



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4117003/2018**

5 **Held in Glasgow on 18, 19 and 21 February 2018**

**Employment Judge: Mary Kearns (sitting alone)**

10 **Mrs J Lochhead**

**Claimant  
In Person**

15 **Thomas Bradley & Co Ltd  
t/a Thomas Bradley & Co  
Tay House**

**Respondent  
Represented by:  
Mr W Lane  
Solicitor**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 The Judgment of the Employment Tribunal was to dismiss the claim.

#### **REASONS**

1. The claimant who is aged 56 years was employed by the respondent as a business development manager from 3 March 2017 until her dismissal on 3 May 2018. On 27 August 2018, having complied with the early conciliation requirements she presented an application to the Employment Tribunal in which she claimed that her dismissal was automatically unfair.

#### **Issues**

2. As the claimant did not have two years' continuous employment with the respondent, she was not entitled to claim 'ordinary' unfair dismissal. Her claim was for automatically unfair dismissal under section 104 Employment Rights Act 1996 ("ERA"). The claimant's case was that she was dismissed for the reason or principal reason that she asserted a statutory right.

3. The question for determination by this Tribunal is whether the dismissal was for that reason or not; and if it was, the appropriate remedy.
4. The claimant originally pointed to two statutory rights she said she had alleged the respondent had infringed: (i) the right to receive a written statement of employment particulars; and (ii) the right to be accompanied under section 10 Employment Relations Act 1999. However, the latter right does not fall within the lists in section 104 and a claim for automatically unfair dismissal for having asserted it is not competent. The claimant accordingly indicated that her case was that the reason or principal reason for her dismissal was that she had asserted her statutory right to receive a statement of employment particulars.
5. There was some reference in the evidence to the claimant also having asserted the right to receive an itemised pay statement. Paragraph 8.2 of the ET1 sets out the details of the claimant's claim so far as relevant as follows: "*Due to asserting my Statutory Rights on 8<sup>th</sup> March 2018 re my question about my job contract, job description and my current terms and conditions I was told I would get a letter out for a meeting to discuss further with my trade union representative present this Statutory Right was denied as I received an unexpected disciplinary hearing date instead of an initial discussion...*" There is no mention in the ET1 about asserting a statutory right to an itemised pay statement. This was not part of the originating application (and in any case, did not take the claimant's case any further forward). Accordingly, on the basis of the dictum in Chapman v Simon 1994 IRLR 124 CA that it is the act of which complaint is made in the originating application and not some other act that must be adjudicated, I have disregarded it.

### **Evidence**

6. The parties lodged a joint bundle of documents ("J") and referred them by page number. The claimant also lodged a number of further documents ("C"). The respondent called the following witnesses: Mr Scott Ewart, consultant and Mr Steven Bradley, partner. The claimant gave evidence on her own behalf.

### **Findings in Fact**

7. The following material facts were admitted or found to be proved:-

8. The respondent is a company engaged in 'later life planning' including pre-paid funerals, wills and trusts. The company started in 2016 and operates in Scotland and the North of England. It currently has twenty employees. At the time of the claimant's employment it had around ten employees.
- 5 9. In or around February 2017 the claimant made a telephone call to the respondent's partner and senior manager Mr Steven Bradley. She told him that she had heard of the respondent, knew what they were doing and would like to have a mutually beneficial chat with them. Mr Bradley asked another member of the respondent's management team, Mr Scott Ewart to reach out to the claimant and have a meeting  
10 with her. At the meeting Mr Ewart explained to the claimant that the company was a new start up business which was just getting off the ground. The claimant indicated that she was unhappy in her present post and they discussed the possibility of a role for the claimant with the respondent and what opportunities she could bring to the table. It was agreed that the claimant would join the respondent  
15 as business development manager. On 27 February 2017 Mr Ewart emailed the claimant (J64) confirming what had been discussed and agreed. In the email Mr Ewart said: "If you can generate leads and enquiries whilst doing some actual signing up (although I'm happy to attend clients you generate to thoroughly advise and sign up). Working Monday to Friday. Hours will vary as you know depending  
20 on clients request. But targeting the charities and the events (elderly person clubs, exhibitions, church groups etc)." The email went on to say that they would offer £1,000 per month which would be reviewed after three months. At the end of the email Mr Ewart stated: "We then offer a points based system. For example client buys funeral plan this is 5 points. A trust is 15 points. Now depending on how many  
25 points you get each month will create your commission and we add to your base salary each month. ..."
10. The claimant was employed by the respondent as a business development manager from 3 March 2017 until 3 May 2018. The claimant's principal duties were to generate client leads and arrange appointments for clients with the respondent's  
30 estate planning consultants, to source and attend events to that end and to develop links with charities. For example, the claimant would take a promotional stand and/or give talks at day care centres, conferences or church coffee mornings,

