EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000032/2023

Held in Glasgow on 21 June 2023

Employment Judge C McManus
Members Ms L Millar and Mr A McFarlane

Mr A Fleming	**Claimant** **In Person**
Abbey Metal Ltd	**Respondent** **Represented by:** **Ms M Jenkins - Solicitor**

JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Employment Tribunal is:

1. The claimant's dismissal was an automatic unfair dismissal under section 103A of the Employment Rights Act 1996 (protected disclosure), in respect of disclosures in respect of health and safety, and the claimant's claim in that regard is successful.

2. The claimant is awarded a basic award of **£399.20** (THREE HUNDRED AND NINETY NINE POUNDS AND TWENTY PENCE) in respect of this automatic unfair dismissal.

3. The claimant's compensatory award in respect of this unfair dismissal is reduced to nil, on application of section 123 of the Employment Rights Act 1996, that reduction being made on a just and equitable basis, taking into account payments made by the respondent to the claimant in terms of the claimant's successful application for interim relief and payments made under the Order for Continuation of Contract.

4. The respondent failed to provide the claimant with a statement of employment particulars, contrary to section 1 of the Employment Rights Act 1996 and the claimant is awarded the higher amount under section 38 of the Employment Act 2002, being 4 weeks of the claimant's net weekly pay as at the date of termination of employment, which is (4 x £349.26) **£1397.04** (ONE THOUSAND, THREE HUNDRED AND NINETY SEVEN POUNDS AND FOUR PENCE).

5. The respondent failed to provide the claimant with itemised pay slips, as required under section 8 of the Employment Rights Act 1996 and a declaration is hereby made to that effect, under section 12(3) of the Employment Rights Act 1996.

6. The claimant's claim for unlawful deductions from wages is withdrawn and dismissed.

REASONS

Introduction

1. The ET1 included claims for:

   - Automatic Unfair Dismissal (section 103A of the Employment Rights Act 1996 ('the ERA')
   - Failure to provide a statement of employment particulars complaint with section 1 of the ERA.
   - Failure to provide itemised pay slips in accordance with section 8(1) of the ERA.
   - Unlawful deductions from wages

2. In the ET1, the claimant applied for interim relief. An Interim Relief Hearing took place on 6 February 2023. The claimant's application for interim relief was successful and an Order for Continuation of Contract was issued under sections 129 and 130 of the Employment Rights Act 1996, in terms set out in Judgement dated 10 February 2023.

3. The claimant was unrepresented at the Interim Relief hearing. He then became represented by named students from the Strathclyde University Law Clinic. The claimant's representatives advised the Tribunal that the claimant had obtained alternative employment. On the basis of that information, the respondent's representative sought revocation of the Order for Continuation of Contract.

4. A Hearing in respect of that application for revocation took place on 3 May 2023. The respondent's application was successful. The Order for Continuation of Contract dated 10 February 2023 was revoked with effect from 20 March 2023, as set out in decision dated 3 May 2023.

5. The Final Hearing in this case had been scheduled to proceed to a Final Hearing on 19, 20, 21 and 22 June 2023.

6. On 31 May 2023, the respondent's representative wrote to the Tribunal and the claimant's representatives intimating a change to the Respondent's position on liability in respect of the claim for automatic unfair dismissal pursuant to section 103A of the Employment Rights Act 1996 (ERA) and applying for the four day final hearing in this case be varied to be a one day hearing on remedy. The respondent's position was that, taking into account the effect of the Order issued following the successful interim relief application, the Claimant's losses were zero. Their position was that the claimant had been overpaid by the respondent, in terms of that Order, and that on an economic basis only, to save the Respondent the legal costs of attending a four-day evidential final hearing, liability was conceded for the claim for automatic unfair dismissal pursuant to section 103A of the Employment Rights Act 1996. It was set out in that correspondence that the Respondent did not concede liability for the other claims however, it was not considered that substantial witness evidence (if any at all) was required on those matters. A List of Issues for determination by the Tribunal was proposed by the respondent's representative.

7. The claimant's representatives did not agree with this proposed List of Issues. In particular, their position was that included in the claimant's claim was a

claim for detriment in terms of s47B of the Employment Rights Act 1996, and for compensation for that detriment. It was their position that this was in respect of a detriment other than the claimant's dismissal. The respondent's representative's response to that position was that the claimant had not raised a claim for detriment pursuant to section 47B of the ERA.

8. Following further correspondence between the parties' representatives and the Tribunal, an amended Notice of Final Hearing was issued, scheduling the Final Hearing for 20 and 21 June 2023. Parties' representatives were informed in letter from the Tribunal of 9 June 2023 that if the claimant seeks to pursue a claim for detriment pursuant to section 47B of the Employment Rights Act 1996, then an application for amendment to include that claim should be made, and that any such amendment application should include:

    1. Detail of the action by the claimant which is relied upon as being a protected disclosure (with regard to the provisions in respect of 'protected disclosure' set out in Part IVA of the Employment Rights Act 1996).

    2. What was disclosed.

    3. How the disclosure was made.

    4. To whom the disclosure was made.

    5. When the disclosure was made.

    6. Why that disclosure is considered to be a 'qualifying disclosure' within the meaning of section 43B of the Employment Rights Act 1996?

    7. What detriment the claimant says he suffered as a result of making that disclosure

9. Parties' representatives were informed that a decision on whether or not to allow such an amendment application would then be made as a Preliminary Matter prior to the Final Hearing.

10. On 13 June 2023, the claimant's representatives wrote to the Tribunal (copied to the respondent's representative) seeking leave to amend and enclosing terms of an 'amended paper apart' to the ET1. That set out the terms of the proposed amendment, which was to include the following additional paragraphs:

"The action taken by the claimant in submitting the above list is the action by the claimant which is relied upon as being a protected disclosure (with regard to the provisions in respect of 'protected disclosure' set out in Part IVA of the Employment Rights Act 1996).

