EMPLOYMENT TRIBUNALS

Claimant: Mr Ian Kirby

Respondent: Lancaster University

Heard at: Manchester **On:** 10-13 March 2025

Before: Employment Judge Cookson
Mrs M Plimley
Ms P Owen

Representation
Claimant: In person
Respondent: Mr Jason Searle, Counsel

JUDGMENT having been sent to the parties on 2 April 2025 and written reasons having been requested in accordance with Rule 60(4) of the Employment Tribunals Rules of Procedure 2024, the following reasons are provided:

REASONS

Introduction

1. This case concerned two joined claims, the first in respect of a claim for holiday pay for the funeral of the late Queen and for the King's Coronation, and the second in relation to alleged detriments and unfair dismissal done on the ground or for the reason that the claimant had made protected disclosures.

2. The first claim (2404615/2023) was lodged on 21 April 2023 following early conciliation between 10 March 2023 and 21 April 2023. The second claim (2407258/2023) was lodged on 5 July 2023.

3. The claimant was registered as a temporary worker of the respondent, although for the purposes of part of his claim he asserted that he had the status of an employee in relation to one of his assignments. The respondent is a well-known higher education institution based in Lancaster which employs approximately 3,500 staff in Great Britain.

4. There were three case management preliminary hearings in this case.

Documents considered in reaching our judgment

5. In reaching our judgment we considered the following:

5.1. A bundle of documents which runs to some 508 pages;

5.2. The evidence of the claimant in his witness statement and in his oral evidence;

5.3. The evidence in witness statements for the respondent from:

5.3.1. Larissa Morrish (Head of Procurement).

5.3.2. Rebecca Barrow (formerly Head of Employee Relations and Organisational Change).

5.3.3. Tara McLaughlin (Head of Employee Engagement and Recruitment Services at the relevant time).

5.4. A cast list, chronology and reading list provided by the respondent.

5.5. Oral submissions made by both representatives on behalf of the parties.

6. The claimant had obtained a witness order in relation to a Ms Jacks. Ms Jacks did not attend, and the claimant applied for a postponement to which the respondent objected and the ground that this claim needs to be heard and it was not clear what evidence the claimant expected her to give. It would not be in the interests of justice to postpone this hearing when respondent witness are giving evidence on the reasons for the decisions taken. It seems the claimant had expected to be able to cross-examine Ms Jacks and the issue the claimant wished to call her about – that he had been offered a post for 12 months which was later withdrawn, is not in dispute. The respondent says the relevant decision makers were present to give evidence.

7. In the circumstances we concluded that in the absence of a clear explanation of the relevance of Ms Jack's evidence to the legal issues. It was not in accordance with the overriding objective to postpone this hearing. The claimant's main argument appeared to be that Ms Jack's evidence was relevant to the question of his legal status, but we received no clear explanation of the relevance to the legal tests of employment. Whether someone has employment status is a question of fact and law and Ms Jack's opinion about that would not assist us.

8. The respondent raised that the claimant had failed to provide a schedule of his loss as ordered by this judge at a preliminary hearing earlier in proceedings. The claimant suggested that a previous response by Employment Judge Horne to a request for an unless order meant he did not have to provide this. Employment Judge Horne's decision on the unless order predated the order made by this judge and the claimant had later identified in the list issues that he expressly disagreed with Employment Judge Horne's assessment of what he was claiming.

9. The claimant was instructed to attend the next day's hearing ready to explain precisely what he says he should have been paid as holiday to enable the tribunal to assess if he had been underpaid.

10. The claimant told us this was difficult for him to do. The next day he told us that he estimated he had been underpaid by £137.50. No explanation for that calculation was provided.

Findings of fact

11. We made our findings of fact on the basis of the material before us taking into account contemporaneous documents where they exist, and the conduct of those concerned. We resolved conflicts of evidence on the balance of probabilities taking into account our assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts. We did not make findings of fact in relation to every matter which was contested in evidence before us, simply those which we found to be material to the determination of the legal issues in this case.

12. The claimant first registered as a temporary worker with the respondent in March 2018. We were provided with a document setting out the terms on which the claimant worked for the respondent, which appears to have been entered into in October 2019 although we did not have a signed copy of this. This document is headed as 'Terms of Engagement' which states that it confirms the standard terms of registration with the Employment and Recruitment Service (referred to as ERS).

13. This document provides that registration does not give rise to any contract of employment or any other employment relationship between ERS; the client which is defined to as a third-party employer, including departments of the University and Lancaster University Students' Union; and the claimant as a temporary worker. As already noted, however, the claimant has asserted that at least one of his assignments gave him the legal status of an employee and the conclusions that we reached about that are referred to further below.

14. The Terms of Engagement document was introduced into evidence by Ms McLaughlin although not referred to in the course of this hearing. It was not in dispute that the claimant undertook a wide range of different assignments for the University under the Terms of Engagement as an "ERS worker". He was well thought of and hiring managers would often approach him directly with offers of assignments.

15. At the heart of this case is the entitlement to the additional "bank holidays" announced for the funeral of the late Queen on 19 September 2022, and the bank holiday to celebrate the coronation of the King on 6 May 2023. At the time of the

announcement of the additional bank holiday by the Government in September 2022 for the funeral of the Queen, the claimant was working for the procurement team of the University. Unusually for an ERS worker this meant he had a university e-mail address which was required to enable him to access particular software. As a result, he received an e-mail sent to all University employees with university e-mail addresses announcing that the University would recognise the additional bank holiday for the funeral of the Queen. The announcement sent on 13 September 2022 stated that *"A bank holiday has been announced for her late Majesty Queen Elizabeth II's state funeral on Monday 19 September. Lancaster University will recognise this, therefore all UK based staff will receive the equivalent of their normal working hours on that day as leave. This includes part-time staff."* The e-mail goes on to explain what will happen for those staff who would still be required to work on that day.

16. The claimant accepted that although this was announced as a bank holiday, no amendment had been made to the Working Time Regulations and it made been up to employers to decide whether to all employees paid time off for the days in question.

17. The claimant told us that he had received the University announcement e-mail "inadvertently" because he had a university e-mail address at the time and he told us that ERS workers are not usually regarded as members of staff, although the respondent's witnesses were less clear in their evidence about this. It appeared there was some ambiguity in the word "staff" as opposed to references to employees. The announcement also stated that *"The day's leave will not show as part of your annual leave entitlement on PeopleXD"* (which is the University's intranet).

