



EMPLOYMENT TRIBUNALS

Claimant: Paula Smith

Respondent: Barrels Care UK Ltd

Heard at: Bury St. Edmunds Hearing Centre

On: 17, 18 and 19 June 2026

Before: Employment Judge Illing

Representation

Claimant: In person

Respondent: Ms Stella English (Litigation Consultant)

JUDGMENT

The judgment of the Tribunal is that: -

1. The complaint in respect of holiday pay is well-founded. The respondent made an unauthorised deduction from the claimant's wages by failing to pay the claimant for holidays accrued but not taken on the date the claimant's employment ended.
2. The respondent is to pay the Claimant **£1024.66** by **17 July 2026** subject to the deduction of tax and National Insurance.
3. The Complaint of unlawful deduction of wages is not well founded and is dismissed.
4. The complaint of unfair dismissal is not well founded and is dismissed.
5. The complaint of being subjected to detriment for making a protected disclosure is not well-founded and is dismissed.

REASONS

Procedural history

1. The Claimant has issued three claims, excluding duplicates, all of which have been consolidated to be heard at this final hearing. Three were consolidated on 23 January 2025 by EJ Quill (3311406/2024; 3305371/2024 and 3306136/2024). The fourth claim was a duplicate of the third.
2. The Parties attended a case management hearing on 30 April 2025 where the issues to be determined were identified and agreed. They remain the issues to be heard.
3. On 23 January 2026, the Claimant applied to amend her claim to include disability discrimination. A preliminary hearing was held on 27 May 2026 before Employment Judge Laidler, but neither party attended. The application to amend the claim was refused.

The hearing

4. Documents:
 - 4.1. Bundle initially of 337 pages. Further disclosure was permitted and the final bundle length was 341 pages.
 - 4.2. Witness Statements from:
 - 4.2.1. Mrs Paula Smith
 - 4.2.2. Mr Rajeer Singh for the Respondent
 - 4.2.3. Mr Arasaratnam Kumanan for the Respondent

Conduct of the Hearing

5. The hearing was conducted in person, with oral judgment and any remedy hearing to be hybrid, with the respondent's representative attending by CVP.
6. The process was explained to the Claimant as a litigant in person and she was afforded the opportunity to provide re-examination and closing oral submissions. Both Parties also provided their submissions in writing.
7. The issues to be determined are:
 - 7.1. Holiday Pay Claim.
 - 7.2. Reduction in Hours of Work – unlawful deduction
 - 7.3. Unfair dismissal (Constructive)
 - 7.4. Detriment following the making of a protected disclosure.

8. These are the issues as determined at the case management hearing on the 30 April 2025 before Employment Judge Gumbiti-Zimuto and the Parties confirmed that the list of issues remained as drafted.

Findings of fact

9. I make my findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. I do not set out in this judgement all of the evidence which I heard but only my principal findings of fact, those necessary to enable me to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts I have done so by making a judgment about the credibility or otherwise of the witnesses I have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.
10. Any subtitles are for reference only.

Background

11. The Respondent is a provider of care homes providing residential care for the in the dementia care sector.
12. The Claimant commenced employment on 06 August 2019 as a Care Assistant.

Policies, Procedures and Employment Contract

Employment Contract

13. The Claimant signed an employment contract on 06 August 2019. It states that her normal hours of work are 36-hours per week Monday to Sunday as agreed on a rota basis. It also states:

You may be required to work additional hours when authorised and as necessitated by the needs of the business.

14. Annual leave is detailed within the contract as follows:

Your holiday year begins on 1st April and ends on 31st March each year, during which you will receive a paid holiday entitlement of 5.6 weeks inclusive of any public / bank holidays which you may choose to request. Entitlements are pro-rata to the above for part-time employees. In your first holiday year your entitlement will be proportionate to the amount of time left in the holiday year.

15. The contract also provides as follows:

For the purpose of

In the event of termination of employment holiday entitlement will be calculated as 1/12th of the annual entitlement for each completed month of service during that holiday year and any holidays accrued but not taken will be paid for. However, in the event of you having taken any holidays in the current holiday year, which have not been accrued pro-rata, then the appropriate payments will be deducted from your final salary.

16. Holiday pay is further detailed in a separate handbook.

17. Sickness and pay is also included in the contract:

There is no contractual sickness / injury payments scheme in addition to SSP.

18. Within the contract Capability and disciplinary procedures are referred to but noted to be in the Employee Handbook.

19. Notice is also included in the contract, and the Claimant was obliged to provide 1-month of notice. The Respondent was required to provide 1-month of notice or statutory notice, whichever was the greater.

Employee handbook [136]

20. The entitlement and conditions for annual leave are included in the handbook which includes:

We do not permit holidays to be carried forward and no payment in lieu will be made in respect of untaken holidays other than in the event of the termination of employment.

21. The handbook as dated 02 January 2024, which the Claimant has signed as received, also states that all leave must be agreed in writing by [Manager].

Rota of work

22. The Claimant states that she was on a permanent fixed rota of working, working 3-days one week and then 4 the next. She also states that she had 48-hours of work per week throughout her employment.

23. The respondent states that the Claimant was on a rota whereby she was required to work throughout the week and that her contract was for 36-hours per week.

24. The Claimant stated that she worked overtime and that this was regular throughout her employment.

25. The Respondent states that there was overtime, but that this was not guaranteed. The allocation of overtime was dependant on the overall mix of the employees working to ensure that the staff ratio was correct and regulatory requirements were met.

26. The Claimant has used her P60s to evidence that she was working in excess of her contractual hours throughout her employment.

27. The Respondent has analysed the Claimant's pay details to identify the actual hours worked each month from August 2019 until June 2024.

28. The data from the Respondent shows that the Claimant's hours have varied from the start of her employment. The total hours are divided by 46.4, to account for the 5.6-weeks of holiday on which the Claimant would not be working.

29. The data is recorded as April to March and her total working hours per year are as follows. These figures have been corrected from the oral judgment and reflect those figures used and provided during the oral remedy judgment:

29.1. 2019 – 2020 1406.5 Hours. This equates to an average of 45.5 hours per week. No overtime is separately recorded. The monthly hours range from 110

- (August 2019 – approx. 25-hrs per week) to 266 (March 2020 – approx. 61-hrs per week) hours in one month.
- 29.2. 2020 – 2021, 2116.50 hours This equates to an average of 45.6 hours per week. No overtime is separately recorded. The monthly hours range from 172 (February 2021 – approx. 39.6-hrs per week) hours to 220.5 (December 2020 – approx. 50.9-hrs per week) in one month.
- 29.3. 2021 – 2022, 1716 hours. Overtime is separately recorded as 337.8 hours, giving a total of 2053.8 hours. This equates to an average of 44.2 hours per week. The monthly hours range from 159.6 (March 2022 – approx. 36.8-hrs per week) to 232.5 (January 2022 – approx. 53.6-hrs per week) hours in one month.
- 29.4. 2022 – 2023, 1776 hours. Overtime is separately recorded as 269 hours, giving a total of 2045 hours. This equates to an average of 44 hours per week. This equates to an average of 44.2 hours per week. The monthly hours range from 180 (May 2022 – approx. 41.5-hrs per week) to 216 (November 2022 – approx. 49.8-hrs per week) hours in one month.
- 29.5. 2023 – 2024, 2295 hours. This equates to an average of 49.5 hours per week. No overtime is separately recorded. The monthly hours range from 168 (May 2023 and March 2024 – approx. 38.7-hrs per week)) to 263.5 (September 2023 – approx. 60.8-hrs per week) hours in one month.
- 29.6. April 2024 records 60 hours, this was when the Claimant had holiday and sickness absence.
- 29.7. May 2024 records 192 hours, which equates to an average of 49.7 hours.
- 29.8. June 2024 records 216 hours, which equates to an average of 49.8 hours.
30. For completeness, a month of work at 36-hours per week would equate to 156-hours per month. A month of work at 44-hours per week would equate to 208-hours per month.
31. In cross checking these calculations, I have reviewed the total hours recorded by the Respondent, which include holidays and overtime otherwise recorded separately. The totals are therefore divided by 52 to determine a weekly average. These show as follows:
- 31.1. 2019 - 2020, 1534 hours (for 8-months). This equates to an average of 44.2 hours per week.
- 31.2. 2020 – 2021, 2353.50 hours. This equates to an average of 45.2 hours per week.
- 31.3. 2021 – 2022, 2315.40 hours. This equates to an average of 44.52 hours per week.
- 31.4. 2022 – 2023, 2369.60 hours. This equates to an average of 45.5 hours per week.
- 31.5. 2023 – 2024, 2487 hours. This equates to an average of 47.8 hours

32. The Claimant's P60 records, with the Claimant's own calculation records, the averages for each year as:

- 32.1. 2020 – 2021 – 46-hours per week
- 32.2. 2021 – 2022 – 46 hours per week.
- 32.3. 2022 – 2023 – 47.5 hours per week
- 32.4. 2023 – 2024 – 50 hours per week.