where she would generate leads for the respondent with clients interested in their services.

11. The claimant began work with the respondent on 3 March 2017. Not long after she started work she told Mr Ewart that she was not happy working for £12,000 per annum. It was agreed that the 3 month review would take place immediately and the claimant's salary would be increased to a basic £18,000. On 14 March 2017 Mr Ewart emailed the claimant (J63) confirming that her salary would now be £1,500 per month and stating that commission would be paid one month in arrears. In the email he stated: "Business development manager role entails building relationships with charities throughout Scotland. Generating client leads and sourcing and attending events. Although these will be the main roles/responsibilities there may be other ad hoc duties required." On 19 March 2017 Mr Ewart sent the claimant a further email (J66) with the subject heading "Bonus Points explained". The email stated:

15 *"Points are as follows...*

*55 & over = £10 for each point example someone with 66 points would get basic plus £660.*

*75 & over = £12 for each point example someone gets 90 points they get basic plus £1080.will get you there*

20 *100 & over = £15 for each point. This is where you want to be and aiming for 150 points per month or 1/2 trusts per week will get you there. Example you get 130 points so you get basic plus £1950.*

*Just to make clear of course as an employee this will be subject to usual tax & NI reductions etc but also not achieving 55 points means no bonus will be achieved."*

25 12. One morning in or about October 2017 the claimant was at a networking event where she got talking to a man who worked for Peninsula. The man introduced himself as John Gillespie and said that part of his job involved making sure employees had proper contracts of employment and statements of terms and conditions in place. The claimant had not been given a written contract or statement

of terms and conditions of employment, so she took Mr Gillespie's card and arranged an introduction for him to Mr Ewart. Mr Ewart met with him and engaged him to advise the respondent on HR issues. In or about October 2017 Mr Gillespie drafted an Employee Handbook (J25), which was issued to all staff including the claimant. Peninsula then drafted statements of terms and conditions for all the respondent's staff.

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13. In or about December 2017 Mr Bradley mentioned to the claimant that he was thinking about changing her job title to 'Community and Events Manager'. The claimant said that she would like to discuss it with her trade union representative. (The claimant is a member of Equity). The claimant said to Mr Bradley that she did not even have a statement of terms and conditions of employment from the respondent. By this time the respondent had instructed Peninsula to draft statements of terms and conditions of employment for all their employees, including the claimant. These were ready by around late February/ early March 2018 and were emailed to staff. In a conversation with Mr Ewart on 8 March 2018 the claimant requested a copy of her own statement (J74), and he sent it to her later that day by email. After she received it, he met with her briefly, (still on 8 March) and asked her to sign it where indicated. The claimant said that she wanted to discuss it with her union first.
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14. The respondent's most profitable product is a trust. Generating a lead for or selling a trust attracts 15 bonus points. Generating a lead for or selling a funeral plan attracts 5 points. The claimant was given points for the leads she generated, provided those leads led to sales of the respondent's products by the estate planning consultants who followed up the leads. The general expectation was that those employees, including the claimant, who were involved in business development or sales would generate an average of five booked appointments per week and would score an average of 100 points per month. A booked appointment is where a client agrees a time, place and the service they are interested in. Booked appointments are the respondent's main sales leads.
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15. The claimant did not attain the minimum 55 points in any month of her employment by the respondent, nor did she normally secure 5 appointments per week. The

claimant's monthly points ranged between zero and 44 over the course of her employment. This was significantly worse than the performance of the telephone sales employees. Nevertheless, she was paid monthly bonuses by the respondent most months. These were described by the respondent as 'discretionary' and appeared to have no relation with her monthly points. Over the course of her employment the claimant was paid bonuses amounting to a total of £5,040.