18. Very quickly on receipt of that e-mail the claimant sent an e-mail to the ERS general e-mail address querying how this would apply to him. He said *"I am currently working in the procurement department via ERS and so appreciate this notice obviously applies to myself as well however I would appreciate your confirmation that I am to complete that week's timesheet showing the 7.5 hours I normally work on Monday as worked to ensure that I am paid for this day's leave*."

19. The following day Ms McLaughlin e-mailed a number of colleagues identifying the need to work out how the communication which had been made "to all Lancaster University staff" would apply to the ERS staff who did not receive any annual leave entitlement under the Terms of Engagement. Under the Terms of Engagement as temporary workers ERS workers were paid holiday pay as an additional sum in addition to hourly pay. Her e-mail noted that ERS hourly rated staff do not receive annual leave entitlement, but a payment calculated in normal times on a 28-day leave entitlement 20 days plus 8 bank holidays which is referred to as 12.07% of hourly rate. Her e-mail also said this: *"For collective memory and transparency of the decisions made and to demonstrate the action ERS have taken to ensure "all staff" benefit as per the message we have made the following calculations for the state funeral annual leave uplift as per the message. ERS will uplift to 12.55% the holiday rate percentage from 12.07% for September 2022 monthly export only to accommodate the "gift" of an extra day's leave as per the communications listed below to all staff*." The calculation below sets out what is if the usual calculation is reformulated on the basis of 29 days' total leave, the "holiday pay percentage"

becomes 12.55%, although in the course of cross-examination Ms McLaughlin was somewhat equivocal about where the calculation had come from.

20. Later the same day, 14 September 2022, an e-mail was sent to the claimant from the general ERS e-mail account (without any identification of the sender beyond this) to inform him that *"As you are engaged under ERS terms and conditions your leave is calculated as an additional proportion of your hourly rate. As the bank holiday was not planned at the beginning of the year, we will be applying an additional calculation in respect of 19 September bank holiday. Therefore for the month of September only, you will see on your payslip that the holiday pay calculation increases to take into account the additional bank holiday".*

21. The claimant replied around half an hour later to query the position. He noted the terms of the original announcement and pointed out that his normal working hours on the day of the funeral were 7.5 hours which at his normal rate of pay which includes the holiday pay per hour would give him a payment of £88.65 for the day. He said *"I am assuming from the University's statement that you are intending I will receive the full lost day's earnings of £88.65. Can you confirm what the new holiday pay calculation figure will change from £1.27 to so I can see this will equal the amount of £88.65. (This seems a very complicated way of ensuring I see my lost days paid!!)"* He later sent a further e-mail stating that he knew other ERS colleagues had been told just to complete their timesheets as usual and he therefore assumed that he should do the same "unless I hear otherwise".

22. On 16 September 2022 Ms McLaughlin wrote to the claimant. In that e-mail she stated that the original announcement to staff had not explained how this would apply to ERS workers. She pointed out that the ERS workers are employed on different terms and conditions to "employees" and that the communication stating that staff would receive the equivalent to the normal working hours as a day's leave would not apply to ERS workers. Instead the University would increase holiday pay for all ERS workers to account for the extra bank holiday for September. She said this *"In this way all staff that are currently working through ERS will benefit from the extra bank holiday entitlement and not just those who may be scheduled to work on Monday 19 September".* She also went on to say *"We have agreed that if local arrangements have been made that are different to those stated above then that is a matter for individual hiring managers. We have spoken to your department, and they have said that they will pay you for the work you would have completed on Monday."* The e-mail goes on to reiterate that ERS workers are not guaranteed particular hours, days of work and that the University is not under any obligation to pay for work in full when cancelled with 48 hours' notice, which in this instance it has been.

23. It is not in dispute that in due course the claimant was paid for the shift he was scheduled to work on Monday 19 September and was paid an additional uplift of holiday pay for those hours at the rate of 12.55%. This meant that the claimant actually received slightly more in pay than the original announcement had indicated he would receive. The respondent's employees received their usual pay for that day. The claimant received what he would have been paid plus an additional 12.55% and so in that sense was treated more generously than the original announcement.

24. The claimant raised no further dispute or query in relation to payments for the Queen's funeral but after the respondent announced on 22 February 2023 that the University would also recognise the additional bank holiday for the Coronation and that "*All staff will benefit from an additional day off in 2023*" the claimant contacted the ERS e-mail address again on 1 March 2023 to query whether the entitlement to holiday for student ambassadors would increase. The claimant says that this e-mail was his first protected disclosure. The body of the e-mail says this:

> *"Hi*
>
> *I'm currently working in DeLC and I'm down as a timesheet authoriser for our student ambassadors.*
>
> *Following the University's announcement that all staff will be given an extra day's banks holiday as a result of the King's Coronation, can I just check that their holiday pay rate will increase from the current 8 bank holidays days per annum (presently £1.15) from 1 April to 9 days per annum??*
>
> *Just out of interest, as a result of the Queen's funeral in September and the extra bank holiday granted to all University staff, their current holiday pay rate should also have risen to 9 days per annum but I can't see this was ever amended??*
>
> *I look forward to hearing from you so I can let the ambassadors know how this granting of an extra day's bank holiday affects them".*

25. Ms McLaughlin replied to that e-mail on 6 March 2023. Her letter was in very similar terms to the response she had sent the previous September. She said this, *"in order to comply with ERS terms and conditions we will be increasing the holiday pay for all ERS workers to account for this extra Bank Holiday for the payroll month of May. In this way all staff that are currently working through ERS will benefit from the extra bank holiday entitlement and not just those who may have been scheduled to work on the Coronation bank holiday. You will note this was the arrangement for the Queen's funeral day too as per the e-mail sent to you on September 16 2022. Holiday pay for the pay period was uplifted.*"

26. She goes on to state that the communication stating that staff would receive the equivalent of their normal working hours as a day's leave would not apply to ERS workers and she went on to say this*, "I recommend that communication regarding payment for hours worked by any of the staff you manage on ERS engagements is handled by Sarah Elliot, the line manager and budget holder, as your contractual end date for this placement currently ends before the holiday pay uplift would take affect but recognise you wish your ambassadors are informed in good time*". She also says this, *"If work is planned for the ambassadors, it is for the budget holder/department to decide if they wish to (a) pay for work that was scheduled on the bank holiday by authorising the timesheet or (b) cancel the work. The decision to pay for the day's bank holiday work is at the budget holder's discretion but work can be cancelled with 48 hours' notice*".