33. The data records that the Claimant was working different amounts every month, which was also affected by the different number of weeks per month and the cut off dates for payroll. That being said, I am satisfied that the Claimant was working overtime regularly, but that it was not a specific amount each week. Some months she had more than the 36-hours, but not less, others show that the Claimant worked almost double her contractual hours.

34. The P60s give details as to the overall average across the year, however the Respondent's evidence provides the further details and records the month-by-month changes to the Claimant's working pattern.

35. I have reviewed both the annualised records and the month-by-month records and I find that the Claimant was not working an average of 48-hours per week until the year of 2023 – 2024.

36. The actual pattern of work was not evidenced, and I take the Claimant's case at its highest. I am satisfied that the Respondent provided the Claimant with regular days on which she was required to work her contractual hours of 36-hours per week with additional hours being provided as overtime. I am also satisfied that the contract provided for her to be available throughout the week. Given that she has clearly worked different hours of work each month, I find that the Claimant was available to work on days throughout the week.

37. I am satisfied that throughout the Claimant's employment she had regular overtime, but that the amount was subject to change. I find that when the Claimant was offered overtime, if she accepted it, it was a commitment she was required to fulfil. I also find that the overtime allocation was regular and settled.

38. The Claimant's rate of pay per year is as follows:

- 38.1. 2022 – 2023 - £9.59 per hour
- 38.2. 2023 – 2024 - £10.42 per hour.

Background

39. In April 2023, the Claimant was invited to a formal investigation meeting following an allegation of bullying as made by a colleague.

40. Also in April 2023, the Claimant sent a message to her manager to ask why she had had £451.88 deducted from her wages as an overpayment for holiday. She stated:

I had 31.2 hrs brough over from last year cleared with sonny. $201.6 + 31.2 = 232.8$ – 228 = 4.8hrs left which I should have been paid for I am absolutely fuming can you please sort this by tomorrow.

41. The Claimant explained that these hours included 24-hours that had been carried over from 2022 due to Covid and that the regulations had allowed it to carry over again.
42. In April 2023 the Claimant received a repayment of £230.24 without an explanation from the Respondent. She did not take any further action in relation to this.
43. Following the meeting in April 2023, the Claimant was informed by letter dated 08 June 2023 that the grievance against her had been upheld. The Claimant stated that no disciplinary action followed and the respondent did not provide any evidence of any outcome. I find that there was an incident in April 2023, but that there was no sanction.
44. On 27 September 2023 the Claimant was suspended following an allegation of inappropriate conduct towards a resident and a staff member on 19 September 2023. The Claimant stated that other than being suspended, she did not know of the investigation or the outcome.
45. The Respondent told the Tribunal that the suspension was due to a concern being raised by a social worker to the Council. The requirements of s.42 Health and Social Care Act required the respondent to investigate the allegations. This first stage required an investigation but that this would not be escalated unless there was a safeguarding issue contrary to s.42. On this occasion, the respondent told the Tribunal that there was not a safeguarding issue, and the Claimant was permitted to return to work.
46. I find that it was a reasonable course of action to suspend a colleague in order to investigate a safeguarding allegation.
47. On 14 November 2023, all of the colleagues were reminded that the food in the kitchen was for the residents and if they wanted a meal then they should pay for it.
48. The Claimant replied to her manager Kamali about the instruction stating:
- We work hard in your care home and are on our feet all day and working for minimum wage.. and you would rather throw left over food in the bin.. than put in the belly's of your hard working carers?? Is that humanly correct!*
49. In reply, the respondent stated:
- Please stop accusing us directly. We are staff as well. It's not me. It's the company policy. It's the company money...*
- ..
- Unfortunately, for last 5 years people were getting away with eating free food where they been told they shouldn't now we have to once again remind the policy & take disciplinary if they cannot follow the rules.*
50. On Friday 16 February 2024 Mr Singh wrote to all staff to remind them that their working days were flexible as per their contracts. This was to ensure that each shift met the needs of the residents. It also stated that whilst they would try to authorise holidays, it may not always be possible. The Claimant asserts that she did not get

this email. Mr Singh stated that he took the emails from a list and sent it to all employees.

51. I find that Mr Singh was reminding all colleagues of the flexibility required of their rota and the discretion regarding the taking of holidays.
52. On 08 March 2024, the respondent states that it met with the Claimant to discuss a performance improvement plan. The respondent Mr Singh stated that there had been a discussion with the Claimant at the time about it, the Claimant states that she was just handed the document detailing an improvement plan.
53. It was not disputed that the respondent carries out regular supervisions of its employees.
54. The Claimant signed and dated the PIP. I find that this was a record of a conversation and a meeting regarding an improvement plan for the Claimant. The Claimant did not raise a complaint about this process.

Holiday pay

55. It was undisputed by the Parties that the Claimant had an annual leave entitlement of 201.60 hours, which was calculated based on the Statutory Annual Leave requirement of 5.6-weeks and the contractual 36-hour working week.
56. In April 2024, whilst in Spain, the claimant was hit by a car and was hospitalised.
57. On 11 April 2024 the Claimant emailed Mr Singh to confirm that she had been discharged, she also stated:
- Obviously won't be in next week... so if you can continue Annual leave or put me as sick it's up to you. I will be back to work Monday 22nd. Thankyou Paula.*
58. Mr Singh replied:
- You take of yourself and forget everything we will do everything for you which is in your best interest x*
59. The Claimant told the Tribunal that she believed that she would be paid annual leave for this absence. She stated that she did not modify her spending because she thought she would be paid.
60. The Claimant submitted a fit note dated 19 April 2024, which certified her as not fit for work from 12 April 2024 to 21 April 2024.
61. On 03 May 2024, the Claimant emailed Mr Singh to request that the 16 – 19 April be paid as annual leave. The Claimant says this was following a request by Mr Singh to put her application in writing and I accept that.
62. On 06 May 2024 Mr Singh responded to the Claimant to inform her that the period requested would be recorded as sickness absence, as indicated by the fit note she had provided. He stated that this was following advice from the external HR provider and that because of the fit note, the absence had to be recorded as sickness and SSP was paid.
63. The Claimant confirmed that she was able to use the annual leave on another occasion.

64. On 23 May 2024 the Claimant initiated early conciliation and filed an ET1 on 24 May 2024. This was because of the changes to the rota, not providing her with 48-hours of work per week and for paying holiday at the rate of 36 hours per week.

