



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Watkins

Respondent: Flame International

Heard at: Reading Employment Tribunal
(Hybrid hearing)

On: 15 to 17 February 2022, 14 to 17 June 2022 (deliberations in
Chambers 25 and 29 July 2022)

Before: Employment Judge Eeley
Mr P English (by CVP)
Mr S Edwards (by CVP)

Representation

Claimant: Mr T Watkins (claimant's husband)

Respondent: Ms H Platt, counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant was not engaged to work for the respondent pursuant to a contract of employment. The claimant was not an employee during her time working for the respondent.
2. As the claimant was not an employee, the Tribunal has no jurisdiction to determine the claim of unfair dismissal (Part X of the Employment Rights Act 1996).
3. The claimant was a worker within the meaning of section 230(3)(b) and section 43K of the Employment Rights Act 1996 during her time working for the respondent.
4. The claimant may have suffered unauthorised deductions from wages during her time working with the respondent but the Tribunal is unable to determine this complaint without hearing further evidence and submissions from the parties in relation to unpaid, accrued annual leave.

5. The claimant's complaints of protected disclosure detriments contrary to section 47B of the Employment Rights Act 1996 fail and are dismissed.
6. The claimant's complaints of detriment on the grounds that she asserted a statutory right in relation to working time contrary to section 45A of the Employment Rights Act 1996 fail and are dismissed.

REASONS

1. The claimant brings claims of protected disclosure detriment and/or automatic unfair dismissal and a claim of automatic unfair dismissal and/or detriments for asserting a statutory right. She also claims unauthorised deductions from wages. The issues for determination by the Tribunal were agreed between the parties and were set out in the case management summary of Employment Judge Chudleigh dated 25 February 2021 [77]. These were again checked and agreed with the parties at the start of the final hearing.
2. The Tribunal was referred to an agreed hearing bundle which ran to 435 pages which was enlarged to 518 pages with the addition of supplemental documents following further voluntary disclosure between the parties in between the February and June hearing dates. Numbers in square brackets are references to pages in the bundle unless otherwise indicated. We had the benefit of an agreed cast list and chronology. The claimant prepared an updated chronology prior to the June hearing dates which was not agreed between the parties.
3. The Tribunal received written witness statements and heard oral evidence from the following witnesses:
 - a. The claimant, Sophie Watkins
 - b. Janice Ransom, Founding Director/CEO and trustee of the respondent;
 - c. Nicholas Shenow, Chair of the Board of Trustees at the respondent;
 - d. Simon Walker, contractor providing business support services to the respondent.
 - e. Valerie Batchelor one of the respondent's founding trustees and its current Deputy Director.
4. The claimant presented witness statements from Jan Hession and Richard Dunne. They gave no oral evidence and were not cross examined. The

Tribunal read and considered those statements so far as they were relevant to the issues the Tribunal had to determine.

5. The Tribunal also received written and oral submissions on behalf of both parties, for which we were grateful.

Findings of Fact

The parties

6. The respondent is a UK based Christian charity which was established in 2003. The charity has teams of volunteers who deliver programmes which aim to bring healing in troubled and war torn countries largely through the equipping and training of leaders to support their local communities and refugees, as well as post conflict reconciliation. The charity was set up by Ms Ransom upon her retirement from a career in the military. Ms Ransom was involved in the Armed Forces Christian Union (“AFCU”) which is a tri-service Christian organisation providing spiritual support, teaching and fellowship to those in service.
7. Ms Ransom first met the claimant through her husband, who had previously served in the RAF. She had known Mr Watkins for about 24 years through the AFCU (of which the claimant has also been a member.) Mr Watkins initially applied for a role with the respondent in 2011. Although this did not progress, Mr Watkins continued to keep in touch with Ms Ransom and the charity as well as providing some financial support to the respondent.
8. Mr Shenow has been a trustee of the respondent since 2011 and has been Chair of the Board of Trustees since 2017. This is a voluntary role. He is employed as Head of Communications Strategy and Integration at Tearfund, a large Christian charity. Prior to that he served in the British Army for 18 years, latterly in the rank of Major. As Chair of Trustees he is involved in overseeing the respondent’s governance, strategic direction, periodically reviewing its budgets and ensuring that key compliance obligations are met. Ms Ransom is responsible for the day to day running of the respondent. Mr Shenow met Ms Ransom through the AFCU in around 1994. He also knew the claimant and her husband personally prior to their involvement in the respondent. He got to know them through the ACFU and he was serving in the army during a similar period to Mr Watkins’ service in the RAF. Mr Watkins and Mr Shenow attended the same church from 2008 and he was best man at the Watkins’ wedding.
9. Mr Walker was engaged as a self employed contractor for the respondent between November 2011 and April 2020, providing business support services. Prior to this his last full time employed position was as Head of Financial and Business Development and Planning at the Medical Research Council. His earlier career included roles with HMRC and as a tax consultant. He has also served as a trustee of several charities. He has a number of voluntary roles as a school governor, licensed lay minister and magistrate.

10. Ms Batchelor is one of the founding trustees of the respondent charity and is currently Deputy Director of the respondent. She was formerly a Brigadier in the Adjutant General Corps of the British Army, a post from which she has since retired. During the period covered by the claimant's claims, she was involved in some correspondence and text messages with Ms Ransom and effectively acted as an informal 'sounding board' for Ms Ransom. She was not directly involved in managing the claimant or her work for the respondent.
11. The claimant's professional background is in teaching. She took a career break to have her family. She continued to have caring responsibilities for her children and her mother during the period under consideration by this Tribunal. Furthermore, she cared for her husband when he received a cancer diagnosis. As set out above, she had met Ms Ransom and Mr Shenow through the AFCU.

The claimant's work with the respondent.

12. In February/March 2017 the claimant commenced voluntary work with the respondent. During this period it was agreed that the claimant could submit expenses claims for childcare costs as a volunteer. She submitted those claims to Mr Walker.
13. In January 2018 the claimant approached Mr Walker and Ms Ransom and asked if she could now be paid for extra work (i.e. over and above the time and activities for which she had previously agreed to volunteer). She wrote to the respondent on 20 January 2018 listing the different types of tasks that she had done for the respondent together with her ideas as to what other paperwork she could do for them [134-136].
14. The claimant's preference was to take on paid administrative work. The respondent's view was that there was not really a need for this so they could not offer this role to her. However, they recognised that she had made a valuable contribution as a volunteer and had relevant skills. The respondent therefore proposed other paid work that she could do as a contractor. There were similarities between the work she had done as a volunteer and those tasks which for which she would be paid, although the paid work included some additional tasks. It included some IT support, website and database-related work, supporting the respondent's outreach efforts, plus a limited book-keeping/data entry role. The respondent identified that they could offer the claimant around 6 to 7 hours per week of paid contracted work (sometimes more when supporting events or taking on 'one-off' projects).
15. The respondent says that it was made very clear to the claimant from the outset that the respondent did not have an employee vacancy and that they were creating the self employed contractor opportunity for her at *her* request because she made a valuable contribution to supporting the respondent's activities and they knew it would help her out financially. It was thought that the arrangement would be mutually beneficial. The respondent says that much of the claimant's work was 'desirable' rather than 'essential' to the charity. At no time did the respondent seek to engage an employee to carry

out the tasks which the claimant undertook. The respondent says that they could have used other means to deliver those tasks where necessary, such as looking for another volunteer. The claimant agrees that she always considered herself a contractor and that was the language she used during the course of her time carrying out paid work for the respondent. The respondent had always described her that way. It was only when she realised that she wanted more pay that she rethought this. The Tribunal finds that both parties intended that the claimant should be a contractor rather than an employee from the outset. It was the claimant who had second thoughts about this and sought to clarify or change her status in the absence of a written contractual document to clarify the position. The absence of contractual documentation left room for ambiguity.

16. When there was an employee vacancy within the respondent organisation, we find that it was usually advertised and subject to an open competition between the applicants. The claimant did not go through such an application and open competition process in order to get her paid work with the respondent because of the way that the role arose. The role had been created for the claimant at her own instigation and was not the subject of applications or a job competition. The Tribunal has no way of knowing whether the claimant would have got the job through an open competition if it had been advertised. That said, she must have performed satisfactorily in her prior voluntary work or the respondent would not have seen fit to take her on in the paid role. Whatever the intention of the parties, we recognise that the intention of the parties is not a complete answer to the question of the claimant's employee/worker/contractor status and we go on to make findings below about the relevant features of the relationship and the way that it operated.
17. The respondent's position was that it always went through a formal recruitment process for employees, including agreeing a role description, the number of envisaged hours, salary etc and then advertising the position. The respondent's case was that employees were always issued with written employment contracts as soon as they commenced employment with the respondent. Mr Walker was responsible for putting these into place. The respondent says that when the claimant was engaged as a self employed contractor, the respondent explained the significance of this to her at the time. Notably, the respondent explained that she would not be an employee (or worker) with the accompanying rights and benefits, although she would have the advantages of being a self employed contractor. This part of Mr Walker's evidence was not challenged by the claimant before the Tribunal. It was certainly the case that the parties used the 'language of' contractor status rather than employee status in their dealings with each other from the outset of the paid relationship.
18. Mr Walker contended that he was the primary point of contact within the respondent for arranging contracts, terms of reference etc for the staff team since he was responsible overall for the provision of its business support services. He says that, for some reason, unlike for other self employed contractors, the respondent did not put a written contract in place for the

claimant. He says that this was an omission on his part which may have come about partly because the claimant continued many of her unpaid volunteer activities when she first changed status and partly because this issue had (as he understood it) been covered in the claimant's conversations and/or correspondence with Ms Ransom and Mr Walker. He also contended that they had built up a relationship of trust with the claimant during the months before she started carrying out paid work for the respondent. Mr Walker confirmed that since this time the respondent has put more robust process in place to make sure everyone receives a written contract from the outset of their engagement with the respondent.

19. Mr Walker's further evidence to the Tribunal was that in 2018 it was not his practice to put lengthy agreements in place with contractors detailing terms and conditions, notice periods (there were none) etc in the same way that he did for employees. However, he would usually have put something in writing to confirm the agreed terms. He put forward an example of the sort of common written terms he used for self-employed contractors at that time [141-142]. The claimant did not receive any such document.
20. The claimant's agreed hourly rate was £10.30. She also knew that the work that the respondent had for her was not guaranteed for any set length of time nor was there a guaranteed number of hours per week: it was discretionary. The claimant initially continued to volunteer alongside her paid work for the respondent and she claimed childcare expenses for her volunteering time during this period. The Tribunal finds that the whole arrangement was designed to assist the claimant in increasing her cash resources. We query whether the job would have been paid at all if it had been done by someone else who was not known to need the cash or for whom the individuals within the respondent did not feel any particular responsibility or loyalty. The prior personal relationship between the claimant and individuals within the respondent organisation significantly influenced the respondent's decision to offer the claimant paid work as opposed to unpaid volunteer work.
21. The claimant commenced paid work for the respondent in January 2018.
22. From September 2018 the claimant ceased to work as a volunteer and remained as a paid contractor only. She stopped claiming childcare costs as expenses when she ceased working as a volunteer.
23. Mr Walker recalled that in the autumn of 2018 the claimant asked him if she could be placed onto the respondent's payroll. He understood this to be for administrative convenience so that she would not need to keep submitting monthly invoices. However, he explained that this was only for employees and not for contractors. She seemed to understand and accept this. Mr Walker's position was that at no point after she started work as a self employed contractor up until November 2019 did he ever receive the impression from the claimant that she did not understand the difference between being a contractor and an employee or worker, or that she had ever considered herself to be an employee or worker for the respondent.

November 2019 was the turning point. The Tribunal finds that the claimant either didn't actively consider the employment status issue prior to that time or she did not realise the legal significance of the language which was being used by the parties in this regard. We find that, as far as both parties were themselves concerned, they were in a contractor relationship rather than an employee/worker relationship until the claimant raised the issue in November 2019.

24. Mr Walker had been working for the respondent on a self employed basis since 2011 and was used to invoicing the respondent. The Tribunal finds that Mr Walker assisted the claimant with informal advice on how to run her self employed affairs. He gave her informal advice on a personal basis on: when and how to invoice the respondent, how to keep tax records, National Insurances rates, not being subject to tax on a PAYE basis, the need to complete self-assessment tax returns, how to offset expenses etc. He also offered her a template invoice to assist her.

The way in which the claimant worked

25. It was the respondent's case that there was no obligation on the claimant to accept any of the respondent's offers of work. The respondent's position was that it was not obliged to offer her work. The Tribunal accepts both these propositions. The respondent maintained that the claimant appreciated the flexibility provided by the arrangement. This flexibility included being able to determine when, where or whether to provide services to the respondent. We agree. The nature of the arrangement between the respondent and the claimant was that when work was offered it was always discussed and, when agreed, arranged to fit around the time that the claimant could offer. The parties understood that there was no contractual notice provision so that either party could suspend or terminate the services and the arrangements at any time. The respondent could decide not to offer any further paid work to the claimant or the claimant could say she was not available to accept the paid work. For example, the claimant could take time away from her work with the respondent to look after her children during school holidays. Indeed, we heard of one particular example in February 2018 where the claimant decided to extend her planned holiday by a day or two and she just informed the respondent that she would not be available to work as anticipated. She did not need to ask permission for this and the respondent was not entitled to object or to insist that she returned to work on the pre-planned day. The claimant emailed Mr Walker the evening before the day where she had previously indicated she would be working in the office to tell him that she had decided to extend her short break away so that she would come in on another day to work instead [137]. Nobody at the respondent took issue with this and the claimant did as she wished.
26. The Tribunal accepts the respondent's evidence that the claimant had much greater flexibility than any of the respondent's employees. She was not subject to the respondent's policies and procedures (such as regarding requesting leave or time off to look after children or dependents etc). We find that the claimant told Mr Walker or Ms Ransom if/when she would or would

not be available and she was able to work agreed tasks around this. Alternatively, the respondent would not offer work or expect deliverables when she was unavailable. The respondent conceded that it would sometimes ask the claimant when she was planning not to work but contends that this was purely to enable them to plan operationally rather than to specify the time and place she worked in advance. The respondent maintained that the hours the claimant worked were entirely up to her as could be seen from her invoices for November, December 2018 and January through to August 2019. The respondent contended that the invoices show that she provided reduced services as and when she wished without having to agree this or request it in advance (as would be the case for employees). The respondent also maintained that even when the claimant had informed the respondent that she would carry out work at a particular time, she was free to alter the arrangement. The respondent explains that the claimant often needed to fit her work around other commitments (particularly her young children) and also to undertake caring responsibilities for her mother (who was suffering from dementia) as well as for her husband when he was diagnosed with cancer. This meant that sometimes she worked the days, evenings or weekends that suited her best and changed this at short notice. She informed the respondent as a matter of courtesy, for example via email on 1 September 2018 [126]. She did not have to get permission to make these changes. We accept that the respondent's evidence in this regard accurately reflected the reality of the situation.

27. The Tribunal accepts that there were some limited occasions or activities where the respondent needed to be more prescriptive as to when the claimant worked especially for reasons of operational efficiency. For example, there were six-monthly staff team meetings. The claimant was also asked to attend the four-monthly communications meeting. There were also events and activities which took place on fixed dates such as the "Big Church Day Out," biennial conference and "The Forge" ministry course. If the claimant were to work in relation to these events she would have to do the work at the time the events were actually taking place. Although the respondent was keen for the claimant to support these events and meetings, they could not require her to attend them as a contractor. She was free to decline to do so, although this would have resulted in the loss of paid work for her. In practice, the claimant was always keen to get involved partly for financial reasons but also to enjoy the social interaction and the change of scene.
28. The claimant was also free to decide where she wanted to do the work. With the exception of fixed-date meetings, events and activities (as already outlined) and her book-keeping (which Ms Ransom requested she complete from the respondent's office in line with data protection obligations) the claimant could decide whether to work from home or in the respondent's office and increase her social interaction. She was able to catch up with staff members with whom she had become good friends. The office space available was somewhat limited given the size of the respondent's team so attendance at the office needed to be managed to ensure that those who needed to be there on a particular day actually had a desk available at which

to work. Regardless of their legal status staff members could not always come into the office to work without forward planning. Individual preferences were accommodated where possible. The claimant preferred to work in the office on a Tuesday or the same day that her friend Natalie was also in the office. The respondent accommodated this so far as reasonably practicable.

29. The issue of the claimant sending along a substitute to work in her place never arose in practice and the parties never addressed their mind to it at the time. The issue was only addressed by the parties in retrospect and with one eye on this litigation. The closest they got to addressing the issue in practice was when the claimant was not available to work when it was previously anticipated that she would be. The evidence heard by the Tribunal suggested that the respondent either told the claimant to leave the task until she was available to complete it herself, or someone else within the organisation picked up the task and completed it in the claimant's absence (either Mr Walker, or a volunteer or an employee). Neither the claimant nor the respondent ever suggested that the claimant could or should recommend or send someone else to do the task in her place. This sort of substitution arrangement was just not anticipated by the parties.
30. We do find that there were some limits to the requirement for personal service by the claimant, however. It appears that the claimant's husband assisted her in some of her work and that she billed for that work as though it was her own and was paid for it in the usual way even though it had been partially done by Mr Watkins. This shows that the identity of the individual completing the task was not central to the relationship between the parties. What mattered was that the job was done and paid for, whoever actually did the work in question. Indeed, the Tribunal heard evidence that the claimant took advice from her husband in completing her work tasks and actively involved him in supporting her delivery of IT work for the respondent (particularly in connection with the Microsoft 365 IT migration project.) The respondent concedes this that this was not strictly an example of the claimant providing a substitute but makes the point that drawing on personal contacts to enable the delivery of work in this way is a practice which is commonly used by contractors rather than by employees. Furthermore, the respondent could not say for certain whether any of Mr Watkins' time was included in the hours which the claimant charged for the project. However, Mr Walker recalled the claimant mentioning in a discussion about her invoices for the project that her husband had been quite heavily involved. He gained the impression that Mr Watkins' time was recognised in the higher number of hours charged. Overall, we accept that the claimant was able to bill for some work which she did not do personally or which was partially done by her husband and that this was not questioned by the respondent at the time.
31. The Tribunal finds that there was no fixed line management structure in place in relation to the claimant. Rather, there was a co-operative way of working whereby the claimant would speak to the person who had 'commissioned' the task about the task in question. So, for example, where the task concerned business administration services the claimant was most likely to liaise with Mr Walker given his role for the respondent. If the task concerned or was

linked to 'mission statements' the claimant would more likely approach Ms Ransom. There was no structural diagram or written job description specifying to which person the claimant should report in relation to which work. The claimant did not have a line manager as such in the way that an employee would do. She was not under the direct control of any individual. Nor was anyone answerable to the claimant for their work. The respondent's position is that the claimant had flexibility to deliver the agreed tasks as and how she wished. The respondent did concede that the claimant was primarily responsible to Mr Walker for the delivery of her contracted services but also to Ms Ransom or Natalie in respect of some tasks. In addition, she was accountable, like the rest of the team regardless of their legal status, to the respondent and Ms Ransom's overall leadership. We accept that Mr Walker was responsible overall for the delivery of business services to the respondent and most of the claimant's contracted services related to business services.