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16. In or about March 2018 Mr Ewart and Mr Bradley analysed the claimant's weekly lead figures (J73). These showed that there had only been two weeks in the period between week 35 (end of August/beginning of September) of 2017 and week 9 (end of February) of 2018 when the claimant had booked five appointments. They also showed that there had only been one week in the period when the claimant's points had extended into double figures and that several weeks the figure was zero. These figures compared unfavourably with those of the respondent's telesales consultants (J411 – 418) who were paid much less than the claimant. Over the 12 week period between week 36 and week 47, Telesales consultant S (who was part time and was paid £8.50 per hour) had arranged an average of 3.8 appointments per week and had earned 46.6 average points per month. Over the same period, telesales consultant N (who was full time and was paid £11 per hour) had arranged an average of 5.5 appointments per week and had earned an average 56.6 points per month. By contrast, over the same period the claimant had arranged an average of 1.2 appointments per week and had earned 14.6 average points per month. Mr Bradley and Mr Ewart were shocked and disappointed by the figures and agreed that they needed to address them with the claimant.

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17. On 20 March 2018 Mr Ewart had a meeting with the claimant. He again asked her about the statement of terms and conditions given to her on 8 March. She indicated that she was not yet prepared to sign it and that she wanted to have an official meeting with her union representative present to discuss it. Mr Ewart broached the subject of her appointment and lead figures and told her that he was unhappy about the number of appointments she was generating and her lack of leads/points. Mr Ewart told the claimant that she should focus on achieving appointments by attending community events, bowling clubs, church and chapel meetings etc and that this was what the job entailed. It was more of a 'community and events

manager' role as that was a more effective way of generating leads. The claimant did not agree with him. She said she did not want to just attend chapel and small events. She insisted that as business development manager she should be going to big events and liaising with charities and other organisations. Mr Ewart tried to get the claimant to refocus on results, but she was focused on the 'Business Development Manager' title. Mr Ewart felt that he was getting nowhere, and that the claimant was not listening to him. Towards the end of the meeting the claimant referred back to her statement of terms and conditions and said she was unhappy with the hours in the statement and wanted to have an official meeting with her trade union representative present. The meeting ended with Mr Ewart saying to the claimant "Right. That's ok. We will have an official meeting." After the meeting Mr Ewart called Mr Bradley and told him the ball was back in his court and that he (Mr Ewart) thought his relationship with the claimant was breaking down.

18. Mr Bradley then telephoned the claimant later on 20 March 2018. He asked her to come in and speak to him the following morning. The claimant refused. She said that Mr Ewart had told her that he would send her out a letter for an official meeting. She told Mr Bradley that it would be best and make more sense to have an official meeting with her trade union representative present and they could move from there. She told him 'thanks anyway' but that she had her diary appointments and other things to do and follow up. The claimant said: "Steven, we've actually had a conversation a couple of times before and nothing's been achieved, it's much better to do this officially".

19. On 22 March 2018 the claimant sent an email to Mr Bradley (J425) saying: "Thank you for your telephone call on Tuesday evening. As you are aware I am not happy with my terms and conditions sent to me on 8th March 2018 or my proposed Job Title change. Can you confirm that my terms and conditions and my Job Title is still the same as when I started with the company."

20. Mr Bradley then contacted Peninsula for advice about how to proceed. On 9 April 2018 they sent out a formal letter (J67) to the claimant inviting her to a disciplinary hearing on 13 April to discuss unsatisfactory output in the booking of client meetings and achieving her points target. The letter also referred to failure to follow a

reasonable management instruction in refusing Mr Bradley's request to come into the office and speak to him. Enclosed with the letter were the claimant's appointment and sales analysis figures (J73) and copies of the emails of 27 February 2017, 14 and 19 March 2017 referred to above.