65. On 28 May 2024 the claimant raised a grievance it states:

Dear hasib I wish to raise a formal grievance

Whilst on annual leave in Spain at the beginning of April I was struck by a car on 5th April 2024 and was hospitalised for 5days, I was not able to return to the uk until 17th April , I was in contact with deputy manager throughout my time in Spain. Sick leave and annual leave was discussed and DM told me that what ever was in my best interests regarding sick / annual leave. My doctor made me fir for work for Monday 22nd April and a fir note was given to yourself. On my return to work on 22nd April I informed DM that I would like to take 4 days annual leave to cover my sick, this was marked on my time sheet as annual leave. Cut off date for wages is the 27th of each month. On Friday 3rd May I was on my day off when I received a call from DM asking me if I could put in an email the days I wanted to claim annual leave and not sick 16 – 19th April 4 days, he informed that I would be getting paid but it needed to be emailed to the relevant department. To add insult to injury I received an email on Monday 6th May (which was our payday) informing me that annual leave was not approved and I was made to take sick pay. This decision was cruel and unfair, as I was lead to believe I would be paid annual leave and not sick pay

I would therefore like to raise a formal grievance.

66. The Claimant's grievance email was acknowledged on 28 May by Mr Rahman the home manager and a meeting was offered. The grievance was in relation to the non-payment of annual leave during the sickness absence but did not raise the issue of the incorrect calculation of holiday pay.

67. On 06 June 2024 Mr Rahman, the manager, emailed the claimant to invite her to a grievance meeting, but the Claimant could not be able to attend as she was in London until the following evening.

68. A meeting took place on 13 June 2024 between the Claimant and Mr Rahman and an outcome letter was sent on 01 July 2024, which stated that Mr Singh had not told the Claimant that she would be paid as annual leave and that the company had followed its own policy to record the absence as sickness absence. The Claimant was offered the right to appeal but did not do so.

69. Having heard evidence from the Claimant and Mr Singh, I am satisfied that the Claimant presumed that she would be paid for annual leave and that Mr Singh did not tell the Claimant that she would be paid as annual leave for this period.

70. The Claimant was not offered a shift on the 14 June 2024, which she says was in breach of contract. The respondent states that the Claimant was not offered the shift because others required the shift to ensure the correct make up of the team on the floor. I find that the respondent allocated the hours to another colleague.

71. On 24 June 2024 the Claimant issued a second ET1. This repeated the claims of the first ET1 and added in the complaint regarding the annual leave in April following her accident.

72. On 28 June 2024, the Claimant was not offered a fourth shift for the week, which the Claimant says was in breach of contract. In June the Claimant is recorded as working 216 hours, which is an average of 49.8 hours per week. The respondent states that the Claimant was not offered the shift because others required the shift to ensure the correct make up of the team on the floor. I find that the respondent allocated the hours to another colleague.

73. The Claimant has not raised a complaint regarding her shifts in July. She is recorded as working a total of 192 hours that month.

74. On 30 July 2024, the Claimant wrote to Mr Rahman to state:

Can you please put in an email the conversation we just had about the provider only giving me 4days wk 1 and 3 days wk2, By law my contract is 48hrs per week..

75. The respondent acknowledged this email as a grievance by letter dated 13 August 2024. On 14 August, the Claimant informed Mr Rahman that she had not raised a grievance about this stating *"The heading on the email I sent was from an old email. My mistake."* but was seeking an explanation about the shift changes.

76. Mr Rahman offered the Claimant a grievance process, which she did not wish to follow.

Incident of 21 August 2024

77. On 21 August 2024 there were two alleged incidents.

78. Mr Singh alleges that he heard the claimant talking about a new colleague to others, stating that *"he is a liability"* and *"he does not know how to work"*. This was allegedly witnessed by Mr Singh and other colleagues.

79. Mr Singh further says that following a team meeting, the Claimant raised her concerns about the colleague and referred to him as *"a liability"*, in front of the team. The colleague in question was attending a resident at that time. Mr Singh states that he intervened and told the claimant that this should be discussed privately.

80. The Claimant says that this did not happen, that she did not say this in front of anyone, but only in the office in private with Mr Singh and Mr Rahman.

81. The Claimant stated in evidence that she believed the colleague to be a liability and accepted that she raised his name to ask what going to be done about it.

82. Following the incident, Mr Singh says that he spoke to his manager Mr Rahman and he was asked to collate witness statements. Which he did. The witnesses supported Mr Singh's understanding of what had happened.

83. The Claimant asserts that this is fabricated and the statements were obtained after the second claim had arrived at the respondent's offices. I am satisfied that whether the second claim had arrived or not, the Respondent was on notice that the Claimant had issued a claim.

84. I am also satisfied that the incident occurred as alleged and accept Mr Singh's evidence.

Removal of shifts

85. The Claimant claims that she did not have shifts on 09 and 23 August 2024 again in breach of contract. The rota shows that the Claimant worked 3-shifts per week throughout August, which would be 36-hours per week. The respondent states that this was due to the requirement to ensure that the staff on the floor had the relevant experience and training. The Claimant says that it was because she had initiated the claim and that she was being punished by removing her overtime and giving the shifts to others.
86. The Claimant stated that the second ET1 was delivered to the Respondent on 30 August 2024.

Statement of Concern

87. On 03 September 2024 the Claimant was called into Mr Rahman's office. Mr Singh was there. The Claimant was handed a statement of concern which detailed 5 allegations including:

1. Food Consumption / Without Proper Attire: *Paula ate food from the kitchen while present there, and she was not wearing an apron and did not have authorisation to have anything from the kitchen.*

2. GDPR Violation: *Paula disclosed information about residents and staff to a cook, in our presence, potentially violating GDPR regulations.*

3. Bullying Allegation: *Paula is accused of bullying a staff member by questioning their responsibility and refusing to collaborate with them.*

4. Unauthorised Communication: *Paula sent a direct message to a family member of a resident from her personal phone without management's approval.*

5. Leaving the Building Without Approval: *Paula left the building to go home during working hours without obtaining prior approval from management.*

88. With regards to the food consumption, the respondent states that despite the instruction not to eat the resident's food, the Claimant was seen by Mr Singh on CCTV eating the food in the kitchen and not wearing the apron that is required when in the kitchen. The Claimant denied this allegation.
89. Regarding the GDPR allegation, the respondent states was a comment overheard by Mr Singh when the Claimant was speaking to the chef in the kitchen. He believed that he had heard her discussing personal information about a resident. The Claimant denied this allegation.
90. The bullying allegation was in relation to the incident on the 21 August 2024, which is detailed above and as witnessed by Mr Singh.
91. The unauthorised communication was, the Respondent states, a communication between the Claimant and a resident's Next of Kin by text or WhatsApp. There was, allegedly a complaint by the family following a message from the Claimant. The Claimant states that she had always had permission to update this particular resident's Next of Kin and denied that the communication was unauthorised.

92. With regards to leaving the premises, it was alleged that the Claimant had left the building without approval. Mr Singh stated that he had witnessed the Claimant driving through the village at a time when she should have been on shift. The Claimant denies leaving without approval but did state that she would leave the building to obtain a paper for residents. She also described a recent event where she had returned home during her shift to find a magnifying glass for a resident who had returned from hospital without her own.
93. The Claimant stated that the allegations were fabricated and that the statement of concern had no dates or details as to the allegations. She said that this had come out of the blue and she had been asked to write a statement in response. She says she refused and that she told her manager to add the dates and then she would provide a statement.
94. Mr Singh stated that upon being given the statement of concern, the Claimant became angry with Mr Rahman. She refused to provide a statement and left the office.
95. I am satisfied that whilst these are allegations and remain to be investigated, there was some substance to establish that these were allegations that required further investigation by the Respondent with the Claimant.
96. It is not disputed that the Claimant remained at work on the 03 September 2024.
97. The Claimant came into work on the 04 September. She says that no-one raised the statement of concern with her. The Respondent accepts that it did not and stated that they were seeking advice from the external HR provider before taking any further steps. I accept the Respondent's explanation.

Resignation

98. On 05 September 2024 the Claimant resigned. She stated:

I am writing to resign from my post as a Carer, I am resigning with immediate effect from today's date....