32. The claimant was given a business email address for business purposes. This was partially so that she could communicate with external bodies using a business address. It did show those external to the charity that she was part of the organisation and had some authority to operate on the respondent's behalf. We also find that the claimant would have been unable to carry out certain tasks without a business email address as this was a technical requirement in order for her to be able to log onto the respondent's system. She would have been unable to do this using her personal email account. However, we do note that even self employed contractors may be given an internal business email for the work that they do with (and for) a particular 'client.'
33. The claimant initially bought her own laptop in order to do her work for the respondent. However, on reflection, the respondent decided that the computer was not of a high enough specification for her to complete the work effectively. The respondent therefore purchased a second laptop which the claimant then used in her work. At the end of the engagement between the parties both the laptops were sent back to the respondent. The second computer was returned to the respondent because it had always belonged to the respondent. The first computer was given to the respondent by the claimant as a charitable donation of a computer which she had initially purchased for herself.
34. The respondent permitted the claimant to reclaim the cost of other equipment which was reasonably necessary for her to carry out her contracted activities, with prior agreement. The claimant also identified equipment which she determined was necessary for the respondent to deliver improvements in sound recordings. She gained prior approval from the respondent and purchased this equipment for the respondent's use. These were then invoiced via her expenses claims to the respondent (e.g. purchase of headphones for Forge recordings invoiced to the respondent March 2019 page 383).

35. The claimant submitted invoices based on the agreed hourly rate throughout 2018 [348-398].
36. On 9 April 2019 there was an increase in the claimant's rate of pay to £11.35 per hour.
37. The respondent asserted that it was always open to the claimant to negotiate agreed terms with the respondent. An example given is in relation to the Big Church Day Out in 2018 which the claimant originally agreed to volunteer for. She subsequently requested payment for this and this was raised by email on 1 May 2018 [129]. Whilst the Tribunal does not know whether the respondent agreed to this change it is evidence that the claimant knew that she could ask about such changes should she wish to do so.
38. Given the tasks which she undertook for the respondent (e.g. book-keeping) the claimant was able to see the respective rates of pay of those working for the respondent. She would have been able to see that she was paid the same hourly rate as another contractor Tristan Stephenson- Coulshawe. She would also have been able to see that Mr Walker was on the slightly higher rate of £12.50 due to his more onerous responsibilities, higher skills and greater experience. The respondent made the valid point during the Tribunal hearing that if the claimant had thought that her agreed hourly rate was unfair (or illegal) one might have expected her to raise this with the respondent in the 18 months prior to November 2019. We find that during most of that period the claimant's main concern was to ensure that her own hourly rate provided her with sufficient cash flow and with funds for particular purposes (e.g. house renovation). It was only in November 2019 that she started to compare her status to others working within the respondent organisation. It was only then that she started to query whether her underlying hourly rate was the same as others once tax, National Insurance, holiday pay and pension contributions were taken into account (i.e. did the basic underlying rate of a PAYE employee match that of the contractor who accounts for their own tax and NI etc).
39. We find that the claimant did not need to ask the respondent's permission in order to be able to take on other paid work from other sources. This was something which she did from time to time (e.g. teaching/tutoring). At the time of her subsequent pay dispute with the respondent, the claimant was also in discussion with another charity co-located with the respondent (MMI) about taking on some contracted work with them for IT support [118]. She mentioned the hourly rate she had quoted to MMI in her correspondence with the respondent. She would have had more than one source of paid work and evidently felt free to contract with more than one body for paid work.

IT Migration project

40. The respondent contracted with various outside bodies for the provision of IT services. In particular, The Modbury Group hosted the respondent's website domain. Shiloh Computers provided broader IT services and hosted the

respondent's server. It became apparent in 2019 that the respondent's server was coming to the end of its useful life and the proposal was that the respondent should be moved onto Microsoft 365 as a more up-to-date alternative. At around the time this change in server was proposed the claimant suggested to the respondent that they dispense with Shiloh's services. Shiloh's services were somewhat surplus to requirements if the server was due to be phased out.

41. These proposed changes meant that there would have to be a migration of the IT services to Microsoft 365 from the hosted Exchange server (Shiloh). The practical question which the parties were required to consider was: how would the migration be achieved and whose support or services would be needed in order to achieve the migration effectively? Furthermore, was there a deadline by which the migration needed to be completed? The respondent realised that it was desirable to transfer the IT hosting arrangements from Shiloh but from the respondent's point of view there was no immediate rush to do this. The claimant was keen to progress the project which carried some financial benefit to the respondent (it would save some costs) and gave additional work to the claimant.
42. On 21 August 2019 Shiloh emailed the respondent stating an intention to migrate the respondent's email provision to Microsoft 365. This was the "IT Migration Project" [157]. Shiloh initially thought that they would be able to effect the migration remotely and outside business hours. However, the respondent pointed out that not all its staff were office based and working during standard UK business hours. For example, some staff would be out of the country 'on mission' and it would be inappropriate to have the email out of action during such times.
43. The external deadline for the migration project was the date which the existing server was due to go out of operation: 1 November 2019 [164]. Shiloh indicated that after that date the respondent's email would no longer function. That was the ultimate deadline which the respondent needed to work to.
44. In light of the anticipated difficulties Mr Walker instructed the claimant and Natalie to look into moving the respondent to Modbury and using Office 365 by the end of October. He noted that if that did not work the respondent might have to consider working with Shiloh as a temporary measure. The claimant duly explored the options and relayed to Mr Walker the proposal from a Mr Hammerstein that the email transfer should be simple and that users would just have to make three separate changes to their accounts and Modbury could use Team Viewer to support any users who struggled to do this. He would be able to transfer everyone's email archive from Shiloh to the Modbury server along with all the website files so that nothing would be lost. He was due to test the process using the claimant's email before making the overall changes. On 2 October 2019 they agreed this proposal which was due to take place the following week.

45. The Modbury Group agreed to assist with the IT Migration project. The claimant agreed the date for the IT Migration Project as 22 October. On 18 October 2019 the Modbury Group withdrew from the IT Migration Project [171] because they realised that they could not migrate the emails from Shiloh's hosted server after all. The Modbury Group's late withdrawal from the project left the respondent in difficulties. They needed to make the changes to the email system before it went out of service on 1 November 2019. The claimant therefore got to grips with the problem and put in extra work (particularly over one weekend) in order to ensure that the task was completed within the necessary timeframe.
46. On 22 October 2019 the IT Migration Project was completed, much to the respondent's relief [176]. The claimant had not foreseen the problems from the outset and was as surprised by the Modbury Group's withdrawal as anyone else at the respondent. On reviewing the available evidence we are not convinced that the claimant should have been able to foresee these problems. This was essentially a technical IT question concerning which IT provider had the necessary technical capability to do the migration task. The claimant did not hold herself out as an IT specialist and would naturally have relied on the assurances that she had been given by the technical experts. Nevertheless, the deadline of 22 October was duly met, largely as a result of the claimant spending extra time over the weekend talking to the relevant people to ensure that it was completed on time. She subsequently billed for that work. The Tribunal is reluctant to get drawn into attributing blame for the extra work that the claimant did. We cannot know whether she was solving a problem of her own making or just reacting to a situation that others had created. Either way, the migration took place on time and the respondent was not left without IT support/email services when its team was abroad on a mission.
47. On 29 October 2019 the claimant emailed Simon Walker to submit an invoice and request an increase in her rate of pay [120]. After the project had been completed, the claimant raised an invoice suggesting that she receive her hourly rate paid at 1.5 for work which was undertaken during evenings and at the weekend. The invoice was for £800 in respect of "more than" 60 hours (i.e. at up to £13.33 per hour) for additional work. She explained that she had based her calculations on "my normal hourly rate along with a 1.5 hourly rate for evening and Sunday communications with Microsoft" (email 29 October 2019 120]. The claimant was retrospectively trying to renegotiate her hourly rate for certain types of work. Instead of introducing this as a retrospective renegotiation she went straight ahead and submitted the invoice. That is to say, she billed and requested payment for the enhanced rate without getting the respondent's prior agreement. Even if the claimant was unable to agree the enhanced rates with the respondent prior to undertaking the work in question (because it was an emergency), she could have refrained from submitting the invoice before she had broached the subject with the

respondent. In the circumstances the respondent was entitled to be annoyed or upset that the claimant had not prewarned them or obtained preauthorisation before submitting the bill. It is not the normal order of events in a business context. She should at least have raised the issue and explained her reasons for increasing her bill before actually presenting the invoice as a *fait accompli*.

48. Even though Mr Walker was within his rights to be annoyed at the way the claimant had approached the issue, he actually agreed that he would pay the outstanding 60 hours at the normal rate pending resolution of the dispute £681 [120 item 21]. This meant that the claimant would not be out of pocket for the work she had done based on her standard rate whilst her proposal of a higher hourly rate was considered.
49. Simon Walker suggested to the claimant that they meet to discuss and resolve the issue at the earliest opportunity, which would be on the Tuesday or Thursday of the following week (when he would next be in the respondent's office). This was agreed but then the claimant decided to change her plans and work from home that week [118]. Due to Simon Walker's other pressing commitments their next opportunity to meet was not until 19 November 2019. These delays were unforeseen.
50. During the period before the planned meeting the claimant emailed Mr Walker a proposal (on 7 November page 118) suggesting that two rates of pay be agreed: her normal hourly rate for core work (book-keeping, in-house graphics, talk recordings, general website updates, social media and any other more generalised tasks), which was £11.35, and a higher rate of £15 for IT support. This was on the basis that the claimant had proposed this rate to another charity to whom she intended to provide services and this had been agreed. This was then followed by a further email on 12 November with an amended invoice for £1050 for delivery of the IT project with a higher rate (£15 per hour) as well as an additional 10 hours (70 hours rather than the previous 60 hours) [117] and invoice at [398]. So the claimant had modified her proposal since she submitted the invoice so that the rate of pay and the number of hours claimed had both increased. It was apparent from some of the evidence we heard that the claimant wanted to increase her income to compensate for the loss of carer's allowance. That was a significant driver behind the proposal. It also appeared that the extra 10 hours charged for might well include a charge for the claimant's husband's work.
51. Mr Walker's reaction was that there was no problem in principle with the claimant invoicing for the IT project taking longer than expected resulting in more hours. The respondent had agreed to pay for the claimant's time on an hourly rate basis. However, he was taken aback by the manner in which the claimant had gone about seeking an increased payment. Mr Walker would have expected her to speak to him or Ms Ransom in advance rather than simply submit two invoices seeking uplifted, unagreed rates. He also had concerns regarding the proposal to pay for time worked at evenings and weekends on the basis of a higher hourly rate given that the claimant was free to choose when to carry out work and, as a general rule, found it

beneficial to be able to work outside traditional office hours in order to accommodate her other commitments.

52. On balance the Tribunal does not have enough evidence to be able to say who was 'to blame' for the extra time the project took. We cannot say that the claimant's mismanagement of the task meant that she had to work longer as opposed to the project throwing up last minute, genuinely unforeseeable challenges. The respondent seems to have thought that the claimant mismanaged the project and then sought to charge extra money for the extra time it took but we are unable to say whether their assessment is fair or correct. The claimant certainly solved the problem once it arose and took whatever time was necessary to accomplish this. It was not unreasonable of her to ask for payment for this time. The problem was the 'fait accompli' and the demand for a higher rate of pay which had not been discussed beforehand.
53. We find that the respondent had no established practice of paying enhanced hourly rates for "out of hours" work. This was a new proposition. It is also important to note that the timing of the work on the migration project was essentially forced on the claimant by the circumstances but in the normal course of events working 'out of hours' was part and parcel of the relationship and of benefit to the claimant. It gave her the flexibility she required to manage her other responsibilities. So, in effect, the respondent was now being asked to pay a premium for work carried out at a time of day which the claimant would normally have wanted to work for her own reasons (albeit not on this occasion). The Tribunal can see how that would be a difficult precedent for the respondent to accept.
54. Mr Walker also disagreed with the claimant's contention that the IT migration project required a higher degree of skill and that a higher rate of pay was appropriate as a result. He maintained that the degree of technical ability required was such that he was able to effectively act as a 'helpdesk' for the claimant whenever she needed to double check her thinking or correct mistakes. The Tribunal does not entirely accept this. We agree that it was not technical IT work as such in that a 'layperson' could do it. But it did involve a higher level of pressure and skill than the tasks which the claimant usually did for the respondent. It was essentially a project management task. So, it was above the usual level of difficulty demanded of the claimant but did not constitute specialist IT work for which specialist expertise was required.
55. Mr Walker also took the view that a further issue arose from the claimant's demand in that the respondent would usually aim to treat members of the team, including contractors, on a broadly comparable basis. The Board of Trustees would not normally agree a change to one person's pay rate without reconsidering the differentials across the respondent's wider team. We accept that that was a legitimate concern for Mr Walker (and the respondent).

56. Mr Walker responded to the claimant's request on 15 November [115-116]. He pointed out that there was no quick fix that he would be able to offer that day as it would have wider implications for the respondent. He noted that the general principle would be that existing rates would apply unless and until agreement was reached. It was not a matter that he was entitled to decide himself, rather it would require Board of Trustees consideration. He also made clear to the claimant that he was being proactive in looking to resolve the issues raised including by having a preliminary discussion with Ms Ransom. We find that he was entitled to do that and tell her the limits of his powers. He set up a process to resolve it. It could not be done straight away.
57. The claimant's response included: "it makes absolute sense to me that to change my hourly rate for a specific responsibility isn't appropriate given how the respondent is structured." The remainder of her email suggested that this was a request for consideration only. She went on to say that "I love working for the respondent and it's more of a vocation than a job" and "I would not like to pursue this any further unless you would like to have a conversation about this to "put it to bed" as it were." [115-116] It seems that the claimant was looking to backtrack on her previous approach of invoicing first and then seeking to negotiate after the fact.
58. Mr Walker maintained that he was expecting to have a fruitful meeting with the claimant the following week. He also started to consider a proposal that could be put to the Board of Trustees for consideration generally in relation to contractors' rates, pending his discussion with the claimant.
59. Prior to the meeting with the claimant Mr Walker paid the undisputed part of her invoice (namely 60 hours at her agreed rate of £11.35 totalling £681.) This was paid on 1 November as well as the £283.75 on the normal invoice for October. This was so that the claimant would not be disadvantaged financially by a delay whilst they resolved the differences, especially when she had previously explained that she was experiencing cash flow challenges. Mr Walker maintains that he also made it clear that this initial payment of £681 was temporary until they had the opportunity to meet to discuss her request for the additional amounts [119]. He did not pay those additional 10 hours at the time because he was unclear as to whether the extra 10 hours which appeared on her second invoice on 12th November would be agreed and paid. He expected this to be covered in the meeting on 19 November 2019.

Meeting 19 November 2019

60. On 19 November there was a meeting between Mr Walker and the claimant to discuss the claimant's request and the respondent's response.
61. During the meeting Mr Walker explained to the claimant that both he and Jan Ransom had been disappointed by the way she had approached the matter, particularly the total lack of any discussion in advance. He raised questions

about the process she had used. This did not mean that he was not prepared to negotiate the substance of the claimant's request but rather that he wished that she had handled it differently. This then developed into a discussion of the claimant's behaviour and we find that Mr Walker probably pointed out some of her perceived shortcomings. The claimant did not take kindly to this and was angered and upset by Mr Walker's manner and the criticisms he made. The claimant expressed concern that she had potentially annoyed Ms Ransom and in response Mr Walker made an attempt to help her understand the impact some of her actions could have on others in the office. This apparently led to a wider discussion about some of her behaviour. We conclude that it would have been obvious to Mr Walker that the claimant was offended and that she took this very personally.

62. They then discussed Mr Walker's email of 15 November at length exploring the various pay-related issues. At no point did Mr Walker accept that her "pay was lower than £11.35" as the claimant suggests. He did agree with her that an employee paid £11.35 an hour enjoys holiday pay and an employer's pension contribution. He explained that a decision to alter the hourly rate or to use different rates for different work would have to be taken to the Board of Trustees at their next meeting on 29th November so he was unable to agree any change before then. However, he told the claimant that he was progressing a proposal on hourly rates in parallel with his recommendation that it would be timely to carry out a periodic charity-wide pay review. He explained his intention to recommend that both Tristan Stephenson-Coulshaw and the claimant should be paid at the same hourly rate as Mr Walker as a temporary measure (i.e. £12.50 per hour pending any wider review) and that this should apply retrospectively from 1 November.
63. Mr Walker asserted that at this point the claimant became extremely heated or agitated. That she "lost it," screaming and jumping up and down in her chair and shouting that the respondent was employing her illegally that this was unjust and had to be stopped. He maintains that the outburst was so loud that it was heard through the wall by another member of staff (Natalie). Immediately after the meeting Natalie checked whether Mr Walker was alright because she had heard the claimant screaming at him. We accept this as an accurate account of the claimant's behaviour in this part of the meeting. The fact that a third party had to intervene is objective evidence that the claimant was shouting and behaving in an unorthodox manner, otherwise there would be no need for Natalie to check on Mr Walker.
64. Mr Walker took the view that, regardless of the merits of the argument, the claimant's conduct towards him was totally unprofessional and entirely inappropriate. We agree. In fact, the claimant obviously realised that she had overstepped the mark on the day because she asked Mr Walker if they were 'still friends' before the end of the meeting. Mr Walker asserted to the Tribunal that he remained calm and took some time during the meeting to attempt to calm the claimant down, including by explaining what why he felt the approach the respondent taken in relation to self employed contractors was not illegal, immoral, or irregular. We accept that he did this but consider that

this was likely to have been seen as inflammatory and condescending by the claimant at that particular moment. As they left the meeting the claimant asked him “are we still friends?” He reassured her that they were and that he would take her concerns to the Board. They concluded the meeting by the claimant agreeing to send a pay-related proposal which could then be considered by the Board of Trustees. (This was Mr Walker’s suggestion). After the meeting he expected to receive a proposal from the claimant as the agreed next step.

