Case No: 2501343/2023

EMPLOYMENT TRIBUNALS

Claimant: **Mr P Henderson**

Respondent: **Durham Indoor Bowls**

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under Rule 69, the judgment sent to the parties on 30 October 2023, is corrected as set out in bold at the name of the Respondent's Representative of the corrected judgment.

Employment Judge Morris

Date 6 December 2023

Important note to parties:
Any dates for asking for written reasons, applying for reconsideration or appealing against the judgment are not changed by this certificate of correction and corrected judgment. These time limits still run from the date the original judgment or reasons were sent, as explained in the letter that sent the original judgment.

EMPLOYMENT TRIBUNALS

Claimant: Mr P Henderson

Respondent: Durham Indoor Bowling Club Community Association Limited

Heard at: Newcastle Hearing Centre (by video) **On:** 24 October 2023

Before: Employment Judge Morris (sitting alone)

Representation:
Claimant: In person
Respondent: Ms I **Splavska**, consultant

RESERVED JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The reason for the claimant's dismissal related to his conduct.

2. As such, the claimant's complaint that his dismissal by the respondent was unfair, by reference to section 103A of the Employment Rights Act 1996 (being that the reason (or, if more than one, the principal reason) for the dismissal was that he made a protected disclosure) is not well-founded and is dismissed.

3. The claimant's complaint that, contrary to Regulation 14 of the Working Time Regulations 1998, the respondent did not compensate him in respect of his entitlement to paid holiday that had accrued but had not been taken at the termination of his employment is not well-founded and is dismissed.

4. As was conceded on behalf of the respondent, when these proceedings were begun it was in breach of its duty under section 1 of the Employment Rights Act 1996 to give the claimant a written statement of initial employment particulars but, for the reasons explained in the Reasons below, the Tribunal does not make an award to the claimant under section 38 of the Employment Act 2002.

5. In relation to the claimant's reference to the Tribunal under section 11 of the Employment Rights Act 1996 that the respondent had not given him itemised pay statements in accordance with section 8 of that Act, the Tribunal finds that the respondent failed to give him pay statements in accordance with that section but, for the reasons explained in the Reasons below, the Tribunal does not make an order that the respondent pay any sum to the claimant in respect of the unnotified deductions that the respondent made from his pay.
6. The claimant's complaint that the respondent was in breach of his contract of employment by not giving to him one week's notice of the termination of that contract as is required by section 86 of the Employment Rights Act 1996 was withdrawn by the claimant and is dismissed.

REASONS

The hearing, representation and evidence

1. This was a remote hearing, which had not been objected to by the parties. It was conducted by way of the Cloud Video Platform as it was not practicable to convene a face-to-face hearing, no one had requested such a hearing and all the issues could be dealt with by video conference.

2. The claimant appeared in person and gave evidence. The respondent was represented by Ms I Splavsa, consultant, who called the following people to give evidence on its behalf: Mr M Goodyear, Chair of the respondent; Ms S Craig, General Manager of the respondent; Mr A Merton-Smith, Assistant General Manager of the respondent.

3. The principal evidence in chief on behalf of the respondent was given by way of written statements, copies of which had previously been sent to the claimant. The claimant had not complied with any of the Orders of this Tribunal made on 4 July 2023 including that he should produce a written witness statement. He relied instead on what he had stated in his claim form (ET1), particularly in sections 8 and 15 of that form. Into section 8 the claimant had copied the written grievance that he had submitted to the respondent on 18 January 2023; into section 15 he had copied the legal advice that he said he had obtained from a solicitor. Additionally, I permitted the claimant to add further oral evidence to address points that he wished to cover arising from the witness statements of the respondent's witnesses.

4. As the claimant had submitted the legal advice that he had received as part of his claim form he had waived any privilege that he might have in that respect. I record, however, the at a point during his cross-examination when he began to say what his solicitors had said to him I interrupted to advise him that legal advice was generally subject to the doctrine of privilege. He accepted that intervention and quite properly declined to continue with the answer that he had intended to give.

5. The Tribunal also had before it a bundle of documents, which had been produced by the respondent without input from the claimant, again despite the above Orders of this Tribunal. In this respect he had commented in an email to the Tribunal dated 13 October 2023 in response to a strike-out warning issued to him by the Tribunal that he would be using the respondent's evidence as everything he was going to send to the respondent had been sent by the respondent to him. The numbers shown in parenthesis below are references to the printed numbers shown at the bottom right-hand corner of the pages in that bundle.

The name of the respondent

6. By consent, the name of the respondent is amended to become as shown above and any necessary amendments are made without the need for re-service.

The claimant's complaints

7. As the claimant confirmed at the commencement of this Hearing, his complaints were as follows:

   7.1 'Automatic' unfair dismissal under section 103A of the Employment Rights Act 1996 ("the 1996 Act") as the reason for his dismissal was that he had made a protected disclosure.

   7.2 A complaint under Regulation 30 of the Working Time Regulations 1998 that, contrary to Regulation 14 of those Regulations, the respondent had not compensated him in respect of his entitlement to paid holiday that had accrued but had not been taken at the termination of his employment.

   7.3 A reference under section 11 of the 1996 Act that the respondent had not given him itemised pay statements in accordance with section 8 of that Act.

   7.4 A complaint that the respondent was in breach of his contract of employment by not giving to him one week's notice of the termination of that contract as is required by section 86 of the 1996 Act.

