EMPLOYMENT TRIBUNALS

Claimant: Mr B Handford

Respondent: Ms Y Shkop

Heard at: Watford
On: 16-17 and 20 January 2023

Before: Employment Judge Caiden

Representation
Claimant: In person
Respondent: Mr L Wilson (Counsel)

RESERVED JUDGMENT

1. The applications to admit more documents into the agreed bundles before the Tribunal by the Claimant and Respondent is granted.

2. The Claimant's application to have parts of the Grounds of Response struck out is refused.

3. The Claimant's complaint of automatically unfair dismissal under s.100(1)(c) Employment Rights Act 1996 is not well-founded and is dismissed.

4. The Claimant's complaint of unlawful deduction of wages is not well-founded and is dismissed.

5. The Claimant's complaint of the Respondent being in breach of the requirement to provided amended written statement of particulars is well founded and succeeds. The term that was required to the amended statement was that "The Respondent would pay the Claimant's healthcare costs whilst he was obliged to comply with the Respondent's own Covid-19 secure bubble requirements during his employment."

REASONS

A) Introduction and issues

1. By an ET1 presented on 26 November 2021 the Claimant claimed he had:
   1.1. been automatically unfairly dismissed;
   1.2. suffered unlawful deductions from his wages;
   1.3. not received an amended statement of written particulars as required by statute.

2. The Claimant and Respondent, represented by Mr Wilson as was the case before this Tribunal, attended a Preliminary Hearing on 21 November 2022 during which the issues were clarified and distilled in a list of issues. Those liability issues were discussed, refined slightly, and agreed by all the parties at the commencement of the present Tribunal hearing on 16 January 2023. These agreed issues are set out below:

   Automatically unfair dismissal

   2.1. Was the reason or principal reason for the Claimant's dismissal that he brought to his employer's attention, by reasonable means, circumstances with his work which he reasonably believed were harmful or potentially harmful to health or safety? If so, the Claimant has been unfairly dismissed.

   2.2. The claimant relies on a conversation he had with Edgar Alijev allegedly on 1 July 2023, for which the Tribunal were provided with an agreed transcript, during which he states he brought to Mr Alijev's attention that a wrist injury incurred by the Claimant came about after a failure of the Respondent to provide health and safety training on how to prepare and cut lobsters.

   Unlawful deduction of wages

   2.3. Were the wages paid to the Claimant on the ten dates specified in the particulars of claim at paragraph 29 less than the wages that were "*properly payable*"? The dispute between the parties is whether the Claimant actually did more than his 48 hours per week, in effect overtime, by virtue of the hours he worked which included disputed working time of the Claimant having meals with the family and being on 'standby' to deal with the child and/or periods where he was in quarantine.

   Amended statement of particulars

   2.4. When the proceedings were begun, was the Respondent in breach of its duty to give the Claimant amended written statement of particulars namely failure to include reference to the alleged agreement to cover Healthcare costs during his employment and/or an alleged agreement to cover for the Claimant's wrist surgery.

B) Preliminary matters

3. Throughout the 15-16 January 2023, this being all stages prior to submissions, the Respondent, who speaks Russian, had the benefit of court appointed interpreters who relayed the relevant information into Russian and the Tribunal,

and other English speakers in attendance, had the benefit of any answers given in Russian by the Respondent being relayed into English. The interpreters, it was a different one on the 15 and 16 January, took the relevant affirmation and the Tribunal was satisfied that the proceedings could fairly proceed.

4. At the commencement of the hearing the Tribunal was provided with:
   4.1. a bundle of documents for the hearing which ran to 549 pages plus index. In these reasons page numbers in **bold** relate to this bundle;
   4.2. witness statements of three witnesses which were contained in the bundle at **pp.124-167**. All three witnesses, Mr Alijev, the Respondent, and the Claimant gave live evidence before the Tribunal having taken an affirmation;
   4.3. a bundle of documents relied upon for applications that ran to some 666 pages plus index;
   4.4. a skeleton argument on behalf of the Claimant. This document was updated and the finalised version, which the Tribunal had regard to, was redated on the front sheet 20 January 2023.

5. Additionally, both parties wished to admit more evidence. The Respondent wished to provide a document from the tennis coach which the Claimant did not object to. The Claimant in turn wished to provide a Claimant's bundle of documents that ran to 32 pages plus index. The Respondent did not object to this save for page 21 which was titled as metadata and stated that properties of the recording that was provided, and transcribed, was 1 July 2021. In short, the Respondent objected to its inclusion stating that it had no way of verifying this and did not want it to be taken as meaning that the meeting did occur on the 1 July 2021. As an aside, the Claimant later in the hearing produced two further documents that were referred to in evidence and transpired in the bundle the wrong 'attachment' had been included, namely 29 June 2021 letter by Mr Sorene (Consultant Orthopaedic, Hand & Upper Limb Surgeon) and a cover email of 2 July 2021 from his secretary. These documents were not objected to by the Respondent. The Tribunal concluded that in respect of all these applications the documents should be admitted and gave relevant reasons at the time. These were in short that all were of potential relevance, had not been objected to and to the extent that it had (the one limited document) it could be dealt with during live evidence and submissions. In the Tribunal's view it made little sense to exclude a document that was of relevance, and not covered by privilege, in the context of hundreds of pages worth of evidence, on the grounds that the content of it was disputed when it would be no doubt later stated by the Claimant that he had the 'properties' of the document that could support his contention and then countered with that not necessarily being definitive evidence of the meeting being on 2 July 2021. Accordingly, all these extra documents were admitted into evidence.

6. The Claimant on the first day, following applications to admit evidence, sought to strike out parts of the Respondent response on the grounds that parts scandalous under rule 37(1)(a) of Schedule 1 to Employment Tribunals (Constitution and Rules of Procedure Regulations). These applications were initially made by letter of 13 November 2022, and ran to 11 separate applications to strike out. The Claimant confirmed that only five of these were pursued, namely 1, 4, 5, 10-11 and the letter setting these out was at pp.445-461 of the applications bundle. The Tribunal refused the application and gave

reasons at the time. In summary it was stated that the strike out power is discretionary, not mandatory, and the meaning of scandalous in this context is someone who is either misusing the privilege of legal process to vilify others or giving gratuitous insult to the court in the court of such process (*Bennett v London Borough of Southwark* [2002] EWCA Civ 223; [2002] IRLR 407 at [27]). In the present case the Claimant was in essence stating parts should not be believed given documentary evidence and therefore should be struck out. This however does not amount to the threshold 'scandalous' – there may be a difference as to the facts, but the statements were not misusing the legal process to vilify nor giving gratuitous insult. Moreover, the Tribunal would also not exercise any discretion. In the circumstances the correct course would be for the Claimant to challenge during evidence the relevant parts of the Respondent and make submissions as to why certain assertions made should be rejected rather than for in effect a 'mini trial' on certain aspects.

7. Returning to the documents before the Tribunal, the Tribunal confirms that it considered all the documents that had been provided and took particular care on pages within the hearing bundle which it was referred to during live evidence and were referred in the witness statements and in closing submissions.

8. Finally, it is noted that the hearing was unable to conclude within the listed two day period and the parties came back on the 20 January 2023 to make submissions. At that hearing the Respondent and her solicitor, who had attended the previous days in person, attended via CVP. The Tribunal confirmed with Mr Wilson that the Respondent was able to understand and provide adequate instructions. It was satisfied that this was the case and the Tribunal is grateful to both the Claimant and Mr Wilson for making themselves available for the extra day.

C) Findings of fact

9. The Tribunal heard and considered much evidence. It made the following findings of fact on the balance of probabilities of those areas that were material to the decision it had to make.

