EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4105479/2020 (V)

Held by means of the Cloud Video Platform on 4, 5 and 6 April 2022

Employment Judge W A Meiklejohn

Tribunal Member Mr J McElwee

Tribunal Member Mr G McKay

Mr T Foley	**Claimant** **Represented by:** **Mr S Smith - Solicitor**
Mr P Sarkar t/a Innovate from Zero	**Respondent** **In Person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is as follows -

(a) the claimant's claim of detriment brought under section 47B of the Employment Rights Act 1996 ("ERA") does not succeed and is dismissed;

(b) the claimant's claim of breach of contract by reason of the respondent's failure to pay National Minimum Wage ("NMW") succeeds and the respondent is ordered to pay to the claimant the sum of **NINETEEN POUNDS AND EIGHTY PENCE (£19.80).**

(c) the claimant's claim of unlawful deduction of wages by reason of the respondent's failure to pay holiday pay succeeds and the respondent is ordered to pay to the claimant the sum of **NINETY FOUR POUNDS AND FIFTEEN PENCE (£94.15).**

(d) the claimant's claim of failure to provide an initial statement of employment particulars succeeds and, as the claimant's claims have succeeded in part and awards have been made, the respondent is ordered in terms of section 38 of the Employment Act 2002 to pay to the claimant the sum of **FOUR HUNDRED AND SEVENTY POUNDS AND SEVENTY SIX PENCE (£470.76).**

(e) the claimant's claim of failure to provide itemised pay statements succeeds and the Employment Tribunal makes the following declarations -

(i) between August 2019 and February 2020 inclusive and in May 2020, the respondent failed to give the claimant itemised pay statements which complied with section 8(2) ERA,

(ii) in the case of the statements between August 201 9 and February 2020 inclusive, this was because the claimant was unable to access them at or before the time when the relevant payment of salary was made to him,

(iii) in the case of the statement for May 2020, this was because the claimant was unable to access it due to his no longer having access to the email account to which it was sent, and

(iv) by virtue of section 11(3) ERA, we did not have jurisdiction to determine any question as to the accuracy of the amounts stated in the particulars contained in the itemised pay statements which were provided to the claimant.

(f) In respect that the respondent has already paid to the claimant (per his solicitors) the sum of **TWO HUNDRED POUNDS (£200.00)** the respondent is entitled to deduct this sum when complying with the Tribunal's orders for payment set out above.

REASONS

1. This case came before us for a final hearing, conducted remotely by means of the Cloud Video Platform, to determine both liability and remedy. The claimant was represented by Mr Smith and the respondent participated in person.

Procedural history

2. The most recent preliminary hearing took place on 20 August 2021 (before Employment Judge Shepherd). The outcome was a case management order which included the following -

   (a) the claimant's claim of automatically unfair dismissal for making a protected disclosure (section 103A ERA) was dismissed upon withdrawal by the claimant;

   (b) the claimant's claim that he was subjected to detriment for taking action to enforce his right to NMW (section 23 National Minimum Wage Act 1998 and section 48 ERA) was dismissed upon withdrawal by the claimant;

   (c) the respondent's application to amend the response to add an employer's contract claim was refused;

   (d) the respondent's application under rule 50 (contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) that the final hearing be heard in private was refused;

   (e) within 7 days of receipt of the order, the parties were to agree, and notify the Tribunal of, any suggested changes to the agreed list of issues.

3. EJ Shepherd's Note recorded that, while the respondent accepted that the effective date of termination of the claimant's employment was 15 May 2020, he wished to reserve his position that some of the earlier detriments said to arise in the protected disclosure claim (those preceding 15 May 2020) did not form part of an act extending over a period in accordance with section 48 ERA. EJ Shepherd directed that the question of whether the detriments relied upon formed part of a series of similar acts or failures should be determined by the Tribunal at the final hearing.

Agreed list of issues

4. The agreed list of issues contained within EJ Shepherd's Note (in relation to which we understood no changes were suggested) was in these terms -

Detriment for making a protected disclosure (s47B, s43B ERA 1996)

1 Did the claimant make a disclosure of information? The disclosure is said to be information that the respondent was committing fraud in respect of declarations to the HMRC with regard to the claimant's working hours and pay set out in an email to the respondent on 5 May 2020.

2 Did the claimant have a reasonable belief that the disclosure was made in the public interest?

3 Did the claimant have a reasonable belief that the information tended to show that a criminal offence had been or was being committed?

4 If the disclosure was a protected disclosure, was the claimant subjected to a detriment for making it? The claimant alleges the following detriments:

a. Informing the claimant on 8 May 2020 that he did not qualify for overtime payments

b. Refusing to compensate the claimant for accrued holiday pay

c. Between 8 May 2020 and 19 June 2020, the respondent sending the claimant calls, texts and voice notes

d. On 8 May 2020, the respondent sending the claimant an email stating that he had been dismissed rather than resigned and that he had failed to meet the required productivity targets

e. On 19 June 2020 emailing the claimant asserting that the claimant may be held to be a "bad leaver" and would not receive money owed to him.

5 Did the alleged detriments set out above form part of a series of similar acts or failures?

Failure to pay National Minimum Wage (breach of contract claim, s.1 NMWA 1998)

6 Did the respondent act in breach of the claimant's contract of employment in failing to pay the claimant the national minimum wage between September and December 2019?

Holiday pay, s.13 ERA 1996

7 Has the claimant suffered an unauthorised deduction from wages in not being paid for outstanding holiday entitlement on the termination of his employment?

Written statement of particulars- s.2 ERA 1996

8 Did the respondent fail to provide the claimant with a written statement of particulars of employment?

Itemised pay statements - s.8 ERA 1996

9 Did the respondent fail to provide the claimant with itemised pay statements?

Preliminary matters

5. We required to deal with two preliminary matters, being (a) the existence of a settlement agreement and (b) the respondent's application to introduce Connect-In Ltd as an additional respondent.

Settlement agreement

6. On Friday 3 April 2022 the respondent emailed the Tribunal attaching (a) a copy of a settlement agreement (the "agreement") between the claimant and himself which was marked *"Without prejudice and subject to contract"* and which bore to have been signed by the respondent on 29 September 2020 but was not signed by the claimant and (b) correspondence relating to that agreement. Separately the respondent emailed the Tribunal attaching a receipt for £200 from the claimant's solicitors.