5 21. The claimant attended the disciplinary hearing on 13 April along with her Equity  
representative, Mr Adam Adnyana. The hearing was chaired by Elizabeth Cook,  
HR consultant with Peninsula Business Services. The hearing was recorded and a  
transcript produced (J81). The claimant said that she had been very shocked to  
receive the letter because she did not have targets and had never had targets. She  
10 said that no one had ever spoken to her about this. The claimant said that there  
was absolutely nothing in her job title to say that she was to generate sales  
appointments and that "it's actually because I asked about my job description and  
my contract that this actual situation has arisen. I've not had a contract from  
Thomas Bradley & Co, I only got it on the 8th of March recently because I had  
15 asked for it and then when I did get it I then had a meeting with Scott and I said  
perhaps we should have an official meeting to try and sort it all out, and he said  
okay that would happen and I would get a letter coming out to me. So, this is me  
just got the letter a couple of days ago but I don't have any targets in my job title."  
In relation to points, the claimant agreed that she did not achieve 55 points per  
20 month. However, she said that she had nevertheless been paid bonuses totalling  
£5,040 over the course of the year.

22. After the hearing Ms Cook prepared a report which contained her findings and  
recommendations. Ms Cook upheld the first two allegations relating to  
unsatisfactory standards of output of work and of booked appointments. She  
25 recorded that the claimant's position was that's he did not have targets. Ms Cook  
referred to the final three lines of Mr Ewart's email to the claimant dated 14 March  
2017: "Business development manager role entails building relationships with  
charities throughout Scotland. Generating client leads and sourcing and attending  
events. Although these will be the main roles/responsibilities there may be other ad  
hoc duties required." She concluded that it was made clear to the claimant from the  
30 beginning that her role required her to generate leads and stated that whilst the  
target of five appointments per week was not explicit, it was reasonable to expect



that a target number of appointments would be generated each week. With regard to the second allegation about the failure to attain 55 points per week, Ms Cook found that whilst there was a disparity between what was detailed in Mr Ewart's email to the claimant dated 19 March 2017 and what had actually happened. She found that, in fact the claimant had benefitted from the decision to pay her a bonus despite her not attaining 55 points per month. Ms Cook did not uphold the third allegation about failing to follow a reasonable management instruction. Ms Cook recommended that the claimant be issued with a final written warning. However, she also stated that given the claimant's length of service, there would be nothing unlawful about the respondent choosing to dismiss her with notice.

23. Mr Bradley considered Ms Cook's recommendations and decided to dismiss the claimant with two weeks' pay in lieu of notice. He wrote to the claimant a letter dated 3 May 2018 (J115) informing her of his decision and of her right of appeal. The claimant appealed the decision by a hand delivered letter which she wrote on 8 May 2018 (J116). Sarah Reid, a consultant from 'HRFace2Face' conducted the appeal hearing on 23 May 2018. During the course of the appeal hearing the claimant stated her position. She told Ms Reid that she had emailed Mr Bradley on 22 March 2018 and that: "I asked him to confirm my job description, job title and terms and conditions were the same as when I started with the company, and I got no reply, and I still have not had a reply to this date about my terms and conditions and my job title. So soon after this conversation, we come up to the 11th of April; I received an invite to a disciplinary meeting. I have concerns that these two actions are linked, and.. the disciplinary action taken against me by my employer, is connected to me raising issues about my employment and my employment rights. It was a discussion about my job title, my terms and conditions that started these allegations in the first instance, and that was when I said I don't have a job contract, and then they were going to – they were talking about changing my job title from Business Development Manager to Community Events Manager, and I said well, I'm actually Business Development Manager, and all of this started from that. So the entire crux of this matter was because I had asked about my job title, my terms and conditions, my contract of employment; All of this is due to me raising issues around my employment and my employment rights."