10. Prior to the Claimant's employment with the Respondent, the Claimant had worked for several families as a Governor or Male Nanny (what the Claimant referred to as "*Manny*"). The Tribunal will refer to this role simply as Governor. He started this career in around 2012 and provide the Tribunal with positive references from former employers (**pp.447-450** and Claimant's bundle page 12). The Tribunal accepts that the Claimant was well liked and valued by his former employers. Moreover, the Tribunal accepts that he developed a close bond with the Respondent's son and until the events that gave rise to his dismissal was equally a valued employee. The Tribunal commences with these findings of fact as at times the evidence before the Tribunal and submissions by the parties seemingly suggested that there were issues of, or the Claimant was concerned that it was being portrayed that, the Claimant not being capable in his job. The Tribunal finds that is not the case and indeed the Respondent herself in live evidence noted the bond the Claimant had with her son and that prior to the event leading to dismissal, which the Respondent relied upon in this Tribunal as being for a breakdown of trust and confidence rather than any allegation of lack of capability, he was successful in his role.

11. As well as being a Governor, the Claimant had a photography business which included wedding photography. This provided him with a significant income. From March 2020 onwards the effects of Covid-19 led to this photography business stalling and the Claimant in fact lost what he described as "*all income from a full well photography season in 2020*". The result was that the Claimant needed more than his then current 30-hour Governor role and commenced looking for employment with more hours. On 20 August 2020, the Claimant received the advert for the role of "*Live-in Governor*" for the Respondent by a private domestic staff agency (**p.237**).

12. The Claimant was interviewed for the post at the Respondent and was appointed to the role. The Tribunal heard evidence as to what occurred during these interviews and allegations were made as to what was stated, or rather not stated, during this process as the Claimant alleges that he was "*deceived*" into the role. However, none of this is material to the issues before the Tribunal and so no findings of fact are made.

The contract

13. Following some negotiations on clauses, the parties agreed a written contract of employment that was dated "*27 August 2020*". It was found at **pp.433-447**. It contained the following material clauses for present purposes:
    13.1. Clause 2.1, the Claimant's employment commenced on 1 October 2020 (**p.433**);
    13.2. Clauses 4.1 that his job title was "*Tutor*" to the Claimant's child who was born in January 2013 so was aged 7-8 during the Claimant's employment (**p.434**);
    13.3. Clause 4.3 that states "*You will perform such duties as an employee as are associated with your position, including those which may be set out in an appropriate job description which may be issued to you by the Employer from time to time, and any such other duties as the Employer may properly and reasonably assign to you without further remuneration*" (**p.434**);
    13.4. Clause 4.4a) detailed various responsibilities which went far beyond the traditional understanding of a "*Tutor*" but were consistent with that of a "*Governor*" (**p.434**). It also contained an obligation that in performing his duties "*in order to prevent the spread of COVID-19 infection, you must comply with preventive measures, rules of personal and public hygiene, including the regime of regular washing of hands soap or treatment with skin antiseptics throughout the working day, wearing masks, observing the regime of isolation from third parties, as well as control over the observance of hygiene rules by the child*" (**p.434**);
    13.5. Clause 4.4a.1) which prohibited the Claimant taking certain action which included "*You are prohibited …go about your business on a walk (go to stores, make appointments, etc…*" (**p.435**);
    13.6. Clause 4.4b) which included a statement that "*devoting the whole of your working time during your hours of work to those duties and acting always with good faith towards the Employer*" (**p.435**);
    13.7. Clause 4.4c) which stated in part "*comply with all reasonable and lawful directions given to you by the Employer*" (**p.435**);
    13.8. Clause 5, which stipulated that the place of work was the Respondent's residence in Ascot and that he could be required to work temporarily at other places in the UK, and he lived at the main residence of the Respondent at her discretion (**p.435**);

13.9. Clause 6 stated "*Your hours of work vary depending on the Employer's requirements. You will be informed on reasonable notice of your required hours of work each week and you are required to keep good communication with the Employer so that she can keep you informed of such required hours. You will be entitled to meal and further refreshment breaks as required by law, in each case to be taken at such times as are specified by the Employer. You may be required to work longer hours when the Employer is in the UK and shorter hours when the Employer is abroad. The Employee shall receive a minimum of one full day of rest per week.* [6.2] *The Employer reserves the right to vary your normal hours of work as necessary to meet the needs of the business*" (**pp.435-436**);

13.10. Clause 7 set the basic salary of £36,000 net per annum;

13.11. Clause 7.2 set out that the Claimant could only work in excess of 48 hours per week if he signed an opt out (which it was agreed he had and was at **p.446**), but further specified that "*Working hours exceeding 48 hours per week are subject to additional pay based on the wage rate. If for reasons depending on the Employer, the working hours are less than 48 hours per week full wages for that period are payable*" (**p.436**);

13.12. Clause 19.1.1 which set out a notice period of 4 weeks written notice minimum (**p.441**);

13.13. Clause 24 which confirms that the contract incorporates the "*statement of your terms and conditions of employment in accordance with the Employment Rights Act 1996*" (**p.442**).

Initial quarantine

14. Following the Claimant leaving his former post and being successfully appointed to the 'live in post' with the Respondent he ensured that his short-hold tenancy was to end on 9 October 2020. The Claimant planned to put his things in storage as he would not be taking all of these with him when he moved into the Respondent's residence in line with expected 1 October 2020 start date.

15. The Claimant and Mr Alijev, the Respondent's House Manager at the relevant time and in effect the Claimant's line manager given his role and fluency in English, spoke on the telephone on 29 September 2020. This was the first time the Claimant became aware of the quarantining arrangements prior to him moving into the Respondent's main residence in Ascot ("Ridge House"). At **p.243** there was an email between Mr Alijev and the Claimant confirming the arrangement would be that he would move into a flat owned by the Respondent in London on 1 October. It stated that on the 7 October 2020, the Respondent would book a Covid-19 test for the Claimant and following his negative result he would be moved into Ridge House. The email made clear that "*there have to be at least 5 days of isolation before you can do test*" and asked for a list of groceries so the fridge could be stocked for the Claimant. It is common ground that what was stated in this email did occur, that the Respondent paid for all food for the Claimant whilst he 'isolated' at her London flat and that he started receiving his salary.

Working practices at Ridge House and approach to Covid

16. Ridge House, where the Respondent lived primarily and the main place of work for the Claimant is located on the Wentworth Estate. The Wentworth Estate is an area of homes and woodlands that covers approximately seven square

kilometres in Surrey. It includes a well-known golf club, Wentworth Golf Club, and several large residential homes.

17. The Respondent employed other staff members. Some such as Mr Alijev and the chef 'lived out', whilst others such as the Claimant and housekeepers 'lived in'. The Claimant was the only staff member who resided at the main house in Ridge House with the others being in a separate building on the same plot of land as Ridge House (referred to as the staff cottage at times in the Tribunal hearing and below).

18. The Respondent, as indeed many were at the relevant time, was cautious of catching Covid-19. At the time there were no publicly available vaccinations, and the Tribunal was informed the main cause for her concern was her son's health conditions which meant that he was thought to be particularly vulnerable to Covid-19. The exact condition is not relevant as it was common ground between the parties that the Respondent's son had some condition that merited him being schooled at home virtually and not attending in person teaching like his fellow pupils. The primary school year for 2020-2021 in the main was in person (although there were various breaks) in contrast to 2019-2020 which had significant school closures from March onwards.

19. As a result of both the national issue and their own personal circumstances the Respondent's working practices including a number of Covid-19 mitigating measures. There was a suggestion during evidence that it was merely following government guidance and replicating the national situation. The Tribunal rejects this suggestion and finds that it went beyond guidance and what was occurring in the nation. In effect a Covid-19 secure bubble was being created which involved the following:
    19.1. the 'live out' staff were to remain at least 2 metres away from the Claimant, her son and the 'live in' staff, by way of example the chef would often cook outside under a Gazebo and Mr Alijev often remained outside of the house, or would wear special protective gear if required to come inside as well as maintaining social distance from others;
    19.2. the 'live in' staff were ordinarily restricted to the Wentworth estate and had to remain at least 2 metres away from others on the estate;
    19.3. if there was a need to leave the Wentworth estate for 'live-in' staff there would be a period of having to 'quarantine' before being able to return and work in the main residence as normal.

