



EMPLOYMENT TRIBUNALS

Claimant: Oskar Bunsch

Respondent: Woodlands Commercial Limited

Heard at: London South (Croydon)

On: 12th, 13th, 14th 15th and 16th January 2026

Before: Employment Judge L Clarke
Members: Mrs N Beeston
Dr S Chacko

Appearances

For the claimant: Mr Bunsch (in person with a Mackenzie friend: Mr Okoye)

For the respondent: Mr Williams (solicitor)

JUDGMENT

1. The Claimant was a worker within the meaning of section. 230(3)(b) of the Employment Rights Act 1996.
2. The complaint of automatic unfair dismissal for having made protected disclosures, alternatively of public interest disclosure detriment (termination), is not well-founded and is dismissed.
3. The complaint of wrongful dismissal/notice pay is not well-founded and is dismissed.
4. The complaint of direct age discrimination is not well-founded and is dismissed.
5. The complaint of breach of contract (failure to review pay) is not well-founded and is dismissed.
6. The complaint of failure to pay holiday pay under the Working Time Regulations 1998 is well-founded and succeeds.
7. The Respondent shall pay to the Claimant the agreed sum of £3,000.00 (to include holiday pay and pension contributions due to the Claimant during his period of engagement with the Respondent).

8. The remedy hearing provisionally listed for 23rd April 2026 is vacated.

WRITTEN REASONS

Introduction

1. The claim form was presented on 9th December 2022 and sought compensation for unfair dismissal, protected disclosure detriment/automatically unfair dismissal, wrongful dismissal/unpaid notice, holiday pay, redundancy, age discrimination and breach of contract. Early conciliation started on 3rd October 2022 and ended on 10th November 2022.
2. The Respondent's ET3 denied that the Claimant was an employee and asserts that he is self-employed and had a contract with Indigo Services Europe Limited.
3. The Tribunal sent strike out warning letters to the Claimant in relation to his complaints of ordinary unfair dismissal and statutory redundancy payments on 1st March 2023 as it did not appear that the Claimant had the requisite length of service required for these claims in any event.
4. A preliminary hearing took place on 16th November 2023 at which Indigo Services Europe Limited ("Indigo Services" or "Indigo") were added as Second Respondent and the claim was set down for a preliminary public hearing and given case management directions.
5. On 13th June 2024 a further preliminary hearing took place. By that date Indigo Services had been dissolved and no longer existed and the claims against it were dismissed. The complaints of ordinary unfair dismissal and statutory redundancy payments against the Respondent were also dismissed as the Claimant's period of engagement with was less than 6 months from about end of March 2022 to 9th September 2022 and accordingly, he did not have the requisite length of continuous service for the claims to succeed. Further case management directions were given and a public preliminary hearing was listed.
6. By application dated 18th July 2024 the Respondent applied to strike out the claims based on allegations of the Claimant having approached witnesses and tampered with documents.
7. At the public preliminary hearing on 28th August 2024 Employment Judge Heath found that the Claimant had acted scandalously and unreasonably but dismissed the application to strike out the claims. Written reasons for his decision were provided and case management directions were given and a list of issues was settled.
8. The claims were listed for a 5-day final hearing to deal with liability and remedy which was heard between 12th and 16th January 2026.

9. Over the first two days of the final hearing a substantial amount of Tribunal time was taken up with resolving issues about the documentation.
10. The Tribunal heard evidence and submissions as to liability only. Despite imposing time limitations on the evidence and submissions, there was insufficient time to conclude the hearing and deliver judgment as a result of the delays arising from documentation issues.
11. No submissions or hearing took place in relation to remedy and the Tribunal reserved judgment and set a provisional hearing date for a remedy hearing to take place on 23rd April 2026 if required.

The Issues

12. At the commencement of the hearing, the list of issues that had been agreed at the hearing on 28th August 2024 was confirmed save that the Respondent confirmed that it was not putting forward a justification defence so items 7.6 and 7.7 on the list of issues were deleted.
13. During final submissions the Respondent conceded that the Claimant was a “worker” within the meaning of s.230(3)(b) of the Employment Rights Act 1996 (“ERA 1996”).
14. Further, following its concession that the Claimant was a “worker” the Respondent also conceded that the protected disclosure claim should be considered either as an automatic unfair dismissal, or as a freestanding claim where the detriment was termination, depending on the conclusions reached by the Tribunal as to the Claimant’s status. The Tribunal agreed.
15. Following discussions between the parties during the Tribunal’s deliberations, the parties agreed that the sum of £3,000 was due to the Claimant by way of holiday pay and pension contributions and the Respondent agreed to pay the same to the Claimant irrespective of the outcome of the Tribunal’s deliberations.

The Evidence

16. The Tribunal considered a paper bundle, numbered to page 365, together with a supplemental bundle, numbered A1 to A45. References hereafter in bold within square brackets are to the pages of the bundle/supplemental bundle. Pagination given in the witness statements and the Claimant’s written submissions rarely matched the pagination of the documents in the bundles. During the hearing the correct bundle references were located and (with the agreement of the Respondent) the Claimant provided a document key to assist the Tribunal to locate relevant documents during its deliberations.
17. At the hearing, the Claimant, Mr Tony Mallins and Mr Chinedu Okoye gave oral sworn evidence on behalf of the Claimant. The Claimant relied on those of his statements produced throughout the proceedings numbered 2, 4, 5, 7 and 8.

Statement number 8 was an additional witness statement produced at the hearing and dated 6th November 2025 which the Claimant had not been directed to produce but which the Respondent did not object to being admitted.

18. The Respondent was represented by Mr Williams, who called sworn evidence from Mr Arun Gomes, Mr Steven Archer, Mr Michael Brennan and Ms Joanna Ayres.
19. The Tribunal was also referred to, and considered, witness statements from each witness who gave oral evidence.
20. The Tribunal also considered witness statements submitted by the Claimant from Mr Adrian Christea, Mr Gavin Hay, Mr Nazar Charyyev and two statements from Mr Marek Gres, none of whom attended to give oral evidence.

The Submissions

21. The Tribunal heard oral submissions from both Mr Williams and the Claimant. Additionally the Claimant provided written submissions in a document entitled "Particulars of Claim".
22. Mr Williams' submissions included the concession that for all purposes the Claimant was a worker within the meaning of s.230(3)(b) of the ERA 1996 and that the Respondent no longer sought to suggest that the Claimant was self-employed. He did not refer the Tribunal to any law but submitted that this was a case which was fact dependent and the Tribunal should draw its own conclusions as to the integrity of the evidence of each party. He further submitted that the events relied on for the age discrimination claim were not corroborated and there was no detriment or discrimination. He asserted that none of the alleged public interest disclosures were in fact in the public interest and were not therefore qualifying disclosures and that any events which occurred were so trivial that the Claimant ought to have known that they were not in the public interest. He asserted that the Claimant had been given 1 weeks' notice, which he had worked and been paid for, and which was all that was required and that there had been no breach of contract. He conceded that the holiday pay claim would succeed and that the Respondent would also be liable for pension payments as a result of the concession that the Claimant was a worker.
23. He suggested that the automatic unfair dismissal claim should be considered in the alternative as a protected disclosure detriment for termination and that the required status of the Claimant for the claims brought to be capable of succeeding was as follows:

Employees only:

- (i) automatic unfair dismissal;
- (ii) wrongful dismissal/notice pay

Employee or Worker status:

- (iii) age discrimination claim
- (iv) holiday pay claim

- (v) alternative claim to automatic unfair dismissal: protected disclosure detriment (termination)

Any status:

- (vi) breach of contract claim

- 24. The Tribunal considered the Claimant's written submissions and heard just over 40 minutes of oral submissions from the Claimant. The Claimant cited *Barton v Investec Crosthwaite Securities Ltd [2003] ICR 1205 EAT* in his written submissions and *Cresswell v High Speed Two (HS2) Ltd & Others 2300933/2023* in his oral submissions. No other legal submissions were made. The Tribunal considered both cases but did not find either to be of particular assistance.
- 25. The remainder of the Claimant's submissions were by way of a recital of what he considered to be the facts, his interpretation of them, and his feelings about them. He digressed on occasion into evidence that the Tribunal had not heard during the evidential stages of the hearing and covered matters which did not form part of his claims. These elements of his submissions were disregarded by the Tribunal.
- 26. He was prompted by the Tribunal to address them on the claim for breach of contract which he had not otherwise addressed and directed the Tribunal to his e-mail to the Respondent regarding a review of his pay [207].

Law:

Standard of Proof

- 27. The party who bears the burden of proving the claim, or any element of the claim, must do so on the balance of probabilities.

Employment Status

- 28. S.230(1) ERA 1996 defines an employee as an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment.
- 29. A contract of employment is defined in s230(2) as a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing.
- 30. In essence, in determining whether the Claimant was an employee, the Tribunal must consider whether the agreement between the Claimant and the Respondent in this case was a Contract **of** service – in which case the Claimant would be an employee, or a contract **for** service, in which case the Claimant will be an independent contractor but may nevertheless be a worker under s.230(3)(b) of the ERA 1996 (as the definition of worker encompasses, but is wider than, those who are employed). The statute itself provides a limited amount of assistance in terms of determining what a contract of employment is, or who falls within the category of worker.