65. Mr Walker reported the event to Ms Ransom when they next met so that she was kept aware of the issue
66. On 20 November 2019 the claimant sent an email to Mr Walker. She suggested that there had been an ‘oversight’ with her hourly rate from the start. She asserted that her hourly rate was determined by Council pay scales (or similar). She asserted that this scale would be for use for employees on payroll rather than as an appropriate comparator for a contractor who receives no holiday or sick pay or pension contribution and receives no payment for administrative work such as tax returns and invoicing. She also started to challenge her standard contracted rate of £11.35 an hour suggesting that, in real terms, this equated to a PAYE rate of £9.79. In particular, she claimed that it should reflect an element for employee benefits she would not be entitled to as a contractor (namely holiday pay, sick pay, and pension contributions). She also outlined her financial responsibilities and alleged that the current hourly rate (not on payroll) was to the respondent’s gain and her loss. The claimant concluded by declining to suggest an increased hourly rate until the “underlying issue of what went wrong is made right as soon as possible” [113].
67. Mr Walker was surprised that the claimant suggested there had been an oversight with the hourly rate from the start which she wanted to be ‘made right’ before coming up with proposals for the future. The claimant had seemed content with how they had finished the meeting on 19 November in terms of agreeing next steps.
68. Before Mr Walker was able to respond, the claimant sent a further email on 21 November [112-113]. She opened the email: “*Further to my email to you regarding my status as a contractor and not an employee (although in legal terms I would now qualify for status as an employee with related benefits)..*” She went on to assert that a contractor would normally agree an increased rate in advance of doing the work but in the circumstances of the migration project she did not realise the extra work involved until it was too late so that there was no time to agree an enhancement. It was her position that this situation happens with contractors and a reasonable agreement is made after the event to pay accordingly and appropriately... “*It is legally entirely acceptable as a contractor to invoice proportionally more should the circumstances dictate that I should.*” The claimant was clearly stating that she believed she would now qualify for employee status (with related benefits).

69. This aspect of the claimant's approach became a feature of the case. The claimant was not prepared to send correspondence to the respondent and then wait a reasonable amount of time for the recipient to receive, read and act upon it. Instead, she had a tendency to send multiple emails to an individual over a short period of time without giving them a reasonable opportunity to respond. The clearest example of this is her emails to Mr Shenow over the course of one weekend (see below) but this was one of a number of examples. The recipient of such correspondence could be forgiven for feeling somewhat bombarded and pressurised.
70. This marked the claimant broadening the scope of the dispute from rates of pay to 'employment status' in general. She may have taken this approach in order to leverage a higher rate of pay (i.e. the equivalent rate to what an employee would get once benefits such as holiday pay etc are considered) but the scope of the argument became wider.
71. Between 20 and 21 November Mr Walker was unable to deal further with the claimant's issues as he was otherwise engaged with pressing matters such as making arrangements for a burial and thanksgiving service for his mother who had died on 31 October.
72. On Mr Walker's return to the respondent's office on 22 November he had to complete and distribute all the necessary documentation for the Board meeting which was to be held on 29 November. This required a lot of input from him. In addition, he was involved in the ongoing preparations for the biennial conference which was due to commence on 29 November. In those circumstances the Tribunal finds that Mr Walker was not 'sitting on' the claimant's grievance or unnecessarily delaying dealing with it. Rather, he had more than one task to accomplish during this period of time. He had to divide his time across a number of tasks. Any reasonable employee in those circumstances would have realised that (proportionate to the priorities and needs of the respondent and the value of the claimant's demands) taking this time before being able to resolve the claimant's grievance was reasonable. In short, it was unreasonable to expect Mr Walker to resolve the claimant's problem then and there and in priority to the other tasks on his agenda during this time.
73. Mr Walker spoke to Ms Ransom at the first available opportunity following receipt of the claimant's emails. He had already explained to the claimant that the next step would be to prepare a briefing paper for the Board of Trustees. He and Ms Ransom agreed that this remained the best way forward despite the claimant not having put forward her own proposal setting out what she was asking for in order to resolve the problem. They also agreed that they needed to consider the concerns raised by the claimant in relation to her employee/contractor status.
74. 22 November was Mr Walker's first opportunity to properly consider the issue. As it was his first day back in the office since the meeting with the claimant

he had had no opportunity to properly consider and respond to the points in her emails.

75. On 22 November 2019 the claimant emailed Ms Ransom suspending her services with the respondent [195]. She stated, *“Under the current circumstances of the problem of the legality of my employment status with Flame I consider that it is best and appropriate for everyone if I suspend my work for Flame for the time being. I have received an email from Simon this morning regarding my DBS check but please be aware that I will not be responding to emails regarding Flame work for the present.”*
76. The claimant seems to be asserting that the respondent is doing something wrong by this stage. She alleged illegality, that her status with the respondent was illegal. She persisted in this description of the situation during the Tribunal proceedings. In reality, the most she could reasonably assert was that the apparent ‘contractor’ relationship did not accurately reflect the legal reality of her work with the respondent (i.e. that she was wrongly labelled or characterised as a contractor when she was de facto an employee). Over time she focused more on the ‘illegality’ of the situation. Her allegations of illegality and implicit wrongdoing on the respondent’s part unnecessarily inflamed the situation before the respondent had a reasonable opportunity to resolve the dispute.
77. No one from the respondent challenged the claimant’s suspension of services on the basis that they considered her to be self employed and therefore entitled to suspend her services at any time without giving ‘notice.’ The claimant used the language of ‘suspension’ to refer to this but we find that it is more properly characterised as her withdrawing her services with immediate effect (as she was entitled to do). A suspension is more properly the terminology used when an employer decides that an employee should no longer carry out their duties under a contract of employment for a period of time but without termination of the contract of employment.
78. Ms Ransom forwarded the claimant’s suspension email to Ms Batchelor. Ms Batchelor was cross examined about the meaning of her text message communications in relation to this issue. Ms Batchelor’s initial response was: *“If advice has been given by who we think, I believe we have no option but to release S quickly and efficiently. Otherwise the festering will continue..”* Ms Batchelor was clearly concerned that the claimant would unsettle others in the workplace and create an unpleasant atmosphere given the small numbers in the workforce. She explained to us that her reference to releasing the claimant was made because she thought the claimant was a contractor and not an employee and that the respondent was therefore under no obligation to retain her. If there was a problem they were under no obligation to offer her any more work. She was effectively recommending that no more work be offered to the claimant until matters were resolved. When she saw the claimant’s ‘suspension’ email she felt that it came out of the blue. The moment that the claimant started to allege there was a problem with the legality of the situation Ms Batchelor was surprised because this did not tally

with her understanding of the position. Ms Batchelor understood that the claimant had the right to withdraw her services. She had commented that the claimant's 'suspension' was good for the respondent in one sense because if someone is working for the organisation who is dissatisfied and makes this known it unsettles the rest of the office. She referred to the suspension being permanent because the respondent had no obligation to reinstate the claimant once she withdrew her services. The respondent was not obliged to resume work with any contractor. That said, Ms Batchelor conceded that she had no authority to make this decision on behalf of the respondent as she was only one of the trustees.

79. Ms Batchelor also cautioned that the respondent should not act without legal advice. She was concerned that Ms Ransom's personal sympathies for the claimant might lead her to take steps without impartial, detached legal advice. In circumstances where the claimant had raised a legal dispute the respondent should respond in kind and protect its own legal position. Ms Batchelor certainly felt that the claimant was alleging that the respondent was intentionally acting illegally. Ms Batchelor's point of view was that the respondent was not abusing the claimant's status, it was all above board so there was nothing illegal in the claimant's contractual arrangement with the respondent. Above all, Ms Batchelor felt that the issue should be left until after the conference and the Trustees' meeting. She was concerned that the respondent had not been given time to reflect and get legal advice and that the respondent needed to focus properly on the issue once the other matters on the agenda had been dealt with.
80. The claimant sought to suggest that Ms Batchelor's reference to the situation being permanent meant that the respondent had decided to dismiss the claimant upon receipt of the claimant's email. However, we accept that Ms Batchelor's position was that she thought the claimant was self employed and so both parties could release themselves from any further obligations without notice. This meant that the claimant had withdrawn her services but the respondent had no obligation to offer her further work in the future. This did not mean that they would not do so but the decision had already been taken by the claimant not to work for the foreseeable future. Ms Batchelor was advising Ms Ransom to get legal advice and deal with it dispassionately. Ms Batchelor did not have the authority to make the decision but was just acting as a sounding board for Ms Ransom.
81. The respondent ended up in this position because the claimant would not let the matter rest. She kept on pushing it. She would not wait for an outcome and so the respondent's witnesses were feeling somewhat harassed by the claimant.
82. Mr Walker started work on a briefing paper for the Board of Trustees on 22 November.
83. On 23 November 2019 the claimant raised concerns with Mr Shenow via a series of emails and voice recordings. On that Saturday the claimant sent

three emails with voice recordings (made by the claimant) attached. The claimant then sent a further email at 17.19 on Saturday checking receipt of the earlier messages. She then sent a further email at 18.27 attaching a further voice recording. Mr Shenow had house guests over the weekend but excused himself and listened to the recordings. [228,227, 197-200, 226, 201-202].

84. The claimant alleges that the emails raised a grievance regarding Simon Walker's conduct towards her in the meeting of 19 November 2019 [197-202-223-227].
85. All this information came to Mr Shenow over a weekend when he had houseguests but he took time to listen to what she was conveying. However, he could not give her an outcome as quickly as she wanted. On any objective reading of the situation the claimant was demanding an immediate resolution to her problem. She did not let it rest with one message but kept following it up and pushing for a response.
86. Mr Shenow emailed the claimant at 19.22 the same day seeking clarification that he had understood matters correctly. He summarised what he understood her complaint to be. The claimant responded at 19.54 summarising her complaint and confirming that this related to her status and that she believed that she was a worker and not genuinely self employed and should have received holiday and other benefits. At 21.00 the claimant sent a further lengthy email summarising her complaint in relation to Mr Walker's handling of her request for a pay increase in more detail [223-224]. Mr Shenow first saw this email the next day (Sunday) and again read what she had to say.
87. The following day (Sunday) Mr Shenow effectively sent an acknowledgement or 'holding email' confirming that he had received everything she had sent but could not respond substantively yet. He effectively asked her to leave it with him and promised her an update by the following Tuesday.
88. Mr Shenow discussed the matter with Ms Ransom on the phone that weekend. Mr Shenow was told that the claimant had suspended her services to the respondent. He took this as ending her engagement with the respondent with immediate effect. They both agreed that they needed to obtain independent advice.
89. They contacted Karen Liddington in order to obtain HR advice. They could not obtain that advice until Wednesday 27 November. Mr Shenow was also told that Mr Walker was drafting a briefing paper for the Trustees. This was sent to Mr Shenow and he asked for further information.
90. Mr Shenow sent an email to the claimant on Monday 25 November to acknowledge the suspension and he confirmed that the suspension would not prejudice the outcome of her complaint in that he would still consider her concerns.

91. The claimant sent a number of emails to Mr Shenow during the period when he was waiting to take independent advice. (We were referred to at least seven in the time up to 27 November). During this time Mr Shenow was working full time for Tearfund and was caring for his mother during a terminal illness. He also needed to prepare for the respondent's biannual conference and Board of Trustees meeting. He therefore had limited capacity to focus on the claimant's correspondence. He did his best to keep her updated and sent emails on 24 and 27 November. The claimant indicated her appreciation of his efforts and was in receipt of pastoral support during this period from Jan Hession, as arranged by Ms Ransom.
92. The claimant continued to bombard Mr Shenow with emails even though he had limited scope to do anything substantive until he had taken advice and attended the Trustees meeting. Although the claimant acknowledged that Mr Shenow was doing all that he could and was handling it appropriately, the reality was that she was still dissatisfied with the respondent's approach and highly critical of the fact she had not had an answer to her complaint as soon as she thought she was entitled to one.
93. Mr Shenow reviewed the respondent's internal policies to see which applied to the claimant. The respondent then got advice from Ms Liddington on Wednesday 27 November. This was followed up in writing on 28 November. The respondent was advised that the claimant was not entitled to the benefit of the respondent's grievance process as she was self employed but that the respondent should look into her complaint in any event.
94. Mr Shenow took the view that main issue arising was that of employment status and that everything else had to follow on from that being resolved. Mr Shenow therefore prioritised the status issue and wanted to resolve the claimant's individual grievance before looking at the wider implications and issues for the organisation as a whole.
95. The claimant raised a number of other issues via email during this time. Mr Shenow read the emails to check that they did not raise matters which needed to be dealt with urgently. If they did not then he decided he would focus on the status issue before coming back to deal with other matters.
96. Mr Shenow decided to use the Trustee Board meeting to give a preliminary view on the claimant's employment status and agree an appropriate response to the complaint.
97. Mr Walker sent his briefing paper to the Board of Trustees late on 23 November [278-283]. Mr Shenow received Mr Walker's briefing paper and considered it. He emailed Mr Walker with the list of questions from the claimant on 24 November and Mr Walker provided his initial response the next day [243]. Mr Walker also used the HMRC employment status checker tool in relation to the claimant's status. Mr Shenow had already used the tool himself and forwarded the output to Mr Walker. Mr Walker felt that Mr Shenow had not entered all the input details correctly which meant that the

result was unreliable. He therefore responded having rerun the status checker for himself and suggesting where Mr Shenow may have erred. Mr Walker also used the status tool to recheck his own and Ms Ransom's status and confirmed the outcome via email [261-262]. The tool did not come up with a clear determination for Ms Ransom but showed that both Mr Walker and the claimant were self employed contractors. (A copy of the output from Mr Walker's check is at page 266-269). When Mr Shenow reviewed Mr Walker's output he was satisfied that it had been completed accurately. He also took advice from Ms Liddington in relation to the claimant's status which also confirmed her self employed contractor status.

98. The Tribunal therefore heard evidence that the HMRC tool was used twice by two different people using two different sets of inputs. Mr Shenow's result initially showed the claimant as an employee and Mr Walker's showed her as self employed. The claimant effectively asserted that Mr Walker was inappropriately manipulating the tool in order to get the answer that he wanted. Of course, that was one possibility. The other possibility was that there was a genuine difference of opinion as to the correct answer to the questions on the tool. If there are different inputs you may get a different answer to the status question. In reality, Mr Walker was the person who worked most closely alongside the claimant and was therefore best placed to give accurate answers to the HMRC questions. Consequently, his results from the HMRC tool may be more likely to be correct. However, for Employment Tribunal purposes the HMRC tool is not determinative anyway. It is more relevant for the Tribunal to look at the features of the relationship and the questions and the answers to them. At paragraph 39 of her witness statement to the Tribunal the claimant presented a table comparing her answers to the questions with those given by Mr Walker. The differences were highlighted in grey. On reviewing the table it appears that both individuals have genuinely answered the questions from their own experience and point of view. It is more a feature of the limitations of the tool that it produces two different answers. The tool poses multiple choice questions and it is possible that none of the answers completely and accurately reflect the true state of affairs in a holistic way. When this Employment Tribunal decides the claimant's employment status we will review the raw evidence and apply the appropriate legal tests and employment law principles to determine the matter rather than follow either of the HMRC status tool results slavishly. After all, the tool is not determinative and has been compiled to give answers for tax purposes rather than in the context of eligibility for employment rights.
99. On 25 November 2019 the claimant telephoned, texted and emailed Ms Ransom to request a meeting with her [250-252].
100. On 26 November 2019 Ms Ransom emailed the claimant to explain that Mr Shenow's view was that she should not meet the claimant until the situation had been investigated. The proper procedure should be allowed to run its course [254].

101. On 26 November 2019 the claimant emailed Mr Shenow to request that she be able to attend the respondent's biennial conference [219] (she had previously confirmed that she would not be attending when she suspended her services to the respondent). On 27 November 2019 the claimant emailed Mr Shenow to reiterate her request to attend the conference. Mr Shenow declined the request [215]. He stated: *"My decision is not intended to isolate you or cause further distress, but I ask you not to attend in the capacity as either one of the team or a supporter. This is because I am concerned that your attendance may both hinder and complicate the speedy resolution of your complaint. I appreciate this may be a very difficult to accept, but I hope the reason makes it clear why abiding with this decision is important."*
102. We accept the evidence we heard that, in the time between the claimant's suspension decision and her subsequent request to attend the conference, the respondent had already made alternative arrangements for someone else to cover the tasks at the conference which the claimant had initially been assigned to do. As a practical matter they did not need her to attend. They also considered that if the claimant was in dispute with the respondent then there was a potential downside to her attending. There was a risk that she would discuss matters relating to her work and her grievance and that this would damage the respondent's reputation unnecessarily. We find that the respondent acted entirely reasonably in asking the claimant to stay away from the conference in the circumstances. She herself had decided to stay away and then sought to change her mind. The respondent had a duty to protect the organisation and minimise risk to its reputation. The claimant was not entitled to change her mind (and the arrangements) unilaterally.
103. On 27 November 2019 the claimant emailed Mr Shenow stating that three contractors were illegally classed as self-employed by the respondent [214] and that the respondent had been avoiding tax and National Insurance deductions on their pay. Mr Shenow considered that the claimant's allegations regarding the status of other contractors would be best considered after the respondent had determined the claimant's status. Given that the claimant's wider concerns all seemed linked to her initial complaint regarding her status and pay he remained comfortable that the best approach was to resolve those key points first.
104. On 28 November 2019 the claimant emailed Mr Shenow to request payment for the November 2019 invoices. In reply he said, *"Please invoice and send to Simon directly. This is without prejudice for hours you have worked for Flame. i.e. when the matter is resolved any agreement to adjust the hourly rate (upward only) will be applied to the hours covered by this invoice. If you do this before Monday Simon will pay you on Monday."* [213] The Tribunal cannot see that this email is at all problematic. All it does is to say that the respondent will pay the sums which are not in dispute pending resolution of the dispute about the enhanced rate of pay and increased hours done on the IT migration project. It is ensuring that the claimant is not unnecessarily kept out of pocket whilst the matter is resolved. It also protects the respondent's position so that it has not conceded that there is an entitlement to a higher

rate of pay but it may agree to this in due course, at which point the claimant will receive the extra pay. That is all that 'without prejudice' means in this context. It protects everyone's interests pending final resolution of the dispute.

