EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr E. Grazioli	**v**	**Charles Gregory Solicitors Limited**

Heard at: London Central

On: 1, 2, 3 and 4 November 2021 (+ 8 & 18 November 2021 in chambers)

Before: Employment Judge B Beyzade

Members: Mr A Adolphus, Tribunal Member
Ms J Cameron, Tribunal Member

Representation

For the Claimant: Mr M Sprack, Counsel
For the Respondent: Mr A Korn, Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The unanimous judgment of the tribunal is that:**

1.1. The complaint of unfair dismissal (constructive) is well-founded, and it therefore succeeds.

1.2. The complaint of failure to inform and consult pursuant to Regulations 13 and 15 of the TUPE Regulations 2006 ("TUPE") is well-founded, and it therefore succeeds.

1.3. the claimant's claim for unfair dismissal for the sole or principal reason that the claimant made protected disclosures pursuant to section 103A of the Employment Rights Act 1996 ("ERA 1996") is not well-founded and is dismissed.

1.4. the claimant's claim that he suffered detriments on the ground that he made protected disclosures is not well-founded and is dismissed.

1.5. the complaint of unauthorised deduction from wages in respect of arrears of pay between October 2019 and December 2019 is well-founded and it therefore succeeds.

1.6. the complaint of failure of the respondent to pay the claimant's holiday pay entitlement that had accrued at the termination of his employment is well-founded, and it therefore succeeds.

1.7. the complaint of failure of the respondent to pay the claimant's pension contributions is not well-founded and is dismissed.

1.8. The claimant's claims for failure to provide a statement of terms of employment and itemised pay statements are dismissed following withdrawal of those claims by the claimant pursuant to Rule 52 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013*.

1.9. Any matters relating to remedy in respect of the claims referred to in paragraphs 1.1, 1.2, 1.5 and 1.6 of this Judgment shall be determined at a 1-day remedy hearing to be listed before the same Employment Judge and two members by way of a Cloud Video Platform hearing on the first open date after 11 March 2022.

REASONS

Introduction

2. The Claimant presented a complaint of unfair dismissal (constructive), unfair dismissal pursuant to s 103A of the ERA 1996, detriments he suffered pursuant to s 47B of the ERA 1996, failure to inform and consult pursuant to Regulations 13 and 15 of TUPE, failure to provide a statement of terms of employment and itemised pay statements and unlawful deduction from wages (arrears of pay, holiday and pension contributions) which the respondent denied.

3. A final hearing was held between 1 November and 4 November 2021. This was a hearing held by CVP video hearing pursuant to Rule 46. The Tribunal were satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in hearing were able to see and hear the proceedings. In addition the Tribunal met in chambers on 8 November 2021 and 18 November 2021 (deliberations and judgment in private).

4. The parties prepared and filed a Joint Index and Bundle of Documents in advance of the hearing consisting of 419 pages.

5. On the morning of the hearing the respondent's solicitor made an application (intimated first by email dated 20 October 2021) for certain paragraphs of the claimant's supplementary statement exchanged on 15 October 2021 to be disallowed. The Tribunal refused the application. The Tribunal provided oral reasons for its decision at the hearing. Reasons for this having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing, or a written request is presented by either party within 14 days of the sending of this written record of the decision. The respondent's representative indicated that he did not require additional time to take instructions, that where necessary he will refer to the new witness statement, and that he may need additional time in cross examination. The Tribunal considered this matter when discussing a timetable with the parties.

6. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

Unfair Dismissal

1. *Did the Respondent breach the contract of employment between the Claimant and Respondent in the manner alleged at para. 44 of the Claimant's Particulars?*

2. *Did this conduct amount to a repudiatory breach of contract?*

3. *In response to which (if any) breach of contract did the Claimant resign?*

4. *If there was a course of breaches leading to a "last straw", which breach was that last straw, and did the Claimant resign on 11 December 2019 in response to that?*

5. *Did the Claimant waive any/all of the alleged breaches, and/or affirm the contract, by continuing to work for the Respondent's predecessor and/or continuing to be employed by the Respondent after 1 October 2019 (the TUPE transfer date)?*

6. *If not, was the Claimant constructively unfairly dismissed?*

7. *If so, should any award be reduced under Section 123(6) or Section 123 (6A)of the Employment Rights Act 1996 ("ERA 1996") and if so by how much? [To be determined at the remedy hearing].*

8. *Should any award be increased due to failures to comply with ACAS Codes of Practice? [To be determined at the remedy hearing]*

9. *If the Claimant is found to have been constructively dismissed, was the dismissal fair by reason of the Claimant's conduct? [To be determined at the remedy hearing]*

10. *Would the Claimant have been dismissed in any event even if the process had been fair and/or would the Claimant have been dismissed at some future date and if so when? If so, should the Tribunal exercise its discretion to reduce damages in the circumstances? [To be determined at the remedy hearing].*

Automatically Unfair Dismissal

11. *Did the Claimant make 'disclosures' within the meaning of Section 43B(1) of the ERA 1996 on any/each of the following occasions namely*
    a. *25 September 2019 (as set out at para. 17 of his Particulars of Claim);*
    b. *11 October 2019 (as set out at para. 19 of his Particulars of Claim);*

c. 28 October 2019 (as set out at para. 33 of his Particulars of Claim);

12. If so, were the alleged disclosures qualifying disclosures within the meaning of Section 43B(1)(b), (d) and/or (f) of the ERA 1996?

13. If so, did the Claimant believe that the said disclosure fell within Section 43B(1)(b), (d) and/or (f) of the Employment Rights Act 1996 in respect of any[the Claimant's case]/each [the Respondent's case] of those disclosures?

14. If so, did he have reasonable grounds for believing that the said disclosure fell within Section 43B(1)(b), (d) and/or (f) of the Employment Rights Act 1996 in respect of any[the Claimant's case]/each [the Respondent's case] of those disclosures?

15. .If so, in each instance, did the Claimant believe that the said disclosure was in the public interest within the meaning of Section 43(1)(B) of the Employment Rights Act? 16.If so, did he have reasonable grounds to believe the said disclosure was in the public interest within the meaning of Section 43(1)(B) of the Employment Rights Act?

16. If not, were the disclosures made in accordance with Section 43C of the ERA 1996? In particular, did the Claimant make the alleged disclosure to his employer (as set out in paragraphs 50 of the Response)? The Respondent accepts that the first alleged disclosure made on 25 September 2019 to Mrs Wheatley was made in accordance with this provision.

17. If so, in each instance, were the alleged disclosures 'protected disclosures' within the meaning of Section 43A of the ERA 1996?

18. If not, were the disclosures made in accordance with Section 43C of the ERA 1996? In particular, did the Claimant make the alleged disclosure to his employer (as set out in paragraphs 50 of the Response)?

19. If not, were the disclosures made in accordance with Section 43G of the ERA 1996? In particular (a) were the disclosures made for personal gain as pleaded in Paragraph 51 of the Response and (b) was it reasonable to make the alleged disclosure to Mrs Wheatley as pleaded in paragraph 51 of the Response?

20. If so, which, if any, of the alleged protected disclosures, was the Respondent aware of?

21. If so, was the Claimant automatically unfairly dismissed on 11 December 2019 because of one of the protected disclosures set out in paragraph 50 of the Claim? If so which? Was this the principal reason for dismissal within the meaning of Section 103A of the Employment Rights Act 1996 (It is conceded that if this was the principal reason for the Claimant's constructive dismissal, the dismissal would be automatically unfair within the meaning of Section 103A)?

Detriment Contrary to 47B of the ERA 1996

22. Did the Claimant make 'disclosures' within the meaning of Section 43B(1) of the ERA 1996 on any/each of the following occasions namely
(a) 25 September 2019 (as set out at para. 17 of his Particulars of Claim);
(b) 11 October 2019 (as set out at para. 19 of his Particulars of Claim);
(c) 28 October 2019 (as set out at para. 33 of his Particulars of Claim);

23. If so, were the alleged disclosures qualifying disclosures within the meaning of Section 43B(1)(b), (d) or (f) of the ERA 1996?

24. *If so, did the Claimant have reasonable grounds for believing that the said disclosure fell within those provisions?*

25. *If so, in each instance, did the Claimant have reasonable grounds to believe the said disclosure was in the public interest within the meaning of Section 43(1)(B) of the ERA 1996?*

26. *If so, in each instance, were the alleged disclosures 'protected disclosures' within the meaning of Section 43A of the ERA 1996?*

27. *Were the disclosures made within the meaning of section 43C of the ERA 1996? In particular, did the Claimant make the alleged disclosure to his employer (as set out in paragraph 50 of the Response)? The Respondent accepts that the first alleged disclosure made on 25th September 2019 to Mrs Wheatley was made in accordance with this provision.*

28. *If so, which, if any, of the alleged protected disclosures, was the Respondent aware of?*

29. *If so, were each of the disclosures 'protected disclosures' in that the relevant statutory conditions were met in so far as these related to the Respondent as set out above?*

30. *If not, were the disclosures made in accordance with Section 43G of the ERA 1996? In particular (a) were the disclosures made for personal gain as pleaded in Paragraph 51 of the Response and (b) was it reasonable to make the alleged disclosure to Mrs Wheatley as pleaded in paragraph 51 of the Response?*

31. *Was the Claimant subjected to any of the detriments set out at para. 50 of the Claimant's Particulars, namely had the Respondent:*
    a. *suspended the Claimant for making protected disclosures relating to the lack of practicing certificate, insurance etc [para 26 Particulars]*
    b. *made baseless, bad faith allegations of nonattendance, noncompliance, disruptive behaviour and aggressive behaviour [para 27]*
    c. *held an investigative meeting without inviting the Claimant [para 31]*
    d. *threatened to dismiss the Claimant without holding a disciplinary meeting [para 32]*
    e. *transferring the Claimant's employment via TUPE without advance notice or consultation [para 34]*
    f. *failed to provide the Claimant with a decision or copy of the disciplinary meeting that he attended on 11 December 2019.*
    g. *booked the disciplinary hearing for 11 December 2019, despite having been informed that the Claimant would return from annual leave on 12 December 2019 [para 39].*
    h. *attempted to impose significant, unilateral changes in his contract, to which he objected [para 36].*
    i. *deliberately scheduled a disciplinary hearing when the Claimant had previously arranged annual leave [para 38]?*

32. *Were those detriments on the grounds of the [any]/each of the Claimant's protected disclosures? If so which?*

Unlawful Deduction of Wages

33. *Were the Claimant's wages unlawfully deducted in that:*

a. *Was he paid less than his salary for October (£1982.04), November (£1982.04) and December 2019 (£703.30);*
b. *If so, how much was he paid for that period? The Claimant claims that he was paid £343.87 during this period;*
c. *Was he not paid his outstanding annual leave on termination; and/or*
d. *Did Rider Support stop paying his pension contributions in May 2019, and the Respondent stopped paying them from October 2019-December 2019?*

Failure to provide written particulars

34. *Had Rider Support failed to provide an accurate written statement of particulars?*

35. *If so, did liability for this failure transfer to the Respondent within the meaning of Regulation 4(2)(a) of TUPE?*

36. *Did the Respondent issue the Claimant with a contract of employment and/or provide the Claimant with Particulars of Employment after the transfer on 29 October 2019? If so what effect does this have on the Claim?*

Failure to provide itemised pay statement

37. *Had Rider Support failed to provide an itemised pay statement contrary to s8(1) of the ERA 1996?*

38. *If so, did liability for the said failures transfer to the Respondent within the meaning of Regulation 4(2)(a) of TUPE?*

39. *Did the Respondent provide the Claimant with itemised payment statements after the transfer? If so, what effect does this have on the Claim?*

Failure to inform and consult

40. *Was the Claimant informed and consulted by the transferor prior to the transfer of his employment to the Respondent within the meaning of Regulation 13 of the Transfer of Undertakings Protection of Employees Regulations 2006 SI 2006/246 ("TUPE")?*
41. *If not, was the transferor under an obligation to inform and/or consult prior to the transfer on 1 October 2019?*

42. *If so, was it 'reasonably practicable' for the transferor to inform and consult the Claimant within the meaning of Regulation 15(2)(a) of TUPE?*

43. *If it was, is the transferor or the transferee liable for the failure to inform and consult within the meaning of Regulation 15(7) and/or (8) of TUPE?*

44. *If so, what award of 'appropriate' compensation shall be payable to the Claimant pursuant to Regulation 16(3) of TUPE and who shall be liable to pay that award? [To be determined at the remedy hearing]*

Jurisdiction

45. *Was the Claimant's claim for failure to provide written particulars from Rider Support presented within the three-month time limit set out in Section 11(4) of the Employment Rights Act 1996?*

46. *Was the Claimant's claim for failure to provide an itemised pay statement from Rider and/or the Respondent, presented within the three-month time limit set out in Section 11(4) of the Employment Rights Act 1996?*

7. It was agreed that matters relating to liability only will be investigated and determined at this hearing, and if the claimant's claims were successful in whole or in part that there would be a separate remedy hearing listed by the Tribunal.

