Case Number: 3311716/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr M Szlacheta	v	(1) Warlite Security Limited (2) First4Freelancers Limited

Heard at: Watford, in person **On**: 3 and 4 November 2022

Before: Employment Judge Hyams **Members:** Ms E Davey
Ms J Hancock

Appearances:

For the claimant: In person
For the respondents: Mr K Chehal, representative

UNANIMOUS RESERVED JUDGMENT

1. The first respondent owes the claimant unpaid wages of (see paragraphs 112-117 below) in total £541.40 gross, from which national insurance contributions and (if applicable) income tax are deductible under the Income Tax (Pay as You Earn) Regulations 2003, SI 2003/2682.

2. The claimant was not dismissed unfairly within the meaning of section 103A of the Employment Rights Act 1996 ("ERA 1996").

3. The claimant's claims of detrimental treatment within the meaning of section 47B of the ERA 1996 fail and are dismissed.

4. The claimant was not wrongfully dismissed. The claimant's claim for unpaid notice pay accordingly fails and is dismissed.

REASONS

The claims made by the claimant in this case and related matters

1 By a claim form presented on 14 September 2020, the claimant claimed unfair dismissal (giving in box 5.1 of the ET1 form as the date of the termination of his employment 12 June 2020), a redundancy payment, and a series of payments, including notice pay, holiday pay, arrears of pay, and "other payments". He was

also claiming (as he said in box 8.1 of the ET1 on page 11 of the hearing bundle; any reference below to a page is to a page of that bundle):

> "Lack of rest brakes, discrimination at work, unfair dismissal, Earl under stress and lack health and safety" (*sic*).

2 The claimant's first language is Polish, and his English is far from perfect. On 21 December 2020, the claimant sent an email to the tribunal enclosing a number of documents which he was plainly relying on to prove his case. On 30 January 2021, a member of the tribunal's staff wrote to the claimant:

> "I refer to your email dated 21/12/2020 which has been placed on the file. Your email has been referred to Employment Judge R. Lewis who has asked me to tell you that it is not the role of the Tribunal to take evidence. The parties must prepare their own evidence."

3 On 29 August 2021, the tribunal notified the parties of the holding of a preliminary hearing to take place by telephone on 20 October 2021. In the letter containing that notification, this was said (on the direction of Employment Judge ("EJ") Quill):

> "Please can the claimant notify the tribunal if he requires an interpreter and if so, what language."

4 On 7 September 2021, the claimant sent the tribunal an email in the following terms:

> "I would like to add to my case all timesheets we were obligate to fill in on site. It shows how many hours I worked and how many bank holidays etc.
> Maciej Szlacheta
> I do not need a translator I think my English is good enough."

5 The day before the hearing which we conducted (i.e. on 2 November 2022), a tribunal consisting of EJ Hyams, Ms Davey and Ms S Wellings commenced hearing the case. Shortly after the start of the hearing day on 2 November 2022, EJ Hyams said that the claimant might well benefit from there being an interpreter present. The claimant then said that he did not want an interpreter to assist him. That constitution of the tribunal then ceased, at 2.30pm on 2 November 2022, to hear the case because Ms Wellings was obliged to be recused because of a connection between her and Peninsula, who represented the respondent in this case. Fortunately, a different second lay member, Ms Hancock, was available to sit on the next two days. The hearing therefore restarted at 10.00 on the next day, 3 November 2022, with Ms Hancock having replaced Ms Wellings.

6 In box 8.2 of the claim form (on page 12), the claimant wrote, after referring to his wages claims (which, as can be seen from our above judgment, succeeded in part):

> "Rest my claim is related with unfair dismissal biased on health and safety complaints and bullying and discrimination I was effected after I complain on health and safety to manager and supervisor.like didn?t pay me my salary, didn?t pay holiday they cancelled my duty with out reasonable time for example 3.00 morning few h before my shift or in the middle of shift manager came with three others guess and force me to go home they deteriorate did not provid me with brakes or did after 11h work during my last hour of shift. Warlite left my complaining with out answer so showing high discrespect towards me. Failure to provide rest brakes under time regulation as well deserve for compensation. They did comments during work about my complaint about my uniform.All this discrimination started when I did complain about health and safety.During peak of covid19 in Barnet hospital I made complain about high vests we had to wear during work .They were dirty and hand over from person who finished right now to person who started work .And as well lack PPE on some of the wards like mask weren?t provided First mask for employee were delivered by Warlite few weeks after we started work .Following it Warlite broke my 17 weeks contract with out notice and try to put responsibility for payslip company claimed that they employed me .It was not true .Warlite employed me and they broke our agreement and than They set payslip company in aim to avoid responsibility for what they did .I have never accepted it.Limited my duty to 0 hand form discrimination was taken to stop me working".

7 We have quoted that passage as it was in the original, complete with all of its flaws. All quotations below are in the same form: as they were in the original from which we have taken the quotation, although in some instances we have corrected an obvious error which it would have been misleading to leave in the quotation. Where we have done that, the correction is in square brackets.

8 The claim form contained the following additional text, in box 15, on page 17:

> "When they issued payslip after more than 6 weeks Warlite informed me first time that from now payslip company will be my employer I did not accept it and informed both company that I am working for Warlite.Undisputed is I got harm and stress during my work because of discrimination from Warlite .Scale of abuse against me during 7 weeks of work is huge and unbelievable.The reduction of shifts as well huge pressure of discrimination in many areas was deteriorated to stop me working or to make me decision to make resignations from work."

The preliminary hearing conducted by EJ Smeaton

9 On 20 October 2021, EJ Smeaton conducted a preliminary hearing for case management purposes. In paragraph 13, at pages 52-53, in her record of the hearing EJ Smeaton recorded the issues in this way:

‘13. The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Time limits / limitation issues

13.1 Were all of the Mr Szlacheta’s complaints presented within the time limits set out in sections 23(2) to (4), 48(3)(a) & (b) and 111(2)(a) & (b) of the Employment Rights Act 1996 (“ERA”)? Dealing with this issue may involve consideration of other issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; when the treatment complained about occurred; etc.

13.2 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 25 May 2020 (in respect of allegations against Warlite) or 27 May 2020 in respect of allegations against First4Freelancers) is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

Public interest disclosure - detriment

13.3 Did Mr Szlacheta make one or more disclosures of information as follows:

13.3.1 Shortly after 22 April 2020, Mr Szlacheta complained to a supervisor who worked on-site for Barnet hospital that he was being made to wear dirty vests and that, accordingly, Warlite was in breach of health and safety laws given the risks associated with Covid-19;

13.3.2 On 23 May 2020, in an email to Richard Barella and Sue Rideout, Mr Szlacheta complained that he had been forced to go home mid-shift, had not been paid properly for that shift and had not been given adequate breaks;

13.3.3 On 11 June 2020, Mr Szlacheta complained to a new team leader from Warlite (Mr Szlacheta does not know his name but believes he was of Cypriot nationality, which may help Warlite identify him) that he hadn’t had a break in at least 9 hours;

13.[3].4 On 15 June 2020, in an email to Mr Barella and Ms Rideout and in Whatsapp messages to Mr Barella, Mr Szlacheta complained that his shifts had been cancelled

with short notice and that he was not being given adequate breaks and questioned whether he was being treated badly because he had complained about breaks

13.4 Did Mr Szlacheta have a reasonable belief that the disclosure(s) was in the public interest and tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject (s.43B(1)(b) ERA 1996) and/or that the health and safety of any individual had been, was being or was likely to be endangered (s.43B(1)(d) ERA 1996);