105. On 29 November the meeting of the Board of Trustees took place. During the meeting the trustees considered Mr Walker's briefing paper [274-277, 278-283]. Mr Walker also prepared a comparison document considering the claimant's request and his original proposal to her to indicate the practical differences [270-273].
106. We were asked to consider the briefing paper and Mr Walker's commentary at [278] onwards. The claimant characterised this as a false and detrimental narrative about her. At various points during the Tribunal hearing the claimant used the descriptions 'poisonous' and 'twisted' in relation to Mr Walker's documents and words during this time. However, we note that Mr Walker was responding directly to the issues that the claimant had raised. He was entitled to fill in the factual gaps and put the other side of the story to the Board. The claimant's descriptions of the 'poisonous' or 'twisted' narrative are somewhat overblown and do not accurately reflect either the tone or the content of the evidence which the Tribunal has heard and reviewed.
107. There are parts of the commentary which the claimant has interpreted as critical of her. She has seen these as more extreme criticisms than they actually are when read in context and with an objective point of view. Mr Walker did not trash her reputation in the way she asserted in her representations to the Tribunal. We find that the claimant has overreacted and taken Mr Walker's comments out of context. This undermines the claimant's credibility rather than Mr Walker's. Two people may reasonably disagree on an issue without this being evidence of malice on the part of one of them. We find that Mr Walker reasonably disagreed with the claimant's point of view and she was upset by this. It is certainly not the sort of 'smoking gun' that she asserted to the Tribunal. We do not consider it to be evidence of a vendetta where Mr Walker is trying to poison the Board against her. What Mr Walker wrote is *fair* criticism. There is nothing to suggest malicious or underhand behaviour by Mr Walker and we do not accept the claimant's overall negative characterisation of his motives and actions during the relevant period.
108. It is important to note that Mr Walker did attend parts of the Board meeting on 29 November. This would normally form part of his role. Given the nature of his work for the respondent he would need to be on hand to assist the Trustees in relation to certain matters and to provide advice and guidance. This would be normal practice. In addition, on this occasion he presented his briefing paper to the Board and answered their questions. Crucially, he then left the room whilst the Board discussed matters where there might be seen to be a risk of a conflict of interest, where there were concerns over confidentiality or where it was Mr Walker himself who was to be discussed. This ensured that he did not unduly or unfairly influence the Board. He provided relevant information and assistance but the Board discussed

matters amongst themselves fully and fairly and without his presence. Furthermore, the decisions taken were the Board's decisions and not Mr Walker's. They were free to delegate some decisions to the Chair, Mr Shenow.

109. The claimant viewed Mr Walker's presence at and involvement with the Board meeting as malevolent and malign. Again, this does not recognise that he had legitimate and good reasons for participating and that his involvement was not all about the claimant and the claimant's relationship with the respondent. The claimant seems to have concluded that Mr Walker 'had it in for her' and would take any opportunity to work to oust her from the organisation. The Tribunal could discern no reason why he would take that stance or why he would invest such time and energy into ridding himself of the claimant who, at the end of the day, worked only a few hours per week for the respondent. The claimant was not central to Mr Walker's considerations at this time.
110. The claimant also seems to assume that if Mr Walker was present at the Board meeting then she should be too, in order to ensure that he did not 'bad mouth' her behind her back. Again, this fails to take account of the nature and purpose of the meeting. It was the Trustees' Board meeting. The issues which the claimant had raised were but one item on the agenda, the rest of which would have no relevance to her, particularly as she had suspended her services to the respondent at this time. We heard no evidence that she routinely attended Board meetings as part of her work for the respondent. The Board meeting was not a sort of 'grievance meeting' at which both sides to the dispute would be represented and would make their case before the impartial decision maker. We find that there was nothing wrong in principle with Mr Walker attending to present a briefing paper and fulfil his other duties to the Board. The claimant was not thereby entitled to attend and have her say too.
111. The Board were told that the claimant had elected to suspend providing services to the respondent and had effectively ended her (then) current engagement as at 22 November 2019. The implications were discussed at the Board meeting. One possible outcome recognised by the Board was the possibility that the claimant's suspension of services might become permanent. The Trustees also discussed giving the claimant a 6-month "cooling off period" to keep the door open for her potential re-engagement in the future. However, no decision was made at the Board meeting. These were only the preliminary views of the Board.
112. At the meeting there was also a wider discussion around reward and remuneration of the staff team. The Board agreed that there should be a global review in Spring 2020 to include comparison with the pay scales used in other Christian charities and the correspondence between employee pay and contractor hourly rates. Mr Walker was given the job of providing a further briefing paper on these issues for presentation at the next Board meeting.

113. The Board did not seek to determine the claimant's employment status at the Board meeting. A provisional conclusion was reached by the Board that they believed that the claimant was a self employed contractor based on Mr Shenow's investigation to date. The Board did not make any final decision or recommendation. They agreed that Mr Shenow should continue with his investigations and seek further professional advice. Mr Shenow received delegated authority from the Board to make an informed decision as to the most appropriate outcome which did not require further Board of Trustee approval.
114. The outcome from the Board meeting was that the trustees agreed to accept Mr Walker's interim proposal. Pending a full scale pay review the Trustees were willing to pay the claimant a further £402.35. This represented an increase from £11-35 to £12-50 per hour backdated to cover work undertaken since 1 November plus full payment of the claimant's invoice submitted on 12 November for £1060 (of which £691 had already been paid leaving an outstanding balance of £369). The Trustees did not accept an increase of the claimant's hourly rate for the IT project from £11.35 to £15 per hour. Furthermore, the Trustees did not decide the question of the claimant's employee status at that time. This decision was effectively delegated to Mr Shenow to deal with subsequently, although he gave his preliminary view at that stage.
115. The Tribunal was informed that the charity-wide staff pay rates review took place during the first quarter of 2020 and recommendations were developed based on what comparable Christian organisations were paying their staff, both employees and contractors [274-277]. Those proposals were subsequently discussed by the Trustees at a meeting on 20 March and the revised rates were confirmed. There was an agreement that the respondent should seek to negotiate hourly rates with its contractors which were comparable with the pay scale for its employees to ensure fairness and parity across the board. This resulted in an approximate uplift of 12.5% to the existing rates reflecting the fact that contractors are not entitled to holiday or sick pay or pension contributions, incur lower National Insurance contributions and could incur costs for maintaining their own business. Had the claimant waited until Spring 2020 she would have benefited from that pay review which, whilst not recognising her as an employee, would have given her the comparable benefits she had sought [323-326].
116. On 30 November the claimant submitted a further verbal allegation via an audio recording [284-286]. It made allegations about Ms Ransom and a culture of fear, suppression and silence.
117. On 2 December 2019 the claimant sent a series of emails to Nick Shenow [209-211].
118. Mr Shenow considered whether to meet with the claimant about her grievance and considered that, on balance, she had had ample opportunity to articulate her position and communicate with him via her many emails. (He had also, in fact, heard her representations and thoughts orally given than

she had sent various audio recordings for him to consider.) As the provisional conclusion was that the claimant was not an employee the respondent's grievance procedure did not formally apply to her so she was not entitled to a meeting. He felt that the claimant's communications had become increasingly erratic and angry. He was concerned that a meeting was unlikely to be productive and rather risked being unhelpful and confrontational. In any event, he was able to ask for any necessary clarification or further presentations from her as part of their ongoing email correspondence.

119. At around this time Mr Shenow came to the conclusion that:

- i. It was not appropriate to agree a retrospective rate of pay on the terms that the claimant had requested. However, to resolve the matter he was prepared to make a discretionary goodwill payment to the claimant to pay the full amount of her invoice for this period.
- ii. There would be a pay review in relation to all staff in Spring 2020.
- iii. The claimant had been engaged to work for the respondent as a contractor and had never been considered to be an employee. He felt that her working arrangements were consistent with her self employed status.
- iv. The claimant's concerns around Mr Walker's behaviour in the meeting on 19 November were unfounded.
- v. The concerns that the claimant raised about the charity's spending were not substantiated. The charity was getting significant value from its use of Spread Creative and the costs had been properly considered by the Board. He also did not consider that any concerns about payments made for websites and to Shiloh were made out. He did not see grounds for thinking there was a misuse of funds or a breach of the respondent's legal obligations.
- vi. He did not accept that other members of staff were illegally classified as self employed. In any event, there was due to be a wide ranging review of the respondent's contractual arrangements to ensure that it reflected best practice. He could discern no factual basis for the claimant's allegation that Ms Ransom had failed to submit tax returns or make NI contributions. Nor was there evidence to suggest that Mr Walker had avoided tax.
- vii. The claimant had alleged that Mr Walker had encouraged her to falsify a claim for payment. She subsequently withdrew this allegation.
- viii. He did not accept her assertion that Ms Ransom had failed to take her complaint seriously. Nor did he think that there was evidence of a culture of fear caused or perpetuated by Ms Ransom. He noted the inconsistencies in the claimant's position. She repeatedly spoke highly of Ms Ransom but her views seemed to change when she was not allowed to attend

the conference and she then became very critical of Ms Ransom.

120. On 2 December Mr Walker sent an email to Mr Shenow and Ms Liddington appending a draft version of a letter to send to the claimant [289-293].
121. On 3 December 2019 the claimant emailed Mr Shenow with further information as to why she believed that her employment status was not “self employed” [205].
122. On 5 December 2019 Mr Shenow wrote to the claimant to confirm the outcome of his investigation. He rejected the claimant’s claim of being illegally employed as a contractor or that she was an employee. He rejected her request to be paid for the days that she had expected to work during the rest of November (but that she did not work due to her suspension of her own services on 22 November). He confirmed the respondent’s refusal to apply a retrospective pay increase for work done prior to the claimant raising a concern. Instead, he offered the goodwill payment, as described above. He also rejected her contention that she was entitled to a full grievance process since she was not an employee. He confirmed that the respondent would not offer the claimant further work following the suspension of her services. The claimant alleges that this amounted to a dismissal. [298-300].
123. On 5 December, the claimant emailed Mr Shenow questioning the points that he had made in his outcome letter and referring to an email from Mr Walker [297].
124. On 9 December 2019 Mr Shenow emailed the claimant asking her to clarify her email. The claimant replied stating that she had already sent Mr Shenow the relevant information and she declined to engage further without external arbitration [203].
125. On 10 December 2019 Mr Shenow emailed a further response to the claimant [314-316]
126. On 18 February 2020 the claimant presented her ET1 claim form to the Tribunal.
127. In the period from December 2019 to April 2020 Mr Walker assisted to improve best practice following on from the learning points that the respondent had identified in relation to the claimant’s complaint. This included supporting an audit (undertaken by Ms Samuel) of the respondent’s legal arrangements including contracts, policies, processes and risk management. She reported back to the Board at their meeting of 20 March. Mr Walker then progressed the recommendations made. The respondent reached the same conclusion that the claimant had always been a self employed contractor and that anyone taking on her tasks would similarly be a self employed contractor (such as the subsequent contractor taken on by the respondent, Ms Lee).

The only change made by the respondent was that the Board of Trustees decided that written agreements should be put in place detailing extensive terms and conditions so that the basis of every contractor's engagement and legal relationship with the respondent would be set out clearly in writing. Mr Walker also undertook the staff team pay review which resulted in increased rates for contractors being agreed.

128. Mr Walker decided to stop working for the respondent as a contractor on 16 April 2020 as he was not willing to provide services under the proposed new contractual arrangements and it had not proved possible to negotiate an acceptable variation, more in line with the agreement Mr Walker had suggested. Mr Walker sent the claimant a WhatsApp message to let her know that he was leaving the respondent, as a courtesy.

THE LAW

Employment status

129. Section 230 Employment Rights Act 1996, so far as relevant states:

- (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
- (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing.
- (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)-
 - (a) a contract of employment, or
 - (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

130. For the purposes of a whistleblowing detriment claim the definition of "worker" is extended by section 43K Employment Rights Act 1996 which states:

(1) For the purposes of this Part “worker” includes an individual who is not a worker as defined by section 230(3) but who-

...

(b) contracts or contracted with a person, for the purposes of that person’s business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for “personally” in that provision there were substituted “(whether personally or otherwise)”,

...

And any reference to a worker’s contract, to employment or to a worker being “employed” shall be construed accordingly.

Employees

131. There is no statutory definition of a contract of service. The matter is governed by the common law and associated case law. Whilst the control test, the ‘organisational integration’ and the ‘economic reality’ tests are all useful tools to assist in determining whether someone is an employee or not, there is no single definitive test. Instead, the Tribunal must consider all the relevant features of the working relationship in determining whether a given individual is in fact an employee.

132. The most commonly cited starting point is the so-called “multiple (or mixed) test” as set out in Ready Mixed Concrete (Southeast) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433. Three conditions for employment were identified:

- (i) the servant agrees that in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
- (ii) he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree to make that other master.
- (iii) the other provisions of the contract are consistent with it being a contract of service.

133. Following Ready Mixed Concrete it has been established that there is an ‘irreducible minimum’ without which it is impossible for a contract of service to exist. This consists of three elements: control; personal performance; and mutuality of obligation. Even where these three elements are present it is still necessary to examine all relevant factors to see whether they are consistent or inconsistent with employment status and determine whether, as a matter of overall assessment an employment relationship exists (Revenue and Customs Commissioners v Atholl House Productions Ltd [2022] ICR 1059); Kickabout Productions Ltd v Revenue and Customs Commissioners [2022]

EWCA Civ 502) The 'irreducible minimum' are necessary but not necessarily sufficient conditions for the existence of an employment contract. Once the necessary conditions of control and mutuality of obligation were found, a multifactorial approach has to be applied to determine whether, judged objectively by reference to the contract and the circumstances in which it was made, the parties intended when reaching their agreement to create a relationship of employment.

134. A contract of employment need not be in writing. "The relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part." (Autoclenz Ltd v Belcher and ors [2011] ICR 1157).
135. Control is not a bright line test as there are some kinds of work where the scope for control is limited. Types of control may vary. Control may be practical and legal, direct and indirect. It is not necessary for the work to be carried out under the employer's actual supervision or control. Many employees apply skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus the significance of control is that the employer can direct what the employer does, not how he does it. Control is a matter of degree. In a more general sense control requires that ultimate authority over the purported employee in the performance of his or her work rests with the employer.
136. 'Mutuality of obligation' refers to the obligation on one party to provide work for the other and the obligation of the other to accept that work and carry it out. It can be described as the 'wage/work' bargain. A one sided commitment is insufficient: there must be an obligation to offer work and a corresponding obligation to accept it. It does not mean that the employee is obliged to work whenever asked by the employer. It does permit him to refuse work. The question is whether there is an obligation on the claimant to do at least some work and a correlative obligation on the employer to pay for it.
137. Mutuality of obligation is often questioned in cases of so-called 'casual staff.' It is generally a characteristic of casual work that there is no obligation to provide work and no obligation to accept it. Workers are free to work when they wish and employers are free to hire when they wish. Claims by casual staff to employee status generally fail through lack of mutuality of obligation. Nevertheless a casual worker may be classified as an employee if either the worker can point to the existence of a 'global' or 'umbrella' contract of employment which continues to exist during the periods when they are not working; or the worker can successfully argue that he worked under a succession of specific, short term contracts of service.
138. In the case of an umbrella contract the questions will be whether there is an obligation to provide and perform any work that becomes available and whether that obligation continues during non-working periods (i.e. whether mutual promises as to future performance have been made). No contract of

employment, whether called global or umbrella, can exist in the absence of mutual obligations subsisting over the entire duration of the relevant period (Clark v Oxfordshire Health Authority [1998] IRLR 125.) If the course of dealings between the parties gives rise to mutual expectations that work will continue to be provided, this may amount to sufficient mutuality of obligation to found the basis of a global contract (Nethermere (St Neots) Ltd v Gardiner and anor [1984] ICR 612.) If there is no global contract of employment based on a long-standing relationship the employee may still be able to establish mutuality of obligation with a specific engagement entered into as part of that relationship. He may be able to establish that a single contract within the relationship gives rise to employee status for its duration (McMeechan v Secretary of State for Employment [1997] ICR 549)

139. The requirement for personal service is relevant to both employment contracts and worker contracts. Much of the case law focuses on substitution clauses. Where a substitution clause does form part of the true terms of the agreement, the extent of the right of substitution will determine whether the clause is consistent with an obligation of personal performance. Does it provide absolute freedom to either do the job oneself or send someone else to do it, or is it more limited?
140. The issue of control is always relevant but is not necessarily conclusive. In some cases it may be relevant to consider the so-called “integration” or “organisational test” which concentrates on the degree of integration of a worker into the employer’s organisation. Relevant factors may include whether any existing disciplinary or grievance procedure was applicable and whether the individual was included in any occupational benefit scheme. The same issue can be looked at from the opposite perspective. The Tribunal may ask whether the person who was engaged to perform the services is performing them as a business person in business ‘on their own account.’ The degree to which the individual is integrated into the employer’s organisation remains a material factor under the multiple test. Relevant considerations might include whether the individual wears a company uniform or uses the company logo or is subject to the respondent’s disciplinary and grievance procedures.
141. Mutuality of obligation and the right of control are necessary preconditions to a finding that a contract is one of employment. Once those necessary but not necessarily sufficient, conditions are satisfied the Tribunal must deploy a multifactorial approach and carry out an overall assessment of all the relevant factors present in the particular case. At the third stage of the Ready Mixed Concrete test it is the tribunal’s task to examine all relevant factors, both consistent and inconsistent with employment, and determine, as a matter of overall assessment, whether an employment relationship exists.
142. Factors which may be considered as a matter of evidence include: whether the individual provides his or her own equipment to complete the work; whether the individual hires his or her own helpers; what degree of financial risk the individual takes; what degree of responsibility for investment and management he has; and whether and how far he has an opportunity of

profiting from sound management in the performance of his task (Market investigations Ltd the Minister of Social Security [1969] 2 QB 173). The nature of the investigation may also be characterised as considering the so-called “economic reality” test.