You should be aware that I am resigning in response to a breach of contract by the employer and I therefore consider myself constructively dismissed.

I believe my contract was breach by implied term of contract due to cutting working hours without consent and my annual leave being calculated incorrectly.

As you are aware I have sought legal advice and as a result have 2 different claims going through an employment tribunal, with the second one being received at the end of last week for breach of implied term of contract, as a result I have been made to feel bullied and harassed, I was called into your office on 3rd September 2024 with a minor list of accusations which I believe was in retaliation to me making claims against my employer at an employment tribunal, You asked me to make a statement on the contents of the letter and I informed you I could not make a statement as no dates or times were present on the allegation's.

I feel my mental health has suffered so much as a result of being scrutinized and discriminated against that I can no longer work for the company.

99. On the 06 September 2024 the Respondent wrote to the Claimant asking her to reconsider and to follow the grievance process rather than resign. It arranged a grievance meeting for the 13 September.
100. The Claimant did not retract her resignation nor accept the offer of a grievance process.
101. A third claim was issued on 14 September 2024 to include dismissal.
102. On termination, the Respondent states that the Claimant had taken more holiday than had accrued in that she had accrued 90.46 hours but had taken 120. The Respondent did not deduct this overpayment from the Claimant's salary and asserts she is not entitled to holiday pay.

Findings of fact on contribution, Acas and *Polkey*

103. The Claimant resigned without notice.
104. In considering contribution and *Polkey*, the findings of fact set out below are the Tribunal's own, reached on the balance of probabilities, relevant to the issues of whether the Claimant contributed to her dismissal by her own blameworthy conduct (contribution) and whether, if the dismissal was tainted by unfairness, there was a chance that the respondent would have fairly dismissed her in any event (*Polkey*). There is considerable overlap between the factual issues relating to these questions.
105. With regards to the grievances, the respondent has responded promptly to acknowledge them and to arrange a meeting, followed by a written outcome. The Claimant did not appeal the one grievance outcome she received.
106. With regards to the conduct of the employer on the 03 September 2024, the Acas Code of Practice does not require an employer to provide an invitation to a disciplinary investigation. It requires the employer to ensure that the employee is aware of the allegations they are facing. From the limited process that had occurred in relation to the Statement of Concern, I am satisfied that this was a first stage of an investigation process and that had the Claimant not resigned, her thoughts and explanations would have been sought.

The law

Holiday Pay

107. The Working Time Regulations 1998 provide workers with a minimum entitlement to paid leave. The minimum entitlement, subject to certain exclusions, is 5.6 weeks paid holiday per year subject to a cap of 28 days. The 5.6 weeks are made up of 4 weeks basic annual leave under Reg 13 and 1.6 weeks additional leave under Reg 13A. 28 days corresponds to 5.6 weeks for a worker working 5 days per week, but if a working week is longer, the statutory minimum remains capped at 28 days even though the full 5.6 weeks of holiday will thereby not be guaranteed. Workers may in addition to the guaranteed minimum holiday be entitled under their contractual terms to enhanced holiday entitlement.

108. Reg 13 was amended by the Working Time (Coronavirus) (Amendment) Regulations 2020 to allow workers to carry over any basic annual leave that it was not reasonably practicable for them to take due to the effects of coronavirus for the subsequent two leave years. Any employer may not prevent a worker from taking such leave except where there is 'good reason to do so.' This amendment was repealed by the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 (SI 2023/1426). The Government published guidance on what should be considered when assessing whether it was reasonably practicable to take the leave in the relevant year
109. Reg 16(1) WTR 1998 provides that 'A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave'. A week's pay is calculated according to ss221 to 224 ERA 1996 and, from 6 April 2024, regulations 16(3ZA)-(3ZG) WTR 1998, subject to slight technical modifications and the removal of the limit on a week's pay.
110. Calculating annual leave for people working variable hours or for variable pay Regulation 16 of the Working Time Regulations 1998 changes the reference period for calculating annual leave pay from 12 to 52 weeks for workers whose pay varies because either: (a) they have no normal working hours; or (b) they have normal working hours but the amount of work or days or times they work each week varies.

Post-April 2024

111. Regulation 16(3ZA) WTR 1998 states that the following should be included when calculating holiday pay:
- a) payments, including commission payments, which are intrinsically linked to the performance of tasks which a worker is obliged to carry out under the terms of their contract;*
 - b) payments for professional or personal status relating to length of service, seniority or professional qualifications;*
 - c) other payments, such as overtime payments, which have been regularly paid to a worker in the 52 weeks preceding the calculation date.*

Pre-April 2024

112. The legislation often fails to take into account pay a worker would in fact receive during a pay period. The Working Time Regulations implement the Working Time Directive and ss221 to 224 in many respects fail to provide workers with the full entitlement to pay required by EU law (see ***British Airways plc v Williams [2012] IRLR 1014*** and ***Z.J.R. Lock v British Gas Trading Ltd and Others [2014] ICR 813 (CJEU)***). The Working Time Directive only provides for 4 weeks' leave, so the existing ERA 1996 provisions continue to apply unmodified to the additional statutory 1.6 weeks' leave available to employees unmodified.
113. It is now clear that the calculation of a week's pay in the ERA 1996 should not be followed blindly, but where possible should be interpreted in accordance with the Working Time Directive. The key case is:

- 113.1. **Bear Scotland & Ors v Fulton & Ors UKEATS/0047/13/BI; [2015] ICR 221:** the EAT held that sums paid for non-guaranteed overtime (i.e. overtime that was offered at the employer's discretion, but not guaranteed, but which the employees were obliged to perform) should be included in the calculation of holiday pay. It modified regulation 16(3)(d) of the WTR to read:

"as if the references to sections 227 and 228 did not apply and, in the case of the entitlement under regulation 13, sections 223(3) and 234 do not apply"

- 113.2. Voluntary overtime should be included in any calculation of holiday pay where the pattern of work is sufficiently regular and settled for payments made in respect of it to amount to normal remuneration (**Dudley Metropolitan Borough Council v Willetts & Ors UKEAT/0334/16**, **Flowers & Ors v East of England Ambulance Trust UKEAT/0235/17/JOJ** and **East of England Ambulance Service NHS Trust v Flowers and others [2019] EWCA Civ 947**).

114. The CJEU has held in **King v The Sash Window Workshop Ltd EUECJ C-214/16** that Article 7 of the Working Time Directive precludes national provisions or practices that prevent workers from accumulating untaken annual leave throughout the whole period of their employment, where such accumulation has happened because the employer has refused to pay for the leave. **King** has been considered by the Court of Appeal in **Smith v Pimlico Plumbers Ltd [2022] EWCA Civ 70**, which held (overturning the EAT):

- 114.1. *Paid annual leave is a 'single composite right'. Unpaid annual leave does not satisfy the requirements of that right. Providing unpaid annual leave is to be treated as the same as if no annual leave were provided at all.*

- 114.2. *If an employer fails to provide an employee with paid annual leave in a given leave year, that right does not lapse but accumulates until the termination of the working relationship.*

- 114.3. *Regulations 13 and 14 WTRs should be re-read as set out in an Appendix to the Court of Appeal's judgment*

Implied terms in employment contracts

115. Terms can be implied into a contract by custom and practice; that is if they are customary in a particular trade or locality or at a particular workplace. To constitute a binding implied term, a custom or practice must be:

- 115.1.1. "Reasonable, notorious and certain" (see **Bond v CAV Co [1983] IRLR 360** and **Henry v London General Transport Services Ltd [2001] IRLR 132**).

- 115.1.2. Followed "because there is a sense of legal obligation to do so" (see **Solectron Scotland Ltd v Roper [2004] IRLR 4**).