13.5 Was the disclosure made to Warlite as Mr Szlacheta's employer (or another responsible person within the meaning of s.43C ERA 1996);

13.6 Did Mr Szlacheta suffer one or more of the following detriments because of one or a combination of any disclosures found to fall within s.43B ERA 1996:

13.6.1 From the end of April 2020 onwards, Warlite failed to provide Mr Szlacheta with breaks at appropriate times or at all;

13.6.2 From the end of April 2020 onwards, the supervisor referred to above at paragraph [13.3.1] made jokes about Mr Szlacheta raising complaints about breaks;

13.6.3 On 19 May 2020, Mr Szlacheta was made to go home mid-shift

13.6.4 On 12 June 2020, Mr Szlacheta's shifts were cancelled at late notice;

13.6.5 Warlite failed to respond to email or Whatsapp messages sent by Mr Szlacheta on 15 June 2020.

Public interest disclosure – automatic unfair dismissal

13.7 What was the principal reason Mr Szlacheta was dismissed and was it that he had made a protected disclosure as alleged above at paragraph [13.3].

Unpaid annual leave – Working Time Regulations

13.8 When Mr Szlacheta's contract came to an end, was he paid all of the compensation he was entitled to under regulation 14 of the Working Time Regulations 1998?

13.9 How much, if any, pay is outstanding?

Unauthorised deductions

13.10 Did the respondents make unauthorised deductions from the Mr Szlacheta 's wages in accordance with ERA section 13 and if so how much was deducted?

Breach of contract

13.11 To how much notice was Mr Szlacheta entitled?

13.12 How much notice was Mr Szlacheta given?'

10 Order number 2 of those set out at the end of EJ Smeaton's record of the hearing of 20 October 2021 was in these terms:

> "The parties must inform each other and the Tribunal in writing within 14 days of the date this is sent to them, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way."

11 No party had written to the tribunal or the other parties taking issue with EJ Smeaton's formulation of the issues.

Relevant law

Protection against detrimental treatment, and dismissal, for "Whistleblowing"

12 In order to succeed in claiming detrimental treatment for whistleblowing, an employee must show that he or she made a disclosure falling within section 43A of the Employment Rights Act 1996 ("ERA 1996"). That means a disclosure falling within section 43B of that Act that is made in accordance with sections 43C-43H of that Act. Section 43C provides:

> "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."

13 Section 43B provides so far as relevant:

> '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,
>
> ...
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.'

14 The meaning of the words "in the public interest" was the subject of extensive discussion in the case of *Chesterton Global Ltd v Nurmohamed* [2018] ICR 731. The issue in that case was stated in the opening words to paragraph 32 of the judgment of Underhill LJ in that case, with which Beatson and Black LJJ agreed:

> "The particular issue that arises in this appeal is whether a disclosure which is in the private interest of the worker making it becomes in the public interest simply because it serves the (private) interests of other workers as well."

15 Thus, by implication, if a disclosure is only "in the private interest of the worker making it" then it will not be a disclosure within the terms of section 43B.

16 In paragraph 8 of his judgment, Underhill LJ said this:

> "Those provisions [i.e. the public interest disclosure provisions in the ERA 1996] were subject to some exegesis by this Court in *Babula v Waltham Forest College* [2007] EWCA Civ 174, [2007] ICR 1026. Two points in particular are emphasised in that case, though in truth both are clear from the terms of the section itself:
> (1) The definition has both a subjective and an objective element: see in particular paras. 81-82 of the judgment of Wall LJ (pp. 1045-6). The subjective element is that the worker must believe that the information disclosed tends to show one of the six matters listed in sub-section (1). The objective element is that that belief must be reasonable.
> (2) A belief may be reasonable even if it is wrong. That is well illustrated by the facts of *Babula*, where an employee disclosed information about what he believed to be an act of criminal incitement to religious hatred, which would

fall within head (a) of section 43B(1). There was in fact at the time no such offence, but it was held that the disclosure nonetheless qualified because it was reasonable for the employee to believe that there was."

17 In paragraph 34 of his judgment, Underhill LJ recorded that Mr James Laddie QC, counsel for the claimant employee:

> 'suggested that the following factors would normally be relevant (I [that is, Underhill LJ] have paraphrased them slightly):
>
> (a) the numbers in the group whose interests the disclosure served – see above;
>
> (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 – as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far.'

18 The nub of Underhill LJ's judgment was in paragraph 37, which was in these terms:

> "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 [Endnote 5: Although disclosures tending to show breaches of the worker's own contract are the paradigm of disclosures of a "private" or "personal" character, they need not be the only kind: see the Minister's reference to disclosures "of minor breaches of health and safety legislation … of no interest to the wider public".), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the

> circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above 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."

19 Section 47B(1) of the ERA 1996 provides:

> "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."

20 In a claim made under section 47B of the ERA 1996 of detrimental treatment for making a protected disclosure within the meaning of section 43A of that Act, which is made under section 48 of that Act, it is for the employer to prove the reason for the conduct which it is claimed was detrimental. That is the effect of section 48(2), which provides that "it is for the employer to show the ground on which any act, or deliberate failure to act, was done".

21 That which constitutes a detriment for the purposes of section 47B of the ERA 1996 is best seen in the same way as that which is a detriment for the purposes of for example section 27 of the Equality Act 2010. Thus, as it was said in *Jeremiah v Ministry of Defence* [1979] IRLR 436, [1980] ICR 13, treatment would be detrimental for the purposes of section 47B "if a reasonable worker would take the view that the treatment was to his detriment". In addition, it may not be detrimental conduct within the meaning of section 47B to take action with a view to defending a suspected or actual claim of a legal wrong. That proposition is supported by the decision of the House of Lords in *St Helens Metropolitan Borough Council v Derbyshire* [2007] UKHL 16, [2007] ICR 841.

22 Where an employee is dismissed for whistleblowing, i.e. the making of such a disclosure, the dismissal will be automatically unfair within the meaning of section 103A of the ERA 1996 "if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

23 Section 47B(2) of the ERA 1996 provides:

> "(2) ... This section does not apply where—
>
> (a) the worker is an employee, and
>
> (b) the detriment in question amounts to dismissal (within the meaning of Part X)."

24 The word "dismiss" is defined by section 95(1) of the ERA 1996. An express dismissal is most common. It occurs when an employee is informed that he or she is dismissed. A "constructive" dismissal within the meaning of section 95(1)(c) occurs where an employer repudiates or fundamentally breaches the

employee's contract of employment and the employee accepts that repudiation or fundamental breach. Such acceptance is usually done by resigning. Where the employee does not resign, then the conduct said to be an acceptance of the repudiation or fundamental breach of contract must be unequivocal: *Norwest Holst Group Administration Ltd v Harrison* [1985] ICR 668.