7. The respondent asked us to admit the agreement into evidence and invited us to determine whether this affected our jurisdiction to hear the case. Mr Smith objected. His principal ground of objection was that the agreement did not satisfy the conditions regulating settlement agreements in that there was no declaration in the agreement to that effect (under reference to section 203(3)(f) ERA). His alternative position was that the agreement made express provision for the claimant having the right to continue with his claim if any of the monthly payments provided for in the agreement was not made, which was what had happened.

8. The respondent accepted Mr Smith's contentions, and that the hearing should proceed. Notwithstanding that, it was for us to determine what effect, if any, the agreement had on our jurisdiction to hear the case. We noted that the agreement was not fully compliant with the conditions regulating settlement agreements as described by Mr Smith. We also doubted whether the agreement could truly be said to be an *"agreement to refrain from instituting or continuing any proceedings"* where it contained express provision to the contrary. In these circumstances, we decided that the hearing should proceed.

Additional respondent

9. The respondent said that the claimant had actually been employed by a company called Connect-In Ltd, and that the business was no longer a sole trader entity when the claimant started. He sought to add Connect-In Ltd as an additional respondent and offered to lead evidence about this.

10. Mr Smith objected to this. The matter had been raised previously. The claim was brought against the respondent as a sole trader and it was too late to bring in a second respondent. He referred to the earlier preliminary hearing before EJ Wiseman.

11. We adjourned to consider this matter. We noted that EJ Wiseman had said this in her Note following the preliminary hearing on 26 April 2021 -

"7 *Correct identity of the respondent*

This is a relatively new issue raised by Mr Sarkar, who suggested in recent correspondence that the respondent should be Connect-In Ltd. Mr Sarkar

explained he had previously been employed by this company and that the company had merged with his sole trading business.

I directed Mr Sarkar to put his explanation in writing and to confirm the company number for Connect-In Ltd. I also asked Mr Sarkar to confirm Connect-In Ltd would accept liability for the award made to the claimant if he was successful.

Mr Sarkar has a period of 28 days (that is, by or before the 25 May 2021) to provide this information."

12. The case file disclosed that on 21 May 2021 a document on Connect-In Ltd headed paper and signed by the respondent was sent to the Tribunal in response to EJ Wiseman's direction. This stated as follows -

"To *Whom It May Concern*

Connect-In Ltd (company no. SC402327) was incorporated on 24 Jun, 2011. The company provides wireless engineering (connectivity), mobile app design and software development services.

Mr Sarkar joined the company as a Full Time Employee in addition to being a Director on 12 Feb, 2013 having left RTX Wireless Engineering services.

Mr Sarkar additionally started freelance consultancy work and became self-employed on 19 Jan, 2019 trading as RS Consulting and taking up freelance clients (under tradename InnovateFromZero).

Due to the business synergies and to consolidate trading activities, Connect-In acquired Innovate From Zero (including tradename and client lists) and merged all consultancy work to go through InnovateFromZero - a division of Connect-In under Sec 933 division charter, along with a license to use Connect-In IP by client base of InnovateFromZero. As the client base grew the division started employing staff (unit led by Mr Sarkar), the unit being responsible for its own P&L accounts; while it receives administrative support from Connect-In including shared operational costs like hosting, mail servers, etc. The business unit turned profitable in Dec 2019, and Connect- In made an additional investment of £5000 for this division. The division generated around £50k in turnover by financial year

end (Jun), figures are reported along with Connect-In's trading revenues in our Annual Accounts.

I hope this clarifies everything."

13. We noted that this partially complied with EJ Wiseman's direction. There was no confirmation that Connect-In Ltd would accept liability for any award made to the claimant if he was successful. It would have been helpful if the respondent had stated when the acquisition by Connect-In Ltd was said to have taken place. We noted that this document conflicted with the terms of the respondent's ET3, which bore to have been prepared on his behalf by Just Employment Law, where it was stated that -

"The *respondent is Prithviraj Sarkar t/a Innovate From Zero as a sole trader."*

14. The respondent's explanation for this was that his advisers only had five days to prepare the response to the claim. However, we considered that it was reasonable to assume that the terms of that response reflected the information given to the advisers by the respondent. We noted from the case file that the same advisers had submitted a preliminary hearing agenda on behalf of the respondent on 10 December 2020 in which they had confirmed that the name of the respondent was correct. They had also written to the Tribunal on 16 December 2020 referring to the respondent as a sole trader.

15. The respondent was represented by a solicitor from the same advisers at the preliminary hearing on 17 December 2020 (before EJ Kearns) and the Note issued following that hearing disclosed no issue being raised as to the correct identity of the respondent. The same solicitor submitted an amended response on behalf of the respondent on 6 January 2021 in which there appeared the same statement as to the identity of the respondent. On 26 January 2021 the respondent's advisers wrote to the Tribunal to intimate that they had withdrawn from acting for him.

16. On 12 February 2021 the respondent wrote to the Tribunal; his letter included the following -

"…./ would like to refer your attention to my initial ET3 Tribunal response form in which I have responded to the claimant's case. At the time of my response due to time constraints, I note I may have potentially inaccurately replied to the Tribunal without being able to attend to who should be "the correct respondent" in this case. I have now been made aware of having the correct respondent name Sole Trader/Limited entity before a final hearing following the ACAS early reconciliation process. We would like to request additional time to seek legal advice on the legal liability of the claimants' case put forward and ensure we have the correct legal respondent name before a final hearing."

17. On 19 March 2021 a Dr S Roy, describing himself as *"one of the Directors and officeholders"* of Connect-In Ltd wrote to the Tribunal. His letter requested that (a) the claimant should desist from further communication and (b) the application for postponement should be reviewed. It made no reference to the correct identity of the respondent. In response to a query from the claimant's solicitor as to the authority by which Dr Roy was writing to the Tribunal, an email dated 22 March 2021 from *team @innovatefromzero.com* stated that -

"In their original ET1 the claimant may have mistakenly asserted Innovate From Zero is a sole trader, but this business including the trade name was acquired by our Company a Ltd. (limited entity). "

18. In a letter attached to an email to the Tribunal sent on 6 August 2021, the respondent said the following -

"The respondent would also like to note that during numerous correspondence dating back to 2020, there has been repeated formal requests that the claim brought forward by the claimant should be against the business rather than against an individual person/person(s). Therefore the respondent would again like to request that this information is updated on the claim to protect their own personal information and finances."