"The list is a list of health and safety issues which were of serious concern to the claimant and which he wished to be addressed by the respondent. The claimant submitted this written list of concerns signed by himself and other colleagues to John Maclean on 12thJanuary2023 at 3:35pm. The claimant's submission of this list to John McLean is a disclosure and this disclosure is a 'qualifying disclosure' within the meaning of section 43B of the ERA 1996 as per s43B(1)(d); that the health or safety of any individual has been, or is likely to be endangered."

and

"The detriment suffered by the claimant was being shouted as (sic), sworn at in a hostile and intimidating manner by John Maclean (sic) and being subject to physical acts of aggression all as described above. This constitutes detriment, occurring prior to dismissal, in terms of s47B of the Employment Rights Act1996. As per s47B(1), a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. The actions of John Maclean were a direct result of the claimant making the protected disclosure as detailed above.

The actions of John Maclean (sic) as described above resulted in the claimant feeling distressed, upset, stressed, humiliated and belittled, culminating in suffering sleepless nights following the incident and being prescribed anti-depressants by his doctor."

11. The respondent's representative's comments on that application to amend were provided in their correspondence of 15 June 2023. They objected to the application to amend, for reasons set out in that correspondence.

Claimant's Application to Amend

12. The claimant's application to amend was dealt with as a preliminary matter at the outset of this hearing. Both parties' representatives provided written submissions. There was discussion with the representatives on their written submissions.

13. The application to amend was not allowed in the proposed terms. We accepted the respondent's representative's position that the ET1 does not raise a detriment claim under section 47B or set out details of a detriment suffered as a result of making an alleged protected disclosure. We accepted their reliance on the terms of the ET1, including the claimant's position that "*the only reason I have been dismissed is because I have whistle blown.... if I had not mentioned the health and safety breaches or whistle blown I would still have been employed".* We accepted their reliance on the position at the time of consideration of the application for interim relief being that the claim was for automatic unfair dismissal on the grounds of whistleblowing under section 103A of the ERA. We did not accept the claimant's representative's position that the original paper apart to the ET1 form set out the basis of the detriment claim. We did not accept the claimant's representative's submission that the proposed amendment was merely a re-labelling of existing facts. We considered it to be significant that the proposed amendment sets out the alleged consequences of the respondent's actions, other than dismissal. Although the allegations that the claimant was shouted and sworn at are set out in the original paper apart, there is no indication in the ET1 that the claimant suffered a detriment other than dismissal. There was no explanation why the claimant had not indicated in the original paper apart to the ET1 that the respondent's actions resulted in him "*..feeling distressed, upset, stressed, humiliated and belittled, culminating in suffering sleepless nights following the incident and being prescribed anti-depressants by his doctor."* It was not suggested that those consequences would not have

been known by the claimant at the time of his submission of the ET1 and its' paper apart. The claimant's position at the Hearing was that he had received advice from CAB before submitting his ET1 and the original paper apart.

14. We took into account that there had been discussion before the Tribunal on the relevancy of an award for injury to feelings being sought by the claimant, that being included in the Schedule of Loss which was produced at the Hearing on the respondent's application for revocation of the Order for Continuance of Contract. The claimant's representatives also sought to rely on a detriment claim being included in without prejudice communications with the respondent's representatives. They were reminded that reliance could not be placed on without prejudice communications with the respondent's representative. We considered it to be significant that:

- The claimant had sought advice from CAB before submitting his ET1
- The claimant's representatives (Strathclyde Law Clinic) had been instructed in this case since 13 March 2023
- the Agenda form completed on behalf of the respondent set out a List of Proposed Issues and that did not include any issue in respect of any claim for detriment separate from dismissal.
- The claimant's representatives were instructed at the time of the case management Preliminary Hearing on 22 March 2023, and represented him at that hearing.
- There was no indication or discussion at the case management Preliminary Hearing on 22 March 2023 that the claims should include a claim under s47B.
- The Note issued after the Preliminary Hearing records, at paragraphs 5 & 6, that the respondent had set out a draft List of Issues in their completed Agenda, that the claimant's representative noted that that list did not include any issue in respect of the claim for non-provision of wage slips, that it was agreed that the ET1 mentions non provision of wage slips and this should be included in the List of Issues, and that it

was agreed that the representatives would liaise to agree the List of Issues for Determination by the Tribunal at the Final Hearing, to include remedy.

- There was no indication that the Note of the Preliminary Hearing did not accurately record the claims made.

- No application to amend was made until 13 June 2023.

15. We applied the principles in *Selkent Bus Company Ltd v Moore [1996] IRLR 661.* We approached the application to amend on the basis that the facts sought to be relied upon by the claimant would have been known from the outset and that s47B excludes dismissal as a detriment and is a separate statutory claim. We accepted that there are no allegations set out in the ET1 giving fair notice of a claim under s47B and that amendment was necessary for such a claim to be pursued. We did not accept the claimant's representatives' reliance on the narration of acts of hostility and aggression. We considered it to be very significant that neither at the case management Preliminary Hearing, nor after the issue of the Note of that hearing was their attempt to clarify that a claim for detriment should be included in the issues for determination by the Tribunal.

16. We considered the applicable time limits. We considered it to be very significant that as at the date of the case management preliminary hearing, if amendment had been sought to include a claim under section 47B, that claim would have been brought within the statutory time period. That is on the basis that the events sought to be relied upon occurred on 13 January 2023, so the time limit for lodging the s47B claim expired on 13 April 2023. The case management preliminary hearing was on 22 March 2023. The amendment was not sought until 13 June 2023. We accepted that the respondent is entitled to rely on the statutory time limits. The claimant was represented by students from Strathclyde Law Clinic at that case management Preliminary Hearing.

17. There was no explanation offered as to why the application to amend was not made until 13 June 2023. There was no suggestion that it was not reasonably practicable for the claim to have been raised within the statutory time limit.

18. We accepted that if the application to amend was allowed it would significantly add to delay and costs. We accepted that the respondent was ready to proceed to a hearing for determination of their proposed issues but that if the amendment were allowed, they would require to call additional witnesses and the Final Hearing would require to be postponed and rescheduled for more than 2 days.