20. The Tribunal briefly pauses to explain why it concluded that the above restrictions were greater than those required by law and that there was in general a preclusion on leaving the estate for the Claimant. The Respondent stated during evidence that the contract excluded him from meeting with third parties but if he went out and followed health and safety, such as wearing a mask, that would "*be ok*". The Tribunal asked the Respondent what the situation would be if, which appeared to be completely lawful and in line with guidance, the Claimant left the estate to visit a supermarket quickly and wore a mask. The Respondent candidly admitted that she would be "*quite concerned so for first 5 days he would not have contact with child and also no doubt for 5 days would get paid. Cannot be sure if he wear the mask all the time*". In effect this answer corroborated the preclusion of leaving the estate. Further, as set out above at paragraph 13.4, the contract stated a need to have a "*regime of isolation from third parties*" which goes far beyond language of social distancing

that was commonplace at the time and is instead consistent with the bubble requirements set out above.

21. Returning to the working practices and approach to Covid-19, the Respondent provided all food to the Claimant. He was also able to make use of Tennis lessons and various facilities the property had, such as the swimming pool. In terms of eating meals, it was common ground that he ate nearly all meals with the family.

22. In relation to eating meals there was a dispute as to whether the Claimant was required to eat meals with the Respondent and her son, or whether this was merely an option with the other being to eat with other staff or prepare something himself. On this aspect the Respondent's account is preferred: eating meals with the family was in effect a choice or an option, rather than being mandated. As a matter of fact it appears to have become a routine or an expectation that he would chose that each day, hence a place was laid for him at the table, but it was not mandated. The reasons for coming to this conclusion are:
    22.1. there was evidence that even on days off he would eat with the family (see for example Respondent's witness statement [24], **p.127**). This seemingly goes against it being something that is purely to do with a mandated work requirement;
    22.2. there is nothing in any correspondence that shows the Claimant was required to eat with the family or that he would be disciplined for failing to do so, in fact the last few days of his employment he did not eat with them;
    22.3. the Claimant's witness statement does not set out any actual instruction to do this. The closest is at [25] (**p.143**) "*Additionally, on the first day of my employment, I was instructed that I would be eating dinner with the Respondent and her child. I assumed this would be just for the first day, to break the ice and to get to know each other a little. Instead, I discovered that the Respondent wanted me to eat with her and her child every meal time*". This does not amount to a specific instruction to eat every meal as such but merely a desire it appears.

23. As far as the Claimant's son was concerned he had a busy and varied schedule. There were online school classes that often started around 8am following breakfast and concluded at around lunch time. Thereafter there were private tutorials separate to school and sports, mainly tennis and golf. The Claimant would assist in so far as necessary if there were any technical computer issues with classes but was not teaching them, but he did need to take the Respondent's son to his golf and other live lessons. The Claimant did not do homework with the Respondent's son and after dinner time that was around 6.30pm the Respondent's son went to sleep at 7.30pm. Accordingly there were 12 hours in the day where the Claimant *may* have had some contact with the Respondent's son but equally there would be time when he did not, or he would be having a break even if it had to be spent on the Wentworth Estate.

<u>Access to Doctors and Christmas vacation</u>

24. On 7 December 2020, the Claimant was concerned by lumps under his skin and wanted to seek a medical opinion. He emailed Mr Alijev setting out the issue which drew attention this may cause given the request that "*we live in a secure bubble at Ridge House and that we do so potentially until summer*" (**p.403**) and asked if the Respondent would cover any required healthcare costs

privately so they could visit. The email noted "*This situation has made me realise we should have discussed healthcare provision before I started*".

25. In response to this message on the same date amongst other things Mr Alijev stated "*As per our recent telephone conversation, I would like to let you know that I have contacted Dr Harley…Answering your questions about healthcare costs, Yulia* [the Respondent] *has confirm, that she will provide necessary support and will cover all required healthcare costs, which you are isolating at Ridge House. These are unprecedented times, and it was almost impossible to predict and discuss everything during the interview process*" (**pp.403-404**). The Tribunal finds as a fact that, given the Claimant was never in fact isolating in the way it is commonly understood, the statement in this email was to cover all healthcare costs whilst the Claimant was having to abide by the Covid-19 healthcare bubble requirements set by the Respondent, see paragraph 19 above.

26. The Claimant received the relevant treatment over the Christmas period which was paid for by the Respondent. A further incident unrelated to this led to a telephone consultation with Dr Harley, the Respondent's private family doctor, prescribing antibiotics before the Christmas break and once again this was paid for by the Respondent. The Claimant was given the use of the Range Rover and spent Christmas with his partner. Thereafter, it was arranged that the Claimant would once again 'quarantine' in the Respondent's London flat from 31 December 2020 until 10 January 2021. A Covid-19 test was arranged to confirm that the Claimant was negative prior to his return to Ridge House.

<u>Lobster incident</u>

27. On 25 February 2021, two live lobsters were delivered to Ridge House in large polystyrene boxes filled with ice. The lobsters had been ordered by the Respondent and arrived after the Chef had left. The Respondent's son had seen the lobsters and was excited at the prospect of these being cooked. The Claimant stated that he was asked by the Respondent to prepare the lobsters, having been asked to contact the chef to find out their shelf life (ie could they last until the following day) and how best to prepare them. The Respondent stated that this was not the case, that the Claimant had asked if he could cook lobsters for his dinner. The Tribunal prefers the Claimant's account on this and finds that he was asked in effect to prepare the lobsters by the Respondent once it was concluded that there was a risk they would not last until the following day. This is because of the following:
    27.1. the Respondent, the only other party giving witness evidence that could assist other than the Claimant, simply stated in her witness statement that she did not ask the Claimant to cook the lobsters but she never explains why the Claimant would opt to cook such an unusual, and expensive, food. Effectively all that was being stated was the Claimant was simply cooking his food (which was the position taken in the ET3, **p.34** [20]). Furthermore, the Claimant asked the Respondent to provide further information on the position in its ET3 including who paid for the lobsters, arranged the delivery, the timing of the cooking (**pp.49-50** [23]). The Respondent declined to provide this information in a response of 6 April 2022 (**p.59**). The Tribunal does not draw any inference from that document, but it does show that the Respondent was on notice well before exchange of witness statements aspects of the Claimant's case in relation to this and therefore it is surprising that the Respondent's statement is so

brief on this aspect and silent on critical parts. The Tribunal does draw an inference in terms of those aspects that the Respondent was silent on in her witness statement, namely payment for the lobsters, why they were delivered that day and the timing of the cooking were as set out by the Claimant (it not having any positive case on these despite the prior notice). The inferences drawn are that the Respondent paid for them, chose the delivery time in terms of that day, they were prepared in part when the Claimant's son was there and it was not a case of it being ordered for the Claimant or anyone to cook;

27.2. the Claimant had no knowledge on how to cook lobsters and his own evidence was that he initially thought that they were boiled but instead following contact with the Respondent's chef opted to stun them by freezing them. This aspect was not challenged, his lack of knowledge of cooking lobsters, and the Tribunal conclude that it is unlikely that someone without any knowledge in preparing lobsters would undertake such a task without any prompting. Additionally, it is inherently unlikely that someone would ask to use an expensive and unusual ingredient, in this case a live lobster, or just cook such without any prior permission from the employer who bought it (the Respondent in live evidence accepted she paid for all food in the house including the lobster). This is what would have to occur for the Respondent's account to be accepted;

