EMPLOYMENT TRIBUNALS

Claimant:	**Mr A Wright**
Respondents:	**(1) Callie Best** **(2) Angela Beaston** **(3) Natasha Beaston** **(4) Jennifer Post** **(5) Brian Breen** **as trustees of Gateway North East (a registered charity)**
Heard at:	**Newcastle Employment Tribunal**
On:	**5th, 6th and 20th October 2023**
Before:	**Employment Judge Sweeney** **Stuart Moules** **Steve Wykes**

Appearances
For the Claimant, In person
For the Respondent, Ms J Fearne

JUDGMENT having been given on **03 November 2023** and written reasons for the Judgment having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

WRITTEN REASONS

The Claims

1. In a Claim Form presented on **29 March 2022**, the Claimant ('C') brought the following claims:

    a. A claim that he had been subjected to a detriment, in contravention of section 47B ERA 1996 on the ground that he made a protected disclosure.

b. A claim that he was automatically unfairly constructively dismissed in that the reason, or principal reason, for his alleged constructive dismissal was that he had made a protected disclosure (within section 103A ERA 1996).

c. A claim that, in any event, he had been unfairly constructively dismissed (within section 98 ERA 1996.

d. A claim of breach of contract in respect of a failure to pay pension contributions.

2. At the outset of the hearing the Tribunal discussed and identified the claims and issues. C confirmed that he was not pursuing the claim of breach of contract in respect of the failure to pay pension contributions as this had been resolved.

Whistle-blowing detriment – section 47B ERA 1996

3. The relevant disclosures (see para 38 of Employment Judge Langridge's Case Summary of **05 January 2023**) were said to be contained in the following documents:

a. C's letter of **07 December 2021** to Angela Beaston, chair of Trustees [**C's bundle: black ring binder**]. The information relied on is found on **C bundle page 19**

b. C's letter to Angela Beaston of **10 December 2021**. The information relied on is found on **pages 20-21**

c. C's (Jackson) letter of **21 December 2021** to Joanne Fearne and subsequently to the Charity Commissioners. The information relied on is found at **pages 29-37**

We refer to these as the three '**PIDs**'

4. C confirmed that he was not relying on any disclosure allegedly made in his resignation email of **06 January 2022 [page 48-49]**.

5. C claims that the Respondent, and in particular, Joanne Fearne, deliberately failed to pay his wages which he says were due on **28 December 2021** or – if he is wrong about that date – on **31 December 2021**.

6. This failure to pay those wages on time was one of, indeed, the main thing that triggered the Claimant's decision to terminate his employment. He claimed that he terminated his contract of employment in circumstances where he was entitled to terminate it without notice by reason of the Respondent's conduct. In other words, he claimed that he was (constructively) dismissed within the meaning of section 95(1) ERA 1996. As he contends the principal reason for not paying the wages on the due date was that he had made a protected disclosure, he contended that his dismissal was automatically unfair.

7. If not automatically unfair, he claimed his constructive dismissal was generally unfair. He relied on two terms: an express term of his contract that he was to be paid every four weeks (he says he was to be paid every fourth Tuesday). He also relied on the well-known term of 'mutual trust and confidence' – implied into all contracts of employment. The implied term means that an employer must not, without reasonable or proper cause, conduct itself in such a manner as is calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

8. The things that the Respondent did which are alleged to have breached that implied term were:

    a. Joanne Fearne accessed his computer drive and deleted the content of a draft letter he was preparing to send to her and trustees. This was referred to by the Claimant as a breach of trust or of his confidentiality.

    b. The Respondent did not provide him with payslips.

    c. The Respondent failed to pay his pension contributions properly.

    d. His wages were paid late and that the amount fluctuated from month to month.

    e. Joanne Fearne's treatment of a member of staff, namely Michaela Arkle.

    f. The Respondent failed to pay him his **December 2021** wages on the due date (either **28 / 31 December**) .

9. The failure to pay on time in **December 2021**, was, says the Claimant the final straw and triggered his decision to resign.

10. The Claimant and Joanne Fearne gave oral evidence. The parties had prepared two separate bundles of documents. The Respondent's index and bundle was confusing to follow but we managed to identify all the documents which the parties sought to rely on.

Findings of fact

11. The Respondents are or were all trustees of a charitable organisation registered with the Charity Commission as 'Gateway North East' or '**GNE'**. This charity was established in **2010** by a group of well-meaning individuals – parents and carers - with noble aims, one of whom was Joanne Fearne. Ms Fearne had been a trustee of **GNE** up until some time in early **2019**, when she became the charity's Chief Executive Officer ('CEO'). She became a trustee again, on **01 April 2022** and is currently one of three trustees, the others being Laura Fearne and Ruth Williams. Trustees are the people responsible for controlling the work, management and administration of the charity on behalf of its beneficiaries and employing staff.

12. **GNE** supports children, young people, families and carers affected by disability or a barrier to learning by providing support, including leisure activities, holiday schemes, training and work experience. It provides emotional, physical, practical and spiritual support and aims to educate society about the needs and positive attributes of young people with a disability or barrier to learning and their families.

13. C was employed by the Respondent from **05 December 2016 to 06 January 2022**.He commenced employment as a family support worker. For the first few years of his employment with the Respondent, there were no issues of a nature that caused him to feel unsettled at work. Matters changed in **2019** when there was an incident regarding a trip to Ghana (the facts of which were not given and which are incidental to the issues in this case). It is relevant only to the extent that the Claimant identifies this trip as the time when his relationship with the Respondent's former CEO, Joanne Fearne, changed. Whatever happened resulted in the Claimant intending to leave the Respondent's employment in **2019** although in the end he did not. C remained an employee and in fact his role developed to encompass an element of staff welfare. He and Ms Fearne embarked on some training in this respect, resulting in the Claimant assisting in the development of an employee development booklet. Certainly, by **August 2021** he had taken on the role of staff welfare officer. Insofar as Ms Fearne suggested it had nothing to do with her, we reject this. She was, we infer, aware of the Claimant becoming staff welfare officer, encouraged it and agreed to it [**R bundle, page B74-76]**.

14. In **July 2018**, **GNE** took advice on the advantages and disadvantages of changing to a different legal structure with a view to setting up a registered limited company (Gateway North East Limited) which would have the same charitable aims and objectives of **GNE**. It was postulated that the limited company could employ staff and enter into service level agreements with **GNE** for the provision of support and activities to the service users.