143. Tribunals are cautioned against using a checklist approach. Not all details are of equal weight or importance in any given situation.
144. A person in business on his own account will carry the financial risk of that business. So payment by commission or by the job, or the right to set the rate charged or to participate in the profits (or bearing the responsibility for losses) will usually point towards self employment.
145. Payment of a regular wage or salary is a strong indicator of employment. The label given to and the amount of any payment is not necessarily important. A worker’s right to fix his own remuneration is strong evidence of self employment. The fact that there is no payment of a regular salary will not necessarily mean that a worker is not an employee, provided that the existence of some other benefit can be shown.
146. The provision to the worker of benefits such as sick pay, holiday pay and pensions will suggest a contract of employment whilst the provision by the worker of his own tools, equipment and premises will tend to point towards self employment.
147. The incidence of tax and national insurance is also a relevant consideration. Deductions at source suggest employment whereas a gross payments suggest self employment. The opinion of HMRC on status for tax purposes will never be conclusive as to his or her status for employment law purposes. Registration for VAT will also be a pointer towards self employment.
148. The parties’ stated intention as to the status of their working relationship in law may be a relevant factor but the tribunal must always look to the substance of the matter even if the parties expressly agree on a label with the approval of HMRC. The mere fact that an employee requested that he be treated as self-employed will not prevent him from later claiming that the arrangement is still, in substance, a contract of service.

Worker status

149. The definition of a worker for the purposes of the claims pursued by the claimant is set out in section 230(3) Employment Rights Act 1996 (see above). See also section 43K for the purposes of the protected disclosure detriment claim (also set out above).
150. A ‘limb (b)’ worker is defined by statute and there is no substitute for applying the words of the statute to the facts of the case (Bates van Winkelhof v Clyde & Co LLP and another (Public Concern at Work intervening) [2014] ICR 730).

The task for the tribunal is primarily one of statutory interpretation (Uber BV and ors v Aslam and ors [2021] ICR 657). The statutory interpretation should give effect to the purpose of the legislation, which is to give protection to vulnerable individuals who have little or no say over their pay and working conditions because they are in a subordinate and dependent position in relation to a person or organisation who exercises control over their work. It would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a 'worker.' To do so would reinstate the mischief which the legislation was enacted to prevent. After the Uber decision tribunals will focus much less on inconsistency with written documentation and more on the practical reality of the working relationship. The key question may be whether the relationship is one of subordination and dependence having regard to the legislative purpose of protecting those who have little or no influence on the terms under which they work.

151. The following factors are necessary for an individual to fall within the definition of worker:
 - a. There must be a contract, whether express or implied, and, if express whether written or oral;
 - b. The contract must provide for the individual to carry out personal services; and
 - c. Those services must be for the benefit of another party to the contract who must not be a client or customer of the individual's profession or business undertaking.

152. Section 43K(1) ERA extends whistleblowing protection to certain individuals who do not fall within the definition of worker in section 230(3). This includes home workers who are not subject to an obligation to personally perform the work.

153. To be a worker the claimant must show that there is an express or implied contract with the 'employer.' The parties must intend their agreement to create legal relations.

154. For section 230(3) workers there has to be an obligation to perform work personally. Determining whether a contract includes an obligation of personal performance is a matter of construction and is not necessarily dependent on what happens in practice. It does not necessarily follow from the fact that work is done personally that there is an *undertaking* that it be done personally (Redrow Homes (Yorkshire) Ltd v Wright [2004] ICR 1126).

155. The mere presence of a substitution clause in written contractual documentation is not necessarily determinative. The substitution clause may not reflect the reality of the working relationship. The presence of a substitution clause in written documentation is unlikely to prevent a finding of worker status if there is no evidence of such a clause being operated or intended to operate in practice. Even if the substitution clause does form part of the true terms of the agreement it is still necessary to consider the extent

of the power of delegation. Some substation clauses are still compatible with an obligation of personal performance. The theme of the case law is to determine whether the right of substitution was fettered in some way. It may be relevant to consider the circumstances in which a substitute can be sent along to perform the work and who is able to put limits on this: worker or employer? It may also be relevant to consider whether there are any limits on the types of people who can act as a substitute in performing the work. Who decides whether the substitute is suitable or acceptable and by what metric?

156. A line of case law on the ‘contract personally to do work’ under the Equality Act has focused on the question of whether the *dominant purpose* or *feature* of the contract is the provision of personal services. By looking at this it may be possible to determine whether the contract most properly lies in the employment field or the business field (see e.g. James v Redcats (Brands) Ltd [2007] ICR 1006). This may require consideration of whether the dominant feature of the contractual arrangement is the execution of personal work or labour or whether the dominant feature is a particular outcome or objective and the obligation to provide personal service is an incidental or secondary consideration.
157. The last part of limb (b) of the statutory definition makes it clear that if a person renders services or performs work on the basis that the person to or for whom he does so is a customer or client of his business or profession, he is not a worker. In Byrne Brothers (Formwork) Ltd v Baird and ors [2002] ICR 667 it was suggested that “the essence of the intended distinction [created by the exception] must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm’s-length and independent position to be treated as being able to look after themselves in the relevant respects.” It was suggested that drawing this distinction in most cases will involve all or most of the same considerations as when distinguishing between a contract of employment and a contract for services but with the boundary pushed further in the individual’s favour. The idea being to ‘lower the pass mark’ so that cases which fail to attract employee status might nevertheless achieve the protections offered to ‘workers.’ Factors to consider could therefore include the degree of control exercised by the ‘employer,’ the exclusivity of the engagement and its typical duration, the method of payment, what equipment was supplied by the worker and the level of risk undertaken. Factors such as having business accounts prepared and submitted to HMRC, being free to work for others, being paid at a rate that includes an overheads allowance and not being paid when not working might also suggest non-worker status.
158. The crucial question is whether the ‘employer’ is the claimant’s ‘client or customer’ (Hospital Medical Group Ltd v Westwood [2013] ICR 415). The ‘integration test’ will often be relevant in determining whether a person is a worker or in business dealing with a customer or client (Cotswold Developments Constructions Ltd v Williams [2006] IRLR 181). This may ask a tribunal to examine whether a person is providing services to a customer or client by focusing on whether that individual actively markets his or her

services as an independent person to the world in general (and thus has clients or customers) or whether he or she is recruited to work for the principal as an integral part of its organisation.

159. The core of the worker status is the requirement to do/perform work personally. However, for the purposes of a protected disclosure detriment claim the requirement to do work personally is removed (s43K).

Protected Disclosures

160. A protected disclosure is defined by section 43A Employment Rights Act 1996 as a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H. In this case the alleged disclosures were made to the claimant's employer in line with section 43C.

161. Section 43B of the Employment Rights Act 1996 defines a qualifying disclosure thus:

- (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:
- a. that a criminal offence has been committed, is being committed or is likely to be committed,
 - b. that a person has failed, is failing, is likely to fail to comply with any legal obligation to which he is subject,
 - c. that a miscarriage of justice has occurred, is occurring or is likely to occur,
 - d. that the health or safety of any individual has been, is being or is likely to be endangered,
 - e. that the environment has been, is being or is likely to be damaged, or
 - f. that information tending to show any other matter falling within one of the preceding paragraphs has been, or is likely to be deliberately concealed.

....

- (5) In this Part "the relevant failure," in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

162. As set out in Williams v Brown AM UKEAT/0024/19 there are five separate stages to applying the necessary tests: *"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."*

Disclosure

163. In order to make a disclosure an employee simply has to communicate the information by some effective means in order for the communication to constitute a disclosure of that information.
164. 'Information' in the context of section 43B is capable of covering statements which might also be characterised as allegations (Kilraine v London Borough of Wandsworth [2018] ICR 1850). 'Information' and 'allegation' are not mutually exclusive categories of communication. Rather, a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a 'relevant failure.' The decision in Kilraine stressed that the word 'information' in section 43B(1) has to be read with the qualifying phrase 'tends to show'. The worker must reasonably believe that the information 'tends to show' that one of the relevant failures has occurred, is occurring or is likely to occur. In order for a statement or disclosure to be a qualifying disclosure, it must have sufficient factual content to be capable of tending to show one of the matters listed in section 43B(1)(a)–(f).
165. The context of any disclosure may also be relevant in determining the content of the disclosure. Meaning can be derived from context. Disclosures may also have to be looked at cumulatively. Information previously communicated by a worker to an employer could be regarded as 'embedded' in a subsequent communication. Two or more communications taken together can amount to a qualifying disclosure even if, taken on their own, each communication would not (Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540). Whether two communications are to be read together is generally a question of fact (Simpson v Cantor Fitzgerald Europe [2021] ICR 695).

Qualifying disclosures

166. A qualifying disclosure does not have to relate to a relevant failure of the employer that employs the worker making the disclosure. It may relate to the relevant failure of a colleague, a client or other third party.
167. Section 43B(1) requires that, in order for any disclosure to qualify for protection, the disclosure must, in the 'reasonable belief' of the worker:
1. be made in the public interest, and
 2. tend to show that one of the six relevant failures has occurred, is occurring, or is likely to occur.
168. The employee has to have a reasonable belief that that the information he or she disclosed tends to show one of the six relevant failures. This has both a subjective and an objective element. If the worker subjectively believes that the information he or she discloses does tend to show one of the listed

matters, and the statement or disclosure he or she 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 or her belief will be a reasonable belief.

169. The worker's reasonable belief must be that the *information disclosed tends to show* that a relevant failure has occurred, is occurring, or is likely to occur, rather than that the relevant failure *has* occurred, *is* occurring, or is *likely to occur*. The worker is not required to show that the information disclosed led him or her to believe that the relevant failure was established, and that that belief was reasonable. Rather, the worker must establish only reasonable belief that the information tended to show the relevant failure.
170. The focus is on what the worker in question believed rather than on what a hypothetical reasonable worker might have believed in the same circumstances. This does not mean that the test is entirely subjective. Section 43B(1) requires a *reasonable* belief of the worker making the disclosure. This introduces a requirement that there should be some objective basis for the worker's belief. In Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT it was held that reasonableness under section 43B(1) involves applying an objective standard to the personal circumstances of the discloser, and that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe. The subjective element is that the worker must believe that the information disclosed tends to show one of the relevant failures and the objective element is that that belief must be reasonable (Phoenix House Ltd v Stockman [2017] ICR 84). The EAT in Korashi v Abertawe Bro Morgannwg University Local Health Board stated that the focus on 'belief' in section 43B establishes a low threshold. However, the reasonableness test clearly requires the belief to be based on some evidence. Unfounded suspicions, uncorroborated allegations etc will not be enough to establish a reasonable belief.
171. There can be a qualifying disclosure of information even if the worker is wrong (Darnton v University of Surrey [2003] ICR 615). Truth and accuracy are still relevant considerations in deciding whether a worker has a reasonable belief. Determination of the factual accuracy of the worker's allegations will often help to determine whether the worker held the reasonable belief that the disclosure in question tended to show a relevant failure. It may be difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he or she believes that the factual basis of the allegation is false.
172. The worker must reasonably believe that his disclosure tends to show that one of the relevant failures has occurred, is occurring or is *likely* to occur. Likely should be construed as requiring more than a possibility or a risk, that an employer or other person might fail to comply with a relevant legal 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 will fail to comply with the relevant legal obligation' (Kraus v Penna Plc and anor [2004] IRLR 260).

Public interest

173. The public interest element of the test is also qualified by the requirement of 'reasonable belief.' In order for any disclosure to qualify for protection the person making it must have a 'reasonable belief' that the disclosure 'is made in the public interest.' There is no statutory definition of the public interest. The focus is on whether the worker reasonable believed that the disclosure was in the public interest rather than on the objective question of whether the public interest test was in fact satisfied.

174. In Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731 the Court of Appeal rejected the argument that for a disclosure to be in the public interest it must serve the interests of persons outside the workplace and that mere multiplicity of workers sharing the same interest was not enough. The essential point was that to be in the public interest the disclosure had to serve a wider interest than the private or personal interest of the worker making the disclosure. Even where the disclosure relates to a breach of the worker's own contract of employment there may still be features of the case that make it reasonable to regard disclosure as being in the public interest. The following factors might be relevant:

- (a) the numbers in the group whose interests the disclosure served;
- (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed
- (c) the nature of the wrongdoing disclosed, and
- (d) the identity of the alleged wrongdoer.

The number of people sharing the interest is not determinative. The fact that at least one other person shared the interest was insufficient in itself to convert it into a matter of public interest. Conversely, it was wrong to say that the fact that it was a large number of people whose interests were served by the disclosure of a breach of the contract of employment could never, in itself, convert a personal interest into a public interest.

175. In Underwood v Wincanton Plc EAT/0163/15 the EAT held that it was arguable that the public interest test was satisfied by a group of employees raising a matter specific to their terms of employment. 'The public' can refer to a subset of the general public, even one composed solely of employees of the same employer. In Morgan v Royal Mencap Society [2016] IRLR 428 it was held that it was reasonably arguable that an employee could consider a health and safety complaint, even one where the employee is the principal person affected, to be made in the wider interests of employees generally.

176. There may be a difference between a matter of public interest and a matter that is of interest to the public, and that there may be subjects that most people would rather not know about that may be matters of public interest

(Dobbie v Felton t/a Feltons Solicitors 2021 [IRLR] 679, EAT). A disclosure could be made in the public interest even though the public will never know that it has been made, and a disclosure could be made in the public interest even if it relates to a specific incident without any likelihood of repetition. The absence of a statutory definition of 'public interest' does not mean that it is not to be determined by a principled analysis. The four factors identified in Nurmohamed will often be of assistance. Some private employment disputes will more obviously raise public interest matters than others.

177. For a disclosure to qualify the worker need only have a *reasonable belief* that his or her disclosure is made in the public interest. The tribunal does not have to determine the objective question of what the public interest is, and whether a disclosure served it. The Tribunal has to consider what the worker considered to be in the public interest; whether the worker believed that the disclosure served that interest; and whether that belief was held reasonably. As reasonableness is judged to some extent objectively, it is open to a Tribunal to find that a worker's belief was reasonable on grounds which the worker did not have in mind at the time. Tribunals should be careful not to substitute their own view of whether the disclosure was in the public interest for that of the worker (Nurmohamed). That does not mean that it is illegitimate for the tribunal to form its own view on that question as part of its thinking but only that that view is not, as such, determinative. The necessary belief is simply that the disclosure is in the public interest and the particular reasons why the worker believes that to be so are not of the essence. A disclosure does not cease to qualify simply because the worker seeks to justify it after the event by reference to specific matters which the tribunal finds were not in his or her head at the time. A tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his or her belief but nevertheless find it to have been reasonable for different reasons which he or she had not articulated at the time: all that matters is that his or her (subjective) belief was (objectively) reasonable.

178. Belief in the public interest need not be the predominant motive for making the disclosure or even form part of the worker's motivation. The worker's motive might, however, be one of the individual circumstances taken into account by a tribunal when considering whether the worker reasonably believed the disclosure to be in the public interest. A worker may seek to justify an alleged qualifying disclosure by reference to matters that were not in his or her head at the time he or she made it, but if he or she cannot give credible reasons for why he or she thought at the time that the disclosure was in the public interest, that may cast doubt on whether he or she really thought so at all. Belief in a public interest element would not have to form any part of the worker's motivation so long as the worker has a genuine (and reasonable) belief that the disclosure is in the public interest.

Breach of a legal obligation

179. Section 43B(1)(b) is capable of covering not only those obligations set down in statute and secondary legislation but also any obligation imposed under the common law (e.g. negligence, nuisance and defamation), as well as contractual obligations and those derived from administrative law. It can include breaches of legal obligations arising under the employee's own contract of employment (subject to the public interest element of the test also being met.) It does not cover a breach of guidance or best practice, or something that is considered merely morally wrong. A worker will not be deprived of protection in relation to a disclosure simply because he or she is wrong about what the law requires.
180. A worker need not always be precise about what legal obligation he or she envisages is being breached or is likely to be breached for the purpose of a qualifying disclosure under section 43B(1)(b). In cases where it is 'obvious' that some legal obligation is engaged then the absence of specificity will be of little evidential relevance. In less obvious cases, a failure by the worker to at least set out the nature of the legal wrong he or she believes to be at issue might lead a tribunal to conclude that the worker was merely setting out a moral or ethical objection rather than a breach of a legal obligation.

Method of disclosure

181. In order to be a protected disclosure, the qualifying disclosure must be made in the correct manner as set out in sections 43C-43H. A worker who makes a disclosure to their employer has fewer hurdles to get over than one who makes the disclosure to an outsider. A disclosure made to a worker's employer will be a protected disclosure s43C(1)(a).

Detriment

182. Section 47B of the Employment Rights Act 1996 provides that a worker has the right not to be subjected to any detriment by his or her employer, a colleague acting in the course of employment or an agent acting with the employer's authority on the ground that the worker made a protected disclosure. The requirements for a successful claim are that:
- (e) the claimant must have made a protected disclosure;
 - (f) he must have suffered some identifiable detriment;
 - (g) the employer, worker or agent must have subjected the claimant to that detriment by some act, or deliberate failure to act; and
 - (h) the act or deliberate failure to act must have been done on the ground that the claimant made a protected disclosure.
183. Section 47B(1) does not apply where the worker is an employee and the detriment complained of amounts to dismissal. Any such complaint instead falls under section 103A which renders a dismissal automatically unfair if the sole or principal reason for it was that the employee made a protected disclosure. The exclusion under section 47B(2) is only triggered if the claimant is an employee. Where a worker is 'dismissed' in that his contract for services or working relationship is terminated because he or she made a

protected disclosure he or she can claim against the employer for that dismissal under section 47B.

184. A detriment is unlawful under section 47B if done 'on the ground' of a protected disclosure, whereas dismissal is unfair under section 103A only if the protected disclosure is the reason or principal reason for it. A section 47B claim may be established where the protected disclosure is one of many reasons for the detriment, whereas section 103A requires the disclosure to be the primary motivation for a dismissal.
185. Section 47B provides protection from any detriment. There is no test of seriousness or severity. It is not necessary for there to be physical or economic consequences for it to amount to a detriment. What matters is that the complainant is shown to have suffered a disadvantage of some kind.
186. The protection is against acts and *deliberate* failures to act. A deliberate failure to act shall be treated as done when it was decided upon (section 48(4)(b)).