27. The claimant replied to that e-mail on 8 March 2023. He says his reply was a protected disclosure. In that e-mail he suggests that a statement should be posted on the University website explaining how the additional bank holiday works. In terms of what is said to be the protected disclosure he said this,

> *"The other point is are you quite sure the correct way of administering the bank holiday is to increase the Holiday Pay for 1 month only in the month the extra bank holiday falls due? I'm sure you already appreciate an employer has a legal obligation to ensure all employees receive a total of 5.6 weeks statutory paid holiday per annum. This will be made up of 8 bank holidays i.e. 20 days = 4 weeks + 8 bank holidays = 1.6 weeks giving a total of 5.6 weeks. The granting of an extra bank holiday increase the annual statutory pay from 1.6 weeks to 1.8 weeks giving a revised holiday rate of 5.8 weeks (I assume you already know this however this is explained in more detail on ACAS.org.uk under checking holiday entitlement).*
>
> *Obviously all ERS contracts are for no longer than 3 months (initially!) and so the entitlement will be a proportion of the length of contract. So for example a 3 month contract will give a holiday pay rate of 1.45 weeks (based on the new bank holiday entitlement of 5.8 weeks) and so on. This also means this enhanced rate will apply to all contracts issued in 2022 and 2023 – not just for the one month when the two extra bank holidays have occurred. I'm not sure what legislation you are quoting when you say the enhanced rate is applicable for 1 month only? It is also worth mentioning that ERS's terms and conditions do not override an employer's statutory and legal responsibilities.*
>
> *I hope you find this helpful, could you check perhaps and confirm just to make sure the right thing is being done?"*

28. Over the coming weeks the claimant received confirmation of a new ERS assignment, this time as a Clinical Researcher Assistant. On receiving confirmation of that assignment, the claimant contacted Rebecca Barrow to say that the amount of holiday pay should be increased to show it was based on 9 days instead of 8. It was Ms McLaughlin who replied to inform the claimant that the pay rate would not be amended, and that the Coronation was considered to be a unique event but that the holiday pay percentage calculation for May would be increased to 12.55% for that pay period.

29. In the meantime, the claimant had contacted ACAS to initiate early conciliation on 10 March 2023.

30. During April the claimant was offered a further assignment, as an Exam Invigilator between 8 March 2023 and 31 August 2023 (date of confirmation 31 March 2023) and an assignment as an "OSCE driver" over a number of days in June and August. The claimant replied to the offer in relation to the driver role and the exam invigilation to state that his contracts needed to be amended to show the correct holiday pay and that once he had received the amendment he would press accept. No amendment was ever issued.

31. On 21 April 2023 the ACAS Early Conciliation Certificate was issued, and the claimant lodged his first tribunal claim as a claim for holiday pay.

32. On 10 May the claimant e-mailed to reply to an e-mail about the OSCE driver post which said this:

"Can I just check though the holiday pay?? I can still access the offer however the holiday pay hasn't been altered – it's still 12.07% based on 28 days and of course it should now be 12.55% based on 29 days … the cost of living increase you mention is a separate increase that's been applied to the hourly rates across campus. I've attached a screenshot which shows the holiday pay hasn't been uplifted yet to the new rates of pay.

I've copied ERS in (and Becca Barrow in HR who is helping resolve this) and once it's been confirmed I will let you know".

33. Somewhat unhelpfully this is referred to as PD4 in the List of Issues.

34. Two days later, on 12 May 2023, the claimant e-mailed ACAS and copied in Ms Barrow, Ms McLaughlin and the ERS e-mail address. This e-mail is referred as the third alleged protected disclosure (PD3) in the List of Issues although chronologically it was later in time. In essence the e-mail purports to confirm what the claimant has been told by ACAS that morning referring to advice he has sought as to how the additional days holiday pay should be correctly calculated and applied in law. He goes on to say that ACAS have told him that *"the holiday payments calculation of 12.07% applied to my hourly rate has in fact been deemed unlawful (see Harper Trust v Barzel (correctly a reference to the Supreme Court decision in Harper Trust v Brazel"*, (a copy of which was included in the bundle of documents) and he says this: *"When I submitted my ET,1 I was unaware of this and so will need to make sure this is included should the case proceed to Tribunal.*

I have also copied Lancaster University into this e-mail as;

> *1. I am still to receive a reply to my e-mail of 20/04/2023 and*
>
> *2. As this method of calculation has been deemed unlawful then it would be helpful to suggest all of my contracts – and indeed all employed through the ERS within the University – are altered with immediate effect."*

35. On 16 May 2023 the respondent was sent a Notice of Claim and Hearing containing the claim 2404615/2023.

36. The claimant continued to be offered further assignments including as Graduation Photography Assistant and Purchase to Pay ("P2P") Assistant in the Procurement Team in addition to the assignments he had already been offered. The latter role was a 3-month assignment due to start on 26 June 2023 until 15 September 2023. That was confirmed on 9 June 2023.

37. The claimant told us that this was to be a "temp to role" and that the temporary assignment would lead to a permanent role in September was offered to him by Laura

Jacks. The claimant also told us that the P2P was a contract of employment because he would work the same hours as University employees, he could not send a substitute, he was obliged to do work given to him by Ms Jacks and the University and would be preforming the same role as the employee staff.

38. There had been discussions between the claimant and Ms Jacks about a longer-term contract covering capacity created by Ms Jack's maternity leave. It is clear Ms Jacks was keen for Mr Kirby to be engaged and at one point she purported to offer him the role, but Ms Morrish told us that it was not open to Ms Jacks or her to formally offer the role because the advertising of the role would be subject to University procedures, which can include for example some vacancies being ring fenced. Although the claimant sought to place significance on the fact Ms Jack's had "offered" him the role, it is also clear the claimant at least had recognised that Ms Jacks would not have authority to make an offer and that later he and Ms Jack had discussed that the role would be formally advertised which would allow him to apply for that role. It appears that Ms Jacks thought the claimant would be the best candidate who should get the job if he applied. She had created something of an expectation in the claimant's mind, but the Tribunal concluded that no offer which bound the respondent had been made and the claimant knew that. When the role did come to be advertised, initially it had been advertised to employees on the redeployment register only and then later had been advertised internally and externally.

