a fixed amount each month. In terms of what was agreed between the parties this was agreed as a fixed amount, which was reflected in the terms of the draft agreement sent to the claimant by the first respondent, albeit that deed was not accepted and agreed by him;

e. The claimant was not asked to, or required to, make any capital contribution to the partnership. There was no degree of risk for him in participating in the partnership in terms of money which he had paid. A capital contribution would be a common indicator of a fixed share

partner who was genuinely not engaged under a contract of employment;

f. The claimant had not seen the partnership accounts and there was no expectation from the equity partners that he would be involved in any decisions about the partnership's accounts or funding. Whilst not all non-employee partners necessarily have full visibility of such matters, the absence of any information was a factor supporting the contention that the claimant was an employee;

g. There had been no partnership meetings (albeit it appeared one had been arranged or there had been an attempt to arrange one);

h. The equity partners made all the most significant decisions about the first respondent about which the Tribunal heard evidence. The equity partners made the decision to reduce the payment of drawings to the associate partners. The equity partners made the decision to end the engagement of the claimant. Neither the claimant nor the other associate partners were involved in these decisions and there was no suggestion in evidence that they would be;

i. As recorded in the factual findings above, the equity partners did not consider the associate partners comparable to equity partners nor did they consider that the associate partners needed to enter into agreement with each other when agreeing the partnership deed. The partnership deed was an agreement simply between one associate partner and the equity partners, not all the partners; and

j. The claimant was provided with childcare vouchers for which deductions were made, something which can only be provided and deductions made on the basis undertaken for those who are employees.

180. The Tribunal identified the following factors as being the ones which supported the argument that the claimant was not an employee (at the material time):

a. The first respondent paid the claimant without monthly deductions for pay as you earn income tax and national insurance. No employer's national insurance contributions were made. The claimant was taxed as an independent contractor and was aware that was the way he was being paid. The Tribunal accepted the respondents' contention that the parties' approach to tax, and the claimant's acceptance of the approach to tax, was a significantly more important indicator for these parties and this claimant (with his expertise), than it may have been in other cases;

b. The claimant was issued with a P45 which he accepted and did not challenge. As identified, this was more significant for the claimant as a tax expert;

c. There was no doubt that during the latter part of 2019 and early 2020 the parties believed that the claimant was a self-employed partner. The claimant's own evidence was that if he had been asked, on the day after the P45 had been issued to him, whether or not he was self-employed, he would have said that he was self-employed. His view of his status at the time was shown in the correspondence sent and the terminology used by the claimant (such as using the term drawings). As recorded above, the claimant accepted that when he said he was an employee in his email of 2 March 2020, he had executed a one hundred and eighty degree manoeuvre. The views of the parties are not determinative, but they were a significant factor, particularly in the light of the professional expertise of the parties;

d. The claimant was no longer entitled to pay for overtime worked after the change in status/title;

e. Prior to the change in status/title the respondent had been paying pension contributions for the claimant in accordance with auto enrolment requirements. It ceased to do so;

f. The first respondent held onto sums of money for the claimant in order to subsequently meet his tax and national insurance obligations, the evidence being that there was a difference between the full drawings due and the amount of the drawings actually paid. That amount was held in a notional account, although no evidence was provided of where any monies were held or there being a separate named or designated account as such. The lack of account clarity or evidence regarding the reconciliation of amounts due after a particular tax year's tax and NI were paid, meant that this was a factor given limited weight;

g. The first respondent did not require a written record or account of the holiday taken by partners. The Tribunal accepted Mr Barker's evidence that no one counted the number of days holiday taken by a partner and therefore partners were able in practice to take the holiday they wished (provided the required work was undertaken). There was, however, a defined amount of holiday identified which was not enforced and the written document produced by the first respondent (albeit not agreed) spoke of a defined amount. There was a difference in terms of recording and enforcement for partners, when compared to employees;

h. The claimant received consistent payment/drawings throughout his time as an associate partner even when he was absent on ill health grounds. Employees had no entitlement to sick pay above SSP, albeit that there was a discretion to pay full pay during sickness absence which was in practice usually exercised;

i. As evidenced by Mr Iddon, associate partners were advertised to the outside world as holding partner status, a change which occurred from 6 April 2019 or shortly after;

j. There appeared to be some involvement of the associate partners collectively in terms of pay decisions for other employees, albeit fairly limited;

k. The Tribunal accepted the respondents' evidence about the future intentions for the first respondent and that the role taken by the claimant was genuinely part of a transition from employment to equity partnership. There was a confluence of circumstances during 2019 and 2020 which meant that the first respondent and the equity partners did not focus on this issue at the time and the changes required to the way the first respondent operated, but there genuinely was an intended process. The change was not just a paper exercise. The change was a stepping stone as part of a transition for the first respondent; and

l. The claimant's exposure to financial risk, which is addressed in more detail below.