15. **GNE** used to employ a finance manager. However, in **January 2019** he or she left, giving only 1 day's notice of resignation. Ms Fearne, the now CEO, took over the management of finance. Shortly after this she helped with the setting up of the limited company resulting in the incorporation of Gateway North East Limited on **25 February 2019**. She became a director of that company, eventually resigning her directorship on **01 December 2021**.

16. In **GN**E's draft Strategic Plan 2021 to 2025 and Business Plan 2022 to 2023 [**page 100 to 141**] the limited company was described as a dormant company. It turned out to be very difficult to put the strategy undertaking the charitable objectives through this company. The trustees found it difficult to recruit someone to manage the limited company. There were a number of reasons for this. Contracts with Durham County Council (one of, if not the biggest, source of funding) came to an end in **September 2019**. Then there was COVID. With the first national lockdown in **March 2020**, **GNE**, like most, if not every other non-critical employer in the country, was compelled to close its places of work and activities and staff had to work from home. Face to face activities stopped which had a major impact on its viability.

17. It was still hoped that the limited company would get up and running and that it would employ staff and work with the charity as well as other bodies and companies.

18. However, it was not until **August 2021 t**hat a CEO of the new company was appointed. His name was Gary Jackson. The intention was that any new staff would be recruited and employed by the company and that existing staff, such as the Claimant, would transfer their employment to the new company, hopefully by **01 October** 2021 [nb: in the end that did not happen]. It was also envisaged that Ms Fearne, the CEO of GNE, would step down as CEO. Ms Fern said to the Tribunal that she ceased as CEO in about **September 2021**. However, we saw little evidence that she had, in reality, stepped down. She did not remove herself from the day-to-day operations of the Respondent charity. In fact, she continued to be involved very much as she had done. We find that if she stepped down it was in 'name only'. We emphasise that it was very difficult to get a good sense of what had been happening, such was the opaque and disorganised way in which the Respondent has presented its case and in which it ran the charity. However, we do find that the intention and the agreement was that Ms Fearne would effectively continue to run the finances until about **March 2022**.

19. It was of no concern to the Trustees how she did this, whether as its employee, as a CEO or via any other title, as a volunteer or in some other capacity (such as doing it through Ms Fearne's own company). The legal niceties were, in all probability, lost on those running **GNE** and not at the forefront of their minds. Ms Fearne had, in **June 2020**, formed a private company limited by guarantee (it was a Community Interest Company or CIC) called **Pearls North East CIC**. Ms Fearne had intended that her company would enter into a service level agreement with **GNE** to handle wage, charity finances and the limited company accounts. She told the Tribunal that two SLAs were effected: one between Pearls NE and the Charity and one between Pearls NE and the limited company. Ms Fearne referred to a 'General Service Agreement' in the Respondent's bundle at page **B116-120** (relating to Pearls NE Cic and Gateway North East Ltd). However, this was an incomplete document and was unsigned and unwitnessed. We did not hear any evidence from any Trustee regarding it.

20. Given Ms Fearne's involvement with **GNE** from the outset, the trustees wanted her to say on to ensure that the charity's activities were handed over as smoothly as possible. Therefore, she agreed to do so. We accept that she had intended to do so through the mechanism of Pearls North East and that a service level agreement to that effect would be signed. However, we were not satisfied that any such agreement was in the end ever reached or executed. NB. In mid-late 2021, the running of the charity was, we find, shambolic. Whatever was intended, Ms Fearne continued as CEO in all but name. Importantly, she retained control of wages and finances. She was, if not an employee, an agent of the charity. We were not at all satisfied that there had been any concluded agreement between Pearls NE and GNE.

21. To say that the situation was confusing is putting it mildly. Certainly, from the point of view of the employees such as the Claimant, he was very unclear as to who was in charge of what, as between **GNE** and the limited company.

Michaella Arkle

22. On or about **26 November 2021**, Ms Fearne told Mr Jackson that an employee, Michaela Arkle, had emailed a third party, namely Pastor Tony Patrick, in which Michaela accused Ms Fearne of stealing from the charity shop and that Mr Patrick had forwarded to Ms Fearne the email from Michaela in which Michaela said this.

23. Mr Jackson interviewed Ms Arkle on **26 November 2021**. He asked the Claimant to attend the interview as support for Ms Arkle, which he did. She denied the allegation and became very upset. Subsequently, the Claimant emailed Mr Patrick. The email and Mr Patrick's response is at page **15** of C's bundle.

24. There was no truth in what Ms Fearne said about Michaela Arkle. Ms Fearn had lied. She admitted as much in an email to Mr Jackson and the Claimant (and Kate Welch) on **04 December 2021** [**C bundle page 25-26**]. She tried to explain herself in that email and expressed her annoyance (as she did again in these proceedings) at Mr Jackson telling Ms Arkle about the allegation. It was a serious matter. Any employee in the position of Mr Wright would reasonably, in our judgement, be rightly concerned that the person who had effectively been running the organisation should lie about a junior employee in this way, with the potential damage this could have caused not only to Ms Arkle's reputation but to her employment. Ms Fearn believes Mr Jackson and Mr Wright were in the wrong in speaking to Ms Arkle about this. As an independent tribunal, it seems to us that it was a perfectly reasonable and natural thing to do. Mr Jackson was expected to manage Ms Arkle and here he was, being made aware that she had allegedly spread unfounded accusations to a third party. That cried out for investigation. For his part, the Claimant took his responsibilities as staff welfare office seriously and this incident deeply concerned him. C was, we find, shocked by the situation and it was perfectly understandable and reasonable that he would be so.

25. Michaela submitted a grievance against Ms Fearn [**C bundle, page 24**]. This was prepared with the Claimant's assistance. He too decided that he would write to the Trustees regarding this incident concerning Michaela Arkle as a staff welfare concern. In the first week of **December 2021** he started working on a letter. On **06 December 2021**, he opened his work share drive to finalise the letter only to discover that the text or content of it had been deleted. He saw the initials '**JF'** against the deletions. Upon checking the version history he saw that it showed Ms Fearne as a person who had accessed the document on **04 December 2021** at 1:56pm and again on **05 December 2021** at 6:05pm [**C's bundle, page 7**]. The Claimant was unnerved by this. However, he managed to recover the deleted content and emailed the letter to Ms Fearne on **07 December 2021**. He also sent a slightly differently worded version to Trustees, Angela Beaston and Jennifer Post [**C bundle, page 17- 19**]. (C identified this as the first of his three PIDs). He said he was '*concerned that Joanne Fearne's treatment and attitude*

towards members of staff is causing considerable stress and anxiety.' He referred to the Respondent being a signatory to the NHS 'Mindful Employer' initiative, urging the Trustees to take the issue seriously. He referred to himself as the 'staff welfare officer, having been given the responsibility of implementing measures to *ensure the promotion of staff wellbeing and mental health at work*.' He appealed to the Trustees to '*meet with [himself] and other senior members of staff to find a peaceful and satisfactory resolution to this matte*r.' C was raising a grievance in this document. He also expressed hope that Ms Fearne could be supported in any difficulties she was having.