116. The term must be regularly, but not necessarily universally, adopted in the particular trade or locality or at the particular workplace. A single incident will not be enough to establish an implied term based on custom and practice (**Waine v R Oliver (Plant Hire) Ltd 1977 IRLR 43**)

117. The authorities on implying terms by custom and practice were reviewed by the High Court in **Patel v De Vere Group Ltd [2013] 4 WLUK 621** (paragraphs 45 to 72) and the following conclusions drawn (at paragraph 73):

- *The general rules and principles of contract law apply equally to employment contracts as they do to any other form of contract. However, given the informal nature of many employment contracts and the complex factual situations in which they may arise, applying well-established rules and principles to individual cases may be difficult.*
- *Terms may be incorporated into an employment contract based on custom and practice which arises within a single organisation (for example, at a particular workplace) but does not reflect any wider custom affecting an entire trade, industry or place.*
- *There must be sufficient evidence of the alleged custom and practice to allow the court to infer that both employer and employee would regard themselves as bound by the practice, notwithstanding the absence of any express provision to that effect in any individual employment contract. That conclusion is likely only to be justified where the practice is “notorious, certain and reasonable”, although notoriety in this context is to be taken to mean no more than a sufficiently widespread knowledge and understanding of the practice. In other words, the custom must be fair (not arbitrary or capricious), generally established and well known, and clear cut.*
- *Whether a term is to be implied into an individual contract by custom and practice is normally determined by reference to the circumstances prevailing at the time when the contract was made. Subsequent custom and practice might justify the implication of such term, either on the basis of a variation of the original contract or some form of supplemental agreement, at least in cases where the original contract is silent about such matters and, as is commonly the case, the working relationship between the parties has continued to evolve.*
- *However, it will be difficult, if not impossible, for a term to be implied by reason of subsequent custom and practice where the proposed term would be inconsistent with the express provisions of the original contract; at the very least it would need to be a “very long established practice” to have such an effect.*

118. I have directed myself to consider cases in relation to hours of work. The EAT took into account the parties’ conduct with regard to hours of work in **Borrer v Cardinal Security Ltd EAT 0416/12**. There, it held that a security guard was contractually entitled to 48 hours’ work per week, despite the fact that his terms of employment stated that his hours would be specified by his line manager and, in practice, he received a weekly text message from his area manager confirming where he was to work the following week. The employment tribunal’s relevant findings were that B and a colleague were initially recruited to cover 102 hours between them; that for two years, B worked 48 hours per week principally at a Brighton store; that he worked for two or three weeks at another local store for the same number of hours; and that when that work was unavailable, CS Ltd arranged for him to take outstanding holiday, then found him alternative work and subsequently offered him a full-time position (albeit at only 38 hours per week). Based on these findings, the EAT held that the true agreement between the parties was that B would work 48 hours per week but

that his remuneration would depend on the rate applicable to the assignment to which he was allocated.

Unfair Dismissal (Constructive)

119. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95 of the Employment Rights Act 1996.
120. Section 95(1)(c) provides that an employee is dismissed by her employer if:
“the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”
121. The principles behind such a constructive dismissal were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. *The statutory language incorporates the law of contract, which means that the employee is entitled to treat herself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The respondent relied upon that decision as establishing that there must be a breach of contract that amounts to more than just unreasonable conduct. It is established case law that to be entitled to resign, any breach of contract must be fundamental and not minor or inconsequential.*
122. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] IRLR 462** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:
“...without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”
123. It is apparent from the decision of the House of Lords that the test is an objective one, in which the subjective perception of the employee can be relevant but is not determinative. A Tribunal must look at all the circumstances. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.
124. Conduct after the resignation/dismissal cannot be considered when determining whether there is a breach of contract, relying upon **Gaelic Oil Co Ltd v Hamilton [1977] IRLR 27**.
125. Not every action by an employer, which can properly give rise to complaint by an employee, amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. It has been described as a demanding test. Simply acting in an unreasonable manner is not sufficient.

126. A part of the test to be applied is whether the actions of the employer fell outside the range of reasonable responses which a reasonable employer might consider to be appropriate. What was said in **Claridge v Daler Rowney Ltd [2008] IRLR 672** is:

"It is necessary that the conduct must be calculated to destroy or seriously damage the employment relationship. The employee must be entitled to say "You have behaved so badly that I should not be expected to have to stay in your employment". It seems to us that there is no artificiality in saying that an employee should not be able to satisfy that test unless the behaviour is outwith the band of reasonable responses."

127. A point reaffirmed by the EAT in **Leeds Dental Team Ltd v Rose [2014] IRLR 8**, EAT is that 'likely' is sufficient on its own, it is not necessary in each case to show a subjective *intention* on the part of the employee to destroy or damage the relationship, As Judge Burke put it:

"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of..."

128. If an individual delays too long in resigning, they will have affirmed the contract and waived the breach. The Tribunal must also determine whether the claimant resigned in response to the respondent's conduct/breach.
129. The term of trust and confidence is well established and is widely used in the context of constructive dismissal. However, one caveat arises from developments in contract law generally concerning the control of contractual discretions. The case of **Braganza v BP Shipping Ltd [2015] UKSC 17, [2015] IRLR 487** affirmed that if what the claimant is objecting to is the way that the employer exercised a discretion under the contract (to the claimant's detriment), it is *not* enough for the latter just to argue that the decision was unreasonable; he or she must show that it was *irrational* under the administrative law *Wednesbury* principles, which is a much tougher test to satisfy. The reason for this is to restrict the judge to consideration of the process adopted by the employer, rather than remaking the decision judicially.

Protected disclosures

130. In **Williams v Michelle Brown AM UKEAT0044/19/00**, HHJ Auerbach set out the test for identifying whether a qualifying disclosure has been made:

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

Unless all five conditions are satisfied there will be not be a qualifying disclosure.
[9 and 10]

131. There must be a disclosure of information. In **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38**, the EAT held that to be protected, a disclosure must involve giving information and must contain facts, and not simply voice a concern or raise an allegation:

"The ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". Contrasted with that would be a statement that "You are not complying with Health and Safety requirements". In our view this would be an allegation not information." [24]

132. However, in **Kilraine v London Borough of Wandsworth [2018] ICR 1850** the Court of Appeal held that:

"...the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the judgment below [2016] IRLR 422, para 30, set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. ...

On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1) , not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision." [30 and 31].

"The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in the Cavendish Munro case did not meet that standard.

133. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in **Chesterton Global Ltd v Nurmohamed [2018] ICR 731** , para

8, this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief.” [35 and 36].

“It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in the Cavendish Munro case [2010] ICR 325, para 24, the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says “You are not complying with health and safety requirements”, the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim under the protected disclosures regime in Part IVA of the 1996 Act, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the Claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner” [41].

134. As regards the Claimant’s belief about the information disclosed, the question is whether the Claimant believed at the time of the alleged disclosure that the disclosed information tended to show one or more of the matters specified in section 43B(1). Beliefs the Claimant has come to hold after the alleged disclosure are irrelevant. Whether at the time of the alleged disclosure the Claimant held the belief that the information tended to show one or more of the matters specified in s.43B(1) and, if so, which of those matters, is a subjective question to be decided on the evidence as to the Claimant’s beliefs. It is important for a tribunal to identify which of the specified matters are relevant, as this will affect the reasonableness question.
135. Whereas the test for reasonable belief is a low threshold, it must still be based upon some evidence. Unfounded suspicions, rumours and uncorroborated allegations are insufficient to establish reasonable belief.
136. The belief must be as to what the information tends to show, which is a lower hurdle than having to believe that it does show one or more of the specified matters. There is no rule that there must be a reference in the disclosure to a specific legal obligation or a statement of the relevant obligations nor is there a requirement that an implied reference to legal obligations must be obvious. However, the fact that the disclosure itself does not need to contain an express or even an obvious implied reference to a legal obligation does not dilute the requirement that the Claimant must prove that she had in mind a legal obligation of sufficient specificity at the time he made the disclosure - **Twist DX and others v Armes and others UKEAT/0030/30/JOJ**.