8. In his claim form the claimant also contended that the respondent had not provided him with a written contract of employment. If that were to be established, it could amount to a breach of the respondent's duty under section 1 of the 1996 Act to give the claimant a written statement of initial employment particulars.

9. At the commencement of the Hearing the claimant confirmed that the respondent had now paid to him compensation in respect of his complaint at sub-paragraph 7.4 above of not giving him due notice of the termination of his contract of employment and, therefore, as recorded above, he withdrew that complaint.

The issues

10. That final complaint having been withdrawn and dismissed, the remaining issues in this case that the Tribunal would decide are set out below.

    Protected disclosure

    10.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the 1996 Act?

    10.2 If so it would be a protected disclosure because it was made to the claimant's employer.

Unfair dismissal

10.3 What was the reason or principal reason for the dismissal of the claimant? If it was that he had made a protected disclosure, in accordance with section 103A of the 1996 Act he must be regarded as having been unfairly dismissed.

Holiday Pay (Working Time Regulations 1998)

10.4 Did the respondent fail to pay the claimant compensation for annual leave that the claimant had accrued but not taken when his employment ended?

Itemised pay statements

10.5 Did the respondent give the claimant itemised pay statements in accordance with section 8 of the 1996 Act?

Statement of employment particulars

10.6 Did the respondent give the claimant a written statement of initial employment particulars as is required by section 1 of the 1996 Act?

Consideration and findings of fact

11. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by or on behalf of the parties at the Hearing and the relevant statutory and case law (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

General context and chronology

11.1 The respondent operates an indoor bowling club ("the Club"). The claimant was employed by the respondent as a General Assistant. His employment commenced on 12 September 2022. At that time, the employees of the respondent comprised four persons in total: the General Manager, Ms Craig, the Assistant General Manager, Mr Merton-Smith and two General Assistants, one of whom was the claimant.

11.2 There is no dispute between the parties that during the first few weeks of the claimant's employment everything went well in terms of his performance of his duties and his relationships with colleagues and customers of the Club.

11.3 On 24 October 2022, an incident occurred at the Club when the claimant refused to serve one of its long-standing members. His reason for that refusal was that the member had parked his car in an area of

the club car park that had been cross-hatched with yellow painted lines (79 and 80), and had refused to move it when the claimant asked him do so. On the basis of his experience in previous employments, the claimant considered that such delineation marked an area reserved for emergency vehicles.

11.4 The Club member concerned explained to the claimant that he had misunderstood and parking was permitted in the hatched area; in this, he was supported by the ex-manager of the Club and a current director of the respondent both of whom were present in the Club at the time. The claimant ignored these explanations and continued to refuse to serve the member. This resulted in Mr Merton-Smith being called to the Club. He too explained to the claimant that he had misunderstood as the hatched area was no longer used as an emergency bay and that several customers parked there. He asked the claimant to apologise and serve the member but he refused and informed Mr Merton-Smith that if he served the member he would leave the Club premises. Mr Merton-Smith served the member and, having checked that Mr Merton-Smith had his keys to the Club and cashed up one of the two tills behind the bar, the claimant left. Thus Mr Merton-Smith was required to remain to complete the remaining two hours of the claimants four-hour shift. In cross examination the claimant explained that he had left because, having been undermined, he became unwell and felt it best not to react but to remove himself.

11.5 The claimant sent a message to Ms Craig (25) in which he broadly confirmed the above events making it clear that he would have been happy to serve the member if he had moved his car from the yellow emergency bay. Having first spoken to Mr Merton-Smith, Ms Craig replied to the claimant's message to inform him that she needed to have a meeting with him at 2pm the following day. There then followed a series of messages between them, from which it is reasonable to infer that the claimant thought that he was going to be dismissed: for example, "Is it to return my keys?" (25), "Should I bring my uniform in also?", "Now need to go job centre as know how this is going to end". Ms Craig responded that she needed to speak to the claimant "to find out all the facts before anything else" and that "he shouldn't be assuming anything at this stage" (26).

11.6 The following morning, 25 October 2022, the claimant again messaged Ms Craig to say that he was having huge anxiety attacks and asked who would be attending the meeting. She replied it would just be her and the claimant, which he confirmed was helping (27).

11.7 The meeting took place after which Ms Craig handed the claimant a prepared letter (29) in which, having referred to the circumstances of the previous day, she set out three particular matters which would not be acceptable in any circumstances:

- Refusing to serve a customer without cause.

- Not accepting a decision made by your line manager.
- Walking out on your shift not fulfilling your scheduled hours.

She recorded that the claimant was being given a formal written warning, which would stay on file of six months and advised the claimant,

> "If any other disciplinary incidents occur further action will be taken which could lead to termination of your employment."

The letter was then signed by both Ms Craig and the claimant. In cross examination he explained he had signed only, "To keep the peace".

11.8 The claimant then continued at work but from this point on, his performance and his attitude towards colleagues, particularly Mr Merton-Smith, changed. The evidence of Mr Merton-Smith was that the claimant "mounted a passive aggressive campaign against me, including wilful refusal to follow a reasonable instruction and deliberately doing things in such a way as to irritate me or cause me extra work, including interrupting or contradicting my conversations with customers and repeatedly turning off every light in the building when I was still in the club."

11.9 Ms Craig observed that, especially over the extremely busy Christmas period, the working relationship between the claimant and Mr Merton-Smith seemed to be getting worse. She asked them both what their issues were and identified what she regarded as being very small problems. She asked Mr Merton-Smith not to focus too much on the small issues, to which he agreed. She then spoke to the claimant and explained that Mr Merton-Smith considered that he was deliberately refusing to take instructions, which the claimant denied explaining that it was just that they did some things differently.