31. [Ready Mixed Concrete \(South East\) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD](#) as approved in [Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC](#), and in [Commissioners for HM Revenue and Customs v Professional Game Match Officials Ltd 2024 UKSC 29, SC](#) set out a 3 part test for determining whether a contract of service (i.e. a contract of employment) exists.
32. A contract of service exists if:
- (a) the individual agrees that, in consideration of a wage or other remuneration, he or she will provide his or her own work and skill in the performance of some service for the employer (the actual word MacKenna J used was 'master');
 - (b) the individual agrees, expressly or impliedly, that in the performance of that service he or she will be subject to the other's control in a sufficient degree to make that other an employer; and
 - (c) the other provisions of the contract are consistent with its being a contract of service.
33. Part (a) of the 3 part test requires personal service, i.e. that the employee perform the service themselves. A genuine substitution clause enabling someone other than the Claimant to fulfil the principal obligations will prevent the arrangement being one of employment.
34. Similarly, a lack of mutuality of obligation (an unqualified obligation on the individual's part to provide his work and an unqualified obligation to provide work on the other side) will also prevent an arrangement from being that of employment.
35. The degree of control over the individual's performance is also a key factor. The question is whether, in practice, the employer can direct what the employer does or does not do. A high degree of autonomy on the part of a highly skilled worker will not necessarily displace the employer's practical right and ability to give instructions about how the individual does their job (for example: in relation to what to do, how to prioritise it, who s/he should report to). So long as some degree of control is exercised this may be sufficient to point to employee status even if in practice the employer lacks the capacity or desire to tell the individual how to do their job. [White and anor v Troutbeck SA 2014 ICR D5, CA](#)).
36. Failure to satisfy either of the first 2 limbs will prevent the arrangement being a contract of employment. However, even if the first 2 limbs are satisfied, the Tribunal must consider whether other provisions or terms of the contract are consistent with it being a contract of employment. This requires the Tribunal to consider all relevant factors, both consistent and inconsistent with employment, and to determine as a matter of overall assessment whether a contract of employment exists.
37. Relevant factors may include:
- (i) The terms of any formal written agreement and/or the parties' self-categorisation (although this is not decisive. The Tribunal is not bound to accept its terms if it considers it to be a contrivance or to not reflect the reality of the situation. What happens in practice may be more significant than what any written contract states);

- (ii) Financial considerations (e.g. the pay and tax regime applied including who sets the method of payment and entitlement (or otherwise) to sick pay and maternity/paternity pay);
 - (iii) The extent of integration into the putative employers' organisational structure;
 - (iv) Whether the individual was under a duty to obey orders;
 - (v) Whether the individual had control over his/her hours of work and holiday;
 - (vi) Whether the individual was supervised as to the mode of working;
 - (vii) Whether the individual provided his/her own equipment, tools and/or materials;
 - (v) Whether the individual is performing his services as a person in business on their own account;
 - (vi) The nature and length of the engagement;
 - (viii) Custom and practice.
38. The Tribunal should not adopt a mechanical tick box approach but should stand back and make an informed, considered, qualitative assessment from the picture painted by an accumulation of detail - *Hall (Inspector of Taxes) v Lorimer 1994 ICR 218, CA*.
39. The Tribunal must consider all the circumstances but in particular the 3 broad aspects which feed into an ultimate conclusion as to how the relationship between these 2 parties can be categorised. Those 3 essential broad aspects which provide an irreducible minimum for employment status are:
- (1) personal performance;
 - (2) mutuality of obligation; and
 - (3) control.

Automatic Unfair Dismissal

40. Section 94 of the ERA 1996 confers on employees the right not to be unfairly dismissed. Enforcement of that right is by way of complaint to the Tribunal under section 111.
41. The Claimant must show that he was an employee and was dismissed by the Respondent under section 95.
42. Where, as in this case, the Claimant has less than 2 years continuous service, the Claimant must prove that the reason or the principal reason for the dismissal was the making of a protected disclosure: ***Maund –v- Penwith District Council [1984] ICR 143 (CA)***.
43. If the reason, or principal reason for the dismissal is that the employee made a protected disclosure, the dismissal will be automatically unfair under s103A of the 1996 Act. If the protected disclosure was merely a subsidiary reason, the dismissal will not be automatically unfair.

Protected Disclosure Detriment

44. Section 47B(1) of ERA 1996 confers on workers (including employees, see section 43K) 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. Enforcement of that right is by way of complaint to the Tribunal under section 48(1A).
45. The Claimant must show that he made a qualifying disclosure within the meaning of s43B of the 1996 Act.
46. In order to be a qualifying disclosure, the Tribunal must be satisfied of all of the following - **Williams v Michelle Brown AM, UKEAT/0044/19/OO**:
- (1) It is a disclosure of information.
 - (2) The Claimant believes the disclosure is in the public interest.
 - (3) The Claimant's belief that the disclosure is in the public interest is reasonable.
 - (4) The Claimant believes that the disclosure tends to show one (or more) of the six specified categories in s 43B(1), namely:
 - (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.
 - (f) That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be, deliberately concealed.
 - (5) The Claimant's belief that the disclosure the disclosure tends to show one (or more) of the six specified categories in s 43B(1) is reasonable.
47. "Information" will only be disclosed if the disclosure conveys sufficient factual content. This is a matter for evaluative judgment by the Tribunal in light of all of the facts of the case - **Kilraine v London Borough of Wandsworth [2018] ICR 1850**. It is for the Tribunal to decide whether a series of communications should be read together so that an amalgamation of their contents amounts to a disclosure of information - **Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 (EAT)**.
48. The requirement of reasonable belief is both a subjective and objective test.
49. There must be some objective basis for the belief but the focus is on whether it was reasonable for the Claimant to believe it, not whether a hypothetical reasonable worker would have done so. It is a low threshold but rumours, unfounded suspicions and uncorroborated allegations will not be sufficient to found reasonable belief. If the threshold is met, the disclosure will be a qualifying disclosure even if the information disclosed turns out to be untrue or inaccurate - **Babula v Waltham Forest College [2007] ICR 1026**.

50. All the circumstances including the workers belief in the factual basis of the information as well as what the facts tended to show had to be considered together in determining whether for the purposes of s43B(1) of the ERA 1996 the Claimant held a reasonable belief that the disclosure tended to show a relevant failure - ***Darnton -v- University of Sussex [2003] ICR 615.***
51. An event should be construed as being “likely” if there is more than a possibility or a risk.
52. In considering whether the Claimant reasonably believed the disclosure was in the public interest, it is necessary to consider whether the Claimant considered the disclosure to be in the public interest, whether the Claimant believed the disclosure served that interest, and whether that belief was reasonably held. It is not for the Tribunal to determine whether a disclosure was in the public interest.
53. There should be features of the case which make it reasonable to regard it as being in the public interest. The Tribunal must take into account:
- (i) The numbers in the group whose interests are affected.
 - (ii) The nature of the interests affected and the extent to which they are affected by the wrongdoing.
 - (iii) The nature of the wrongdoing.
 - (iv) The identity of the alleged wrongdoer.
- See ***Chesterton Global Limited (t/a Chestertons) and anor -v- Nurmohamed (Public Concern at Work Intervening) 2018 ICR 731 CA and Dobbie -v- Felton t/a Felton Solicitors EAT 0130/20.***
54. A disclosure could be in the public interest even if the motivation for the disclosure was to advance the worker’s own interests as motive is irrelevant. What is required is that the worker reasonably believed disclosure was in the public interest in addition to their own personal interest - ***Chesterton Global Ltd v Nurmohamed.***
55. In relation to disclosures concerning breaches of legal obligations, unless the legal obligation is obvious, there must be some disclosure that actually identifies the legal obligation although strict legal language is not required, the identification need not be detailed or precise and a common-sense approach is to be adopted. A “legal obligation” can be a contractual obligation, statutory or secondary legislation or a breach of common law (e.g. negligence, nuisance, defamation). It does not cover guidance, best practice or moral obligations.
56. A qualifying disclosure will be a protected disclosure if it was made to the employer or certain other relevant persons – s43A and s43C(1)(b)(ii) of ERA 1996. In this case there is no dispute that all the disclosures were made either to the Claimant’s employer (if he was employed by the Respondent) or (if he was not so employed) to another person (namely the Respondent’s employees and/or site manager) who had legal responsibility for the relevant failures and who therefore fell within relevant categories and so will be protected disclosures if the Claimant made qualifying disclosures.
57. A “detriment” in the context of s47B(1) is a disadvantage. It covers most adverse treatment at work and need not involve economic detriment. It should be viewed from the perspective of the worker. The matters which may be considered to be

detriments are wide ranging and can include deliberate failures to act, suspension, disciplinary action, moving the worker and subjecting the worker to performance management – see ***Shamoon -v- Chief Constable of the RUC 2003 ICR 337 HL***, ***Merrigan -v- University of Gloucester ET 1401412/10***, ***Keresztes -v- Interserve FS (UK) Ltd ET 2200281/16*** and ***Chief Constable of West Yorkshire Police -v- B and anor EAT 0306/15***.