39. In the background to the claimant continuing to being approached by hiring managers, Ms Barrow had become aware of the tribunal claim. She told us that after discussions with Ms McLaughlin, she decided that it was not appropriate to keep engaging the claimant as a temporary worker because of the way he was conducting himself in relation to issues that he had with the University, particularly because the management time being incurred was disproportionate to the value of the issues and *"we would not know when the next tribunal claim was coming*". They had decided that it would be appropriate to terminate arrangements with Mr Kirby at the end of an assignment and before a new one was due to begin and looked for an appropriate break point.

40. The Tribunal accepted Ms Barrow's evidence that it was her decision to terminate the claimant's engagement. The Tribunal accepted that the reason Ms Barrow took that decision as expressed in paragraph 22 of the witness statement that *"A real concern was that the University was going to find itself incurring significant management and legal costs in defending a claim for a sum that was extremely low in value and the University had to act in this regard. The University is funded in part by public money and takes it responsibilities in this regard extremely seriously*". Indeed, the claimant in his cross-examination and his submissions identified that he thought the reason why his engagements were terminated was that he had brought the Tribunal claim 2404615/2023. That was not however how he had explained his complaint in the claim form for 2407258/2023 to judges. Despite there being three preliminary hearings, the claimant had only ever referred to his case being that the reason for the termination had been protected disclosures and significant time had been spent by judges determining which alleged disclosures the claimant was (and would be allowed to) rely upon.

41. In the context of the "next tribunal claim" comment, significantly this was not the first time the claimant had brought legal proceedings against the University. He had previously brought a claim which was heard in 2021 which was also a claim for unlawful deduction from wages in which the claimant had sought to argue that he was entitled to be placed on furlough and he sought payment for a cancelled shift. His claim that he should have been placed on furlough was unsuccessful but his claim in relation to the shift was upheld. Having given a reserved judgment, the employment judge had allowed some time to see if the parties could resolve the value of what exactly the value of the upheld complaint would be, recognising that it would be a small sum.

42. Included in the documents before us was correspondence between the claimant and the respondent's solicitors. This shows that the respondent's solicitors had sought to agree the value of the claim with the claimant. The claimant's responses were unhelpful, and the Tribunal accepted that the solicitors had been forced to spend a disproportionate amount of time resolving the value of the claim. Eventually it appears a sum was agreed which was slightly higher than the University considered it would be liable for in order to resolve the matter. In relation to those proceedings the University had spent in excess of £11,000 of which more than £1500 was spent seeking the resolve the value of the unpaid shift, when the value of the claim was not more than £120.

43. The Tribunal accepted that Ms Barrow was concerned that the University would not only incur significant legal costs in relation to the claim which had just been received, but that this was a pattern of behaviour with legal costs being incurred out of all proportion to the value of the claims and this would happen again.

44. Insofar as it was suggested by respondent witnesses that a disproportionate amount of management time had been spent dealing with correspondence about the protected disclosures and related correspondence, the Tribunal could see that the claimant had raised issues about the King's Coronation with different staff and was unwilling to accept what he had been told by Ms Mclaughlin. In relation to the late Queen's funeral, the claimant had sent a handful of e-mails around the time but had received only one substantive reply from Ms McLaughlin. There had the been some five months before the correspondence started again in relation to the King's Coronation. The replies to the claimant seem to cover the same points and we were not persuaded that the time in drafting those replies could be described as disproportionate, but it was clear that the claimant was unwilling to accept the answers he had been given.

45. The claimant had had a number of different assignments running with the University at different times between March and June. He had been offered further assignments which were to run between June and August. On 26 June 2023 there was something of a gap in that the claimant had completed one assignment in the morning and was due to begin the new assignment as on the P2P assignment in the Procurement Team in the afternoon. Before he was able to begin that new assignment Ms Barrow met with him and told him that his Terms of Engagement agreement and all assignments under it were to be terminated. Ms McLaughlin was

informed that all future assignments which had been arranged were to be terminated and that the claimant was not to be engaged again.

The Law

Holiday pay

46. Under general contractual principles it for an employer and a worker or an employee to agree what terms apply in relation to holiday. The entitlement will be determined by reference to the contract or evidence of what was agreed.

47. However, the contractual position is also subject to the Working Time Regulations 1998 (WTR) which creates certain rights for workers and employees as a statutory minimum.

48. Under regulation 13 all workers are entitled to 4 weeks paid leave (which reflects the EU Working Time Working Directive) and under regulation 13A a further 1.6 weeks. The 1.6 weeks' additional leave entitlement is intended to reflect the number of public holidays in England and Wales, but workers have no automatic right to take leave on public holidays. There can be differences in terms of the calculation of pay for the 4 weeks and the further 1.6 weeks but that was not an issue in this case.

49. The entitlement to 1.6 weeks was not amended at the time of the late Queen's funeral or the King's Coronation. Whether the extra time was granted was a matter for employers.

The Brazel ruling.

50. The claimant in his case refers to the ruling in *Brazel v Harpur Trust 2022 ICR 1380, SC*. By the time of this hearing the ruling in that case had been superseded by new regulations, but this was a judgment of significance at the time this case is about.

51. It relates to the entitlement under the WTR for workers on permanent contracts with no normal hours, and who worked for only part of the year. There had been a question for some time on how correctly to calculate their leave entitlement because the WTR based a worker's entitlement on a proportion of the number of weeks in the leave year that the individual had been engaged, regardless of the amount of work done. There was no express provision allowing for a pro rata reduction in paid holidays to reflect periods during the year when a worker was not actually working.

52. *Brazel v Harpur Trust* concerned a part-time music teacher employed under a permanent zero-hours contract, who worked irregular hours during the school year, which varied between 32 and 35 weeks. B gave no lessons during school holidays and performed no other substantial duties then, although her contract continued throughout the year. She was paid monthly in arrears on the basis of an agreed hourly rate applied to the hours worked in the previous month. B's contract stated that she had the right to 5.6 weeks paid annual leave, in line with the Regulations. She was required to take her annual leave during school holidays, and the employer made three annual payments in respect of her leave in April, August and December.

On each occasion, her holiday pay was calculated as 12.07 per cent of her earnings in the preceding term. However, B argued that this resulted in her being underpaid. She pointed out that the 'week's pay' calculation prescribed by Reg 16 of the Working Time Regulations and S.224 ERA for workers without normal working hours, which involved taking her average earnings over the preceding 12 weeks, would have resulted in holiday pay of around 17.5 per cent of her earnings for the term. (The statutory reference period for calculating holiday pay has since been increased to 52 weeks, with no account taken of weeks for which no remuneration was paid.)