181. The latter factor, which the Tribunal found supported the claimant not being an employee, arose from his exposure to risk. It was clear from the claimant's evidence and his correspondence, that the claimant was extremely concerned about his exposure to potential liabilities as a partner of the first respondent, in the absence of an agreed partnership deed which provided him with explicit protection from such exposure. The claimant was clearly and understandably concerned about whether he might be personally liable for partnership debts or liabilities, if the first respondent had insufficient funds to meet its liabilities. That concern and the potential exposure was something which was indicative of the claimant not being an employee, but rather being a genuine partner. In the absence of an agreement, the claimant was correct to be concerned because under section 9 of the Partnership Act that liability existed.

182. In their evidence to the Tribunal, the respondents' evidence was that in their view the claimant would not have been expected to meet such liabilities. As recorded above, the Tribunal found that in practice and without an agreement having been reached, the default arrangements under the Partnership Act regarding liability applied irrespective of what the first respondent's equity partners assumed would have been the case in the absence of such an agreement having been concluded. The Tribunal did not find that, based upon the evidence heard, there was in place an agreement under section 19 of the Partnership Act 1890 which varied the provisions of section 9. Had the deed offered to the claimant been accepted by him, such a variation would have existed (and the claimant would not have had the same exposure to risk). On balance the Tribunal found that the respondents' evidence displayed a rather surprising naivety on the part of the equity partners about what the implications were under the Partnership Act of having the claimant as a partner without a written partnership agreement having been reached. The claimant was correct in his understanding of the real implications for him of being in partnership without an agreed indemnity. His fears, clearly expressed, demonstrated that no agreement existed which varied section 9 of the Partnership Act, and correctly reflected the true position regarding his exposure to liability and risk. As a result, the claimant's exposure to risk, was a factor to be weighed in the balance when considering whether the claimant was working under a contract of employment. It was a factor which was indicative of him not working under such a contract. For this

factor the balance would have been different if an agreement had been reached, such as that proposed by the first respondent in the partnership deed.

183. The Tribunal found that a number of the factors suggested as having relevance in determining whether the claimant was an employee, were in fact either neutral or had very little weight in any such an assessment (albeit that for some of them they might indicate one way or the other, but the extent to which they did was very limited) . Those factors included:

a. The claimant being expected to wear a suit when working as a professional advisor;

b. One partner telling another what they thought that partner should do, for example around supervision and childcare when working remotely, or in a proposal about which partner should supervise the payroll department. Whilst proposed as examples of control, in practice in any partnership there may be strong views expressed by partners to one another about such matters (particularly at times of change and work pressure) and the evidence heard did not have any particular weight in ascertaining the true nature of the claimant's engagement;

c. The absence of a formal agreed document which defined the claimant's role and terms, once engagement under the employment contract had ceased. Clearly, had there been an agreed document in place that would have assisted the parties and the Tribunal in identifying the terms of the agreement in place, but the absence of a written agreement was not a significant factor in establishing the nature of the engagement (in circumstances where the claimant worked and received payments);

d. The claimant's ability to negotiate the level of monthly drawings/payments might have in some circumstances been indicative of him not being engaged in employment, but in practice it could also have evidenced an employee in a relatively strong negotiating position, and therefore was not significant in reaching a determination either way;

e. The management of the tax team and the claimant's responsibility for staff issues in the team, as these existed at a time when the claimant was indisputably an employee;

f. The evidence heard about a dispute between a client and the first respondent about what do about an outstanding debt to the partnership and future work (572). The existence of a debt management process, was not genuinely indicative of employment status; and

g. The evidence heard about the fees charged for the administration of the second respondent's father's estate, as the evidence heard about the agreement of such fees demonstrated, in the view of the Tribunal, good practice in terms of financial probity and integrity.

184. In deciding the question of whether the claimant was working under a contract of employment at the relevant time and was therefore an employee of the first respondent within the meaning of section 230 of the Employment Rights Act 1996, the Tribunal balanced all the factors outlined above. The Tribunal has considered what was said in **Stekel v Ellice** and has looked at the terms of the relationship. The answer was not one which the Tribunal found to be clear-cut. It was one where there were meritorious arguments put forward by both parties and the outcome was somewhat finely balanced. Having considered all the factors, the Tribunal found that after the change in his status to an associate partner and after the essential terms upon which he was so engaged were agreed, the claimant was no longer working for the first respondent under a contract of employment. The Tribunal found the matters described above regarding the tax position and the views of the parties as having particular weight when reaching this decision in a case involving parties with their particular expertise. However, the decision was reached having considered all of the matters outlined above and taking them all into account.

*The timing of the change in status*

185. One matter which was the subject of considerable argument before the Tribunal was the question of when the claimant's status changed and whether in fact it could have done so in the absence of agreement about all the terms which applied. The claimant's status cannot have changed on 1 April 2019. He remained taxed as an employee until 23 April 2019. The claimant's status cannot have changed by 9 April 2019 due to accreditation requirements and the fact that Mr Barker's email of that date asked who was to be made associate partners, evidencing that it cannot already have occurred. It is fair to say that there was some considerable confusion about when exactly it was that the claimant's status changed. As already addressed in the findings of fact above, it was not necessary for the Tribunal to determine when exactly the amount/level of drawings which the claimant would receive as an associate partner was agreed, but the Tribunal accepted the respondents' submission that the sum was certainly agreed by January 2020 and, indeed, it was agreed by late August 2019 as the claimant did not challenge the amount in any document thereafter (having done so on a number of occasions prior to that date).