58. The detriment must have been caused by the protected act. In determining this the Tribunal should consider:
- (1) Was the Claimant subjected to a detriment by the employer?
 - (2) Was the Claimant subjected to a detriment because they made a protected disclosure?
59. It is for the Claimant to prove that there was a protected disclosure, detriment and that the employer subjected the Claimant to that detriment. Once he has done so, the burden of proof passes to the employer to prove that the worker was not subjected to a detriment on the ground that they made a protected disclosure.
60. The Tribunal is entitled to draw inferences as to the real reason why the employer acted the way that they did in the absence of direct evidence and on the basis of its findings of fact.
61. The making of the protected disclosure must be the real reason, core reason or motive for the detriment the employer subjected the Claimant to, that is the disclosure must have materially (more than trivially) influenced the employer's treatment of the Claimant but the employer's motive need not be malicious – ***Chief Constable of West Yorkshire Police -v- Khan [2001] ICR 1065 HL***, ***Fecitt & oths -v- NHS Manchester (Public Concern at Work intervening) [2012] ICR 372, CA*** and ***Croydon Health services NHS Trust -v- Beatt [2017] ICR 1240, CA***.
62. The person who subjects the Claimant to the detriment must know that the Claimant made the protected disclosure unless they have been influenced or manipulated to carry out the detriment by a different person who was aware of the protected disclosure.

Wrongful dismissal/notice pay

63. A wrongful dismissal claim is a form of breach of contract and can be brought pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623).
64. The period of notice required to be given to an employee on termination, other than cases where summary dismissal is justified or where payment in lieu of notice applies, may be determined either by the express or implied terms of any written agreement or by statute.
65. S.86 of ERA 1996 provides the irreducible minimum period of notice required and overrides any lesser notice provided for in the contract of employment.

66. For employees who have been continuously employed for more than one month but less than two years, the statutory notice period specified by s.86(1)(a) ERA 1996 is one week.
67. In the absence of express terms, notice may be given orally or in writing but must be clear and unambiguous. Unless the terms of the contract provide otherwise, notice begins to run from the day after the day on which it was given.

Direct Age Discrimination

68. S.13 of the Equality Act 2010 ("EA 2010") confers on employees the right not to be discriminated against on the grounds of age. Enforcement of that right is by way of complaint to the Tribunal under section 120 EA 2010.
69. The Claimant must show that he was subjected to less favourable treatment by the Respondent and that such less favourable treatment was because of his age.
70. Under section 5 EA 2010, the protected characteristic of age relates to a person of a particular age group.
71. In determining whether there has been less favourable treatment, there must be no material difference between the circumstances of the claimant and the comparator – s23(1) EA 2010. It is a question of fact and degree whether someone whose circumstances are not precisely the same can be an appropriate comparator - ***Hewage -v- Grampian Health Board [2021] UKSC 37***. The tribunal can consider a hypothetical comparator if there is no actual comparator, or as well as any actual comparator but it may be easier to consider "the reason why" the employer treated the Claimant the way it did and then consider whether it was less favourable treatment because of the protected characteristic – ***Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285*** and ***Aylott -v- Stockton on Tees Borough Council [2010] IRLR 994 (CA)***.
72. S.136 EA 2010 sets out a two-stage burden of proof for claims brought under the Act which has been subject to clarification and guidance, in particular in ***Igen -v- Wong [2005] EWCA Civ 142; [2005] IRLR 258***:

Stage 1: The prima facie case

There must be primary facts from which the tribunal could decide, in the absence of any other explanation, that discrimination took place. It is not necessary that a tribunal would definitely find discrimination, only that reasonable tribunal properly concluding on the balance of probabilities could do so.

The burden of proof is on the Claimant: ***Ayodele -v- (1) Citylink Ltd (2) Napier [2018] IRLR 114, CA.***; ***Royal Mail Group Ltd -v- Efobi [2021] UKSC 22*** and the tribunal must take into account all of the evidence adduced (not only that of the Claimant) and any argument made by the Respondent (e.g. that a comparator is not truly comparable). The tribunal should not take into account any explanation for the treatment given by the Respondent.

A difference in status and treatment is not sufficient to shift the burden of proof – ***Madarassy -v- Nomura International plc [2007] ICR 867*** and there must also be something to suggest that any difference in treatment was due to the relevant characteristic – ***B -v- A [2010] IRLR 400***.

Stage 2: the burden shifts

The Respondent must prove that it did not discriminate against the Claimant by proving that the treatment was in no sense whatsoever because of the protected characteristic. Cogent evidence is expected to discharge the burden of proof.

73. In ***Hewage -v- Grampian Health Board [2021] UKSC 37*** the Supreme Court said of the burden of proof provisions that “They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is on a position to make positive findings on the evidence one way or the other.”
74. Provided that the protected characteristic had a significant influence on the outcome, discrimination is made out – ***Nagarajan -v- London Regional Transport [1999] IRLR 572, HL***.
75. The tribunal may draw inferences from the primary facts found, should consider not merely each separate incident but the global cumulative effect of the primary facts found and must be mindful that discrimination may be unconscious – ***King -v- The Great Britain-China Centre [1991] IRLR 513 (CA)***, ***Anyia -v- University of Oxford [2001] IRLR 377 (CA)*** and ***Nagarajan -v- London Regional Transport [1999] IRLR 572, HL***.
76. Less favourable treatment is an objective test. The Tribunal should consider whether the reasonable employee would consider the treatment to be unfavourable. There is a neutral burden of proof in relation to this element.

Discrimination Time Limits

77. Time limits for claims for bringing a claim for age discrimination are set out in s.123 of the Equality Act 2010 (“EQ 2010”). The primary time limit is within 3 months of the discriminatory act, but this is extended by the ACAS early conciliation provisions – s140B EQ 2010.
78. Where the Claimant relies upon an omission rather than on a positive act of the Respondent, time runs from when the person decided not to do the act. In the absence of evidence to the contrary, someone is taken to decide on failure to do something when either they do an act which is inconsistent with them doing it or (if they do not do anything inconsistent) on the expiry of a period in which they might reasonably have been expected to do it – s.123(4) EQ 2010.
79. If more than one discriminatory action is claimed, the 3 month time-limit attaches to each action.
80. However, under s132(3) conduct extending over a period is treated as if done at the end of the period, so the 3 month time limit only needs to be counted from that

point. This is often colloquially referred to as 'continuing discrimination'. In *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96, the CA held that 'an act extending over a period' can comprise a 'continuing state of affairs' as opposed to a succession of isolated or unconnected acts. There needs to be some kind of link or connection between the actions, especially if different people are involved. This often means that a series of discriminatory actions can be in time provided the claim was brought within 3 months of the most recent action (i.e. the most recent action which is ultimately found to be discrimination).

81. The Tribunal also has a wide discretion to extend time if it is just and equitable to do so – s.123(1)(b) EQ 2010.
82. The burden is on the Claimant to show that it is just and equitable for an extension to be granted. There is no presumption that the discretion will be exercised, extensions are the exception rather than the rule – ***Robertson -v- Bexley Community Centre t/a Leisure Link* [2003] IRLR 434 (CA)**.
83. When considering whether or not to exercise its discretion to grant an extension of time, the tribunal should have regard to the checklist in s.33 of the Limitation Act 1980 (as modified by the EAT in ***British Coal Corporation -v- Keeble & Others* [1997] IRLR 336, EAT**). The tribunal should consider the prejudice each party will suffer according to the decision reached and all the circumstances of the case and in particular:
 - (i) The length and reasons for the delay;
 - (ii) The extent to which the cogency of the evidence will be affected by the delay;
 - (iii) The extent to which the Respondent has co-operated with any requests for information;
 - (iv) The promptness with which the Claimant acted once s/he knew of the facts giving rise to the cause of action; and
 - (v) The steps taken by the Claimant to obtain appropriate advice once s/he knew of the possibility of taking action.
84. The potential merits of the claim may also be relevant to the exercise of the discretion: ***Rathakrishnan -v- Pizza Express (Restaurants) Ltd* [2016] ICR 283, EAT**.

Breach of contract

85. Articles 3 and 6 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 confers jurisdiction on the Tribunal to determine breach of contract claims arising or outstanding on the termination of employment, save for those listed in Article 5 of the Order.
86. The Claimant's entitlement to bring this claim depends upon him being an employee of the Respondent.

Relevant Findings of Fact and Associated Conclusions

The evidence

87. The Tribunal found the Claimant's written evidence to be difficult to follow. It did not address all of the elements of his claim. Taken as a whole, his oral and written evidence was oddly specific and pedantic in respect of some matters but peculiarly vague and evasive in respect of other matters. It was not carefully given or straightforward. For example, his response during cross-examination to a question as to who he thought he was working for: Indigo or the Respondents? was that there was "*no evidence of any contract between me and Indigo*". This was also inconsistent with the documentary evidence.
88. He frequently demonstrated that his interpretation of events was coloured by what he wished or expected to be the case, rather than what actually occurred. For example, he was unable to substantiate his conclusions about the basis on which he was engaged by providing any evidence as to any words said by Mr Archer during their meeting which were capable of reasonably being interpreted in the manner in which the Claimant interpreted them. His attempts to undermine documentary evidence provided by the Respondent were not convincing or substantiated by any evidence other than his own assertions.
89. The Claimant's evidence was also sometimes contradictory. For example, he told the Tribunal that he had never worked for Indigo then later said that he had worked for them in 2018.
90. The Tribunal found him to be aggrieved by the circumstances giving rise to this claim but did not consider his evidence to be a complete, accurate or reliable account of events. Further details as to the reasons for this are given below.
91. The Tribunal did not consider that any reliance could be placed on the evidence of the Claimant's witnesses who did not attend to be cross-examined, particularly in light of the findings made by EJ Heath at the preliminary hearing on 28th August 2024. In any event, the Tribunal did not find the evidence of any of the Claimant's witnesses was relevant or assisted to determine the claims.
92. The Respondent's witnesses Mr Archer, Mr Brennan and Ms Ayres gave evidence in a straightforward, considered, open, genuine and compelling way. Mr Gomes' had limited recollection of specific matters related to health and safety and his evidence appeared more guarded and rather vague in some areas but overall, the Tribunal found the evidence given by all of the Respondent's witnesses to be honest, largely consistent with each other and with the documentary evidence, credible and reliable.
93. Where the evidence of the Claimant contradicted that of the Respondents witnesses or was not supported by the contemporaneous documentary evidence, the Tribunal preferred the evidence of the Respondents' witnesses or the documentary evidence.

