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EMPLOYMENT TRIBUNALS

Claimant

Mr E Bitar

Respondent(s)

Nuffield Health

AND

Heard at: London Central

On: 27 April 2017

Before: Employment Judge Burns (Sitting alone)

Representation

For the Claimant: Mr Ohringer, of Counsel

For the Respondent: Mr Bownes, Solicitor

Reasons provided following request pursuant to Rule 62(3) of the Employment Tribunal Rules of Procedure 2013.

REASONS

1. These are claims in contract and for authorised deduction from wages, and for unfair dismissal. The unfair dismissal claim raises various subsidiary issues namely, for how long the Claimant was an employee of the Respondent (on which depended whether he had sufficient continuity of service to claim ordinary unfair dismissal) and secondly, whether the dismissal was for making protected disclosures.

Application to widen issues

2. At a Case Management Preliminary Hearing on 13 October 2016, the Claimant was given leave to add the unfair dismissal whistle blowing and unauthorised deduction from wages aspects of his claim. In paragraph 3.3.1 of the list of issues produced by Judge Lewzey, she confirmed that the protected disclosure to be relied upon was the Claimant's grievance on 7 June 2016 (erroneously referred to in her note of 7 June 2015). The Claimant was given leave to amend his claim within these limitations.
3. When producing Further and Better Particulars of his amended claim, he sought to add other protected disclosures including for example raising health and safety concerns in the summer of 2015 to his then line manager. This was drawn to Judge Lewzey's attention and by letter dated 14 March 2017, she refused to agree to

amend the list of issues to include the wider the range of protected disclosures. This refusal was repeated in a further letter written on her instructions on 20 April 2017.

4. Notwithstanding this, in the Claimant's skeleton argument prepared for trial Mr Ohringer, set out a range of further protected disclosures which the Claimant wished to rely upon including health and safety complaints made in May 2012 and the complaint by the Claimant to the Information Commissioner in April 2016 which had resulted in a letter being sent by the commissioner to the Respondent dated 11 July 2016, four days before the Claimant was dismissed.
5. Mr Ohringer submitted that I should allow the Claimant to rely on these additional disclosures and in particular the matter relating to the information commissioner and that I was not bound by the list of issues. In the alternative he applied for leave to formally amend the claim to add these matters.
6. I refused these applications, doing so once I heard all the evidence. My reasons for refusing are as follows.
7. Firstly, Ms Lewzey had already considered whether to allow the Claimant to add issues or amend the claim further and had made rulings about this in April and March which, if they were to be challenged at all, should have been challenged at the EAT.
8. Secondly, if I am wrong about that, I would in any event refuse to change Ms Lewzey's ruling because the Respondent has prepared for the trial upon the basis of the issues identified in October 2016 and reconfirmed in the letters in March and April 2017 and has not prepared to meet wider allegations. For example it had not prepared any witness evidence from the person who received the information commissioner's letter of 11 July 2016. From a forensic point of view, it would be very unfair to add a new dimension to the trial which the Respondent had not prepared to deal with.
9. Thirdly, adding an extra protected disclosure would not make any difference to the outcome. There is no evidence at all that Ms Renton, who I find made the decision to dismiss the Claimant, was even aware of any of the protected disclosures that the Claimant had made. Her reasons for dismissing the Claimant were quite different.
10. I did however allow the Claimant to amend to bring a small claim for £20.50 converting it from an authorised deduction to contract because there is no forensic prejudice. Ms Lewzey had not had her mind turned to that particular proposition and in any event, if I did not allow it the Claimant could in theory at least bring the claim in the County Court.

Witnesses and evidence

11. During the hearing I heard evidence from Tannaz Zadeh, from Alice Eggerton, from the Claimant, from Kevin Wallace and Jared Margolis. I read a statement from Judy Renton who could not attend because she had suffered a serious injury recently. The documents were in a large bundle and in a separate small supplementary bundle. I was given a Claimant's written skeleton argument and a written final

submission and numerous authorities from both parties. Mr Bownes for the Respondent kindly provided a written chronology.