27.3. in the Claimant's bundle at page 20 there is a phone call with a number that matches that of the Respondent's chef lasting some 8 minutes and and at **p.337** there was a message from the Chef to the Claimant providing a YouTube video how to cut and prepare a live lobster but with the additional text of "*how to cut it but do the ice stage for extra humanness*". This is consistent with the Claimant's account in relation to his lack of knowledge (it is accepted that one of course could ask even on the Respondent's version of him just wanting to prepare them). Additionally, the fact that there was a phone call and not merely a short WhatsApp exchange is more likely, given no underlying friendship has been established, to suggest the Claimant was asked to contact the chef in relation to the lobsters;

27.4. it is consistent with the explanation given in the Claimant's letter of 4 July 2021, **p.258** and **p.344**. The only response refuting this was at **p.261** which was something that was during live evidence said in part not to have been well translated. This does not address however any request to cook the lobsters or other material facts but simply denies in broad terms that the Respondent made a request for the Claimant to cook them;

27.5. it is consistent with the transcript of the early July 2021 meeting (the date is disputed but not material for purposes). It is stated at **p.172** "*Now this this was a work accident, like I was, I was asked by Yulia to chop some lobsters because the lobsters arrived late. So the chef wasn't here. So Yulia asked me to prepare the lobsters and she didn't want to boil them…*"

27.6. the Respondent's account is inconsistent with its case in terms of meals generally which is the Claimant rarely cooked and that was the reason for eating meals with the family. It is surprising for such a person as described by the Respondent to then want to undertake the effort of preparing something that required more preparation.

28. Whilst preparing the lobster, the Claimant pressed down hard on a knife and sustained a wrist injury. It was disputed whether the cause of the injury was

the preparation of the lobsters. Once again, the Tribunal accepts that it was the cause for the following reasons:

28.1. there was no other competing explanation that made more sense, the suggestion that it was whilst hitting a hand in the swimming pool during the course of doing a stroke seems less likely as that would affect the fingers which is what the Claimant stated in evidence was the part he hurt in the swimming pool. The Claimant's bundle at page 31 contained information that the condition he had been diagnosed as having, scapholunate torn ligament, often is caused "*when there is a lot of stress put on the wrist. A common cause is a fall onto the hand*" that seemingly was consistent with his explanation of bearing all his weight down on his wrist to cut through the hard shell of the lobster;

28.2. a consultant orthopaedic hand surgeon on 1 April 2021, so just over a month after the incident, records this being the cause of the injury whilst taking a history in consultation (**p.339**). Further consultants record the same on 22 June 2021 (**p.341**) and 7 September 2021 (**p.349**). A further consultant letter in the Claimant's bundle at page 11 by Mr Rahimtoola records that he was informed "*in the initial consultation, on 25 March 2021, when Mr Handford informed me his injury occurred "4 weeks ago", being 25 February 2021*" and explains that in the dictation delay he failed to make the date of injury clear;

28.3. this was the explanation the Claimant gave near the time as set out above at paragraphs 27.4-27.5. Additionally on 6 April 2021 he stated that "*I saw a doctor regarding my wrist, which I injured whilst cutting the lobsters, I received a diagnosis that my scapholunate ligament is torn*" (**p.249**);

28.4. the Respondent in live evidence actually stated "*I don't doubt or question his version of events of how the injury to hand occurred*".

Relevant events from April 2021 up to the Claimant's dismissal

29. The Claimant's wrist injury led to requiring more medical advice. It was coming up to the period of Easter holidays and he had MRI scans and relevant consultations. This showed that the Claimant suffered a "*torn scapho-lunate ligament rupture, which his 100% ruptured*" (**p.339**). The Claimant was informed that there were two options (a) direct repair which needs to occur within 6 weeks of the injury or (b) reconstruction which can occur if the first option is not successful or if the 6-week period has elapsed. The estimated recovery time would be 6 weeks full immobilisation and thereafter another 4-6 weeks post-operative rehabilitation. In effect it was a 3-month recovery period being foreseen at that stage.

30. The Respondent was informed of the consultant's opinion on 6 April 2021 (**p.250**). The Claimant suggested in this email that this surgery occurs during the summer holidays to minimise disruption to the Respondent and also stated

> *None of us could have foreseen me injuring my wrist like his. Yulia* [the Respondent] *kindly agreed to cover my medical expenses while I am living in a secure bubble. I need confirmation that this will now include the costs of the surgery and physiotherapy.*

31. By email of 12 April 2021, Mr Alijev stated "*I would like to confirm in writing that Yulia* [the Respondent] *will cover surgery costs as agreed previously*" (**p.251**).

32. The Respondent's son returned on 10 May 2021 to School. However, there were times when he did miss school and was at home owing to his condition. The Claimant did the school run when the Respondent's son was at school.

33. Delays with the MRI scan arriving at the hand surgeon and difficulties with payment methods required by the surgeon led to the Claimant being asked to find another surgeon to conduct the surgery. The surgeon that was consulted was happy to conduct the surgery, but it later transpired was not available after 19 July 2021 which was when the Respondent was leaving with her son for their summer holidays. A consultation was booked for another hand surgeon and the relevant quotes were provided to the Respondent which on 28 June 2021 the Claimant confirmed via WhatsApp message to Mr Alijev (**p.329**). The email itself is on **p.253** and there is a later message that same day with more details on **p.252** and in relation to recovery period notes "*Although I only need 6-9 weeks of physiotherapy, it will be 3-6 months until I gain full strength and range of movement in my wrist*".

34. On 30 June 2021, Mr Alijev contacted the Claimant to request a face to face meeting the following day to discuss the arrangements around the Claimant's wrist surgery. On 30 June 2021, the Claimant by WhatsApp contacted Mr Alijev to say "*You said we would talk about the surgery this morning. The first surgeon is holding the* [1]*2 August date and I need to let her know today whether to cancel it. The other surgeon is available still for the 19th of July but they will not hold the date until it is paid for*" (**p.330**). His reply was "*I have not forgot about it, will speak definitely today*". In fact, it was common ground that no such meeting actually took place.

35. On 1 July 2021, the Claimant had a meeting with Mr Alijev in the morning. The Respondent was not present at this meeting. This is the meeting in which the Claimant relies upon as raising the matter of health and safety set out at paragraph 2.2 above. There is a transcript of this meeting at **pp.169-186**. At this point it is worth noting the Respondent alleged the meeting did not occur on 1 July 2021 but occurred *after* a meeting that occurred between the Claimant, Mr Alijev, and the Respondent which it was common ground did take place on 1 July 2021. The Respondent's case was this meeting that was recorded occurred on 2 July 2021. This is not accepted by the Tribunal and the Tribunal finds the relevant meeting occurred in the morning on 1 July 2021 for the following reasons:
    35.1. Mr Alijev who was present at the meeting's witness statement is equivocal at [29] he states "*I remember that Brian and I also had a meeting on one of the mornings which he recorded. I do not remember the exact date, but I think it took place after the initial meeting on 1 July 2021*" (**p.137**). In this statement Mr Alijev is not certain of any date and merely "*thinks*" it was after the 1 July 2021;
    35.2. by contrast the Claimant has at all times been clear the meeting occurred on 1 July 2021;
    35.3. there was a WhatsApp message at 08:19 on 1 July 2021 that stated "*Hi, I am running late. Should be in Ridge House at 8:50*" (**p.330**). This is consistent with a meeting occurring in the morning between the Claimant and Mr Alijev, there being no other plausible reason given by the Respondent for this exchange;
    35.4. the content of the meeting makes no reference to an earlier meeting with the Respondent, Mr Alijev and the Claimant (which was the

Respondent's case if its order of meetings were accepted). This is surprising if the Respondent's case was correct. By contrast it is entirely consistent with the Claimant's case. Indeed, equally consistent is that the meeting starts pretty soon with a reference to "*initially when we discussed that uh we will have a medical compensation was to have, to make sure that you are shielding within a house and, uh, initial plan was that the surgery will take X amount of weeks that you can do it during the summer break. Now, it seems that it's gonna take much longer about five, six weeks plus also the, how to you call it rehabilitation*" (**p.170**). This, it seems to the Tribunal, refers to the initial agreement to cover the costs of the surgery and the "*now*" to the most recent email. This is reinforced by later in the meeting at **p.175**, Mr Alijev stating "*we discussed if you could find out the cost, the cost came back only last week. Yeah, last week, or beginning of this week. So, and also durations, when I asked you how long is gonna take, how long will be the physio, all of this information came up only now*";

35.5. the Claimant's bundle at page 21 suggests the audio file of "*Recording of conversation with Edgar*" was "*Modified: Thursday 1 July 2021 at 09:27*". The Respondent stated it had not checked the truth of this but it supports the Claimant's case, and in effect for the Respondent to be correct the Claimant would have needed to either have his device set on the wrong date by 1 day or deliberately tampered with it to change the date. These are less likely to occur than a straightforward reading of the date on the file.