The Claims

94. The Claimant is a carpenter who was formerly qualified and worked as an accountant and has also worked as an auditor and project manager [121-129]. His first language is Polish but he has a good understanding of English, having worked in both the UK and South Africa and other English speaking countries in both carpentry and professional roles. He did not wish to use the services of an interpreter. As a carpenter he has worked via agencies, including Indigo Services, but prefers more direct engagement where possible. By 2022 he was nearing retirement age (apx 7 years away) and was ideally looking for permanent stable work as he wished to work on a job from start to finish and to avoid what he perceived as unnecessary difficulties arising from agency engagement, particularly in relation to pay and taxes.
95. The Respondent is a commercial and residential construction company and insurance repair specialist operating in London and the Home Counties. Whilst the majority of skilled tradesmen in the construction industry are self-employed, the Respondent's website [327] describes it as "*an owner-managed business with tried and tested, skilled, dependable tradesmen who are directly employed by the company.*" It has a core employed PAYE workforce, paid via in-house payroll services, and supplemented by a number of other tradesmen who work regularly or solely for the Respondent who prefer to be self-employed.
96. However, due to fluctuations in volumes of work the Respondent's own work force is not always sufficient and during busy periods (usually for around 6 weeks per year during the summer) it also uses tradesmen sourced through a number of different agencies including Indigo Services, Optima and City Site. This is particularly the case during the summer months because the Respondent undertakes a substantial amount of work for schools who frequently require the work to be done over their summer holiday period. The Respondent had a longstanding Contract for Services which it entered into with Indigo Services on 15th August 2016 [114-116] whereby Indigo Services were the Respondent's subcontractor and agreed to provide services by such persons who were suitably qualified and experienced to perform them. Indigo Services agreed to maintain adequate insurance in respect of the services it provided [Clauses 23 & 24 at 115].
97. In 2022 the Respondent had a contract to develop a site at 244 Stanley Road, Twickenham, known as the "Busen site", to build a gym (a large new-build project). The construction started in or before March 2022 and was completed and handed over to the owners in November 2022, following which other contractors came on site to fit out the building. It opened to the public in January 2023.
98. Shortly after the Respondent commenced work on the Busen site, the Claimant identified this as a site likely to require carpenters and entered the site to enquire about work opportunities. He spoke to Mr Brennan, who was in charge of the site and engaged as a free-lance site manager for the Respondents, and who saw the Claimant's portfolio. Mr Brennan advised the Claimant that everyone on site was self-employed and that he could not take people on. He directed the Claimant to Mr Archer, one of the directors of the Respondent [161/162].
99. The Claimant then contacted the Respondent and arranged to attend a meeting with Mr Archer.

100. On 23rd March 2022 Mr Archer met with the Claimant at the Respondents' offices and the Claimant showed him his carpentry portfolio. The Claimant's account and understanding as to what occurred at the meeting differs from that of Mr Archer.
101. Although the Claimant provided the Tribunal with notes of the interview [A38] these were not made at, or immediately after, the interview. The Claimant told the Tribunal that he made handwritten notes the week following the meeting which he subsequently typed up for the first preliminary tribunal hearing. The handwritten notes have not been provided, nor have the original typed notes. The document at [A38] is an e-mail to the Claimant's McKenzie friend dated 13th November 2023 containing the notes and that e-mail has subsequently been supplemented by handwritten additions. Neither the original typed notes nor the subsequent handwritten additions record all the things the Claimant now says were discussed at the meeting. For example they do not include any reference to a notice period. They also contain obviously inaccurate assertions, for example it notes: "*we do not use AGENCY carpenters said director*". All parties agree that there were agency carpenters on engaged by the Respondent on the Busen site.
102. The Tribunal does not accept the document at [A38] as an accurate or contemporaneous record of what was discussed at the meeting between the Claimant and Mr Archer. At best these notes were the Claimant's incomplete and partially misremembered interpretation of the discussion.
103. The Tribunal preferred Mr Archer's account for the reasons set out at paragraphs 87-93. above. At the meeting, the Busen site project and the Claimant's portfolio were discussed, and there was agreement that the Claimant could be engaged to provide his services to the Respondent. The Claimant and Mr Archer discussed the Respondent's preference for a dependable stable workforce and the Claimant indicated that he preferred to avoid agencies, preferred stable work and wished to be on a job from start to finish.
104. Mr Archer thought the Claimant would be a good fit with his age and experience and told the Claimant that he needed carpenters at the Busen site. Mr Archer told the Tribunal that the Respondent does sometimes recruit to its permanent workforce but that even those who are directly engaged or employed by the Respondent do not start out on that basis. They are first engaged via Indigo Services to enable the Respondent to see their work and determine whether the Respondents liked them. Mr Archer gave a clear account of the standard process of onboarding someone via Indigo Services which was consistent with what Tribunal finds happened in respect of the Claimant as set out below. On the balance of probabilities the Tribunal found that it was unlikely that Mr Archer would have given a different inconsistent account to the Claimant during their meeting.
105. Mr Archer may well have given the Claimant the impression that his work on the Busen site would be reviewed and might lead to him being considered as a possible future addition to the Respondent's permanent workforce, but the Tribunal accepted his evidence that he did not agree to engage the Claimant directly. It was clear to the Tribunal that following the meeting the Claimant understood that he would not be a permanent part of the Respondent's workforce engaged on a PAYE basis. He told the Tribunal that "*I was a person hired for the duration of the project who was falling under Woodlands insurance.*"

106. The Tribunal finds that Mr Archer also told the Claimant that the work would be on a self-employed basis and that the Respondent sub-contracted with Indigo Services to provide services. The Claimant confirmed to Mr Archer that he had a self-employed UTR (tax) number and had previously been registered with Indigo Services. Mr Archer and the Claimant agreed a rate of pay equivalent to £180 per day for a standard 9 hour day (i.e. £20/hour).
107. The Claimant's assertion that it was contractually agreed at this meeting that his pay would be reviewed is not supported by any independent evidence. His own note at [A38] suggests only that there was discussion of a review of wages in 30-60 days (an unspecified date) and does not indicate a firm offer to increase pay at any point. It also suggests that he accepted the offer "*on condition there is a possibility of wage review in 30-60 days*". The Tribunal noted that on 10th July 2022 the Claimant wrote an e-mail to Mr Archer saying "*I am writing to request a review after 4 weeks as agreed in my interview*" [207]. This does not accord precisely with the timeframe the Claimant records in [A38] for a review. Mr Archer did not reply to this e-mail and the Tribunal accepted the evidence in his witness statement that he did not do so because he was surprised by it and had not discussed this with the Claimant at any time. He was not asked by the Claimant about a pay review during oral evidence. No other evidence before the Tribunal suggests the Claimant raised this request earlier (in July 2022 he had been working for the Respondent for about 3 months) or pursued his request further subsequently or pressed for a review. The Tribunal finds that there was no agreement (contractual or otherwise) to review the Claimant's wages.
108. Although Mr Archer clearly indicated to the Claimant that engagement would be via Indigo Services, the Tribunal accepts that the Claimant may have misunderstood and thought that the Respondent was merely using Indigo Services as a payroll company and believed that he was being engaged directly by the Respondent. Mr Brennan told the Tribunal that he had to repeatedly remind the Claimant that he was self-employed.
109. At the end of the meeting no start or finish date was agreed and the Tribunal finds that there was no agreement for the Claimant to be directly engaged by the Respondent as either a permanent or fixed duration employee.
110. Following the meeting, the Respondent passed the Claimant's details to Indigo Services who set up a profile for the Claimant on their portal and required him to sign in and verify his identity and right to work by providing a scan of his passport and by passing a "liveness test" (essentially a live video connection which is used by automated software to verify that the person in the video is the same person shown on the identity document provided). The Claimant was also required to provide other information and to electronically agree to a Contract for Services [130-137].
111. The documents provided by Indigo Services to the Respondent, include an electronically signed contract [130 – 137], the activity log of its portal activity [164-165]. Additionally, the Respondent provided screenshots of the information on the Indigo portal including the upload of the Claimant's passport and the liveness test [364 & 365] which clearly show images of the Claimant. An e-mail from Indigo

Services to the Respondent company on 30th March 2022 also confirms that he had been set up as a user [365].