19. Despite this, the respondent did not raise the point at the preliminary hearing before EJ Shepherd on 20 August 2021 (or at least there is no reference to it in her Note which appears carefully to record what was discussed).

20. The respondent then made an application to the Tribunal on 26 August 2021 to postpone the final hearing listed for 7-9 September 2021. That application did not include the addition of Connect-In Ltd as an additional respondent. The application was refused, but the scheduled final hearing was then postponed on the application of the claimant's solicitor on the grounds that the parties were hoping to settle.

21. On 21 October 2021 the respondent emailed the Tribunal in terms which included –

"/ am writing on behalf of our company as the respondent to this case."

Notwithstanding this, we did not believe the respondent could have been in any doubt that the claim was brought against himself as a sole trader as every item of correspondence he received from the Tribunal was headed *"Mr T Foley* v *Prithviraj Sarkar t/a Innovate from Zero".*

22. We were satisfied that (a) the respondent was well aware of the issue as to whether he or Connect-In Ltd was the correct respondent from no later than 12 February 2021 (see paragraph 16 above) and (b) he had ample time to make an application to the Tribunal to have Connect-In Ltd added as an additional respondent prior to the final hearing. While the respondent had provided a response to EJ Wiseman's direction, the case file disclosed that there had been no application to bring in Connect-In Ltd as a respondent until the application made at the hearing before us.

23. We reminded ourselves of the terms of Rule 2 **(Overriding objective)** of the Employment Tribunal Rules of Procedure 2013, which provides as follows -

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable -

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues;

(e) saving expense

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

24. We refused the respondent's application to amend for the following reasons -

(i) It was not consistent with the position clearly stated in the ET3 which had been prepared by a professional adviser acting on the respondent's instructions.

(ii) The respondent had in effect been offered an opportunity to make an application to amend by EJ Wiseman and had not taken this up.

(iii) The application made at the hearing before us came too late and granting it would not be consistent with the overriding objective. We had in mind that it would not, in all the circumstances, be fair or just to allow an additional respondent to be brought in at the start of the final hearing, and would potentially cause delay and/or expense.

Evidence

25. We heard oral evidence from the claimant and the respondent. We had a joint bundle of documents initially extending to 237 pages. This was supplemented by an additional 10 pages added during the hearing. We refer to the bundle of documents below by page number.

Findings in fact

26. The claimant and the respondent were socially acquainted. The claimant had part-time employment (working 18 hours per week, mornings only) with Glasgow Life. From around April 2019 they had discussions about the claimant taking up

employment with the respondent. The claimant's understanding was that the respondent had been involved with Connect- In Ltd but had now started his own consultancy helping start-up businesses develop their products. The respondent's evidence was that he had set up Connect-In Ltd in 201 1, and had started his own sole trader business under the name Innovate from Zero in January 2019.

27. The respondent's business was at that time based at the RBS Accelerator hub in St Vincent Street, Glasgow. We understood that this was a "*hot desk*" facility made available to eligible businesses for a limited period. Users had to clock in/out of the premises.

Salary and hours of work

28. Some two weeks before the claimant started work, he met with the respondent to discuss the details of his proposed employment. The claimant's position was that they agreed he would be a part-time Research Assistant on a monthly salary of £500, working to support the respondent. It would be a PAYE (ie employed) role.

29. The respondent said that he had estimated the claimant's salary at £500 per month. He said that the original goal was full-time employment equating to 120 hours per month for which the salary would be £1050 per month. He had spoken to his accountant who advised that this would translate to £1020 per month net. As the claimant was to be working 60 hours per month, his salary would be roughly half of that figure.

30. There was a conflict in the evidence as to what was agreed about hours of work. The claimant said that hours were not discussed until he started work for the respondent. According to the claimant, the respondent had said that this (ie the salary of £500 per month) would equate to 21 hours per week. The claimant said that he accepted that. He did not think it through and did not work out that this would be less than NMW.

31. The claimant said that when he started, he was doing 21 hours per week. It was flexible in that he could come into the office or work from home. The actual hours

varied - sometimes he would work late, until 8/9pm. His focus was not on his working hours but more on getting paid at the end of the month.

32. The claimant did not keep a record of the hours he worked. However, after his employment ended in May 2020, he had prepared a spreadsheet (181) in which he detailed his hours of work during each month of his employment as follows -

Tax year 2019-2020

August	*42*
September	*84*
October	*84*
November	*84*
December	*78*
January	*60*
February	*60*
March	*60*

Tax year 2020-2021

April	*60*
May	*30*
June	*0*

33. The respondent said that he had allowed flexibility. He did not track the claimant's time at work. He did not accept that the claimant had worked 21 hours per week (except during December 2019 when he, the respondent, was away) and denied saying that this was what £500 per month equated to. He believed that the claimant had worked less than 60 hours per month at the office but *"would not say it was less than 60 overall".* In some weeks the claimant might have worked overtime *"on his own initiative"* but he was not asked to do so. The

respondent said that he did not count as work the time he and the claimant spent talking and having dinner together.

34. Our view of this was that the claimant had worked flexibly, sometimes from home but more often in the office. We believed that he had worked for more than 60 hours per month between September and December 2019 but we were not satisfied that he had worked exactly 84 hours per month, as per his spreadsheet. We noted that in his ET1 it was stated on the claimant's behalf -

"From the beginning of his employment, the claimant was contracted to work 15 hours per week, but would often work much longer hours, at the request of the respondent. The claimant would undertake tasks for the respondent as and when he made requests of him."

35. We preferred the evidence of the respondent as to what the claimant's salary was meant to cover in terms of hours of work. The explanation based on advice from the respondent's accountant was plausible and supported the respondent's position that the salary was intended to cover 60 hours per month, or 15 hours per week. We did not accept, as alleged by the claimant, that the respondent had told him that his salary equated to 21 hours per week. That was at odds with what was stated in the claimant's ET1 , in terms of contracted hours.