25 Where an employee claims to have been dismissed "constructively" and that the dismissal was unfair within the meaning of section 103A of that Act, the judgment of Cavanagh J in *De Lacey v Wechseln Ltd* UKEAT/0038/20/VP, [2021] IRLR 547, contains this helpful passage:

> '68. ... [I]n principle, a "last straw" constructive dismissal may amount to unlawful discrimination if some of the matters relied upon, though not the last straw itself, are acts of discrimination. There is very limited authority on this point. However, in *Williams v Governing Body of Alderman Davies Church in Wales Primary School* [2020] IRLR 589, at paragraph 89, HHJ Auerbach said that a constructive dismissal should be held to be discriminatory "if it is found that discriminatory conduct materially influenced the conduct that amounted to a repudiatory breach." At paragraph 90, HHJ Auerbach said that the question was whether "the discrimination thus far found sufficiently influenced the overall repudiatory breach, such that the constructive dismissal should be found to be discriminatory." (my emphasis)
>
> 69. I respectfully agree with the test as it is set out in paragraph 90 of the *Williams* judgment. Where there is a range of matters that, taken together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory. In other words, it is a matter of degree whether discriminatory contributing factors render the constructive dismissal discriminatory. Like so many legal tests which are a matter of fact and degree, this test may well be easier to set out than to apply. There will be cases in which the discriminatory events or incidents are so central to the overall repudiatory conduct as to make it obvious that the dismissal is discriminatory. On the other hand, there will no doubt be cases in which the discriminatory events or incidents, though contributing to the sequence of events that culminates in constructive dismissal, are so minor or peripheral as to make it obvious that the overall dismissal is not discriminatory. However, there will be other cases, not falling at either end of the spectrum, in which it is more difficult for an ET to decide whether, overall, the dismissal was discriminatory. It is a matter for the judgment of the ET on the facts of each case, and I do not think that it would be helpful, or even possible, for the EAT to give general prescriptive guidance for ETs on this issue.'

Section 86 of the ERA 1996

26 Section 86(1) of the ERA 1996 provides:

> "The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more–
>
> (a) is not less than one week's notice if his period of continuous employment is less than two years".

The Working Time Regulations 1998, SI 1998/1833

27 Regulation 12(1) of the Working Time Regulations 1998 provides:

> "Where a worker's working time is more than six hours, he is entitled to a rest break."

28 Regulations 21 and 24 of those regulations provide that regulation 12(1) does not apply

> "where the worker is engaged in security and surveillance activities requiring a permanent presence in order to protect property and persons, as may be the case for security guards and caretakers or security firms",

but that

> "(a) his employer shall wherever possible allow him to take an equivalent period of compensatory rest, and
>
> (b) in exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, his employer shall afford him such protection as may be appropriate in order to safeguard the worker's health and safety."

<u>The evidence which we heard</u>

29 We heard oral evidence from the claimant on his own behalf and, on behalf of the respondent, from Mr Richard Barella, the respondent's Operations Manager. The claimant's witness statement was unsigned and undated. Mr Barella's was signed on 26 January 2022.

30 We had before us the hearing bundle to which we refer above. Including its index, it consisted of 163 pages. In addition, the claimant had sent the tribunal a series of individual documents which he had not indexed but to which (or at least to most of which) he referred in the document which we treated as his witness statement. Some of those documents were in the hearing bundle, but some were not.

31 There were some material conflicts of evidence. In stating our findings of fact below, we state how we resolved those conflicts of evidence.

Our findings of fact

32 The claimant was employed by the respondent as a security guard. The respondent supplies security guards to (as Mr Barella said in paragraph 5 of his witness statement) "residential and commercial clients". One of those clients was Compass, who provided at that time security services to Barnet Hospital. Compass subcontracted the provision of guards in that regard to the respondent, but Compass was the provider and organiser of the provision of guards to the National Health Service ("NHS") body which was responsible for that hospital. That hospital had (see paragraph 56 below) its own security team, including some guards.

33 The claimant was employed under a contract of which there was a copy at pages 71-81. In that contract it was said that the claimant was an employee of the second respondent. That document did not, however, reflect reality in that the first respondent was in fact the claimant's employer in the law of contract, as Mr Chehal and Mr Barella accepted during the hearing. As EJ Hyams said during the hearing, the documentation relating to the claimant's relationship was in a highly unsatisfactory and potentially misleading state.

34 The reason why the claimant alleged in the ET1 claim form that he was employed under a contract for 17 weeks was, he said, that he had inferred that from the fact that he had signed the document at page 82, which was entitled "Warlite Security Limited Working Time Regulations 1998 Opt-Out" and had 5 numbered paragraphs, the first of which was headed "Definitions". The entirety of that first paragraph was this:

> "In this agreement the following definitions apply:-
>
> The employer – Warlite Security Ltd, Room A, 1 Tower Lane, East Lane Business Park, East Lane Wembley, Middx, HA9 7NB
>
> "Working week" means an average of 48 hours each week over a 17 week period
>
> - Unless the context requires otherwise, references to the singular include the plural and references to the masculine include the feminine and vice versa
> - The headings contained in these terms are for the convenience only and do not affect their interpretation."

35 The rest of that document was about (and only about) the claimant having opted out of the working time limit of 48 hours per week.

36 The document at pages 71-81 reflected reality in one respect, however, in that it did not specify the number of hours per week which the claimant was required to work, and we agreed with the respondents that the claimant was employed under what is usually called a zero hours contract.

37 The respondents intended the claimant to be entitled to receive no more than the national minimum wage of £8.72 per hour, but the respondent paid the claimant for all of the time when he was on duty (that is to say, including any rest breaks that he had). His shifts were 12 hours long. The first respondent engaged the second respondent to provide payroll services, but in fact the second respondent used another party, Smart Pay Solutions Limited, to do at least some of that work, since the claimant's pay statements (of which there were only 2 before us; they were in several places but we refer to them in these reasons as being at pages 160 and 162) were stated to have been made by Smart Pay Solutions Limited. Mr Barella described the situation in paragraphs 8 and 9 of his witness statement, but he did not refer to the fact that the second respondent deducted from the claimant's wages the sum of £60 as recorded in each of the pay statements at pages 160 and 162. We accepted Mr Barella's oral evidence that that sum was intended to be paid to the second respondent as payment for the second respondent's organisation of the claimant's pay, but there was no provision in any of the documents before us for the deduction of that sum from the claimant's pay. All that there was before us about the rate at which the claimant was intended to be paid was the text from Mr Barella to the claimant at page 114. That was part of a series of texts, which were sent on 21 April 2020. On page 114, the claimant wrote these texts (one after the other):

> "I would like to ask you what's rate per h and when I get payment? Thank you"
>
> "Is it employed or self employed"
>
> "Thank you"

38 Mr Barella then wrote:

> "Its employees 9.20 per hour monthly pay".

39 The claimant worked as a security guard for the respondent only in the period from 22 April to 11 June 2020 inclusive, and when doing so he worked only at Barnet Hospital.

High visibility vests

40 At the time that the claimant was employed at that hospital, the respondent did not provide guards with what are usually called "high visibility vests", to which Mr Barella referred in his witness statement and orally as "tabards". However, the hospital required them to be worn by security guards working there, and on 22 April 2020 Compass supplied the claimant with one.

41 The claimant's oral and written evidence was that on the next day, 23 April 2020, he saw that the vests were being given out without having been washed. He described the situation in this way in the first indent of paragraph 2 of his witness statement.

> "I started working as we agreed on 22 April 2020, I was asked by supervisor to wear hi visible vest on site so I did it . Next day I saw that vests are handed over between people who finished work to one who started after wearing it 12 hours. I said to them that is lack of hygiene and against health and safety in work. I was informed that if I do not wear it, I cannot work so I did. After few days I bought my own vest but other people kept handing it over to each other."

42 After a certain amount of discussion, the claimant accepted when giving oral evidence that he had complained to a Compass supervisor about the lack of cleanliness of the tabard which he was required to wear. At that time, the first respondent did not have any supervisors employed at Barnet Hospital.