112. The Respondent's witnesses obtained these documents from Indigo and/or from Indigo's Portal (which the Respondent can view but not alter) and clearly believed that the documents were genuine. No evidence other than the unsupported of the Claimant himself suggests otherwise. The Tribunal accepts these documents as accurate and concludes that the Claimant did log into the Indigo Services Portal, provide information, undertake the liveness test and agree to the contract. The Tribunal notes that the right to work check undertaken on 30th March 2022 [169] gives the company name as "Indigo".
113. The Tribunal is satisfied that the Claimant did all of this notwithstanding his denial of the same and his assertion that he never logged onto Indigo's portal. His assertion that he did not log onto the portal only came when pressed. His initial evidence was to the effect that the documents were forged, that he didn't sign anything on-line (and he sought to use documents post-dating the Tribunal proceedings to support this) and that he could not have provided a share code (a code from the government's website which is sent to the Claimant to be shared so that prospective employers can use it to log onto government systems and confirm that the individual has been verified as having the right to work in the UK) when specified as it was not provided to him until after the date registered on the systems.
114. The Tribunal accepts that the Claimant may not have himself manually entered his typed signature on the contract document but found no objective evidence to support the Claimant's suggestion that the documents were manufactured. The activity log has all the characteristics of a genuine automatically machine generated log. The Tribunal accepted Ms Ayers' evidence that the documents were obtained from Indigo Services and that those at [363 & 364] were screenshots from the portal used by Indigo Services. The Claimant's assertion that he could not have provided a share code on the 26th March 2022 (the date recorded on the activity log) as he did not receive it until 29th March 2022 [A31] was undermined by his own evidence that he has to get a new share code every 3 months and that prior to 29th March 2022 he had a share code as he was working elsewhere. Further, the activity log does not show the share code entered and [A31] indicates that the share code can only be used once and for 10 minutes. E-mail correspondence in the bundle [168] indicates that on 29th March 2026 he was being asked to provide a share code by Falcongreen, the company he had been working for immediately prior to commencing work on the Busen site, and that he provided them with a share code on 29th March 2022 about 10 minutes after securing the code at [A31].
115. Following confirmation by Indigo Services that the Claimant had been on-boarded [365], on 4th April 2022 Ms Ayers e-mailed the Claimant to welcome him on board and request that he complete and provide various documentation and attend the Respondent's offices to collect uniform and for safety mask fitting. He was also advised that he had been added to the Respondent's H & S learning portal and was asked to complete the asbestos awareness training first and then work his way through the rest. He was also advised as to where to send his timesheets to ensure that he would be paid [138].

116. No written contract between the Claimant and the Respondent was ever provided or executed and the Tribunal accepted that it was not the Respondent's intention to engage the Claimant as an employee.
117. The Tribunal accepted the evidence of the Respondent's witnesses that the document [139] that the Claimant was asked to complete was a standard document used by the Respondent at that time for all persons howsoever engaged, although in light of the current tribunal proceedings the Respondent's had developed bespoke documents for each different type of engagement between the Respondent and its tradesmen to avoid any future confusion as to the nature of their engagement. Although the Tribunal heard evidence that the Claimant completed the form at [139] the completed and signed form was not provided.
118. The Claimant subsequently attended the Claimant's offices and was provided with a "uniform" including a company branded T-shirt and sweatshirt. He also collected the Respondent's branded timesheets. Either then or subsequently, he also obtained a high vis vest bearing the Respondent's company logo. He may also have received other PPE equipment but no specific evidence about this was given.
119. He also received an ID card identifying him as connected to the Respondent company and copies of the Respondent company's relevant health and safety and well-being policies.
120. The Claimant subsequently logged on to the Respondent's H & S learning portal and completed a number of modules on that site. He was also around this time completing, wholly independently, and at his own expense, an online project management training course, PRINCE 2, which he had commenced in about February 2022.
121. The Claimant also provided the Respondent with a copy of his passport [179] and his share code to enable the Respondent to carry out a right to work check and various other information, including his self-employed UTR tax number. He was also subject to a Disclosure and Barring Service (DBS) check.
122. These matters may have re-enforced the Claimant's misconception of the nature of the arrangements between himself and the Respondent as they were not inconsistent with a direct employment agreement between the Claimant and the Respondent.
123. However, no evidence suggests that the Claimant was provided with a contract by the Respondent or a handbook or other materials covering such matters such as leave, notice, holiday pay, sick pay entitlement, grievance and disciplinary entitlement or procedures. Although the Claimant initially appeared to assert that he had been provided with a disciplinary procedure, it became clear in his oral evidence that he was simply referring to the wording which appeared on the timesheets he completed, namely "*Falsifying times on this timesheet could be treated as misconduct*" [e.g. 171]. No disciplinary procedure was available to the Tribunal and it was not put to any of the Respondent's witnesses that the Claimant

had been given a disciplinary policy. The Tribunal is satisfied that on the balance of probabilities the Claimant was not given one.

124. The Tribunal was also directed to evidence that the Claimant made a holiday request on the Respondent's standard holiday request form completed on 7th September 2022, and given to the Respondent on 9th September 2022, requesting holiday for 6 days between 14th to September 2022 [262]. The Respondent did not reply to this request. This request was particularly incongruous as it post-dated the Claimant's termination and was the only such form completed by the Claimant, notwithstanding the evidence of Mr Archer that the Claimant had other days off, notice of which he had given to Mr Archer. The Tribunal accepted the evidence of Ms Ayers that these forms were freely available in the office and could have been picked up by anyone attending it. The Tribunal is not satisfied that the Claimant was given this form by the Respondent rather than that he collected it himself.
125. Ms Ayres' unchallenged evidence (para 11 of her witness statement) was that when the Claimant attended the office, he told her that he would eventually like to be an employee paid through PAYE and she told him "*that depends on how busy we are, but you never know what might happen*".
126. The Tribunal accepted evidence of the Respondents witnesses to the effect that all tradespersons, howsoever engaged, were:
- (i) Required to provide their personal and emergency contact details. This was in case of an accident or emergency on site.
 - (ii) Requested to provide bank details in case any expenses were incurred that needed to be refunded.
 - (iii) Required to undertake right to work checks.
 - (iv) DBS checked. This was because many of the Respondent's contracts were on school sites or on insurance sites where they may be attending residential properties and the clients and required DBS certificates. Checking all their tradesmen allowed the Respondent to freely allocate any of them to work at any site where their services were required. The Tribunal noted that the Claimant's evidence was to the effect that even if he had been engaged by an agency, only the Respondent, not the agency, could request the DBS check.
 - (v) Provided with safety equipment as may be required including, if necessary, RPE face masks, hard hats and high visibility fluorescent jackets/tabards.
 - (vi) Signed up to the H & S learning portal and required to work through the modules so that the Respondent could be satisfied that they were aware of relevant health and safety information.
 - (vii) Provided with (or offered) the Respondent's uniform (branded t-shirts and sweatshirts) but that there was no requirement for anyone to wear them on site. People other than tradesmen engaged by the Respondent (including children of Mr Gomes) were similarly offered and wore them. They were a marketing tool and also helped to promote the company image and identify people on site.
 - (viii) Required to complete timesheets. Branded timesheets were readily available and could be collected by anyone. The Respondents were interested in the contents of the information on the timesheets (the days and hours worked) not on whose letterhead they appeared and would

accept timesheets from tradesmen either on their own letter head or any other branded timesheet without attributing any significance to the branding. The timesheets were checked against site logs and approved by the site manager and were then forwarded to the relevant agency for payment.

- (ix) Provided with ID cards. These could be shown to suppliers such as Screwfix or Travis Perkins and enabled tradesmen to purchase materials or equipment on the Respondent's account.
- (x) Provided with health and safety and well-being policies as the Respondent company was principally responsible for health and safety on its sites and accordingly required all its tradesmen to adhere to their policies.
- (xi) Offered an opportunity to join the Respondent's WhatsApp group to facilitate communication between those working on a project.

127. The Claimant commenced work at the Busen site, on about 28th March 2022. For a period between 4th April 2022 and 17th April 2022 he undertook work for the Respondent at another of their sites, the Hampton High School, during the school holiday period before returning to the Busen site.
128. Following Ms Ayres' request for a DBS check, the Claimant provided to her an incomplete document. The Respondent itself does not receive a copy of the report from DBS, only a notification as to whether there are points of concern on it. The document the Claimant provided to her was clear and did not match the notification received from the DBS which indicated that there were points of concern on his DBS check. Ms Ayres was concerned about this and discussed it with Mr Archer who spoke to the Claimant about it. On 21st June 2026 the Claimant brought his actual and complete DBS check to the office and showed it to, and discussed it with, Mr Archer. The accurate and complete DBS check showed that the Claimant had a prior conviction for an offence which related to stalking/harassing women and making a nuisance of himself (the Tribunal wasn't provided with a complete copy [186] and was not privy to the precise details but this was not challenged by the Claimant).
129. The contents of the DBS check and the fact that they had not initially been provided by the Claimant was a matter of grave concern to Mr Archer, primarily because it would prevent the Claimant from being engaged on many of the sites the Respondent had contracts for (all schools during term time when pupils were present and some whether or not work was being undertaken during term time and many of the sites they attend pursuant to contract with insurance companies). It was not however of direct concern in relation to the Busen site as it did not preclude him from working there. No further action was therefore taken in respect of the Claimant having provided an inaccurate document or as a result of the contents of the real DBS check and the Claimant continued to be engaged on the Busen site.
130. In undertaking his work on the Busen site the Claimant determined his own working hours, although there were constraints on the hours the site could operate and standard site hours were 7am to 4/4.30pm Monday to Friday. Mr Brennan described having to speak to the Claimant because he was coming in and starting work too early (6:30am) when there was no first aider on site (and therefore insurance would not be valid) and because he could be causing a nuisance to the

site neighbours with noise. The Claimant's evidence largely corroborated this but again demonstrated a small misunderstanding.