8. The Tribunal were also provided with a Chronology prepared by the claimant's representative and the respondent's representative commented on its contents. This contained a reading list showing essential reading for the Tribunal to undertake prior to hearing any witness evidence.

9. The claimant gave evidence at the hearing on his own behalf along with Ms J Everett (each providing a statement and supplementary statement albeit Ms J Everett's second statement was the same as the first). Mr S Douglas, Ms R Hussain, Mr H Tilbury, and Mrs C Wheatley gave evidence on behalf of the respondent, all of whom had produced a written statement except Ms R Hussain and Mrs C Wheatley who produced both initial and supplementary statements.

10. Both parties were represented by counsel and made oral closing submissions, in addition to producing written submissions on the final day of the hearing. The Tribunal were also supplied with a Bundle of Authorities containing key cases.

Findings of Fact

11. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues -

Background

12. On 31 May 2007 Rider Support Services Limited employed the claimant. Initially the claimant was employed as a paralegal, and he was later employed as a solicitor. The claimant had conduct of personal injury claims.

13. The claimant's gross weekly basic pay was £576.92, and his monthly gross pay amounted to £2500.00.

14. Rider Support Services Limited was dissolved in 2015. Thereafter Rider Support Services was owned and operated by the late Mr M Wheatley as a sole trader and sole practitioner. On 08 August 2018 Mr M Wheatley sadly deceased. Mrs C Wheatley became responsible for the practice by virtue of her role as his executrix. The practice obtained a temporary registration for initially one year from the Solicitors' Regulation Authority ("SRA").

15. Mrs Wheatley was not a qualified solicitor, and she had no legal background. Initially Mr M Greenstein was appointed as the supervising solicitor for the practice. In December 2018 Mr S Douglas, Paralegal met with Ms R Hussain with a view to her taking over as supervising solicitor. Ms Hussain was approved by the SRA to undertake the role of supervising solicitor in early 2019 and in February 2019 she had a meeting with the SRA during which Mrs Wheatley was also in attendance.

16. At the time Mr S Douglas, the claimant, Adel (Office Manager), Ms J Everett (Receptionist), Ms M Harrison (PA), Mr P Sadler (Locum Paralegal), in addition to Mrs C Wheatley and Ms R Hussain were part of Rider Support Services.

17. In January 2019 the claimant booked annual leave from 18 November 2019 to 10 December 2019.This was booked in advance because it was a cruise holiday to cross the Atlantic and the duration was for around 3 weeks.

18. In April 2019, Mrs Wheatley met the landlord and agreed that Rider Support Services could continue to occupy their premises until expiry of Riser Support Services' Lease on 24 September 2019.

19. Mrs Wheatley and Ms Hussain experienced some difficulties with the bank, including in May 2019 when Natwest Bank froze Rider Support Services' accounts. Access was secured to the client and office accounts of the practice.

20. Rider Support Services made an application to the SRA to become a registered Alternative Business Structure ("ABS") in June or July 2019.

21. On 08 August 2019 the SRA sent a letter to Ms Hussain advising her to continue with temporary emergency registration until the SRA made a decision in relation to Mrs Wheatley's application.

Alternative Premises

22. On 20 August 2019 Mrs Wheatley held a meeting with all employees except for Mr Douglas who was on annual leave at the time. During the meeting employees were advised that the Landlord was probably trying to end the Lease and that the building in its current state was not worth the rent that they were now seeking. It was agreed that alternative premises would be viewed and sought.

23. During the week commencing 26 August 2019 it was agreed that members of staff would visit the Hammersmith offices where Charles Gregory Solicitors was based, in order to view to premises to see whether it was a potential solution to their accommodation issues. The claimant and Mr Douglas viewed the premises and provided feedback.

Removal of licence to provide reserved legal activities

24. On 21 September 2019 Mrs Wheatley received an email from her solicitor attaching a copy of a letter from the SRA dated 20 September 2019. The SRA's letter advised that Rider Support Services' licence to provide reserved legal activities was removed. The SRA did not grant the application for an ABS.

25. It became clear on that day that it would no longer be possible for Rider Support Services to continue to operate in its present form under the ownership of Mrs Wheatley (and Ms Hussain as supervising solicitor). Staff were required to move physical files from Rider Support Services' offices (based in Putney) to the respondent's offices (located in Hammersmith). The SRA's letter required that by 27 September 2019 steps were taken to advise clients that they could return their matters or consent to their files being transferred to another authorised body that can provide reserved legal activities and further required that Rider

Support Services cease to conduct reserved legal activities. This information was communicated to members of staff including the claimant.

26. The claimant contacted a helpline to seek advice and he was told that if there had been an intervention in order to avoid any issues he should not do a thing. The claimant stated that he received advice that he should not be doing any work based on the fact that there was an intervention by the SRA. However there was in fact no evidence of any intervention from the SRA, and the fact that there was no intervention was confirmed to the claimant by Mr Douglas and Mrs Wheatley on 24 September 2019.

27. He was advised by the helpline to ask if the files only were being transferred or if the files and staff were transferring to a new firm. On 23 September 2019 the claimant asked Ms Hussain to confirm this information. She advised that her instructions at the time from Mrs Wheatley were to transfer the files. In relation to anything else that he was concerned about, the claimant was advised to speak to Mrs Wheatley.

28. During the conversation between the claimant and Ms Hussain on 23 September 2019 there was a misunderstanding on the claimant's part in relation to whether Rider Support Services had been intervened by the SRA. The claimant believed that there had been an intervention, whereas in fact, the ABS application was not successful, and the firm was not able to carry out reserved legal activities from 27 September 2019. The claimant's belief that there was an intervention was incorrect and it was not clear to the Tribunal why he had assumed this. The claimant was not told that there was an intervention, and this was not in fact the case, and there was no logical reason why Ms Hussain would have said this to him. Ms Hussain said that the claimant needed to speak to Mrs Wheatley about this matter.

29. The claimant did not speak to Mrs Wheatley about his employment status when he was asked to do so by Ms Hussain on 23 September 2019.

File transfers

30. Members of staff including the claimant started transferring files from Rider Support Services' office to the respondent's office on 23 September 2019.

31. On 24 September 2019 Mr Douglas told the claimant that there had been no intervention by the SRA.

32. On that day staff continued to send letters to clients to inform them about the current state of the business. In the letter to clients it was stated "*Charles Gregory Solicitors have kindly agreed to accept our cases and house our staff.*"

33. On the same day during a meeting between the claimant and Mrs Wheatley, the claimant was advised that there had been no intervention by the SRA. This was in response to the claimant having advised clients that there was an intervention.

34. The claimant sent an email to Mrs Wheatley on 25 September 2019 asking for clarification about how to transfer client files to the respondent and he raised a number of questions. The claimant sent a further email on 26 September 2019 chasing a reply.

Claimant's sickness absence

35. The claimant attended an appointment with his GP, and he was signed off sick for 2 days from 25 September 2019 until 27 September 2019 and he received a further statutory fit note for two weeks between 26 September 2019 until 11 October 2019 as a result of a suspected allergy. Mrs Wheatley sent a message to the claimant on 30 September 2019 advising him that as he had been away for 4 consecutive days he would be entitled to Statutory Sick Pay for the duration of his sick leave up to a maximum of 28 days.

Claimant's employment status

36. On 11 October 2019 the claimant sent an email to Mrs Wheatley bearing the words without prejudice and subject to contract following up his email of 26 September 2019, querying his employment position and practicing certificate, and asking for a redundancy payment from Rider Support Services. His Practicing Certificate was not due to expire until 31 October 2019.

37. On 11 October 2019 the claimant stated in his evidence that he had advised Mrs Wheatley that in his view he had been made redundant and expressed concerns about his practising certificate and referred to his allergy. The claimant had clearly not been told that he had been made redundant and his files were being transferred to the respondent. In any event the only employee who had such a belief was the claimant. His clients were Brazilian Portuguese speaking clients, so it was very likely that the respondent would require him to continue to work on his files as he had the required language skills. The respondent responded to his concerns about his Practising Certificate not being valid by advising him that this was not due to expire until 31 October 2019 and that his certificate was valid at the time in question. He was off sick at the time, and he was not working.

38. On 12 October 2019 Mrs Wheatley replied to claimant's email stating that the situation was not as the claimant had described, but that his comments had been noted and that they were happy to discuss his position on his return to work.

39. The claimant and Mrs Wheatley met at a Café Nero near the respondent's office on 15 October 2019 during which the claimant was advised that Mrs Wheatley could not talk to him about the queries he was raising, and when he returned to work those issues can be discussed with him. The claimant agreed to come into work the next day.

40. Mrs Wheatley appeared to have the mistaken belief that the claimant was required to attend the respondent's offices in order to sign the contract of employment, in order to be transferred. Mrs Wheatley did not appear to have sought advice or researched the position, albeit other staff members were seeking to guide her in piecemeal fashion.

Claimant's suspension

41. On 16 October 2019 the claimant attended the respondent's offices, but he did not carry out any work that day. The claimant had a telephone conversation with Mrs Wheatley during which Ms Hussain came downstairs and told him to turn the loudspeaker function off as it was disturbing the office. This was because the claimant was speaking too loudly. He was, in fact, shouting on the telephone to Mrs Wheatley on 16 October 2019. He was continuing to state that his employer was still Rider Support Services who were not able to carry out reserved legal activities and he had no files to work on. Mrs Wheatley disconnected the call.

42. Mrs Wheatley subsequently told the claimant that he was suspended on 16 October 2019 on full pay. Initially the suspension was for a number of matters, but this later changed to a single allegation of nonattendance at work.

43. On 17 October 2019 the claimant was sent a letter confirming his suspension on full pay and the reasons for his suspension including non-attendance, non-compliance, disruptive behaviour, and aggressive behaviour and that this was to enable an investigation to take place. The letter (prepared following HR advice that the respondent obtained) stated that the investigations were completed, and the claimant would be contacted again to inform him of any action to be taken against him. The claimant was invited to attend an investigation meeting on 18 October 2019 which he did not attend.

44. The claimant went to his GP, and he was signed off sick from work until 22 October 2019. His fit note gave the reason for absence as '*acute stress reaction*.' He was subsequently paid Statutory Sick Pay.

Investigation meeting

45. On 18 October 2019 the claimant sent an email to Mrs Wheatley in relation to rearranging the investigation meeting.

46. Thereafter on 22 October 2019 Mrs Wheatley sent an email to the claimant requesting him to attend an investigation meeting on 23 October 2019. The email confirmed that when the claimant returned to work from sickness absence on 23 October 2019 he will revert to suspension on full pay.

47. On 23 October 2019 the claimant sent an email to Mrs Wheatley at 4.21am setting out concerns relating to the investigation and his employment position, but the claimant did not attend the investigation meeting or return to work. The claimant did not attend work for the remainder of the month of October 2019 and during the whole of November 2019 (nor did he return to work prior to his resignation on 11 December 2019).

48. On 24 October 2019 Mrs Wheatley sent an email to the claimant following the investigation meeting, which took place in the claimant's absence. The claimant was advised that Mrs Wheatley will revert to him as soon as possible with the outcome, which can lead to a disciplinary and/or dismissal. The letter also stated that the claimant will need to attend the office in order to discuss who his employer is and to enable him to transfer over.