186. What is relevant to the decision which the Tribunal needed to reach was whether the claimant was an employee in 2020 and, in particular for the unfair dismissal claim, by June 2020. The Tribunal does not need to decide when exactly the claimant's status changed.

187. It is fair to say that the identification of the precise date of the transition by the first respondent was a somewhat shambolic process. There was certainly an ongoing disagreement until August 2019 about one of the central terms upon which the claimant would be engaged as an associate partner (that is pay), which the respondents' representative accepted was required for an agreement to be reached. However, by January 2020 (at the very latest and in all likelihood by much earlier) there was agreement about the essential terms of the claimant's engagement as an associate partner, albeit not about all the terms recorded in the proposed partnership deed. By that time the agreement was not so vague and uncertain that no definite meaning could be given to it without adding further terms. An agreement was in place for the claimant's engagement as an associate partner, albeit not a written agreement.

188. The Tribunal does not find that the claimant's statement that he would only become a partner if he could review the partnership's accounts and if he agreed to all the terms, meant that what subsequently transpired was not an agreed change. In practice the claimant's role was changed by agreement and the claimant worked under the agreed terms and received an increased amount of pay as a result. He implicitly accepted those terms and the change in agreement (particularly exemplified by the change in the claimant's tax position and the claimant operating in accordance with that changed position, as a tax expert). The Tribunal also does not find that the claimant's concerns about the implications of there being no agreed deed in January 2020, or his change of view about his status in March 2020, meant that the claimant had not previously agreed the change in status by working under the terms which were agreed.

*Estoppel*

189. As the Tribunal has not found the claimant to have been an employee, it was not necessary to consider and apply the respondents' novel argument regarding estoppel by convention, based upon **Tinkler v Revenue and Customs Commissioners**. Nonetheless the Tribunal did consider the arguments put forward and whether it would have resulted in the claimant not being found to be an employee (had the Tribunal found that he otherwise was).

190. The Tribunal did not find that the factors identified as being necessary for estoppel by convention to apply were present in this case. From the summary of the case recorded in the respondents' representative's submissions and the headnote (recorded at paragraph 148), factors (ii) and (iii) were not present in this case. There was no doubt that the claimant wished to progress to be an associate partner. As has already been recorded, the claimant did not object to the first respondent's proposed approach to taxation and how he was to be presented as being engaged to the HMRC. However, the claimant did not convey to the first respondent that he expected the first respondent to rely on the sharing of a common assumption such that the claimant might be said to have assumed some element of responsibility for the first respondent's reliance on the common assumption. In practice the first respondent proceeded with its intended approach to the taxation and engagement of the first respondent based upon what its equity partners believed to be the correct approach. It/they did not rely on what the claimant conveyed, nor could it be said that the claimant assumed some element of responsibility for the first respondent's reliance (or that of its equity partners). In addition, the first respondent and its equity partners relied upon its/their own independent view of the matter, there was no evidence that they relied upon a common assumption with the claimant when making the change.

191. Even had the Tribunal found the elements of the test in **Tinkler** satisfied, it would not have accepted the respondents' representative's argument that estoppel by convention could preclude an employee from arguing they were an employee or being found to be an employee by the Tribunal. Many of the key authorities regarding employment status involve cases where the label agreed by the parties for the relationship at the time, was ultimately found not to be correct. If the respondents' representative's contention was correct and applicable to the label agreed by potential employees for their engagement, it would drive a coach and horses through the case law and would mean that many of the key cases would

have been wrongly decided. It may be that the distinction drawn in **Autoklenz** arising from the inequality of bargaining power in cases of employment status is the reason why the matters identified in **Tinkler** should not estopp or prohibit an argument that the parties status differed from what they agreed at the time, but in any event the Tribunal does not find that in this case it would have estopped the claimant from being found to have been an employee (had the Tribunal found that to be the case).

192. Having reached those decision on the merits of the estoppel argument and its application to the facts of this case, the Tribunal did not go on to determine whether the respondents would have been able to rely on such an argument even though it was only put forward when submissions were made and was not identified in advance as being an issue in the case. Had the argument been accepted and found to apply to the facts of this case, the Tribunal would also have needed to consider that issue.

*Was the claimant a worker?*

193. As the Tribunal found that the claimant was not an employee, the Tribunal went on to consider whether the claimant was nonetheless a worker for the first respondent within the meaning of section 230(3)(b) of the Employment Rights Act 1996. That is, whether he worked under a contract whereby he undertook to do or to perform personally any work or services for the first respondent, and the first respondent was not by virtue of that contract a client or customer of any profession or business undertaking carried on by the claimant? The fact that the claimant was not an employee did not preclude him from being a worker, as in practice the worker test applies a lower bar than that for an employee. All of the factors described above in detail as being applicable to employment status, were also considered when determining whether the claimant was a worker and will not be repeated in this part of the Judgment (save for identifying that the factors relating to tax and the parties views of the tax position, have very limited application when determining worker status as the approach to tax turns upon employment-status and not worker-status).