24. After the appeal hearing Ms Reid prepared a report. In her findings she recorded that: “JL feels that these issues [with not meeting output targets] were raised at a formal setting because she raised concerns about her employment and her employment rights.” Ms Reid found insufficient evidence to support this allegation and did not uphold it. Otherwise, she recommended that the appeal be dismissed and the original sanction of dismissal remain. Mr Bradley considered the report and recommendation from Ms Reid and decided to refuse the appeal. He informed the claimant of this by letter dated 13 June 2018 (J146).

25. The reason for the respondent’s dismissal of the claimant was that they were unhappy with her output in terms of the number of client appointments she had booked and the number of leads she was generating. They considered that she was not generating sufficient business to justify her salary, particularly when her results were compared with those of the telesales consultants, whose pay was much lower. The claimant’s assertion of her statutory right to a written statement of employment particulars was not the reason or principal reason for her dismissal.

**Applicable Law**

26. Section 1 Employment Rights Act 1996 (“ERA”) provides that not later than two months after the beginning of employment:

**“1 Statement of initial employment particulars**

(1) *Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.”*

27. Section 104 of the Employment Rights Act 1996 provides so far as relevant as follows:

**“104 Assertion of statutory right**

(1) *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 –*

*(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or*

*(b) alleged that the employer had infringed a right of his which is a relevant statutory right.*

5 *(2) It is immaterial for the purposes of subsection (1) -*

*(a) whether or not the employee has the right, or*

*(b) whether or not the right has been infringed;*

*but for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.*

10 *(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.*

*(4) The following are relevant statutory rights for the purposes of this section –*

15 *(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal....”*

### **Observations on the Evidence**

28. It appeared from the documents in the bundle that in her evidence to the Tribunal the claimant had accidentally conflated her conversations with Mr Ewart on 8 and 20 March 2018 and aside from this that she had more generally conflated the  
20 events of those dates. Aside from that, the relevant evidence so far as within the knowledge of each of the witnesses was for the most part not really in dispute and is more fully discussed where appropriate below.

### 25 **Discussion and Decision**

29. An employee asserts a statutory right for the purposes of section 104 either by bringing tribunal proceedings to enforce it or by alleging the employer has infringed

the right. In this case the claimant relies upon the second ground. There is no requirement that the employer had actually infringed the right, only that the employee asserted in good faith that they had done so. Put shortly, the claimant's case is that she had asserted her statutory right to a statement of written particulars of employment both (i) in or about December 2017 to Mr Bradley when he mentioned to her that he was thinking about changing her job title to 'Community and Events Manager', part of her response being that she did not even have a statement of terms and conditions of employment from the respondent; and (ii) in a conversation with Mr Ewart on 8 March 2018 when she requested a copy of her own statement of terms and conditions (J74). This was sent to her later that day under cover of an email.

30. I think there is enough here to amount to the claimant asserting her statutory right to written particulars (under section 1 ERA) and alleging that the respondent had infringed that right, given the conversations in December 2017 and on 8 March 2018 (by which time the relevant statement had been drafted and was quickly sent to her). The key question in this case is whether the fact that asserted the right was the reason or principal reason for her dismissal. The claimant's case was that when she asserted her statutory right to Mr Ewart on 8 March 2018 he got angry and made a rash decision to dismiss her. She rejected the suggestion that her dismissal was because of her performance. The respondent's case was that the claimant's allegation that her right to a written statement of particulars had been infringed was no part of the reason for her dismissal; and that the dismissal was because of her performance, and specifically, her failure to generate sufficient leads and appointments.

31. The claimant disputed that the bonus targets set out in Mr Ewart's email correspondence of March 2017 applied to her. She also denied that they were performance targets. That was a logical position for her to take standing the terms of the correspondence and the fact of her bonus payments. She did not dispute that she had not scored 55 points in any month, nor that she had not generally managed to secure 5 appointments per week. A comparison of her own records (C420) with the respondent's redacted (J157) and unredacted (J419) records suggested that the claimant's performance against the indicators of points and

appointments were broadly as the respondent's witnesses had testified. However, it was also not in dispute that the respondent had paid the claimant a total of £5,040 in bonuses despite her not having achieved their targets. Indeed, there appeared to be no relationship whatsoever between the bonus and the claimant's performance against those indicators. If they were related, then Mr Ewart was completely unable to explain how.