131. The timesheets and site logs in the bundle show that the Claimant's hours varied day to day/week to week, (for example: 6am to 4pm, 7.30am – 4.30pm, 6.45am – 4pm, 6am – 4.30pm [145, 146, 188, 206] but that he usually undertook between 9 and 10 hours per day [171-178].
132. The Claimant's evidence was that working time regulations were being broken on the Busen site, particularly in the first week of August 2022 and that he had discussed this with other tradesmen on site and brought it to the Respondent's attention. Neither Mr Brennan or Mr Gomes recalled having any discussion with the Claimant about working time regulations and only Mr Brennan was asked about this in oral evidence. The Tribunal found it likely that the Claimant had mentioned concerns about working time regulations being exceeded but that no significance was placed on this by the Respondent. Most, if not all, of the tradesman on site had opted out of the working time regulations and/or were considered to be self-employed and all set their own hours.
133. The Tribunal accepted the evidence of the Respondent's witnesses to the effect that tradesmen were paid for time worked based on their timesheets. Those engaged via agencies had no specific working hours although there were site hours during which the site was open and work could take place (for the reasons at paragraph 130 above). There were no consequences if a tradesman chose not to attend site on a particular day or left at any particular time. Generally the tradesmen wanted to work and there were enough of them to complete the work in the timescales required.
134. The Respondent's witness, particularly Mr Gomes, were clear that tradesmen were free to attend work as they chose and were not obliged to be on site on any given day. If a tradesman decided not to work a particular day for any reason, that was not a problem and was accepted. Mr Gomes explained that the tradesmen were usually looking for regular work on longer projects and at the beginning of a project most of them wanted to work 5 days per week but that started to drop off towards the end of the project some days they would come in, some days they would not, or they would cease to come at all. This was because they were starting to look for other work and some found other jobs with projects that were just beginning and consequently did not return to site. Although it could sometimes become more problematic in ensuring there was sufficient labour towards the end of the project this was simply a feature of the industry and the fact that most were self-employed. It was not generally a problem however as towards the end of the project the requirement for their trade was diminishing and attrition and diminished demand dovetailed.
135. The Respondent's witnesses clearly considered the Claimant to be engaged on the same basis as described above. If the Claimant hadn't turned up to work on any given day no action would have been taken in respect of that failure, or, if any action was taken the Tribunal concluded it was likely to be limited to establishing his future intentions, that is, whether he planned to return to site.

136. The Tribunal's conclusions were supported by emails in the bundle. On 17th August 2022 the Claimant e-mailed Mr Archer seeking permission to take unpaid sick leave on 18th August 2022 as he had a fever [233]. Mr Archer responded on 18th August 2022 telling the Claimant it was not a problem and that he hoped he felt better soon [233].
137. The Claimant told the Tribunal that throughout his work at the Busen site he was paid directly into his bank account and was never issued with payslips or other documents relating to his pay. He only reluctantly admitted that the payments into his bank account came from Indigo, although he asserted that on some months it was someone else (unspecified). No bank statements were provided to the Tribunal.
138. The bundle contains CIS Tax vouchers and self-billing invoices from Indigo for each week of the Claimant's engagement with the Respondent [331-353]. These identify the Claimant as a sub-contractor and the contractor as Indigo Services. The Claimant's UTR number and identifying number for the CIS scheme as well as a breakdown of the gross sums paid and deductions also appear. The Claimant denied that he had received these.
139. Despite his qualifications and history of working as an accountant [121-129], and his preciseness and meticulousness regarding some of the matters related to his claim, he appeared surprisingly laissez-faire regarding his payment for the work he undertook on the Busen site. He appeared unconcerned about the lack of contemporaneous pay documentation and said that merely checked his bank account to see that money had been received and would do an approximate check by estimating 45 hours per week x £20/hr gross. He confirmed that he was unable to verify that the amounts that he was paid and any deductions made were correct because he had not received any paperwork and said that he had not done a tax return for the 2022-2023 tax year but had told HMRC he was unable to do his return as he had tribunal proceedings. He also told the Tribunal that construction was an unscrupulous industry and that although he was not happy not to receive payslips, he gave the Respondent reasonable leeway and simply expected to receive an appropriate summary at the end of the tax year. He said that he had never asked for a payslip or other documentation and merely expected the documentation to be sent to him in due course.
140. The Tribunal found his evidence regarding his lack of receipt of documentation regarding pay to be wholly implausible and incredible. He worked at the Busen site for just over 5 months and his hours varied day to day/week to week. As a former accountant/forensic accountant he would be aware of the need to keep careful records for tax purposes if not for his own benefit. It was not believable that he simply accepted whatever he was paid without documentation to support how the amounts had been calculated and took no steps to request or chase documentation evidencing the amounts paid and the deductions.
141. The Tribunal had no doubt as to the veracity of tax vouchers at [331-353]. These documents clearly reflect the understanding of the Respondent that the Claimant was contracted to Indigo Services who deducted a payment which covered services provided by Indigo, including their insurance which covered the tradesman when on the Respondent's site.

142. During his period of engagement with the Respondent, the Claimant consistently signed in on the site logs as being from "WCL" i.e. Woodlands Commercial Limited and completed and submitted time sheets on the Respondent's logo headed standard timesheet. The Tribunal is satisfied that no weight should be placed on this. It was the Claimant's own choice to record in this manner and may have reflected a misperception of the arrangements the Tribunal has found were in place, The Respondent was concerned only with the times entered on the site log and not the company recorded.
143. The Claimant provided his own tools, save for large plant required on site. On 22nd June 2022 he purchased using his own funds a Dewalt table saw at a cost of £774.95 to use on site [204].
144. No evidence suggested that whilst on site the Claimant was closely supervised or told how to do his job. He was told what jobs had to be done by Mr Brennan in accordance with what was required on site for the build, but he was not told how to do a particular job. There was a site timetable which indicated the period within certain jobs needed to be completed in order to keep the build on schedule – necessary as there were numerous trades on site all interacting and working to complete the project. The Claimant was a skilled worker operating with a large degree of autonomy within the scope of what the build itself required. However, he found it difficult to work effectively as a team and many of the jobs required a pair of carpenters working together. He therefore tended to be asked to complete those jobs on site which required only a single carpenter.
145. The Tribunal was not satisfied that the Claimant was given particularly awkward jobs and the Claimant's evidence did not elaborate on what was awkward about the particular jobs he was given save in very general terms related to his height. He gave no evidence of any matter which suggested that the jobs he was allocated were given to him as a result of his age and the Tribunal found that job allocation was based solely, as per Mr Brennan's evidence, on the best match to the skill set of the tradesman and whether it could be done by a solo carpenter or required a two man team.
146. During two periods, largely in August 2022, when Mr Brennan, the site manager, was not on site as a result of sickness absence (covid) and when his wife was unwell and required an operation, the Claimant stepped up and undertook some aspects of the role of site manager, including signing timesheets on behalf of other tradesmen on site. There is limited evidence as to whether the Claimant was asked to take on this role or merely took it upon himself to step into the role in Mr Brennan's absence but there is no evidence that the Respondent's objected to him taking this role. The Tribunal was not however satisfied that the Claimant was ever engaged as the site manager or considered by the Respondent's to be the deputy site manager as he claimed.
147. He did however clearly see himself to be in a responsible role and on a number of occasions raised concerns about the site with others.
148. On 14th June 2022 he e-mailed Mr Archer to inform him that there had break-in at the site [200]. He also took numerous photos of the site including some of an

unsafely erected scaffolding tower [A18] which he said he informed Mr Gomes about. Mr Brennan agreed that the tower shown in the photo was defective. The date stamp on the photo shows it was taken on 29th July 2022.