43 Mr Barella's evidence, both in paragraph 10 of his witness statement and orally, was that he did not know, and the first respondent did not know, that the claimant had complained about the dirty state of the tabards given out by Compass to security guards to wear at the hospital. We accepted that evidence.

44 In fact, the claimant bought himself a tabard within a week of starting to work for the first respondent. It cost him, he said, £1.50. He then wore only that tabard, and he kept it clean.

Personal protective equipment

45 In the second indent of numbered paragraph 2 of his witness statement, the claimant said this:

> "Other issue raised by me was lack of face mask during pandemic in some departments we had to cover like security. Richard Barella delivered mask on 09.05.2020 then I had been working so far 3 weeks but all in all masks delivered were useless in hospital, where we have to deliver customer service to patients which ask us about current pandemic regulations. (Picture masks delivered by Warlite ltd was delivered to Tribunal on 30.11.2021 and pictures of message send to employees on group forum Barnet Crew Hospital send by Team Leader Worlite ltd on 12 June 2020 to employees that mask will be provided on main entrance from Monday. And from now will be provided on all departments). It shows that to 12 of June mask was not provided in some departments."

46 However, EJ Smeaton had not recorded the claimant as relying on any complaints made by him about face masks. In any event, Mr Barella's evidence was that the claimant had not to his knowledge complained to the respondent

about face masks. It was also that there was a shortage of such masks, as part of the general shortage of personal protective equipment ("PPE") both in the NHS and generally. We accepted the latter evidence, not least because we ourselves recalled the situation as it was at that time, which was the time of the first national lockdown imposed in response to the Covid-19 pandemic. While it was not directly relevant to the claimant's case, given the content of EJ Smeaton's record of the hearing of 20 October 2021 which we have set out in paragraph 9 above, we also accepted that Mr Barella was not aware that the claimant had complained about a lack of face masks.

47 Mr Barella had in fact procured the supply of some rather restrictive face masks, of which there was a photograph at page 142. In paragraph 17 of his witness statement, he said this (which we accepted):

> "The hospitals all supply PPE to both staff and visitors. We offered P3 face masks to guards on 2 May 2020 once they were able to source masks at a cost of £30 per mask. The welfare of guards is very important to the Respondent."

48 Thus, the evidence of the claimant and that of Mr Barella was to the effect that he, Mr Barella, had organised the delivery of face masks in the first half of May 2020. In addition, the claimant agreed that the photograph at page 142 was of one of those masks.

49 The claimant repeatedly sought to question Mr Barella about PPE. After first being asked about that matter by the claimant, Mr Barella gave evidence to the same effect as the passage from his witness statement which we have set out in paragraph 47 above. He also said that the message to which the claimant referred in the passage of his witness statement which we have set out in paragraph 45 above as having been sent on 12 June 2020 by the supervisor employed by the respondent by the name of Kiri, to whom we refer further below, was about masks (and in fact hand cleanser) to be used by members of the public, not staff.

50 After that, not least because it was not one of the claimed public interest disclosures recorded by EJ Smeaton in her record of the hearing, we, through EJ Hyams, repeatedly directed the claimant not to pursue that line of questioning, saying that it was for that reason not relevant, and that any question the answer to which could not be relevant should not be asked. The claimant, however, repeatedly insisted that his line of question <u>was</u> relevant, and (as on many other occasions during the hearing) repeatedly spoke over EJ Hyams when EJ Hyams was trying to ensure that the claimant's questioning moved on.

51 In fact, the claimant also on many occasions spoke over Mr Barella when he was giving his evidence, despite frequently being asked by EJ Hyams not to do so and despite EJ Hyams pointing out that if the claimant spoke over Mr Barella's evidence then we could not hear it and we could not take it into account.

52 The claimant's explanation for repeatedly asking Mr Barella about PPE was that it was relevant to the first respondent's attitude to matters of health and safety. Mr Barella repeatedly said that the first respondent was concerned about the welfare of the guards whom it employed, and we could see (and we accordingly concluded as a fact) that he at least was genuinely so concerned.

The appointment by the respondent of a supervisor to work at Barnet Hospital

53 Mr Barella's witness statement contained nothing about the appointment of a supervisor by the first respondent at Barnet Hospital, but in his oral evidence he said that such a supervisor was appointed because the hospital asked for a supervisor and said that they would pay for one to be appointed by the first respondent because the hospital was so unhappy about the quality of the guards who were being supplied. That was, Mr Barella said, supported by the fact that many guards turned up not in uniform and then, when they were present, used their mobile telephones when on duty. EJ Hyams' note of Mr Barella's evidence on this (slightly tidied up for present purposes) is as follows:

> "He [that is, Kiri] reported to Louise [Fairbairn, the hospital's security manager] and me; but Compass paid for his services as they [the hospital] were not happy with the quality of the guards. And he ended up doing breaks.
>
> ...
>
> Q: [i.e. the claimant's question] What was his duty regarding breaks?
> A: It was not him; Compass paid us to engage him to ensure that staff did not use phones; I found out about it after you left us. I was not aware of him doing breaks. I think that Compass used him to spare their own guards. They might have had 4 or 5 guards off sick so might have used him to cover."

54 It was the claimant's oral evidence that the supervisor was of Cypriot origin. The claimant and Mr Barella agreed that the supervisor's name was Kiri. The notes of Ms Davey and Ms Hancock of the part of the evidence to which the passage of EJ Hyams' notes set out in the preceding paragraph above relates were to the same effect as that passage. Two of us were not sure, when we returned to the evidence of Mr Barella about the manner in which Kiri acted in regard to breaks, whether or not it was to the effect that Kiri organised breaks or whether it was that he was used by Compass to cover staff such as the claimant while they went on their breaks. One of us understood the evidence to have been to the effect that Kiri had not been used to organise the breaks of (for example) the claimant, but that he had been used by Compass to provide cover for guards who needed breaks.

55 In deciding what the true position was, we took into account what Mr Barella said so far as relevant in paragraphs 14 and 30 of his witness statement. We have

set paragraph 14 out in paragraph 62 below. In paragraph 30, Mr Barella said this:

> "We were not responsible for providing the Claimant with breaks as it was Barnet hospital's in-house security team that had responsibility for providing the Claimant with breaks."

56 We then considered what was likely to have happened in regard to breaks. Mr Barella's unchallenged oral evidence was that the hospital had its own, in-house team, and that it had a contract with Compass for the provision of additional security guards. The guards supplied by the first respondent to Compass were integrated into the team run by Compass in conjunction with the hospital's security team. That team was managed by Ms Fairbairn (who, we noted, signed off the claimant's time sheets such as the one at page 136). It was therefore unlikely that Compass had directed Kiri to manage the breaks of the guards employed by the first respondent. In those circumstances, we concluded on the balance of probabilities that, as Mr Barella said, Compass managers organised breaks, and the first respondent was in no way (whether through Kiri or otherwise) responsible for doing that.

57 Mr Barella said that the first respondent recognised that security guards have a "a hard job" in often not being able to take a break for a considerable period of time. He also said that security guards were not permitted to eat when on duty, although if for example a guard was diabetic, then he or she was permitted to eat for example a chocolate bar when on duty. We accepted that evidence of Mr Barella.