Findings of Fact

12. The Claimant started work for Cannons Health and Fitness on 18 September 2006 under an "Instructor Consultancy Agreement". Cannons Health and Fitness transferred its business to the Respondent and the Claimant became contracted to the Respondent under the same 2006 contract.
13. The Respondent provides health-promoting facilities such as gymnasiums and swimming pools to the paying public.
14. Under the 2006 contract the Claimant would attend at the Fulham Sports Centre and swimming pool to work as a swimming instructor on a part-time basis working on Thursday and Friday afternoons and on Saturday mornings during school terms. I refer to these as his "core hours".
15. In September 2015 he signed an employment contract to carry out the same duties. There is no dispute that he was an employee of the Respondent from then on.
16. From about 2006 onwards the Claimant was permitted to provide private lessons for his own pupils using a swimming lane in the Fulham pool for which he would pay Cannon Health and subsequently the Respondent about £10 per hour. These private lessons were fitted in around the core hours. The private pupils would pay the Claimant directly. By 2016 this private element of the Claimant's work at Fulham was far more valuable in terms of remuneration for him than were the core hour work.
17. When the Claimant was asked to sign the employment contract in 2015, he asked his then line manager, Ms Zadeh whether this would affect his long-term arrangement under which he was permitted to hire a lane for his private pupils and Ms Zadeh said it would not. I do not accept that Ms Zadeh gave any specific assurance however as to how long the arrangement would continue and I do not find that she discussed it with the general manager at Fulham at that time, Mr Margolis, (who ceased to being general manager at Fulham at the end of August 2015).
18. Mr Margolis was succeeded as general manager by Mr Barr. At the time the Respondent was trying to implement a decision made on a company-wide basis to 'bring all the swimming lessons in-house'. What this meant was that all swimming lessons in the Respondent's swimming pools should be provided through the Respondent itself and not by private contractors making use of the Respondent's swimming pools.
19. On 21 January 2016, in a meeting between the Claimant and Mr Barr, the latter told the Claimant that his use of Fulham swimming pool for providing private lessons could not continue. The Claimant was unhappy about this and complained but Mr Barr reiterated on 3 February 2016 that the Claimant's private lessons in the pool must cease with immediate effect.

20. The Claimant wrote a letter of complaint which was received by Mrs Melvin on 22 February 2016. She wrote on 3 March 2016 stating that the Claimant had the benefit of a discretionary licence which the Respondent was entitled to terminate on the giving of appropriate notice. She in effect agreed that the Claimant had not been given adequate notice and gave him an extended notice period until 30 April 2016 which was the period of extension he had requested.
21. In April 2016, Ms Zadeh ceased acting as the Claimant's line manager and Judy Renton replaced her. Mrs Renton was unfamiliar with the task of co-ordinating and managing swimming lessons and swimming instructors and she was under a lot of pressure. She wrote to the Claimant in April complaining that he was not replying to emails and trying to set up a one-to-one meeting with him to discuss a number of matters including a renewal of his CRB clearance and various other administrative matters relating to his transition to the PAYE system. Also she complained that she was struggling with the Claimant having taken time off during the first week of term and asking if he was able to extend his core hours for providing lessons – see page 190.
22. On 10 May Mrs Renton wrote again. She was still trying to get CRB documentation from the Claimant. She asked him if he was able to make up on 4 June lessons which she was proposing to miss on 14 May. The Claimant's reply was that he could not because it was half term and he was going to be away with his family – page 203.
23. On 18 June 2016 the Claimant asked for time off on 15 and 16 July.
24. On 20 June, Mrs Renton wrote expressing her disappointment that the Claimant was again wanting time off and pointing out that he was required to provide a commitment when he agreed to provide a term of lessons. By this time the Claimant had requested time off on three occasions and had also said he was unable to extend his teaching week to make up for lessons he had missed resulting from his time off. She refused to authorise the time off on 15 and 16 July – see page 242.
25. At the same time Mrs Renton was trying to arrange the teaching programme for the forthcoming autumn term commencing in September 2016. She wanted to meet with the Claimant to discuss a new better working timetable and this would involve rearranging the Claimant's working hours to suit the Respondent's business needs and she had a proposal for the Claimant which she wanted to discuss with him. She proposed meeting the Claimant on Wednesday 13 July for this purpose – see page 244.
26. On 21 June the Claimant wrote to say he could not meet Mrs Renton on the said dates she was proposing and he reiterated that he would be taking off 15 and 16 July so Mrs Renton should arrange cover to him, page 250.
27. On 8 July 2016 the Claimant wrote to say that he would be unwilling or unable to discuss any proposal for revision of his core hours until he had received the outcome of a grievance which he had lodged complaining about a number of matters including the removal of the facility for hiring a swimming lane to provide his private lessons. Until that was resolved, he would like simply to maintain the same working

hours which he had had for the last nine years. These he had already given to Mrs Renton in a text dated 30 April namely 3-5.30pm on Thursday and Fridays and 11-12am on Saturday mornings – see page 2 of the supplementary bundle and page 265 of the main bundle.