Causation (detriment cases)

187. Causation under section 47B has two elements:
- (i) was the worker subjected to the detriment by the employer, other worker or agent?
 - (j) was the worker subjected to that detriment because he or she had made a protected disclosure?
188. The question of causation is to be applied to the employer's act or omission not the ensuing detriment. What was the reason for the respondent's act or omission? (Not, what was the reason for the detriment?)
189. In any detriment claim it is for the employer to show the ground on which any act, or deliberate failure to act, was done (section 48(2)). This does not mean that, once a claimant asserts that he or she has been subjected to a detriment, the respondent must disprove the claim. Rather, it means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant (i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment) the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.
190. If the tribunal has rejected the reason advanced by the employer, the tribunal is not then bound to accept the reason advanced by the employee: it can conclude that the true reason for dismissal was one that was not advanced by either party (Kuzel v Roche Products Ltd 2008 ICR 799, Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14).

191. It may be appropriate to draw inferences as to the real reason for the employer's action on the basis of the tribunal's principal findings of fact. The EAT summarised the proper approach to drawing inferences in a detriment claim in International Petroleum Ltd and ors v Osipov and ors EAT 0058/17:
- (a) The burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure that he or she made.
 - (b) By virtue of section 48(2), the employer (or worker or agent) must be prepared to show why the detrimental treatment was done. If it (or he or she) does not do so, inferences may be drawn against the employer (or worker or agent) (see London Borough of Harrow v Knight 2003 IRLR 140, EAT)
 - (c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.
192. In order for liability under section 47B to be established the worker must show that the detriment arises from the act or deliberate failure to act by the employer. Only then can the worker say that he or she has been 'subjected to' the detriment in question.
193. Section 47B will be infringed if the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistle-blower (Fecitt and ors v NHS Manchester (Public Concern at Work intervening) [2012] ICR 372). There is a different test in detriment cases from dismissal cases under section 103A. The 'material influence' test is to be applied in section 47B detriment cases whereas in a section 103A unfair dismissal case the test is still to ask what the *sole or principal reason* for the dismissal actually was. This is the consequence of the two causes of action being placed in different parts of the Employment Rights Act 1996 (Part V and Part X).
194. It is not necessary to consider how a real or hypothetical comparator who has not made a protected disclosure was or would have been treated when determining whether the protected disclosure was the 'ground' for the treatment complained of (even though it may be a useful exercise).
195. The motivation need not be malicious. It does not matter whether the employer intends to do the whistle-blower harm, so long as the whistle-blower has, as a matter of fact, been subjected to a detriment on the ground of the protected disclosure.
196. In general, in a detriment claim, the starting point is that it is necessary to examine the thought processes of the alleged wrongdoer. Does the person who actually subjects the worker to the detriment know of the protected disclosure so that the protected disclosure can have materially influenced his decision to subject the claimant to the detriment? The tribunal must generally focus on the mental processes of the individual decisionmaker and so cannot

find an unlawful detriment if the decisionmaker did not know about (and so could not have been influenced by) the protected disclosure. That general rule has sometimes said to be displaced in cases where a manipulator with an unlawful motivation is in the 'hierarchy of responsibility' above the worker subjected to the detriment, or is in some way formally involved in the process that leads to the decision, and thereby procures the detriment via the innocent decisionmaker (see the parallels to section 103A in Jhuti v Royal Mail below). However, in Malik v Cenkos Securities plc UKEAT/0100/17 it was considered impermissible to import the knowledge and motivation of another party to the decisionmaker for the purpose of establishing liability under section 47B. The Court of Appeal's decision in Reynolds v CLFIS (UK) Ltd and ors 2015 ICR 1010 was referred to. That was an age discrimination case in which the Court rejected the 'composite' approach to liability and concluded that the acts of those who had provided 'tainted' information to the decisionmaker for unlawful reasons had to be considered separately from the actions of the innocent decisionmaker. Mr Justice Choudhury's view was that it is permissible to attribute the motivation of someone other than the dismissing officer to the employer in a *dismissal* case in some circumstances because the liability for the dismissal lies only with the employer. However, the same does not apply in a detriment case, where provision is made for individual liability of the workers. In effect, a whistleblowing detriment case has more in common with the mechanics of a discrimination case than an automatic unfair dismissal case under Part X of the Employment Rights Act.

197. The fact that section 47B now makes provision for individual liability of workers who subject colleagues to whistleblowing detriment may be the distinction which rationalises the different approaches in the previous cases of Ahmed v City of Bradford Metropolitan District Council and ors UKEAT/0145/14/KN and Western Union Payment Services UK Ltd v Anastasiou on the one hand and Malik v Cenkos Securities plc on the other. Only Malik was decided on the basis of the law after section 47B(1A) was introduced to provide for individual liability of workers and agents (and vicarious liability of the employer for the same acts). The fact that the decisionmaker can be personally liable for a detriment under the Equality Act 2010 led the Court in Reynolds v CLFIS (UK) Ltd and ors to conclude that it would be unjust to attribute the discriminatory motivation of another to that decisionmaker. That same consideration may be said to apply just as much to detriment under section 47B. The observation has been made that the principles decided by Royal Mail Group Ltd v Jhuti, cannot be transplanted wholesale into the unlawful detriment context because Jhuti was an unfair dismissal case and only employers (and not individual workers) can be liable for unfair dismissal.
198. There is currently no clear answer to the question whether knowledge of a protected disclosure can be imputed to an innocent decisionmaker who subjects the whistle-blower to a detriment. In the context of section 103A, the Supreme Court's decision in Jhuti has removed a lacuna in the protection from automatically unfair dismissal that is afforded to employees. As to a worker's right not to be subjected to a detriment the introduction of sections 47B(1A) and 47B(1B) may have similarly plugged the gap in protection so

that it still more appropriate to look at the knowledge of the decisionmaker in a detriment case rather than seeking to impute the knowledge of someone else in the organisation to that decisionmaker.

199. An employee's conduct in making a protected disclosure may, in certain circumstances, be separable from the disclosure itself (Bolton School v Evans [2007] ICR 641, Kong v Gulf International Bank (UK) Ltd 2022 EWCA Civ 941). The employer can act lawfully if it relies only on the non-protected aspects of a whistle-blower's conduct even when that conduct is closely connected with the protected disclosures themselves. For example, in Panayiotou v Chief Constable of Hampshire Police and anor 2014 ICR D23 EAT the reason for the detriments and dismissal was not the fact that the claimant had made protected disclosures but rather the manner in which he pursued his complaints. The tribunal found that he would 'campaign relentlessly' if he was dissatisfied with the action taken by his employer following his disclosures and would strive to ensure that all complaints were dealt with in the way he considered appropriate. As a result the employer had to devote a great deal of management time to responding to his correspondence and complaints. However, in some cases it will be impossible to draw a line between the disclosure and the manner of that disclosure.

Causation in section 103A dismissal cases

200. In Royal Mail Group Ltd v Jhuti [2020] ICR 731 it was held that in a section 103A case of automatic unfair dismissal the tribunal need generally look no further than the reasons given by the decision maker in order to determine the reason for the dismissal. However, in a so-called 'lago' case a person in the hierarchy of responsibility above the dismissal decisionmaker determines that for reason A (the protected disclosure) the employee should be dismissed but that this reason should be hidden from the actual dismissal decisionmaker behind another, invented reason (reason B). The decisionmaker then adopts reason B and dismisses for reason B with no personal knowledge of reason A. In such an 'lago' case the tribunal should look behind the decisionmaker's reason (B) to determine that hidden reason A (the protected disclosure) was the reason for dismissal rather than the apparent, innocent reason B.
201. The line of reasoning in Jhuti only needs to be used where an innocent decisionmaker is manipulated into dismissing a whistle-blower for an apparently fair reason and is 'unaware of the machinations of those motivated by the prohibited reason.' It does not apply where the decisionmaker is aware of the protected disclosure and is thus not deceived into dismissing for an unrelated reason (University Hospital North Tees and Hartlepool NHS Foundation Trust v Fairhall EAT 0150/20).

Asserting a statutory right

202. Pursuant to section 104 Employment Rights Act 1996 an employee's dismissal is automatically unfair if the reason or principal reason for the dismissal was that:
- (d) The employee brought proceedings against the employer to enforce a relevant statutory right, or
 - (e) The employee alleged that the employer had infringed a relevant statutory right.
203. It is immaterial whether the employee actually had the statutory right in question or whether the right had been infringed, but the employee's claim to the right and its infringement must have been made in good faith (section 104(2)). Furthermore, it is sufficient that the employee made it reasonably clear to the employer what the right claimed to have been infringed was. It is not necessary to actually specify the right (section 104(3)).
204. The statutory right in question must be a 'relevant statutory right' within the meaning of section 104(4). There are a number of employment rights that do not appear in that subsection and a claim under section 104 cannot, therefore, be brought with regards to them. The employee must assert and *infringement* of the statutory right. Section 104 does not cover the case where the employee is dismissed for merely availing himself of the statutory right. The employer does not need to have actually infringed the statutory right in order for the claim to succeed.
205. A claim of automatically unfair dismissal under section 104 can only be pursued by an employee rather than a worker. Unlike in whistleblowing cases there is no claim for detriment because of asserting a statutory right which directly mirrors the protection against automatically unfair dismissal. In this case the claimant has to rely upon the more specific protection potentially offered by section 45A Employment Rights Act 1996 which states (so far as relevant):
- (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by the employer done on the ground that the worker-
 - (a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,
 - (b) refused (or proposed to refuse) to forgo a right conferred on him by those Regulations,
 - (c) ...
 - (d) ...
 - (e) brought proceedings against the employer to enforce a right conferred on him by those Regulations, or
 - (f) alleged that the employer had infringed such a right.
 - (2) It is immaterial for the purposes of subsection (e) or (f) –
 - (a) whether or not the worker has the right, or
 - (b) whether or not the right has been infringed,

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

- (3) It is sufficient for (1)(f) to apply that the worker, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.
- (4) This section does not apply where a worker is an employee and the detriment in question amounts to dismissal within the meaning of Part X.

206. There is no extended definition of worker for the purposes of section 45A (unlike for the protected disclosure detriment claim).

CONCLUSIONS

207. In the following paragraphs we set out our conclusions in line with the list of issues agreed with the parties at the outset of the final hearing [78].

Employment Status

Employee

- 208. The Tribunal's finding is that the claimant was not engaged by the respondent under a contract of employment. Taking into account all the relevant factors as set out in the case law the relevant indicia of employment are absent.
- 209. The claimant was engaged to work for the respondent in a very flexible way. It was always intended that this should be the case. Until the latter stages of the engagement the claimant herself felt that the flexibility offered by her work for the respondent was actually beneficial to her given all her other commitments and the need to be able to work flexibly in order to accommodate the other demands on her time.
- 210. The stated intention of the parties, from the outset, was that the claimant would be a contractor and not an employee. Hence her later request to be put on the payroll was refused. It was only in the later stages of the relationship that the claimant sought to change her status. She accepted that she had always spoken of herself as a contractor but she then sought to change this. Whilst the parties' stated intention is not determinative in the face of other evidence to the contrary, we find that the stated intention was that the claimant would *not* be an employee and the relationship was set up (and operated) entirely in line with that mutual intention. Indeed, in cross examination the claimant did accept that she thought she was a contractor from January 2018 until she submitted an invoice on 29 October 2019.

211. The respondent really did not have control of the claimant's work. The respondent agreed the particular tasks it needed her to do and she then had a high degree of choice about when, where and how she accomplished those tasks. She was able to negotiate deadlines to fit with her other commitments. There was very little that was set in stone by the respondent. The claimant was asked to do certain types of task from the office for data protection reasons. She had flexibility about when she worked from the office. She generally pre-warned the respondent when she would be working in the office so that she could ensure that there was sufficient office space to accommodate her and whoever else needed to be in the office that day. Subject to that practical consideration, she was free to choose the days she was in the office according to her own preferences. She generally chose days when she would be able to work alongside her friend Natalie. She could complete most of her work from home at a time of her choosing. She often worked in the evenings and at weekends. She sometimes did her work at the same time as she was caring for her children. She was not solely focused on her work for the respondent during those periods but would still be entitled to bill for those hours. (She had more flexibility in this than many employees would have had and did not have to discuss this with a line manager.) The respondent did not mind when and how she worked so long as any time critical work was completed on time. Most of the tasks were not time critical. There were some meetings which she was asked to attend which would have to take place at particular times for operational reasons but they made up a relatively small part of her job.
212. The claimant chose how to carry out her work. Nobody really supervised how she did her job save for ensuring that the tasks were covered as needed. She was able to negotiate what tasks she took on and when.
213. There was no real mutuality of obligation between. The respondent was under no obligation to continue offering the claimant work and she was under no obligation to accept that work. Either side could withdraw from the arrangement without any notice and without any sanction being applied. This was reflected not only in the fact that the claimant unilaterally suspended her services but also in the fact that there were no set hours of work each week. As she herself stated [235] "I don't have to fulfil any set hours..." There was no guaranteed minimum amount of work which the respondent would offer her. She was not obliged to accept any work which the respondent did choose to offer her.
214. The claimant did not have to ask permission for time off work. She could unilaterally change her proposed hours of work with no real notice to the respondent. She could decide not to work on the days and at the times she had previously suggested that she would be working for the respondent. The claimant did not have to request or book holiday time in advance. For example, she informed the respondent that she was extending a weekend break away at short notice and would not be working on a day when she had previously indicated that she would be available. The respondent recognised that it could do nothing to prevent her from doing this. Any advance warning

of a change of plans from the claimant was provided as a matter of courtesy rather than because she was seeking permission from the respondent.

215. The claimant was not subject to employee policies and procedures such as any disciplinary policy. She was not subject to any sanction when she took book-keeping documents home against the respondent's wishes. She never had any entitlement to sick pay or holiday pay. She was responsible for her own tax and National Insurance arrangements. She submitted her own tax returns. She was not on the payroll. She was not subject to PAYE. She was paid once she had submitted an invoice for the work done. Neither the claimant nor the respondent had to give any notice of termination of the engagement. The claimant took some financial risk in doing the work. She received no guaranteed income. If the respondent offered no work then the claimant would receive no pay.
216. The claimant was free to get people to help her in completing her work. The issue of providing a substitute, as such, never arose. Neither side really knew whether the claimant was entitled to send someone along to do the work in her place. However, the claimant did have the opportunity to get help and support from her husband. She could call upon his assistance and then bill for his work as her own (e.g. during the IT migration). Had she been an employee she would not have been entitled to do this. The respondent would have had ultimate control over who did the work and whether the claimant could bill for it. It would have had some involvement in arrangements for getting someone to cover the tasks the claimant could not accomplish herself.
217. The claimant was also entitled to offer her services to others on a similar basis. Indeed she offered her services to another organisation which shared the respondent's building. The respondent had no way of preventing her from doing this and would not have had first refusal on her time in the event of a clash of commitments. Indeed, the claimant sought to use the rates she had offered to the other business as a yardstick by which to renegotiate her pay with the respondent. She was also free to offer her services to others as a tutor.
218. The claimant's performance was not monitored or reviewed. She could carry out jobs when, how and where she wanted.
219. Whilst third parties may not have realised that the claimant was not the respondent's employee, she was not truly integrated into the business. She may have had an email on the respondent's system but that was a practical requirement to give her access to the systems that she was to help administer. It did not mean that she was part and parcel of the respondent organisation as an employee. Indeed, the claimant took steps to acquire her own computer to do her work for the respondent. In that sense she initially supplied some of her own equipment even though, subsequently, the respondent decided to provide a more suitable computer. In any event, she gifted her computer to the respondent.

Worker

220. Although the claimant did not qualify for employee status, the Tribunal has concluded that she was not an entirely independent contractor either. She fell into the middle category of ‘worker’ status within both sections 43K and section 230(3)(b) of the Employment Rights Act 1996. There was a contract to provide personal service. Although she had sought assistance at times from her husband she did not have a right to substitute someone else to do her work for her. There was nothing in the evidence before us to suggest that she could send someone else along to do the work instead of doing it herself. There were sufficient fetters on her freedom of choice for there to be an obligation of personal service consistent with worker status.
221. The dominant purpose of the contract was the provision of labour rather than the provision of a particular ‘product’ or service by a business. The relationship sat more comfortably within the employment field than the business field.
222. We do not accept that she was providing services to the respondent as her client or the customer of her business. She was not tendering for work as a separate business. Nobody observing her would have referred to her as an external contractor or business which was separate from the respondent in that sense. She was working on particular assignments for the respondent rather than having an overall business contract with them. This differs, for example, from the position of Shiloh and Modbury who were very clearly providing a service to the respondent as an external contractor. They had particular expertise and marketed themselves to various clients, of which the respondent was just one. Likewise, the respondent contracted with Gareth’s business “Spread Creative” for particular pieces of work. The relationship was with the company rather than with the individual behind it. These relationships were qualitatively different from the relationship the respondent had with the claimant. She did not have a freestanding business. She offered her services to the respondent and this grew out of her desire for paid work when she had started off working for them as a volunteer. The relationship did not have commercial origins. Whilst she was free to work for others, the services she offered were not part of a specific business. So, for example, she could offer tutoring services but this would be a completely different work stream from her engagement with the respondent. She could do some work for the other organisation in the respondent’s building but she did not have any sort of business ‘setup’ or infrastructure which she was using to contract with other clients.
223. We find that the claimant was a worker for the purposes of section 43K and section 230(3)(b).

Did the claimant assert her statutory rights?

224. As the claimant was not an employee she cannot rely upon section 104 Employment Rights Act. Section 104 is part of Part X of the Act and is only

applicable to claimants who were working pursuant to a contract of employment.

225. As set out above, a worker can only bring a detriment claim rather than an unfair dismissal claim and must fit such a claim within the confines of section 45A Employment Rights Act 1996. Given the evidence in this case the claimant can only bring herself within section 45A(1)(b) or (f) of the Employment Rights Act 1996. This relates solely to rights conferred by the Working Time Regulations 1998 rather than any other statutory rights.
226. The respondent has rightly conceded that if the claimant was a worker then she did assert her statutory rights in line with section 45A. It is conceded that in the messages she sent on 22 and 23 November the claimant essentially asserted her right to be paid holiday pay and sick pay under the Working Time Regulations 1998 and that this would meet the definitions of section 45A(1)(b) or (f).
227. Paragraph 2.1 [78] of the list of issues indicates that the only communications relied upon to show that the claimant asserted her statutory rights were the emails to Mr Shenow and Ms Ransom over the period 22 to 26 November 2019 (backed up with the three audio recordings). The claimant's closing skeleton argument sought to broaden the claim out to encompass emails and verbal communications on 15 November, 19 November and 20 November. This is not the basis on which the case was put in the agreed list of issues or during the course of the evidence. On that basis, the Tribunal is not prepared to widen the parameters of the claimant's case after the conclusion of the evidence. In addition, as the claimant was not an employee and therefore cannot rely on section 104 the other statutory rights which she sought to rely on in her closing submissions are not relevant to this case. She cannot rely on them (paragraph 28 skeleton argument: Social Security Contributions and Benefits Act 1992, Pensions Act 2008). Likewise the statutes relied on at paragraph 36 of the claimant's skeleton argument cannot assist her in relation to her section 45A detriment claim.
228. We have reviewed the rest of the documentation and agree that the only relevant assertions of a statutory right in this case are those which have been conceded by the respondent.
229. Although section 45A(2) imposes a requirement of good faith, the respondent did not take this point. It was not asserted that the claimant's section 45A assertions were not made in good faith. In those circumstances, given that this was not addressed in cross examination or the wider evidence, the Tribunal is not prepared to conclude that the claimant was not acting in good faith.