58 The claimant accepted that he was in practice able to use the toilet when he needed to do so.

59 Mr Barella said when giving oral evidence that he did not remember speaking to Kiri about any complaints of the claimant about his breaks. He also said this (as noted by EJ Hyams, with the notes tidied up; Ms Davey and Ms Hancock's notes were to the same effect):

> "I do not remember speaking about the claimant complaining. We had often had complaints from guards at hospitals. They could have 5 or 6 guards and they would have to pick a guard to do break cover. If you start breaks at 11 o'clock and have 5 or 6 guards being given breaks then someone would have a late one.
>
> We would expect the claimant to have a proper break and a comfort break. When a guard needs a comfort break they will normally radio and say can someone cover me, I need the loo. At Barnet they did not have enough radios for all guards to have one. We complained about that only a month ago; we said that they did not have enough radios."

60 That evidence was not challenged by the claimant, and in any event we accepted it.

What happened on 19 May 2020, the claimant's complaint of 23 May 2020, and what happened after that complaint was made

61 On 23 May 2020 the claimant sent the email at page 131. It enclosed a timesheet and was in these terms:

> "Hi I enclose my timesheet fifth weeks I worked 4 days . I would like to tell that 11.40 Tuesday came to me manager with 3 security guards and they forced me to go home illegally so I should be paid my full time.And next 2 days I was given brakes after 19.00 exactly Thursday 19.07 after more than 6 h from my first one .After 18.00 supervisor went to home said goodbye to me I asked about brake he said 18.30 but I got 19.07 definitely to late .As well he told me I can not work white shirt but more people can so it's not equal treatment is it ?Maciej Szlacheta"

62 Mr Barella's witness statement contained in paragraph 14 the following relevant passage:

> "The Claimant complained about being forced to go home, not being paid properly and not been given adequate rest breaks on 23 May 2020. However, the breaks were dealt with by the Compass Supervisors on-site at Barnet Hospital as they arrange cover for the breaks. To our knowledge the Claimant's rest breaks were adequate. The hospital does give rest breaks but depending on how busy they are the breaks can be at various times."

63 In paragraph 32 of his witness statement, Mr Barella said this:

> "On 19 May 2020, the Claimant was sent home mid-shift due to over booking of guards. It was our client's discretion who they sent home and they chose the Claimant due to the high level of complaints about him, not because of any alleged disclosures he had raised."

64 We found it significant that the claimant himself recorded in his contemporaneous email at page 131 that he had only gone home when a "manager with 3 security guards" came and told him to do so. That was, we inferred, because the claimant was refusing to go home and, we inferred, his refusal was because he thought that he would not be paid for the remainder of his shift. We drew that inference because of the following text message exchange, which was on page 130 and started with the following one sent by the claimant at 12:54 on 19 May 2020:

> "Can you tell me please I get payment for 12h today or you are going to cut my salary because you cancel my part shift?"

65 Apparently later on the same day, Mr Barella replied:

"Yea I'll sort something out for you buddy it wasnt your fault".

66 In fact, unknown to Mr Barella, the claimant was not paid for the rest of his shift. Mr Barella agreed that the claimant should have received 8 x £9.20 for the rest of his shift, i.e. before deductions, and we accordingly determined that he should receive £73.60 as unpaid wages.

67 In relation to the question of whether or not the claimant was subjected to any kind of detriment because he had complained in his email of 23 May 2020 about being given rest breaks late, we took into account what Mr Barella said in paragraph 32 of his witness statement, which we have set out in paragraph 63 above and Mr Barella's evidence about the reason why the claimant ceased to work at Barnet Hospital, to which we refer in the next section of these reasons, below. As we say below, we accepted all of that further evidence of Mr Barella. Some of it conflicted with that of the claimant in a highly material respect. In considering that conflict of evidence, for the reasons given below we preferred the evidence of Mr Barella, and we found his evidence to be more reliable than that of the claimant. Having done that, we accepted Mr Barella's evidence in paragraph 32 of his witness statement about the reason why the claimant was required to go home during the night of 19 May 2020.

68 We then considered what the claimant claimed had happened after he had sent his email of 23 May 2020, and which he was now claiming was detrimental treatment within the meaning of section 47B of the ERA 1996. We bore in mind the fact that the burden of proving the reason for what occurred was, by reason of section 48(2) of that Act, on the first respondent. However, we first had to decide whether the claimant had proved on the balance of probabilities that the things about which he now complained had in fact happened.

69 The claimant's witness statement contained this passage about his claimed detrimental treatment (It was the first part of numbered paragraph 3):

"After I complained they started harassing me.

They did not provide me brakes or did it during last hour of work.

Made joke with it.

They cancelled my shifts in the middle of shift when manager came with three others guards and forced me to go home because I allegedly did not confirm my shifts. I showed him confirmation he asked me to call to Richard Barella from Warlite ltd he said I have to go home, He promised me, to pay me full time and confirmed by text message that it was not my fault, On the end they did not pay me.
They cancelled my shifts few hours morning before I was supposed working.

> Supervisor from Warlite refused my brake after 9.5 hours of work Made comments about my shirts."

70 As can be seen, that complaint went further than the issues determined by EJ Smeaton. However, Mr Barella gave evidence in his witness statement and orally about the same things. In paragraph 16 of his witness statement, he said this:

> "The Claimant also complained that he was told by Supervisors at Barnet Hospital not to wear a white shirt and said this request was discrimination. For the avoidance of doubt, Barnet Hospital required all security guards to wear black polo shirts. It is denied that the Claimant was discriminated against on the grounds of any protected characteristic, as alleged or at all. The Claimant was treated equally to all other security guards and was informed of the dress code requirement during his initial interview (bundle age 92 – 93)."

71 In fact, that dress code was stated in the following way in the first bullet point on page 92:

> "Black trousers, black shoes and plain white SHORT SLEEVED shirt must be worn."

72 Mr Barella told us (and we accepted) that the hospital wanted all of the guards employed there to wear the same uniform. We could not as a result see any basis on which the claimant could reasonably complain about comments being made about his shirts if they were not the black polo shirt that Barnet Hospital required to be worn by all guards engaged there. Evidentially, this complaint of the claimant of detrimental treatment in the form of criticisms of his shirts helped the respondent rather than the claimant. That was because the claimant did not say to us that he had worn black polo shirts and been criticised for doing so. Rather, the tenor of his evidence was that he had worn white shirts and been criticised for doing so, which, he implied by his questions asked of Mr Barella, was unfair. The claimant did not state specifically what was the colour of the shirts which he did in fact wear. If it had been material to his case then he would have had to do so. If he did in fact wear white shirts then that was consistent with what we ourselves observed of the claimant, which was that he was on occasion contrary, that is to say his stance was oppositional for the sake of opposition alone, in circumstances when it could not reasonably be asserted that the opposition was well-founded.

73 The most difficult question for us on the facts would have been whether or not the claimant was treated by the first respondent less favourably than other guards employed by the first respondent at Barnet Hospital. That would have been a difficult question if only because the respondent did not call Kiri (who was the only person employed by the respondent as a supervisor at the hospital while the claimant was employed by the respondent) to give evidence. However, given our finding stated in paragraph 56 above that Kiri had no power to decide

when the claimant got breaks, we were bound to conclude that the claimant had not proved on the balance of probabilities that he had been treated by either respondent detrimentally, or less favourably because, he had complained (1) about not being given rest breaks at least once every 6 hours and (2) that the failure to afford him rest breaks (albeit that he was in fact able to use the toilet whenever he needed to do so) before he was in fact given them involved a risk to his own health and safety.