11.10 After a short break between Christmas and New Year the claimant informed Ms Craig that he could no longer work with Mr Merton-Smith. The claimant denied having said that but did accept that he had said that working with Mr Merton-Smith was "insufferable due to the incident". Having first spoken to Mr Merton-Smith, Ms Craig explained to the claimant that their not working together was not an option with such a small team of four staff. She asked them both to write down the issues that they had and they would get to the bottom of it in discussion with the respondent's directors. Mr Merton-Smith had prepared a list of issues that he had claimant (37-40) but the claimant did not (32). I record that although that text message from Ms Craig is not dated the claimant informed me that it must have been 15 January 2023.

11.11 At about this time the claimant began to request holidays. His explanation in cross examination was that after Christmas he simply wanted to have a few weekends off whereas Ms Craig identified that he was seeking to avoid working on the same shifts as Mr Merton-Smith. The consequence was that the other General Assistant had to have her

shifts changed to accommodate the claimant's holidays. Ms Craig explained to the claimant that this was not fair.

11.12 The list of issues prepared by Mr Merton-Smith ran to four pages (37-40). It being a matter of record I need not set out the detail here and only summarise the key points, which included the following: the claimant refusing reasonable instructions of which he gave examples; many "small things" (again giving examples) which he stated had "built up into an aggressive campaign of defiance"; other incidents including rudeness; poor social skills including interrupting conversations and being tactless. He recorded that he had basically stopped asking claimant to do anything because he knew he would refuse or deliberately do it the wrong way. Although he was the claimant's line manager, he did not know how he could manage him as he appeared to want everything done his way regardless of what he was told by anyone else. He accepted that many of his issues, taken alone, were insignificant but there were just so many of them and the claimant's refusal to do any of them as asked had become a challenge to authority. He concluded that the Club had a duty of care towards its staff, he did not deserve the treatment that he was experiencing and the situation needed to be resolved quickly. The effect was not just on him but on all the staff who had been a very happy, loyal and cohesive group but that was being challenged by the claimant's presence.

11.13 The evidence of Mr Goodyear also referred to issues that he had had with the claimant. Early in 2023, the respondent had received an electricity bill, which would increase costs by an average of £1,600 per month. All staff were advised of the need to mitigate electricity usage including practices in the kitchen (such as reducing the use of the glass washer and the large deep fryer) and turning out unused lighting. While the other employees had complied, the claimant did not. When Mr Goodyear entered the kitchen on one occasion he found that the claimant had turned on the deep fat fryer and was using the glass washer containing only approximately 12 items. When challenged by Mr Goodyear, the claimant explained that he was using the fat fryer for what it was for and doing as his training required him to do; that disregarding that the instructions had been changed and it should be used only in exceptional circumstances for special need. That evening, as Mr Goodyear and three elderly colleagues were leaving the Club, the claimant suddenly turned all the lights off, which Mr Goodyear considered to be dangerous. When challenged by Mr Goodyear about this the claimant had responded to the effect, "You told me I had to save electricity".

11.14 On the evening of 16 January 2023, the claimant gave to Mr Goodyear's wife (for onward transmission to him) a four-page document (33-36) in which he recorded issues he had, first, with Mr Merton-Smith and, secondly, with Ms Craig. That document again being a matter of record the details need not be set out here and I set out only the key points below.

11.15 The claimant's issues with Mr Merton-Smith included his not talking to him and complaining when the claimant pointed out that he had used a teacup in which to make white coffee; an issue with using the wrong teabags; being told that he was impossible to work with; his true hair colouring being questioned; being barked at for trying to involve himself in a conversation; being repeatedly ignored and grunted at; Mr Merton-Smith giving customers tea without payment, which he characterised as being "Theft/Stolen Stock ". The claimant concluded this section of his document by stating that due to all that had gone on, he no longer felt comfortable working alone with Mr Merton-Smith, and every time he reported any issues to Ms Craig nothing was recorded and he was always told that he needed to get on.

11.16 The claimant's issues with Ms Craig included her screaming at him and calling him a petulant child for his holiday requests; having not responded appropriately to a message he had sent her about an unpleasant shift at work (31); the rejection of a suggestion that he had twice made that a third party should deal with these matters; her threatening him/his job for being insubordinate; her screaming at him about her doing the rotas; her being spiteful and bullying. He concluded that he no longer felt safe/secure working with management at the Club. He stated that he had asked for his contract as he had been working for four months and had been told that he would not be getting one.

11.17 When Mr Goodyear attended the Club on 17 January 2023 (the day after he had received the claimant's document via his wife), he informed the claimant that he had received his list of issues and would now begin to look into his concerns. The following day Mr Goodyear also received the document that Mr Merton-Smith had produced (37-40) not knowing that Mr Goodyear had by then received the document from the claimant.