49. In the letter from Mrs Wheatley to the claimant of 24 October 2019 there was reference to the claimant's disciplinary investigation meeting being informal. The respondent took statements from their own staff, but not from the claimant.

Transfer of claimant's employment to the respondent

50. On 28 October 2019 Ms Hussain sent a letter to the claimant advising him that his employment transferred to the respondent on 01 October 2019 in accordance with TUPE, that he was absent without leave, that he will receive an amendment to his contract of employment (including amendment to name of employer, privacy notice and pension changes) and wishing him well in his employment at Charles Gregory Solicitors. The letter also assured the claimant that all of his terms and conditions of his employment would remain unchanged other than the name of his employer and his pension.

Disciplinary hearing invitation

51. On the same day the claimant was sent a letter by email advising him of the outcome of the disciplinary investigation which included copies of contractual and employment documents and inviting him to a disciplinary hearing on 30 October 2019. It was alleged that the claimant was absent without leave on 14 and 15 October 2019 and from 23 October 2019, that he displayed aggressive behaviour, he was physically aggressive, and that he refused to work in the office.

52. On 28 October 2019 the claimant merely indicated his intention to raise a grievance (which he did not send to the respondent until December 2019). He did not refer to any specific point he would be making in his grievance, nor did he make any allegation that the respondent was in breach of TUPE or otherwise.

53. On 29 October 2019, Ms Hussain sent an email to the claimant advising him that he had been suspended pending the investigation meeting, enquiring about his absence from work, and she advised the claimant that he could set out any grievance in writing to her.

54. On the same date the claimant was provided with new terms of employment from the respondent by email. He was asked to sign and return the contract to the respondent. The email acknowledged that there was no contract of employment from his previous employment on his employment file.

55. The claimant was not consulted in relation to the contract of employment that was sent to him by Ms Hussain on 29 October 2019. This was somewhat puzzling as he did not have a written contract of employment with Rider Support Services. It appeared the respondent was seeking to carry out a harmonisation of contracts, purporting to be accepting the transfer of the claimant's employment on the same terms except that the name of the employer and pension arrangements would be different, when in fact this was not the case. The terms of employment sent to the claimant differed in some respects including not just a change in the employer's name and pension, but

also in terms of the location of work, the possibility of weekend working and holiday.

56. The claimant did not attend the disciplinary hearing that was scheduled to take place on 30 October 2019.

57. Ms Hussain sent a letter to the claimant by email on 31 October 2019 advising the claimant that he is required to attend a disciplinary hearing on 4 November 2019 in relation to an allegation of being absent from work without leave. The letter advised that the possible outcomes if the claimant could not provide a satisfactory explanation included a warning, final written warning, or dismissal and that if the claimant failed to attend the hearing this may be treated as a separate issue of misconduct.

58. The claimant was paid £343.87 in relation to the month of October 2019.
59. The claimant's union representative sent an email dated 1 November 2019 to Ms Hussain requesting the results of the investigation and a copy of the disciplinary procedure, and he also requested a postponement of the disciplinary hearing to 11 November 2019. Ms Hussain replied advising that she was in a court hearing until 15 November 2019, and she provided her dates of availability.

Claimant grievance, disciplinary hearing, and suspension

60. On 7 November 2019 the claimant's union representative replied advising that the claimant's grievance is being prepared and that the claimant was not absent without leave. It was pointed out that the claimant was suspended following a disciplinary process having commenced and that he had not been reinstated. On 13 November 2019 a further email was sent from the claimant's union representative to Ms Hussain asking for the time and the address of the disciplinary hearing scheduled on 15 November 2019.

61. Ms Hussain replied by email dated 14 November 2019 stating that the claimant's suspension was lifted on 23 October 2019 and that the claimant was advised of this on 24 October 2019.

62. On the same date Ms Hussain confirmed that the disciplinary hearing had been rescheduled to 19 November 2019. The claimant's union representative emailed advising that the claimant was on annual leave and offered availability to attend a disciplinary hearing from 12 December 2019 (which was after the claimant's return from annual leave).

63. On 18 November 2019 Ms Hussain advised that the disciplinary hearing would proceed as planned as she was not aware of the claimant's annual leave, and she advised that failure to attend without good reason will lead to further disciplinary action. The claimant's union representative advised Ms Hussain that the claimant was on holiday on a cruise, that if the hearing proceeded this would be procedurally unfair and the hearing should be rescheduled to after 12 December 2019. Ms Hussain advised that the hearing will not be rescheduled, and the claimant's union representative replied reiterating that the hearing date must be changed as a matter of fairness.

Further disciplinary hearing invitation

64. On 26 November 2019 Ms Hussain sent an email to the claimant's union representative advising that the disciplinary hearing would now take place on 11 December 2019. The email advised that the claimant's previous nonattendance will be taken into account, that the claimant should consider himself as receiving a final warning, and that further non-attendance will be treated as 'a second act of misconduct' and will lead to termination of his employment.

Claimant's grievance

65. On 09 December 2019 the claimant's union representative submitted a written grievance on behalf of the claimant dealing with a number of matters.

Disciplinary hearing

66. On 11 December 2019 at 11.00am the claimant's disciplinary hearing took place. The claimant attended the disciplinary hearing along with his union representative.

67. One of the issues discussed at the disciplinary hearing on 11 December 2019 was the claimant's absence from work without leave. This was a central matter that related to the claimant's grievance. However, notwithstanding this, the claimant's grievance which was sent to Ms Hussain on 9 December 2019, was not acknowledged until after the disciplinary hearing took place on 11 December 2019.

68. On the same day at 1.11pm Ms Hussain sent an email acknowledging receipt of the claimant's grievance and confirming that she will be appointing an impartial person to hear the grievance and an invitation will be sent to him to attend a grievance hearing shortly. The claimant was advised that he had to return to work immediately.

69. On 11 December 2019 at 10.30pm the claimant sent an email to Ms Hussain advising that he was resigning from his employment with immediate effect.

70. The respondent asked the claimant to reconsider his resignation by 20 December 2019 and invited the claimant to attend a grievance hearing on 23 December 2019.

71. However, the grievance hearing did not take place and the claimant did not retract his resignation.

72. The claimant did not receive any payment in respect of his employment during the months of November and December 2019.

Observations

73. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

74. It is not clear why the claimant believed he was told that Rider Support Services could no longer operate as a law firm on 23 September 2019, as this did not reflect the fact that reserved legal activities could continue until 27 September 2019.

75. On 23 September 2019 Ms Hussain did not tell the claimant that his employment would not transfer to the respondent. Employees were not discussed by the claimant or by Mrs Wheatley at the meeting on 24 September 2019. There was no mention in paragraph 32 of the claimant's witness statement that the issue of employees was raised by the claimant or the respondent at the meeting on 24 September 2019. The Tribunal noted that Rider Support Services referred to staff being "housed" at the respondent's premises in their file transfer letters that were sent to their clients, which would be likely to lead an employee to believe it was different from the staff transferring to the respondent's employment.

76. In relation to the disclosures that the claimant states he made on 25 September 2019 the Tribunal observed as follows:
    (a) The claimant refers to a handover. The Tribunal assumed that this was a reference to the transfer of clients and files to the respondent. The claimant acknowledges that he was not part of the management discussions or negotiations. The claimant was aware that a file transfer letter was prepared and sent to clients, and clients were to be asked for consent for the file transfer to take place. We observed that this was a request for Mrs Wheatley to provide him with information rather than a disclosure of information.
    (b) The claimant states he was asked to contact his clients to advise that the SRA had intervened in the respondent's firm and that this had resulted from the late Mr Wheatley's death. We observed previously that there had been no intervention. The Tribunal was also shown a copy of the letter sent to the clients in which Rider Support Services did not attribute the transfer of files to Mr Wheatley's death and did not refer to an intervention. The letter to clients clearly stated that the transfer followed negotiations with the respondent.
    (c) In relation to the Conditional Fee Agreements ("CFAs"), once again as with (a) above, this was a request for information from Mrs Wheatley. There was no suggestion that this issue was a breach of any regulations or a breach of the respondent's or Mrs Wheatley's legal obligations.
    (d) The claimant states in his letter dated 25 September 2019 a number of questions and opines that in his view there was an argument that Rider Support Services were in breach of contract in relation to CFAs and should seek to discuss this with its solicitors. It was not factually correct that Rider Support Services had lost its licence, but in any event the files were being transferred to a law firm and consent was being sought from clients. Although the claimant had apparently identified a client who was not happy that his file was transferred already, the Tribunal was not provided with further details or evidence about this. In any event the claimant acknowledges that the client did not want to push this matter, and there was no evidence that the client pursued a complaint or alleged that there had been a breach of contract.

77. There was no evidence before the Tribunal in terms of the detailed particulars of the claimant's allergy including when this occurred, when this was brought to the attention of the respondent, and what (if any) reasonable adjustments were requested.

78. Mrs Wheatley did not demonstrate understanding of the concept that the transfer of employees' employment could take place automatically by operation of law. We believed that it was improper for the respondent to focus on requiring the claimant to attend their office to sign a new contract and that the respondent's attention should have been properly directed at the fact that the claimant did not have a written contract of employment with Rider Support Services (it was not clear why the respondent did not seek to ascertain what his terms of employment were from the outset).

79. In relation to the letter of suspension dated 17 October 2019 Mrs Wheatley did not include any clear timeframe within which the suspension would end or be reviewed. The letter stated that there was an ongoing investigation, and in the witness evidence reference was made to the fact that this took time.

80. When the claimant attended the respondent's premises on 16 October 2019, the Tribunal formed the impression that he was disruptive in the workplace. The Tribunal observed that despite being in the same premises that day, neither Ms Hussain or the claimant attempted to raise or discuss the issues that the claimant had been outlining in his correspondence. Ms Hussain could have told the claimant that she was in the middle of the process of transferring staff which might have diffused the situation.

81. Mrs Wheatley's approach in the letter dated 24 October 2019 was somewhat confusing and troubling given that the letter stated the meeting was held in the claimant's absence and she would revert with the outcome which could lead to a disciplinary and/or a dismissal. There was no evidence before the Tribunal that a full investigation was carried out prior to this letter being sent, and indeed, the claimant himself was not interviewed.

82. The claimant was not consulted in relation to the contract of employment that was sent to him by Ms Hussain on 29 October 2019. There was no evidence that the respondent met the claimant to investigate what the terms of his contract with Rider Support Services were, or to discuss any changes to his terms of employment after the transfer of the claimant's employment to the respondent.

83. No instruction was provided by Ms Hussain (or anyone else from the respondent) for the claimant to return to work and to resume his duties in the October 2019 correspondences. This was somewhat surprising as the claimant had been suspended from work.

84. There was no appreciation during the disciplinary hearing on 11 December 2019 that the claimant's grievance could be important enough to pause the disciplinary matter, in order to consider the issues that the claimant were raising.

85. The Tribunal observed that in terms of the witness evidence it heard, different witnesses were able to assist with or comment on specific aspects of this case. Where there was a conflict of evidence, the Tribunal made findings of fact on the balance probabilities based on the documents, and having considered the totality of the witness evidence, and accepted the evidence that set out the position most clearly and consistently.

Relevant law

86. To those facts, the Tribunal applied the law –

Unlawful deduction from wages

87. Section 13 of the ERA 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision in the workers contract advised in writing, or by the worker's prior written consent. Certain deductions are excluded from protection by virtue of s14 or s23(5) of the ERA 1996.

88. A worker means an individual who has entered into or works under a contract of employment, or any other contract whereby the individual undertakes to personally perform any work for another party who is not a client or customer of any profession or business undertaking carried on by the individual (s230 ERA 1996).

89. Under Section 13(3) there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less that the total amount of the wages properly payable by him to the worker on that occasion.