36. There was a conversation between the claimant and the respondent about the claimant's hours of work in January 2020. The claimant described this as starting To *put my foot down"* because he felt he was working hard for very little money. We believed that the fact that the respondent was in India for around three weeks in December 2019/January 2020 may have contributed. The outcome was agreement that the claimant would work from 2pm to 5pm and, according to the claimant, *"things stabilised a bit".*

Payments received by claimant

37. The claimant had prepared a summary of the payments he received during his employment (182). These were as follows -

Date	***Amount***	***Description***
04/9/2019	*£510.28*	*Transfer, half was an advance. …*
01/10/2019	*£250.00*	*Transfer, repaid half the advance, so 1 earned £250*
02/10/2019	*£100.00*	*Transfer, asked for more money back to survive*
01/11/2019	*£260.28*	*Transfer*
04/11/2019	*£100.00*	*Transfer*
02/12/2019	*£360.00*	*Transfer*
05/12/2019	*£150.00*	*Transfer, put through as an advance but. .. Christmas bonus*
02/01/2020	*£510.00*	*Transfer*
31/01/2020	*£510.00*	*Transfer*
23/02/2020	*£510.00*	*Transfer*
01/04/2020	*£515.00*	*Transfer*
30/04/2020	*£510.00*	*Transfer*
*11/05/2020**	*£26.28*	*Transfer, unclear what this is for*

*This was erroneously recorded by the claimant as 11/04/2020 in his summary.

38. The accuracy of these dates and amounts of the payments was confirmed in a statement relating to the Innovate from Zero bank account with Royal Bank of Scotland (240).

39. We were satisfied that three of these payments were, or included, advances (to account of salary) by the respondent to the claimant. These amounted to £250 on 04/09/2019, £100 on 02/10/2019 and £100 on 04/11/2019. In relation to the payment of £150 on 05/12/2019, we believed that this was probably intended originally to be an advance but, as it was not deducted from the salary payment on 02/01/2020, it became a bonus.

40. The claimant's evidence about this, which we accepted, was that the respondent told him on a call from India that it was a bonus. As the respondent was away between the latter part of December 2019 and the early part of January 2020, it seemed unlikely that the payment would have been described as a bonus at the time of payment on 05/12/2019. Also, the respondent accepted that there had been a bonus, although he said it was £50 and not £150.

41. In relation to the payment of £26.28 on 11/05/2020, we understood that this represented payment of salary of £176.28 for the period 01/05/2020 to 10/05/2020 under deduction of the £150 paid on 05/12/2019. The reason for the 10/05/2020 date was that the claimant was, at the time, treated by the respondent for payroll purposes as having been dismissed on that date. The respondent accepted that this meant the claimant had not received pay (or rather, as referred to below, holiday pay) for the period between 11/05/2020 and 15/05/2020.

Holidays

42. It was common ground that the claimant's holiday entitlement was based on the Working Time Regulations 1998 ("WTR"). This meant that -

    (a) His holiday year ran from his start date of 19 August 2019 (per regulations 13(3) and 13A(4) WTR).

    (b) His holiday entitlement was 5.6 weeks per year, and required to be calculated on a pro rata basis for his period of employment between 19 August 2019 and 15 May 2020 (per regulations 13(1), 13A(1) and (2), and 15A WTR.

    (c) He was entitled to compensation for holidays accrued but untaken on termination of employment (per regulation 14 WTR).

43. The claimant took holidays as follows -

    (a) On 6 January 2020 (his birthday).

    (b) One day at Easter 2020.

(c) Five days between 24 and 30 April 2020.

(d) As the claimant did not return to work thereafter, ten days between 1 and 15 May 2020.

Written statement of employment particulars

44. The respondent accepted that the claimant had not been given a written statement of employment particulars as required in terms of section 1(1) ERA.

45. The respondent made reference in correspondence with the claimant to the Innovate from Zero staff handbook (73-111). We were satisfied that the claimant had not been issued with a copy of this and was only directed to it shortly before his employment ended.

46. On 4 May 2020 the respondent emailed the claimant (120) attaching a copy of his own contract of employment with Connect-In Ltd (122-141). We understood the context for this was that the claimant's role had become known as Chief Operating Officer and there had been discussion about his becoming a director. The claimant was however suspicious at the respondent's reference in his email to updating "*Connect-In to InnoZ". We were* satisfied that this did not constitute the provision by the respondent to the claimant of a written statement of employment particulars, and was not so intended by the respondent.

Itemised payslips

47. The claimant's payslips were sent to him by email each month from the respondent's payroll provider. They were password protected. The claimant was unable to open these until he was given the password by the respondent on 4 March 2020(113).

48. The claimant did not check his earlier payslips when he received the password. We believed that this was because his focus was on receiving payment of his salary each month rather than the paperwork relating to it. He looked at his payslips only after receiving his P60 for 2019/2020 (119).

49. When the claimant reviewed his payslips (241-247) he found that they did not reflect the amounts actually paid to him. They referred to a salary of £1050 gross

per month and showed deductions for PAYE income tax and employee's National Insurance contributions which appeared to be based on that salary.

50. The claimant did not receive a payslip for the month of May 2020. We accepted the respondent's evidence that this had been emailed by the payroll provider to the claimant's business email address, ie the email address he had used while employed by the respondent. We noted that this email account had been closed around the end of May 2020 and we considered it probable that this had prevented the claimant from accessing the May payslip.

Claimant receives P60

51. There was a conversation between the respondent and the claimant on 30 April 2020. The respondent asked the claimant to take a reduced salary or pay deferral. The claimant said that this *"freaked me out".* The respondent had then paid the claimant his usual salary for April 2020.

52. Later on 30 April 2020 the claimant received an email from the respondent (117) attaching his P60 for 2019/2020 (119). The email also intimated a change in payroll provider.

53. The claimant looked at his P60 and noted the amount of gross pay it disclosed (£8640.00). Over the weekend of 2/3 May 2020 the claimant accessed his payslips (241-247). He realised that there was *"something not right".* The claimant saw that his payslips disclosed full-time earnings and recognised that this was what must have been reported to HM Revenue and Customs ("HMRC").