19. The claimant may have a remedy against his advisors in respect of the failure to include a claim under section 47B.

20. We considered the balance of hardship to the parties. We did not accept the claimant's representative's position that allowing the amendment would lead to no hardship to the respondent. The respondent is entitled to fair notice of the claims against them and entitled to rely on the applicable statutory time limits. They have taken steps to prepare for the Final Hearing and adopted the position of not contesting liability of the unfair dismissal claim. If the amendment were allowed, the Final Hearing would require to be postponed to enable the respondent to lead evidence from relevant witnesses. We took into account that if the amendment were allowed, and if it were successful, that could result in a significant injury to feelings award, dependant on the Tribunal's decision on the evidence heard. A factor in the balance of hardship is that the claimant may be able to seek remedy against his advisors in respect of the loss of the chance to bring the section 47B claim. We accepted that the balance of hardship would be on the respondent, should the amendment be allowed.

21. On consideration of all these above factors, our decision was to refuse the claimant's representative's application to amend to bring a claim under section 47B. The terms of the proposed amendment were allowed in respect of the paragraphs which reference the statutory basis of the qualifying disclosure, being:

"The action taken by the claimant in submitting the above list is the action by the claimant which is relied upon as being a protected disclosure (with regard to the provisions in respect of 'protected disclosure' set out in Part IVA of the Employment Rights Act 1996).

*The list is a list of health and safety issues which were of serious concern to the claimant and which he wished to be addressed by the respondent. The claimant submitted this written list of concerns signed by himself and other colleagues to John Maclean (*sic) *on 12th January 2023 at 3:35pm. The claimant's submission of this list to John Maclean* (sic) *is a disclosure and this disclosure is a 'qualifying disclosure' within the meaning of section 43B of the ERA 1996 as per s43B(1)(d); that the health or safety of any individual has been, or is likely to be endangered."*

Proceedings at the Hearing

22. Evidence was heard under oath or affirmation from the claimant and from John McLean (Director of the respondent company)

23. Reference was made to some documents included in the Respondent's Bundle. The numbers in brackets in this judgment refer to the page number of that document in that Bundle. That Bundle did not initially contain the letter of dismissal, the claimant's appeal letter or the outcome of that appeal. Those letters were added during the course of the Hearing.

Issues for Determination

24. At the outset of this Hearing, it was confirmed that the claim for unlawful deductions from wages under s13 ERA related to non-payment of employer pension contributions. It was confirmed on behalf of the claimant that all outstanding employer pension contributions in respect of the claimant's employment with the respondent had been paid and that therefore the claim for unlawful deductions from wages was withdrawn. Reference was made to that confirmation at paragraph 3, of document 14 of the Bundle (B86- B87).

25. The respondent proceeded on the basis that they did not contest liability in respect of the unfair dismissal claim. They proceeded on the basis that it was

accepted that the claimant was entitled to an Unfair Dismissal Basic Award of £399.20.

26. The issues for determination by this Tribunal in this case were:

    a. Is the clamant entitled to an unfair dismissal compensatory award?

    b. If so, in what amount, taking into account any uplift for failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures and section 123 of the ERA?

    c. Did the respondent fail to issue the claimant with a statement of employment particulars, contrary to section 1 of the Employment Rights Act 1996?

    d. If so, what amount is the claimant entitled to under section 38 of the Employment Act 2002 in respect of that failure?

    e. Did the respondent fail to provide the claimant with itemised pay slips, as required under section 8 of the Employment Rights Act 1996?

    f. If so, is the claimant entitled to any remedy in respect of that failure?

Findings in Fact

27. The Tribunal made findings in respect of facts which were material to the issues for determination by this Tribunal. The following material facts were admitted or found by the Tribunal to be proven.

28. The respondent is a small company which manufactures and fits metal equipment such as gates. The claimant was employed by the respondent as a labourer from 16 April 2021 to 16 January 2023. The claimant was dismissed following having raised concerns about health and safety in respect of conditions at the respondent's premises. The claimant gave a list of health and safety concerns to the respondent's owner (John McLean) on 13 January 2023 and had an exchange of words with him about that. John McLean then reported to Fergus Wallace (respondent's Manager) that the claimant had been threatening and aggressive towards him. It was decided that the

claimant would be dismissed. A letter was prepared to give to the claimant. On 16 January 2023, the claimant was summoned to a meeting with Fergus Wallace, by Fergus Wallace shouting to the claimant '*Get your arse in this office*.'" The claimant was not given the opportunity to be represented at that meeting. He was not given notice in writing of the allegations against him. The claimant was not given the opportunity to state his position in respect of the allegations against him. Fergus Wallace gave the claimant a letter from him (at B88) stating:

"*We must confirm that following numerous incidents of inappropriate bad language, serious insubordination, irregular behaviour culminating with the incident on Friday 13th January 2023 at which you acted in an aggressive and threatening manner towards a company director, it has been decided that you be summarily dismissed from employment for these gross misconduct offences.*

This dismissal is effective from 16th January 2023 (your last day of employment).

You are not entitled to notice of this summary dismissal.

You have the right of appeal against this dismissal and any appeal should be made in writing to the person noted in this letter within five working days of receiving confirmation of your dismissal."

29. The claimant appealed his dismissal by writing to Fergus Wallace in the terms of the letter at B89 – B90.

30. No appeal hearing was arranged. The claimant was informed that his appeal was not successful. This notification was by letter from Fergus Wallace dated 24 January 2023 (at B91) stating:

"*Please be advised that after discussion we advise you that your written appeal against the termination of your employment has been unsuccessful."*

31. The claimant consulted Citizens Advice Bureau (CAB) and received advice about making a claim to the Employment Tribunal. On 22 January 2023, the

claimant submitted an ET1 and paper apart. In that ET1 the claimant sought Interim Relief and stated '*a Schedule of Loss will be provided*'. The application for Interim Relief was successful following a hearing on 10 February 2023. Following the claimant's successful application for Interim Relief, the claimant received payments from the respondent in terms of the Order for Continuation of Contract dated 10 February 2023. On 20 March 2023, the claimant started new employment, at a higher rate of pay than he had received from the respondent. The respondent made an application for revocation of the Order for Continuation of Contract. A Hearing in respect of that application took place on 3 May 2023. The application was successful. The Order for Continuation of Contract dated 10 February 2023 was revoked with effect from 20 March 2023, as set out in decision dated 3 May 2023. The effect of this Order was that the claimant has received from the respondent his full salary, including pension contributions from the date of his dismissal on 16 January 2023 until the date of revocation of the order on 3 May 2023. The claimant continued to receive payments from the respondent under the Order for Continuation of Contract after he had started in his new employment. Payments received from the claimant by the respondent from 20 March 2023 until 3 May 2023 were overpayments.