53. The case progressed the employment tribunal system and higher courts. Arguments were raised about the extent reference should be made to EU law and the purposes of the Working Time Directive. What is significant is that in the Court of Appeal's judgment, the issue was whether B's holiday entitlement should be reduced to reflect the fact that she was a 'part-year' worker, i.e. one who did not work throughout the year. It was accepted that the Directive requires only that workers accrue entitlement to paid annual leave in proportion to the time that they work, with the result that workers who do not work a full year are not entitled to the full four weeks' leave provided for in Article 7(1). However, the fact that the Directive's requirements were satisfied by this 'accrual approach' did not mean that such an approach was mandatory: Member States may adopt arrangements that are more favourable to workers than those required by the Directive. In terms of domestic law, Underhill LJ acknowledged that it may, at first sight, seem surprising that the holiday pay to which part-year workers are entitled represents a higher proportion of their annual earnings than in the case of full-year workers. However, he was not persuaded that this was unprincipled or obviously unfair. He stressed that the workers in question were on permanent contracts. It was not unreasonable to treat that as a sufficient basis for fixing the quantum of holiday entitlement, irrespective of the number of hours, days or weeks that the workers might in fact have to perform under the contract; the actual days from which they would be relieved, and the amount of their holiday pay, would reflect their actual working pattern. The Court concluded that it was unnecessary to approach the construction of the Working Time Regulations on the basis that they must be taken to incorporate the pro rata principle.

54. The Supreme Court unanimously dismissed the employer's further appeal, holding that the amount of leave to which a part-year worker under a permanent contract is entitled is not required by EU law to be, and under domestic law must not be, pro-rated to be proportional to that of a full-time worker. It was not enough, the Court held, for the employer to show that the Court of Appeal's interpretation leads to a part-year worker receiving disproportionately more paid leave than other workers. The Supreme Court also rejected the employer's two alternative suggested methods for calculating holiday pay. It identified multiple problems with these proposed methods. First, they were directly contrary to the statutory method set out in the Working Time Regulations in several ways. The incorporation into the Regulations of the means of calculating an average week's pay set out in S.224 ERA for workers, including those who work very irregular hours, was a policy choice made by Parliament according to which the number of hours worked affects the amount of a week's pay in some circumstances but not in others. Secondly, the two proposed methods involved complicated calculations requiring all employers and workers to

keep detailed records of every hour worked, even if they were not paid at an hourly rate.

Protected disclosures "whistleblowing"

55. The Employment Rights Act says this about what will be protected.

s43A 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."

s43B 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.

56. There are five necessary components of a qualifying disclosure set out in section 43B ERA. Unless all five conditions are satisfied, there will not be a qualifying disclosure. They were summarised helpfully by HHJ Auerbach in Williams v Michelle Brown AM UKEAT/0044/19/OO:

"9. It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.

57. Section 43B(1) requires both that the worker has the relevant belief, and that their belief is reasonable. This involves a) considering the subjective belief of the worker and also b) applying an objective standard to the personal circumstances of the worker making the disclosure.

Protected disclosure detriment

Section 47B of the Employment Rights Act 1996 says

"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.

What does "detriment" mean?

58. The term 'detriment' is not defined in the ERA, but it has a broad scope which has been given extensive consideration in case law and we understand the term to have a similar meaning to the same term in the similar context of the anti-discrimination legislation. *Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337, HL tells us that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment, which be applied by considering the issue from the point of view of the worker.

"On the ground of"

59. The test for whether a detriment was done 'on the ground that' the worker has made a protected disclosure or any other protected act, is set out in *Fecitt and ors v NHS Manchester* [2012] IRLR 64. What needs to be considered is whether the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the worker. This means in determining the grounds upon which a particular act was done, it is necessary to consider the mental processes both conscious and unconscious of the employer. It is not sufficient to simply apply a 'but for' test to the facts.

60. There must be a causal connection between the employee's protected act or status and the employer's decision. In other words, we must ask what was the reason for the employer's act or omission? However, the motive behind the employer's act or omission is immaterial, in the sense that it does not matter why the employer should wish to treat a protected employee differently and it does not matter whether there is or is not an intent to discriminate against the protected employee. It does not matter whether the employer intended to subject him to a detriment.

The burden of proof in detriment cases

s48 ERA: Complaints to employment tribunal

s48 (2) On a complaint under subsection (1), (1XA), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

61. S48 does not mean that, once a claimant asserts that he or she has been subjected to a detriment, the respondent (whether employer, worker or agent) must disprove the claim. The claimant must show that all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a protected disclosure, there was a detriment, and the respondent

subjected the claimant to that detriment. If they do, the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure or did a protected act.

62. The tribunal has to determine the reason or principal reason for the detriment on the basis that it is for the employer to show what the reason was. If the employer has not shown to the satisfaction of the tribunal that the reason was that asserted by him, it is open to the tribunal to find that the reason is that asserted by the employee. However, it is not correct to say that the tribunal has to find that if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. It is open to the tribunal to find that the true reason for dismissal was not that advanced by either side. In other words, if a tribunal rejects the reason for dismissal advanced by the employer, a tribunal is not then bound to accept the reason advanced by the employee: it can conclude that the true reason for dismissal was one that was not advanced by either party depending of course on the findings of fact made in the case

Drawing inferences.

63. We recognise that there will often be little or no evidence to show why a worker has been subject to a detriment. Given the importance of establishing a sufficient causal link between the making of the protected disclosure and the detriment complained of, we recognise that it may be appropriate for a tribunal to draw inferences as to the real reason for the employer's (or worker's or agent's) action on the basis of its principal findings of fact. This approach originated in discrimination law (where it has now been replaced by statutory provisions) but has frequently been adopted by tribunals considering claims under S.47B and other unlawful detriment grounds as it fits neatly with the stipulation in S.48(2) that it is for the employer (or worker or agent) to show the ground on which it acted, or deliberately failed to act.

Submissions

64. We had brief oral submissions from the parties. For the respondent Mr Searle pointed out that our starting point must be the List of Issues (which is contained in the attached to these written reasons below). In brief summary his submissions were that the claimant had always seen himself as a worker and that he had not made out a case that he was an employee.

65. In relation to the holiday pay claim Mr Searle argued that this was without merit. He suggested that it had proved unreasonably difficult for the Tribunal to even understand what the unlawful deduction claim was. Mr Searle argued that this was a simple matter of deduction, and it should not have been so difficult for the claimant to identify the outstanding amount. He suggested the reason why the claimant had had such difficulty was that he knew that even the sum he suggested was more than he was entitled to and pointed out that the claimant was unable to identify where the entitlement to any sum claim from. Mr Searle highlighted to us what Employment Judge Barker had recorded in her case management hearing summary form the hearing on 28 August 2024.