26. Angela Beaston replied to the email on **08 December 2021**. She said she was '*not aware that Joanne Fearne was still employed by **GNE***' but added that they took the Claimant's claims seriously. She asked for supporting evidence to back up the claims and said that they would also be contacting Ms Fearne for her side of the story.

27. On **10 December 2021** (at 10.51am), the Claimant emailed Ms Fearne, referring to the version history and asking if she had deleted the content [**C bundle page 4**]. Ms Fearne replied within a couple of hours. She denied accessing the document.

28. Although she has denied it, we find that Ms Fearn did access the Claimant's work and she deleted the content. Not only was her name on the version history as having accessed the document, she had been provided with C's password back in **February 2021** and C had not changed his password since then [**C bundle, page 5**]. We did not believe Ms Fearne's denials or her vague assertion that someone else might have accessed it, using her log on. Such a vague assertion, in the face of the evidence, seemed highly implausible. Furthermore, the letter in question was a complaint about Ms Fearne's conduct. It is more likely than not, and we so infer, that Ms Fearne deleted the content out of a sense of indignation, anger and frustration. She saw herself as having put her life and soul into the organisation even to the point of it affecting her health. And here she was being accused of acting contrary to the values of the Charity. We infer that she accessed the document on **04 December 2021** and after a period of reflection, accessed it again on **05 December 2021** to delete the content. In one of her responses to C she said she could not have accessed it she was in bed all day Monday. However, that was **06 December 2021**, after the document had been accessed. More importantly, C said he was willing to be proved wrong and suggested there be an investigation as it was serious. Ms Fearne, however, never got back to him.

29. At 12.57pm the same day, **10 December 2021**, the Claimant responded to Mrs Beaston's email of **08 December 2021** attaching what he referred to as the evidence asked for as well as other supporting documents. The email was at **C bundle page 17** and the attachments on **C pages 20 to 24**.

30. The content of the Claimant's attached documents fall into the following categories:

    a. Concerns about JF's treatment of Michaella Arkle,
    b. Concerns about failure to pay pension contributions on a regular basis in the case of himself and Michaella Arkle,

c. Late payment of wages
d. One member of staff recently being paid a third of her wage
e. Breach of trust and confidentiality by accessing C's 'office 365' personal documents. This was a reference to JF accessing his draft letter.

31. The Claimant heard nothing back from the Trustees regarding his grievance.

32. On **21 December 2021**, Mr Jackson emailed a report headed 'whistleblowing' to Ms Fearne [**C bundle pages 29-37**]. He also sent the same report to the Trustees, although it is unclear on what date he did this. We conclude from the evidence that it was sent on **04 January 2022** [**C bundle, page 41**]. The report was expressly sent on behalf of Mr Jackson, the Claimant, Michaela Arkle and Hannah Jackson. In broad terms, it covered the following categories:

    a. Safeguarding,
    b. Breaches of employees legal rights
    c. Late payment of salaries
    d. Lying and bullying
    e. Management issues
    f. Breach of TUPE obligations
    g. Breach of trust

33. Mr Jackson had sought legal advice from Sintons' solicitors prior to sending the report. The Claimant had contributed to part of it. Mr Jackson also sent the report to the Charity Commissioners. We know it was received certainly by **06 January 2022**. We find it was sent to the commissioners on **06 January 2022**, read in conjunction with **C bundle page 41**. We infer he waited for payment of wages on **06 January 2022** before sending it.

Pay day end of December 2021

34. We find that payment of wages was due on **Friday 31 December 2021**. Indeed, we find that wages were contractually due every 4th Friday. Wages were sent on Tuesday to be paid on Friday. That is also the case from the staff handbook, a copy of which the Claimant had. Under the section 'Administration ' (**R page 281**) it says wages are due on the Friday.

35. Looking at the spreadsheet prepared by the parties (**C bundle page 57**) there were some late payments of wages. the payment for **Friday 26 February 2021** was made on **03 March 2021**. This was not challenged by the Respondent. It was, on our findings, late by 5 days. Other dates where payment was paid late (by reference to the due dates) are:

    a. **06 December 2019** (6 days late)
    b. **24 April 2020** (almost 4 weeks late)
    c. **03 December 2020** (19 days late)

36. Therefore, before the payment that was due on **31 December 2021**, there had been four occasions when wages were late, the last of which was the wages payable on **26 February 2021**. The same spreadsheet identifies 17 occasions between **13 September 2019** and **31 December 2021** when no payslip was sent and 10 occasions in that period when the net amount did not coincide with the payment received. We accepted this evidence.

37. The wages payable to the Claimant on **31 December 2021** were not paid on that date. As of **05 January 2022**, they had still not been paid and the Claimant emailed to say he was claiming constructive dismissal. According to his witness evidence, which we accept, he resigned with immediate effect on **06 January 2022** [**page 48-49**]. The outstanding wages from **31 December** were paid on **06 January 2022**. Others were not paid until then either, namely Gary Jackson, Hannah Jackson, Michella Arkle.

38. There were others whose wages were not paid on **31 December 2021**, namely Nicky Beaston, Jaydon Stapleton and Harriett Hudson. They were sessional workers.

39. As of that date, it was Ms Fearne who was responsible for ensuring that wages were paid to the Claimant. He remained an employee of the charity. Relationships between Ms Fearne and Mr Jackson were fraught at that point. He was frustrated by what he considered to be her interference. As at the date wages were due to be paid to the Claimant, he was still employed by the charity, GNE. As far as the limited company was concerned, there were no directors. New directors were appointed on **06 January 2022**. Immediately upon appointment, the wages were paid.

40. There was, without doubt, utter confusion at this stage as to who was responsible for payment of wages at the end of December.