32. The claimant was not issued with a written statement of particulars of employment or contract of employment.

33. The respondent instructed an accountancy firm to deal with their pay roll. Part of those pay roll services included provision of pay slips for the respondent's employees. These pay slips were issued to the respondent by email. The claimant did not receive any pay slips from the respondent. The claimant has received payments from the respondent as set out in those payslips. That includes payments received in respect of the Order for Continuation of Contract, until revocation of that Order. There were no unrecorded deductions from the claimant's wages paid by the respondent or deductions which the claimant was unaware of.

Relevant law

34. Section 1 of the Employment Rights Act 1996 ('The ERA'), requires an employer to give their employee a written statement of particulars of employment. Compensation for failure to provide a section 1 statement of particulars is under section 38 of the Employment Act 2002 ('EA') and may be awarded following success in any of the claims listed within Schedule 5 of the Employment Act 2002. That list at Schedule 5 includes section 111 of the ERA (unfair dismissal). The relevant provisions of section 38 EA are:

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

(2) If in the case of proceedings to which this section applies—

(a) the employment tribunal finds in favour of the worker, but makes no award to him in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (c. 18) (duty to give a written statement of initial employment particulars or of particulars of change or (in the case of a claim by an worker) under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday),

the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

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

(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 or (in the case of a claim by a worker) under section 41B or 41C of that Act,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

(6) The amount of a week's pay of an a worker shall—

(a) be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 (c. 18), and

(b) not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay)."

35. Part X of the ERA sets out the law on unfair dismissal. Chapter 1 of that Part X sets out the provisions on the right not to be unfairly dismissed. That includes the provisions in respect of automatic unfair dismissals (where the normal qualifying period of two years' service before gaining the right to make an unfair dismissal claim does not apply). That includes, at section 103A, that in circumstances where the reason (or principal reason) for an employee's dismissal is that the employee made a protected disclosure, that employee shall be regarded for the purposes of that Part X as being unfairly dismissed.

36. Chapter 2 of that Part X contains the provisions with regard to compensation for unfair dismissal. Where the Tribunal makes a finding of unfair dismissal (or where that is conceded) it can order reinstatement or in the alternative award compensation, made up of a basic award and a compensatory award.

37. The basic award is calculated as set out in the ERA Section 119, with reference to the employee's number of complete years of service with the employer, their gross weekly wage and the appropriate amount with reference to the employee's age. Section 227 sets out the maximum amount of a week's pay to be used in this calculation. There is a statutory cap on the amount of weekly pay which can be used in this calculation. The basic award may be reduced in circumstances where the Tribunal considers that such a reduction would be just and equitable, in light of the claimant's conduct (ERA Section 122 (2)).

38. In terms of the ERA Section 123(1) the compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

39. There are circumstances where an 'uplift' may be applied to an unfair dismissal compensatory award, where there has been unreasonable failure to follow the ACAS Code of Practice (section 207A (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULR(C)A')). This is known as 'the ACAS uplift'. Section 124A of the ERA provides that where an award of compensation for unfair dismissal falls to be reduced or increased under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (effect of failure to comply with Code: adjustment of awards), or increased under section 38 of that Act (failure to give written statement of employment particulars), the adjustment shall be in the amount awarded under section 118(1)(b) and shall be applied immediately before any reduction under section 123(6) or (7).

40. In order for a disclosure to be a protected disclosure, it must satisfy the provisions of Part IVA of the ERA. The meaning of 'protected disclosure' is with reference to the definition of 'qualifying disclosure' in section 43A and subsequent sections in that Part IVA. The claimant relies upon section 43B(1)(d), which provides that any disclosure which in the reasonable belief of the worker is made in the public interest and tends to show that the health and safety of any individual has been, is being or is likely to be endangered, is a qualifying disclosure. The disclosure must be made in accordance with one of six specified methods of disclosure set out in sections 43C to 43G.

41. Part V of the ERA sets out provisions in respect of protection from suffering detriment in employment. Section 47B sets out the provisions in respect of a worker's 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.

42. This case was dealt with in terms of the Tribunal's overriding objective as set out in Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('The Procedure Rules'), being:

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly.

Dealing with a case fairly and justly includes, so far as practicable -

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

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

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

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

(e) saving expense.

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

Claimant's Representative's Submissions

43. The claimant's representatives' submissions were made on the basis that the respondent had accepted that there was an automatically unfair dismissal in terms of section 103A of the ERA. Their position was that the claimant received all sums due in terms of the Order issued after the successful Interim Relief application and that the claimant has received all sums due in respect of pension contributions. Their position was that the claimant had mitigated his losses by securing new employment on 20th March 2023. They accepted that an overpayment was made, as the Order was not revoked until May 2023. Their position was that the claimant does not seek any further compensation in respect of wage loss but does seek an uplift for failure to comply with the ACAS Code of Practice.

44. In respect of that uplift, the claimant's representatives relied on the claimant not being given the opportunity to state his case prior to his dismissal. They relied on there being no investigation, no notification in writing of the alleged misconduct and its possible consequences and no witness statements. They relied on no notice in writing being given of a disciplinary hearing and there being no notification of the right to be accompanied at a disciplinary hearing. Their submission was that the claimant was not given details of his alleged misconduct. Their submission was that the respondent failed to comply with the ACAS Code of Practice on Disciplinary Procedures and that that failure was unreasonable. They submitted that it was just and equitable for the award to be increased by 25% under s207A TULRA. They accepted that the claimant was given the opportunity to appeal his dismissal but submitted that that appeal was not meaningful. The claimant's representatives sought that an increase of 25% by applied in respect of the ACAS uplift.