11.18 That day, 17 January, Mr Goodyear wrote down brief notes of how he intended to proceed with his investigation of these matters in the context of the letters he had received from the two employees, which included talking to all four employees of the respondent (41). That note also records initial discussions he had with the other General Assistant including that she had identified issues between Mr Merton-Smith and the claimant working together; she thought that some of the examples provided by the claimant were ""overplayed"/"exaggerated"" and that he started most of them; the claimant can be "difficult" when he wants to be – when it "doesn't suit"; if he takes the "huff", he just walks away and sits elsewhere and ignores everyone or just goes home; if the claimant was down to work with Mr Merton-Smith it seemed like he takes holiday or goes sick often at the last minute so she ended up doing those shifts, and although she usually did not mind it was not fair, particularly when she had plans; Ms Craig was just trying to get the rotas sorted but the claimant was being difficult again and trying to cherry pick his dates first. Mr Goodyear's note then records his

discussion that day with Mr Merton-Smith in which he reiterated the content of his letter of complaint and gave other examples. Mr Goodyear recorded in his note that he was convinced that Mr Merton-Smith's account was accurate as some observations that Mr Goodyear had made supported his version: for example, the claimant butting into conversations, overfamiliarity with members, derogatory remarks, putting the lights out when he had still been in the function room and sitting outside when he was supposed to be working. Mr Goodyear's note concludes, "Need to talk to PH next!" (43).

11.19 He was not able to pursue that course of action, however, as he was informed that shortly before the busy lunchtime period was about to start on that day of 17 January the claimant had simply collected his belongings and left premises without informing Ms Craig or providing any explanation before leaving, which Mr Goodyear considered to be in direct contravention of one of the conditions set out in the written warning that had been given to the claimant. The consequence was that Ms Craig had to contact Mr Merton-Smith urgently to come to the Club to provide assistance.

11.20 On the morning of 17 January 2023 Ms Craig had once again explained to the claimant that it was impossible to create a shift pattern so that he and Mr Merton-Smith did not work any shifts together. Minutes before the lunchtime rush and without informing Ms Craig, the claimant collected his belongings and walked out leaving her to work alone. Once more Mr Merton-Smith had to respond to her urgent request for help.

11.21 Ms Craig later saw that the claimant had sent her a message timed at 11:59 (44) as follows:

> "Due to on set of diarrhea I am having to go home, hopefully will be fine for my Thursday shi
>
> Shift on Thursday, if hasn't cleared up by then will let you know"

11.22 This surprised Ms Craig as the claimant had not mentioned anything of any illness during the three hours they had already worked together, neither did he approach her before he left to inform her of this or to check whether she could manage in his absence. He had simply left. In oral evidence the claimant disputed this. He maintained that he had gone into the kitchen at about 12.10 and told her that he had, "Truly serious diarrhoea and would have to go home". He then added that he informed her that he had a "legal obligation" to go home because he had diarrhoea. When asked why he sent the message if he had already told Ms Craig that he was leaving and why, he answered that it was "To cover all bases". He was then asked why, if he had told Ms Craig that he was leaving, he had not commenced his message with words to the effect, "As I told you"; he replied, "I don't know". Having considered carefully these conflicting accounts, I accept the evidence of Ms Craig

as being the more credible. I agree with the points put to the claimant in cross examination that if he had already told her that he was leaving and the reason for that he did not need to send a message to the same effect only minutes later but, if he did, he would have made some mention of their conversation only minutes before.

11.23 In this connection, the evidence of Mr Goodyear was that even if the claimant had genuinely been unable to handle food, there was alternative work available for him to do.

11.24 By email of 18 January 2023 the claimant submitted a formal grievance against what he referred to as being the conduct and actions of Ms Craig and Mr Merton-Smith (66). Again this is a matter of record, which does not need to be set out in full. Important points include the following:

11.24.1 he had been requesting his contract for months and been told that he would never be getting one;
11.24.2 he had not received any payslips for four months and made out to be trouble for asking for them;
11.24.3 his verbal warning had been pre-written and he had been forced to sign it with no notetaker or witness present;
11.24.4 he had asked for a third party to deal with his complaints of being bullied, ignored and repeatedly having his jobs threatened and left to do all duties alone with no support;
11.24.5 the complaint he had made about issues with Mr Merton-Smith had not been logged;
11.24.6 when he had to go home due to diarrhoea Ms Craig, “called me a liar, and not to bother coming back”, when he was only complying with the law as a food server;
11.24.7 Mr Merton Smith and Ms Gray were both bullying him etc although all had been okay with Ms Craig before he had requested an audience Mr Goodyear “(whistleblowing)”;
11.24.8 due to their actions he had been left to feel bullied, undervalued and had no job security;
11.24.9 the stress that had been induced by the verbal and physical action of both managers and club representatives had made him feel very unwell.

11.25 Also on 18 January the claimant started new employment. In cross examination he explained that this had been to supplement the income he received from the respondent as, with Christmas over and there being no overtime, he needed a second job.

11.26 On 19 January 2023 the claimant sent a further message to Ms Craig that due to continuing to have chronic diarrhoea he would “not be able to come in for my shift today. Sorry for any inconvenience caused”. Ms Craig respondent, “No problem see you on Tuesday” (44). On 23 January the claimant sent a message to confirm that he would, “be back as normal tomorrow, all cleared up”. He asked whether Ms Craig

would be putting holiday through for the previous Thursday, “So am able to pay my bills?” (45).

11.27 The claimant’s employment was terminated on 24 January 2023 but, strangely, neither he nor the respondent had referred to the circumstances of that termination in the claim form or response form that they had respectively completed; neither had Ms Craig addressed this point in her witness statement. As the reason why the respondent had dismissed the claimant was a crucial issue in these proceedings I sought clarity on this matter first from Mr Goodyear (who had referred to it in his statement) and secondly from Ms Craig; that being the order in which they gave evidence.