41. On **21 December 2021**, Ms Fearne emailed Gary Jackson with the subject: '*please sign the attached form so I can sort out how to legally get people paid*'. For some reason unknown to us, Mr Jackson responded to say '*in the hands of our legal team'*. We have read **R bundle, page 115.** We find that Ms Fearne wanted to ensure that wages were paid to staff on time. It is clear that at this stage, however, there was a raging dispute as to who was responsible and who could legally pay the Claimant (and others) their wages.

Relevant Law

Constructive dismissal

42. Section 95 Employment Rights Act ('ERA') defines the circumstances in which an employee is dismissed for the purposes of the right not to be unfairly dismissed under section 94. Section 95(1)(c) provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is **entitled** to terminate it without notice by reason of the employer's conduct. This is known as 'constructive dismissal'.

43. The word 'entitled' in the definition of constructive dismissal means 'entitled according to the law of contract.' Accordingly, the ‘conduct’ must be conduct amounting to a repudiatory breach of contract, that is conduct which shows that the employer no longer intends to be bound by one or more of the essential terms (express or implied term) of the contract of employment: **Western Excavating (ECC Ltd) v Sharp** [1978] I.C.R. 221, CA.

44. In many cases, the breach of contract relied upon by the claimant is of the implied term of trust and confidence. That is expanded upon in a well-known passage from the judgment of the EAT (Browne-Wilkinson J) in **Woods v WM Car Services (Peterborough) Limited** [1981] I.C.R. 666

“It is clearly established that there is implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee ***Courtaulds Northern Textiles Ltd. v. Andrew*** [1979] I.R.L.R. 84. *To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it*: ***see British Aircraft Corporation Ltd. v. Austin*** [1978] I.R.L.R. 332 and ***Post Office v. Roberts*** [1980] I.R.L.R. 347. *The conduct of the parties has to be looked at as a whole and its cumulative impact assessed:* ***Post Office v. Roberts****”*

45. The test for determining whether this term of trust and confidence has been broken is an objective, not a subjective one. An employee may well genuinely lose trust and confidence in his employer (and vice versa) but that, of itself, does not mean that the term has been broken. A tribunal or court must assess objectively whether the conduct of the Respondent is such that it can be said the relationship of trust has been seriously damaged.

46. If so, the employee must resign in response to that conduct and not delay too long in doing so, lest he be found to have affirmed the contract.

47. It is a question of fact in each case whether there has been conduct amounting to a repudiatory breach of contract: ***Woods v WM Car Services (Peterborough) Ltd*** [1982] I.C.R. 693, CA. In determining this factual question, the tribunal is *not* to apply the range of reasonable responses test (which applies instead only to the final stage of deciding whether the dismissal was unfair), but must simply consider objectively whether there was a breach of a fundamental term of the contract of employment by the employer: ***Buckland v Bournemouth University*** [2010] IRLR 445, CA.

48. It is enough that the employee resigned in response at least in part, to fundamental breaches of contract by the employer. The fact that the employee also objected to other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the circumstances of the repudiation: **Meikle v Nottinghamshire County Council** [2005] ICR, CA. It follows that once a repudiatory breach is established, if the employee leaves and even if he may have done so for a whole host of reasons, he can

claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon: **Wright v North Ayrshire Council** UKEATS 0017/13 (27 June 2013); **Abbey Cars West Horndon Limited v Ford** UKEAT 0472/07.

49. The final incident which causes the employee to resign does not in itself need to be a repudiatory breach of contract. In other words, the final incident may not be enough in itself to justify termination of the contract by the employee. However, the resignation may still amount to a constructive dismissal it the act which triggered the resignation was an act in a series of earlier acts which cumulatively amount to a breach of the implied term. The final incident or act is commonly referred to as the 'last straw'. The last straw must itself contribute to the previous continuing breaches by the employer. The act does not have to be of the same character as the earlier acts. When taken in conjunction with the earlier acts on which the employee relies, it must amount to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial**:** ***Omilaju v Waltham Forest London Borough Council*** *[2005] IRLR 35*.

50. The thorny issue of how the law on affirmation applies in 'last straw' cases where there has been past repudiatory conduct has recently been addressed (and resolved) by the Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] I.C.R. 1. The effect of the last straw is to revive the employee's right to resign in cases where arguably an employee had affirmed an earlier fundamental breach by the employer. The tribunal should consider:

    a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

    b. Has he or she affirmed the contract since that act?

    c. If not, was that act (or omission) by itself a repudiatory breach of contract?

    d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

    e. Did the employee resign in response (or partly in response) to that breach?

51. In a case of constructive dismissal, the reason for dismissal is the reason for which the employer fundamentally breached the contract of employment.

52. If the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract. As stated by Lord Denning in **Western Excavating v Sharp**, the employee 'must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged'. Affirmation can be implied from a

prolonged delay but the passage of time, in and of itself, will not usually equate to affirmation. All the circumstances must be considered.

53. In a complaint of unfair constructive dismissal, because the employer has not expressly dismissed the employee, it is not a case of it having to show a reason for the 'dismissal'. The employee has, after all, resigned in response to what he says is repudiatory conduct / a fundamental breach of contract. However, the Respondent must still show the reason for the constructive dismissal, which for all intents and purposes means it must show the reason it repudiated the contract of employment: see **Berriman v Delabole Slate Ltd** [1985] I.C.R. 546, CA. ……

54. If an employer does not attempt to show a potentially fair reason in a constructive dismissal case but simply relies on the argument that there was no dismissal, a tribunal is under no obligation to investigate the reason for dismissal, or its reasonableness for itself: **Derby City Council v Marshall** [1979] I.C.ER. 731, EAT. Of course, the position is otherwise where the reason is said to be 'automatically unfair, for example under section 103A ERA 1996.

Public interest disclosures

55. The ERA provides two forms of protection to 'whistle-blowers': (1) protection from detriment under s47B and (2) protection from dismissal under s103A.

56. By **s103A ERA** 1996, if the reason or principal reason for dismissal is that the employee made a protected disclosure, that dismissal is regarded as being automatically unfair.

57. By **s47B ERA** 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.

58. Whistle-blowers do not have to be right. They may be wrong in their belief. The legislation is concerned with reasonableness. In order for a disclosure to be considered a protected disclosure under the ERA two things need to be satisfied:

1.1. Firstly, there needs to be a 'qualifying disclosure' within the meaning of section 43B ERA.

1.2. Secondly, it must be made in a manner which accords with the scheme of the Act set out in s43C to s43H. In this way it becomes a 'protected' disclosure.