54. The claimant emailed the respondent on 5 May 2020 (144-145) in these terms -

"Following our conversation on the phone payday Thursday 30/04/20 - you raised concerns about paying my part-time salary which has been at £510 per month. You have also refused to furlough me. You sent me through a P60 that appears to have clerical errors. I have worked on PAYE with Innovate From Zero since August 2019, almost 9 months at £510 month (part-time), but I was asked to work 21 hours a week until December before I started to raise concerns on the premiss that the company would repay me when the startup made more money.

As we had a friendship before I joined you as staff at the RBS accelerator hub I took youfr] word on things.

The financials on my P60 read as follows £8640 but my earnings have been £510 per month? I am presuming that this has been an error on the part of your accountant. As an active public servant and former HMRC officer, I am instructed to remind you as part of my oath of allegiance that any errors must be fixed in order that the legal amount of tax is declared and is reflected accurately on my history. I find this very concerning and so I wish to raise this with you. I have gone back and checked my payslips which I kept requesting each month but did not receive access till Feb, I took the access as a sign of honesty. And I did not look at these properly until I got P60. What has been mentioned on my P60 does not reflect what was paid to me or agreed hours.

You, therefore, must correct the paperwork by Friday the 8th of May by 5.30pm. This is an absolute deadline. You must also compensate me for the money owed between Aug-Dec for hours and tasks worked and for weekends worked. I must note the change of hours to 15 when I refused to work any more hours in January on promises of repayment. You then offered a directorship but with no formal contract and promise of a repayment scheme to which I was naive until I researched recently because I trusted you. The current rate of the living wage is £8. 72 per hour and so the total owed is £872. 12 discounting the weekends that I was asked to work. I was forced to work during holidays and time off- however I will call this a loss. The settlement I have requested is very generous. Once all have been met on Friday the 8th of May at 5.30pm. I will review and consider the new contract you sent through on Friday 01/05/20. In the meantime, I will take continued annual leave from last week until Monday 01/05/20 where we can discuss everything provided by you on Friday. On this date, we can discuss how to proceed.

I [have] not been given a proper contract since august of which I repeatedly asked for along with my payslips which took months to be given access and now I have only looked at properly. I have found the maths do not add up."

Further correspondence

55. This led to an exchange of messages between the parties. On 6 May 2020 the respondent emailed the claimant (146-147) making a number of points -

    (a) The respondent was not obliged to issue the claimant with a contract when he started in August 2019.

    (b) The respondent referred to *"Productivity"* issues.

    (c) Overtime should not be used without written agreement and asserting that the claimant had been paid at or above NMW.

    (d) The confusing statement - "I/l/e *are reporting salaries to HMRC not hours, expenses included. Payslips would be corrected with the following FPS/RTI run when reported."*

    (e) Reference, under *"Directorship",* to a *"formal partnership agreement".*

    (f) The respondent said he was open to a discussion about furlough.

56. On 8 May 2020 the respondent emailed the claimant at 17.00 (148-149) referring him to the grievance section of the *"HR Handbook"* and quoting a section headed *"Pay, Benefits and Pensions"* and sub-headed *"Salary arrangements". We* understood the point the respondent was making was that pay queries or mistakes should be raised with the employee's line manager immediately and in any event within 30 days. The respondent also referred to overtime requiring *"prior explicit approval of your manager" and* being payable in respect of posts which have been *"specifically designated as qualifying for overtime payment".*

57. On 8 May 2020 the claimant sent an email to the respondent at 18.15 (151) attaching a letter of resignation (152) which was in these terms -

    "*I am writing to inform you of my decision to resign from your company. This is on the grounds of constructive dismissal. I hereby resign all duties with one weeks statuary notice from the date of this letter to be taken as annual leave entitlement, with pay, as laid out by Acas and UK Government.*

My employment start date was on the Monday the 19th of August 2019 and will cease on Friday 15 August 2020. My annual leave 04/05/2020 will now be extended to 15/05/2020.

My Duties were never finalised, as I had to continually pursue a written letter of particulars and formal contract with you. I also had to pursue you for wage slips and for accurate pay along with better working conditions from you. However, as a statement, I shall resign all duties acting as your operations manager and research analyst during this time.

I have also found that Innovate from Zero is in conflict with my personal morals and ethics and can no longer proceed to work for such a company."

58. The respondent replied to the claimant on 8 May 2020 at 19.05 (150-151) as follows -

"*Thank you for this. On behalf of Innovate From Zero we will put you in Notice in your position as Operations head.*

Your employment termination date is 15 May 2020. We are not suspending your account immediately and you still have access to the company property (if needed). We thank you for the service to date.

Post-termination you will no longer have access to company Drive, Files & Folders. Any confidential information provided to you should be handed over and deleted/destroyed.

This procedure should be initiated by your handoff date: 15 May 2020.

For your user account, any data will remain available till the above date.

Should you need to access your @InnovateFromZero mail, file or folder for a specific purpose it can be arranged till 15 May.

There is no entitlement to ask for specific periods of paid leave as PT staff not having completed 1 year of employment. Kindly refer to the company handbook.

The responses you are stating, some of it did not make sense, but in respect to the months of service we will not pursue this further unless you necessitate due to your future actions to invoke any disciplinary grounds.

We *do wish you all the best."*

59. Shortly after this, still on 8 May 2020, the respondent sent another email to the claimant at 19.11 (153-154) as follows -

"It is actually with regret but we must let you go.

Due to ongoing performance issues and loss of productivity in the difficult Covid-19 times, we need to terminate your employment contract with us by 15 May-20.

It would be appreciated if you can finish designated tasks before this date. If you cannot please inform and follow the official protocol.

Earlier we raised concerns on our overall performance incl. specific tasks assigned to yourself in Feb-Apr-2020.

EXTRACTED BELOW

These are examples of tasks started but not completed within designated hours. "

We understood that the email then listed these tasks but unfortunately the copy provided to us was not legible.

60. There was a further exchange of emails between the claimant and the respondent on 3-5 June 2020 (155-156) relating to the claimant's spreadsheet and holiday pay.

WhatsApp messages

61. We were provided with exchanges of messages passing between the claimant and the respondent from 4 May to 14 June 2020 (159-173). We took from these messages that -

(a) The parties agreed that the week following the week of leave taken by the claimant at the end of April 2020 was to be treated as a continued break.