194. The claimant did undertake to do or to perform personally work and services for the first respondent. It was not in dispute that the work he undertook needed to be undertaken by him personally.

195. The first respondent was not in any sense a client or customer of any profession or business undertaking undertaken by the claimant. The claimant did not carry on a profession or business undertaking, save for doing so as an integral part of the first respondent for clients of the first respondent. The first respondent was not in any sense a client or customer of any profession or business undertaking carried on by the claimant. The work he did for the first respondent was not in the course of such a profession or business. This decision was taken with regard to all the relevant facts and circumstances as described.

196. Having reached those findings and applying the statutory definition, the Tribunal finds that the claimant was a worker.

197. As already recorded, the Tribunal did not agree with the respondents' representative's submission that this was a case where the claimant could only be an employee or self-employed, whether because of the way the case was argued or

for any other reason. When the claimant raised matters with the first respondent before the end of the engagement, he certainly argued that he was employed and did not raise the alternative of worker status. However, whatever the claimant's own views or contentions at the time, the Tribunal finds that the nature of the engagement was that he was engaged as a worker by the first respondent.

198. The Tribunal acknowledges and agrees with what was expressed in **Pimlico Plumbers** which is recorded above, that is that a test which is essentially applied partly by determining a negative and is somewhat clumsily worded is unusual and difficult to apply. Nonetheless on the facts of this case and based upon the findings recorded above regarding the position of associate partners in the first respondent (and the claimant in particular), the Tribunal finds the claimant was a worker of the first respondent for the period during which he was engaged as an associate partner.

*Whether the claimant made one or more public interest disclosures?*

199. As identified in the list of issues as 3.1.2-3.1.6 and, in any event as required by the EAT in **Williams** and **Marten**, the Tribunal asked itself the five questions required for each of the alleged disclosures. Those questions were:

a. did the claimant disclose information?

b. did the claimant believe the disclosure of information was made in the public interest?

c. was that belief reasonably held?

d. did the claimant believe that the disclosure tended to show the matters pleaded at paragraph 27 of the Grounds of Claim namely: that the first respondent had failed, was failing or was likely to fail to comply with any legal obligation; and/or information tending to show any of the same had been, was being or was likely to be deliberately concealed?

e. was that belief reasonably held?

200. One submission made on the respondents' behalf was that the claimant could not have disclosed information in any of the disclosures relied upon, because he had already informed the respondents about what he alleged, including in previous emails. The Tribunal does not accept that something is not a disclosure of information because the information disclosed has already been disclosed. Whilst it might make it evidentially less likely that a subsequent disclosure is the reason for detrimental treatment when the information has previously been disclosed without a detriment, the protection against detrimental treatment still applies to each and every protected disclosure made. A worker who repeatedly discloses the requisite information is protected against detrimental treatment each time he makes such a disclosure. The fact that the same information has previously been disclosed, does not stop an individual from being protected from detriment when he discloses the same information again.

201. The first alleged disclosure relied upon was the email of 10 March 2020 (491) (PD1), which was the claimant's email to the equity partners which began with the claiming describing how he felt he found himself in an odd and bemusing situation. In

that email the claimant explained that years down the line an HMRC PAYE audit might deem payments to the associate partners to be subject to PAYE, described himself as risk averse, and concluded that without a partnership agreement the claimant's professional view was that he was an employee. He attached the article by Fox Williams (494A) as it might prove useful, which was an article about how partnerships should undertake a risk analysis and protect themselves by ensuring that all partners signed a carefully drafted deed.

202. The Tribunal has needed to look quite hard at PD1 in order to identify the information disclosed in it. PD1 does disclose the claimant's view (at that time) that he had been taken off the payroll without agreement and that (without a deed having been entered into) his professional view was that he was still an employee, and the first respondent was vulnerable to such a finding from a future HMRC PAYE audit. The Tribunal notes that whilst the Judgment in **Kilraine** shows there must be some information disclosed, it is also clear that there does not need to be very much by way of information. Whilst the distinction does not assist very much in applying the legal test, it is fair to say that much of PD1 is the making of an allegation. However, the Tribunal finds that in PD1 the claimant did disclose information, as it cannot be said that PD1 was so general and devoid of specific factual content that it did not amount to a disclose of information at all.

203. The second question to be determined regarding PD1 was whether the claimant believed that the disclosure of information which he was making within it was made in the public interest? The Tribunal reminded itself that the claimant's motive in making the disclosure was not what needed to be determined. What was to be determined was whether the claimant had a genuine belief that the disclosure made was in the public interest. That involved a focus on what he genuinely believed. It also involved a focus upon the information disclosed, as the question is about what the claimant believed about the disclosure of information being made.