Did the claimant make public interest disclosure(s)?

230. The list of issues indicated that the claimant asserted that she made protected disclosures over the period 22 to 27 November 2019. We have considered each of the documents relied upon by the claimant in her closing submissions.

22nd November 2019

231. The relevant emails to Ms Ransom are set out in two places in the bundle [238-239, 194-195].

232. We conclude that the email sent at 11.18 does disclose some information, particularly about the way in which the claimant has been working for the respondent. It couples this with an assertion that the respondent has been employing her illegally as a casual worker. She asserts that it is illegal for the respondent to pay her as a casual worker after week 13. The earlier message, sent at 9.16, does not disclose so much information other than to make the allegation that there is a problem with the legality of the claimant's employment status and that she will be suspending her work for the respondent. In any event, we have taken the content of both emails together as they are part of one exchange of messages and should be read in that context.

233. We find that the two emails do disclose information which, in the reasonable belief of the claimant, tended to show a breach of a legal obligation (section 43B(1)(b)). The claimant did believe that her messages tended to show a breach of her legal entitlements under her contract with the respondent. In all the circumstances as the claimant understood them to be we accept it was reasonable for her to believe that her messages disclosed a relevant failure. She may have misunderstood the law (regarding working for more than 13 weeks as a casual worker, for example) but she did not have to be correct in her interpretation of the law for this to have been a qualifying disclosure. She reasonably believed that the factors relied on showed that she was not a contractor and was entitled to certain additional elements of pay.

234. The difficulty with these disclosures is the public interest element. We are unable to conclude that the claimant reasonably believed that the disclosure was made in the public interest. We are not convinced that she actually applied her mind to the public interest at the time she sent these emails. Even if she did, we can find nothing within the disclosures that would support the view that the disclosure was made in the public interest. The disclosures relate wholly and exclusively to the claimant's own status and entitlements. Whilst the claimant's motives in making the disclosure are not the relevant issue, the wider context of the disclosures can help the Tribunal to discern whether she had the relevant belief and whether it was reasonably held. The earlier chronology suggests that her initial concern was to increase her rate of pay and increase her income from her work for the respondent. It is this which she initially raised with the respondent. She then introduced the 'contract status' issue as part of her pay negotiation. She used it as leverage to increase her rate of pay. She sought to compare herself to employees and

say that, in real terms, she was being paid less. The disclosure is made in the context of a personal contract renegotiation rather than with an eye on some higher ideal or public interest. The disclosures relate wholly and exclusively to the claimant's personal situation. Although the claimant's motivation is not the test to be applied, it does shed light on the claimant's beliefs when she made the disclosures in question and whether she subjectively and reasonably believed that this was a disclosure in the public interest.

235. The disclosures are solely about her personal contractual entitlements. The disclosures are not made for the benefit of other employees. Whether she obtained employee status or not would have no relevance to anyone else who was working with the respondent, still less any wider section of the public. This is not a case where the individual claimant is effectively seeking to negotiate contractual changes and improvements for a group or class of individuals within the workforce. The representations and disclosures made refer to the claimant and to the claimant alone.
236. Nor it is clear that she could have thought that it was in the public interest to assert that the charity should pay her more for her work or engage her as an employee with extra contractual benefits. The Tribunal considered whether the fact that the respondent is a charity could give this a public interest element. We concluded that it could not. We accept that there may be a public interest in the charity being properly administered and that disclosure of some wrongdoing, even in a relatively small charity, could be in the public interest. However, that is not what this disclosure is about. The claimant not alleging anything to the effect of 'misappropriation of public money' or 'tax evasion.' Taken at its highest she was really saying "you should have categorised me as an employee so that I have tax and NI deducted at source and the benefit of holiday pay, other benefits and possibly and increased rate of pay." That is not an allegation or disclosure that HMRC is being denied the money that is rightfully due to it. The HMRC issue regarding employment status is really a question of who accounts for her tax and National Insurance: the claimant (via self assessment) or the respondent (via PAYE). Either way, HMRC receives the money which is properly due to it. That is not an allegation of illegality in the 'wrongdoing' sense. It is an allegation of mislabelling of the contract. If this sort of disclosure were considered to be in the public interest then every time an individual worker engaged in a discussion with his employer about employee/worker/contractor status then this would automatically convert it into a public interest argument. This would render the public interest requirement in section 43B(1) meaningless. However, the legislation was drafted in this way for a reason. It was not intended that every dispute about an individual's contract would constitute a public interest disclosure. Nor could the claimant be said to be making a disclosure in the public interest on the basis that higher pay and different employment status would be more in line with the respondent's charitable purposes. Proper use of charitable money and furtherance of the charitable purpose do not mean that a charity is required to provide attractive rates of pay compared to other employers or that it is prevented from engaging independent contractors rather than employees to carry out work for them.

237. The claimant has to show some basis for asserting that she reasonably believed the disclosure was made in the public interest. She has failed to do that on the facts of this case.
238. We have considered the guidance in the case law, including that in Nurmohamed. The disclosure served only the claimant's interests, not a wider group. The disclosure did not serve a particularly important interest and the effect of the alleged 'wrongdoing' is marginal or indirect. The alleged wrongdoing is not said to be deliberate, more inadvertent or ill-advised. Although the respondent is a charity it is a small one and not, so far as we were told, funded by any public bodies. The identity of the alleged wrongdoer does not, therefore, give the necessary public interest.
239. Finally we note the case of Okwu v Rise Community Action Ltd 2019 UKEAT/0082/19. In that case the protected disclosures related to breaches of the Data Protection Act through use of a shared phone and an unsecured drawer to store sensitive documents. The claimant had also made disclosures about her contractual entitlement, her tax reference, pension entitlement, tax issues, problems with her payslips and her entitlement to a section 1 statement of employment particulars. They were *not* found to be protected disclosures and did not go through to appeal. They related to her personal circumstances only. Mrs Watkins' disclosures about her employment status in this case bear a greater similarity to the *unprotected* disclosures in Okwu than to the *protected* disclosures. They too lack the public interest element.

23rd November 2019

240. The claimant relies on the emails she sent to Mr Shenow including the three audio recordings that she attached to them. The transcripts of the recordings were at [197, 199, 201]. The emails themselves were at [223, 225, 227, 228].
241. We have considered whether these emails and recordings disclose information and, if so, what. The information disclosed falls into two broad categories.
242. The first category was material relating to the claimant's contractual status and rate of pay. The claimant again questions whether she is really an employee with all the rights that go with that status. The comments that she makes in these portions of the disclosures focus more on whether she should be paid more (i.e. trying to negotiate a 'fairer' rate of pay). It is not an assertion that the respondent is in breach of a legal obligation as such. She is not saying she is legally entitled to the higher rate of pay, just that she should be given it as a matter of fairness and comparison with other employees. It is hard to see how the claimant is disclosing information which, in her reasonable belief, tended to show a relevant failure (section 43B(1)(b)).

243. This part of the disclosures also fail the public interest element of the statutory test for the same reasons set out above in relation to the 22 November disclosures. It is wholly related to the claimant's own situation and does not have any wider public interest element.
244. The other category of information disclosed in these communications is an assertion that the charity is overspending on external contractors and a criticism regarding the use of charity funds. She expresses the view that the respondent is paying for duplicate services from contractors and that some elements of the spending are unnecessary and do not reflect good value for money. She is disclosing her personal opinion about how the respondent could be run better or more efficiently. She disputes the money spent on the services of Spread Creative, for example. She is not disclosing information which tends to show a breach of a legal obligation (s43B(1)(b)). She is disclosing her opinion about how the charity could be run better or how they could obtain better value for money. However, she is not disclosing anything which tends to show that a legal obligation has been breached or is likely to be breached etc. There is nothing in the information disclosed which tends to show a relevant failure. It is therefore not a qualifying disclosure.
245. In those circumstances it is not necessary to consider the public interest element of the test as the disclosures fail the 'relevant failure' component of the test. Even so, the Tribunal was not satisfied that she reasonably believed that the disclosure was made in the public interest. As there was no allegation or disclosure of wrongdoing it is hard to see how the disclosure could be in the public interest. There is no particular public interest in the way that all businesses are run. Not all aspects of a business's organisation and management are matters of public interest, particularly where they are not public bodies. There would need to be something more specific about a particular feature of the way a business is run that imports an element of public interest (e.g. are misleading representations being made to the stock market or to a relevant regulator?) The position does not necessarily change when the organisation in question is a charity unless there is some sort of misappropriation of funds or difficulty in ensuring that the charity is legitimately and legally administered. That is not what these disclosures are about. The claimant is not disclosing maladministration or some breach of the regulatory requirements applying to charities. She is just saying that she thinks it could be done better or more efficiently. That is not the same thing. Indeed, the points she makes are not without self interest. She would have preferred the money which was spent on outside contractors (such as Spread Creative or Shiloh) to be directed towards her instead. She felt that she could do as good a job in dealing with the respondent's website and did not see why that money should be spent on a different contractor. It could, in her view be used to bolster bonuses or rates of pay for her and her colleagues in the organisation [198].
246. Although paragraph 4.2 of the List of Issues [78] refers to the claimant raising a formal grievance about Mr Walker's conduct when he met her on 19 November, the claimant did not put her case on the basis that this part of the emails or recordings constituted a protected disclosure. We have not been

asked to find that it is a protected disclosure in that regard. Had we been asked to find that this was a protected disclosure we would have struggled to do so. It is hard to discern a qualifying disclosure about a relevant failure with the necessary public interest element when examining what is said about the 19 November meeting.

27th November 2019

247. The claimant relies on emails that she sent to Mr Shenow [214]. Once again, these emails have two themes. First she alleges that a group of workers are not correctly labelled. They should be labelled as employees. She says that is true of the claimant, Mr Walker and Ms Ransom and Mr Stephenson-Coulshaw. Secondly, she alleges that there is a duplication of spending for the respondent's website to be hosted in two places.
248. In relation to the correct labelling of employees we accept that she was disclosing information and that she reasonably believed that the information tended to show breach of a legal obligation (s43B(1)(b)) albeit she would not know enough about each person's tax affairs to be able to say whether they were accounting for tax appropriately. She says that they should be counted as employees. If, as a matter of law, they are employees then the arrangements that the respondent makes should reflect the applicable tax rules.
249. However, in looking at the public interest element of the test we note that, once again, the disclosures are primarily about the claimant's own financial interests. They may or may not have implications for two or three other people. That is still a very small group. We do not consider that the increase in numbers from the claimant to a total of four individuals would be enough for the claimant to reasonably believe that she was making this disclosure in the public interest. It is still essentially about the claimant's own position, particularly as the others she has identified are all doing different jobs from her. It is not as though she is making a disclosure about several people who are all on the same pay scale or pay band or in the same department. If she is incorrectly labelled as self employed this does not automatically mean that the other individuals are also incorrectly labelled in the same way. Each individual's case turns on its own facts. There is no 'collective argument' here that the same employment status applies to all the individuals automatically.
250. We also note that just because someone is registered as self employed does not automatically mean that HMRC is being denied money which is properly owed. It is just that the accounting for it switches and becomes the individual's responsibility (via self assessment etc). If the individual pays what is owed in tax and NI according to the rules for a self employed person then there is no public interest in disclosing that someone should be viewed as an employee. The public interest is in the proper administration and application of tax law and HMRC rules. The relevant rules can be properly administered for self employed individuals just as much as for employees.

251. Looking at the Nurmohamed factors we have addressed the 'numbers' issue. Furthermore, we would tend to consider the alleged disclosure of wrongdoing to have a more marginal or indirect effect than direct or very sizeable effect. It certainly would not be seen as deliberate wrongdoing and it would not relate to a large or prominent respondent 'wrongdoer.' We do not accept that the public interest element of the test is satisfied.
252. As stated above, the second thread in these disclosures is about paying twice for services from an external contractor. This is essentially the same argument as we have set out and dealt with at paragraphs 244-245 above and we conclude that it fails for the same reasons as set out therein. It is a 'value for money' argument that does not tend to show a relevant failure and there is therefore no need to consider the public interest element of the test. Even so, we are not satisfied that it meets the public interest element of the test for the reasons already discussed.
253. In light of the foregoing, the Tribunal has concluded that that none of the disclosures relied upon by the claimant in this case constituted a protected disclosure within the meaning of the Employment Rights Act 1996.

Did the claimant suffer the alleged detriments and, if so, was she subjected to them on the ground that she had made a protected disclosure or asserted a statutory working time right (section 45A)?

254. As set out above, the Tribunal has concluded that the claimant did not make any protected disclosures in this case. However, for completeness we have also addressed the detriments the claimant relied upon in order to determine whether or not she was subjected to them because of the alleged protected disclosures. We have examined whether the respondent subjected the claimant to the said detriments and, if so, have considered the reason why. We have considered whether the alleged protected disclosures materially influenced the respondent's treatment of the claimant in the ways she alleges.
255. We have also considered whether the claimant was subjected to the alleged detriment contrary to section 45A Employment Rights Act 1996.
- (a) Nick Shenow did not speak to or meet with the claimant after 19 November 2019
256. We have reviewed the totality of the evidence in this case. The claimant did not escalate the matter to Mr Shenow until 23 November so any allegation of detrimental treatment before that date is not well founded. In fact the Tribunal is being asked to consider a relatively short period of time. We can see that Mr Shenow actually offered to speak to the claimant or meet with her in his email of 10 December 2019 [314]. It was a matter for the claimant whether she chose to take advantage of this offer. Mr Shenow did not refuse to speak

to her in the way her pleaded case implies. The factual allegation, when viewed in its proper context, is not proven.

257. Even if Mr Shenow had not made such an offer to speak to the claimant direct, we are not satisfied that he subjected the claimant to a detriment in the way which she asserts. The reality is that from the moment the claimant escalated her complaints to Mr Shenow he did keep the lines of communication open so that she could make whatever representations to him she wished. She had clear access to him and sent him numerous emails. She could make all the representations that she wished to. She was not prevented from communicating her position or making representations. The claimant suffered no detriment. We also note that Mr Shenow did email the claimant on at least nine occasions.
258. The Tribunal does not accept that Ms Batchelor instructed Mr Shenow not to speak or meet with the claimant after 19 November. We accept that she did not actually have a conversation with him about this whole issue outside of the Board meeting discussion on 29 November. Mr Batchelor merely counselled Ms Ransom to take legal advice and act cautiously once it became apparent to her that the dispute might lead to litigation.
259. We have also considered why Mr Shenow acted as he did. Did he act in this way because the claimant had asserted a statutory right or sought to make a protected disclosure? We accept Mr Shenow's evidence that the reason he did not meet with or speak to the claimant was because of the volume of information he was receiving from her during the period in question. This gave him sufficient information to inform his investigation of the pertinent issues. He was also aware of the contradictory nature of much of her communication and he realised that he needed to scope the complaint clearly. A face to face or verbal conversation would have been unhelpful to that given all the circumstances.
260. It is also true that Mr Shenow was juggling a lot of competing demands on his time and attention at that time. He worked full time, he was managing his mother's end of life care and had the respondent's bi-annual conference to prepare for. He needed to be able to organise his time and prioritise matters so that he could focus on what was most important. A verbal conversation with the claimant (on top of the barrage of correspondence she had already sent) would have hindered that. He clearly felt that he could best protect the claimant's interests by progressing her complaint promptly so that the matter could be resolved without the claimant becoming more distressed.
261. In short, Mr Shenow acted as he did because he was trying to be dispassionate and keep the interaction professional and make decisions based on evidence from all relevant parties. The *substance* and *content* of the claimant's complaint or disclosure was immaterial to the way he behaved. He did not act in this way because there was a potential protected disclosure or an assertion of a statutory right. The fact that she was complaining about the absence of holiday pay or about her employment status had no material effect on Mr Shenow's behaviour. The *way* that the claimant conducted

herself and communicated and the *amount* of information she provided meant that it was unhelpful and unnecessary to have further verbal conversations during this time. This would have been the case whatever the substance of the claimant's complaints or disclosures. Mr Shenow would have needed to follow an appropriate process whatever she was complaining about. He could not give an immediate response to her without investigating and taking advice. It is apparent that the claimant was not in an appropriate frame of mind to have a reasonable conversation about the issue and Mr Shenow would have been ill advised to have such a conversation in the circumstances.

262. The necessary causal link between the alleged protected disclosure/assertion of a statutory right and the alleged detriment is not made out on the evidence in this case.
263. The test of causation in section 47B does not require us to compare the treatment of the claimant with that of Mr Walker as submitted in paragraph 46a of the claimant's skeleton argument. We are not tasked by the statute with deciding whether the claimant was treated fairly as compared to Mr Walker. In any event, the comparison is not a fair one in the circumstances of the case given the different roles of the claimant and Mr Walker within the organisation and the need for Mr Shenow to obtain Mr Walker's account of events to compare with the claimant's. For the avoidance of doubt, the Tribunal does not accept that Mr Shenow's failure to meet or speak directly to the claimant during this period "allowed Simon Walker to create and promote a poisonous narrative regarding the claimant's character and motives."

Detriments (b) and (c) Nick Shenow did not properly investigate what happened during the meeting between the claimant and Simon Walker on 19 November 2019. Nick Shenow did not address the grievance the claimant raised regarding the behaviour and conduct of Simon Walker in his meeting with the claimant on 19 November 2019.