90. Under Section 27(1) of the ERA 1996 "wages" means any sums payable to the worker in connection with their employment including salary and holiday pay. S 27(2)(c) of the ERA 1996 excludes pension contributions from the scope of unlawful deduction from wages claims: *Somerset Council v Chambers [2017] IRLR 1087* and therefore a claim for pension contributions would need to be brought as a breach of contract claim.

91. A complaint for unlawful deduction from wages must be made within 3 months beginning with the due date for payment (Section 23 ERA 1996). If it is not reasonably practicable to do so, a complaint may be brought within such further reasonable period.

Breach of contract

92. In terms of the claimant's contract, the starting point is that contracts of employment which give rise to the entitlement to pay are a matter of contract: based upon an agreement between the parties, employer, and employee, although it is recognised that those two parties rarely have the same bargaining power. Many forms of employment protection have been established by Parliament over the years to ensure that employers deal properly and in accordance with minimum contractual entitlements with their employees. In short, employers will not be acting lawfully if they act on a unilateral basis. The statutory provisions dealing with the relevant employment protection rights are set out in the *Employment Tribunals Act 1996*, at Section 3 read with the

Employment Tribunals Extension of Jurisdiction (England) Order 1994/1623 for the pay arrears claim, Part II of the Employment Rights Act 1996, particularly at Sections 13, 14, 23 and 24, for the unlawful deduction from wages claim. The Tribunal had regard to its overriding objective at Rule 2 of the Employment Tribunals Rules of Procedure 2013 to deal with cases fairly and justly.

Unfair dismissal (constructive)

93. The Tribunal had regard to the terms of section 95(1)(c) ERA which provides that an employee is dismissed by his or her employer for the purposes of claiming unfair dismissal if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is known as constructive dismissal.

94. The Tribunal also had regard to the case of *Western Excavating Ltd v Sharp 1978 ICR 221* where it was stated that:- "*if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed*."

95. An employee pursuing a claim of constructive dismissal must establish that:-
• there was a fundamental breach of contract on the part of the employer;
• the employer's breach caused the employee to resign and
• the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

96. The claimant asserted the employer had, by their actions, breached the implied duty of trust and confidence. This term is implied into all contracts of employment, and means that employers will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (*Courtaulds Northern Textiles Ltd v Andrew 1979 IRLR 84*).

97. In the case of *Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666* it was stated that "to constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."

98. This was developed further in the case of *Malik v BCCI 1997 IRLR 462* where it was stated that "in assessing whether or not there has been a breach of the implied obligation of mutual trust and confidence, it is the impact of the employer's behaviour on the employee that is significant – not the intentions of the employer. Moreover, the impact on the employee must be assessed objectively."

Qualifying disclosures – s 43A and 43B ERA 1996 and automatically unfair dismissal s 103A ERA 1996

99. In relation to the claimant's claim that his dismissal was for the reason or principal reason that he had made a protected disclosure the relevant sections of the ERA 1996 state:
43A Meaning of "protected disclosure": 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.
43B Disclosures qualifying for protection: 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…
(d) that the health or safety of any individual has been, is being or is likely to be endangered… 43C Disclosure to employer or other responsible person: A qualifying disclosure is made in accordance with this section if the worker makes the disclosure — (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to— (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
103A Protected disclosure: An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

100. The word 'disclosure' does not necessarily mean the revelation of information that was formerly unknown or secret. Section 43L(3) of the ERA 1996 provides that: '*any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention*.'

101. Accordingly, protection is not denied simply because the information being communicated was already known to the recipient. This was confirmed by the EAT in *Parsons v Airplus International Ltd EAT 0111/17*.

102. Not all disclosures are protected under the ERA 1996. For a disclosure to be covered, it has to constitute a 'protected disclosure.' This means that it must satisfy three conditions set out in Part IVA of the ERA: a. it must be
-a 'disclosure of information,'
-b. it must be a 'qualifying' disclosure — i.e. one that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of six 'relevant failures' has occurred or is likely to occur,
-c. it must be made in accordance with one of six specified methods of disclosure.

103. The worker's reasonable belief must be that the information disclosed tends to show that a relevant failure has occurred, is occurring, or is likely to occur, rather than that the relevant failure has in fact occurred, is occurring, or is likely to occur. In other words, the worker is not required to show that the information disclosed led him or her to believe that the relevant failure was established, and

that that belief was reasonable — rather, the worker must establish only a reasonable belief that the information tended to show the relevant failure.

104. This point was considered by the EAT in *Soh v Imperial College of Science, Technology and Medicine EAT 0350/14*. It was explained that there is a distinction between saying, 'I believe X is true' and 'I believe that this information tends to show X is true.' As long as the claimant reasonably believed that the information provided tends to show a state of affairs identified in section 43B(1) ERA, the disclosure will be a qualifying disclosure for the purposes of that provision even if the information does not in the end stand up to scrutiny.

105. The wording of S.43B(1) indicates that some account is to be taken of the worker's individual circumstances when deciding whether his or her belief was reasonable. The statutory language is cast in terms of 'the reasonable belief of the worker making the disclosure' not 'the belief of a reasonable worker.'

106. Thus, the focus is on what the worker in question believed rather than on what a hypothetical reasonable worker might have believed in the same circumstances. However, this is not to say that the test is entirely subjective — S.43B(1) requires a reasonable belief of the worker making the disclosure, not a genuine belief. This introduces a requirement that there should be some objective basis for the worker's belief. This was confirmed by the EAT in *Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT*, which held that reasonableness under S.43B(1) involves applying an objective standard to the personal circumstances of the discloser, and that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe.

107. If the claimant reasonably believed that the information tends to show a relevant failure, there can be a qualifying disclosure of information even if they were later proved wrong. This was stressed by the EAT in *Darnton v University of Surrey 2003 ICR 615*. The EAT held that the question of whether a worker had a reasonable belief must be decided on the facts as (reasonably) understood by the worker at the time the disclosure was made, not on the facts as subsequently found by the Tribunal. This case was cited with approval by the Court of Appeal in *Babula v Waltham Forest College 2007 ICR 1026*, when it made clear that a worker will still be able to avail him or herself of the statutory protection even if he or she was in fact mistaken as to the existence of, for example, any criminal offence or legal obligation on which the disclosure was based. Where the legal position is something of a grey area, a worker might reasonably take the view that there has been a breach.

108. In *Kilraine v London Borough of Wandsworth 2018 ICR 1850*, the Court of Appeal held that 'information' in the context of S.43B can cover statements which might also be characterised as allegations - 'information' and 'allegation' are not mutually exclusive categories of communication. The key principle is that, to amount to a disclosure of information for the purposes of S.43B the disclosure must convey facts.

109. In relation to a purported disclosure under S.43B(1)(d), as with the other categories of relevant failure, a worker will be expected to have provided sufficient details in the disclosure of the nature of the perceived threat to health and safety. However, this duty does not appear to be too onerous. In *Fincham v HM Prison Service EAT 0925/01*, for example, the employee perceived herself to be the subject of a campaign of racial harassment. She wrote a letter to her employer containing the statement: '*I feel under constant pressure and stress awaiting the next incident*.' Although an employment Tribunal held that this was not sufficient to amount to a qualifying disclosure, the EAT thought otherwise. It said: '*We found it impossible to see how a statement that says in terms "I am under pressure and stress" is anything other than a statement that [the employee's] health and safety is being or at least is likely to be endangered… [That] is not a matter which can take its gloss from the particular context in which the statement is made*.'

110. In *Palmer and anor v London Borough of Waltham Forest ET Case No.3203582/*13 the employment Tribunal considered whether a worker was required to identify 'a specific risk or a specific person or a specific timescale of risk' but held that, in its view, that would be a gloss on S.43B(1)(d), which refers to the health and safety of 'any' individual. There is no requirement that to attract the protection of the statutory scheme, disclosures must be made in good faith. However, S.49(6A) of the ERA 1996, gives the Tribunal the power to reduce compensation in successful claims under S.103A by up to 25% where 'it appears to the Tribunal that the protected disclosure was not made in good faith'. The leading case on good faith (in a slightly different context under earlier whistleblowing legislation) is *Street v Derbyshire Unemployed Workers' Centre 2005 ICR 97* where the Court of Appeal equated 'good faith' with acting with honest motives. It was held that where the predominant reason that a worker made a disclosure was to advance a grudge, or to advance some other ulterior motive, then he or she would not make the disclosure in good faith.

111. In *Kuzel v Roche Products Ltd [2008] ICR 799*, the Court of Appeal considered the operation of the burden of proof as regards the reason for the dismissal in an unfair dismissal case brought by reference to both section 98 and section 103A. Mummery LJ envisaged that the Tribunal will decide first whether it accepts the reason for the dismissal advanced by the employer before turning, if it does not find that reason to be proved, to consider whether the reason was the making of the protected disclosure:

    a. In his judgment Lord Justice Mummery also rejected the contention that the burden of proof was on the claimant to prove that the making of protected disclosures was the reason for dismissal. However, Mummery LJ agreed with the EAT that, once a Tribunal has rejected the reason for dismissal advanced by the employer, it is not bound to accept the reason put forward by the claimant. He proposed a three-stage approach to S.103A claims: a. First, the employee must produce some evidence to suggest that his or her dismissal was for the principal reason that he or she had made a protected disclosure, rather than the potentially fair reason advanced by the employer. This is not a question of placing the burden of proof on the employee, merely

requiring the employee to challenge the evidence produced by the employer and to produce some evidence of a different reason;

b. Second, having heard the evidence of both sides, it will then be for the employment Tribunal to consider the evidence as a whole and to make findings of primary fact based on direct evidence or reasonable inferences;

c. Third and finally, the Tribunal must decide what was the reason or principal reason for the dismissal on the basis that it was for the employer to show what the reason was. If the employer does not show to the Tribunal's satisfaction that it was its asserted reason, then it is open to the Tribunal to find that the reason was as asserted by the employee. However, this is not to say that the Tribunal must accept the employee's reason. That may often be the outcome in practice, but it is not necessarily so.

112. The Tribunal bears in mind that an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case of automatically unfair dismissal advanced by the employee.

113. Whistle-blower protection is analogous to the victimisation provisions in antidiscrimination legislation, in that both seek to prohibit action taken on the ground of a protected act. This has led courts and Tribunals considering claims under S.103A to refer to the substantial body of case law concerning causation under the victimisation provisions in what is now the EqA for guidance. In *Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL*, a claim concerning victimisation contrary to the former Race Relations Act 1976, Lord Nicholls stated that the causation exercise for Tribunals is not legal but factual. A Tribunal should ask: 'Why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason?' This approach was expressly approved in the context of S.103A by the EAT in *Trustees of Mama East African Women's Group v Dobson EAT 0220/05*.

114. Lord Denning MR in *Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA* held that the principal reason for the dismissal is the reason that operated on the employer's mind at the time of the dismissal, it is the: '*set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*'. Lord Justice Underhill adopted this approach in *Croydon Health Services NHS Trust v Beatt 2017 ICR 1240, CA*, stating that 'the "reason" for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision — or, as it is sometimes put, what "motivates" them to do so'.

Detriments on the ground of making protected disclosures

115. Section 47B of the ERA 1996 says:
47B(1): "A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker had made a protected disclosure."

116. The case of London Borough of Harrow v Knight 2003 IRLR 140 EAT set out the correct approach to apply under section 47B(1) and section 47B(1A) which is:

• the Claimant must have made a protected disclosure and
• they must have suffered a detriment
• the employer/worker/agent must have subjected the Claimant to that detriment by some act/deliberate failure to act and
• the act or deliberate failure to act must be done on the ground that the Claimant made a protected disclosure.

117. As far as detriment is concerned the Tribunal took account of the Court of Appeal decision in the case of *Ministry of Defence v Jermiah 1980 ICR 13* where the court said that: "*Detriment meant simply putting under a disadvantage and that a detriment exists if a reasonable worker would or might take the view that the action of the employer was in all the circumstances to his detriment. What matters is that compared with other workers, hypothetical or real, the complainant has shown to have suffered a disadvantage of some kind. Someone who is treated no differently than other workers even if the reason for an employer's treatment is perceived to arise from or be connected to the act of making a protected disclosure will find it difficult to show that he or she has suffered a detriment*."