66. It is worth noting here what she said.

"(8) Previous case management orders have contained a summary of the case and it is not necessary to repeat the facts here. However, it is important to note that the claimant will say that he accepts that the respondent did not have a legal obligation to pay workers (as opposed to employees, or "staff" as the claimant referred to them) for an extra statutory bank holiday either for the Queen's funeral or the King's Coronation. His case is made on the basis that, having issued an email to "staff" (employees) to inform them that they would make such a payment, which he believes he received inadvertently, the respondent agreed to make a payment to him to acknowledge the extra bank holidays. The respondent accepts this, and part of the respondent's case is that this was done as a goodwill gesture.

(9) It is the claimant's case that having agreed to make a goodwill payment to him, and a goodwill payment to all workers and casual staff, the respondent was then obliged to (1) notify all workers (or "students" as the claimant referred to them during the hearing) that they were receiving a goodwill payment and why; and (2) the respondent was then obliged to pay the workers for the bank holidays at the same rates and on the same basis as employees. The claimant gave the reason for (2) as that the difference in payment rates was "unfair". He also said that he acknowledged that the respondent did not have an obligation to inform all workers as he suggested.

(10) The Tribunal noted that his arguments are somewhat contradictory. However, the claimant told the Tribunal that he had issued legal proceedings previously against the respondent on the basis that it had published information online (which is assumed to be its intranet) that it would pay workers for shifts cancelled due to Covid. When it did not then make such payments, the claimant said that the Tribunal found that having promised to do so the respondent was then obliged to do so and he won his case. I noted that this did not appear to be the same as the circumstances of the current case.

(11) The claimant's protected disclosures are made on the basis that "all students"/workers were being paid rolled up holiday pay at the "wrong" rate, following the Supreme Court case of Harpur Trust v Brazel. The respondent acknowledged that at the time to which the claim relates, it paid rolled up holiday pay at 12.07% and that Harpur Trust now discourages employers from applying a universal rate of 12.07% as for some workers this may produce a shortfall in holiday pay. However, the Tribunal noted that whether or not 12.07% produced a shortfall in holiday pay depended very much on the individual circumstances of each worker's working patterns and simply because the respondent applied 12.07% at the time, this did not mean that all casual workers were underpaid holiday pay. The Tribunal noted that the claimant was not able to say with any certainty how many casual workers at the respondent were affected by this issue but his assertion was that "all" were likely being paid at the incorrect rate."

67. Mr Searle pointed out to us that the claimant was unable to explain on what basis he argued that the "WTR" approach to holiday pay would apply to the additional days holiday in this case and that the claimant's case about Harper Trust was simplistic. That is a case about permanent term time employees, and it is not true that it applies across the board to all workers. Mr Searle argued that all of the payments made to staff for the additional bank holidays had been goodwill gestures. The respondent could have chosen to cancel the assignments of temporary workers

working with 48 hours' notice. Instead for the Queen's funeral the claimant had been paid 7.5 hours he had been due to receive (which included an element for holiday pay) and had then received an additional sum as announced by the respondent about what would apply.

68. In relation to the assignment for which the claimant had claimed employment status (the P2P assignment), Mr Searle argued that it was disingenuous to suggest that this was some sort of freestanding offer of employment. The claimant had not applied for that separately, it was an assignment under the temporary working arrangements as the others had been which he accepted were only temporary assignments and no contract had ever been formed. In relation to the longer maternity cover, the claimant had not been offered that all and he knew it.

69. In relation to the claimant's claims about having made protected disclosures Mr Searle highlighted to us that the appropriate test is that in *Fecitt v NHS* (see above). He pointed out that it is not enough for an individual to say, "I made a disclosure and I have been subject to a detriment". We have to look at the decision-maker and whether the protected disclosure has been a material influence on their decision. He reminded us that the claimant bears an initial burden of proof to show that there is information which tends to show that a detriment has been done on the ground of a protected disclosure.

70. In relation to the protected disclosures themselves, Mr Searle reminded us that in order to be protected that we have to be satisfied that the claimant held the relevant belief in a legal breach and that that belief was reasonably held. He argued that in the claimant's case this had not been established. He was not able to explain how the respondent was said to have got things wrong. He also reminded us that we would have to make three findings about what information had been disclosed and that there must be a disclosure of facts not simply allegations. He criticised the alleged disclosures as being no more than queries or questions raised "out of interest" or requesting information.

71. Mr Searle accepted that PD3 perhaps had the strongest argument to being a protected disclosure, although he argued it still fell short. This had in fact been addressed to ACAS although it was accepted it had been copied to the respondent.

72. Mr Searle argued that the claimant had failed to establish that he had a reasonable belief in the public interest and that it is not enough just to say, "other employees or workers are affected". Mr Searle highlighted that he expected the claimant to say that the reason why this is in the public interest is that the respondent relies on public money but that highlights exactly why the respondent has to carefully manage its costs and how its money is used and therefore had to have regard to the fact it was being required to respond to the claimant again and again. Even if we did not accept that he argued that the claim has to fail because the claimant was not able to say which of the protected disclosures had resulted in the termination of the assignments and that contrary to the permission to amend which had been granted by Employment Judge Barker, the claimant appears to point to other e-mails which he says were protected disclosures to support his case.

73. In any event Mr Searle argued that Ms Barrow's evidence had been clear: the claimant raising concerns about the holiday pay issue had mimicked his behaviour in connection with the dispute about being put on furlough which had resulted in a significant waste of time and public money and that she had known the claimant's approach to the tribunal claim when it was received would be the same. Costs would be unmanageable and that it would be impossible to come to a resolution. He argued this was a case not about the fact in principle that the claimant had brought his case but about the manner and obstructive way that the litigation was being managed and the way the claimant was trying to tie up the employer. Mr Searle pointed to what he said was the claimant's persistent refusal to accept answers that he received from the University demonstrating the unreasonableness of his case and invited us to dismiss the complaints.

74. The claimant told us that his claim was and always had been straightforward. That when the University granted an extra bank holiday this created an uplift to entitlement over the year. He told us that he had always accepted that there was no statutory requirement to grant the bank holiday, but he argued that once granted in essence the approach set out in the Working Time Regulations should apply to the extra holiday. In terms of the lawfulness of the 12.07% additional pay approach he explained he had been told by ACAS that this was now unlawful as a result of the *Harper Trust* case. The claimant told us that he had a genuine belief that what the University had done was wrong. In terms of providing information about the amount that he was claiming he referred us to the direction which Employment Judge Home had given on 29 March 2023 in relation to an unless order sought by the respondent and told us that that was why he had not identified a precise figure at this hearing.