137. The reference to public interest involves a distinction between disclosures which serve only the private or personal interest of the worker making the disclosure, and those that serve a wider interest.
138. It is still possible that the disclosure of a breach of a claimant's own contract may satisfy the public interest test, if a sufficiently large number of other employees share the same interest. In such a case it will be necessary to consider the nature of the wrongdoing and the interests affected, and also the identity of the alleged wrongdoer. These are also referred to as the four factors in **Chesterton**.
139. It is not for the tribunal to determine if the disclosure was in the public interest. Rather the question is:
- 139.1. whether the worker considered the disclosure to be in the public interest;
- 139.2. whether the worker believed the disclosure served that interest; and
- 139.3. whether that belief was reasonably held.

Breach of a legal obligation

140. As regards legal obligation, in **Boulding v Land Securities Trillium (Media Services) Ltd (2006) UKEAT/0023/06** HHJ McMullen QC held the following:

"The legal principles appear to us to be as follow. The approach in ALM v Bladon is one to be followed in whistle-blowing cases. That is, there is a certain generosity in the construction of the statute and in the treatment of the facts. Whistle-blowing is a form of discrimination claim (see Lucas v Chichester UKEAT/0713/04). As to any of the alleged failures, the burden of the proof is upon the Claimant to establish upon the balance of probabilities any of the following:

(a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on.

(b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

141. "Likely" is concisely summarised in the headnote to **Kraus v Penna plc [2004] IRLR 260, EAT** Cox J and members:

"In this respect 'likely' requires more than a possibility or risk that the employer (or other person) might fail to comply with a relevant obligation. The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable, or more probable than not that the employer (or other person) will fail to comply with the relevant legal obligation. If the Claimant's belief is limited to the possibility or risk of a breach of relevant legislation, this would not meet the statutory test of likely to fail to comply." [24 and 25].

142. In **Eiger Securities LLP v Korshunova [2017] ICR 561**, Slade J held:

“In order to fall within ERA s.43B(1)(b)... the ET should have identified the source of the legal obligations to which the Claimant believed Mr Ashton or the Respondent were subject and how they had failed to comply with it. The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation...”

The decision of the ET as to the nature of the legal obligation the Claimant believed to have been breached is a necessary precursor to the decision as to the reasonableness of the Claimant’s belief that a legal obligation has not been complied with” [46 and 47].

143. Accordingly, whilst the identification of the legal obligation does not need to be precise or detailed, it has to be more than a belief that what was being done was wrong.

Automatic Unfair Dismissal

144. Section 103A of the Employment Rights Act 1996 provides:

Protected disclosure.

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

145. The statutory question is what motivated a particular decision maker to act as they did – **Kong v Gulf International Bank (UK) Ltd (Protect (the Whistleblowing Charity) intervening) [2022] IRLR 854 [59]**.
146. The reason or principal reason for the dismissal means the employer’s reason. This can be the reason of the dismissing officer, but it may be necessary to look beyond that decision. In **Royal Mail v Jhuti [2019] UKSC 55** (at paragraph 60), the Supreme Court held that where the reason for dismissal is hidden from the decision maker behind an invented reason, it is for the tribunal to look behind the invention rather than to allow it to infect its decision, and provided the invented reason belongs to a person placed in the hierarchy of responsibility above the employee, there is no difficulty attributing that person’s state of mind to the employer, rather than that of the decision maker.
147. As regards the burden of proof, in **Kuzel v Roche Products Limited [2008] IRLR 530**, the Court held:

“The tribunal must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the tribunal that the reason was what he asserted it was, it is open to the tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the tribunal must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.” [59 and 60].

148. A case of whistleblowing dismissal is not made out simply by a “coincidence of timing” between the making of disclosures and the termination of employment - ***Parsons v Airplus International Ltd [2017] UKEAT/0111/17*** [43].

Submissions

149. Both Parties were permitted to make closing submissions, which were also received in writing.

Conclusions

150. I now set out my conclusions on the issues, applying the law as set out above to the facts which I have found. I do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

Implied term of contract

151. The Claimant has asserted that she has a term implied into her contract that requires her to be provided with 48-hours of work per week. She states that this has come about by way of custom and practice.
152. It is undisputed that the Claimant’s employment contract expressly provides for 36-hours per week, across the whole week, Monday – Sunday.
153. It is undisputed that the Claimant regularly worked overtime, and I have found this to be the case. I have found that her hours of work have varied by week, month and year. The records indicated that the Claimant has worked a minimum of her contractual hours rising, on occasion, to almost double this.
154. I have also found that the amount of overtime provided to the Claimant was subject to change.
155. Terms can be implied into a contract by custom and practice; that is if they are customary in a particular trade or locality. A custom or practice must be “*reasonable, notorious and certain,*” and “*because there is a sense of legal obligation to do so.*”
156. I have reviewed the authorities on implied terms and have considered the case of ***Patel v De Vere Group Ltd [2013] 4 WLUK 621***. In the claim before me, I consider that the conclusions in paragraph 114 above from (para 73) within ***Patel*** are relevant.

157. I have found from my review of the Claimant's working hours that she has regularly been provided with overtime. The question is whether the requirement to provide 48-hours of work has been implied into the contract to replace the 36-hours.
158. There is evidence that the Claimant has had regular overtime and that the availability of overtime was well known, i.e. notorious. The provision of overtime is not arbitrary but regulated by the Respondent to ensure that the staff on the floor enable it to meet its obligations to the residents and any training requirements of the staff.
159. At the time the contract was made, it expressly provided for 36-hours of work. This distinguishes this case from **Borror** where there were no such express terms of the contract. I have found that whilst the overtime was regular, it was also voluntary, becoming binding only once accepted.
160. Whilst the working relationship has clearly evolved, it is clear from the data provided that the Claimant's monthly hours both increased and reduced over time. Her annualised average also increased and decreased.
161. I have reviewed the Respondent's data which shows the monthly variations in working hours. The monthly data shows increases and decreases in the Claimant's working time where it can be reduced to contractual amounts or increased to almost double.
162. I have also reviewed the Claimant's P60 data, which provides a snapshot of the annualised average, but not the monthly detail.
163. I have found that the only year that shows an average of 48-hours or over per week is the year 2023 – 2024, which is from both the Respondent's data and the annualised data in the Claimant's P60.
164. There is an express contractual provision of 36-hours within the Claimant's contract of employment. The final year of employment shows an increase over the asserted 48-hour average week, but I am not satisfied that one year means that it is a "*very long established practice*" to have the effect of implying a term to require the respondent to provide the Claimant with 48-hours per week.
165. I conclude, therefore that the requirement to provide the Claimant with 48-hours of work per week is not implied into the employment contract.

Holiday pay claim

166. I have found that the Claimant was regularly offered and accepted overtime. Once accepted, she was obliged to fulfil the shift. Whilst the offer of overtime was not guaranteed, I have also found that the overtime offered to the Claimant was regular and settled.
167. Whilst the overtime was voluntary, I conclude that this should be included within any calculation of holiday pay. (***Dudley Metropolitan Borough Council v Willetts & Ors UKEAT/0334/16, Flowers & Ors v East of England Ambulance Trust UKEAT/0235/17/JOJ and East of England Ambulance Service NHS Trust v Flowers and others [2019] EWCA Civ 947***).
168. The inclusion of overtime in holiday pay flows from the obligations required by the Working Time Directive. This Directive provides for 4-weeks' leave per year and therefore these provisions apply to this time period only.

169. I have found that the Claimant was permitted to take annual leave and was paid for that time off. Whilst I have found that overtime should be included in that calculation, I distinguish this case from **King v The Sash Window Workshop Ltd EUECJ C-214/16** as she has had this right to paid annual leave, albeit the payment was miscalculated. The limitation of 2-years will therefore apply. (Deduction from Wages (Limitation) Regulations 2014 (SI 2014/3322))

In the period from 6 August 2019 until 5 September 2024 did the respondent pay the claimant the correct amount of holiday pay?