11.28 Mr Goodyear’s answers to my questions as to the reasons for the claimant’s dismissal included the following:

11.28.1 Once again the claimant had left work without approval, leaving Ms Craig in the lurch. It was 11.59. Bowling was to finish at 12.00 and people were coming in for the afternoon sessions. The claimant must have known that if he walked out again one of the sanctions might be the termination of his employment.

11.28.2 He and Ms Craig had had a conversation in which it was decided that she should meet the claimant and if there was not to be a fundamental change in the claimant’s attendance and behaviours at work he should be dismissed.

11.28.3 The key thing was that if there was no reconciliation involving an obvious understanding on behalf the claimant of the inconvenience/trouble he was causing and that his refusal to work effectively with Mr Merton-Smith put pressure on everyone his employment should be terminated.

11.28.4 This was a team of four and rotas need to be complied with. To leave somebody saying that he was not working was untenable. The Club did not have the manpower/flexibility to accommodate this.

11.29 Ms Craig’s answers included the following:

11.29.1 When the claimant attended for work on 24 January Ms Craig asked to see him. She explained that she had done so because she needed to find out why he thought it acceptable to walk off again.

11.29.2 In their discussions she found that he did not acknowledge any responsibility and maintained that it was in accordance with his rights.

11.29.3 She asked whether, during his absence, the claimant had worked at his other job, to which he replied that he had but explained that that was okay because he was not preparing food.

11.29.4 He had suggested that because Ms Craig was in the building he had not left it unattended.

11.29.5 She had been unable to get the claimant to understand that his behaviour was affecting everybody he came into contact with.

11.29.6 After having talked for 15 or 20 minutes Ms Craig informed the claimant that she did not think that they could work in this environment and she was going to have to terminate his employment.

11.29.7 At that the claimant had begun to walk out but she had said that she needed his fob and keys. She had followed him out of the building whereupon the claimant had said, "I've got copies anyway", and threw them into the bushes.

11.29.8 She denied the claimant's evidence that she had told him, "I can't query your work but I can't change you so I think it's best that you leave" explaining that she would not use that terminology and definitely had not said it.

11.30 I then expressly asked Ms Craig what she would have written as being the reasons for the dismissal if she had confirmed that dismissal in writing. She answered that he had been dismissed, "because this was the second time in 16 weeks that he had walked out on shift and he had previously had a written warning for this". I accept that evidence.

Holiday pay

11.31 While the claimant had ticked the relevant box in his claim form to indicate that he was making a complaint relating to the non-receipt of all the holiday pay that was due to him, he answered in cross examination that he had "no idea" what his holiday entitlement was but given the hours that he had worked, including overtime, he felt that he was due at least one week more.

11.32 As mentioned above, into section 15 of his claim form the claimant has copied the legal advice that he had received in this and other respects. That advice included that, "Based on the average of your hours that you provided me with, you would be entitled to 58 hours of holiday for the period that you have worked. You will need to deduct any holiday you have taken in the period of your employment (provided that you were paid for it) from those hours to establish the amount you can claim.

11.33 The respondent had prepared and sent to the claimant a document headed, "Annual leave entitlement calculation" (48). That calculation shows a total holiday entitlement during the holiday year 2022/2023 of 7.35 days. On the basis of an eight-hour day that is shown to result in a total holiday entitlement of 58.8 hours, which I note is approximately the same as the calculation made by the claimant's solicitors. The respondent's calculation then sets out the leave taken by the claimant in either a whole day or a fraction of a day. The final result is shown to be that the claimant actually took 8.25 days' paid holiday, which is recorded as being 0.9 of a day (i.e. just over seven hours) more than his accrued entitlement.

11.34 It is right to record that the claimant questioned these calculations during the course of being cross-examined (including as to the days on which he had been on holiday and that on certain days he had only been rostered to work half a day in any event) but in his answers the claimant demonstrated some confusion between the dates shown as being his days of holiday and the dates shown on his payslips, which were the dates of those payslips and not the dates of his holidays.

Payslips

11.35 The bundle of documents contains copies of a number of payslips in the claimant's name (50-59). They appear to cover the period 26 September 2022 to 23 January 2023. An additional payslip dated 30 January 2023 was then produced shortly before the Hearing and on the morning of the Hearing I agreed that a further payslip could be submitted, which is dated 31 October 2022. That payslip is said to be in substitution for the payslip also dated 31 October 2022, which is included in the bundle of documents (53) due to the fact that that payslip does not show the amounts of basic wage, tax or National Insurance whereas the one produced on the morning of the Hearing does. Although I agreed that the complete payslip could be submitted I observed that I was somewhat dubious because what mattered was what the claimant had been given at the time. There are other issues with the payslips that are contained in the bundle of documents: for example, there are other payslips (e.g. dated 17 October 2022, 14 November 2022 and 28 November 2022) which again do not show the amounts of basic wage, tax or National Insurance while that dated 12 December 2022, although showing amounts, does not align those amounts so as to show to what they apply.

11.36 The claimant denies ever having received any payslips and, in his grievance letter refers to having been "made out to be trouble for asking for them".

11.37 None of the respondent's witnesses addressed this complaint in their witness statements. In answering questions in cross examination, Ms Craig stated that, as was the case with all employees, the claimant had been told that the payslips were kept in a file in the Club office where he could have accessed them. He had responded, however, that he did not need the payslips because he accessed the HMRC website from which he could get all necessary details. She added that once the claimant had asked for the payslips, sometime in December 2022, Mr Merton-Smith had given them all to him. Thereafter, if the claimant was within the building at the time that the payslips were issued, he would be given his otherwise he knew that it would be in the office. Mr Merton-Smith confirmed the principal aspects of this evidence.