45. The claimant's representatives submitted that the claimant was not provided with a written statement of employment particulars. They relied on the document purported by the respondent to have been issued not being signed by the claimant, although being signed by the respondent, and being dated prior to the claimant's start date.

46. Their submission was that the Tribunal has jurisdiction to hear the claim for failure to provide a written statement of employment particulars because Schedule 5 of the Employment Act 2002 includes claims under section 48 of the ERA, relating to claims under section 47B. Their submission was that the claimant did not receive the contract included in the Bundle. They sought an award of £674 in respect of this failure, being 2 weeks pay under section 38 of the Employment Act 2002.

47. The claimant's representatives submitted that the claimant did not receive the wage slips in the Bundle. They accepted that the pay slips accurately reflect the amounts paid by the respondent to the claimant. No compensation was sought in respect of the alleged failure under section 8 ERA.

48. In their updated Schedule of Loss, the claimant's representatives sought a total award of £15,367 (including £11,000 in respect of Injury to feelings, which fell as the amendment as proposed was not allowed).

Respondent's Representative's Submissions

49. In respect of the complaint re failure to provide a written statement of employment particulars, the respondent's position was that the Tribunal has no jurisdiction to award any compensation under section 1 of the ERA. Their submission was that compensation for failure to provide a section 1 statement of particulars is under section 38 of the Employment Act 2002, and can only be awarded following success in any of the claims listed within Schedule 5 of the Employment Act 2002. They relied on section 103A of the ERA not being listed within that section 5. Their position was that the Tribunal does then not have jurisdiction to hear that claim.

50. Their alternative position was that if we considered that we do have jurisdiction to hear this head of claim, the evidence of Mr McLean should be accepted, and it should be accepted that the claimant was provided with a contract of employment at the start of his employment, being that at B71 – B73. Their submission was that this was signed by Mr McLean on 5 April 2023, in advance of the Claimant's employment beginning and there was no failure to provide a written statement of particulars, so no uplift to the compensatory award should be made.

51. Their submission was that if the Tribunal does not accept the respondent's evidence on this point, the claimant should be paid no more than 2 weeks' pay under section 38 of the Employment Act 2002. Their submission was that section 38 provides that in such circumstances the tribunal must make an award of the minimum amount (two weeks' pay) unless there are "exceptional circumstances" which would make such an award "unjust or inequitable" (section 38(5), EA 2002), and that the Tribunal may award the higher amount (four weeks' pay) if it considers it just and equitable in all the circumstances. They relied on the claimant seeking an award of 2 weeks' pay. Their submission was that there are no circumstances in which 4 weeks' pay would be just and equitable and there are no "exceptional circumstances" which apply. They relied on *Costco Wholesale UK v Miss Z Newfield, [2013] UKEAT/0617/12.*

52. In respect of the claim for alleged failure to provide an itemised payslip in accordance with section 8 (1) of the ERA, the respondent denied that the claimant was not provided with payslips. Notwithstanding that position, they relied on there being no allegations of any unrecorded deductions from his pay. It was submitted that on application of section 8 ERA, there would be no monetary award available to the claimant if he were to succeed in this head of claim. They relied on the award in the event of a successful claim being calculated with regard to the amount of unlawful deductions made from the pay of the worker during the period of 13 weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment), the Tribunal may order the

employer to pay the worker a sum not exceeding the aggregate of the unnotified deductions so made (s12(4) ERA 1996). They relied on the claimant not having raised the issue during his employment with the respondent. Their submission was that if the Tribunal does not accept the respondent's position that itemised pay slips were issued to the claimant, in any event the Claimant has not alleged that there were any unnotified deductions from his pay and so there would be no monetary award available to him. They relied on the claimant's position in the updated schedule of loss at B6.

53. In respect of remedy, the respondent's representative's submission was that as the respondent has conceded the S103A automatic unfair dismissal complaint, the claimant is entitled to a basic award, as per the claimant's schedule of loss, of £399.20, being 1 weeks' pay for his 1 year of service as per the calculation method in section 119 ERA. They relied on the just and equitable provisions in section 123 of the ERA 1996. They relied on the position in respect of mitigation in the claimant's updated schedule of loss at (B61), that the Claimant's financial loss is not in dispute, and it is agreed that he has no financial loss, past or future.

54. They relied on the Employment Tribunal's Remedies Handbook 2022 – 2023. Their submission was that there should be no award for loss of statutory rights as the claimant did not have 2 years' service with the respondent prior to his dismissal. Their submission was that he had not accrued the rights to lose. They further submitted that any award for loss of statutory rights falls under the compensatory award (relying on *Hope v Jordan Engineering Ltd [2008] UKEAT/0545/07).* They submitted that any award made as a compensatory award should be adjusted, taking into account payments made to the claimant as a result of the successful Interim Award.

55. The respondent's representative relied on the position in their counter schedule of loss (B65-67). It was their position that the Respondent had made an overpayment of £2,195.58, in terms of payments from 20th March 2023 until the date of revocation of the Order for Continuation of Contract on 3 May 2023. They relied on the amount of those payments not being in dispute.

Their submission was that these overpayments followed the claimant's dismissal and may be viewed as compensation for the losses suffered, advance payment of any liability caused by the dismissal, or as a payment unrelated to the dismissal. Their submission was that the Claimant will normally be required to give credit for payments made by the employer in satisfaction of loss (*Digital Equipment Co Ltd v Clements [1997] ICR 237*) and that credit should be given to these payment made to reduce the loss suffered by the Claimant flowing from the dismissal.

56. It was the respondent's representative's submission that these payments should be taken into account before the application of any adjustments such as a failure to comply with the ACAS code or a failure to provide a statement of employment particulars. Reliance was placed on the Employment Tribunal's Remedies Handbook 2022 – 2023, in particular at pages 64 – 65.

57. The respondent's representative relied on the terms of the Interim Relief Order (the Order for Continuation of Contract) being that the claimant's contract was ordered to continue so that he is not put to any financial loss as a result of any alleged automatic unfair dismissal under section 103A of the ERA, until his complaint has been determined. They relied on the claimant being paid his wages pursuant to this Order, until the Order was revoked on 5 May 2023.