36. In relation to the content of this meeting, which applies even if the Tribunal was wrong as to the date, with respect to the issue of the Claimant's injury and health and safety the following was stated:

36.1. by the Claimant "…*But when we agreed to healthcare….that must have also included in consideration accidents that might happen because it's healthcare. Anyone could have an accident…you know*" (**p.172**);

36.2. by the Claimant "*Now this this was a work accident, like I was, I was asked by Yulia to chop some lobsters because the lobsters arrived late. So the chef wasn't there. So Yulia asked me to prepare the lobsters and she didn't want to boil them because she didn't want them screaming in front of* [her son]. *So she asked me to chop them…so it was an accident at work*" (**p.172**);

36.3. by the Claimant in response to the query what happened to your hand "*Well, I was chopping the lobsters and the force of pushing down and cutting through the lobster….caused the injury*" (**p.173**);

36.4. by the Claimant "*I was at work, I was asked by my boss to do something…Ok so it was a work accident. I injured myself. Hang on, I'm trying to think what I'm saying, I'd received no training on how to cut lobsters. So there was no health and safety training*" (**p.179**). Mr Alijev stating shortly after this passage "*…there is no point even continue conversation. Because you're now trying to go from the legal side. I haven't received training for cutting lobsters, then in this case, we have to look whether you have all the training when you applied for the role, caring with* [Respondent's son]*, do you have first aid, do you have….If you're coming from that way, then we can go from different direction as well. So let's not try to be smart from the legal side*" (**p.179**).

37. The meeting lasted for nearly 30 minutes. The balance of the meeting did not cover the above. A lot concerned the period of time the Claimant would be away and the need to find a substitute, the scope of the agreement to cover

costs (including his pay, medical costs, and potential insurance to cover it), confirmation that the Claimant intended to have the surgery.

38. Also on 1 July 2021, but during the afternoon there was a meeting between the Claimant, Mr Alijev and the Respondent. This was at around 17:00. It was common ground that there was a meeting in the afternoon on this day and it is confirmed by a WhatsApp sent by Mr Alijev "*Yulia wants to have a conversation while* [her son] *will be in lesson with…at 5pm*" and later him stating "*Can you come to the terrace please*" at 17:11 (**p.330**). The meeting involved discussion as to the recovery time and what would happen whilst this would taking place. The Respondent characterised the Claimant as "*getting very argumentative*" and so decided to break the meeting to allow all to reflect (**p.130** [38]). The Claimant in his statement (**p.158** [105]) characterised his tone as "*frank and forthright; my impression was the that Respondent found it intolerable because she refused to take any personal responsibility for the situation*". On the Claimant's account the meeting ended because the Respondent's son was noted as being nearby (looking out from his window).

39. On the morning of 2 July 2021 (08:38) the Claimant sent a WhatsApp message saying "*Would you ask Yulia if we can continue our discussion regarding the surgery after my day off tomorrow?*" (**p.331**). Later that day at 17:01 he said he was "*still trying to figure out a solution to the surgery problem. Yulia does not need me to work from the 19th of July as she is leaving on holiday. Do you know what date she is back form holiday*" (**p.331**).

40. The Respondent suggested a further meeting occurred on the 2 July 2021 on the patio and that at this meeting the Respondent's son indicated he could hear something, was apparently upset, and this led to the meeting abruptly concluding. The Claimant suggested that was not the case and that this what happened at the meeting on 1 July 2021 (although disputing the Respondent's son would have actually heard anything).

41. The Tribunal concludes that there was in fact a meeting on 1 July 2021 and also on 2 July 2021, and that the Respondent's son in fact only overheard the meeting on 2 July. In short, it accepts the Respondent's case in this regard. Whilst this seems inconsistent with the WhatsApp request to have a meeting after the day off, it is supported by the account of two witnesses (the Respondent and Mr Alijev) and is consistent with a WhatsApp message at 17:01 trying to find a solution, and consistent with the letters after the event below that refer to the 2 July 2021. It was also the Claimant's working day that day. Ultimately, however, as set out further below, even if the Tribunal is mistaken and the Claimant's account is correct not much turns on this as the raising of the health and safety matter occurred certainly before these meetings on the Tribunal's finding of fact and before any decision by the Respondent to dismiss. The Respondent confirmed in her live evidence that her decision was in fact already made up by the conclusion of the 2 July 2021 and she just needed to discuss it with her lawyers.

42. The Claimant was asked to move out of the house and into the staff cottage on 3 July 2021 (which was his day off). On 4 July 2021 at 22:14, the Respondent emailed the Claimant. This email stated (**p.256**)

> *I have to admit that I am drastically upset with the conversation that had place in my Patio on Friday, the 2nd of July 2021, between Edgar you and*

me….[it] *was not at all constructive and was held in intolerable tone. What is even worse my son witnessed it. And the worst of all is the result – confidence between us is destroyed…Now I see as my main goal to go out of this situation in the most proper manner. May I ask you to please come to Patio at 12am tomorrow in order to settle the situation?* (the Tribunal pauses to note that 12am is surely a typographical error and the meeting was to occur at midday, 12pm).

43. On 5 July 2021 at 00:40 the Claimant replied (**p.257**) "*I apologise if you misunderstood my tone. I was trying to explain my understanding of the agreements we have made to the best of my abilities under the circumstances. I, too, am disappointed that our working relationship has deteriorated. I have attached my written response to the discussion we had on the Patio on the 2nd of July which I had written before receiving your email….*"

44. Later on 5 July at 11:29, the Respondent replied to the Claimant (**p.261**) "*Thank you for your answer. I has upset me even more than our conversation on Friday*" and it continued to set out the Respondent's case that it did not request the Claimant cook the lobster and that she did not consider it her obligation to pay private doctors bills. She stated that she was "*ready to pay expenses with respect to the treatment of your right wrist…in order to ensure that you can still be in "our bobble*" *with no threat to infect with Covid-19 my son who is not vaccinated*". As an aside and as already noted above, in live evidence the Respondent stated that in fact the letter was poorly translated.

45. On 5 July 2021 at noon there was a meeting between the Claimant, Mr Alijev and the Respondent. This meeting was brief and the Claimant was informed that he had been dismissed. The Respondent gave a letter to him (**p.419**) and in any event an email dismissal letter was provided on the same day (**p.347**). These letter do not set out a reason for the termination with immediate effect. In live evidence she stated that her "*main concern for me is my child and if I see anything that may affect the safety of my child or any subject to cause any distress*".

46. The Claimant was asked to leave the premises on 5 July 2021 and different accommodation was arranged for him. The Claimant wrote the Respondent's son a card explaining that he "*won't be coming back to see you at Ridge House….We had a lot of fun together and I will miss you a lot*" (**p.546**). The Respondent confirmed that the Claimant did have a good bond with her child and he was sad to see him leave. No replacement for the Claimant was ever found and in fact the Claimant's son has had better school attendance since the start of the 2022 academic year.