Submissions

12. After the evidence had been concluded Ms Splavsa and the claimant made brief submissions, which I fully considered. Ms Splavsa relied entirely upon a written document that she submitted an, in answer to my question, responded that she did not wish to draw out any particular points. The written document did not, however, address the matters of the claimant allegedly not having received a contract of employment or payslips, both of which I therefore raised with her. She confirmed that the respondent did not dispute that a contract of employment was lacking. As to payslips, she submitted that Ms Craig had given certain payslips to the claimant and that he knew that he could get others if he wanted to. She added that the respondent with a small company and they thought they were doing the right thing.

13. The parties can be assured that I took all the submissions made into account notwithstanding that they are not expressly referred to below.

14. The key points made by Ms Splavsa in her written submissions included as follows:

14.1 She first addressed the definition of a "qualifying disclosure" with reference to the decision in Williams v Brown UKEAT/0044/19. She then worked through certain of the five elements referred to in that decision, particularly,

14.1.1 the need for disclosure of information (referring to the decision in Cavendish Munro Professional Risks Management Limited v Gedud UKEAT/0195/09) and submitted that in this case there were complaints but not information; and

14.1.2 the claimant having to reasonably believe that any disclosure was made in the public interest (referring to Babula v Waltham Forest College [2007] IRLR 346, CA.

14.2 She then submitted that any whistleblowing did not cause the dismissal; rather the claimant was dismissed because he left his shift on his own the second time. The claimant had failed to establish the necessary causal link between his grievance and the subsequent dismissal, which was due to his misconduct; in this she relied upon the decision in Simpson v Cantor Fitzgerald Europe [2020] EWCA Civ.

14.3 Finally, referring to the decision in Panayiotou v Kernaghan [2014] IRLR 500, she submitted that the alleged disclosure was separate from the real reason for dismissal, which was the claimant's conduct.

15. The key points made by the claimant included as follows:

15.1 In a nutshell the respondent should be made aware that employment law has to be followed to the letter – it is not up for adaptation.

15.2 The Tribunal should use its full fining powers to make an example of the respondent and safeguard this from happening again.

The law

16. The principal statutory provisions, so far as is relevant to the issues in this case, are as follows:

The 1996 Act

8. — Itemised pay statement.

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

12. — Determination of references.

(3) Where on a reference under section 11 an employment tribunal finds —

(a) that an employer has failed to give a worker any pay statement in accordance with section 8, or
(b) that a pay statement or standing statement of fixed deductions does not, in relation to a deduction, contain the particulars required to be included in that statement by that section or section 9,

the tribunal shall make a declaration to that effect.

(4) Where on a reference in the case of which subsection (3) applies the tribunal further finds that any unnotified deductions have been made from the pay of the worker during the period of thirteen 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.

(5) For the purposes of subsection (4) a deduction is an unnotified deduction if it is made without the employer giving the worker , in any pay statement or standing statement of fixed deductions, the particulars of the deduction required by section 8 or 9.

94. — The right.

(1) An employee has the right not to be unfairly dismissed by his employer.

43A. Meaning of "protected disclosure".

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B.— Disclosures qualifying for protection.

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

(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

43C.— Disclosure to employer or other responsible person.

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

(a) to his employer,
…….

47B.— Protected disclosures.

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

103A Protected disclosure

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

Employment Act 2002

38 — Failure to give statement of employment particulars etc.

(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….,

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 ……,

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.

Working Time Regulations 1998

14. — Compensation related to entitlement to leave

(1) Paragraphs (1) to (4) of this regulation apply where –

(a) a worker's employment is terminated during the course of his leave year, and
(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is

entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be–

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or
(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula –

$$(A \times B) - C$$

where –

***A** is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;*
***B** is the proportion of the worker's leave year which expired before the termination date, and*
***C** is the period of leave taken by the worker between the start of the leave year and the termination date.*

Application of the facts and the law to determine the issues

17. The above are the salient facts and the submissions of or on behalf of the parties relevant to and upon which the I based my judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law some of which are referred to elsewhere in these Reasons.

18. I first interject that in this case neither I nor the claimant were helped by the fact that he had chosen not to comply with the Tribunal's Order that he must produce a witness statement (or, indeed, any other orders in respect of, for example, the preparation of a schedule of loss or the exchange of relevant documents). The claimant's reliance, instead of a witness statement, upon the grievance that he had submitted to the respondent on 18 January 2023 and the legal advice that he received did not sufficiently address the issues in this case. I complied with what was required of me under the overriding objective contained in rule 2 of the Employment Tribunals Rules of Procedure 2013 to deal with cases fairly and justly and particularly sought to ensure that the parties were "on an equal footing", the respondent being represented and the claimant not. That said, as I explained to the claimant, I was unable to "descend into the arena" and become his representative, which he acknowledged and accepted.

19. An example of this was that when I invited the claimant to cross-examine the first of the respondent's witnesses, Mr Goodyear, he merely put to him that his evidence was entirely fictitious, which Mr Goodyear denied. The claimant then said that he had no further questions whereupon I explained to him the potential consequences of leaving the evidence of the respondent's witnesses unchallenged whereupon he did proceed to ask questions of Mr Goodyear and the subsequent witnesses.