The claimant's last shift worked at Barnet Hospital

74 The claimant said nothing in his witness statement about the manner in which his shifts at Barnet Hospital ended. In oral evidence, he firmly denied Mr Barella's evidence about the way in which and the reasons why the claimant's shifts there were ended. Rather, the claimant merely said in numbered paragraph 4 of his witness statement this:

> "All documents I delivered to the Tribunal shows clear that they acted like group which created false documents of employment, delivered to me untrue or misleading information about my employment, breaking health and safety proceedings, breaking working time regulations in order to achieve profit at the cost of employee. Any form complaining against breaking the rules by Warlite ltd encounter immediately response like dismissing my complaints, not delivering proper brakes, cutting my salary, cancelation of shifts, making comments about my shirts. On the end dismissing me without any explanations."

75 Before turning to Mr Barella's witness statement and oral evidence on the manner in which the claimant's shifts at Barnet Hospital ended, we refer to all of the contemporaneous documentation in the bundle.

76 There were several text messages in the bundle which the claimant and Mr Barella had exchanged at the time of the claimant's last shift at Barnet Hospital. That last shift was worked on 11 June 2020. On page 143 there was a text sent by Mr Barella to the claimant at 03:16 on 12 June 2020 in the following terms:

> "Mac [which was how Mr Barella referred to the claimant] don't go in today I have had to replace you".

77 At page 138 there was a text from the claimant sent at 08:10 on 12 June 2020 to Mr Barella, in the following terms:

> "What is the reason you cancelled my shift today?"

78 The final written communication between the claimant and the first respondent (before these proceedings were started) was the email of 15 June 2020 which was relied on by the claimant as his fourth public interest disclosure. It was at page 144. The email consisted of a photograph of a timesheet completed by the claimant for 10 and 11 June 2020, with this text beneath that photograph:

"Hi it's my timesheet I worked 2 days 24 h because you cancelled my duty 03.14 morning so I would like to ask you how much I get for short time notice cancellation bear in mind that's second time my shifts was cancelled like that I hope it's not the reason I asked about my brake after 9 h our team leader and he refused .All in all I got it after 9 h ,other people don't have any problems with breaks but me? Yours sincerely Maciej Szlacheta"

79 Mr Barella's witness statement contained this passage.

"**Disclosure 3**

19. **Disclosure 3:** I wish to state that the Respondent is unaware whether the Claimant complained to a Team leader on 11 June 2020 that he did not have a break in 9 hours. I wish to state that some guards may have had to wait for breaks the same as all medical staff during the extremely difficult times at the peak of the pandemic.

20. I therefore deny that the Claimant made a qualifying protected disclosure, as alleged or at all.

21. On 12 June 2020 our client, Barnet Hospital, requested that the Claimant be removed from site on a permanent basis as they felt he was not suitable for that site. The Claimant was reported to be constantly leaving his post, which meant the entrance was unsecure.

22. He was also reading on duty and leaving his post to talk to nurses whilst they were trying to assist patients and visitors. He was also sitting reading while on duty causing a security risk to members of staff and public. He was repeatedly warned about this by Barnet Hospital. The Claimant continued to ignore Barnet Hospitals instructions.

23. Consequently, Barnet Hospital informed us that they did not want the Claimant on-site anymore.

24. I advised the Claimant and explained that we have other sites available for work, but the client will not allow him to work at the Barnet hospital site.

25. Following the request from the client to remove the claimant from Barnet Hospital on a permanent basis; I offered the Claimant shifts at Northwick Park and North Middlesex hospitals, but he refused to work on another site.

26. The client in particular (Compass) supply over 70% of our business and made it clear that if they do not want a member of our staff back to any site then we are not to send them. In fact this has happened several

times due to individuals poor performance and the Respondent have no choice, but to act on such requests.

27. We were compelled to follow the instructions given by our client and therefore, on 12 June 2020 the Claimant by telephone that he was to be removed from site.

Disclosure 4

28. Disclosure 4 - I wish to state that the Claimant did send an email to Sue Rideout and me on 15 June 2020 complaining that his shifts had been cancelled at short notice and was not given adequate breaks. I wish to state that if our client constantly warns a guard about his / her behaviour on-site then they would indeed ask them to leave and cancel future shifts .This has happened on numerous occasions where guards refused to stay off their phones. In this case, the Claimant refused to stay at his post and stop reading his book and the client was entitled to do this. I wish to state that our client was entitled to cancel the Claimant's shifts and therefore the complaint tended to show no wrongdoing."

80 Paragraph 20 of that sequence was not evidence, and we accordingly ignored it.

81 Mr Barella's witness statement was not well-structured and contained (for example in paragraph 20) what were best regarded as assertions about the merits of the case rather than evidence, as can be seen. Paragraph 31, under the heading "Detriment", was in these terms:

> "I also deny that the Respondent made jokes about the Claimant, as alleged or at all. As far as the Respondent is aware, there were no reports of anyone making jokes about the Claimant. The only comments we received was that he continued to wander from his posts to talk to nurses and was reading books on shift. When the Claimant was challenged about reading books on shift, he told the client it was to improve his English."

82 The claimant denied doing anything that he should not have done. However, we did not hear him denying in terms the assertion that when he was "challenged about reading books on shift, he told the client it was to improve his English". He did, however, deny vehemently that Mr Barella had spoken to him on or after 12 June 2020.

83 The claimant's second question of Mr Barella in cross-examination was why he, Mr Barella, had offered the claimant a new job if he had done so much that was wrong when working at Barnet Hospital. Mr Barella's response was that he did not take clients' requests not to send a particular guard to work for the client again at face value, and that he would "not sack someone just because of that". He said that he recalled the conversation which he had had with the claimant on 12 June 2020. He said that he always called a guard whom a client had sent home and no longer wanted to be supplied to them when the client had told the

first respondent that the guard was no longer to be supplied, and that he did that because otherwise there was a risk (i.e. it had happened in the past) that the guard would then turn up for work at the same place the next day. He said that he had called the claimant on the telephone and said that he (the claimant) could not go back to Barnet Hospital. Mr Barella also said that the person who had told him that the claimant was not wanted back there was Ms Fairbairn. As noted by EJ Hyams, he said this in response to questions asked by EJ Hyams at the start of the hearing day on 4 November 2022:

> "She phoned me and said she wanted Mac off the site and did not want him back. We had quite a good relationship and she went on a sort of rant; I cannot remember whether I asked her [why] before she did, but I probably did ask her.
>
> She said that the claimant was refusing to follow instructions; she might have said what instructions, but I cannot remember. She said also that he was arguing with in-house staff, and that was it. I just said "okay".

84 When EJ Hyams asked him why he had not responded to the claimant's email of 15 June 2020 at page 144 which we have set out in paragraph 78 above, Mr Barella said that he had "had an inkling that something was going on". He said that the claimant's claim was the first one that the first respondent had had in 20 years (by which he meant, we understood, the first one ever, the first respondent having been in business for 20 years). He also said this:

> "Rightly or wrongly I decided not to answer until I had spoken to someone legally."

85 The claimant obtained replacement work for a different employer on 6 July 2020. A P45 was issued for him only on 7 September 2020. There was a copy of at page 148. It referred to a "leaving date" of 30 June 2020.

86 In resolving the conflict of evidence between the claimant and Mr Barella about whether or not there had been a conversation between them on 12 June 2020 as described by Mr Barella and denied by the claimant, we reviewed the evidence before us and accepted the evidence of Mr Barella that he had called the claimant on the telephone on 12 June 2020 and told him (a) not to go back to Barnet Hospital (i.e. as a security guard employed by the first respondent), and (b) the reasons why. That was a critical finding of fact, because the question whether or not there was such a conversation was of great importance in determining the reliability of the evidence of the two witnesses before us. We preferred the evidence of Mr Barella to that of the claimant in this regard for the following reasons.