118. Thus, a 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he has been disadvantaged in the workplace. The assessment of whether a reasonable worker would take the view that the action taken was in all the circumstances to his detriment must be viewed from the perspective of the worker (*Shamoon v Chief Constable of the RUC 2003 ICR 337 HL*). For example, there did not necessarily have to be any physical or economic consequences for there to be a detriment. An unjustified sense of grievance cannot amount to a detriment: see also *Shamoon*.

119. Examples of detriment can include suspension, disciplinary action, moving the whistle blower as in the case of *Merrigan v University of Gloucester ET 1401412/10* and *Keresztes v Interserve FS (UK) Ltd ET 2200281/16*. It can also include being subjected to performance management as in the case of *Chief Constable of West Yorkshire Police v B and anor EAT 0306/15*.

120. The Tribunal must deal with the test of causation in the following order:
■was the worker subjected to a detriment by the employer/ worker/ agent?
■Was the worker subjected to a detriment because they made a protected disclosure?

121. This is what section 48 of the ERA 1996 says:
"48 Complaints to employment tribunals
(1) An employee may present a complaint to an [employment tribunal] that he has been subjected to a detriment in contravention of section 43M, 44(1), 45, 46, 47, 47A, 47C(1), 47E, 47F or 47G.
…
(1A)A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B
…

(2) On a complaint under subsection (1), (1XA), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
(5) In this section and section 49 any reference to the employer [includes—
[(a) where] a person complains that he has been subjected to a detriment in contravention of section 47A, the principal (within the meaning of section 63A(3));
(b) in the case of proceedings against a worker or agent under section 47B(1A), the worker or agent].”

122. The necessary link between a protected disclosure and any detriment relied upon is established if the former was a material influence upon the latter: see *Fecitt v NHS Manchester [2012] ICR 372 CA*.

123. The question of whether the making of the disclosure was the reason (or principal reason) for the dismissal is distinct from the question of whether the disclosure was protected under the statutory scheme — *Croydon Health Services NHS Trust v Beatt 2017 ICR 1240, CA*. The former question requires ‘*an enquiry of the conventional kind into what facts or beliefs caused the decision-maker to decide to dismiss*.’ The latter, however, is ‘*a matter for objective determination by a Tribunal*’ and ‘*the beliefs of the decision-taker are irrelevant to it*.’ Furthermore, as Lord Justice Elias confirmed in *Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA*, the causation test for automatically unfair dismissal under S. 103A is stricter than that for unlawful detriment under S.47B — the latter claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker, whereas S.103A requires the disclosure to be the primary motivation for a dismissal. Thus, if the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee’s claim under S.103A will not be made out.

TUPE -Failure to inform and consult

124. Regulation 13 of TUPE obliges transferors and transferee to inform and consult in respect of affected employees. This term is defined in regulation 13(1) and includes employees of the transferor or the transferee who might be affected by the transfer or may be affected by measures taken in connection with it.

125. Regulation 13(2) provides that the duty to inform must take place long enough before a relevant transfer to enable the affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of the following:
a. The fact that the transfer is to take place, the date or proposed date of the transfer and the reason for the transfer.
b. The legal, economic, and social implications of the transfer for any affected employees.
c. The measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so, that fact.

d. If the employer in question is the transferor, the measures in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages no measures will be so taken, that fact.

126. The duty to consult arises where measures are envisaged being taken.

127. The duty to inform and consult is expanded in regulation 13(3) to cover appropriate representatives of affected employees. This is relaxed in relation to micro-businesses that employ fewer than ten employees and allows employers to inform and consult directly with affected employees in certain specified circumstances.

128. Under regulation 13(9) employers have an excuse for not complying with the duties to inform and consult if there are special circumstances which render it not reasonably practicable to do so. They must, however, take all such steps to fulfil the duty as are reasonably practicable in the circumstances. If the question of reasonable practicability reaches a Tribunal, the burden is on the employer to show that the special circumstances defence should apply (regulation 15(2)).

129. This defence is to be narrowly construed. Circumstances need to be exceptional or out of the ordinary (*Clarks of Hove Ltd v Bakers' Union 1978 ICR 1076 CA*). The special circumstances must exist at the time when the obligation to inform and consult arises rather than as an explanation given in hindsight. In *Scott and Ors v Guardian Facilities and anor* ET Case No 23340014/08 the Tribunal found that although the transfer had happened very quickly, the loss of business at short notice was neither exceptional nor extraordinary and that the transferor had been on notice that the contract was at risk for seven months. There were no special circumstances for the purposes of Regulation 13(9).

130. In *Carillion Services Ltd (In Compulsory Liquidation) and others v Benson* EA-2021-000269-BA the EAT President dismissed Carillion's appeal, that the Tribunal had not erred in concluding that there were no special circumstances here and was correct to follow Court of Appeal authority (*Clarks of Hove Ltd v Bakers' Union [1978] 1 WLR 1207*) that "special" in this context, meant something uncommon or out of the ordinary. At paragraph 52 of his judgment the EAT President stated "*The mere fact that a circumstance has an effect on the ability to comply with an obligation under section 188(1A), (2) or (4) TULRCA does not render it special. Were that not so, then the defence would be available to any employer who could point to a factor that made it difficult or impossible to comply with the obligation to consult or an aspect thereof*."

131. The fact that a special circumstance exists will not excuse a *total* failure to consult where some, albeit limited, consultation could take place: *Shanahan Engineering Ltd v Unite the Union [2010] UKEAT 0411_09_2002*. An employer must still take all steps towards compliance with the statutory obligations as are reasonably practicable in the circumstances of the case.

132. The question of who can bring a claim for failure to inform and consult was decided in *Howard v Millrise Ltd (in liquidation) and anor 2005 ICR 435 EAT*. There it was held that an affected employee had standing to bring a claim for breach of Regulation 13 where an employer had failed to invite affected employees to elect representatives or, in the absence of any election, to provide the requisite statutory information to the employee himself or herself.

133. Regulation 13A sets out circumstances in which a micro-business "…*may comply with regulation 13 by performing any duty which relates to appropriate representatives as if each of the affected employees were an appropriate representative*." The circumstances that need to be satisfied by the respondent are that:
(a)the employer employs fewer than 10 employees;
(b)there are no appropriate representatives within the meaning of regulation 13(3); and
(c)the employer has not invited any of the affected employees to elect employee representatives.

Discussion and decision

134. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

Unfair Dismissal (constructive)
1.Did the Respondent breach the contract of employment between the Claimant and Respondent in the manner alleged at para. 44 of the Claimant's Particulars?
2. Did this conduct amount to a repudiatory breach of contract?
3.In response to which (if any) breach of contract did the Claimant resign?

135. The first issue for this Tribunal to determine is the complaint of constructive dismissal. The claimant asserted the employer had, by their actions, breached the implied duty of trust and confidence. The claimant argued that the respondent had breached the implied duty of trust and confidence by reason of the acts and/or omissions of the respondent that are set out in paragraph 44 of his Grounds of Complaint. We considered each of those matters in turn.

a) Failure to make pension payments

136. The claimant did not raise this either in his letter of grievance of 9 December 2019 or in his letter of resignation of 11 December 2019. There was no evidence that he brought this matter to the attention of the respondent during the course of his employment.

137. The Tribunal did not accept that there was a deliberate default by the respondent in respect of this matter, and the respondent sought to rectify the position when it was brought to their attention. As at the date of the final hearing the claimant's pension contributions appeared to have been paid, and there was no evidence of any outstanding amount that was owed to the claimant by the respondent in respect of his pension contributions.

138. He was offered an alternative pension after his employment transferred to the respondent. The respondent did not act in breach of the claimant's contract of

employment in respect of the claimant's pension. In any event, the Tribunal was not satisfied that this matter amounted to a fundamental breach of contract or that the claimant resigned in response to this.

b) Transferring files

139. The Tribunal did not find that the claimant was deceived into transferring client files without SRA authorisation. He was asked to send a pre-prepared letter to clients, which he did, giving them the choice in terms of whether their file should be transferred to the respondent. As the Tribunal did not accept that this allegation took place as a matter of fact, there was no breach of the claimant's contract of employment in respect of this matter and the claimant did not resign in response to it.

c) Substandard office conditions

140. We did not accept that the claimant was subjected to substandard office conditions. As the claimant was not subjected to substandard office conditions, the Tribunal did not conclude that there had been a breach of the claimant's contract by the respondent in relation to this matter or that he resigned in response to this.

141. There was some dispute about the office conditions but even taking the claimant's case at its highest it was not a fundamental breach of contract to require the claimant to work in the office. The Tribunal noted that there was no evidence of any other complaints from members of staff who had worked in that office. Mr Douglas gave evidence and did not complain about the office conditions. There was no evidence that the claimant complained at the material time or that he required the respondent to make any reasonable adjustments.

d) Failed to give Claimant accurate information about Rider Support Services' regulatory status

142. There was a dispute about exactly what the claimant was and was not told by Mrs Wheatley or Ms Hussain. The Tribunal were satisfied that there was nothing in terms of the information that the claimant was provided about Rider Support Services' regulatory status that could amount to a breach of the duty of trust and confidence and that the claimant did not resign in response to this alleged breach of contract. Rider Support Services did not conduct itself in such a manner as to be in breach of any obligations to provide information to its staff in terms of its regulatory obligations. The claimant was a solicitor albeit he had no management responsibility, and he was not a partner or a director. By his own admission he was not involved in management decisions. There was no obligation on Rider Support Services to furnish the claimant with any specific regulatory information. We noted that regulatory information about the status of law firms is available online and can be obtained from the law society and SRA.

e) Attempting to demote the claimant to a claims handler

143. The claimant alleged that Mrs Wheatley told him that the respondent attempted to demote him to a claims handler. On the facts found by the Tribunal, the claimant was not demoted and there was no attempt to demote him. His Practicing Certificate did not expire, and he was still employed as a solicitor. The respondent's position was that it did not make sense to demote the claimant

as he could charge out at higher fees as a solicitor. The claimant's evidence was therefore not accepted by the Tribunal and accordingly there was no breach of the claimant's contract in respect of this matter. Furthermore the claimant did not resign in response to this alleged breach of contract.

f) Advice to clients that were not in their best interests

144. The Tribunal did not find that the claimant was asked to give advice that was in the interests of Mrs Wheatley and Ms Hussain but not in any clients' best interests. He was asked to send a pre-prepared letter to clients, which he did, giving them the choice as to whether they wanted to transfer their files to the respondent. As the events described by the claimant in relation to this allegation did not take place as a matter of fact, there was no breach of the claimant's employment contract and the duty of trust and confidence in respect of this matter. Furthermore the claimant did not resign in response to this alleged breach of contract.

g) Pressuring the claimant to work without a practising certificate, without confirmation he transferred or insurance cover

145. Whilst the Tribunal did not accept that the claimant was placed under pressure to work without a Practicing Certificate, confirmation that he transferred, or insurance cover, the Tribunal understood that the claimant did suffer anxiety and distress as he was not kept informed about his employment status. This matter alone, did not amount to a fundamental breach of contract.

h) *Claimant's serious allergic reaction to the premises*

146. The Tribunal was not taken to any evidence to show that the claimant had in fact suffered a serious allegoric reaction arising from the respondent's workplace. The claimant did not present any or any sufficient evidence to the respondent during the course of his employment with the respondent to demonstrate that he suffered a serious allergic reaction or that this was due to the workplace premises. There was no mention of this in the claimant's letter of resignation and this was not particularised in his grievance. The only medical evidence was a fit note referring to an allergic reaction, which reflects simply what the claimant had told his GP and does not contain any further particulars or analysis. The Tribunal was unable to find any breach of contract and the implied duty of trust and confidence in relation to this matter. Furthermore the claimant did not resign in response to this alleged breach of contract.