149. The Claimant also reported by e-mail to Mr Archer on 24th August 2022 that an external door on site had been left locked but with the key dangling in the lock [246] and on 4th September 2022 he texted Mr Brennan to advise that someone had left the main gate of the site unlocked [314]. The Tribunal also heard some evidence about an unsafe use of a tile cutting machine which was being used in the dojo area resulting in spilled water.
150. The Tribunal noted that Mr Arun Gomes could not recall the Claimant informing him of any of the disclosures set out at 6.1.1 of the list of issues. He did not say that they had not occurred. Mr Archer accepted that he was notified of a security breach [246].
151. We received no direct evidence from the Claimant orally or in his witness statements that the disclosures alleged at 6.1.1.1 (labourer on a ladder with earphones/cell phone), 6.1.1.4 (labourer using chop saw on site without training) or 6.1.1.5 (untrained apprentice unsafely dismantling a tower) had occurred. Although the Tribunal considered that it was possible that he had also raised these matters with the Mr Brennan or the Respondent it could not be satisfied on the balance of probabilities that he had done so.
152. The Tribunal was satisfied from the evidence regarding the provision of PPE and the online health and safety material provided to those engaged on site, that the Respondents took health and safety seriously. However, none of the Respondent's witnesses seemed particularly concerned about the health and safety matters raised or alleged to have been by the Claimant. Nor did they appear to regard identification of risks or health and safety breaches on site as a negative or a problem. The Tribunal concluded that on the balance of probabilities, such health and safety risks as were identified by the Claimant were a fact of life on a construction site, that some issues or breaches were expected, and perhaps even tolerated. Although prevention was important, what was more important to the Respondent was that such breaches as occurred were identified and rectified. Mr Brennan and Mr Gomes's evidence in this regard was particularly compelling. There were regular health and safety inspections by an auditor (Bob) and in addition, as the site was located adjacent to a railway, there were also site inspections by British Rail until the roof on the building was enclosed. Any health and safety breaches identified by any individual were promptly rectified and the Tribunal was satisfied that it was likely to have been advantageous, rather than detrimental, to the Respondent that health and safety breaches were identified quickly and before a formal audit took place or an accident occurred and no negative consequences were likely to flow from reporting.
153. The Tribunal noted that the Claimant did not escalate or repeat his concern about the individual health and safety breaches and save for the security breaches, did not put them into writing. The Tribunal found that this strongly suggested that either the identified breaches were promptly rectified or that the Claimant did not consider them serious enough, or sufficiently persistent do so.

154. The Claimant also complained about comments made to him by Mr Brennan during the course of his work at the Busen site (see paragraphs 11 and 12 of the Claimant's 5th witness statement and paragraph 48 of the Claimant's 8th witness statement) including that he was sent a WhatsApp message [182 & 315] which the Claimant said he found offensive.
155. The Tribunal noted that there was some inconsistency between the accounts in the two statements and that although the 8th Statement contained more detail than the earlier 5th statement most of the allegations were vague and not specific: "*barrage of comments ref to his age*" "*barrage of comments by Mickey*" and "*barrage with question to Claimant's retirement plans*". With only two specific allegations related to the Claimant's family situation and the purchase of a tool which the Claimant said Mr Brennan had suggested he was too old to use or benefit from.
156. These matters were loosely put to Mr Brennan who appeared genuinely surprised to be accused of having made such comments as "*you are too old to use machinery*" and disputed having made them or any other related comments. The Tribunal accepted his evidence that there had been general discussion of family circumstances and that Mr Brennan had discussed with the Claimant about the reasons why he and his family had moved out of London, namely cheaper property after the Claimant complained of high rent in London but that he had not made any comments about the Claimant getting a wife/girlfriend or in relation to the Claimant's age.
157. Mr Brennan freely accepted having sent the Claimant the link to a YouTube video of the song by the Fureys entitled "the Green Fields of France" [182 & 315]. He explained that it was his favourite song and that he sent it to the Claimant because its subject matter concerned the First World War and he drew parallels between the events it described and the situation in Ukraine, which he knew the Claimant was interested in as they had discussed it several times and he knew the Claimant was involved in a project providing humanitarian aid for Ukraine. The Tribunal accepted his explanation and was particularly impressed by how open and genuine his evidence appeared on this point.
158. The Claimant explained that he found the song offensive because of the history of his family's treatment during the First World War and the Tribunal were impressed by the evident genuineness of his distress recounting this.
159. The Tribunal noted however that nothing said by either the Claimant or Mr Brennan linked the song to the Claimant's age (or any other age related matter) and found that the sending of the video was in no way related to age.
160. The Tribunal accepted the Respondents evidence that by 5th September 2022 the primary construction of the Busen site was drawing to a close and the number of carpenters needed on site was reducing. Some carpenters were still required to finish jobs such as flooring, but not as many as had been on site in previous months and the need for carpenters would be reducing further in the coming weeks as the project neared completion. Other trades such as decorators and cleaners were due to come in before the site could be handed over.

161. This clearly fitted with the timetable given for handover to the client. Although the Claimant claimed that handover occurred in January 2023, the Tribunal did not find this credible in light of the work that would have had to be done post-build completion to prepare the gym for public opening and the undisputed evidence that it was open to the public in January 2023.
162. Mr Gomes and Mr Brennan conferred over the need to reduce the carpentry workforce and determined that the Claimant's services were no longer required.
163. Mr Gomes and Mr Brennan explained that they elected to dispense with the Claimant's services at this time rather than any of the other carpenters because the Claimant's strengths did not include teamwork and many of the remaining jobs still required a two man team. Further, as the Claimant did not have an acceptable DBS check he could not be deployed or transferred to another site if required. The Claimant was therefore a less useful or desirable member of the workforce. The Tribunal accepted this evidence as genuinely given and that it accurately reflected the reason for the termination of the Claimant's services.
164. Mr Gomes considered that no notice was required as he considered the Claimant to be self-employed but stated that he nevertheless gave all self-employed tradesmen a week's notice as a gesture of goodwill and a way of keeping good relationships.
165. Consequently, on Monday 5th September 2022 Mr Gomes told the Claimant that his services would not be required after Friday 9th September 2022 and that 9th September would therefore be his last date on site. By e-mail on the evening of 5th September 2022 the Claimant requested reasons for his "dismissal" and Mr Gomes replied by e-mail on 6th September 2022 advising that he had not been dismissed, and that his services as a self-employed contractor at the Busen site were not required after 9th September 2022 [259].

Discussion and Conclusions

Employment Status

166. The Tribunal considered all of the evidence it received as set out above to create an overall picture in relation to the arrangements and relationship between the Claimant and the Respondent.
167. The Tribunal found that whilst some of factors, such as provision of a uniform, the undertaking of right to work checks and DBS checks might at first glance tend to indicate that the Claimant was an employee, they were not as definitive as the Claimant sought to persuade the Tribunal that they were. On the facts and in the context of this particular case they did not particularly assist the Tribunal to determine whether the Claimant was an employee or merely a worker.

168. The Tribunal accepted that the clothing provided was essentially a marketing tool and that the ID card provided to the Claimant was for ease of purchase of materials.
169. The DBS checks were undertaken to ensure compliance with its obligations to its clients who had specific requirements about working on particular sites and were undertaken across the board to provide for flexibility in the workforce even if work on a particular project such as the Busen site did not have a specific requirement for a check.
170. Although legally right to work checks are only legally required by employers in respect of their employees, it is generally good practice to conduct checks on the workforce and many responsible companies undertake checks, whether the individuals it engages are employees, workers or self-employed, particularly in industries where there are a number of foreign workers, such as construction.
171. The Tribunal found that the access to, and requirement for the Claimant to complete, modules on the Respondent's health and Safety training portal and the provision of health and safety and wellbeing policies and PPE to the Claimant did not point strongly towards employee status in light of the Respondent's overall responsibility for health and safety at its sites and its need to ensure that all persons present on site were aware of and complied with appropriate protocols.
172. Nor did the Claimant's completion of standard forms or utilisation of the Respondent's standard timesheets or holiday forms assist the Tribunal in the context of the facts it found as to their availability and use set out above.
173. The fact that the Claimant utilised and purchased his own tools tended to suggest he might not have been an employee but was not wholly inconsistent with employee status given the skilled nature of his trade.
174. There was an element of integration into the Respondent's structures by the Claimant's inclusion on the WhatsApp group and assumption of the site manager role/signing off of timesheets for other tradesmen during Mr Brennan's absence but neither of these matters indicated more than a fairly superficial level of integration and were not consistent only with the Claimant being an employee. MR Brennan, the site manager, was self-employed and the WhatsApp group was merely a useful communication tool open to anyone on site. Although the Claimant seemed to suggest he was responsible for apprentices on site, this arose primarily in cross-examination and was not accepted by the Respondent's witnesses. The Tribunal was not satisfied on the balance of probabilities that he was.
175. Custom and practice within the construction industry would tend to suggest that the Claimant was self-employed and his tax and pay structure and documents were consistent with this as was the only contract that pertained to engagement on the Busen site, which was with Indigo Services, not the Respondent.
176. Ultimately, the Tribunal focused in particular on the 3 factors forming an irreducible minimum, namely:
 - (1) personal performance;
 - (2) mutuality of obligation; and

(3) control.

Personal Performance

177. The Claimant was a skilled worker and had been interviewed and engaged on the back of his own portfolio and competence. Although the Indigo Services contract which formed the basis of the Claimant's engagement contained a substitution clause [clause 5.1 **132**] Mr Archer gave evidence to the effect that whilst in theory substitution was possible and acceptable, if someone sought to exercise a substitution right there would likely be difficulties unless arranged in advance. This was because any substitute would have to be subject to checks including identity, DBS, right to work, and skills and competence before they would be allowed on site. In practice therefore the substitution clause was impracticable and substitution simply did not happen.
178. The Tribunal concluded that personal performance was therefore an integral part of the arrangements between the Claimant and the Respondent.