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32. However, this is not an unfair dismissal claim where the reasonableness or otherwise of the dismissal is in issue. The only issue for me is whether the reason or principal reason for dismissal was the claimant's allegation that her right to written particulars had been infringed. That is a question of fact. The burden of proof is on the claimant to establish the reason she contends for on a balance of probabilities. I concluded on balance that the claimant has not established that she was dismissed for alleging that her right to a written statement of particulars had been infringed or for asserting that right. There was no real evidence to support that contention.

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33. The claimant had been involved in bringing Peninsula in to draft the written statements and the respondent had instructed them to do so. Some staff had had their statements by 8 March and when the claimant requested hers it was sent to her the same day. It ought to have been provided within two months of the start of her employment and was certainly very late but I did not conclude that anyone was annoyed with the claimant for pointing out the infringement or asserting her right. All the evidence including the claimant's suggested that she had a warm and respectful relationship with both Mr Ewart and Mr Bradley until things began to unravel on 20 March 2018. From that date it appeared to me that the parties were at cross purposes. Mr Ewart and Mr Bradley had analysed their figures and were concerned that the claimant was earning a comparatively large salary and not generating many leads and appointments. As far as they were concerned the point of the meeting on 20 March was to ask the claimant to concentrate her efforts on signing up potential clients at small community events like bowling clubs and church coffee mornings which had proven more effective for business. Unfortunately, the claimant was not listening. She was focused on brand awareness, liaising with charities and the sort of higher-level business development that the respondent as

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a start up business could not really afford. The claimant thought the meeting of 20 March was about her terms and conditions and her job title. In reality, it was about asking her to refocus on tangible results. What became clear at that meeting was that the claimant was not prepared to refocus and did not agree that this was necessary. Mr Ewart felt that he was getting nowhere and that she was not listening to him. He said in evidence: "I realised I was literally getting nowhere". The claimant came across in court as an impressive character who has strong views on the way things should be done. My conclusion from all the evidence was that it became apparent to Mr Ewart at that meeting that she was not prepared to listen to him or change the way she was doing the job and that accordingly, her lead and appointment figures were unlikely to improve. Mr Ewart reported on his meeting to Mr Bradley later on 20 March.

34. Mr Bradley then tried to arrange an informal meeting with the claimant to see if he could sort things out but unfortunately the claimant misread the situation, thought his principal concern was her job title and terms and conditions and insisted on a formal route. The matter was then handled by Ms Cook and Ms Reid who listened to the claimant, considered the evidence and made recommendations. The discussions at the disciplinary and appeal meetings were recorded and the transcripts lodged. These transcripts further indicate that the reason for dismissal was the claimant's lead and appointment record, which record did not appear to be in dispute. The claimant accepted in evidence that she had not earned 55 or more points during her employment and that she did not normally fix five appointments per week. I concluded that the reason for dismissal was that the respondent was unhappy with the claimant's output in terms of the number of client appointments she had booked and the number of leads she was generating. They considered that she was not generating sufficient business to justify her salary. Finally, it was apparent that the claimant's assertion of her statutory right to a written statement of employment particulars was not the reason or principal reason for her dismissal.

35. I was not convinced that the respondent had made it clear to the claimant that she was expected to meet the targets they were seeking to apply and had this been an unfair dismissal claim under section 94 I would have had considerable reservations about that. However, had that been so then no doubt the issue would have been

managed differently. As the claimant does not have the requisite two years' continuous employment to claim 'ordinary' unfair dismissal, the matter ends there.

36. It remains for me to thank both Mr Lane and the claimant for their able conduct of the case.

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**Employment Judge**

**M Kearns**

**Date of Judgment**

**25 March 2019**

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**Entered in register  
and copied to parties**

**26 March 2019**

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