i) Suspension due to making protected disclosures

147. For reasons set out below, the Tribunal did not accept that the claimant made any protected disclosures. He had a valid Practicing Certificate in October 2019 at the time when he states that he raised this issue with Mrs Wheatley. There was no evidence of any issues in terms of the respondent's or Rider Support Services' insurance coverage. Moreover the claimant's suspension had no connection whatsoever to the claimant making any purported protected disclosures. This matter therefore did not amount to a breach of the claimant's contract and the implied duty of trust and confidence. Furthermore the claimant did not resign in response to this alleged breach of contract.

j) Made baseless, bad faith allegations

148. The Tribunal did not find that the disciplinary matters that the respondent were seeking to consider at the disciplinary hearing could amount to gross misconduct or that they were managed or investigated by the respondent appropriately and fairly. However this matter considered in isolation did not reach the threshold of the Tribunal finding that there was a fundamental breach in terms of the implied duty of trust and confidence.

k) *held an investigative meeting without inviting the claimant*

149. The Tribunal found that an investigation meeting was held in the claimant's absence. The claimant was invited to attend a disciplinary investigation meeting. However he did not attend. In relation this single matter alone, this was insufficient to find that there was a breach of the implied duty of trust and confidence. He was later invited to attend a disciplinary hearing, without being afforded a further opportunity to attend an investigation meeting.

l) *Threatened to dismiss the claimant without holding a disciplinary meeting*

150. A letter was sent from Mrs Wheatley dated 24 October 2019 advising the claimant that the investigation meeting was held in his absence and that she will revert to him in relation to a decision which could result in his dismissal. The Tribunal were not referred to the respondent's disciplinary procedures or any contractual procedure (or otherwise). In any event there is an implied obligation on the part of the respondent (which forms part of the implied duty of trust and confidence) that required the respondent to carry out a reasonable investigation which would involve providing the claimant an opportunity to give an explanation in relation to any allegations as part of the investigation and informing him in advance that he could be dismissed. However based on the facts we determined this matter alone could not amount to a fundamental breach of contract by the respondent.

m) Transferred the claimant's employment via TUPE without advance notice or consultation

151. Based on the above findings of fact the Tribunal accepted that the claimant's employment was transferred to the respondent without the claimant being provided with advance notice or consultation. In this case the consequences were that it contributed markedly to the breach of the implied duty of trust and confidence that the respondent had towards the claimant, and it contributed to the claimant's behaviour. He was increasingly concerned that he was being pushed out without redundancy pay. No one from the respondent had confirmed to the claimant in advance what measures were being taken if any and if his employment would in fact transfer to the respondent. The Tribunal found that considering all the circumstances this demonstrated a fundamental breach of the claimant's contract of employment and the implied duty of trust and confidence.

152. The claimant's resignation letter states that he was resigning due to his recent experience as stated in his formal grievance. His letter of grievance referred to the attempt to alter his contract of employment unilaterally (which would not have been this case if there had been consultation). The respondent had not sought to ascertain the terms of the claimant's employment with his previous employer, and they did not consult him about the basis upon which it were

proposed to transfer his employment to the respondent. The Tribunal accepted that the claimant's resignation was in response to this breach of the implied term of trust and confidence by the respondent, together with unilateral changes the respondent sought to make to his contract of employment and the events that ensued thereafter.

n) Failed to provide decision or copy of disciplinary meeting that the claimant attended on 11 December 2019

153. The claimant attended the disciplinary hearing on 11 December 2019, and he resigned on the same day. It was not practicable for the respondent to provide him with its decision following the disciplinary hearing (and prior to his resignation). This matter therefore cannot be described as a breach of the implied term of trust and confidence. Furthermore the claimant did not resign in response to this alleged breach of contract.

o) Arranged disciplinary hearing on 11 December 2019 despite the claimant returning from leave on 12 December 2019

154. The Tribunal did not accept that this was a breach of the implied term of trust and confidence as the claimant had in fact attended the disciplinary hearing. He was not unable to attend due to being on leave. The Tribunal did not accept that this was a fundamental breach of the claimant's contract. Furthermore the claimant did not resign in response to this alleged breach of contract.

p) Unilateral changes to contract of employment

155. The respondent sent the claimant a new contract of employment on 28 October 2019. The claimant did not have a written contract of employment previously, and the respondent made no attempt to ascertain the terms of the claimant's employment with Rider Support Services by discussing these with the claimant. The Tribunal accepted that the changes to the claimant's contract of employment were significant as they affected matters such as his days of work and holiday. The respondent's actions in terms of imposing new terms of employment on the claimant unilaterally was therefore a breach of the implied term of trust and confidence and therefore a fundamental breach of the claimant's contract of employment. His grievance letter sent on 9 December 2019 (which was referred to in his resignation letter) included a complaint that the respondent attempted to alter his contract of employment unilaterally. The Tribunal concluded that the claimant resigned in response to this matter, in addition to the lack of TUPE consultation referred to above, and the events that followed thereafter.

4.If there was a course of breaches leading to a "last straw", which breach was that last straw, and did the Claimant resign on 11 December 2019 in response to that?

156. The claimant raised his allegations in a grievance dated 9 December 2019 in relation to lack of consultation and unilateral variation of his contract. The respondent had not reviewed his grievance or paused the disciplinary proceedings. The respondent held the disciplinary hearing on 11 December 2019. At the disciplinary hearing there was no indication that the respondent would pause the disciplinary process. The commencement of the grievance process was to be progressed separately, however the respondent did not write to the claimant to confirm what would happen in relation to his grievance until

after the disciplinary hearing. This undoubtedly was the last event which led to the claimant's resignation, albeit his resignation was also due to the events that occurred earlier and are described above. The Tribunal accepted the claimant's evidence regarding the reasons for his resignation which centred around the lack of consultation in relation to TUPE and the variation of his contract unilaterally, and the manner in which his grievance and the disciplinary process were conducted thereafter.

157. The Tribunal concluded, having had regard to the above points, that the events described above, did, in the circumstances of this case, breach the implied duty of trust and confidence. The respondent had, by their earlier actions, fractured the employment relationship with the claimant and they had done nothing to try to repair it. The respondent simply wanted the claimant to put it all behind him and return to work immediately (as per the email dated 11 December 2019 from Ms Hussain), without understanding that the claimant had lost trust in his employer. Although there was an indication after the disciplinary hearing that his grievance will be progressed, this was a rather belated communication and it was not clear when and how the process would take place, and whether it would be dealt with fairly.

Conclusion - constructive unfair dismissal

158. The Tribunal were satisfied that there were breaches of the claimant's contract of employment, that the breaches of contract considered as a whole amounted to a fundamental breach namely of the implied term of trust and confidence and that the claimant resigned in response to those breaches. Those fundamental breaches included the threat of dismissal (and the failure to carry out any reasonable investigation including but not limited to meeting or obtaining a statement from the claimant), placing the claimant on suspension and unreasonably alleging he was absent without leave, the failure to inform and to consult the claimant in accordance with the respondent's obligations pursuant to TUPE, attempting to unilaterally vary the claimant's contract, threatening to discipline the claimant separately due to his nonattendance on 26 November 2019, and failing to acknowledge the claimant's grievance which was sent on 9 December 2019 (and to confirm how this would be progressed) prior to the disciplinary hearing and deciding to continue with the disciplinary hearing without considering whether this was appropriate in light of the claimant's grievance.

159. We decided the breaches of contract by the respondent were fundamental (or serious) breaches of contract because the employer's had, by their actions destroyed the claimant's trust in them. They had an opportunity to resolve matters, but they did not take it, and instead compounded the situation by threatening further disciplinary action. We were satisfied the breach was fundamental.

5.Did the Claimant waive any/all of the alleged breaches, and/or affirm the contract, by continuing to work for the Respondent's predecessor and/or continuing to be employed by the Respondent after 1 October 2019 (the TUPE transfer date)?

160. The Tribunal were satisfied that the claimant did not waive any/all breaches of contract and/or affirm the contract by continuing to work for the respondent's

predecessor and/or continuing to be employed by the respondent after 1 October 2019.

161. The Tribunal considered the chronology of events carefully, including the delay in terms of raising the grievance. The claimant was off sick for a period of time, and he was suffering from stress. He went on holiday on a pre-booked cruise, and he spent time seeking to clarify matters with the respondent informally. The respondent was in a position to be able to investigate these matters. The claimant resigned soon after he raised a grievance (on 9 December 2019) and his attendance at the disciplinary hearing on 11 December 2019 during which it became evident to him that the respondent had failed to pay any or any sufficient regard to the matters he complained of in his grievance.

162. We acknowledge the respondent may not have intended any repudiation of contract, but our function is to look at the employer's conduct as a whole and decide whether it was such that its effect judged reasonably and sensibly, was such that the employee cannot be expected to put up with it. We decided, judging the employer's conduct reasonably and sensibly, that the claimant could not reasonably be expected to put up with it: the employer had damaged the employment relationship between them; had done nothing to try to resolve that and the threat of disciplinary action remained.

163. The claimant, following attending the disciplinary hearing on 11 December 2019, wrote to the respondent, to resign. The claimant, in his letter of resignation, referred to his grievance which set out his concerns including the attempt to unilaterally vary his contract and the lack of consultation. The claimant clearly hoped that he would be able to resolve matters informally with the respondent. Having raised a formal grievance, the respondent did not acknowledge this prior to the disciplinary hearing and the disciplinary process was not paused. We are satisfied that what caused the claimant to resign were the grievance he raised and the respondent's response to this leading up to the hearing on 11 December 2019, along with the events that that claimant complained of prior to that date relating to the lack of consultation and attempt to unilaterally vary his contract. Accordingly the claimant was dismissed in accordance with section 95(1)(c) of the ERA 1996.

6.If not, was the Claimant constructively unfairly dismissed?

164. The potentially fair reasons for dismissal are set out in sections 98(1) and (2) of the ERA 1996. The Tribunal were satisfied that there was not a potentially fair reason for the claimant's dismissal.

165. In any event, the Tribunal considered whether the claimant's dismissal was fair and reasonable in accordance with section 98(4) of the ERA 1996 including the size and administrative resources of the employer and found that the claimant's dismissal was not fair and reasonable in all the circumstances.

166. We decided that the claimant was unfairly (constructively) dismissed by the respondent.

Claimant's alleged qualifying disclosures

11.Did the Claimant make 'disclosures' within the meaning of Section 43B(1) of the ERA 1996 on any/each of the following occasions namely as listed in a, b and c:

167. Based on its findings of fact, the Tribunal did not find that the claimant made any 'disclosures' on either 25 September 2019, 11 October 2019 or on 28 October 2019 considering the definition of a qualifying disclosure in section 43B(1) of the ERA 1996.

168. The claimant sent an email to Mrs Wheatley on 25 September 2019 asking for clarification about how to transfer client files to the respondent and he raised a number of questions. The claimant sent a further email on 26 September 2019 chasing a reply. The Tribunal did not find that the claimant made a disclosure in either of these emails. He was simply seeking clarification.

169. On 11 October 2019 the claimant sent an email to Mrs Wheatley following up his email of 26 September 2019, querying his employment position and practicing certificate, and asking for a redundancy payment from Rider Support Services. The Tribunal did not find that the claimant made a disclosure in this email.

170. On 28 October 2019 there was no disclosure made by the claimant to the respondent. There were no written or verbal communications from the claimant to the respondent on that date that the Tribunal found contained a disclosure.

12.If so, were the alleged disclosures qualifying disclosures within the meaning of Section 43B(1)(b), (d) and/or (f) of the ERA 1996?

171. Even though the Tribunal did not accept that any disclosures were made by the claimant, the Tribunal were not satisfied in any event that any alleged disclosures were qualifying disclosures within the meaning of section 43B(1)(b), (d) and/or (f) of the ERA 1996. There were no disclosures made by the claimant which purported to show that the respondent had failed, was failing or was likely to fail to comply with a legal obligation to which they were subject.

172. The Tribunal did not find that the claimant made any allegation that his health and safety had been, was being or was likely to be endangered. The Tribunal did not accept that the claimant complained to the respondent about his health and the impact of the office conditions. There was no evidence that any other employee had complained about the office conditions.

173. There was no evidence before the Tribunal that the matters that the claimant said he disclosed to the respondent had been, was being or was likely to be deliberately concealed by the respondent.