204. The Tribunal's findings of fact about what the claimant believed when he disclosed the information in this email, are recorded in the facts section above. The Tribunal finds that what the claimant believed the information he was disclosing showed was the risk to the first respondent (and him personally) of a future HMRC audit, what he believed that would identify, and how the first respondent could address the gaps to the arrangements in place to close down that risk. The content was about closing down the possibility of a greater amount of tax or NI being required to be paid in the future. The claimant in fact disclosed the information to persuade the first respondent to document what had occurred more thoroughly in order to avoid HMRC being able to challenge what had occurred.

205. The Tribunal did not find the claimant's evidence about what he believed when he made this disclosure to be credible or true. The Tribunal found that at the time that he sent PD1 the claimant was not disclosing information which he believed to be in the public interest, he was disclosing information which he believed showed a financial risk to the first respondent and the claimant (and ways in which that risk could be addressed). Not only was the claimant's disclosure about ensuring that he paid less tax than otherwise might have been due (or at least ensuring there was a reduced risk that he might have to pay more), the claimant reasonably believed when he made the disclosure that it disclosed information about the need to close down the risk of paying greater tax. There was no other facts or documents which

supported the claimant in saying that the disclosure was made in the public interest, and the email itself was not saying that the first respondent was engaged in unlawful transactions or that more tax should be paid to HMRC. In the email the claimant's focus was solely upon asking the first respondent to document what had occurred more thoroughly in order to avoid HMRC being able to challenge what had occurred. The claimant emphasised that he was risk averse and his wish to avoid being open to an easy attack from HMRC. In practice what he was proposing was the opposite of being in the public interest, because he was arguing that the parties should protect themselves more from the risk of being required to pay more tax. The Tribunal finds that the claimant did not believe that the disclosure of information which he was making in PD1 was made in the public interest.

206. The third question was whether that belief was reasonably held. As the Tribunal has not found the claimant to have had the requisite belief when he made the disclosure, the issue cannot be determined. However, had the Tribunal needed to determine whether it was reasonable for the claimant to believe that disclosing information about why he believed there was a risk of an adverse tax audit and how steps should be taken to remove that risk was in the public interest, the Tribunal would not have found such a belief to be reasonably held (there being no public interest in the first respondent and the claimant putting in place arrangements which reduced the risk that they might be required to pay more tax and NI).

207. The fourth question in relation to PD1 was whether the claimant believed that the disclosure tended to show: that the first respondent had failed, was failing or was likely to fail to comply with any legal obligation; and/or information tending to show any of the same had been, was being or was likely to be deliberately concealed. The Tribunal finds that in PD1 the claimant was not disclosing information that he believed showed the first respondent had failed to comply with a legal obligation, rather he was disclosing information that showed he believed the arrangement had not been properly documented. He was not alleging that what had been put in place was that the parties had acted in a way which was contradictory to HMRC requirements, he was saying in his opinion that the arrangement had not been correctly documented. The Tribunal does not find that the claimant believed that what he was disclosing showed that the first respondent (and the claimant) had failed to comply with a legal obligation.

208. In terms of deliberate concealment, the Tribunal also does not find that the claimant believed that he was disclosing information in PD1 which showed that failure to comply with a legal obligation was being deliberately concealed. The email was detailing an alleged failure to document, not a failure to act correctly or to conceal. The Tribunal finds that the claimant did not believe that is what the information he alleged showed.

209. In the light of those findings, the Tribunal did not need to also consider the fifth question for PD1.

210. The second alleged disclosure was the claimant's email of 30 April 2020 (PD2) (579). That was the claimant's email to the equity partners, headed formal grievance – salary reduction. Within the email the claimant wished to raise a grievance following on from the reduction in his salary/drawings a few days before, which the claimant said was without his consent.

211. Unlike PD1, the Tribunal does not find that the claimant disclosed information within this email (PD2) at all. What the claimant did within the email was raise the reduction in the amount paid that month and detail what the impact was. The claimant did not disclose information.

212. The Tribunal also does not find that the claimant believed any disclosure made in PD2 was in the public interest. Inasmuch as there was mention within the email of the claimant's status and tax, the reasons are the same as those explained for PD1. For the remainder of the email, the grievance being raised by the claimant was focussed upon the reduction in his own pay/drawings, being something which was purely personal to the claimant and not in the public interest. Even had the claimant believed that his disclosure in PD2 was in the public interest, it would not have been reasonable for him to do so where the disclosure was all about his own personal pay.

213. In terms of the fourth and fifth questions and PD2, the claimant did assert in the last line of the email that the first respondent had failed to comply with a legal obligation and would do so in the future. The legal obligation being to pay the claimant the amount which he was due. Accordingly, the claimant did believe that the disclosure tended to show that the first respondent had failed, was failing and was likely to fail to comply with a legal obligation, and that belief was reasonably held (in the light of the reduction in pay). However, the personal nature of the legal obligation asserted, further supports the Tribunal's conclusions in respect of whether the claimant believed the disclosures made in PD2 were in the public interest.

214. The third alleged disclosure was the claimant's email of 1 May 2020 (PD3) (584). That was an email sent by the claimant to the equity partners in response to the second respondent's email (581), which was itself a response to PD2.