75. In relation to his protected disclosure complaints the claimant told us that the whole case in his view turned on whether the protected disclosures are accepted as protected. He told us that he has presented his case on the basis that he was dismissed for bringing his tribunal claim in 2023. He argued that the reason given by the respondent relying on the previous tribunal case as being the reason for dismissal could carry no weight because he had subsequently been offered a significant number of assignments and that in his view regardless of whether the disclosures were protected or not he had confirmed a link between correspondence and dismissal.

76. In terms of employment status, the claimant relied on the concessions made by respondent witnesses that during the relevant assignment he would work the same hours and would do the same as "employee" colleagues. The claimant emphasised that in his view he had been offered what he called the "temp to perm" role in correspondence.

77. The claimant told us he thought it was disappointing that the University had described his behaviour as unacceptable.

Discussion, further considerations and conclusion

Claim for Holiday Pay

78. In relation to the claimant's claim for unlawful deduction from wages, he had told us that he had calculated that he had been subject to two underpayments of £137.50 in relation to holiday pay, but the claimant failed to provide any basis for that calculation.

79. The claimant's reason for saying he did not consider that he needed to put forward any other information or calculation that it was what Employment Judge Horne had said in his letter refusing an unless order application made by the respondent in the early stages of the litigation. It was entirely unclear to this Tribunal however why the claimant thought that that correspondence (which was about making an unless order to enable the respondent to put in a response to claim 2404615/2023) meant that he did not have to comply with case management orders which had been made subsequently including by the Judge with conduct of this final hearing following a preliminary hearing on 19 October 2023 for the provision of a Schedule of Loss setting out the calculation of the sums claimed and a witness statement which supported those claims. The notice for this final hearing had made clear that it was intended not only to deal with liability, but also remedy so even on the basis of the correspondence from Employment Judge Horne, the claimant must have realised that he needed to provide evidence to the Employment Tribunal to enable it to work out whether he had in fact been underpaid. In the list of issues, the claimant also identified that he disagreed with Employment Judge Horne about the application of any formula of 12.55% which is how Employment Judge Horne had understood his complaint. We concluded that this being the case the claimant should have realised he had to offer some basis to say what he should have been paid but he had failed to do so. This made our task harder than it needed to be.

80. More significantly however we concluded that the claimant had not established that he had an entitlement to any additional holiday pay at all for the two days in question. The additional bank holidays announced by the Government for the Royal Funeral and the Coronation had not been incorporated into the statutory entitlement under the Working Time Regulations. That entitlement is limited to the statutory 5.6 weeks. The claimant told us he understood that. Whatever the claimant was entitled to be paid it did not arise from rights in the WTR.

81. While the claimant had acknowledged that he had no statutory right to the additional leave, he seemed to suggest that because the leave was to be paid this meant that the WTR provisions would somehow still apply. For this to be case that would have to be contractual entitlement but incorporating the WTR calculation. The claimant offered no explanation for how the WTR calculation would be incorporated into his contract other than his belief that's how it should be, this would be fair and relying on the fact that the University had announced that all staff would be entitled to "an extra day".

82. We did not accept any of those arguments. The respondent was not obliged to provide any staff member, employee or worker, with additional days' paid leave for the Royal events . It had been made clear in the respondent's announcement that changes were not being made to underlying terms and conditions. The respondent had not increased the entitlement of employees to 29 or 30 days leave for them to take at any time, it had put in place a particular set of arrangements for two specific

days on a one-off basis on each occasion. What was to be paid was explained in advance of the days in question to both employees and ERS workers, albeit the announcement about the ERS workers did seem to be a little of an afterthought. We could see no basis for the claimant's assertion that somehow this varied the underlying terms of his engagement for the purposes of the holiday pay claim.

83. We noted that in fact at the time of the late Queen's Funeral the claimant had received the pay he would have earned that day without being required to work, so he had been paid the same as the University employees in accordance with the announcement. In fact, the claimant had received the day's pay and an additional sum for holiday pay so slightly more than if he had worked the day. The claimant did not accept that being paid for a day when he had not been required to work could count as holiday pay, but the Tribunal could not understand on what basis he made that assertion. Even if he was right that the announcement made by the respondent to its employees had created a legal entitlement for the claimant, on his own case he had been paid slightly more than the announcement provided for. It does not appear to this Tribunal that the claimant in fact thought he was owed any money in relation to the Queen's funeral after he had been paid both the additional holiday pay element and for the hours worked at the time, his belief about this seems to have formed in a rather unfocused way later.

84. We noted that the claimant had failed to provide us with specific evidence about what assignments were current, if any, on the day of the Coronation. He does not appear to suggest that this was a day he had been contracted to work and he has not told us if he was due to work and was paid, if he was due to work and the shift was cancelled or if he was between assignments with no entitlement to be offered any future work under the Terms of Engagement. We do not know what if any extra holiday pay, he received during May. We concluded that the claimant had failed to establish as a matter of fact that any deduction had been made to his pay.

85. On this basis we concluded that his claim for unlawful deduction from wages is not well-founded.

Protected Public Interest Disclosures

86. Turning first to whether the claimant had made a protected disclosure at all, the Panel reminded ourselves of the five necessary components of a qualifying disclosure, set out in Section 43B of the Employment Rights Act 1996 and as set out in *Williams v Michelle Brown* (above):

87. We started by looking at each protected disclosure in turn.

88. We concluded that the first disclosure on 1 March 2023 (PD1) simply does not contain a disclosure of any information. It is an e-mail querying what the position was. Without any disclosure of information that e-mail cannot be protected.

89. PD2, the second alleged disclosure contains a little more. It identifies what the claimant says about the law and contains some information. However, we concluded that the claimant could not reasonably believe that the information he disclosed tends to show any legal wrongdoing. The claimant could not reasonably believe that the 2

extra days for the Royal Events had extended the entitlement of employees and workers on the basis he suggested. He has pointed to nothing which could have created a belief that the "annual statutory pay" had increased from 1.6 to 1.8 weeks, which would of course have required secondary legislation. He could not believe that anything the respondent announced generally extended or varied the leave entitlement in any contract including the ERS terms of engagement because that had been made clear from the first announcement which was specific that this was a one-off circumstance.