(b) In a message sent on 8 May 2020 at 13.21 (163) the respondent appeared to offer that the claimant should extend his period of leave.

(c) The claimant was receiving voice notes from the respondent but was not listening to these.

(d) From around 4 June 2020 the respondent was continuing to message the claimant but the claimant was not responding.

HMRC letter

62. The claimant received a letter from HMRC dated 13 October 2020 (174-176) relating to the tax year 2019-2020 and seeking payment of tax of £1412.91 . This referred to his income from Culture and Sport Glasgow and from the respondent. The details in respect of income from the respondent were the same as those contained in the P60 given to the claimant. The total amount stated to have been paid in that tax year by the respondent to the claimant was £9720.00 (made up of two separate amounts - £8640.00 and £1080.00).

63. We were satisfied that these amounts stated to have been paid by the respondent to the claimant in 2019-2020 were patently wrong. The total amount paid by the respondent to the claimant in that tax year was £3775.56 (as detailed at paragraph 36 above).

Effect on claimant

64. The claimant's evidence was that the events described above had been *"one of the more traumatic points in my life".* He had suffered from depression and anxiety and had sought medical assistance. This had impacted on his getting other work and on his relationship at the time. He was however *"now doing quite weir.*

Comments on evidence

65. It is not the function of the Tribunal to record every piece of evidence presented to it and we have not attempted to do so. We have sought to focus on those parts of the evidence which had the closest bearing on the issues we had to decide.

66. The claimant gave his evidence in a straightforward manner. He related his version of events consistently. While we preferred the evidence of the respondent in at least one area (see paragraph 34 above), the claimant was generally a credible witness. He came across as perhaps a little naive in matters of business.

67. The respondent was a less satisfactory witness. It appeared to us that he probably had more experience of the world of business than did the claimant. That made some of the statements he made in his correspondence with the claimant difficult to understand. It seemed implausible that he genuinely believed that the claimant had no entitlement to a statement of employment particulars nor to accrue holiday entitlement.

Submissions for claimant

68. Mr Smith submitted that the claimant had made a disclosure of information for the purpose of section 43B(1) ERA. There were clear errors in his P60. It had been reasonable for the claimant to believe that this indicated fraudulent disclosure to HMRC by the respondent, and that this involved the commission of a criminal offence or, in the alternative, failure to comply with a legal obligation. In either case it was reasonable for the claimant to believe that this engaged the public interest.

69. Mr Smith argued that the evidence showed that the claimant had suffered the alleged detriments. There had been a series of similar acts by the respondent involving threats and cajoling.

70. Mr Smith submitted that we should accept the claimant's evidence as to the hours he had worked (per 181). The claimant had said that he believed this was broadly accurate. The respondent disputed this but had no records to demonstrate otherwise.

71. In relation to credibility, Mr Smith urged us to prefer the evidence of the claimant to that of the respondent. He characterised the respondent's evidence as attempts to harm the claimant's credibility. For example, the respondent had referred to cash advances but provided no concrete evidence of the amounts

and when they were said to have been paid. There was also reference to alleged poor performance.

72. Mr Smith reminded us of the points the respondent had conceded. He had accepted that no statement of employment particulars had been provided (and in this regard Mr Smith sought an award of four weeks' pay in terms of section 38 of the Employment Act 2002). He had also accepted that the claimant's employment ended on 15 May 2020 but he had not been paid beyond 10 May 2020.

73. Mr Smith referred to the fact that the claimant had been unable to access his payslips until March 2020. He had not received a payslip for May 2020. No explanation for the payment of £26.28 in May 2020 had been provided until during the hearing. Clearly deductions had been made but no details had been given.

74. Referring to the HMRC letter received by the claimant, Mr Smith invited us to make an award to the claimant of £1412.91. He argued that this represented a detriment suffered by the claimant for which he should be compensated. Under reference to ***Wilsons Solicitors LLP v Roberts [2018] EWCA Civ* 52** Mr Smith submitted that the tax liability was a loss attributable to the act which infringed the claimant's right (not to suffer detriment) in terms of section 49(2)(b) ERA.

75. In terms of quantification of the award sought by the claimant for injury to feelings, Mr Smith said that the claimant was seeking the sum of £10,000.

Submissions by respondent

76. The respondent referred to there being two entries on the claimant's P60 (in respect of income from the respondent) and said that he had applied the claimant's temporary tax code. The fact that there were two entries could be attributable to the move from one payroll provider to another.

77. The respondent referred to ***Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd and another [2011] 1 WLR 2575*** in support of the proposition that his email exchange with the claimant's solicitor could be enforceable in the absence of a signed settlement agreement. On this basis, he

questioned the Tribunal's right to hear the case brought by the claimant. He argued that there had been unprofessional conduct by the claimant and that the Tribunal should consider the financial loss suffered by the respondent.

78. Returning to the issue of the correct identity of the respondent, Mr Sarkar said it remained his submission that it should be Connect-In Ltd. There had been a transfer of his sole trader business to that company.

79. In relation to the alleged NMW violation, the respondent submitted that there had been unauthorised use of overtime by the claimant. We should not backdate any award to reflect this.

80. Turning to payslips, the respondent said that these had been provided. The password supplied to the claimant applied to all of his payslips. It had been the claimant's error. The tax liability would have been avoided if the claimant had reported the error (ie the wrong amount of gross pay disclosed in the payslips). The May 2020 payslip had been sent to the claimant at the end of that month. It might be that the claimant had not accessed his company email account.

81. With regard to holiday pay, the respondent indicated that he accepted partial liability. Any calculation should proceed on the basis that the claimant took 3.4 weeks of holiday during his period of employment.

82. The respondent accepted that the claimant had not been provided with a written statement of employment particulars.

83. In respect of the tax liability of £1412.91, the respondent argued that the claimant had not suffered any loss because the amount sought by HMRC had not actually been paid by him.

84. The respondent disputed that the claimant's email of 5 May 2020 was a qualifying protected disclosure. It was done not in the public interest but for the claimant own private benefit. He referred to ***Okwu v Rise Community Action UKEAT/00S2/19.***

Applicable law

85. We set out below the various statutory provisions engaged in this case (with the exception of section 38 of the Employment Act 2002 to which we refer below).