What is a qualifying disclosure?

information

59. The worker must disclose information: **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38, EAT. In **Kilraine v Wandsworth Borough**

Council UKEAT/0260/15/JOJ Langstaff J observed that tribunals should observe the principle in **Cavendish Munro** with caution to the extent that it must not be 'seduced' into thinking that it must decide whether something is either 'information' or an 'allegation'. Information may be provided in the course of making an allegation. However, the requirement is still for information to be disclosed. If there is a disclosure, it is necessary to consider whether that disclosure is a qualifying disclosure. This will depend on the **nature of the information disclosed**.

60. As can be seen from the exercise undertaken by Langstaff J (in paragraphs 31-35 of the **Kilraine** case) it is a question of carefully assessing what was said or written so as to determine whether information was provided (which meets the qualifying criteria in the Statute) whether or not an allegation was made as well, or whether what was said does not amount to information, for example because of the vagueness or lack of specificity or clarity.

The information must, in the reasonable belief of the worker, tend to show a relevant failure

61. Section 43B identifies 6 things which the disclosed information must, in the belief of the worker, 'tend to show'. Each of the six categories involves some form of malpractice or wrongdoing and are referred as the 'relevant failures'. The worker is not required to establish that the information is true. He must establish that at the time he made the disclosure, he/she held a **reasonable** belief that the **information disclosed tended to show**. It is not a question of whether a hypothetical reasonable employee held a reasonable belief, but whether **the particular worker's belief was reasonable**.

62. There is a subtle but vital distinction, in that it is not a case of asking whether the worker reasonably believed that a breach of a legal obligation had occurred, is occurring or is likely to occur. Rather, it is a case of asking whether he/she held a reasonable belief that the information they were disclosing **tended to show** that such a breach had occurred, is occurring or is likely to occur. Further, when assessing the worker's belief, the test is not a wholly subjective one. It is the reasonableness of the belief of the particular worker which is being assessed.

63. In cases where a claimant relies on breach of a legal obligation, the source of the legal obligation must be identified before going on to assess the reasonableness of the belief of the employee.

Public interest

64. The worker must reasonably believe that he is making the disclosure in the public interest. That aspect is to be determined in accordance with the guidance of the Court of Appeal in **Chesterton Global Ltd (t/a Chestertons)v Nurmohamed** [2018] I.C.R 731.

65. What is clear from that authority is that there is no 'bright line' between personal and public interest. It is not the case that any element of personal interest rules out the statutory protection. In a case of mixed interests, it is for the tribunal to determine as a matter of fact as to whether there was **sufficient** public interest to qualify under the legislation.

66. The question of what is 'in the public interest' does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be.

67. In **Chesterton Global**, Underlhill LJ, at paras 36-37 said:

> *"I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the **Parkins v Sodexho** kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of **private workplace disputes** should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never."*

68. His lordship added:

> *"where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker…. "*

69. He identified four factors. The four factors adopted are as follows:

> "(a) the numbers in the group whose interests the disclosure served;
>
> (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
>
> (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
>
> (d) the identity of the alleged wrongdoer – as [counsel for the employee] put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more

obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far."

70. It is important to note that the mental element involves a two-stage test: (i) did the clamant have a **genuine belief at the time** that the disclosure was in the public interest, then (ii) if so, did he or she have **reasonable grounds** for so believing? I would add that the claimant's motivation for making the disclosure is not part of this test: **Ibrahim v HCA International** *[2019] EWCA Civ 207.* As the judgment of Underhill LJ puts it: 'the necessary belief is simply that the disclosure was in the public interest'.

71. As to the requirement of **reasonableness** of the belief in public interest this may (in an atypical case) arise on later contemplation by the employee and need not have been present at the time of making the disclosure. **However, not so with the actual belief**. The employee must at the time actually and genuinely believe that she is raising the matter in the public interest.

72. The law protects the worker only against **the act of disclosure**. If the principal reason for dismissal is not the act or fact of disclosure then there can be no unfair dismissal contrary to s103A ERA. If the worker was not subjected to a detriment because he made the disclosure, there is no contravention of section 47B.

Protection

73. If a disclosure is a qualifying disclosure then it becomes 'protected' if (among other things) it is made to the employer (s43(c)(1)(a)). A disclosure made to any person senior to the worker with express or implied authority over the worker should be regarded as having been made to the employer. In **Meridian Global Funds Management Asia Ltd v Securities Commission** 1995 2 AC 500, PC**,** Lord Hoffmann ruled that it will be a question of construction in each case as to whether the legislation in question requires that a person's state of mind be attributed to the corporate body. The purpose of the whistleblowing provisions would therefore have to be considered in any case in which the question arose.

74. Section 47B(1A) – (1E) was inserted into the ERA with effect from **25 June 2013**.

75. Section 47 (1A) provides:

A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

76. Thus, the employer is liable for the wrongs of its employees, workers or agents.

77. If the Claimant has established on the balance of probabilities that he made protected disclosures, that there was a detriment and that the employer subjected him to that detriment, then the burden shifts to the employer to show that he was not subjected to the detriment on the ground that he made the protected disclosure.

78. The employer must then show that, in subjecting C to the detriment (if indeed it did) that the protected disclosure did not materially influence its decision to do so: **Fecitt v NHS Manchester** [2012] I.C.R. 372.

S103A: The reason for dismissal

79. The Claimant carries an evidential burden and not a legal burden. This requires the Claimant to show that there is an issue that warrants investigation and which is capable of establishing the automatically unfair reason advanced: **Maund v Penwith District Council** [1984] I.C.R. 143, CA. If the evidential burden is satisfied, the legal burden reverts to the Respondent to show that the principal reason for dismissal was that advanced was not the asserted impermissible reason. However, an employee, will only succeed in a claim of s103A unfair dismissal if the tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure. A 'principal' reason is the reason that operated in the employer's mind at the time of the dismissal.

80. If the fact that an employee made a protected disclosure(s) was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under s103A will fail.

S47B: causation and burden of proof

81. Causation under s47B has two elements:

    a. Was the worker *subjected* to the *detriment* by the employer?

    b. Was the worker subjected to that detriment *because* he had made a protected disclosure?

82. When considering a case of detriment due to making one or more protected disclosures, a tribunal should be precise as to the detriments and disclosures and should not just roll them up together: **Blackbay Ventures Ltd v Gahir** [2014] IRLR416, EAT (see paragraph 98 of the judgment).