58. The respondent's representative relied on the payments under the Order for Continuation of Contract being "wages" as defined in Section 27 of ERA as including "any sums payable to the worker in connection with their employment". Their submission was that an overpayment to the Claimant in satisfaction of the losses stemming from the dismissal was made, and credit should be given to this.

59. In respect of any increase to the award on application of section 207A of TULRCA, the respondent accepted that there was a failure to comply with the ACAS Code of Practice, but not that this failure was unreasonable. Their submission was that the failure by the Respondent to follow the ACAS Code

of Practice was on the basis of there being reasonable grounds for that failure and no increase in compensation should apply.

60. The respondent's representative's submission was that the unfair dismissal basic award cannot be increased or decreased for the failure by the employer/employee to comply with the ACAS Code of Practice (s124A and s118(1)(b) ERA 1996), or increased following a failure to provide the employee with a written statement of terms and conditions of employment, as that increase is applied within the compensatory award (s38 EA 2002 and s124A and s118(1)(b) ERA 1996). Their submission was that the only loss set out within the compensatory award is the £350 set out in the Claimant's schedule of loss. Their submission was that this should be reduced to zero in light of the sums received from the Respondent, and that then an uplift of 25% would be irrelevant to a nil award. Their submission was that no uplift applies in respect of a failure to provide a statement of employment particulars as this is added after any ACAS uplift. Their submission was that the only award to the claimant should be in respect of the unadjusted unfair dismissal basic award.

Comments on evidence

61. We heard evidence from the claimant and John McLean (Director / owner of the respondent company). Each gave a contradictory version of events. Much of this case comes down to issues of credibility and reliability. We required to make findings in fact, making a determination on what occurred. We did so, taking into account the evidence before us, being the documentary evidence in Bundles and the oral evidence of Mr Fleming and Mr McLean.

62. We did not find Mr McLean to be a credible witness. His evidence was inconsistent with the documentary evidence.

63. John Mclean's evidence was that the respondent did have a Disciplinary Procedure and Grievance Procedure. There was no explanation why copies of those policies or procedures were not included in the Bundle, nor was there any explanation why they were not followed in respect of the claimant's dismissal. Mr McLean's position in evidence was that Fergus Wallace deals

with the policies and procedures. The purported contract at B73 references a Dismissal / Disciplinary Procedure and states '*Please contact John McLean for further information, or to request to review a copy. If you are dissatisfied with any disciplinary or dismissal decision relating to you then you should, in the first instance, apply in writing to John McLean, stating the grounds of your appeal."*

64. The purported contract of employment at B71 – B73 is not signed by the claimant and does not have a place set out for the claimant's details, signature and date. It does not appear that the claimant's start date details have been completed: at B71 it states "*The date of commencement of your employment is [st] [5] [2020]*". The date of John McLean's signature is 5 April 2023, before the claimant's start date, which was on 4 June 2022. John McLean's evidence was that he would have signed that before he went on holiday as he always goes on holiday at Easter, for the first two weeks in April. John McLean's position in evidence in chief was that Fergus Wallace dealt with the preparation of the contract, and that the claimant's contract was at B71 -B73. That was inconsistent with the footer of the document, which showed the creator as Irene McLean. Mr McLean was asked by the Tribunal why the name 'Irene McLean' is set out under 'Form Prepared By' at B73. John McLean then changed his evidence in respect of who would have prepared the contract.

65. Mr McLean's evidence that the claimant was given the opportunity to state his position on what had occurred was inconsistent with the terms of the letter of dismissal (B88). It was not disputed that that letter had been given to the claimant at the meeting when he was told that he was dismissed. That letter must then have been prepared before that meeting. That letter clearly sets out that the decision that the claimant is dismissed. It follows that the claimant could not then have been given the opportunity to state his position on what had occurred before the decision to dismiss him was made. It was only after questions from the Tribunal that it became Mr McLean's position that the claimant had had the opportunity to state his version of what had occurred. That was not part of Mr McLean's evidence in chief. Mr McLean's position in

evidence in chief was that he reported the incident to Mr Wallace, that there had been discussion between him and Mr Wallace and that they came to the decision that the claimant should be summarily dismissed. Mr McLean then sought to retract from that position in his answers to questions from the Tribunal, when his position was that he had not been involved in the decision to dismiss the claimant. For these reasons, we did not find Mr McLean to be entirely credible.

66. The claimant's evidence was consistent with the documentary evidence before us. He did not seek to avoid questions and was consistent in his position. For these reasons, where there was a dispute in the position of the claimant and Mr McLean, we made findings of fact based on the claimant's position in evidence.

67. We noted the reference in the letter of dismissal to the claimant's behaviour. No evidence was heard on any contribution by the claimant to his dismissal, either on 13 January 2023 or previously, and no deduction was sought for any alleged contribution.

Discussion and Decision

Failure to Provide Written Statement of Employment Particulars

68. We did not accept that what is purported by the respondent to be the contact of employment was issued to the claimant. We considered it to be significant that that document was not signed by the claimant (nor does it have details where it should be signed by the employee). The start date in the document is incomplete and is not consistent with the claimant's start date with the respondent. We accepted the claimant's evidence that no contract of employment was issued to him by the respondent. The claimant's evidence was consistent and more credible than Mr McLean's evidence.

69. For these reasons, the claimant's claim under section 1 ERA is successful. We did not accept the respondent's representative's position that no award can be made in respect of the claim under s1 ERA because a claim under s103A is not listed in Schedule 5 of the ERA. Included in the list in that

Schedule 5 is section 111 ERA (unfair dismissal). The claimant's dismissal under section 103A ERA is an unfair dismissal.

70. An award is made to the claimant in respect of the failure to issue particulars of employment. In considering the award to be made in respect of that successful claim, we applied section 38 of the Employment Act 2002. We interpreted section 38(5) as meaning that the successful claimant receives the higher award of 4 weeks' pay, unless there are exceptional circumstances not to give that award. We understood that to be applicable where the written statement of employment particulars was not issued because of exceptional circumstances, in which case the lower award of 2 weeks' pay should be made. There was no evidence before us of any exceptional circumstances preventing the respondent's issue of the written statement of employment particulars. It was the respondent's position that the contract was issued but we did not find the evidence (documentary or oral) to be reliable in support of that position.