86. Sections 43A, 43B and 43C ERA provide, so far as relevant, as follows -

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

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

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

43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure -

(a) to his employer.…

87. Section 47B ERA provides, so far as relevant, as follows -

Protected disclosures

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

88. Section 1 of the National Minimum Wage Act 1998 ("NMW Act") provides, so far as relevant, as follows -

Workers to be paid at least the minimum wage

(1) A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage….

89. The National Minimum Wage Regulations 2015 ("NMW Regs") provide, so far as relevant, as follows -

21 The meaning of salaried hours work

(1) "Salaried hours work" is work which is done under a worker's contract and which meets the conditions in paragraphs (2) to (5) of this regulation.

(2) The first condition is that the worker is entitled under their contract to be paid -

(a) an annual salary.…

(3) The second condition is that the worker is entitled to be paid that salary ....in respect of a number of hours in a year, whether those hours are specified in or ascertained in accordance with their contract ("the basic hours").

(4) The third condition is that the worker is not entitled under their contract to a payment in respect of the basic hours other than -

(a) an annual salary.…

(5) The fourth condition is that the worker is entitled under their contract to be paid, where practicable and regardless of the number of hours worked in a particular week, month or other period, in instalments which -

(a) are equal and occur not more often than weekly and not less often than monthly....

90. The Working Time Regulations 1998 ("WTR") provide at regulations 13 to 17 for a worker's entitlement to annual leave and how that is calculated. The effect of WTR, so far as relevant, can be summarised in these terms -

(a) In the absence of a relevant agreement, the worker's leave year is the year starting on the date upon which his employment began - Reg 13(3)(b).

(b) The amount of annual leave to which a worker is entitled is 5.6 weeks per year - Regs 13(1) and 13A(2)(e).

(c) If the worker's employment terminates part way through a leave year, his entitlement on termination is calculated by reference to the proportion of the leave year which has expired and the proportion of his annual leave entitlement which he has taken. If the former exceeds the latter, the worker is entitled a payment in lieu - Reg 14.

91. Section 13 ERA provides, so far as relevant, as follows -

Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless -

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of a worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised -

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect,

or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion....

92. Section 8 ERA **(Itemised pay statement)** provides, so far as relevant, as follows –

(1) A worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.

(2) The statement shall contain particulars of -

(a) the gross amount of the wages or salary,

(b) the amounts of any....deductions from that gross amount and the purposes for which they are made,

(c) the net amount of wages or salary payable.…

93. Section 11 ERA **(References to employment tribunals)** gives an Employment Tribunal jurisdiction to deal with complaints relating to itemised pay statements, and includes -

(3) For the purposes of this section -

(a) ….

(b) a question as to the particulars which ought to have been included in a pay statement.... does not include a question solely as to the accuracy of an amount stated in any such particulars. ..

Discussion

94. We approached our deliberations by working through the list of issues (see paragraph 4 above).

Detriment for making a protected disclosure

95. We considered first whether the claimant made a disclosure of information. The disclosure was said to be made in terms of his email to the respondent of 5 May 2020 (144-145). What the claimant was telling the respondent was that the information in his P60, understood by the claimant to reflect the salary information provided by the respondent to HMRC, was wrong. We were satisfied that this was a disclosure of information.

96. We considered next whether, in the reasonable belief of the claimant, this information tended to show either of the matters in section 43B(1)(a) - relating to a criminal offence - or section 43B(1)(b) - relating to failure to comply with a legal obligation. We were not persuaded that the claimant had in mind that a criminal offence had been committed or was being committed. His email to the respondent makes no reference to fraud or any other type of crime.

97. We were however satisfied that the claimant believed that the respondent had failed or was failing to comply with a legal obligation to which he was subject. This was the duty to report his income accurately to HMRC. Given the inaccuracies in his P60 and his payslips, we found that the claimant's belief was reasonable.

98. We then considered whether, in the reasonable belief of the claimant, his disclosure of information was made in the public interest. We reminded ourselves of what Underhill LJ said in ***Chesterton Global Ltd and another v Nurmohamed (Public Concern at Work intervening) [2017] EWCA Civ 979 -***

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

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

Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosures being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors. ...may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph. "

99. The "*fourfold classification of relevant* factors" comprised the following -

(a) The numbers in the group whose interests the disclosure served.

(b) The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed - a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect.

(c) The nature of the wrongdoing disclosed - disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people.

(d) The identity of the alleged wrongdoer - *"the larger or more prominent the wrongdoer.... the more obviously should a disclosure about its activities engage the public interest".*

100. Applying that to the present case, what we had was a single employee making a disclosure of alleged wrongdoing relating to his own income and tax position. We believed that this was an example of the kind of private workplace dispute which should not attract the enhanced statutory protection accorded to whistleblowers. We could accept that it was in the interests of the public at large that information provided to HMRC should be accurate and that everyone liable to do so should pay the correct amount of tax. That did not, however, mean that every disclosure of information by a worker to his employer about some perceived irregularity in relation to HMRC qualified as a protected disclosure.

101. Accordingly, we found that the claimant's belief that his disclosure of information was in the public interest was not reasonably held. That meant that it did not satisfy the definition of *"qualifying disclosure"* in section 43B(1) ERA and did not make the claimant eligible for protection from detriment under section 47B ERA.

102. As a consequence of that finding, we did not require to consider the individual detriments alleged by the claimant. This element of the claim did not succeed.

Failure to pay national minimum wage

103. This was pled as a breach of contract. At the risk of stating the obvious, there was a contract of employment in place between the respondent and the claimant. It was based on the verbal agreement that the claimant would work for the respondent. What we had to decide was what were the relevant terms of that contract relating to pay and hours of work.

104. We considered what type of work the claimant was engaged by the respondent to do, having regard to the NMW Regs. We were satisfied that it was salaried hours work. The four conditions set out in regulation 21 all applied. The claimant

was (i) entitled to an annual salary, (ii) paid that salary monthly, (iii) and no more than that, (iv) in respect of basic hours.

105. At the heart of the dispute between the parties was the issue of what were those basic hours. The claimant asserted that between September and December 2019, his basic hours were 21 per week or 84 per month (per 181). The respondent said the correct numbers were 15 hours per week and 60 hours per month.