86.1 The claimant, who was quick to complain and dogged in his pursuit of a complaint, had not said in his email of 15 June 2020 at page 144, which we have set out in paragraph 78 above, that he had not been offered new work by the first respondent.

86.2 In addition, he did not say in that email that he had been dismissed on 12 June 2020. Only later, in the ET1, did he say that (see paragraph 1 above).

86.3 Also, the claimant did not in the email at page 144 ask for a reason why his shift of 12 June 2020 had been cancelled. Nor did he complain in that email that Mr Barella had not replied to his (the claimant's) text at page 138 which we have set out in paragraph 77 above.

86.4 In box 15 of the ET1 form, the claimant referred to being put under pressure to resign (see paragraph 8 above). That appeared to be an attempt to support the proposition that he had resigned rather than being dismissed. That was inconsistent with the proposition that the claimant was dismissed on 12 June 2020.

86.5 Mr Barella's evidence about calling guards whose shifts had been terminated by the end user (such as Barnet Hospital) before the start of their next planned shift to ensure that they did not go back to work for that user made sense, and rang true.

86.6 While we took into account the possibility that the demeanour of a witness is not a reliable indicator of the reliability of the witness's evidence, Mr Barella said several things which might have been regarded as being contrary to the interests of the first respondent, such as the things that we record in paragraph 84 above. In any event, we found Mr Barella to be an honest witness, telling us the truth to the best of his ability.

87 Having come to that conclusion about that conflict of evidence, we accepted also all of the evidence of Mr Barella about the reasons he was given by Ms Fairbairn for directing that the claimant cease to be provided by the first respondent as a guard at Barnet Hospital. While there was evidence in Mr Barella's witness statement in that regard which he later, when giving oral evidence to us, did not repeat (such as that the claimant when challenged about reading books when on shift "told the client it was to improve his English": see paragraph 81 above), we concluded that Mr Barella's memory had faded since the time when that witness statement was made (over 9 months before the hearing before us: see paragraph 29 above), and we accepted the evidence in that statement because it too rang true, given what we had seen of, and heard from, the claimant during the two day hearing before us.

The claimant's pay

88 The pay statement at page 162 to which we refer in paragraph 37 above was accurate. No complaint was made about the payment made pursuant to it except that the sum of £60 was deducted from that payment in the circumstances to which we refer in paragraph 37 above.

89 The pay statement at page 160 was, however, erroneous. In saying that, we ignore the odd statement that £400 was deducted for "Expenses" since that deduction was then nullified (notionally) by the stated reimbursement of that sum. The statement also had on it a deduction of £60 shown. The parties agreed also that there had been a failure to record in the statement that the claimant was owed 6 hours' pay in respect of working on May 2020, which was a public holiday for which he should have been paid time and a half (that being half of the 12-hour working day). That was an underpayment of £55.20 (not, as asserted by the respondent, £46.00, which was for only 5 hours' pay).

90 The main problem with the statement on page 160 (ignoring the matters to which we refer in the preceding paragraph above) was its calculation and the result of that calculation as far as the claimant's pay was concerned. After much discussion with the parties, the claimant accepted that if he had been paid what he should have been paid as stated by the statement at page 160 for holiday pay and for his hours plus the sum of £55.20 and without the deduction of £60, then he would have been paid what he was owed. If and to the extent that he did not accept that, then we concluded that that was the true position. The payment for the claimant's hours worked in the period from 21 April 2020 to 20 May 2020 was stated to be £2,033.20. The claimant's holiday pay was stated to be £232.60. The national insurance deductions were stated to be £251.76, and that figure was not challenged. Thus, the net figure, excluding the £60 deducted as described in paragraph 37 above, should have been £2,033.20 + £232.60 - £251.76 = £2,014.04. However, the "pay and allowances" figure in the column on the left of page 160 stated a gross figure of £1,740.60, and the net figure at the bottom of the right hand column was £1,721.44. That net figure was £292.60 less than it should have been.

Our conclusions on the claimant's claims

91 We now state our conclusions on the claimant's claims. In doing so, in some cases we discuss the claimant's contentions and state our conclusions on them. Where necessary, we draw together the various relevant threads and state our conclusions on the facts resulting from that drawing together.

The length of the claimant's contract of employment

92 We turn first to the issue of the length of the claimant's contract of employment with the respondent. That was the subject of much vehement assertion by the claimant during the hearing before us. It was his contention that the document at page 82, the terms of which we have set out in part in paragraph 34 above, was to the effect that he had a contract of employment for a period of 17 weeks. There was no justification whatsoever for that contention. That document was purely about the opt-out from the normal maximum of a 48-hour working week.

How was that contract terminated? Was the claimant dismissed within the meaning of section 95(1) of the ERA 1996?

93 We concluded that Mr Barella did not offer the claimant more shifts after 12 June 2020 because the claimant had declined to take up the offer of alternative shifts and (see paragraph 25 of Mr Barella's witness statement which, as stated in paragraph 87 above, we accepted) "refused to work on another site".

94 Mr Barella did not respond to the claimant's email of 15 June 2020 at page 144, which we have set out in paragraph 78 above, because he (rightly, as it happened) sensed that the claimant was planning to make a claim against the respondent, and because that email was in terms which did not reflect the reality, which was (as we say in paragraph 86 above) that Mr Barella had explained fully why the shift of 12 June 2020 had been cancelled.

95 The claimant then looked for alternative work. He did not seek more work from the first respondent. He thought that he had a contract for 17 weeks, and that he would later be able to claim pay for the period when he was not working during the rest of the period of 17 weeks from 22 April 2020 onwards.

96 The claimant did not resign. He simply went to work elsewhere as soon as he was able to find alternative work.

97 For the avoidance of doubt, we concluded that the first respondent did not dismiss the claimant on 12 June 2020 or at any other time. Nor did the claimant resign. Nor did he, by presenting his ET1 claim form, accept a repudiation or fundamental breach of contract by the respondent. That was for two reasons. The first was that we concluded that the respondent had not repudiated or fundamentally breached the claimant's contract of employment. The second was that the ET1 was not an unequivocal acceptance of a repudiation or fundamental breach, as in it the claimant claimed that he had been dismissed on 12 June 2020, which could in the circumstances be interpreted only as a claim to have been dismissed expressly rather than constructively.

The claim of wrongful dismissal

98 Since the claimant was not dismissed by the first respondent, the claim of wrongful dismissal, i.e. for unpaid notice pay, could not, and did not, succeed.

The claim of unfair dismissal within the meaning of section 103A of the ERA 1996

99 Also, the claim of unfair dismissal within the meaning of section 103A of the ERA 1996 could not succeed in the light of our conclusion that the claimant was not dismissed within the meaning of section 95(1) of that Act.

The claimant's claims of detrimental treatment within the meaning of section 47B of the ERA 1996?

(1) Did the claimant make protected public interest disclosures within the meaning of section 43A of the ERA 1996?

100 The claimant's claimed public interest disclosures were described by EJ Smeaton in paragraph 13.3 of her record of the hearing of 20 October 2021 which we have set out in paragraph 9 above. Taking them in turn, our conclusions on whether, and if so to what extent they were, such disclosures are as follows.