28. The Claimant also said he wished to continue enjoying the existing annual leave policy. What this meant was that he wished to be able to request and obtain leave during school terms on the giving of notice.
29. The reasoning which lay behind the Claimant's stance at this juncture was that he was still hoping to get his private use of the pool restored through the grievance. The valuable private hours were fitted around the core hours. He did not want to expand his core hours or change them in case this prejudiced the more valuable private lessons which took place around the established core hours and which he was hoping to have reinstated through the grievance.
30. Hence there was a direct conflict of interest between the Claimant's desire to restore and then protect his valuable private lessons in the Fulham pool on the one hand and the Respondent's desire firstly to stop the private lessons which had already in fact taken place on the expiry of the notice at the end of April 2016 and secondly to expand and rearrange the Claimant's core hours to ensure that the Respondent could deliver the in-house swimming lessons reliably.
31. On 11 July Mrs Renton sent her penultimate email to the Claimant. She wanted to be reminded about the Claimant's core hours. Secondly, she required the Claimant to agree that he would not take any annual leave during the term time. She was unwilling to allow the team to continue being placed under pressure and strain, as she put it. She asked the Claimant to come back to her by 13 July 2016 – page 265.
32. On 14 July 2016, the Claimant sent his timetable from 2015, in effect reiterating that he would be willing to work his established core hours but no other hours. He also suggested that Mrs Renton should consult with Ms Zadeh but how instructors had been able to absent themselves during the term time in the past of the giving of notice, hence in effect he was refusing to agree not to take leave during the term - page 268.
33. On 15 July Mrs Renton sent the email in which she dismissed the Claimant and terminated his employment contract summarily. It is a lengthy email. The most relevant part appears on page 272 and 273:

"I am not prepared to move forward with any team member who is not willing to provide 100% support to our swim school, the club and its business needs. This includes a total commitment from all our swimming instructors, all of who found time to re-arrange their busy schedules to attend the recent staff meeting including those not event yet currently teaching for us and all of who provided me there and then with this commitment. You have been with our swim school for a very long period of time and have built an excellent reputation with the parents using this service. You have been a valued member of our team since I first took you on as a self-employed instructor when I ran the swim school in 2008 and your commitment at that time and during that time I had total commitment from yourself and I enjoyed working with you

very much. I understand that since then you have had many issues during your time here but this should not affect any future work with our club or your commitment to it. As part of the fantastic employment benefits package the company is offering each employee, it expects, quite rightly, a return from them. I have absolutely no confidence that should any issue continue between you and the company, you will be able to put them aside and give me the true commitment I would expect from my team. Therefore, and because you are under a 0 hour contact and I am under no obligation to request your services, I can confirm that I will be unable to offer you any swimming lessons with us any longer here at Fulham. I am truly sorry that it has come to this situation but I have been given a job to do and in order to do this to the best of my ability and in order to expand and grow the swim school, I have had to make this very difficult decision.

I wish you and your family the very best for the future.”

34. It was suggested that Mrs Renton’s real reason for dismissing the Claimant was that he had made protected disclosures, in a grievance meeting on 7 June. The relevant facts about this I find as follows: The Claimant had lodged a grievance in May 2016 primarily about the removal of the facility for him to hire the lanes for his private lessons. That grievance was referred to Kevin Wallace, a general manager from another site who had never met the Claimant before and who appears to have had very little knowledge about what was going on at Fulham. There were three formal issues raised, none of which are relied on as protected disclosures. At the end of the grievance meeting on 7 June, which took place away from the Fulham site, I find that the Claimant did mention to Mr Wallace the fact that he had complained to Mr Barr about Mr Barr having disclosed confidential information which the Claimant had written about Ms Zadeh to Mr Barr and which Mr Barr had subsequently sent on to various other people contrary to the Claimant’s wishes. Secondly he mentioned to Mr Wallace that on 7 June that he had raised health and safety concerns about the Fulham pool area which the Respondent had failed to address. These matters appear in the Claimant’s record of the meeting of 7 June at page 229.
35. Mr Wallace denied that the Claimant had mentioned these things to him but I much preferred the Claimant’s evidence in this regard and did not accept Mr Wallace’s unconvincing denials.
36. I therefore find that these matters were mentioned and they were indeed protected disclosures.
37. I do not find however that Mrs Renton was in any way motivated by these issues when she decided to dismiss the Claimant. We can see that on 8 July, the Claimant informed her that he had raised a grievance over various matters. Notwithstanding this, Mrs Renton carried on and tried to negotiate and deal with the Claimant in her email of 11 July 2016. The Claimant himself told me that he had never mentioned any of these protected-disclosure-type matters to Mrs Renton. It is clear from the lengthy detailed email exchanges leading up to the particularly lengthy explanatory email of 15 July what the reasons were for Mrs Renton dismissing the Claimant and none of them had anything to do with the matters raised by the Claimant in the 7 June grievance.