215. In PD3 the claimant did disclose information. As with PD1, much of the content of the email was allegation and argument about the claimant's position, but for the same reasons as were explained for PD1 what was said provided sufficient factual information to satisfy the requirement in the light of what was said in **Kilraine**.

216. The content of PD3 differed from the previous alleged protected disclosures, in that in the email the claimant asserted that the reason why the first respondent had taken the approach it had, was to save itself employer's NI contributions. That line was sufficient to show that the information disclosed within the email was potentially in the public interest. It was an assertion that incorrect tax had been paid. A disclosure which shows that a greater amount of tax should have been paid is, by its very nature, in the public interest. Accordingly, for the disclosure of information made in this email, the Tribunal does find that the claimant reasonably believed that that what he was disclosing was in the public interest, and that belief was reasonably held (where the disclosure supported an assertion that the reason for the first respondent's approach was to pay less NI).

217. The fourth question in relation to PD3 was whether the claimant believed that the disclosure tended to show: that the first respondent had failed, was failing or was likely to fail to comply with any legal obligation; and/or information tending to show any of the same had been, was being or was likely to be deliberately concealed. The assertion made by the claimant "*you are seeking to treat me as a self-employed*

*partner so that you can save employer's National Insurance contributions and use that saving to fund the relatively nominal pay increase you provided me with last year*" did tend to show that the first respondent had failed to comply with a legal obligation (to pay employer's NI contributions) and did tend to show that it had been deliberately concealed (as the treatment of the claimant as self-employed was asserted to have done so). The assertion did not expressly refer to deliberate concealment, but that is not required for the legal test to be made out.

218. However, as with PD1, the Tribunal does not find that in fact the claimant did believe that the information he was disclosing within PD3 was disclosing information that he believed showed the first respondent had failed to comply with a legal obligation (or would do so) or was deliberately concealing a failure to comply with a legal obligation (or would do so). It suited him to give that evidence in the Tribunal. As the Tribunal has found, his evidence was not credible. The first respondent had not appointed the claimant to be an associate partner as a sham or as a means of reducing tax. Whatever the difference in views about the effectiveness of the arrangements put in place in ensuring the claimant was not an employee, the Tribunal also finds that the claimant did not genuinely believe that his change in status had been a sham or had been made to save employer's NI. Whilst this assertion in PD3 was capable of being a disclosure that the respondent had failed to comply with a legal obligation and had deliberately concealed that they had done so, the Tribunal finds that the claimant himself did not in fact believe that what he had disclosed in PD3 tended to show that was the case. He was making an argument in circumstances where the parties' position had become litigious and confrontational. Putting to one side the claimant's motive (which was clearly to further his own argument), the Tribunal does not find that the claimant genuinely believed that the disclosure made showed that the respondent had failed to comply with a legal obligation (or would do so) or had (or would) deliberately conceal that fact.

219. Even had the Tribunal found that the claimant genuinely believed that PD3 disclosed information which showed the requisite information, it would not have found that it was reasonable for the claimant to have had that belief. The claimant's counsel asserted that it was reasonable for him to believe that the entire arrangement had been a sham. That was also recorded in both the grounds of complaint and the claimant's correspondence with the HMRC. The Tribunal does not agree with that submission at all. It would not have been reasonable for the claimant to believe that the first respondent had set up the entire arrangement with the claimant and the other associate partners purely as a sham in the circumstances of this case (even had he done so). It was how the first respondent had operated in the past. Based upon what was said in his own correspondence, had the claimant signed the partnership deed in January 2020 it would have removed risk (and the claimant did not assert at the time, in response to the deed he was offered, that it was all a sham). It would neither have been reasonable for the claimant to believe that the entire arrangement was a sham, nor would it have been reasonable for the claimant to believe that the information provided in the email PD3 tended to show that it was (even though it was what he asserted within it).

220. As a result, the Tribunal did not find that any of the disclosures relied upon amounted to protected disclosures.

*Was the claimant treated detrimentally on the ground that he had made a protected disclosure?*

221. Whilst it was not necessary for the Tribunal to consider whether the claimant was treated detrimentally on the ground that he had made a protected disclosure, having found that no protected disclosures were made, nonetheless the Tribunal did go on to consider what it would have determined had it found PD1, PD2 and/or PD3 to have been protected disclosures.

222. The first alleged detriment was that the claimant's salary was reduced without his consent (D1). Having pay (or drawings) reduced in a given month was a detriment for the claimant. However, the Tribunal finds that the reason for the reduction in monthly drawings being paid in April 2020 (and for the months which followed) was because of the impact of the Covid-19 pandemic on the first respondent and the understandable concerns about the partnerships financial position at a time of great uncertainty. Only PD1 had been sent before the decision to reduce the claimant's drawings was made, so PD2 and PD3 could not possibly have had any material influence on that decision. The Tribunal does not find that any of the claimant's emails PD1, PD2 or PD3 had any influence at all on the decision made by the first respondent to reduce the payment of drawings each month.