D) Relevant legal principles

Automatically unfair dismissal

47. Section 100 Employment Rights Act 1996 ("ERA") sets out automatically unfair reasons for dismissal for "*Health and safety cases*". Unlike ordinary unfair dismissal there is no qualifying period of service required (s.108(3)(c) ERA disapplying the usual requirement for two years continuous service for s.100 ERA). The relevant automatically unfair reason alleged in the present case is s.100(1)(c) ERA:

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—…(c) being an employee at a place where –
(i) there was no such representative or safety committee, or
(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

48. In terms of relevant case law, the Tribunal had particular regard to the following:
    48.1. in addition for s.100(1)(c) ERA to be engaged there are three conditions (a) it is necessary to show that it was not reasonably practicable to raise the health and safety matter with the safety representative or committee, (b) the employee must have brough to the employer's attention by reasonable means the circumstances that he reasonably believes are harmful or potentially harmful to health and safety, (c) the reason for his dismissal or at least the principal reason is the fact the employee was exercising his rights (*Balfour Kilpatrick Ltd v Acheson* [2003] IRLR 683 at [47]);
    48.2. the issue of the reason for the dismissal is in effect a 'reason why' question, and so if the employer has no knowledge of the protected act, of if he dismisses for a reason quite distinct from the protected act, then the automatically unfair dismissal provisions will not bite (*Acheson* at [65]);
    48.3. the fact that something is lawful does not mean that an employee cannot reasonably believe something is harmful or potentially harmful to health and safety, the focus is on what is in the individual's mind and whether that is reasonable (*Joao v Jurys Hotel Management UK Ltd* UKEAT/0210/11/SM [19]-[20];
    48.4. the scope of s.100(1) ERA protection is broad, so whilst it is possible for conduct to be separated out, for example wholly unreasonable, malicious or irrelevant to the task at hand could mean an employee losses protection, there are policy reasons for Tribunal's approaching such arguments by employer's with caution (*Sinclair v Trackwork Ltd* [2021] IRLR 557 [10]-[13])
    48.5. in cases where there is insufficient continuity of employment for an 'ordinary unfair dismissal, the burden of showing the automatically unfair reason under s.100(1) ERA is on the employee *(Maund v Penwith DC* [1984] IRLR 24 at [50] and *Parks v Lansdowne Club UKEAT/310/95*);

Unlawful deduction of wages

49. The right not to suffer unauthorised deductions is set out in s.13 ERA. The time limits for bringing unlawful deductions claim is within 3 months of the deductions, subject to extensions provisions for ACAS early conciliation and the deduction being part of a series (s.23).

50. In an unlawful deduction of wages context it is the worker who bears the burden of establishing on the balance of probabilities that there has been a 'deduction' (see *Timbulas v Construction Workers Guild Ltd* EAT/0325/13 [17], a case where the Claimant was unsuccessful in claiming lack of holiday pay as a deduction of wages as he failed to provide evidence to indicate which days holiday was taken and merely pointing to payslips showing some days were not paid was not enough).

51. Although not strictly about s.13 ERA, a significant amount of the Claimant's argument was that pursuant to the Working Time Regulations 1998 ("WTR") a lot of time not actually doing work was still "*working time*" the following matters were considered:
    51.1. reg.2 WTR defines working time as "*(a) any period during which he is working, at his employer's disposal and carrying out his activity or duties*";
    51.2. EU law establishes that even standby time counts as working time when no work is undertaken constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests (*DJ v Radiotelevizija Slovenija* [2021] IRLR 479 at [37]). *DJ* at [43] noted however that if workplace includes or is indistinguishable from the worker's residence, the mere fact that, during a given period of stand-by time, the latter is required to remain at his or her workplace in order to be able, if necessary, to be available for his or her employer, does not suffice for that period to be classified as 'working time' within the meaning of the directive;
    51.3. although not argued, the Tribunal observes that by virtue of reg.19 WTR the 48 hour weekly maximum would not apply to the Claimant in his role as it seemingly falls within "*domestic servant in a private household*";
    51.4. the case of *Anderson v Jarvis Hotels Plc UKEAT/0062/05* in a contractual claim applied EU law concepts to determine if the time sleeping at a hotel on standby counted as working hours to be paid for, even if not disturbed.

Amended statement of particulars

52. Section 4 ERA requires an employer to inform a worker of any changes to the particulars required under section 1 ERA within no more than 1 month. At s.1(3) ERA this includes
    (d) any terms and conditions relating to any of the following….(ii) incapacity for work due to sickness or injury, including any provision for sick pay
    …
    (da) any other benefits provided by the employer that do not fall within another paragraph of this subsection.

E) Analysis and conclusions

53. The Tribunal sets out its analysis and conclusion on the claims, having regard to the agreed issues which are set out at in the sub-paragraphs to paragraph 2 above.

Automatically unfair dismissal

54. Turning first to the claim of breach of s.100(1)(c) ERA, the starting point is to acknowledge that it is common ground that the Respondent had no health and safety representative or committee. This is not unusual for small private employer's, in this case someone having household staff, but means the only condition for protection from dismissal is that the content of the conversation on 1 July 2021 amounted to the Claimant bringing to his

> *employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,*

55. The Tribunal will consider each of the aspects above remaining aspects of s.100(1)(c) ERA protection in turn, paying particular regard to the arguments raised by the Claimant and Respondent, before addressing the separate question of the reason for the dismissal (that is condition first condition of s.100(1)(a) as analysed by *Acheson*, see paragraph 48.1 above).

56. In relation to whether a conversation with Mr Alijev on 1 July 2021 could amount to the Claimant meeting the brining his "*employer's attention, by reasonable means*" a health and safety issue, the Tribunal concludes it could. In this case he was effectively line managed by Mr Alijev. Mr Alijev was an individual who information to his employer, the Respondent, was continually relayed. Even important personal and contractual matters, such as those of his health, were dealt with via Mr Alijev. Further, Mr Wilson did not suggest in submissions that the conversation had to be had directly with the Respondent, who in any event would have needed a translator present. The issue therefore is not that he chose to discuss matters orally with Mr Alijev but the content of the discussion. That is did the Claimant tell Mr Alijev about "*circumstances connected with his* [the Claimant's work] *which he reasonably believed were harmful or potentially harmful to health or safety*". In relation to the content the material parts are set out at paragraph 36 above, which can be summarised as the Claimant informing that:
    56.1. he had been asked by the Respondent to prepare lobsters, in particular to chop them;
    56.2. he had no training in this, and received no health and safety training on this matter;
    56.3. he injured himself during the course of this chopping.

57. Turning to the "*circumstances connected with his work*", Mr Wilson did challenge that the Lobster Incident was outwith this. The Respondent after all alleged that the Claimant was simply cooking dinner but happened to live at his workplace. On this aspect the Tribunal has already found as a fact that the Respondent on balance did ask the Claimant to prepare the lobster and he was injured in this process (see paragraph 27-28 above). The fact that it may have been done whilst on a 'break' or something that could be done outside of work does not detract from it meeting the broad phrasing of "*circumstances connected with his work*". As noted in *Sinclair* (paragraph 48.4) there are policy reasons for s.100(1) ERA granting broad protection. In this context the

Respondent asking the Claimant to prepare lobsters see by her son during regular working hours is something "*connected with his work*". It was only because of their working relationship as employer and employee that he was being given the instruction. The protection of s.100(1) ERA would be severely eroded if an employer were able to defend it on the basis that a request of an employee was not in fact properly connected with his work because it was outside of the contract or something they should not have been doing. That would often be the case in health and safety cases, and the point is that an employee should be able be protected by 'bringing' such a matter to their employer's attention (which may be stating 'I will not do that' because it is dangerous before it occurs or 'I should not be doing that again' after it has occurred).

58. Moreover, the following factors indicate that it was "*connected with his work*":
    58.1. the preparation and Lobster Incident all occurred when the Respondent's son was around, engaging with the Respondent's son being part of his work;
    58.2. educationally preparation of food or dissecting animals can have value, so once again there is something in relation to the activity that could lead to engagement with the Respondent's son.