90. We did see that the claimant thought he was raising this on behalf of student ambassadors rather than himself and in that sense we understood his assertion this was in the public interest but we agreed with Mr Searle that this could not mean the claimant's reasonably held a belief that the information disclosed tended to show a breach, even if the claimant had convinced himself of what he said. This was a protected disclosure.

91. The protected disclosure on 10 May 2023 which is referred to as PD4 in the List of Issues is the e-mail which the claimant says that he should now be paid 12.55% rather than 12.07% in the assignment as OSCE driver. The email contains little information and explanation. The same criticism can be made as above about the claimant's belief in any legal wrongdoing and whether that belief was reasonably but even more it is an e-mail which is clearly simply about the claimant's personal circumstances sent to a particular hiring officer. We concluded that the claimant could not reasonably believe that this tended to show a relevant legal breach, nor could he reasonably believe it was a disclosure made in the public interest, it was a personal complaint about his personal terms of assignment. It could not be a protected disclosure for that reason alone.

92. PD3 which was made after PD4, was in our view rather different from the others. It contained a disclosure that the method of calculation of holiday pay applied to the hourly rate of ERS workers is unlawful and identified that the approach the University has adopted requires updating. It is not a disclosure about the additional bank holidays as such but a more general disclosure that the University has adopted a flawed approach to holiday pay which has now been found to be unlawful. Although it contains little information, but we accept that "the holiday pay method calculation of 12.07% applied to my hourly rate" is a disclosure of information and it is of wider relevance than being about the Royal Events.

93. We also accepted that PD 3 is an e-mail which does not simply relate to the claimant's personal circumstances alone, but that the claimant raised this on the basis that it applied to all ERS workers, he believed he raised this on behalf of a large cohort including and indeed mainly students and it was therefore in the public interest and we accepted that belief was reasonably held.

94. As Mr Searle pointed out, the claimant has not correctly reflected the judgment of the Supreme Court in what he said, this judgment applies to permanent employees who have an underlying contract but where there are periods during that employment when they do not work, like term time employees. The principles can apply to workers too but as Employment Judge Barker had pointed out it is not a blanket position. We

have not decided the entitlement of ERS workers to leave which did fall within the WTR entitlement under the Terms of Engagement, but ERS workers are in a different position from permanent term time employees like Mrs Brazel. There was no obligation on either side to offer or accept any new assignments. An assignment could be as short as a day or two's work and created no expectation of work in the future. Registered ERS workers apply for each assignment unless they are offered work by a hiring manager and then it will be discrete assignment. What the implications of the Brazel judgment are for those workers would require careful consideration. However we also accept that that the claimant believed on the basis of what he had been told by ACAS that this broad 12.07% approach to holiday pay was unlawful and was therefore a breach of a legal obligation (the WTR). The claimant does not have to prove that he was right about what he believed, simply that his belief was reasonable, and we accept that his belief about this was reasonably held in the circumstances.

95. For these reasons we found that PD3 was a protected disclosure.

96. We therefore went on to consider the extent to which this protected disclosure had influenced the respondent.

97. We do not understand it to be in dispute that the decision to terminate the claimant's registration and that he would be offered no further work under Terms of Engagement was a detriment.

98. For reasons which will become clear we concluded we would require further clarification of the case in relation to employment status from the parties but we decided to look first at the extent to which the PD3, as the sole protected disclosure, had influenced Ms Barrows' decision to terminate the claimant's ERS registration and that he would be offered no further work under Terms of Engagement.

99. Ms Barrow had told us that the pleaded assignments in D1 in the list of issues had already ended and the P2P assignment had not yet begun but Ms Barrow had decided that the P2P assignment which had been offered and accepted was to be terminated. That seemed a sensible starting point. The Panel were all struck by the fact that not only did Ms Barrow tell us her decision was about the legal costs she expected the respondent to face from tribunal claim 2404615/2023 based on the previous case and the disruption this would cause to management time, the claimant himself put his case on the basis that the decision had been because of what was an approaching final hearing in July 2024 (although this was adjourned). Ms Barrow explained that they had tried to explain the respondent's position via ACAS but she felt that the respondent was getting nowhere with the claimant and they were back at the same place as they had faced in the original tribunal (that is the case already determined in 2021) where no resolution would be possible and the respondent would face disproportionate costs. She told us that it was not the logging of an issue or indeed the fact a claim had been brought that concerned her, but the fact that it was so difficult to reach a resolution, for example in the very first tribunal claim it was about the difficulty resolve what the value of unlawful deduction had been because the claimant would not engage with information sent to him by the solicitors. Ms Barrow believed the same thing was happening again. She stressed that after the

2021 claim had settled the HR team had thought they had the right thing and there were no concerns about the claimant's performance as a worker but she saw the same pattern of behaviour happening again with the latest tribunal case and concluded she had to protect the University from that.

100. In summary the Tribunal were satisfied that Ms Barrow's decision had not been influenced by PD3 in any material sense although it was part of the background to the legal dispute.

101. We concluded that the claimant had failed to show facts from which we could conclude that protected interest disclosure 3 had materially influenced Ms Barrow in her decision-making.

102. The claimant had claimed that he was an employee for the purposes of the P2P assignment. The Tribunal considered what findings we should make about the claimant's status. We were concerned that the submissions we had heard about status failed to address the key legal issues necessary for a tribunal to decide status. The claimant had placed great emphasis on the fact that he would work the same hours as respondent employees but key matters like the significance or not of the Terms of Engagement in light of the Uber decision had not been addressed at all and it was no clear why if the claimant was a worker on his case for some assignments he would have a different status for this role.

103. We considered what was proportionate. If we had found that Ms Barrow had been influenced by PD3 in her decision making we would have invited further submissions and the judge would have directed the claimant to address the various legal tests but in the circumstances of limited time being available for this in what remained of the hearing and we conclusions on the factual significance of PD3 we concluded that making findings about that and inviting further submissions would serve no useful purpose. We concluded that it was not in accordance with the overriding objective to invite further submissions and undertake further deliberations when it was inevitable we would conclude the complaint was not well founded.

104. In the circumstances we concluded that none of the complaints in these claims were well-founded and all were dismissed.

105. The respondent made a cost application which has been dealt with separately.

Employment Judge Cookson

Date: 4 July 2025

REASONS SENT TO THE PARTIES ON
Date: 22 July 2025

FOR THE TRIBUNAL OFFICE