264. The Tribunal has found that Mr Shenow obtained the accounts of both the relevant people (the claimant and Mr Walker) about the events of the meeting on 19 November. He also took the third party evidence into account which indicated that the claimant had shouted during the meeting. The crucial point was to determine whether the claimant had received her proper entitlements under the contract rather than to decide who had shouted at whom. The claimant clearly put her case about the events of 19 November 2019 and it is unclear what further investigation could or should have been done.
265. Mr Shenow did address the substance of the claimant's complaints. He did not afford her a full, formal grievance investigation because the respondent's view (on advice) was that the claimant was a contractor and she therefore

had no entitlement to use the grievance procedure which applied to employees. It is clear from the documents and the evidence given that Mr Shenow did properly investigate what happened during the meeting between the claimant and Mr Walker. The Tribunal finds that the claimant was not, in fact, subjected to the detriment she alleges.

266. In any event, the Tribunal has considered the matter of causation. The Tribunal does not accept that the claimant's assertion of statutory rights or her alleged protected disclosures materially influenced the way the respondent acted in this regard. The respondent sought to focus on the salient points of the dispute rather than get drawn into determining who had 'fallen out' with whom. The respondent wanted to make sure that it determined whether the claimant was entitled to further pay and to clarify her status. It took reasonable steps to address the substance of the dispute and give a reasonable and proportionate response.
267. In closing submissions the claimant asserted that the text message quoted at paragraph 46(b)(ii) of the skeleton argument disclosed a failure to investigate. We do not accept that. It is just one example of Mr Shenow drawing conclusions from the material he had read. It should not be looked at out of context.
268. The claimant's real complaint about with the investigation/grievance is not that it was not properly investigated or addressed by the respondent. The real substance of her complaint is that she did not get the outcome from the respondent that she wanted. She was not given what she had asked for and her complaint was not upheld. The process used by the respondent is really not at the core of her allegation. The respondent focused on core issues in her complaint. It did not ignore her or her complaints. It would have been disproportionate to go into the level of detail the claimant is asking for on what is actually a side issue. The core issue is the pay dispute rather than what Mr Walker did or did not do and say on 19 November.
269. The fact that the claimant had asserted statutory rights or (on her case) had made a protected disclosure did not materially influence Mr Shenow's actions. He acted as he did in order to resolve the dispute in a thorough but proportionate way. He would have acted in this way whether or not the complaint was about contractual status, rates of pay, some other protected disclosure or something entirely different.

Detriment (d) Nick Shenow believed Simon Walker's version of events above the claimant's version of events and never sought clarify or understand the discrepancies between the two.

270. The Tribunal finds that Mr Shenow had enough information from which to draw a conclusion. He had the accounts of both protagonists and the independent corroboration from the other staff member who checked in on them because of the audible argument. That staff member was a good friend

of the claimant's (Natalie). It is not clear what further evidence or clarification Mr Shenow could have obtained. He had the accounts of all the witnesses.

271. Mr Shenow was entitled to believe Mr Walker's account. Two out of three witnesses agreed that the claimant lost her temper and her composure. The accounts may not have been totally identical but there were no material discrepancies in the account of what happened. Both versions agree that the claimant lost her temper and shouted at Mr Walker and that he remained calm. (Indeed the claimant was moved to ask whether she and Mr Walker were 'still friends' at the end of the meeting). The real issue is that the claimant did not agree with what the respondent was saying to her about whether or not she should receive the amount of pay she had requested. We do not accept that the respondent subjected the claimant to a detriment as alleged.
272. Furthermore, the Tribunal does not accept that the respondent acted in this way on the ground that the claimant had asserted a statutory right or made a protected disclosure. Mr Shenow did not think that further clarification of the evidence was required and believed Mr Walker, at least partially because of the long standing professional relationship the two had. He trusted Mr Walker's competence and integrity based on this experience and also relied upon Natalie's account. The content of the disclosures or the assertion of a statutory right made no difference to his conclusions which were based on the available evidence. The necessary causation is not established.

Detriment (e) Nick Shenow on behalf of the respondent refused to allow the claimant to return to work after she requested to end her self imposed suspension on Monday 25 November 2019; she had instigated her suspension on Friday 22 November 2019 but asked to return to work once she believed her claims were being investigated.

Detriment (f) Nick Shenow on behalf of the respondent denied the claimant's application to attend the respondent's bi-annual conference.

273. The claimant suspended her work on 22 November. She did ask to return to work on 25 November, effectively in order to attend the conference (it is not clear that she was intending to carry out any other work for the respondent apart from attending the conference). It was that event that she wished to attend rather than anything else. It was not appropriate for her to attend the conference in circumstances where her complaint was still being investigated. She seemed to accept this at the time although she now maintains that this was detrimental treatment. As much as anything, it appears that the claimant resented being unable to take advantage of the social and leisure aspects of attendance at the conference rather than her inability to attend to *work* for the respondent.

274. The respondent's actions should be seen in context. The claimant chose to withdraw her services. She was asked whether she would be attending the conference and confirmed that she would *not* be doing so. On that basis, the respondent made arrangements for someone else to do the tasks which the claimant would have done had she attend as part of her work. Once that work was reallocated there was no business or organisational reason why the claimant needed to attend. On the other hand there were sound reasons why she should *not* attend an important event at a time when she was in dispute with the respondent. There was a material risk of reputational damage if the claimant was in attendance and was able to talk to those present at the conference. The available evidence suggests that she was in a somewhat emotional and volatile state. The respondent was entitled to take this risk into consideration in coming to the conclusion that, once the claimant had withdrawn her services, she should not attend until the underlying dispute was resolved. The respondent's trustees and workers needed to be free to focus on the business at hand (the major conference) rather than be distracted by concerns about the claimant's conduct.
275. The Tribunal is satisfied that the decision not to let the claimant attend the conference or to come back to work was nothing to do with the assertions of the statutory right or the alleged protected disclosures. They did not materially influence the respondent's actions. The decision was based on the claimant's volatile and emotional behaviour during this period. The way she had brought the allegations and the nature of her behaviour whilst they were being investigated made it impossible for her to attend the conference or carry out work for the respondent without risk to the respondent's interests.
276. The necessary causation is not established. The content of the dispute was not relevant to the respondent's actions. Rather, it was the way in which the claimant was behaving at the material time which influenced the respondent's actions. The respondent would have acted in this way whatever the substance or subject matter of the claimant's assertions and disclosures. It was the way the claimant went about matters which raised legitimate concerns on the respondent's part.
277. We also note that the claimant (in her closing skeleton argument) sought to argue that Mr Walker was permitted to continue to work and earn money whilst the claimant was prevented from doing so. We do not accept that this is a fair comparison to make. Mr Walker did not withdraw his services and his behaviour did not risk reputational damage to the respondent. We also note the apparent contradiction in the claimant complaining that her grievance and complaints were not properly investigated (detriments (a) to (d)) and then asserting that she should have been allowed to return to work and to the conference once she was satisfied that her claims were being investigated properly.

Detriment (g) Nick Shenow on behalf of the Respondent refused to pay the claimant suspension pay from 25 November 2019 – 5 December 2019, even

though prior to November 2019 they had agreed 5 work days with the claimant for that period.

278. The basis of the claimant's contract with the respondent was that she was only paid for work which she actually carried out. The claimant chose to withdraw her services. At that point the respondent was under no obligation to offer further work to her. She was therefore not entitled to be paid for work which she had not actually done. The fact that she might have *intended* to work for five days during the period in question is irrelevant if she did not, in fact, do that work. There was no contractual entitlement to pay during periods where the claimant was not working. Even if the claimant had withdrawn her services for some completely different reason (i.e. nothing to do with asserting a statutory right or making a protected disclosure) she still would not have been paid. The claimant was not paid during holidays either (to the extent that she extended a weekend break into a day when she had previously intended to work. She was not entitled to be paid for the day which she took as additional holiday).

279. The Tribunal does not accept that there is any causal link between the pleaded detriment and the alleged protected disclosure or the assertion of a statutory right. Even in the absence of a protected disclosure or the assertions of a statutory right she would not have been paid in circumstances where she had not carried out the work.

Detriment (h) Nick Shenow on behalf of the respondent used the term 'without prejudice' in an email to the claimant on 28 November 2019 without the claimant having been told first that a formal dispute had arisen between her and the respondent, nor offering any explanation, thus causing the claimant anxiety and distress.

280. The meaning of the terminology "without prejudice" was apparent from the wording of the email itself. It was not reasonably foreseeable that the claimant would have been caused any distress by the use of the phrase. It could not reasonably have been interpreted as detrimental to her interests. To the contrary, as set out in the findings of fact, the email sought to ensure that the claimant was not kept unnecessarily out of pocket pending resolution of her claim for enhanced pay. The payment which the respondent was making at that time did not mean that they were agreeing to her demands for increased pay. Nor did it mean that they would refuse them. It meant that the issue was yet to be resolved. Hence the payment was made 'without prejudice.' The Tribunal does not accept that this was a detriment. The Tribunal also finds that the necessary causal link with asserting a statutory right or making a public interest disclosure is absent. The claim fails.

Detriment (i) On 28 November 2019 Nick Shenow on behalf of the respondent required the claimant to email Simon Walker directly to claim her pay for the hours she had already worked in November 2019, even though her grievance against him had not been addressed by the respondent.

281. The claimant effectively withdrew this aspect of her claim in cross examination when she accepted that she was not asked to contact Mr Walker for payment because she had asserted a statutory right or made a protected disclosure. Rather it was because he was the person who would make these sorts of payments for the respondent organisation.

282. In any event the Tribunal struggles to see that this was a detriment. It was merely a request that she send an email in order to get the pay she was asking for. Mr Walker was responsible for actioning any such payments. How else would she obtain the payment? There was no detriment here. She got the pay she requested and could not reasonably have been upset or distressed by sending the email. It was a routine email which was dealt with promptly and professionally.

Detriment (j) At the trustees' Board meeting on 29 November 2019, with Simon Walker present and actively involved in the discussion, the Board sought to determine the claimant's employment status. This was despite the fact that any failure to comply with the requirements of the ERA and WTR was Simon Walker's responsibility and, therefore, his involvement in the meeting represented a serious conflict of interest.

283. The claimant has not established that the Board of Trustees sought to determine her employment status or that Mr Walker was actively involved in that discussion. Mr Walker prepared a briefing paper and he then left the meeting whilst the trustees discussed the claimant's complaint about him. The respondent's witnesses confirmed that there was no decision made about the claimant's employment status at the Board meeting and the trustees agreed to take HR and legal advice and allow Mr Shenow to investigate further. Mr Shenow received delegated authority from the Board to make a final decision about the claimant's status based on the findings of his investigation.

284. Mr Walker attended parts of the Board meeting because it was his job to attend given his position and responsibilities within the respondent. He needed to be involved in some of the other Board discussions which did not concern the claimant. He was required to attend the Board meeting by virtue of his job description and adequately guarded against any difficulties by absenting himself from parts of the discussion. This is standard practice in such organisations in such circumstances.

285. It is important to note that this was not a grievance hearing, it was a Board meeting. In those circumstances it was not appropriate for the claimant to attend too. It was not the sort of hearing where both employee and management sides attend and present their statement of case. Hence, circumstances did not require that either both individuals attended or neither of them attended. Decisions would be taken by the Board of Trustees, not Mr Walker

286. The claimant's factual allegation is not proven. Nor is the necessary causation established.

Detriment (k) Simon Walker perpetuated his detrimental narrative that the claimant was a troublemaker and mostly concerned with financial gain (and the respondent (perhaps unwittingly permitted him to do so), by letting him take a lead role in constructing the dismissal letter and the emails dated 10 December 2019 responding to the claimant's query following the termination of her work with the respondent. The claimant is convinced he took advantage of those opportunities to protect his interests at her expense i.e. a clear conflict of interest.

287. As set out in the findings of fact, the Tribunal does not accept that the briefing paper constituted a 'detrimental narrative' in the way that the claimant asserts. We also accept that Mr Shenow was the decision maker and he was not unduly swayed by Mr Walker. Mr Shenow asked Mr Walker to produce a first draft of the response letter to the claimant on some of the technical points that the claimant had raised. Given his expertise he was best placed to do this. However, that draft was subject to review and amendment by Mr Shenow and Ms Liddington (independent HR). Amendments were proposed and the letter which was sent was 'owned' by Mr Shenow as reflecting his decision. The decisions were taken by Mr Shenow following discussion with the other trustees. He offered further payments to the claimant in line with the Trustees' discussions.

288. In relation to the email sent by Mr Shenow on 10 December this too was his email. He sought input from Mr Walker, Ms Samuel (counsel of reference) and Ms Ransom. In particular, the claimant had referred to a particular email from Mr Walker and so Mr Walker needed to identify the email in question. The suggested response came from Ms Samuel. Mr Walker merely put the suggestions into a draft to assist Mr Shenow and located the email in question and forwarded it to the relevant interested parties.

289. The Tribunal does not find the claimant's allegation proven. In any event we do not accept that the necessary causation has been established. The way the correspondence was handled had nothing to do with the fact the claimant was asserting a statutory right or sought to make a public interest disclosure. It was a practical way of responding to the claimant's correspondence by enlisting the assistance of the relevant individuals with the relevant knowledge and expertise for the subject matter. Hence advice and input was sought from others, not just Mr Walker.

Was the claimant subjected to detriments for asserting a statutory right

290. The statutory right relied on by the claimant was the right to holiday pay and sick pay. The claimant was not off work on sick leave at any relevant point during her time with the respondent.

291. As should be clear from the foregoing paragraphs the Tribunal does not accept that the claimant was subjected to a detriment because she asserted her statutory rights. The content of her assertions was irrelevant to the way the respondent treated her. Even if the claimant had not claimed the right to paid holidays and sick leave the respondent would have behaved in the same way towards her. Overall it was not the substance of her complaint but the way she went about it. Her behaviour during the relevant period was difficult to manage. She became increasingly volatile and demanding of the respondent's time and attention. If the claimant had behaved in the same way but the *content* of her correspondence had been different she would have been in the same position and would have been treated the same way by the respondent. The central reason for the respondent's actions was the fact she was demanding a higher rate of pay as a *fait accompli* without first negotiating the increase. She just sent in the invoice and was affronted when the respondent did not automatically capitulate to her demands. The claimant's emotional response and the respondent's desire to seek appropriate advice were the reasons that the respondent proceeded as it did.

Was the claimant dismissed?

292. The claimant was not an employee and so cannot claim automatically unfair dismissal within Part X of the Employment Rights Act 1996.

293. The claimant sought to put her claim about dismissal using the statutory provisions for employees and so the dismissal claim could be dismissed on that basis alone. The 'dismissal' was not really put forward in the pleaded case as an additional 'detriment' which the claimant has standing to pursue given her worker status.

294. In any event, the Tribunal is not satisfied that there was a dismissal which could be characterised as a further detriment under sections 45A or 47B. The claimant withdrew her services such that the respondent was under no obligation to offer her further work. They communicated this to her in the letter of 5 December 2019, thereby formalising the position that had been extant since 22 November when the claimant took her decision. She had already indicated that it was 'inappropriate' for her to continue to work for the respondent whilst she considered her employment conditions to be 'illegal.' In its outcome to her grievance/complaints the respondent had not agreed with her characterisation of her employment status and had confirmed that she was in fact a self-employed contractor. The respondent would not be making changes to make her employment conditions 'legal' in the claimant's own estimation. The circumstances had therefore not changed to allow the claimant to resume her work, even on her own case. The letter of 5 December made the natural consequence of the claimant's own position clear in light of the outcome of the employment status review. The claimant withdrew her services and the respondent did not resurrect the contract by offering further work. It was the claimant, in effect, who terminated the contract and not the respondent. The respondent just accepted the decision the claimant had

made and formalised it. This was not the claimant being subjected to the detriment of dismissal given the circumstances where there was no obligation on the respondent to offer further work once the claimant 'suspended' her services.

295. Even if the Tribunal were wrong about this and it could properly be characterised as the respondent subjecting the claimant to the 'detriment' of dismissal we do not accept that the claimant's assertion of statutory rights or alleged protected disclosures materially contributed to the alleged detriment. The respondent sent the 5 December letter because the relationship had irretrievably broken down because of the way the claimant had conducted herself. The substance of her complaints and disclosures was not material. If she had gone about the process in a more reasonable manner then the respondent would have had no reason not to offer further work or to confirm the position in that way in the letter. However, the claimant's demanding, volatile and emotional approach to matters meant that the respondent was left feeling unable to offer her further work. It could no longer find a way to manage its dealings with her so that she did not react adversely. She had effectively 'burnt her bridges' with the respondent. Had she made the same substantive complaints and allegations but responded more calmly and constructively to the respondent this would not have happened. The respondent would have looked into the issues she raised and provided an outcome which the claimant would have been able to review. It would then have been up to her whether she wanted to offer her services to the respondent again in future.

Unauthorised deductions from wages

296. The claimant made a claim for unauthorised deductions from wages. The Tribunal has jurisdiction to determine such a complaint given that it has found that the claimant was a worker within the meaning of the Employment Rights Act 1996. The Tribunal has not heard evidence or submissions about the alleged deductions which were said to relate to unpaid holiday pay. (The claimant was not off work on sick leave and so the issue of sick pay does not arise for determination).
297. During the course of the hearing the parties indicated that once the issue of employment status was determined they would probably be able to calculate whatever sums were owed to the claimant in terms of accrued holiday pay. We therefore intend to give the parties time to agree the appropriate sums for holiday pay between themselves so as to avoid the need for a further Tribunal hearing unless it really is necessary. However, if the parties are unable to agree what sums of wages are outstanding the Tribunal will need to list a remedy hearing and provide directions to prepare for such a hearing.

Conclusion

298. All the claimant's claims herein are dismissed, save for the claim for unauthorised deductions from wages.

299. The parties have 28 days from the date the judgment is sent out to the parties to liaise and agree what sums of wages are owed pursuant to the unauthorised deductions from wages claim. By no later than 28 days the parties must write to the Tribunal to confirm whether they have reached agreement in relation to the claim for unauthorised deductions from wages. If they have, they should confirm whether they wish the Tribunal to issue a remedy judgment and, if so, in what terms. If they have not reached agreement, they must write to the Tribunal with dates of availability for a one day remedy hearing during the subsequent 6 months and the Tribunal will issue directions and list the hearing.

Employment Judge Eeley

Date 7 September 2022

RESERVED JUDGMENT & REASONS SENT TO THE
PARTIES ON

8 September 2022

FOR EMPLOYMENT TRIBUNALS