170. I conclude that the Claimant was not paid the correct amount of holiday pay during the course of her employment.

Is the claimant entitled to a further payment of £2445.00? If not is the claimant entitled to any further payment in respect of holiday pay?

171. The underpayment suffered by the Claimant is calculated below. I have concluded that this is limited to 2-years as **King v Sash Windows** is distinguished, I have also concluded that the inclusion of overtime is limited to the 4-weeks' of leave as provided for by the Working Time Directive.

Reduction in hours of work – unlawful deduction of wages

Did the claimant's contract of employment contain a guarantee that she could work an extra 12hrs every other week?

172. I have found that the Claimant has worked additional hours throughout the term of her employment and that there have been fluctuations across the years, months and weeks. Her hours ranged from contractual to almost double this. I have found that the Claimants hours in her last year of employment had increased to 48-hours or more per week, but I have concluded that there was no implied term into her contract to require the respondent to provide the Claimant with 48-hours of work per week. I have also found that the respondent did not guarantee overtime, any overtime was voluntary and subject to the needs of the business.

Did the respondent breach the contract of employment by removing from the claimant working shifts on 14 June 2024, 28 June 2024, 9 August and 23 August 2024? Is the claimant entitled to a payment in respect of the said dates at the rate of 12 hrs pay in respect of each date?

173. I have concluded that there is no implied term in the Claimant's contract to oblige the Respondent to provide her with 48-hours of work per week.

174. I have found that in June 2024 the Claimant worked an average of 49.8 hours per week, I therefore conclude that there was no breach of contract, implied or otherwise.

175. The Claimant was provided with her express contractual hours in August 2024. As there is no implied term, I conclude that the respondent did not breach the contract of employment by not providing these shifts and that there is no payment due to the Claimant.

Unfair dismissal

Was the claimant dismissed?

176. The Claimant was not dismissed. She resigned without notice on the 05 September 2024.

Did the respondent do the following things:

Fail to pay the claimant the correct holiday pay between 2020 and 2024.

177. The respondent did fail to pay the Claimant the correct holiday pay during the course of her employment. The obligation to include holiday pay in the Claimant's holiday pay arose when the Claimant's acceptance of voluntary overtime became regular and settled. I am satisfied that this would have been at least for the last 2-years of employment.

178. The Claimant did not complain about her holiday pay until she issued a claim in the Employment Tribunal on 28 May 2024. Additionally, when she did raise the complaint with the respondent by text dated 30 July 2024 stating that she had a contractual entitlement to 48-hours of work, the respondent offered the Claimant the opportunity to meet and discuss this concern formally as a grievance. The Claimant rejected this.

Treat the claimant unfairly in refusing her request to be paid annual leave in respect of the period 16-19 April 2024 following the claimant's accident in Spain?

179. The obligation on the employer in relation to annual leave is to provide paid leave. There is no obligation on an employer to accept every request from an employee, the discretion is there to accept or refuse that request.

180. In these circumstances, I have found that Mr Singh did not tell the Claimant that she would be paid holiday pay and the Claimant did not lose any annual leave because of this circumstance. Additionally, the respondent had received a fit note from the Claimant regarding her absence, and it is not unreasonable for an employer to record sickness absence correctly and pay accordingly.

181. I conclude that, in these circumstances, it was not unfair for the respondent to refuse the annual leave request.

Subject the claimant to a detriment for raising a grievance about the respondent's refusal to pay the claimant annual leave in respect of the period 16-19 April 2024 following her accident in Spain by removing from the claimant working shifts on 14 June 2024, 28 June 2024, 9 August 2024 and 23 August 2024?

182. I have found that the Claimant worked an average of over 49-hours per week in June 2024 and her contractual hours in August 2024. I have accepted the respondent's contention that overtime was voluntary and that shifts were determined based on the needs of the residents and the needs of those working on the shifts. I conclude that the Claimant was not subjected to a detriment for raising her grievance.

Remove from the claimant working shifts on 14 June 2023, 28 June 2024, 9 August 2024 and 23 August 2024?

183. The Respondent did change the shifts on the dates alleged. As concluded above, the Claimant was not without overtime in June and in August she was provided with her contractual hours. I have accepted the Respondent's assertion as to the make up of who is on shift and I therefore conclude that the Respondent did not treat the Claimant unfairly.

On 3 September 2024, after receiving notice of Employment Tribunal in claim 2, was the claimant was called into the office and confronted with a list of allegations of wrongdoing by the claimant and asked to write a statement in response? And was this done in retaliation for the tribunal proceedings.

184. The Claimant was called into a meeting on the 03 September 2024 and handed a Statement of Concern and asked to provide a statement in response. I have not found that the respondent was in possession of the second Employment Tribunal claim but have found that the respondent was in possession of the first and therefore on notice of the Tribunal Claim.

185. I have found that in evidence the Claimant has herself identified several of the alleged incidents detailed in the statement of concern including her leaving the premises to buy a paper and obtain a magnifying glass for a resident and that she had texted a resident's next of kin. Other allegations regarding food, bullying and the GDPR breach were disputed by the claimant. I have found that I have accepted Mr Singh's evidence that these incidents occurred and that they warranted further investigation.

186. I have found that an employer is not obliged to provide an employee of advance notice of an investigation meeting.

187. I have found that an employer is obliged to put allegations to an employee to ensure that they are aware of those allegations and have the opportunity to answer them.

188. I have found that whilst these allegations were not yet fully investigated, there was some substance that required further investigation and enquiry of the Claimant.

Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

189. With regards to the holiday pay, I have found that the respondent has underpaid holiday pay. The inclusion of voluntary overtime within holiday pay is highly fact sensitive. I have found that the Claimant did not raise this specific issue with the respondent until her claim of 24 May 2024 and then refused the offer of a grievance meeting to discuss her hours of work following her text of the 30 July 2024. I accept

that the respondent has underpaid holiday pay and whilst this was unreasonable, in the circumstances that are highly fact sensitive, at the time the Claimant resigned, I do not conclude that it behaved in a way that was likely to destroy or seriously damage trust and confidence between them.

190. With regards to the annual leave request following the Claimant's accident in April 2024; I am satisfied that the respondent had the discretion to refuse annual leave in circumstances where the Claimant was absent due to sickness which was supported by a fit note. I have found that the respondent did not tell the Claimant she would be paid annual leave for this period and I therefore conclude that the respondent did not act in a way that was calculated or likely to destroy or seriously damage trust and confidence between them.
191. With regards to the shifts in June and August 2024, I have found that the Claimant worked overtime in June and her contractual hours in August. I have concluded that the requirement to provide the Claimant of 48-hours of work was not implied into her contract and that the respondent provided shifts to meet its obligations to its residents. I have concluded that the Claimant did not suffer a detriment, and I therefore conclude that the respondent has not behaved in a way that was likely to destroy or seriously damage trust and confidence between them.
192. The respondent did remove the Claimant from shifts in June and August. I have found that the Claimant did work overtime in June and her contractual hours in August. I have also found that I accept the respondent's evidence as to the provision of shifts. I therefore conclude that the respondent has not behaved in a way that was likely to destroy or seriously damage trust and confidence between them.
193. The Claimant has stated that the allegations in the Statement of Concern were fabricated but has accepted that she did leave the premises and she did text a resident's next of kin, albeit she states that she had proper cause and authorisation to do both. I have accepted this evidence.
194. The respondent has stated that Mr Singh witnessed the Claimant outside of the premises when on shift, the alleged bullying, the GDPR breach and that the food allegation was recorded on CCTV, which he has also seen. I have accepted this evidence.
195. The respondent has provided statements from colleagues who were present on the 21 August 2024 who state that they witnessed the alleged incidents. Again, I have accepted this evidence.
196. I have found that there was substance to the allegations which warranted further investigation and enquiry of the Claimant. Whilst I accept that the timing of the allegations and the lack of detail regarding dates in the Statement of Concern made the Claimant's response difficult, I am also satisfied that the respondent took no further action and sought advice.
197. Whilst I am not satisfied that in providing a Statement of Concern the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent, if it did, I am satisfied that the Respondent had reasonable and proper cause for acting in the manner that it did.

Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

198. I have found that the respondent did fail to pay the Claimant the correct holiday pay. I am satisfied that this was an error in calculation as the inclusion of voluntary overtime is highly fact sensitive. Whilst I have concluded that, in the circumstances of this case, the failure to pay was unreasonable, I am satisfied that this breach was not fundamental.
199. I have found that the Respondent did not breach the employment contract by refusing the annual leave request following the Claimant's accident in April 2024.
200. I have found that the respondent did fail to provide the Claimant with shifts in June and August 2024, but I have concluded that they were not obliged to do so.
201. I have found that the Respondent did remove the Claimant from shifts in June and August 2024 but have concluded that the Respondent was entitled to determine the make up of the rota, subject to the Claimant being provided with her contractual hours as a minimum. With regards to the shift changes, whilst the conduct of the Respondent in not discussing this with the Claimant in advance was unreasonable, it did not amount to a fundamental breach of contract.
202. I have also found that the respondent had proper cause to investigate the allegations detailed in the statement of concern further with the Claimant. Again, there is no breach by the respondent.

Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

203. The Claimant did resign following the provision of the statement of concern because of the removal of her shifts and her concerns regarding holiday pay. I have found that the respondent had proper cause to raise the statement of concern, it was not obliged to provide the Claimant with those shifts and regarding holiday pay, I have concluded that in the circumstances of this case, this was not a fundamental breach of contract.
204. In making my decisions I have taken into consideration the size and resources of the respondent organisation and considered the equity and substantial merits of the case.
205. Equity refers to fairness and justice and the question is whether the sanction by the respondent was fair and just in all of the circumstances. In this case the Claimant has resigned following the actions of the respondent. I have considered the respondent's actions and the Claimant's actions and I am satisfied that the respondent did not commit a fundamental breach of the Claimant's contract to entitle her to resign.
206. In considering the substantial merits of the case, this case has developed from the annual leave request from April 2024. The Claimant was open in that had the respondent told her at the outset that she would only receive SSP she would have accepted it. The Claimant did not lose any annual leave because of the respondent's actions and I have been satisfied that whilst the respondent has made an error in the

calculation of holiday pay, this was able to be rectified once the facts of the Claimant's circumstances had been explored. I have also concluded that the respondent had proper cause to raise concerns with the Claimant.

Protected disclosure

207. In considering whether the Claimant made a protected disclosure there are five conditions that must be satisfied, which I have detailed above and I consider each in turn.

Was the claimant's grievance, made around about 6 May 2024, about the way that the respondent treated the claimant in respect of her request to be paid for annual leave for the period 16-19 April 2024 following her accident in Spain a qualifying disclosure as defined in section 43B of the Employment Rights Act 1996?

208. The Tribunal will need to determine:

What was said or written by the claimant to her manager? When it was said or written?

208.1. By a grievance dated 28 May 2024, the Claimant stated:

Dear hasib I wish to raise a formal grievance

Whilst on annual leave in Spain at the beginning of April I was struck by a car on 5th April 2024 and was hospitalised for 5days, I was not able to return to the uk until 17th April , I was in contact with deputy manager throughout my time in Spain. Sick leave and annual leave was discussed and DM told me that what ever was in my best interests regarding sick / annual leave. My doctor made me fir for work for Monday 22nd April and a fir note was given to yourself. On my return to work on 22nd April I informed DM that I would like to take 4 days annual leave to cover my sick, this was marked on my time sheet as annual leave. Cut off date for wages is the 27th of each month. On Friday 3rd May I was on my day off when I received a call from DM asking me if I could put in an email the days I wanted to claim annual leave and not sick 16 – 19th April 4 days, he informed that I would be getting paid but it needed to be emailed to the relevant department. To add insult to injury I received an email on Monday 6th May (which was our payday) informing me that annuyal leave was not approved and I was made to take sick pay. This decision was cruel and unfair, as I was lead to believe I would be paid annual leave and not sick pay

I would therefore like to raise a formal grievance.

Whether the claimant disclosed any information?

209. There must be a disclosure of information. In **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38**, the EAT held that to be protected, a disclosure must involve giving information and must contain facts and not simply voice a concern or raise an allegation.

210. I have reviewed the grievance in light of the context in which it was made, in that it followed a refusal by the respondent to exercise its discretion to allow the Claimant to retrospectively be paid annual leave for a period of certified sickness absence.
211. I am satisfied that whilst the Claimant is voicing her concerns, i.e that the decision was cruel and unfair, I am also satisfied that there is no disclosure of information. Additionally, and for completeness, I am also satisfied that the Claimant believed that she was raising a personal grievance about a personal matter in her interests alone. I therefore also conclude that the Claimant did not make the disclosure in the public interest.
212. Given my conclusions above, the grievance is not a qualifying disclosure. The Claimant could therefore not suffer a detriment because of the raising of a qualifying disclosure.

Remedy

213. In calculating remedy for holiday pay, it is noted that the hours worked as provided by the Respondent differs from that provided by the Claimant in her P60 calculation. I will take the Claimant's case at its highest and will calculate remedy based on the higher of the two averages where there is a discrepancy. Also, the years being awarded are for the last 2-years of employment being from September 2022 to September 2024, which is why the figures differ from those given above.
214. With regards to the limitation of the payment to 2-years, this is limited by Statute, and I can only award payment for the last 2-years of employment.
215. The Claimant worked a total of 3807 (plus June (216 hours), July (188 hours) and Aug 24 (192 Hours)) in this period. This gives a total of 4403 hours worked in the period.
216. The total hours worked includes time that the Claimant took for annual leave.
217. The Claimant received holiday pay for (5.6×36) 201.6 hours in each year period.
218. In the period September 2022 – August 2023, the Claimant worked 2108 hours. This meant that she worked an average of 45.4 hours, per the Respondent's payment details. The P60 provides for an average of 47.5, which albeit is for the tax year, so I round up to 47.5 average per week.
219. The Claimant was paid annual leave at the rate of 36-hours per week, when she should have been paid at the rate of 47.5 hours per week, for 4-weeks of her annual leave. This amounts to a total of $((47.5 - 36) \times 4) = 46$ hours were underpaid.
220. The rate of pay at this time was £9.59 and therefore the Claimant is owed £441.14 gross.
221. In the period September 2023 to September 2024 the claimant worked 2295 hours. This meant that she worked an average of 49.4 hours per week, per the Respondent's calculation, but I round up to 50-hours per week, per the Claimant's P60, albeit this is for the tax year.
222. The Claimant was paid annual leave at the rate of 36-hours per week, when she should have been paid at the rate of 50-hours per week, for 4-weeks of her annual leave. This amounts to a total of $((50-36) \times 4) = 56$ -hours were underpaid.

223. The rate of pay at this time was £10.42 and therefore the Claimant is owed £583.52 gross.
224. The respondent states that the Claimant has overtaken her holiday and are seeking a deduction. An employer counter claim has not been brought, and I am not at liberty to make this deduction.
225. The Respondent is therefore ordered to pay the sum of **£1,024.66** gross to the Claimant subject to deductions for tax and National Insurance, to be paid by **17 July 2026**

Approved

Employment Judge Illing
Date: 22 June 2026

JUDGMENT & REASONS SENT TO THE
PARTIES ON:
23 July 2026

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FOR THE TRIBUNAL OFFICE