38. Even if I had allowed the Claimant to rely upon his complaint to the information commissioner as a protected disclosure, this would not have changed my view about this point.
39. There is no evidence or basis for me to draw an inference that Mrs Renton knew about it or was motivated by it at all.

Relevant law

Employment status

40. In Autoclenz Ltd v Belcher 2011 UKSC 41 the Supreme Court upheld the Court of Appeal's decision reported at (CA 2010 IRLR 47) that the main indications of employment status are control (by the employer of the employee), mutuality of obligation (the employer to provide work and the employee to do the work in exchange) and personal performance (an ability by the person providing the service to substitute someone else is strong indication against employment). The proper approach to classification in the employment context is to look at the substance and not the form of the relationship. Courts and tribunals have much greater scope to look behind the written terms of a contract to provide labour or services than the ordinary common law rules of contract would allow. Clear evidence of employee status – such as control, mutuality of obligation and personal performance – will, however, be required before an express contractual term that negates employment status can be disregarded. Initial bargaining power will also affect the weight to be given to the written document.

Law of unfair dismissal

41. Section 98(4) ERA 1996 provides as follows:
42. Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
- a. depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and
 - b. shall be determined in accordance with equity and the substantial merits of the case.'

43. The ACAS Code of Practice No.1, Disciplinary & Grievance Procedures (2009) provides that that an employer wishing to discipline an employee should carry out an investigation to formally establish the facts; inform the employee in writing of the problem; after a proper interval, hold a meeting to discuss the problem; decide fairly on the appropriate action, and provide an opportunity to appeal. If these steps are not taken then, even if the employee has been guilty of misconduct, it is likely that the dismissal will be unfair and, under Section 207A of the Trade Union and Labour Relations Consolidation Act 1992, an Employment Tribunal, in awarding compensation for unfair dismissal can, if it considers it just and equitable in all the circumstances to do so, increase the award it makes to the employee by no more than 25%.

Law of SOSR dismissals

44. Section 98(1)(b) of the Employment Rights Act 1996 provides that (any) substantial reason of a kind to justify the dismissal of an employee holding the position which the employee held can be shown by an employer.
45. To be recognised as SOSR the employer must submit evidence showing what those reasons were and that they were genuine and substantial and not frivolous trivial or capricious. Harper v National Coal Board 1980 IRLR 260.
46. Where business reasons are put forward as SOSR then the reasons must be sound and. Where there is a sound reason for a re-organisation and the only sensible way to deal with it is to terminate the existing contracts offering the employees reasonable new ones, and the employee refuses to accept the new agreement, that is a substantial reason such as to justify the dismissal within section 98(1)(b) Hollister v National Farmers Union 1979 ICR 542
47. It does not follow from the fact that it may be reasonable for an employee for personal reasons to refuse to agree to such changes that it is unreasonable for the employer to dismiss him for such a refusal. Nor is it the case that less favourable terms can only be imposed in cases where the very survival of the business depends on it. The employer does not have to show that the re-organisation was essential but that it was for sound business reasons. Chubb Fire Security v Harper 1983 IRLR 312
48. If SOSR reason is established then as with any other potentially fair reason the Tribunal must then consider section 98(4) as set out above.