20. A particular difficulty in the claimant not having thought carefully about his evidence in this case and taken all the time he needed to commit it to writing in a witness statement was that his oral evidence when answering questions did change. Such changes were not significant but gave the impression of the claimant not simply providing further detail in relation to his previous answers but elaborating on his evidence so as to bolster up his case. The effect of that was to bring into question the credibility of his oral evidence. Nowhere was this more apparent than his evidence as to his leaving work mid-shift on 17 January 2023. As recorded above, he first answered Ms Splavsa that he had told Ms Craig that he had, "Truly serious diarrhoea and would have to go home", he then added that he had informed her that he had a "legal obligation" to go home because he had diarrhoea and finally, in answering a question from me by way of clarification, he added that he had said to Ms Craig, "I am really sorry but I am going to have to go home". Also relevant in this connection is the message that the claimant sent to Ms Craig at 11:59 that day that is essentially limited to him informing her that due to the onset of diarrhoea he was having to go home. I accept the point made by Ms Splavsa in cross examination that if the claimant had already told Ms Craig that he was leaving and the reason why, it is more likely than not that he would have made reference to that conversation in his message, which he did not. In this regard, I did not find the claimant's answer to Ms Splavsa's question of why, in his message to Ms Craig, he had not mentioned this, "I don't know" to be satisfactory.

21. Another matter that I consider impacts upon the claimant's credibility is that in his formal grievance (which he submitted on 18 January 2023) he stated with regard to the incident when he had to go home due to having diarrhoea that Ms Craig, "called me a liar, and not to bother coming back". In evidence, Ms Craig denied having said that and I do not find the claimant's account to be consistent with the message Ms Craig sent to him in response to his message on 19 January 2023 to the effect that he would not be able to come into work that day when she wrote, "No problem see you on Tuesday".

22. I now turn to address the issues in this case as set out at paragraph 7 above albeit, for reasons which will become obvious, in a slightly different order.

Unfair dismissal

23. I first consider the claimant's complaint of 'automatic' unfair dismissal under section 103A of the 1996 Act that the reason (or, if more than one, the principal reason) for his dismissal was that he had made a protected disclosure.

24. Thus the first question is what was the reason (or, if more than one, the principal reason) for which the respondent dismissed the claimant. In this regard, I first reminded myself that by reference to the long-established guidance in the case of Abernethy v Mott Hay and Anderson [1974] IRLR 213, the reason for dismissal is the facts and beliefs known to and held by the respondent (or others acting on its behalf) at the time of its dismissal of the claimant.

25. With that guidance in mind, I am satisfied that in this case, the evidence before me is clear. In my findings of fact above I have recorded the evidence of Mr Goodyear and Ms Craig in this connection. I need not repeat those findings here but they include the fact that the respondent employed a very small team of four employees which did not provide any flexibility to enable staff to absent themselves, rotas had to be complied with failing which the affects upon other employees having to provide cover was unreasonable and the claimant appeared not to understand this. Those specifics and the others recorded in my findings of fact formed part of the facts and beliefs known to and held by the respondent at the time. Additionally, I'm satisfied that Ms Craig also had in mind, first, the context of what it is clear from the evidence of both the claimant and the respondent's witnesses amounted to a problematic working relationship between the claimant and his line manager, Mr Merton-Smith and, secondly, the issues raised by him in the document he had prepared and the fact that he had been employed by the respondent for some eight years.

26. Everything in the immediately preceding paragraph provides the context against which I am satisfied, on the basis of the evidence before me, both written and oral, that the reason for the claimant's dismissal (the facts and beliefs known to and held by the respondent) was that he walked off his shift on 17 January 2023; that against a background of having received a formal written warning on 25 October 2021 one aspect of which was that the "Walking out on your shift not fulfilling your scheduled hours." would not be acceptable in any circumstances. Further, that warning had made it clear that if any other disciplinary incidents were to occur, "further action will be taken which could lead to termination of your employment."

27. In short, referring to section 98(1) and (2) of the 1996 Act, I am satisfied that the reason (or, if more than one, the principal reason) for the dismissal of the claimant related to his conduct.

28. It follows that I am not satisfied that the reason (or, if more than one, the principal reason for his dismissal) was that he had made a protected disclosure. That being so, the claimant's complaint of 'automatic' unfair dismissal for that reason is not well-founded.

29. For completeness, I record that if the claimant had been continuously employed for a period of not less than two years (which is necessary to enable him to make a complaint of 'ordinary' unfair dismissal) it might well be

that he could argue that the had good reason for leaving the Club premises during his shifts on 24 October 2022 and 17 January 2023: namely, respectively, that the altercation regarding the car parking amounted to him being undermined such that he became unwell and felt it best not to react but to remove himself, and he had suffered acute diarrhoea that would make it a breach of legislation for him to remain. Those matters, relevant though they might have been to a complaint of 'ordinary' unfair dismissal, are not relevant to a complaint of 'automatic' unfair dismissal where the only question is whether (at risk of repetition) the reason (or, if more than one, the principal reason for the claimant's dismissal) was that he had made a protected disclosure. I repeat that on the basis of the evidence before me I am not satisfied that it was.

30. Likewise, it might be argued that the respondent acted unreasonably in the way in which the claimant's dismissal was handled on its behalf (including the process that was adopted) as is referred to in section 98(4) of the 1996 Act. Once more, however, while such considerations are relevant in a complaint of 'ordinary' unfair dismissal, for the above reasons they are not relevant in this case where the complaint is one of 'automatic' unfair dismissal.