71. The respondent's representative had relied on *Costco Wholesale UK v Miss Z Newfield, [2013] UKEAT/0617/12.* There it had been argued that the award of 4 weeks' pay was perverse, but the Tribunal's award of 4 weeks' pay made under section 38 of the EA was upheld by the EAT. No particular circumstances were relied upon to distinguish that case from the present one.

72. In the circumstances of this case, we made the award of a sum equivalent to 4 weeks' pay in respect of the respondent's failure under section 1 of the Employment Rights Act 1996. That is the higher award under section 38 of the Employment Act 2002, being 4 weeks of the claimant's net weekly pay as at the date of termination of employment. That is calculated at the rate of the claimant's weekly wage as at the date of termination on 16 January 2023, prior to the increase which came into effect at week 41 of tax year 22/23 (after the date of termination of the claimant's employment). We were not assisted by the parties' representatives in calculating the appropriate weekly pay figure. On our calculations, the applicable weekly net pay figure is £337.98, plus employer pension contributions. We calculated an average figure for pension contributions of £11.28 per week (£462.35 / 41 weeks). We then

calculated the appropriate weekly wage figure to be (11.28 + 337.98) £349.26. The award made in respect of the successful claim under section 1 ERA and under section 38 of the Employment Act 2002 is (349.26 x 4) = **£1397.04.**

Failure to Provide Itemised Pay Slips

73. We accepted that payslips for the respondent's employees were produced by the accountancy firm responsible for the respondent's payroll. Detailed pay slips were included in the Bundle. Their production by the instructed accountancy firm was not questioned. Mr McLean's evidence that these had been so produced was not contested in cross examination.

74. Although we accepted that these payslips were produced by the accountants, and sent to the respondent by email, we did not accept the respondent's position that these were provided to the claimant. We found the claimant's evidence to be more credible than Mr McLean in that regard. Mr McLean was inconsistent in his evidence on where the payslips were stored. He did not provide a credible explanation as to how it was ensured that the payslips were collected by the employees, or what would happen to their payslip if an employee was absent from work. We did not accept that the respondent would have printed out payslips provided to them on email and kept a copy in a filing cabinet. We found that evidence to be implausible and without explanation why they would do that. It was significant that Mr McLean could not answer questions on the detail of what happened if an employee was not there to pick up his payslip, e.g. how long the pay slip would lie.

75. For these reasons, the claimant's claim that he was not issued with payslips by the respondent is successful. A declaration is made that the claimant was not issued itemised payslips by the respondent, as is required under section 8 ERA.

76. No monetary award was sought by the claimant's representatives in respect of that claim. We accepted the respondent's representative's submission that any monetary award arising from that failure would be in respect of illegal deductions. There was no evidence of any illegal or unknown deductions

made from wages payments to the claimant from the respondent. There is then no monetary award made in respect of that successful claim.

Unfair Dismissal

77. It was conceded by the respondent that the claimant's dismissal was an automatically unfair dismissal under section 103A ERA.

78. Although the respondent did not contest liability under the s103A claim, we did require to consider the circumstances of the dismissal, in order to make our determinations on whether or not an uplift should be applied on application of the ACAS Code of Practice. For the reasons set out in the 'Comments on Evidence' section above, we found the evidence of Mr Fleming to be more credible than that of Mr McLean with regard to what had occurred. It was significant that we did not hear any evidence from the person who dismissed the claimant (Mr Wallace). The claimant's dismissal was summary in the extreme. The claimant was not suspended. There was no investigatory meeting. The claimant did not receive any advance notice of the allegations. He did not have an opportunity to state his position on what had occurred prior to him being called in to be dismissed. He was not advised of right to bring to any disciplinary meeting a workplace companion or trade union official. Mr McLean relied on there being no recognised trade union. That does not detract from the statutory right of an employee to be accompanied at a disciplinary meeting. We accepted the claimant's evidence in respect of there being no opportunity for the claimant to state his position on what had occurred. It was significant that Mr McLean did not deny that the claimant had been summoned by Mr Wallace. Or that the dismissal letter was given to the claimant at that meeting. Mr McLean's evidence was inconsistent, as set out in the 'Comments on evidence' section above

79. Mr McLean did not dispute that when the claimant was '*summoned'* to a meeting with Mr Wallace, or that at that meeting the claimant was given a letter informing him that he was dismissed. It was significant that there was no explanation as to how or when the claimant could have been given the opportunity to state his position on what had occurred prior to the decision to

dismiss being made. In those circumstances, we concluded that the decision to dismiss had been made prior to the claimant being called to the meeting with Mr Wallace, and the letter informing the claimant of his dismissal was prepared prior to the meeting, and given to the claimant at the meeting, without him having the opportunity to state his position on what had occurred. The only information which formed the basis of the dismissal was that which Mr McLean had given Mr Wallace. There was no investigation prior to the decision to dismiss. These circumstances are all significant with regard to consideration of whether there should be an uplift, on application of the ACAS Code of Practice on Disciplinary procedures.

80. In consideration of the application of that Code of Practice, it was taken into account that the claimant was offered the opportunity to appeal his dismissal, and that he did so. It was significant that the appeal was to Mr Wallace, who had informed the claimant that he was dismissed. At the appeal stage there was no attempt to meet with the claimant, to obtain his position on what had occurred. There was no evidence of any steps investigatory steps taken at the appeal stage. The dismissal was upheld on appeal, which was a paper exercise. We concluded that this was a sham appeal, with no prospect of the decision to dismiss being re-considered or changed. We took into account that the respondent is a small company with no HR department.

Remedy for Unfair Dismissal

81. We accepted the respondent's position that account requires to be taken of sums received by the claimant from the respondent in respect of the successful interim relief application and the resulting Order for continuation of contract. We did not accept the respondent's representative's submissions that the award should be reduced to nil before the application of any ACAS uplift, resulting in an uplift of nil, and an award of nil.