13.If so, did the Claimant believe that the said disclosure fell within Section 43B(1)(b), (d) and/or (f) of the Employment Rights Act 1996 in respect of any[the Claimant's case]/each [the Respondent's case] of those disclosures?
14.If so, did he have reasonable grounds for believing that the said disclosure fell within Section 43B(1)(b), (d) and/or (f) of the Employment Rights Act 1996 in respect of any[the Claimant's case]/each [the Respondent's case] of those disclosures?

174. In any event, for the reasons stated above, the Tribunal were not satisfied that the claimant believed that his alleged disclosures fell within Section 43B(1)(b), (d) and/or (f) of the ERA 1996.

175. Furthermore, the Tribunal did not accept that the claimant had reasonable grounds for believing that the said disclosures fell within Section 43B(1)(b), (d) and/or (f) of the ERA 1996. The Tribunal did not conclude that there were reasonable grounds for the claimant to believe that the respondent were breaching their legal and/or health and safety obligations. Furthermore there was no evidence to support the claimant's contention in respect of Section 43B(1)(f) of the ERA 1996.

15.If so, in each instance, did the Claimant believe that the said disclosure was in the public interest within the meaning of Section 43(1)(B) of the Employment Rights Act?
16.If so, did he have reasonable grounds to believe the said disclosure was in the public interest within the meaning of Section 43(1)(B) of the Employment Rights Act?

176. Notwithstanding the above, the Tribunal were also not satisfied that the claimant believed nor that the claimant had reasonable grounds to believe that the purported disclosures relied upon by him were made in the public interest. There was no discernible public interest element in any of the claimant's purported disclosures. In relation to the purported disclosure on 11 October 2019 the claimant was in fact querying whether he would be receiving a redundancy payment and matters about his own employment status.

17.If so, in each instance, were the alleged disclosures 'protected disclosures' within the meaning of Section 43A of the ERA 1996?

177. For the reasons stated above, we concluded that the alleged disclosures were not qualifying disclosures within the meaning of section 43A (or the definition in section 43B) of the ERA 1996.

18.If not, were the disclosures made in accordance with Section 43C of the ERA 1996? In particular, did the Claimant make the alleged disclosure to his employer (as set out in paragraphs 50 of the Response)?

178. The Respondent accepted that the first alleged disclosure made on 25 September 2019 to Mrs Wheatley was made in accordance with this provision. The Tribunal accepted that the alleged disclosure on that date was made to the claimant's employer at the material time.

179. Mrs Wheatley still had a role and a relationship with the respondent after the claimant's employment had transferred to the respondent. Taking this into account, the Tribunal considered that the claimant made the alleged qualifying disclosure on 11 October 2019 to his employer at the material time.

180. It was reasonable to make the disclosures in question to Mrs Wheatley who was acting as an agent for the employer, and she was engaged by them as a consultant to assist with the transfer.

181. As the Tribunal could not determine any person to whom an alleged qualifying disclosure was made on 28 October 2019, the Tribunal did not have any evidence to show that any alleged qualifying disclosure made on that date was made to the claimant's employer.

19.If not, were the disclosures made in accordance with Section 43G of the ERA 1996? In particular (a) were the disclosures made for personal gain as pleaded in

Paragraph 51 of the Response and (b) was it reasonable to make the alleged disclosure to Mrs Wheatley as pleaded in paragraph 51 of the Response?

182. The Tribunal were not satisfied that the claimant reasonably believed any information allegedly disclosed or allegation within any alleged disclosures was substantially true. He did not have any basis to believe that the matters alleged were substantially true. Moreover, any alleged disclosures were made with the claimant's personal interests and personal gain in mind. Therefore, the alleged disclosures were not made in accordance with section 43G of the ERA 1996.

20.If so, which, if any, of the alleged protected disclosures, was the Respondent aware of?

183. As the Tribunal did not conclude that any purported disclosures were made in accordance with section 43G of the ERA 1996, this matter does not require to be determined. In any event the Tribunal did not accept that there were any qualifying disclosures that were made by the claimant.

Unfair dismissal – s 103A ERA 1996

21.If so, was the Claimant automatically unfairly dismissed on 11 December 2019 because of one of the protected disclosures set out in paragraph 50 of the Claim? If so which? Was this the principal reason for dismissal within the meaning of Section 103A of the Employment Rights Act 1996 (It is conceded that if this was the principal reason for the Claimant's constructive dismissal, the dismissal would be automatically unfair within the meaning of Section 103A)?

184. As the Tribunal did not find that any qualifying disclosures were made by the claimant, the Tribunal dismisses the claimant's claim alleging that he was unfairly dismissed for the reason or principal reason that he made a qualifying disclosure (or qualifying disclosures) under section 103A of the ERA 1996.

185. The Tribunal proceeded to consider this matter further and what we would have found in the event that we were wrong, and we accepted that any qualifying disclosures were made we did not conclude that any qualifying disclosure were made). Having considered all the evidence before it, the Tribunal was not persuaded that the respondent had shown that there was a fair reason for the claimant's dismissal. However, the purported protected disclosures the claimant relied on were made on 25 September 2019, 11 October 2019, and 28 October 2019 (the Tribunal heard no evidence that any information was disclosed by the claimant to the respondent on 28 October 2019).

186. The Tribunal was not persuaded that the alleged qualifying disclosures made by the claimant were the reason or the principal reason for his dismissal because they were allegedly made quite some time prior to the claimant's dismissal, the respondent appeared to be willing to continue to employ the claimant (albeit the claimant for the reasons set out above were entitled to leave his employment by reason of the fundamental breaches of contract that occurred) and further in light of the findings of fact set out above. Moreover, having considered the circumstances of the claimant's dismissal, the Tribunal was persuaded that the reason why the claimant's employment came to an end were the unreasonable conduct of the respondent towards the claimant. There was no evidence to suggest that there was any connection between the respondent's conduct and any alleged protected disclosures.

187. In their evidence before the Tribunal, the respondent's witnesses were adamant that the claimant's protected disclosures were not the reason or principal reason for the claimant's dismissal. The reason advanced were the claimant having resigned from his employment. There was nothing in the evidence from the claimant or the respondent's witnesses which showed to the Tribunal (or which could lead the Tribunal to infer) that the claimant's dismissal took place due to the reason or principal reason that the claimant had made any alleged qualifying disclosures. Having so concluded, the Tribunal were satisfied that the alleged qualifying disclosures made by the claimant played no part whatsoever in relation to the respondent's decision to dismiss the claimant.

188. The Tribunal considered the events in relation to the TUPE transfer in September 2019, the claimant's treatment leading up to his resignation, and the claimant's grievance and his resignation in December 2019. The Tribunal also considered the lack of response to the claimant's grievance on 9 December 2019 until after the disciplinary hearing took place, the failure to halt the disciplinary proceedings, and all the other circumstances. The Tribunal did not accept that the reason or the principal reason for termination of the claimant's employment in these circumstances were the protected disclosures made by the claimant.

Detriments on the ground of making protected disclosures
List of Issues - s 22-30

189. For the reasons set out above, the Tribunal did not find that the claimant made any qualifying disclosures pursuant to section 43B(1)(b),(d) or (f) of the ERA 1996, nor that any purported disclosures were made pursuant to s43G of the ERA 1996. The Tribunal also made findings in relation to s43C of the ERA 1996 which are set out above.

190. As the Tribunal did not find that any qualifying disclosures were made, the Tribunal dismisses the claimant's claim alleging that he was subjected to detriments on the ground that he made a qualifying disclosure (or qualifying disclosures) under section s47B and 48 of the ERA 1996. The Tribunal proceeded to consider this matter further and what we would have found in the event that we were wrong, and we accepted that any qualifying disclosures were made (it was not concluded that any qualifying disclosure were made).

31. Was the Claimant subjected to any of the detriments set out at para. 50 of the Claimant's Particulars, namely had the Respondent:

- *a. suspended the Claimant for making protected disclosures relating to the lack of practicing certificate, insurance etc [para 26 Particulars]*
- *b. made baseless, bad faith allegations of nonattendance, noncompliance, disruptive behaviour and aggressive behaviour [para 27]*
- *c. held an investigative meeting without inviting the Claimant [para 31]*
- *d. threatened to dismiss the Claimant without holding a disciplinary meeting [para 32]*
- *e. transferring the Claimant's employment via TUPE without advance notice or consultation [para 34]*
- *f. failed to provide the Claimant with a decision or copy of the disciplinary meeting that he attended on 11 December 2019.*

g. booked the disciplinary hearing for 11 December 2019, despite having been informed that the Claimant would return from annual leave on 12 December 2019 [para 39].
h. attempted to impose significant, unilateral changes in his contract, to which he objected [para 36].
i. deliberately scheduled a disciplinary hearing when the Claimant had previously arranged annual leave [para 38]?

191. Therefore in the event that the Tribunal were wrong to find that there were no qualifying disclosures made to the respondent, the Tribunal made findings of fact in relation to each of the alleged detriments above. The Tribunal found that the events in relation to the alleged detriments did not occur as described by the claimant except in relation to the lack of an investigative meeting 31(c), threat to dismiss the claimant within the correspondence he was sent 31(d), TUPE transfer without notice or consultation 31(e), and lack of consultation in relation to unilateral changes to the claimant's contract 31(h). In relation to the detriments listed in 31 c), d), e) and h) of the list of issues, the Tribunal accepted that these matters in fact took place and that they all individually amounted to detriments.

192. The purported detriments listed at 31a), b), f), g), and i) did not occur in the manner in which they were described by the claimant. Had the Tribunal been satisfied that those alleged detriments did take place as described by the claimant, the Tribunal would have concluded that those matters could amount to detriments. However as they did not take place as described by the claimant, the claimant did not suffer any detriments in relation to the matters alleged in 31a), b), f), g), and i) of the list of issues.

32. Were those detriments on the grounds of the [any]/each of the Claimant's protected disclosures? If so which?

193. The Tribunal did not find that the claimant was subjected to any of the detriments listed in 31 c), d), e) and h) of the list of issues on the grounds that he made protected disclosures to the respondent.

194. In fact, there was no evidence that there was any connection whatsoever between any of the pleaded detriments and any alleged protected disclosures that the claimant said were made by him. Thus, even if the Tribunal were wrong to find that the detriments listed at 31a), b), f), g), and i) of the list of issues did not occur, we would have concluded that there was no causal link between the protected disclosures purportedly made by the claimant and those alleged detriments. There was no evidence of any acts and/or omissions by the respondent which would suggest that the claimant was treated differently after he made any alleged protected disclosures. The Tribunal did not accept that the respondent would seek to disadvantage the claimant by subjecting the claimant to the detriments pleaded by the claimant because of those purported qualifying disclosures and there was no evidence to support these allegations.

195. The claim involving allegations of detriments on the ground that the claimant made protected disclosures must therefore fail and be dismissed.

Unlawful Deduction of Wages

33.Were the Claimant's wages unlawfully deducted in that:

a.Was he paid less than his salary for October (£1982.04), November (£1982.04) and December 2019 (£703.30);

196. The claimant was due to be paid the sum of £2500.00 (£1982.04 net pay) during each full month that he worked.

197. The total amount of any wages paid to the claimant during October, November and December 2019 was less than the total amount of the wages properly payable by the respondent to the claimant.

Was that an unlawful deduction of wages?

198. The claimant's monthly gross pay of £2500.00 and the amount of pay he received between October and December 2019 were evidenced by the payslips provided to the claimant by the respondent in respect of October 2019, November 2019, and December 2019. The Tribunal concluded that the claimant, proved that there were outstanding amounts of wages payable to him during those months.

199. The claimant should have been paid throughout his period of paid suspension, during any dates when he was not off sick. He was not clearly informed that his suspension had ended and given a date when he would be required to return to work (until Mid-November 2019 when the claimant was on annual leave).