Remedies for unfair dismissal

83. Section 121 ERA 1996 lays down the statutory formula for calculation of a basic award in cases of unfair dismissal.

84. Section 123 ERA 1996 provides as follows:

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be 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.

(2) …..

(3) …

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

85. The compensatory loss is intended to reflect the actual loss the employee suffers as a consequence of being unfairly dismissed. This can cover immediate loss (from the date of termination of employment to the date of the assessment of loss, i.e. a remedy hearing) and future loss. The period covered by immediate losses is subject to the recoupment provisions in the Employment Protection (Recoupment of Benefits) Regulations 1996.

86. The employee must give credit for any earnings from new employment obtained since dismissal. In addition, as provided in section 123(4), the duty to mitigate arises. If there is any issue as to mitigation, the burden is on the employer to show that there were reasonable steps that could have been taken, that the employee did not take reasonable steps to mitigate and to what extent, if any, he would have actually mitigated his loss if he had taken those steps. It is not for the employee to show that what he did was reasonable: **Gardiner-Hill v Roland Berger Technics Ltd** [1982] IRLR 498; **Fyfe v Scientific Furnishings Ltd** [1989] I.C.R 648; **Cooper Contracting Ltd v Lindsey** [2016] I.C.R. D3. Each case is dependent on its own facts. It is for a respondent to raise the question of mitigation and adduce some evidence of a failure to mitigate.

87. The compensatory award is subject to a statutory cap, or maximum amount, as provided for in section 124 ERA.

ACAS Code of Practice and section 207A Trade Union and Labour Relations (Consolidation) Act 1992

88. An employer is expected to have regard to the principles for handling disciplinary and grievance procedures in the workplace set out in the ACAS Code on Disciplinary and Grievance Procedures (the "Code"). The Code is relevant to liability and is considered when determining the reasonableness of the dismissal. Further, if a dismissal is unfair, the Tribunal can increase an award of compensation by up to 25% for unreasonable failure to follow the Code if it considers it just and equitable to do so.

89. The Code sets out the basic requirements for fairness that will be applicable in most conduct cases. It is intended to provide a standard of reasonable behaviour in most instances. The Code sets out the steps employers must normally follow.

90. Paragraph 33 of the Code provides that employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received. Paragraph 40 provides that following the meeting decide on what action, if any, to take. Decisions should be communicated in writing.

Adjustment of compensatory award for failure to provide written particulars

91. Section 38 Employment Act 2002 provides that tribunals must award compensation to an employee where, on a successful claim being made under any of the jurisdictions in Schedule 5 of the Act, the employer was in breach of its duty to the worker under section 1(1) or 4(1) ERA 1996 when the proceedings were begun.

92. The Tribunal must award the 'minimum' amount of wo weeks' pay and may, if it considers it just and equitable in the circumstances, award the 'higher amount' of four weeks' pay. It does not have to make an award if there are exceptional circumstances that would make an award or increase unjust or inequitable.

Discussion and conclusions

93. We deal firstly with the question of whistle-blowing detriment and automatically unfair dismissal on grounds that C made protected disclosures. We were satisfied and concluded that the Claimant – along with others – disclosed information in the report of **21 December 2021** which amounted to protected disclosures. It was less clear whether what he said in his email of **10 December 2021** to Angela Beaston amounted to protected disclosures, although we were inclined to conclude that, in this email too, C made protected disclosures.

10 December email

94. We are satisfied that he made qualifying disclosures in this email. The email which he sent on **10 December 202**1 contained a mixture of assertion and information. The information regarding pensions and pay, in his belief, tended to show that there had been a breach of legal obligations. The information regarding staffing and Michaela, in his belief, tended to show that the health or safety of an individual had been endangered. He believed this to be in the public interest given the values and ethos of the charity which it promoted to external users.

95. Was his belief that the information tended to show these things reasonably held? We concluded that it was. We also concluded that the Claimant genuinely and reasonably believed he was raising these issues in the public interest, applying the guidance in **Chesterton Global**. Although not affecting large numbers of people, the issue regarding pay and pensions affected all the employees of the Respondents. The information regarding the bullying of staff was, given the nature of the organization, an important issue for the Claimant and tended to show, in his belief, that the health of staff was

endangered. Given his personal experiences and from talking to Michaela and others, this belief was reasonable, even if it might be wrong.

21 December email – the report

96. We were also satisfied that the Claimant made a qualifying disclosures in this report. Again, the report was a mix of assertion and information. The information in the report, in C's belief, tended to show that the Respondent was in breach of legal obligations, namely a legal obligation to safeguard and protected the interests of those service users in its charge, the pay and pensions, that the health and safety of staff had been endangered or was likely to be endangered.

97. Was the belief reasonably held? We were satisfied that in relation to the safeguarding issues and pay and pensions that it was – as regards the safeguarding issues, he had learned of this from others and had no reason to doubt what they said. It must be noted we are not saying C was right in what was set out in that report about safeguarding. But of course he does not have to be right. It is all about his belief.

98. We are satisfied that he was of the belief that these matters were in the public interest in that the Respondent was a charitable organisation, promoting charitable views to the outside world. He believed it to be in the public interest that a charity such as the Respondent should act according to its value and that the public interest is served in having conduct contrary to advertised values exposed.

Protection of disclosures?

99. Were the qualifying disclosures protected? This depends on whether they were made withing section 43C-H ERA. C says he made the disclosures to the employer.

100. The employer was the Charity (the Trustees). The **10 December 2021** email was sent to Angela Beaston (a Trustee) and Joanne Fearn. The **21 December 2021** report was sent to Joanne Fearn. The same report was sent to the Charity Commission.

101. Whether the report to Joanne Fearn on **21 December 2021** was disclosed to the employer was a more difficult issue. Ms Fearne was not the employer. However, the Act does not define 'employer' for the purposes of section 43H. From our findings, Ms Fearn was still very much running the show up to the end of **December 2021**. Although her 'status' was unclear given the very opaque and confused way in which the organisation was run and managed, she was without doubt still operating on behalf of the Trustees, with their authority as if nothing had changed. She may have been doing so reluctantly (although we are not so sure of that) but she was still acting on behalf of the employer. At the very least we are satisfied she was acting as an agent of the employer. She still refers to herself as a 'volunteer' yet has single handedly managed this litigation and everything to do with the pay and pensions. She created a company and hoped to enter into a Service Level Agreement ('**SLA**') with the Respondents. She was still in charge of, or largely in charge of, finances and for the purposes of anyone in the position of the

Claimant, was acting on behalf of his employer at least up until **21 December 2021,** when the dispute between her and Mr Jackson reached its zenith. Therefore, when Mr Jackson sent the email with his and the Claimant's name and consent to Ms Fearn, he was for all intents and purposes disclosing information to the employer.