Mutuality of Obligation

179. Having heard the oral evidence, the Tribunal concluded that that it was the Claimant's perception that, following the meeting with Mr Archer on 23rd March 2022, the Respondent was obliged to provide him with work and he was required to take it. However the Tribunal also concluded that the Claimant's perception did not reflect the Respondent's understanding or the reality of the situation.
180. Whilst there was a degree of expectation on both sides that the Claimant would in fact work on the Busen site, no obligation arose. As set out above, the Respondent's witnesses were clear that if the Claimant chose not to work at the site, either on any given day or at all, that was acceptable and accepted. The Claimant was considered and treated no differently from the other tradesmen engaged on the site via agencies and, like those other tradesmen, was free to come to work or not, or to refuse work as he chose. As set out above, the Tribunal accepted Mr Gomes' explanation of how that worked on site in practice.
181. The Tribunal therefore concluded that there was no mutuality of obligation.

Control

182. On the basis of the facts found above, the Claimant had a high degree of control and autonomy over the manner in which he undertook work that he was instructed to do and limited supervision. He was allocated particular jobs by the site manager, Mr Brennan but was not told how to do the individual jobs, which tools to use or how to use them. He determined his own hours, limited only by site opening and insurance constraints.
183. The level of control exercised by the Respondent over the Claimant via the site manager, Mr Brennan, was no more than was required to distribute the various jobs required at any one time to the tradesmen on site and ensure that all were done, and to meet the need for the tradesmen to work around other trades and to

a timetable which would enable completion of the build as a whole within the Respondent's contractual timetable.

184. When the Claimant took on the role of site manager in Mr Brennan's absence his degree of autonomy was increased. The Claimant's own evidence described the situation on site as skilled workers such as himself having considerable autonomy and responsibility but less skilled workers being more strictly monitored.
185. The Tribunal noted that the very limited degree of control exercised by the Respondent over the Claimant was equally consistent with the Claimant being a particularly skilled employee given a substantial degree of autonomy by reason of his skills and with the Claimant being a self-employed individual or worker on a controlled site. The Tribunal did not therefore consider that the degree of control particularly assisted the Tribunal to determine whether the arrangements between the Claimant and the Respondent were such as to confer employee status on the Claimant.

Overall Conclusion on employment status

186. The Tribunal's finding as above that there was no mutuality of obligation precluded the Claimant from being an employee and the Tribunal finds that he was not.
187. Even if the Tribunal had concluded otherwise, having regard to the totality of relevant factors, including all those set out above, the Tribunal would in any event have found that the overall picture was more consistent with the Claimant having been either self-employed or a worker than it was with the Claimant having been an employee and would not have found him to have been employed by the Respondent.

Direct Age Discrimination

188. For the reasons set out above at paragraphs 154 to 159, the Tribunal did not find any facts alleged to amount to unfavourable treatment at 7.2.1 of the list of issues had in fact occurred. The Tribunal found no other evidence of unfavourable treatment related to the Claimant's age and heard no evidence about the treatment of the comparators named at 7.3 on the list of issues.
189. Those matters which the Tribunal was satisfied on the facts were established, namely a general discussion as to Mr Brennan's family circumstances and the price of properties in London versus outside of London and the sending of the YouTube video, the Tribunal found, on the balance of probabilities, were in no way connected or related to the Claimant's age.
190. Consequently the Tribunal found no facts which could found a claim of age discrimination and this claim must be dismissed.

Wrongful Dismissal/Notice Pay

191. For the reasons set out above, the Tribunal found that the Claimant was not an employee of the Respondent. The claim for wrongful dismissal/notice pay, which can only be brought by an employee, must therefore be dismissed.
192. In the event that the Tribunal is wrong about the Claimant's employment status, and the Claimant was an employee of the Claimant, the Tribunal considered what the required notice period was and whether the required notice had been given.
193. The Claimant asserted that it was usual practice to give two weeks' notice but the Tribunal did not accept his assertion and was not satisfied on the balance of probabilities that there was any discussion of, or agreement to, any notice period. The Tribunal accepted the evidence of Mr Archer and Mr Gomes that notice was provided as a courtesy.
194. The Tribunal would have found that the relevant notice period was 1 week, there being no express or implied agreement to override the statutory notice period set out at paragraph 66 above.
195. The Claimant was informed on Monday 5th September 2022 that his engagement would come to an end on Friday 9th September 2022 and he did not work for the Respondent after that time. He was not however given a full weeks' notice as the notice period would have started on the day after notice was given and would therefore have run from Tuesday 6th September 2022 to the end of Monday 12th September 2022.
196. Had the Claimant been employed by the Respondent, he would have been wrongly dismissed and would have been owed pay for the 3 day period from Saturday 10th September 2022 to Monday 12th September 2022.

Breach of Contract

197. For the reasons set out above, the Tribunal is not satisfied that there was any contract directly between the Claimant and the Respondent. Even if the Tribunal is wrong in that conclusion, the Tribunal found that there was no agreement to review wages, either at a particular point in time, or within a particular window.
198. Consequently, although the Tribunal accepts that the Claimant's pay was not reviewed during the course of his engagement with the Respondent, the Tribunal finds that it was not a breach of contract that it was not.
199. The claim for breach of contract is therefore not well-founded and will be dismissed.

Public Interest Disclosure

200. Both the claims for automatic unfair dismissal pursuant to s.103A of the 1996 Act and the alternative claim for detriment pursuant to s48 of the 1996 Act require the Claimant to have made a protected disclosure.

201. The Tribunal is satisfied, as set out above at paragraphs 147 to 151, that the Claimant disclosed to Mr Gomes or Mr Brennan orally and/ to Mr Archer by e-mail, various health, safety or security issues including:
- (i) A scaffolding tower had been unsafely erected;
 - (ii) WTR were being infringed;
 - (iii) A tile cutting machine was being unsafely used in the dojo area; and
 - (iv) There had been security breaches as the gate had been left open and/or keys had been left in the outside of a lock.
202. All of the above was factual information and amounted to a disclosure of information.
203. The Claimant believed that the information that he provided was correct. He had seen the issues and photographed some of them. He gave a clear and plausible explanation as to why he believed they amounted to a health and safety risk – either as a result of instability (the unsafe scaffolding tower), risks of water from the tile cutting machine, or the risk of a child or other non-site worker entering the site and as a result of the dangers present getting into an accident. It was not disputed that the Busen site bordered the railway and was adjacent to a school and children’s playground.
204. The Claimant’s genuine belief that they were true was not unreasonable.
205. The Tribunal also concluded that the Claimant reasonably believed, both at the time he made the disclosures and subsequently, that it was in the public interest to make the disclosures or that the disclosures served the public interest as a result of the potentially serious consequences of the breaches, particularly if an accident to a worker on site or an adult or child entering the site occurred. The Tribunal found his belief was reasonable and that he reasonably believed that the disclosures tended to show that there had been, was being, or was likely to be a failure to comply legal obligations and that the health and safety of an individual had been, was being, or was likely to be endangered.
206. For the reasons set out above, there was an objective basis for the Claimant’s belief and in all the circumstances it was reasonable for him to have reached the conclusions that he did about what the information he disclosed tended to show.
207. All the disclosures set out above were therefore qualifying disclosures.
208. As set out at paragraph 56 above as all of these disclosures were made to the Respondent or its site manager who had legal responsibility for the relevant failures and who therefore fell within relevant categories the disclosures were therefore also protected disclosures.

Protected Disclosure Detriment/Automatic Unfair Dismissal

209. Whether the Claimant is able to claim protected disclosure detriment or automatic unfair dismissal depends upon his employment status but the substantive issues for consideration in either case are the same.

210. There is no dispute that the Claimant's engagement on the Busen Centre project was terminated on 9th September 2022, after he was informed on 5th September 2022 that it would be. The termination was clearly detrimental as he lost the ability to work at the site and earn money in return.
211. The Tribunal considered whether the reason, or the principal/a material reason, for the Claimant's termination was because he had made the disclosures, noting that the Respondent bore the burden of showing that they were not.
212. For the reasons set out above, the Respondent did not generally consider reporting of health and safety breaches to be an issue and the Tribunal found no evidence that reporting breaches was likely to attract negative consequences for those who reported. The Respondent also had no reason to be concerned about breaches of working time regulations.
213. Having heard the oral evidence from Mr Gomes, the undisputed decision maker in relation to the termination, and Mr Brennan, the site manager, the Tribunal accepted their evidence as to the reasons why the Claimant's engagement at the site was terminated as set out at paragraphs 160-163 above and was satisfied that the Claimant's protected disclosures were not a factor in the termination of his engagement.
214. Accordingly, neither the claim for automatic unfair dismissal, alternatively for protected disclosure detriment, is proven and they must fail as the Tribunal finds no nexus between the detriment and the protected disclosures.

CONCLUSION

215. For the reasons set out above, the claim for holiday pay is well-founded and succeeds but the remaining claims are not well founded and are dismissed.
216. The parties have reached agreement as to the amount payable in respect of the holiday pay claim and the Respondent has agreed to pay £3,000 to the Claimant which incorporates both an amount due in respect of this claim and in respect of pension contribution, no claim for which was made.
217. The Tribunal was satisfied that the amount agreed exceeded the amount that was likely to be due to the Claimant on the basis of the statutory calculations under the Working Time Regulations for holiday pay and accordingly, did not consider that a remedy hearing was proportionate or required.

8th February 2026