106. This was addressed in our findings in fact at paragraphs 28-34 above. We preferred the respondent's evidence for the reasons explained there. We found that the claimant's basic hours for which he was paid the agreed salary were 15 per week. The amount paid was in excess of the rate of NMW applicable through to March 2020 (£8.21 per hour, equating to £492.60 for 60 hours). We believed that the claimant had worked more than 60 hours per month but we were not satisfied (a) that the claimant had worked the hours set out in his spreadsheet nor (b) exactly what additional hours he had worked. The onus here, to make out his allegation of underpayment, rested on the claimant and was not in our view discharged.

107. However, from April 2020, while NMW increased to £8.72 per hour, the claimant continued to be paid at the rate of £510 per month. The minimum to which he was entitled for 60 hours* work was £523.20 per month. This applied from 1 April 2020 until the claimant's employment ended on 15 May 2020. There was therefore an underpayment of 1.5 months at the rate of £13.20 per month, giving a total underpayment of £19.80. We found that the claimant was entitled to this amount by reason of the respondent's failure to pay NMW.

108. We would add two points -

(a) The relevant section of the list of issues referred to failure to pay NMW between September and December 201 9. While we found there had been no such failure, we did not consider that we were constrained to look only at that period when the evidence before us indicated a failure to pay NMW for a later period.

(b) We deal below in the context of the holiday pay issue with non-payment of wages for the period 11-15 May 2020. We could have dealt with this in relation to NMW but, as the claimant was on leave at the relevant time, we decided it was more appropriate to proceed in this way.

Holiday pay

109. The claimant was entitled to 5.6 week' annual leave (ie 28 days) in a full year. The proportion of this which he accrued between his start date of 19 August 201 9 and his leaving date of 15 May 2020 was 74%, or (rounding up per Regulation 15A(3) WTR) 21 days. Deducting the days of annual leave actually taken (17 - see paragraph 42 above) left a balance of 4 days of annual leave in respect of which the claimant was entitled to be paid on termination of his employment.

110. The claimant's weekly pay was £117.69 (£510 multiplied by 12, then divided by 52). This equated to 5 days of work. The amount due in respect of 4 days was £94.15. We decided that this was the amount which should be awarded to the claimant in respect of holiday pay. This was less than NMW but that was reflected in our award above relating to NMW.

Written statement of particulars

111. The respondent accepted that the claimant had not been provided with a written statement satisfying sections 1-3 ERA. As his claim succeeded in part, and two of the elements which succeeded were contained in Schedule 5 to the Employment Act 2002 **(Tribunal jurisdictions to which section 38 applies),** being the claims for failure to pay NMW (pled as a breach of contract) and holiday pay, section 38 of the Employment Act 2002 was engaged.

112. Section 38 provides, so far as relevant, as follows -

(1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.

(2) ….

(3) If in the case of proceedings to which this section applies -

> *(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and*
>
> *(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996....*
>
> *the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.*
>
> *(4) In subsections(2) and (3) -*
>
> *(a) references to the minimum amount are to an amount equal to two weeks' pay, and*
>
> *(b) references to the higher amount are to an amount equal to four weeks' pay.*
>
> *(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable. …*

113. The issues for us were whether (a) there were exceptional circumstances which made an award unjust or inequitable and (b) if not, should the award be the minimum amount or the higher amount. We addressed these as follows -

(a) We found no exceptional circumstances which made an award unjust or inequitable. The respondent accepted he was in the wrong by not providing the claimant with a statement of written particulars. He offered no mitigating circumstances.

(b) We considered that it was just and equitable to award the higher amount in this case. The respondent offered no excuse. The fact that he provided the claimant with a copy of his own contract of employment should have served as a reminder of his obligation with regard to a written statement of particulars.

114. The claimant's weekly pay was £117.69 (see paragraph 109 above). Four times this amount equals £470.76. We decided to award the claimant this sum under section 38.

115. We observe that the timeous provision by the respondent to the claimant of a compliant written statement of employment particulars would have meant that (a) the correct identity of the employer, (b) the hours of work and (c) the amount of pay were recorded in writing. In other words, key elements of the dispute between the parties might have been avoided if the respondent had done what the law requires.

Itemised pay statements

116. We were satisfied that pay statements were sent electronically to the claimant for each month of his employment. We did not consider that such statements could be said to have been "p/ven"to the claimant for the purpose of section 8(1) ERA if he was not able to open them for want of a password. The password was provided to the claimant on 4 March 2020.

117. Accordingly, there had been non-compliance by the respondent with section 8(1) ERA in respect of the payslips for the months of August 2019 to February 2020 inclusive because these were not *"given"* to the claimant, as he was not able to access them at or before the time when the payment was made. There had been compliance in March and April 2020. There was non-compliance in May 2020 because, by the time the payslip was sent electronically to the claimant, he was no longer able to access his business email account.

118. It was not in dispute that the payslips which were provided to the claimant did not disclose the correct amounts of (a) gross salary, (b) deductions from that gross salary and (c) net salary payable. If we had jurisdiction to do so, given that the claimant had another source of income, we would have been able to determine only that his payslips should have disclosed a gross monthly salary of £510, adjusted from 1 April 2020 to reflect the increase in NMW. We would not have been able to determine what deductions required to be made nor what the net salary should have been.

119. While the claimant's payslips were clearly incorrect because they disclosed the wrong amount of gross salary, deductions and net salary, in terms of section 11(3) ERA we did not have jurisdiction to determine a question as to the accuracy of the amounts stated in those payslips.

120. We have made declarations above which reflect these findings.

Decision

121. For the reasons set out above -

(a) the claimant's claim of detriment for making a protected disclosure fails,

(b) the claimant's claims in respect of (i) failure to pay NMW and (ii) holiday pay succeed to the extent detailed above,

(c) the claimant was not provided with a written statement of employment particulars and is entitled to an award under section 38 of the Employment Act 2002,

(d) the claimant's claim in respect of itemised pay statements succeeds to the extent detailed above and declarations are made to reflect this,

(e) the claimant is entitled to the amounts of compensation detailed above, and

(f) when making payment to the claimant of the amounts we have awarded to him, the respondent is entitled to deduct the sum of £200 already paid.

Employment Judge: Sandy Meiklejohn
Date of Judgment: 21 April 2022
Entered in register: 26 April 2022
and copied to parties