223. The Tribunal draws some support for this finding from the fact that, as accepted in the hearing on behalf of the respondents, the reduction was a short term cash flow measure and not a decision to withhold payments from the claimant indefinitely. The sums by which the monthly drawings payments were reduced was held in the claimant's capital account as was confirmed by the respondents' counsel.

224. The Tribunal has also considered whether the way associate partners drawings were reduced was materially influenced by any of the alleged disclosures. The reduction of payments made to the associate partners had the most significant impact upon the claimant because of the chosen approach (imposing a cap on the monthly drawings payments, rather than a proportionate reduction). The Tribunal accepts that the monthly payment was reduced to the lowest level of drawings for an associate partner. Whilst there may have been other ways of reducing drawings such as a proportionate approach, the Tribunal finds that the way in which drawings were capped was a pragmatic approach to reduce drawings to the lowest level paid to the associate partners and therefore was not materially influenced by PD1 (or any of the protected disclosures relied upon). The reduction took account of the uncertainty and difficulties faced by the first respondent (and all businesses) at the time.

225. The second alleged detriment was the claimant being suspended from work (D2). The respondents did not accept that the claimant was in fact suspended at all, and therefore the Tribunal first needed to determine whether the claimant was suspended (and, if so, when), before deciding whether a material (that is more than trivial) influence on that decision was the disclosures relied upon by the claimant.

226. The relevant email was sent by the second respondent to the claimant and included two paragraphs which it was important to be read together (582). The claimant was told not to attend the first respondent's premises. He was also told that equity partners would take on his managerial duties. The claimant understood the

instructions to amount to a suspension. As recorded in the Tribunals factual findings above, it was reasonable for the claimant to do so, and, in the light of the first respondent's responses to subsequent emails seeking clarification about suspension, the claimant was effectively suspended (whatever had been intended when the email had been written). It is also self-evident that being suspended, having duties taken away, and being excluded from the office, were all detrimental to the claimant (albeit that being excluded from the premises in practice may have had no practical impact at the time).

227. In terms of the timing of the decision to suspend, only PD1 or PD2 could have had a material influence on the decision, PD3 not having been sent by the claimant at the time. The decision to suspend was made and conveyed in direct response to PD2. One email was in response to the other. Had PD2 been found to have contained a protected disclosure, the decision to suspend was clearly materially influenced by such a disclosure. The Tribunal does not find that PD1 or PD3 had a material influence on the decision made (the former having been made some weeks before, and the latter not yet having occurred).

228. What was alleged to be the third detriment, was that the first and/or second respondent refused to deal with the claimant's grievance until he complied with requests amounting to a retraction of qualifying protected disclosures (D3). Not addressing the claimant's grievance under an appropriate procedure was capable of amounting to a detriment. The reason why the respondents refused to deal with the claimant's grievance was very straightforward. The reason was because they did not consider the claimant to be an employee. Accordingly they did not believe that the procedure applied to him and it would appear to be the case that they were advised that they did not need to address the grievance in the way they would otherwise have done had he been an employee. Irrespective of whether they respondents were correct about the claimant's status, that was nonetheless they reason for the decision. That was not materially influenced by any of the claimant's alleged protected disclosures.

229. The fourth alleged detriment recorded in the list of issues was accepted by the claimant's counsel as being the same as the first (just worded in a different way).

*Was the principal reason for the claimant's dismissal that he had made one or more protected disclosures?*

230. The claimant alleged that his dismissal was automatically unfair because the principal reason for his dismissal was because he had made one or more protected disclosures. This was recorded in the list of issues as issue 2.4 (as part of the section of issues under the hearing unfair dismissal). There was no alterative contention from the claimant that the termination of his engagement as a worker was a detriment. As the Tribunal has found that the claimant is a worker but not an employee, the claimant cannot succeed in his claim that he was automatically unfairly dismissed as that right is limited to employees. As the dismissal/termination was not contended to be a detriment, the claimant cannot technically succeed in such a claim (even though he would have been able to make such a claim, having been found to be a worker).

231. In any event, the Tribunal did not find that the principal reason for the ending of the claimant's engagement as an associate partner was that he had made any of the disclosures relied upon. The Tribunal was mindful of the different test which would have applied to a dismissal, which is that the disclosure or disclosures must have been the principal reason for the dismissal, not just a material factor in the decision reached. The decision to end the engagement was clearly one reached as part of the bigger picture in which the claimant's relationship with the first respondent had broken down occurring in the early stages of the pandemic. On 25 February 2020 the claimant had asked to cease to be an associate partner and to become an employee again, that is that he had sought the end of his existing engagement. On 2 March 2020 the first respondent had responded by agreeing to the proposal that the engagement end. That exchange pre-dated any of the emails upon which the claimant relied as being protected disclosures. That exchange contained the agreement that the associate partner engagement would end. Whilst it is the case that at that point the proposal was that the claimant would be offered employment as an alternative to the engagement which was ending, and by 6 May 2020 that alternative option was no longer being offered, nonetheless the reason for the end of the specific engagement was the claimant's request which preceded the alleged disclosures. The termination also needed to be considered in the context of the claimant declining the partnership deed which had been offered to him, the disagreement about the terms upon which the claimant would be re-employed, the relations which had been deteriorating for some time, and the midst of the pandemic. The dismissal was, at its most basic, the first respondent responding to the concerns raised by the claimant and his wish to see to be an associate partner. The Tribunal does not find that any of the protected disclosures were the principal reason for that "dismissal".