82. We were not assisted by the parties' representatives' calculations in respect of payments made to the claimant under that Order. It was accepted in evidence that the claimant received payments from the respondent as reflected in the payslips included in the Bundle (at B74 – B82). Adding the

net sums in those payslips gives a total net payment to the claimant of £5033.59. That sum is the Tribunal's calculation, adding the figures of net pay to the claimant from the respondent from 10 February 2023 (when a lump sum was paid to the claimant), at week 45 of tax year 22/23, to week 4 of tax year 23/24. It is noted that those pay slips do not all record pension contributions being made, but that it is the parties' representatives' position that there is no ongoing loss in respect of pension contributions and that the claimant has received all sums due to him from the respondent in respect of pension contributions. On that basis, we made the calculations based on net wage only.

83. It was not in dispute that with effect from 20 March 2023, the claimant secured new employment, at a higher rate of pay than he had earned with the respondent. The start date of that employment was 20 March 2023. There was then a period when the claimant was earning from that new income and was also receiving payments from the respondent under the Order for Continuation of Contract. That Order was revoked by decision on 3 May 2023, which was backdated to have effect from 20 March 2023. By the time of that revocation, there had been overpayments to the claimant. On the basis of the payslips and on our calculations, by 3 May 2023, the claimant had received from the respondent total net pay of £5033.59 (being net pay figure from week 45 tax year 22/23 until week 4 of tax year 23/24). Under the Order for Continuation of Contract, the claimant was entitled to total net payment from the respondent of £3004.90 (being net salary from week 45 of tax year 22/23 to week 50 of that same tax year. On the Tribunal's calculations, the claimant received an overpayment under the Order for Continuation of Contract of £2028.69 (being payments made from week 51 of tax tear 22/23 until week 4 of tax year 23/24).

84. It was not contested that the claimant's dismissal was an unfair dismissal under section 103A ERA. The claimant is entitled to an unfair dismissal basic award of **£399.20.** Any ACAS uplift would only apply to a compensatory award.

85. We considered whether the claimant is entitled to a compensatory award in respect of that unfair dismissal. We accepted the claimant's representative's position that the claimant had loss arising from his dismissal until the date he began his new employment (20 March 2023). We accepted that for the purposes of calculation of any uplift in respect of failure to comply with ACAS code, it is that loss figure which should be the basis of the calculation. We calculated the claimant's loss from 16 January 2023 until 20 March 2023 as £3004.90. That figure was calculated by the Tribunal adding the amounts detailed on the payslips as being paid to the claimant from week 45 to week 50 of financial year 22/23.

86. We then considered the extent to which any uplift should be applied. Given that the dismissal was summary in the extreme. There was no explanation offered as to why the ACAS Code was not followed. We did not find Mr McLean to be credible in his evidence that the claimant had been given the opportunity to state his position on the allegations. In the circumstances set out above, we considered that the respondent's failure was unreasonable and that an uplift of 25% should be applied. The only attempt to comply with the Code was in respect of offering an appeal, but that was a sham, to the person who made the decision to dismiss and with no attempt to meet with the claimant or address the points in his letter of appeal. An uplift of 25% on the claimant's losses to 20 March 2023 is (25% of £3004.90) = £751.22.

87. We did consider it appropriate to make an award in respect of loss of statutory rights. In circumstances where the claimant did not need to have qualifying service to bring his unfair dismissal claim and where he had 18 months service prior to his dismissal, we considered it appropriate to make an award of one week's net pay in respect of loss of statutory rights (£349.26). That award is however part of the compensatory award: the remedy for unfair dismissal is only the basic award and the compensatory award.

88. We accept the respondent's representative's submissions that that compensatory award must be such award that the Tribunal considers to be just and equitable. We consider that to do so we must take into account payments which the claimant has received from the respondent in respect if

the Order for Continuation of Contract. On the basis of the figures in the payslips, which are undisputed, under the Order for Continuation of Contract the claimant has received a total of £5,033.59 in respect of payments of net pay from week 45 of year 22/23 to week 4 of year 23/24. Under the Order for Continuation of Contract, until its effective date of revocation, the claimant is entitled to £3004.90 (payments shown in the payslips from week 45 to week 50). The claimant has then received an overpayment from the respondent of £2028.69 (being payments shown in the payslips of week 51 of year 22/23 to week 4 of year 23/24).

89. The calculation of the compensatory award is (£3004.90 + £751.22 + £349.26) £4,105.38. The payslips show the total amount paid to the claimant in respect of wages under the Order for Continuation as £5033.59. As the claimant has already received from the respondent more than the amount of that calculated compensatory award, it would not be just and equitable to make a compensatory award. The claimant's compensatory award of £4,105.38 is reduced to nil on application of section 123 ERA, because the claimant has already received £5,033.59 from the respondent in respect of wages paid under the Order for Continuation of Contract, plus additional employer pension contributions. The claimant has had no financial loss resulting from his unfair dismissal, because of the application of the Order for Continuation of Contract.

90. For these reasons, on application of the just and equitable principle in section 123 ERA, no sum is awarded to the claimant in respect of an unfair dismissal compensatory award.

Award

91. The claimant is awarded the total sum of (£1397.04 + £399.20) **£1796.24.** This is comprised of £1,397.04 in respect of the respondent's failure to provide the claimant with a written statement of employment particulars, and the unfair dismissal basic award of £399.20.

92. Section 123 ERA does not apply to the award under section 38 EA or to the unfair dismissal basic award.

93. We note that the claimant has received overpayment from the respondent under the Order for Continuation of Contract and that will be taken into account by the respondent prior to the payment of sums due to the claimant in terms of this decision. The extent of the claimant's entitlement under the Order for Continuation of Contract, to 20 March 2023 is £3004.90, week 45 to week 50 on the payslips. The claimant has then received an overpayment from the respondent of £2028.69, being payments set out in the payslips from week 51 of year 22/23 to week 4 of year 23/24.

Employment Judge: **C McManus**
Date of Judgment: **18 July 2023**
Entered in register: **19 July 2023**
and copied to parties