(1) Shortly after 22 April 2020, Mr Szlacheta complained to a supervisor who worked on-site for Barnet hospital that he was being made to wear dirty vests and that, accordingly, Warlite was in breach of health and safety laws given the risks associated with Covid-19

101 We accepted that this was a public interest disclosure. It was made to the person other than the first respondent who was responsible for requiring persons to wear dirty high visibility vests, namely Compass, and the claimant reasonably, in the circumstances as they existed at the time, which we accepted were as described by the claimant in paragraph 41 above, believed that that requirement endangered the health and safety of the wearers.

(2) On 23 May 2020, in an email to Richard Barella and Sue Rideout, Mr Szlacheta complained that he had been forced to go home mid-shift, had not been paid properly for that shift and had not been given adequate breaks

102 We have set out the email of 23 May 2010 in paragraph 61 above. We concluded that it was not a public interest disclosure within the meaning of section 43A of the ERA 1996. That was because in our view it was only about the claimant's private, or personal, situation and (applying the test discussed in paragraphs 14-18 above) he did not reasonably believe that he was making a statement which it was in the public interest to make. The only element which it might have been in the public interest to state was the part which concerned the giving of breaks. If that part had been to the effect that the first respondent had a practice of refusing to give the security guards whom it employed proper rest breaks, then it might reasonably have been believed that it was in the public interest to make that part of the statement. However, the claimant could not reasonably believe that the respondent breached regulation 12(1) of the Working Time Regulations 1998, because that regulation did not apply. The only possible reasonable belief satisfying the requirements of section 43B of the ERA 1996 would have been that the health and safety of guards employed by the respondent was being endangered by a practice of not giving them breaks. Thus, the email of 23 May 2020 could have been a public interest disclosure within the meaning of section 43A of the ERA 1996 to that extent (only). However, given that we concluded that even in so far as it included a complaint about not being given breaks it was about the claimant's situation only, on the facts it was not such a public interest disclosure. We nevertheless considered whether the claimant had been treated detrimentally for sending that email.

(3) On 11 June 2020, Mr Szlacheta complained to a new team leader from Warlite (Mr Szlacheta does not know his name but believes he was of Cypriot nationality, which may help Warlite identify him) that he had not had a break in at least 9 hours

103 We did not hear evidence from Kiri, and as a result, we were prepared to conclude that the claimant made this complaint. However, assuming that it was made, we concluded that (1) it concerned only the claimant's private, or personal, situation, and, therefore (2) the claimant did not reasonably believe that he was, in making the complaint, making a statement which it was in the public interest to make. We nevertheless considered whether the claimant might have been treated detrimentally by the first respondent for asserting on 11 June 2020 to Kiri that he had not had a break for at least 9 hours.

(4) On 15 June 2020, in an email to Mr Barella and Ms Rideout and in Whatsapp messages to Mr Barella, Mr Szlacheta complained that his shifts had been cancelled with short notice and that he was not being given adequate breaks and questioned whether he was being treated badly because he had complained about breaks

104 The situation was similar in regard to the claimant's fourth claimed public interest disclosure. It too was, we concluded, (1) a complaint which concerned only the claimant's private, or personal, situation, and (2) the claimant did not reasonably believe that he was in making that complaint making a statement which it was in the public interest to make. We nevertheless considered whether the claimant might have been treated detrimentally by the first respondent for sending that email, which we have set out in paragraph 78 above.

(2) Was the claimant treated detrimentally within the meaning of section 47B of the ERA 1996?

105 The claimant's claim of detrimental treatment within the meaning of section 47B of the ERA 1996 was stated by EJ Smeaton in paragraph 13.6 of her record of the hearing of 20 October 2021 which we have set out in paragraph 9 above. Taking them in turn, our conclusions on the elements of that claim were as follows.

(1) From the end of April 2020 onwards, Warlite failed to provide Mr Szlacheta with breaks at appropriate times or at all

106 Given our conclusion stated in paragraph 56 above that it was Compass and not the first respondent which determined when the claimant received breaks, this claim had to, and did, fail.

(2) From the end of April 2020 onwards, the supervisor referred to above at paragraph [13.3.1 set out in paragraph 9 above] made jokes about Mr Szlacheta raising complaints about breaks

107 This complaint was (see paragraph 42 above) also about the acts of Compass and not the first respondent. It too therefore had to, and did, fail.

(3) On 19 May 2020, Mr Szlacheta was made to go home mid-shift

108 Having (see paragraphs 63 and 67 above) accepted the evidence of Mr Barella about the reason why the claimant was sent home early on 19 May 2020, we concluded that that sending home was effected not by the first respondent but by Compass, at the direction of Barnet Hospital. Thus the claimant's third claim of detrimental treatment by the first respondent within the meaning of section 47B had to, and did, fail.

(4) On 12 June 2020, Mr Szlacheta's shifts were cancelled at late notice

109 Similarly, the cancellation of the claimant's shift of 12 June 2020 resulted from a decision made by Barnet Hospital: the decision was made by Ms Fairbairn as described by Mr Barella in the evidence to which we refer in paragraphs 83 and 87 above. We concluded both for that reason and in any event that Mr Barella's and therefore the first respondent's decision to cancel the claimant's shift of 12 June 2020 was made to no extent because the claimant had claimed that he had not been given proper rest breaks.

(5) Warlite failed to respond to email or Whatsapp messages sent by Mr Szlacheta on 15 June 2020

110 Mr Barella's stated reasons for not responding to the claimant's email of 15 June 2020 at page 144 are set out by us in paragraph 84 above. We accepted that they were the genuine reasons for Mr Barella not responding to that email. In the circumstances that

110.1 the claimant had refused new work from the first respondent, as we conclude in paragraphs 79 and 87 above, and

110.2 the claimant's email of 15 June 2020 at page 144 was disingenuous in so far as it implied that he had not been given that explanation,

we concluded that no reasonable person in the position of the claimant could have regarded the failure by the first respondent to reply to that email as a detriment. Thus, it was not detrimental treatment of the claimant within the meaning of section 47B of the ERA 1996 to fail to respond to that email.

111 In addition, assuming that the claimant was claiming that the first respondent had not responded to his text of 12 June 2020 at page 138, which we have set out in paragraph 77 above, in the light of our conclusions stated in paragraphs 86 and 87 above, we had to, and did, reject the contention of the claimant that the first respondent did not respond to that text.

The claimant's unpaid wages claims

112 Given the circumstances stated in paragraph 37 above, the deduction by the first respondent (and, for the avoidance of doubt, the second respondent) of £60 from each of the claimant's wages payments was an unlawful deduction, contrary to section 13 of the ERA 1996. The claimant was accordingly entitled to the sum of £120 in that regard.

113 Given what we say in paragraph 66 above, the claimant was owed by the first respondent the sum of £73.60 by way of unpaid wages, having agreed to pay him for the 8 hours that he did not work on 19 May 2020.

114 Given what we say in paragraph 89 above, the claimant was underpaid the sum of £55.20.

115 Given what we say in paragraph 90 above, the claimant was underpaid in addition the sum of £292.60.

116 It was neither necessary nor possible to discern whether there had been a failure to pay the claimant holiday pay in accordance with regulation 14 of the Working Time Regulations. If and to the extent that there was such a failure, it will be remedied by the payment by the respondent of the sum of £292.60 to which we refer in the preceding paragraph above.

117 The claimant was accordingly underpaid a total of £541.40. To that extent, and to that extent only, the claim succeeded. From that sum national insurance and (if applicable) income tax will have to be deducted, under the Income Tax (Pay as You Earn) Regulations 2003.

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Employment Judge Hyams

Date: 9 November 2022

Sent to the parties on:

21 November 2022

For Secretary of the Tribunals