Detriment

102. We were satisfied that C was subjected to a detriment by the failure to pay his wages on the due date, **31** December **202**1.

Causation

103. The key question on the whistleblowing detriment complaint then was whether C had been subjected to that detriment because he had made the disclosures. The burden was on the Respondent to satisfy us of the ground on which the act, or deliberate failure to act was done.

104. The Respondent has satisfied us that, although C made protected disclosures, the failure to pay was not a deliberate failure and that it was, in any event, not done because C had made protected disclosures but because Ms Fearn was, as of **21 December 2021**, fearful of paying C's wages because of the dispute that had ensued between her and Mr Jackson, which culminated in Mr Jackson saying in his email of **21 December 2021** that things were in the hands of his legal and accounting team.

105. The complaint was that Ms Fearn deliberately failed to pay C's wages because he made protected disclosures. However, from our findings – see the email exchange between Ms Fearn and Gary Jackson – on **21 December 2021**, we conclude that Ms Fearn wanted to ensure that staff were in fact paid. That was after the email of **10 December** had been drawn to her attention. It was also before the **21 December 2021** report had been sent to her (this was sent later in the evening of **21 December**) but by then, Mr Jackson had already threatened to put matters in the hands of lawyers and accountants. The position was unsatisfactory for the Claimant. It was a shambles and chaotic but the failure to pay was, we conclude, wholly unrelated to his whistleblowing.

106. Therefore, the complaint of detriment under section 48 ERA fails. So too does the complaint of automatically unfair dismissal under section 103A ERA. Whilst we were satisfied that the failure to pay C's wages on **31 December 2021** amounted to a fundamental breach of contract, nevertheless the reason, or principal reason for that breach was not that he had made any disclosure. The reason was that Ms Fearn was fearful of doing something that she was unable to do, in light of Mr Jackson's assertions that she was acting unlawfully. Whatever was behind this raging dispute, the fact of the matter was that it led to a state of affairs in late **December 2021** where the Respondent failed to pay the Claimant (and others) their contractual wages on the due dates. That is a breach of contract. But the reason for it was the state of paralysis that the Respondent's and the limited company's actors had produced (namely Joanne Fearn and Gary Jackson).

107. We turn now to unfair constructive dismissal complaint.

Unfair dismissal

108. The first question was whether the Respondents repudiated C's contract. From our findings we are satisfied that they did by:

1.3. Failing regularly to pay pension contributions

1.4. Failing to pay wages on time on

a. **06 December 2019**
b. **24 April 2020**
c. **03 December 2020**
d. **26 February 2021**
e. **31 December 2021**

1.5. Not providing payslips on each occasion when payment of wages was due

1.6. Accessing the Claimant's computer for not good or proper reason and deleting the content of his letter, for no good or proper reason.

1.7. Joanne Fearn lying to employees regarding Michaela Arkle

1.8. Not taking seriously the Claimant's complaints in his email of **10 December 2021** and not responding to his invitation to meet.

109. Those acts and failures, taken together, amounted to conduct which, in the absence of reasonable or proper cause (of which there was none) was likely or calculated to seriously damage or destroy the relationship of trust and confidence. C had put up with the position regarding pension payments and late payment of wages. What triggered his decision to complain to the Trustees about Ms Fearne in **December 2021** was the false accusation regarding Michaela Arkle, the improper accessing of his letter by Ms Fearne, and the views of Gary Jackson and Michaela Arkle, both of whom were also concerned about Ms Fearn's role in the charity and about her treatment of Michaela Arkle.

110. We considered in respect of the pensions, pay and computer point whether C had affirmed the contract of employment. Without doubt, he had soldiered on despite the issues regarding pay and pensions. However, in **December 2021** (coming up to the Christmas break) when his pay was not paid despite his plea that it should be paid, he regarded this as the last straw.

111. We conclude that the failure to pay wages on **31 December** was indeed a fundamental breach of contract in its own right. Whatever dispute raged between Ms Fearne and Jackson, C was an employee of **GNE**. Pay is at the heart of the employment relationship: it is fundamental to the work-pay bargain. Although satisfied that it had nothing to do with whistleblowing, and satisfied that Ms Fearne personally did not want people not to be paid coming up to Christmas, this is an objective assessment. It is a breach of the express term and entitled the Claimant to resign without notice.

112. Further, it was, we conclude, in and of itself a breach of the implied term of mutual trust and confidence. The failure to pay was something that seriously damaged the relationship of trust and confidence. Did the Respondent have reasonable or proper cause for not paying? We were satisfied that it did not have reasonable or proper cause. That there was a personal battle (it is an apt word in our view) between Ms Fearne and Mr Jackson at this stage was in itself unreasonable. Ms Fearne had interfered – in her own words. Neither she nor the Trustees acted reasonably in this regard. It was a situation of their own making and was totally shambolic.

113. Even if not a fundamental breach in its own right, the failure to pay was the last straw in a series of breaches, which taken together constituted repudiatory conduct and revived all of the other breaches (late and non-payment of pension, wages, accessing the computer, Ms Fearne's lying about C's colleague, Michaela).

114. Therefore, we conclude that C was constructively dismissed.

Fairness

115. No reason is advanced for the constructive dismissal. Even if one had (for example on that had amounted to 'SOSR') we could see no potentially fair reason for dismissal in this case. Looked at matters objectively, the organisation – which had noble aims and well meaning people with a desire to help those less fortunate, including Ms Fearne – was being run shambolically by this stage. We recognise that Ms Fearne has had serious issues regarding her health and other events in her life which were very difficult for her and in respect of which we sympathise. But we must assess these things on an objective basis. There being no potentially fair reason for the constructive dismissal, the claim for unfair constructive dismissal is upheld.

Breach of contract – pension payments

116. C confirmed at the outset of the proceedings that he was not pursuing this as a breach of contract complaint. Therefore, that complaint is dismissed on withdrawal.

REMEDY

Findings of fact

117. At date of dismissal, C's gross pay was £19,968 a year or £384 a week. He was 54 years old. He was earning **£1,071.40** net per month. In addition, his pension contributions were £600 a year.