200. Apart from the dates during which the claimant was off sick from work between 1 October 2019 and 11 December 2019, the respondent was required to pay the claimant his normal salary of £2500 for each complete month or £115.38 per day for each part month worked [less any statutory deductions due including tax and national insurance in relation to which the respondent is required to account to HMRC and to confirm the amounts to the claimant in writing]. The amount due in December 2019 will need to be calculated to 11 December 2019 (the claimant claims 3 full months' earnings in his schedule of loss which is clearly an erroneous approach). The gross amount due in respect of each month taking account of any period during which SSP was payable will require to be determined at the remedy hearing.

201. The claimant did not pursue a claim for compensation under Section 24(2) of the ERA 1996 and accordingly no such award is made.

b.If so, how much was he paid for that period? The Claimant claims that he was paid £343.87 during this period;

202. The Tribunal determined that the claimant was paid £343.87 in respect of the month of October 2019 only, and he did not receive any payments in respect of his wages that were payable in November or December 2019. The Tribunal notes that the claimant's schedule of loss claims he has received £1031.61 in respect of those three months, which is inconsistent with the claimant's payslips, and we have therefore assumed is an error. If this is not correct, and there are other amounts which the claimant has received since his employment with the respondent terminated (other than £343.87 paid in October 2019), these will need to be taken into account at the remedy hearing.

c.Was he not paid his outstanding annual leave on termination; and/or

203. There was no evidence before the Tribunal that the claimant was paid any outstanding annual leave entitlement on the termination of his employment. The claimant's payslips for October, November and December 2019 did not record any payment being made in respect of the claimant's annual leave entitlement. The claimant should have been paid throughout his pre-booked holiday that he had taken in November 2019 and December 2019, and any remaining annual leave thereafter. The claimant states that he is owed 19 days annual leave at £92.50 per day. It is not clear how the daily rate were calculated, to what extent the 19 days claimed included the pre-booked holiday dates that the claimant took as annual leave in November 2019 and December 2019, and how many (if any) of these related to accrued holiday entitlement that had not been taken at the date of termination of the claimant's employment. These calculations will need to be made and the amount due determined at the remedy hearing.

d.Did Rider Support stop paying his pension contributions in May 2019, and the Respondent stopped paying them from October 2019-December 2019?

204. The Tribunal considered that the claimant's claim in respect of non-payment of his pension contributions should have been brought as a breach of contract claim rather than as an unlawful deduction of wages claim (see *Somerset Council v Chambers [2017] IRLR 1087* considered above). For this reason the claim for pension contributions fails and is therefore dismissed.

205. In any event, even if the claim were brought as a breach of contract claim, the Tribunal were not satisfied on the evidence that the claimant was owed any amount in respect of his pension contributions. The respondent had made payments in relation to the claimant's pension to the claimant since the termination of his employment. The burden of proof is on the claimant to show any outstanding sum. The claimant failed to prove that he was owed any amount in respect of his pension. Moreover Ms Hussain stated in paragraph 4 of her supplementary statement that this issue had been resolved.

Failure to provide written particulars
Issues 34-36

206. The claimant's claim for failure to provide written particulars of employment to the claimant was dismissed by the Tribunal on withdrawal of this claim by the claimant's representative during the hearing. This claim was dismissed pursuant to Rule 52 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013*.

Failure to provide itemised pay statements
Issues 37-39

207. The claimant's claim for failure to provide itemised pay statements to the claimant was dismissed by the Tribunal on withdrawal of this claim by the claimant's representative during the hearing. This claim was dismissed pursuant to Rule 52 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013*.

Jurisdiction

45.Was the Claimant's claim for failure to provide written particulars from Rider Support presented within the three-month time limit set out in Section 11(4) of the Employment Rights Act 1996?

208. The Tribunal were not required to determine this jurisdictional matter as the claimant's claim was withdrawn during the hearing by the claimant's representative.

46.Was the Claimant's claim for failure to provide an itemised pay statement from Rider and/or the Respondent, presented within the three-month time limit set out in Section 11(4) of the Employment Rights Act 1996?

209. The Tribunal were not required to determine this jurisdictional matter as the claimant's claim was withdrawn during the hearing by the claimant's representative.

Failure to inform and consult pursuant to TUPE

40.Was the Claimant informed and consulted by the transferor prior to the transfer of his employment to the Respondent within the meaning of Regulation 13 of the TUPE?

210. The respondent's representative submits that the claimant together with Mr Douglas was informed of the transfer by both Mrs Wheatley and Ms Hussain before it took place at the end of September 2019 and that this was confirmed in writing on 28 October 2019. The Tribunal did not accept that the claimant was informed of the transfer of his employment to the respondent at the end of September 2019 nor that the information provided on 28 October 2019 was confirmatory information. Although the respondent's representative states that the claimant was aware of the change of location and he started to work there, this does not address the lack of information and consultation by the respondent prior to the transfer of the claimant's employment to the respondent.

211. The claimant's representative refers in his submissions to the respondent being aware that the claimant's employment could not continue with Rider Support Services on around 20 September 2019, that the respondent was under a duty to provide the claimant with information about the proposed transfer and to hear his views, and that the respondent failed to do so.

212. We are satisfied that there was no evidence that the respondent informed or consulted the claimant prior to the transfer of his employment to the respondent of the matters listed in Regulation 13(2) or in Regulation 13(6) and (7).

213. There was no evidence before the Tribunal of any special circumstances existing that rendered it not reasonably practicable for the respondent to perform its duties pursuant to Regulation 13(2) or Regulations 13(6) to (7).

214. We are satisfied that the respondent employed less than 10 employees at the time it was required to give information pursuant to Regulation 13(2), there were no appropriate representatives within the meaning of Regulation 13(3) and the respondent did not invite the claimant or any other affected employee to elect employee representatives. Therefore pursuant to Regulation 13A the respondent may have complied with its duties under Regulation 13 by performing its duties with the claimant and any other affected employee as though they were appropriate representatives (which it failed to do so).

41.If not, was the transferor under an obligation to inform and/or consult prior to the transfer on 1 October 2019?

215. The Tribunal concluded that the respondent was under an obligation to inform and consult the claimant prior to the transfer of his employment on 1 October 2019. The respondent did not take any or any adequate steps to comply with Regulation 13(2)(d) which requires that where the employer is the transferor, he shall inform and consult in relation to any measures that will be taken or to confirm the fact that no measures will be taken. As stated above, the Tribunal accepted that the changes to the claimant's contract of employment were significant as they affected matters such as his location, days of work and holiday. He did not have a contract of employment with Rider Support Services and no attempt was made for the respondent or Rider Support Services to ascertain the terms of his employment or to consult him in relation to the terms of the proposed new written contract.

216. The Tribunal rejected the respondent's representative's submission that each of the employees were informed about what was taking place as confirmed in paragraphs 9 and 10 of Mr Douglas's witness statement. The Tribunal found that there was no credible evidence that supported the contention that the claimant was informed about any measures prior to the transfer of the claimant's employment taking place pursuant to Regulation 13(2)(d) of TUPE.

42.If so, was it 'reasonably practicable' for the transferor to inform and consult the Claimant within the meaning of Regulation 15(2)(a) of TUPE?

217. The respondent's representative relies on Regulation 15(2)(b) and (c). He submits that Mrs Wheatley of Rider Support Services and Ms Hussain did all that was 'reasonably practicable' given the short time between the receipt of the SRA letter on 20 September 2019 and the closure of the business on 27 September 2019 and that this falls 'fairly and squarely within these provisions'. The Tribunal was unable to accept this submission. Within the time available between those dates, the Tribunal were satisfied that the respondent could have informed the claimant about the transfer, taken steps to ascertain the claimant's terms of employment with Rider Support Services and confirmed any measures it intended to take and to advise the claimant about any changes to his terms of employment. In any event, the respondent has not shown that there were 'special circumstances' (Regulation 15(2)(a)) or that it took all steps as were reasonably practicable as it is required to do so under Regulation 15(2)(b).

218. As with collective redundancies, the "special circumstances" defence is only likely to succeed if an employer can satisfy the Tribunal that a sudden and unforeseen event prevented full consultation from taking place. The Tribunal was not satisfied that the short timescale and the situation of the respondent amounted to special circumstances.

43.If it was, is the transferor or the transferee liable for the failure to inform and consult within the meaning of Regulation 15(7) and/or (8) of TUPE?

219. Rider Support Services were not joined as a party to these proceedings. The respondent did not seek to aver in its Grounds of Resistance that any liability for a failure to information or consult should rest with Rider Support Services (which it now seeks to argue in its written submissions). The respondent's submissions do not provide any detailed particulars for the basis of this

contention it now seeks to make, other than referring to Regulation 15(8)(b). The Tribunal was not satisfied that it would be appropriate to make any finding against Rider Support Services pursuant to Regulation 15(8)(b) and in any event they were not a party to the proceedings.

220. Having considered the respondent's liability pursuant to Regulations 13 and 15(1) and 15(8), we find that the complaint against the respondent is well-founded, and we order the respondent to pay appropriate compensation to the claimant. We are satisfied that the respondent failed to comply with its obligations pursuant to Regulation 13 of TUPE, that it was required to inform the claimant of the measures it intended to take, and to consult the claimant in relation to those measures, and it failed to do so. The amount of compensation due to the claimant in respect of the respondent's failure to inform and consult him shall be determined at the remedy hearing.

Conclusion

221. The claimant's claims that the respondent has unfairly dismissed the claimant, unlawful deduction of wages (wages October – December 2019 and holiday pay), and failure to inform and consult the claimant pursuant to the respondent's TUPE obligations succeed for the reasons set out above and the issue of remedy relating to those claims shall be determined at a 1-day CVP hearing. The claimant's claims made pursuant to section 103A of the ERA 1996, for detriment on the ground of having made protected disclosures, unlawful deduction of wages (pension contributions), failure to provide statement of employment particulars, and failure to provide itemised pay statements are dismissed.

Remedy

222. It was agreed at the outset of the hearing that remedy will be decided at a separate hearing in the event that the claimant's claims were successful. The Tribunal therefore did not hear any argument on the question of remedy, and that matter will therefore be restored before the Tribunal. The Tribunal determines that it is necessary to list this case for a remedy hearing by CVP in relation to the claimant's successful claims with a time estimate of 1-day (to include reading time, evidence, submissions, and judgment if appropriate) before the same Employment Judge and two members on the first open date on or after 11 March 2022. The Tribunal directs that **by not later than 12 noon on 18 February 2022** the parties shall:

222.1 Notify the Tribunal of their dates of availability for a 1-day remedy hearing to be listed between March 2022 – September 2022.

222.2 Notify the Tribunal if the time estimate of 1-day is not likely to be adequate for the just disposal of matters relating to remedy and (if so advised) their time estimate(s).

222.3 Send to the Tribunal a draft timetable to be agreed if at all possible to ensure that the remedy hearing can be concluded within the time estimate.

223. The Tribunal further directs that **by not later than 4pm on 4 March 2022** the parties shall send to the Tribunal and to each party:

223.1 Any additional documents relating to remedy in an agreed bundle in electronic form (such documents including but not limited to any updated Schedule of Loss and mitigation documents and any Counter Schedule of Loss) not exceeding 200 pages unless permission from the Tribunal has been obtained.

223.2 Any witness statement relating to remedy in electronic form not exceeding 15 pages unless permission from the Tribunal has been obtained.

224. **By not later than 7 days before the remedy hearing** parties shall send to the Tribunal and to each party a copy of any:

224.1 Written Submissions upon which they will seek to rely at the remedy hearing (not exceeding 15 pages unless permission from the Tribunal has been obtained).

224.2 Bundle of Authorities containing copies of cases referred to in a party's written submissions or to be referred to in a party's oral submissions (to be agreed if at all possible and in any event not exceeding 10 authorities unless permission from the Tribunal has been obtained).

225. If any of these orders is not complied with, the Tribunal may: (a) waive or vary the requirement; (b) strike out the claim or the response; (c) bar or restrict participation in the proceedings; (d) vacate any hearing; and/or (e) award costs in accordance with the Employment Tribunal Rules.

226. Anyone affected by any of these orders may apply for it to be varied, suspended, or set aside.

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Employment Judge B Beyzade

Dated: 8 February 2022

Sent to the parties on:

10 February 2022

For the Tribunal Office