59. Accordingly, the Tribunal concludes that the Lobster Incident meets the broad phrasing of "*circumstances connected with his work*".

60. The Tribunal next moves on to consider the argument raised by Mr Wilson that the Claimant could not have any "*reasonable belief*" that the matter was "*harmful or potentially harmful to his health and safety*". The Tribunal repeats that the relevant information provided is at paragraph 36 above and summarised at paragraph 56.1-56.3.

61. Mr Wilson suggested that the fact the Claimant did not object, shows that he did not have any reasonable belief in harm. This is especially so, Mr Wilson suggested, because the Claimant was particularly alert to his health. The Tribunal rejects this analysis. Of course, things are context specific, but fundamentally s.100(1)(c) ERA considered matters as at the time the information is conveyed. Even if before an instruction an individual did not have belief in any harm, it is perfectly possible for them, having been harmed in fact or come close, to change their mind and relay such an information to the employer. Indeed, for policy reasons this makes sense as a hurt employee may want to protect others suffering the same harm. Applying all this to the present case, the Claimant has suffered an injury and believes he would not have suffered it had he been better trained or refused to undertake the task (which in his view required more training). The Tribunal was satisfied that the Claimant genuinely held these beliefs. Those in the circumstances are reasonable beliefs for this individual to hold.

62. Mr Wilson also suggested that in fact the Claimant had been given the "*training*" necessary by virtue of the discussion with the Chef and YouTube video therefore there was no other training the Claimant could reasonably be given and this too meant the belief is not reasonable. In relation to this, on the facts

this analysis is not accepted. Chopping lobsters is not a straightforward kitchen task and the brief discussion, and YouTube video does not seem to be enough. But in any event, even if the Tribunal was incorrect on that assessment legally the argument cannot hold good. In effect, the argument is that if there are no further steps an employer can take it means any information conveyed cannot have s.100(1)(c) ERA protection – which in some ways is just a variation on the argument rejected in *Joao* that if something is lawful an employer cannot reasonably believe it being harmful (see paragraph 48.3). The point of s.100(1)(c) ERA is that an employee should not be dismissed for bringing such matters to the employer's attention even if there is nothing they can do about it. If one suffers an injury, as the Claimant did, even if one had all the training that was required many individuals would still "*reasonably*" believe circumstances connected to their work was harmful or potentially harmful. It is difficult for many individuals who suffer harm to believe that there was simply nothing that can be done, and on a practical level such an individual is unlikely to bring the information up with their employer.

63. Finally, the Respondent challenged whether the reason for raising it was a make-weight to try and secure payment for his injury. In effect, the Tribunal interpreted this as being that the belief was not reasonable but purely one to ensure the Claimant would be paid a sum he felt suitable. The statue does not set out anything on any 'mixed purposes' for conveying the information. On first principles all that is required is that the Claimant genuinely, and reasonably, held the belief and brough it to his employer's attention by reasonable means. The Tribunal already concluded he held such beliefs and it does not consider that the way he conducted himself in the meeting, or fact that he was trying to negotiate any particular outcome, makes any difference in the present case. This is not such a case where there is something truly separable that would justify a loss of protection for the Claimant (which for policy reasons should not lightly be done: *Sinclair* at paragraph 48.4 above).

64. Therefore, the Tribunal concludes that the Claimant fell within the protection of s.100(1)(c) ERA and the only remaining issue is one of causation: did the Respondent dismiss the Claimant because he raised the health and safety matters in the 1 July 2021 meeting with Mr Alijev?

65. As already set out above, the Respondent decided to dismiss the Claimant after the meeting on the 2 July 2021 (the next day in fact the Claimant was asked to move out of the main residence). The Respondent was therefore the relevant decision maker and it is her reasoning that needs to be the focus.

66. The Claimant's written submissions focused in large part on Tribunal's not in essence being lulled into an easy label of "*trust and confidence*", the reason the Respondent relies upon for dismissing, but to focus on his alleged conduct instead (he cited *McFarlane v Relate Avon Limited* [2010] ICR 507, *Gallacher v Abellio Scotrail Ltd* UKEATS/0027/19/SS and the general case of *British Home Stores v Burchell* [1978] IRLR 379). However, this all relates to the usual ordinary unfair dismissal test in s.98(4) ERA. In the present case the burden is on him to show that the reason was s.100(1)(c) ERA given he has less than two years' service (*Maund* see paragraph 48.5 above). Merely, rejecting that

the Respondent could lawfully have used "*trust and confidence*" in an ordinary unfair dismissal claim, or indeed that his conduct did not merit dismissal, is not an answer.

67. In this case the Respondent stated in live evidence that she was unaware of the content of the meeting that occurred between Mr Alijev and the Claimant. The Tribunal was concerned that such an important point was never made in her written statement, especially given she had been professionally represented throughout. This was one of the points also made by the Claimant in his written submissions. That being said, on balance the Tribunal accepted this evidence for the following reasons:
    67.1. the case has always been that the Claimant never directly raised the 'health and safety' matter with the Respondent. In so far as he asserts he raised it on 5 July 2021 that is immaterial as that was *after* the decision had been made;
    67.2. the Respondent would only have knowledge if Mr Alijev relayed the relevant parts of the meeting;
    67.3. there were only a few passages in the meeting which needed to be read together and conveyed together to give the Claimant s.100(1)(c) ERA protection. Most of the meeting that lasted 30 minutes did not concern these key aspects;
    67.4. the Respondent spoke Russian and so Mr Alijev would need to communicate in Russian the relevant parts of the meeting that would have given the Claimant s.100(1)(c) ERA protection. Given the above point it is likely that even if Mr Alijev said anything to the Respondent about the meeting it would not cover in Russian the critical and nuanced aspects of language required for the Respondent to have knowledge of the health and safety issue. Simply knowing a time frame for the recovery, that the Claimant wanted to know if his costs would be covered or that the injury supposedly happened because of chopping lobsters would be insufficient ;
    67.5. the timing of the decision and concentration of the period of recovery for the Claimant. All of this would be immaterial if the Respondent did know of the s.100(1)(c) ERA protection and was in effect acting out of a sense of spite. It makes no sense for her to have a meeting with the Claimant that would never touch upon this issue, instead one would expect her to see if there was another means of terminating the relationship rather than holding a few meetings on dates for potential return and then have a brief letter written some four days later.

68. Accordingly, the Claimant's claim of breach of s.100(1)(c) ERA must fail. As set out in *Acheson* (see paragraph 48.2 above) the protection cannot bite as the decision maker was unaware of it. The Tribunal considered whether the suggestion in *Acheson* that there was constructive knowledge as a possibility and also whether this was a situation where someone other than the decision maker's thought process improperly influenced (*Jhuti v Royal Mail* [2019] UKSC 55). It has come to the conclusion that neither is possible. As to the first, there is no scope in the statute for 'constructive knowledge' the only available route is perhaps a *Jhuti* route in the decision making process. On that this does not seem to be a case where this is made out on the facts. Mr

Alijev is junior to the Respondent and did not have any particular influence as such on the process or hiring/firing in general. His concern from the balance of the meeting was the time frames for recovery and the future. So that is likely to be all that would have been conveyed to the Respondent who in any event held a meeting shortly after this one. The Tribunal notes that Claimant has pointed out an apparent 'threat' by him but this does not appear to have gone any further in that the Respondent did not take this approach of looking for other matters in his references or CV to dismiss.