118. The Claimant has not been able to find work since his employment ended. C has bipolar disorder, diagnosed many years ago. He has had many periods of mental health relapses on and off over a period of over 10 years. He experienced a significant deterioration in his mental wellbeing when employment ended. He contacted his GP shortly after his dismissal who referred him to the mental health charity, 'Mental Health Matters' and he was assigned an employment support worker. His mental health was a matter of such concern for him and his support worker that he was advised not to look for a job that would be detrimental to him. As he put it, and we accepted, if he were to go into a job unwell, he would not last more than a few weeks and would have to leave, which would compound his situation by setting his mental health back further. He has had experience of this before. His mental health, from experience, is highly adversely affected by stressful work situations. He found working at **GNE** highly stressful as a result of the matters which were the focus of these proceedings and the final issues regarding his December pay exacerbated the stress for him. Therefore, understanding his health and his needs as he did, and in association with the advice of his mental health worker, it was necessary for him to find a role that he would be comfortable in and that he could maintain. He had suffered a severe knock to his confidence, which he had to build up again.

119. In order to facilitate this, he undertook some voluntary work for a few months starting in about **May 2022**. He was not well enough to look for employment until then. He applied for one job in summer **2022** but was unsuccessful. He eventually found a part time job, which has been a good stepping-stone to get him back into gainful employment, something C very much wants. At the time of the hearing he was working part-time at Durham Cathedral for 12 hours a week. He is paid ESA every fortnight.

120. The Claimant supported what he said in sworn evidence with a letter from Fiona Hutcheon, Employment Specialist Recovery Worker [C bundle, **page 55**].

Grievance

121. The Claimant heard nothing back regarding his grievance (paragraph 31 above). Angela Beaston told Ms Fearne that she would contact her about the complaint. However, she did not do so before Christmas. Christmas came and went. She discussed the issue regarding pay with Ms Fearne on **06 January 2022**. However, nothing was ever communicated to C.

122. The Respondent held no meeting with the Claimant after receipt of his grievance. The email on page 139 of the Respondent bundle (which was not referred to in evidence but which Ms Fearne referred to only in submissions) was concerned with early conciliation discussions, which are not to be put before us.

123. The Respondent did not decide what was to be done in respect of the grievance and did not communicate any outcome to the Claimant. Again, Ms Fearne said in submissions only that a report had been sent after his employment ended to the Claimant's old work email address which, she said, he was still accessing. However, there was no evidence of any of this; we were never shown or referred to any report and we made no findings about any of this. Indeed, we were not satisfied one was sent. In any event, none was never received by the Claimant.

Written particulars

124. The claimant had been given a contract of employment from when he started back in 2016 albeit this was not put before the Tribunal. It set out basic terms and conditions, namely his hours of work, place of work and pay. It contained notes about disciplinary and grievance procedures. It also contained a description of the job. However, C was never provided with an updated written statement in accordance with section 4 ERA, stipulating the pay and the title of his role or brief description of the work he was doing prior to the commencement of proceedings, all of which had changed.

Conclusions on remedy

125. When asked by the Tribunal whether the Respondent challenged the Claimant's duty to mitigate his losses, Ms Fearne said that she did. However, the Respondent adduced no evidence of what reasonable steps were available to the Claimant or as to how he had acted unreasonably. Ms Fearne simply submitted that there were lots of jobs in mental health. We are satisfied and so find that the circumstances in which his employment ended and which entitled C to terminate his contract without notice, contributed significantly to the state of his mental health at the time and thereafter. We accepted his evidence as honest. In any event, applying the legal principles set out above in paragraph 86, the Respondent, having adduced no evidence, did not establish that the Claimant had failed to mitigate his losses.

126. Therefore, the Claimant was entitled to his net losses, attributable to the dismissal, from the date of termination of employment up to the remedy hearing or to the date claimed, if earlier. Mr Wright confirmed that he was only seeking losses up to **15 March 2023**.He had not secured any employment income from the effective date of termination of **06 January 2022** to that date.

ACAS uplift

127. We concluded that the Respondent had failed to comply with paragraphs 33 and 40 of the Code of Practice (see paragraph 90 above). The question is whether the failures were unreasonable. We took account of the size and administrative resources

of the Respondents. However, the fact that an employer is small is not a green light to avoid basic procedures.

128. In our judgement, the failures were unreasonable. It did not take much to comply with those paragraphs of the Code and there was no satisfactory explanation given as to why the Respondent did not respond to the grievance in accordance with the code. Although Ms Beaston did not give evidence, we allowed a discount in the uplift to reflect the fact that the Christmas period intervened Further, Ms Beaston was said by Ms Fearne to have been unwell for a period and that there was a meeting between her and Ms Fearne on **06 January 2022** which resulted in C being paid, albeit late. Therefore, something was done to address that immediate issue. We considered it just and equitable to increase the basic and compensatory awards by 10% in accordance with section 207A Trade Union & Labour Relations Act 1992, which was the modest increase sought by the Claimant. It was just and equitable to do so to reflect that nothing had been done whilst recognising the possibility of some mitigating factors.

Written particulars and updates to written particulars

129. Although the claimant had an original contract, it was not possible to examine it to see to what extent it complied with the duty in section 1. Further, C was not provided with any updated statement in accordance with section 4 ERA, stipulating the pay and the title of his role or brief description of the work, all of which changed since he started employment.

130. In those circumstances, an award must be made under section 38 ERA. We awarded the minimum award of 2 weeks gross pay.

Basic Award

131. The Basic Award was calculated as follows: £2,880 (£384 X 1.5 X 5 years' service.

Compensatory Award

132. We awarded **£20,063.73** consisting of:

a. £16,338.85 (loss of salary from **06 January 2022** to **15 March 2023**: no losses having been claimed in the period after 15/03/2023)

b. £702.72 (loss of pension **06 January 2022** to **15 March 2023**: no losses having been claimed in the period after 15/03/2023)

c. £500 (loss of statutory rights)

d. £1,754.16 (10% uplift pursuant to section 207A Trade Union and Labour Relations (Consolidation) Act 1992)

e. £768 (payment of two weeks' pay pursuant to section 38 Employment Act 2002 for failure to provide updated particulars in contravention of section 4 Employment Rights Act 1996)

Statutory cap

133. The maximum that could be awarded by virtue of section 124 ERA was **£20,568** (£19,968 salary + 600 pension)

134. The recoupment provisions applied to the compensatory award as set out in the judgment sent to the parties.

Employment Judge **Sweeney**

Date: 22 December 2023