*Was the claimant (ordinarily) unfair dismissed?*

232. As the Tribunal has found that the claimant was not an employee, his unfair dismissal claim could not succeed. Had he been found to be an employee, the (ordinary) unfair dismissal claim would inevitably have succeeded as a result of the absence of any procedure whatsoever being followed prior to dismissal, the claimant being dismissed by solicitor's letter. The reason for the dismissal was the breakdown in relations between the claimant and the first respondent and it is therefore possible that the first respondent would have shown that the principal reason for the dismissal was a manifest and irreparable breakdown in trust and confidence, being some other substantial reason capable of justifying dismissal. However, in all the circumstances of the case, any dismissal would have been unfair as the respondent did not act reasonably in treating that as sufficient reason for dismissing the claimant in the absence of any procedure having been followed. The answer to issue 2.6 was that the first respondent did not follow a fair procedure. In the light of the decisions reached, the Tribunal has not reached a decision on *Polkey* or contributory fault (issues 2.8 and 2.9).

*Was there an unauthorised deduction from the claimant's wages?*

233. Issue 5.1 was: did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted, and when? What sums were "properly payable" on each occasion that the claimant alleges deductions were made? Issue 5.2 was: wow much is the claimant owed?

234. As the claimant has been found to be a worker, he is entitled to have his unauthorised deduction from wages claim determined by the Tribunal.

235. As recorded in the section considering the facts above, the claimant was entitled to be paid a net sum each month by the first respondent during the time in which he was an associate partner. By April 2020 that sum was £3,950 each month. The claimant's entitlement has been determined based upon the implied terms of the contract which were in place between the claimant and the first respondent. However, it is also notable that the draft deed offered to the claimant by the first respondent also provided for an associate partner to be entitled to such a payment each month without any provision for it to be reduced or withheld.

236. The claimant was not paid the net sums to which he was entitled in April, May or June 2020 (the amount in June being a pro rata amount). The total net sum not paid to the claimant, to which he was entitled, was £2,865.60.

237. The first respondent has not shown that it had any valid legal entitlement to make any deductions from the sums due. The claimant did not authorise the deductions. There was no other valid reason for the deduction to be made. Even had the draft deed been accepted and applied, the deed had no term within it that would have authorised the deduction. The Tribunal understands why the first respondent was looking at significant solutions to the issues it faced early in the pandemic, but the non-payment of the sums due was still an unauthorised deduction from the wages due.

238. As has already been recorded, the respondents' position was that the first respondent was holding the money for the claimant in any event. As a result, the impact of the Judgment made is that the first respondent must pay to the claimant the sums which it says it has (in any event) held for him.

239. The terms of the judgment record a net unauthorised deduction and the sum due must be paid net. The parties' agreement was that the sums due to be paid in the months in question were net sums. Nothing in this decision has any impact upon the first respondent's ongoing obligation to pay the tax and NI due on the sums paid to the claimant (there being no dispute that such an obligation was part of the agreement between the claimant and the first respondent).

*Breach of contract (notice)*

240. As the Tribunal's jurisdiction to determine claims for breach of contract is limited to employees (and employers), and as the claimant was found not to be an employee, the claim for breach of contract brought by the claimant cannot succeed.

**Summary**

241. For the reasons explained above, the Tribunal finds:

a. the claimant was not an employee of the first respondent, but he was a worker;

b. had he been an employee, the claimant's (ordinary) unfair dismissal claim would have succeeded against the first respondent, but not his claim for automatic unfair dismissal;

c. that no protected disclosures were made by the claimant;

d. that even had the disclosures relied upon have been protected disclosures, the claimant was not treated detrimentally in terms of payments or dealing with his grievance. He would however have succeeded in his claim for detriment based on his suspension as a result of the 30 April 2020 email (against both respondents), had that email been found to have contained protected disclosures;

e. unauthorised deductions were made from the claimant's pay by the first respondent between April and June 2020 of £2,865.50 net; and

f. the breach of contract claim does not succeed as the claimant was not an employee.

Employment Judge Phil Allen
20 January 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
21 January 2022

FOR THE TRIBUNAL OFFICE

# NOTICE

## THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2408104/2020**

Name of case: **Mr C Watson** v **1. Wallwork Nelson & Johnson**
**2. Ian Johnson**

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

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

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

"the relevant judgment day" is: 21 January 2022

"the calculation day" is: 22 January 2022

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

Mr S Artingstall
For the Employment Tribunal Office

# INTEREST ON TRIBUNAL AWARDS

***GUIDANCE NOTE***

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

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

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

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

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

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

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