Public interest disclosure

31. Again for completeness, I record that the claimant's grievance does contain references that might, potentially, amount to qualifying disclosure. Those include his references to not having received a contract of employment or any payslips and having to comply with relevant legislation by going home due to diarrhoea. Such references potentially satisfy, respectively, sections 43B(1)(b) and (d) of the 1996 Act. Further, since the claimant made those alleged disclosures to his employer, they could therefore to protected disclosures.

32. Such considerations have, however, become irrelevant given my fundamental finding that the reason (or, if more than one, the principal reason for the claimant's dismissal) was not that he had made a protected disclosure.

Holiday Pay

33. In my findings of fact above I have referred to the document produced by the respondent headed, "Annual leave entitlement calculation". Having worked through those calculations, I am satisfied that they are correct and the claimant did receive his full entitlement to annual leave as is required by the Working Time Regulations 1998; indeed he received more than his pro-rata entitlement.

34. I am reinforced in that decision by the fact that those calculations broadly accord with the legal advice the claimant had received and I also bring into account the claimant's statement that he had "no idea" what his holiday entitlement was.

35. This being so, I am not satisfied that the claimant's complaint that the respondent did not compensate him in respect of his entitlement to paid holiday that had accrued but had not been taken at the termination of his employment is well-founded.

Itemised pay statements

36. I have referred in my findings of fact to the evidence of Ms Craig and Mr Merton-Smith in this regard. That includes, in particular, first, that the claimant's payslips were not actually given to him but were kept in a file in the Club office for him to access and, secondly, that payslips from the commencement of his employment were given to him in December 2022.

37. As set out above, section 8 of the 1996 Act provides that a worker has the right to be "given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement."

38. I have added emphasis to the above quotation to stress two points in this regard. The first is that the pay statements must be "given" to the worker; the second is that they must be given to him or her "at or before for the time" that the payment is made".

39. In this case, even accepting the respondent's evidence for these purposes (which I acknowledge the claimant refutes), it is clear that the claimant's payslips from the commencement of his employment until sometime in December 2022 were not given to him at the appropriate time and that the payslips from that date until the termination of his employment were, at best, only given to him if he were to be in the Club premises when payslips became available.

40. Thus, I am satisfied that the respondent did not comply with the requirement in that section 8. Having made that declaration in accordance with section 12(3) of the 1996 Act, I therefore turn to consider section 12(4) of that Act. As set out above, that subsection requires me to consider whether any unnotified deductions have been made from the claimant's pay during the period of thirteen weeks immediately preceding the date of the application for the reference. In this case, the date of the claimant's application was 1 June 2023, that being the date upon which he presented his claim form (ET1) to the Employment Tribunal.

41. The period of thirteen weeks immediately preceding that date runs from 1 March 2023 to 31 May 2023. As the last of the payslips that the respondent should have given to the claimant related to week ending 25 February 2023, it is self-evident that the respondent did not make any unnotified deductions from the claimant's pay during the relevant period of 13 weeks. That being so, I am unable to make any order, as referred to in subsection 12(4) of the 1996 Act, that the respondent must pay to the claimant a sum not exceeding the aggregate of the unnotified deductions.

No written statement of initial employment particulars

42. As set out more fully above, section 38 of the Employment Act 2002 provides that if, at the time that relevant proceedings were begun, an employer had failed to comply with its duty under section 1 of the 1996 Act to give a worker a contract of employment or at least a written statement of employment particulars, the Tribunal "must" make an additional award to the employee of either two or four weeks' pay unless there are exceptional circumstances that would make such an award unjust or inequitable.

43. In this case, as was conceded by the respondent, when these proceedings were begun it was in breach of its duty as set out above. I accept the evidence of Ms Craig that she genuinely thought that employees had to work for an employer for six months before it was necessary to provide them with a statement. There might be some basis for her misunderstanding in that prior to 2020 such a statement was required to be issued "not later than two months after the beginning of the employment". That provision has been replaced, however, by a requirement that "the statement must be given not later than the beginning of the employment".

44. On the face of it, therefore, in the absence of exceptional circumstances, I must make an additional award to the claimant. I state "on the face of it" because section 38(2) of the Employment Act 2002 clearly states that that section 38 only applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.

45. That schedule 5 is headed "Tribunal Jurisdictions to which Section 38 Applies". It contains some 20 jurisdictions but neither section 8 nor section 11 of the 1996 Act is amongst them. It follows, therefore, that there is no basis upon which I can make an award to the claimant under this section 38.

Conclusion

46. In summary, therefore, the judgment of the Employment Tribunal is as follows:

    46.1 The reason for the claimant's dismissal related to his conduct.

    46.2 His complaint of unfair dismissal is not well-founded.

    46.3 His complaint in respect of non-payment of accrued holiday pay is not well-founded.

    46.4 His complaint that the respondent failed to give him itemised pay statements or failed to give him such statements at the correct time is well-founded but for the reasons explained above, I am unable to make any order in his favour in this respect.

    46.5 The respondent did not comply with its duty to give the claimant a written statement of initial employment particulars but, once more for the reasons explained above, I am unable to make any order in his favour in this respect.

46.6 The claimant withdrew his complaint in respect of non-receipt of due notice to terminate his contract of employment, which has therefore been dismissed.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 27 October 2023