Conclusions

Contract claim

49. The arrangement whereby the Claimant had the facility to hire lanes in the pool to provide private lessons, was an informal licence terminable on reasonable notice. The consideration passing to the Respondent under the arrangement was the £10 per hour for the lane hire charge and not the provision of the Claimant's services and teaching core hours. The arrangement was oral and not referred to in the 2006 agreement which had an entire agreement clause. Under the arrangement the Claimant derived a private profit from a business he was conducting as a self-employed person. This did not change when the Claimant moved onto the 2015 employment contract which referred to and dealt with his core hours only.
50. The Claimant submitted that the arrangement was a perk and part of his employment contract and alternatively could not be terminated save by the termination of the employment contract itself.
51. There was no express term to this effect. I do not find that Ms Zadeh's discussion of this matter with the Claimant 2015, amounted to an expressed assurance about how long the arrangement would continue into the future.

52. It is implausible and contrary to business common sense that the Respondent or any other owner of a large commercial swimming pool would enter into an agreement on a permanent basis to hire out lanes at a cheap rate to private contractors. It is not necessary to imply a term to this effect either. The obvious term to be implied is that if and when the Respondent wanted to use its own swimming pool for its own business, it would be entitled to bring the arrangement to an end by giving reasonable notice.
53. Mr Barr did not give reasonable notice but Mrs Melvin did. The arrangement was lawfully terminated on 30 April 2016.
54. The only valid claim the Claimant has under the arrangement which has now come to an end, is for any lost profit he suffered for the period between 3 February when Mr Barr prematurely terminated the arrangement and the date in March 2016 when he received Mrs Melvin's letter of 3 March 2016.

Duration of employment status

55. I find the Claimant was an employee from 2006 until his dismissal in 2016. Although the 2006 contract purports to be a consultancy agreement and the 2015 agreement states that the Claimant had no previous continuity of service, neither of those agreements reflected the reality of the situation in so far as the core hours were concerned.
56. The Claimant had to wear a uniform and it was provided by the Respondent. He had to attend meetings just like the other employees. He was managed by a line manager.
57. I accept the Respondent's submissions on this point at page 6 of Mr Ohringer's outline submissions.

"There can be no doubt that mutuality of obligation existed for each term when the Claimant was required to give a course of swimming lessons to the Respondent's clients. He was required to work his allotted hours and teach his pupils for the duration of the term. He was paid for this. If a class was cancelled he was still paid.

The Claimant did this under the Respondent's control. The autonomy he had was no more than that which is given to any qualified professional who well-knows how to do his job. The Claimant worked set hours, he taught the pupils assigned to him, he followed the Respondent's curriculum, he represented the Respondent and he wore their uniform.

There can be no real suggestion that there was a broad right of substitution – the Claimant was required to teach the classes unless he was on annual leave or sick. The Respondent would arrange cover if the Claimant was absent (although the Claimant would help see if another teacher was available). Cover could only be provided from the existing cohort of swimming teachers engaged by the Respondent and only with the Respondent's consent.

As each term's courses were assigned to the Claimant in the middle of the previous term, there were no periods when he was not subject to a contract of employment,

even if the work had not commenced. He was therefore subject to a contract for service even during the holidays.

Alternatively, any gaps were temporary cessations in work under Section 212(3)(b).

The Claimant's work for the Respondent was so clearly in the nature of employment that he had asked a number of times to given a formal employment contract. When he was given such a contract, it was a formality – there was no change to the practical working arrangements. That is because the arrangement between the Claimant and the Respondent was that of employment before and after it was regularised with the contract of September 2015.'

58. Hence I find the Claimant did have sufficient continuity of service to be protected from unfair dismissal as an employee. He had approximately nine or ten year's continuity of service.

Reason for Dismissal

59. The reason for dismissal was the fact that the Claimant was unwilling to discuss changes to his core hours until his grievance was resolved and his refusal to provide confirmation that he would not ask for leave during the term time.

60. I do not regard this as "some other substantial reason" and it was not submitted to me by the Respondent that it amounted to misconduct.

61. The Claimant's employment contract did not forbid annual leave except for the fact that leave could not be taken during the month of January. There was an established procedure which Mrs Renton had inherited namely that instructors teaching during the school term should give adequate notice of their intention to take leave. They did not have an absolute right to give notice and take leave no matter what but clearly there was some sort of working arrangement whereby leave could be taken during term provided that reasonable notice could be given in advance. That is backed up by the provisions of the employment contract.

62. Mrs Renton was not on a sound legal basis when she firstly demanded that the Claimant should give at least four weeks' notice of leave, and then when she changed to saying that she required an undertaking not to take leave at all during the term.

63. I accept, of course that it is very disruptive if people on the one hand commit to teaching a term of lessons and then take lots of leave thus throwing the whole programme into disarray. If that is something which is causing problems to the Respondent, it could amend the employment contract rather than just deal with the matter by sending ultimatums through emails.