69. It is not strictly necessary for the Tribunal to conclude as to what the real reason for the dismissal is given the above. However, in brief the Tribunal concludes that the reason was the length of potential recovery time the Claimant would take and the Respondent's view that her generosity was being abused. In live evidence, the Respondent readily accepted in effect that she was not necessarily being completely 'rational', she even used the words "*crazy*" in terms of the approach to protect her son. Fundamentally, she was of the opinion that the Claimant was arguing too much in the meeting, did not seem to acknowledge that the agreement would not work and ignored in her view the generosity she had always offered. This may be classed as a loss of trust and confidence. The Claimant's written submissions focussed in large part on there being no act of gross misconduct and reasonableness but that is not relevant as there is no ordinary unfair dismissal claim. For the avoidance of doubt, the Tribunal is not concluding that the Claimant had committed any act of gross misconduct or that his dismissal would have been justifiable on trust and confidence grounds if there was an ordinary unfair dismissal claim. So, the only material conclusion is it was *not* for the automatically unfair reason advanced. Therefore, his claim of automatically unfair dismissal fails.

Unlawful deduction of wages

70. The claim of unlawful deduction of wages turns on whether pursuant to the contract wages were "*properly payable*" in respect of standby time, time eating meals and/or periods when the Respondent was in quarantine.

71. As noted in the section on relevant legal principles this claim is not brought under the WTR, or directive, in effect is a claim of contractual interpretation.

72. Dealing first with the periods of quarantine – the Claimant is effectively arguing that for the week each time he was quarantining before he returned to the residence, when he was paid in full his wages, all hours should amount to "*working hours*". The conclusion that flows from that is that he did over 48 hours of work as he was there for a week, and it was not a place of his choosing.

73. The Tribunal rejects this argument and concludes that this time was *not* his "*working hours*". At clause 6.1 it states the Claimant's "*hours of work*" will vary and that he would be kept informed of his "*hours of work*" (see paragraph 13.9 above). During the period of quarantine he was not in fact given or prescribed any hours or work. He was not having anything to do with the Claimant's son and did not appear to have any real contact with the Respondent in that time. The fact that he was having to stay at a place of the Respondent's choosing and could not freely leave does not change this. The contract does not

envisage such being working hours and there is the need for the Claimant's argument to succeed to read in this being working hours by virtue of it being 'working time'. Even on that basis in the particular Covid-19 context it is not accepted that such an approach to interpreting the contract is warranted. Many would be confining themselves to their homes or restricting activities, especially in order to attend other events. So, in this particular context applying even the approach in *DJ* (see paragraph 51.2 above) the Claimant was not very significantly being precluded from freely managing his time during which he was not having to do any Governor duties and was at the flat. This is so even though his accommodation was prescribed by his employer at the time. The Tribunal notes that the Claimant relied in his written submissions on *Royal Mencap Society v Tomlinson-Blake* [2021] UKSC 8 but this is in a national minimum wage context and does not advance things further (there is no national minimum wage claim and his salary even accounting to all this time allegedly above 48 hours would be the minimum levels).

74. Turning now to the 'standby' and 'meal times', the Tribunal repeats the factual conclusion above that the Claimant was not required to attend meals with the Respondent and her son. He chose to do so that necessitated interaction during these meals. This is not therefore his working hours as he was able to decline to be there and stay in his room. When present he no doubt interacted and may have helped the Respondent's son if he was chocking or such like but that is not by virtue of him being working as such, and he was not constantly looking out for this but reacted as an adult would react in those circumstances. In terms of the general argument that from 07:30-19:30 he was effectively on standby and so it was all working time this also fails. Primarily the issue is that the Claimant bears the burden and has not establish before the Tribunal particular tasks undertaken at exact times and relevant frequencies of any such work. That is needed and similarly to the case of *Timbulas* (see paragraph 50 above). The fact is there was lots of time when he was not directly looking after the Respondent's son (hence him framing it as 'standby'). Even allowing for the Claimant's assessment which is 5 hours is worked on a Saturday, that leaves 43 hours for the other 5 work days (so 8.6 hours a day). Once meals are removed from the 12 hour period and other lessons are factored in it seems that the Claimant would not be doing enough work to take him beyond 48 hours in total.

75. Therefore, the Claimant's claim of unlawful deduction of wages fails.

Amended statement of particulars

76. In terms of the amended particulars the first issue is whether there was any agreement to provide to cover Healthcare costs during his employment and/or to cover for the Claimant's wrist surgery. In the main the Respondent's defence was that there was no such agreement. No submissions were made by Mr Wilson that if there was such an agreement it did not fall within the particulars required by s.1 ERA.

77. The Tribunal concludes that in fact an agreement was reached as follows: The Respondent would pay the Claimant's healthcare costs whilst he was obliged to comply with the Respondent's own Covid-19 secure bubble requirements during his employment.

78. The reason for finding such an agreement reached is as follows:
    78.1. as set out at paragraph 24-25 above, **pp.403-404**, there was clear query as to "*healthcare provision*" which the Claimant said he "*should have discussed at interview*" and he was asking in equally clear terms whether as the Respondent had "*requested that we live in a secure bubble at Ridge House*" would she "*agree to cover any required healthcare costs whilst I am here*". Further the Claimant was clear in his correspondence that he was seeking "*for clarity should anything arise in the future I hope you don't mind me asking that you confirm the situation regarding healthcare provisions in writing via email*". The Respondent's answer, via Mr Alijev's email was "*Answering to your question about healthcare costs, Yulia* [the Respondent] *has confirmed that she will…cover all required healthcare costs while you are isolating at Ridge House*". It is notable that it continues with "*it was almost impossible to predict and discuss everything at interview*". Therefore, the answer is equally plain that it was directly addressing the question and confirming that there would be provision of future healthcare costs whilst the Claimant was in the secure bubble;
    78.2. factually healthcare costs were covered in these terms, the consultant and tests in December 2020 and then again following the wrist injury.

79. Mr Wilson suggested that there was no change to the contract and that it was not a contractual agreement. He asserted it was not out of legal obligation but purely kindness. The key written correspondence however as set out above does not support this. The references Mr Wilson make to "*kindly agreed*" and so on all occur well after this event. He also stated that there was no consideration so it cannot have been contractual or something covered by the requirement for amended particulars. In relation to this, the requirement is one of statute and it is not clear that in fact common law concepts of consideration are relevant. All that is relevant is whether something falls within what needs to be shown in the "*written statement*". Further even if consideration were relevant in this particular context just like pay rises and so on, it would be easily found by virtue of the continuation of employment. If Mr Wilson were right it would mean that in effect many statement of particulars would never be updated as say changes to hours or work or place of work do not automatically lead to extra 'consideration' in any other sense. Equally some benefits would change and would not be immediately claimable and fall within required statement of particulars (for example changes to sick pay), and Mr Wilson's argument would mean that these also would not require updating.

80. In so far as the claims that there was a separate promise to pay for the wrist surgery, the Tribunal concludes this is covered by the initial agreement. The Claimant in his written submissions seeks to state there was an agreement that was separate to the employment relationship that therefore lasted even if the relationship were terminated but that is not relevant to a claim of written

particulars of employment. That is a potential separate argument about some collateral agreement or contract that is not the claim before the Tribunal.

81. Dealing now whether this agreement required updating the particulars of employment, the Tribunal concludes it did and as at the time of commencing the claim had never occurred. The relevant term falls naturally within the meaning of "*any other benefits provided by the employer that do not fall within another paragraph*", if it does not fall within "*any terms and conditions relating to any of the following, incapacity to work due to sickness or injury…*" (s.1(d)(ii) ERA and s.1(d)(a) ERA).

82. The result of this complaint is the Tribunal has set out the missing statement of particulars that should have been provided by way of the amended particulars (s.12(2) ERA) above. However, the Claimant is not entitled to any financial compensation under s.38 Employment Act 2002 as he has not been successful in any claim to which Schedule 5 of the Employment Act 2002 relates.

Employment Judge Caiden
3 February 2023

RESERVED JUDGMENT AND REASONS
SENT TO PARTIES ON 7th February 2023

GDJ

FOR EMPLOYMENT TRIBUNALS

Notes

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