64. In any event, when dealing with somebody like the Claimant who is a family man, probably it would not be reasonable to insist that he should never be able to take time off during term particularly when his working hours included Saturday mornings.

65. The other big issue was the Claimant not wishing to modify his core hours until his grievance had been resolved. Plainly the question of the core hours and the private lessons were linked for the reasons already mentioned. (If he changed his core hours, this would prejudice his private lessons and if he expanded his core hours, the same effect may well result.)
66. From his perspective, he was still hoping to get his private lesson facility in the pool reinstated through the grievance and in July 2016 had recently attended a grievance hearing to discuss this and he wished to wait for the outcome (which at that stage at least he assumed would be forthcoming in the fairly near future, - although in the event he never in fact got a reply to the grievance until it turned up in the disclosure for the Tribunal Hearing)
67. Considering his view of the matter it was reasonable of him to say that he did not wish to change his core hours but wished to stick to his established pattern.
68. From the Respondent's point of view, it had the benefit of a zero hours contract under which it dictate hours to employees who could take or leave them. Under a zero hours contract, the employee has no obligation to provide hours of work to an employee and Mrs Renton's obvious remedy, if she felt that the Claimant was unsuitable to provide lessons in the autumn term, was simply to exercise her power under the employment contract by telling the Claimant that it did not suit the Respondent to have the Claimant work at all in the autumn term (or perhaps on Saturday mornings which appears to have been the particular issue). She could have arranged for somebody else to teach those hours and the Claimant would have had no grounds for complaint. It was totally unnecessary, in other words for Mrs Renton to terminate the entire employment contract simply because she and the Claimant had reached an impasse as to which hours would be mutually convenient for him to work in the autumn term.
69. There was therefore no business need to make a final decision never to give anymore hours to the Claimant ever again and to entirely sever the relationship.
70. The procedure which she adopted was unfair. The Respondent has a disciplinary procedure and even if this was not a disciplinary matter it should have had gone through a formal dismissal procedure but this was not followed at all.
71. I do not agree with the Respondent's submission that having gone through a formal procedure would have been futile. On the contrary, it seems to be highly likely that it would have resolved matters.
72. I accept that Claimant had been unco-operative in not meeting Mrs Renton although it has to be said against this that she was proposing meetings on Wednesdays for example when he had childcare commitments and was not due to travel the fairly lengthy distance from his home to Fulham.
73. If she had sent a letter as recommended by ACAS warning the Claimant that he was at risk of dismissal and he should come to a meeting at a mutually convenient time in the near future to discuss this idea of dismissing him, then the Claimant would have realised that he was in danger of losing his employment contract and may well

have modified his stance and the two of them would have probably have been able to work something out particularly as the Claimant is obviously a very good swimming instructor, well-liked by the pupils and their parents and had been working at the centre for nine years or so without problems.

74. So I find the dismissal was substantively and procedurally unfair.
75. I do not make any Polkey deduction because I am of the view that had a fair procedure been followed then Mrs Renton and the Claimant would probably have worked matters out, and a dismissal would have been avoided.
76. I do see that the Claimant was somewhat annoying to Mrs Renton in the period from April up to July and from her perspective she saw him as careless and unco-operative in his dealings with her, she being under pressure as somebody unused to the role.
77. On the other hand when it came to the point of dismissing, I have come to the conclusion that the Claimant was acting within his rights in refusing to agree that he would never take leave during the term and in declining to agree to change his core hours until he had the outcome of the grievance, and as I have said Mrs Renton had other options less drastic at her disposal to deal with that situation including as a last resort simply telling the Claimant that he was not going to be working in the autumn but that he would be happy for him to work again when his hours that he could devote to the Fulham pool matched the Respondent's business needs.
78. Therefore after some careful thought about this point, I have decided that there is no contributory fault to be applied to any calculation of damages.
79. So far as the small contractual claim is concerned, I have granted leave, as I have said for this to be brought as a contractual rather than an unauthorised deduction from wages claim. The Claimant told me that he did provide some training in December 2015. £20.50 is what he should have been paid, nobody from the Respondent told me that he had been paid it. Therefore I award that as well.
80. (After these reasons had been read to the parties we adjourned and the parties agreed remedy so I did not have to deal with that)

Employment Judge Burns
19 May 2017