EMPLOYMENT TRIBUNALS

Claimant: Mr S Kenney

Respondent: Securitas Security Services (UK) Limited

JUDGMENT

Heard at: Teesside **On: 23,24 and 25 January 2019**
Deliberations in chambers : **7 February 2019**

Before: Employment Judge Shepherd
Members: Ms B Kirby
Mr J Adams

Appearances:
For the claimant: In person
For the respondent: Ms Young

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of automatically unfair dismissal for making a public interest disclosure contrary to section 103A of the Employment Rights Act 1996 is not well founded and is dismissed.

2. The claims of detriments for making public interest disclosures contrary to section 47B of the Employment Rights Act 1996 are not well founded and are dismissed.

3. The claim of unauthorised deductions from wages is not well founded and is dismissed.

REASONS

1. The claimant represented himself and the respondent was represented by Ms Young.

2. The Tribunal heard evidence from:

Sonnie Kenney, The claimant;
Neil Banks, former Service Delivery Manager;
Ian Lidster, Security Officer;
Alec Anderson, Security
Geraldine McStea, Service Delivery Manager;
William Gilliland, Service Delivery Manager;
Stuart Hillier, Protective Services Branch Manager.

3. The Tribunal had sight of a bundle of documents which was numbered up to page 307. The Tribunal considered those documents to which it was referred by parties.

4. The claims and issues to be determined by the Tribunal were identified at a Preliminary Hearing before Employment Judge Johnson on 30 July 2018. The claimant had brought complaints of unfair dismissal, unauthorised deduction from wages, failure to make a redundancy payment, being subjected to detriments because he had made protected disclosures, being automatically unfairly dismissed for making protected disclosures and being automatically unfairly dismissed for complaining about matters relating to health and safety. It was stated that, in essence, the issues arose out of the claimant's dismissal on or about 19 March 2018 for reasons which the respondent said related to his conduct. The claimant alleged that this was not the real reason for his dismissal and that the real reason was because he had complained about health and safety matters and made other protected disclosures.

5. The claimant withdrew his claim for a redundancy payment and that claim was dismissed. Also, the claim of automatic unfair dismissal contrary to section 100 of the Employment Rights Act 1996 because he brought to his employer's attention circumstances which were harmful or potentially harmful to health and safety, was withdrawn and dismissed at that hearing.

6. The claimant had been ordered to provide further information about his complaints. He had provided further information which set out a number of alleged disclosures. Ms Young had gone through the alleged disclosures and identified 27 potential disclosures and set them out within the respondent's amended response. This was discussed at the start of this hearing and the claimant agreed that the disclosures he relied on were those set out chonologically as follows:

a. 7 March 2016 (17)- the claimant alleges that he told Mr Julian Antcliffe of a health and safety issue created by Kieron Henderson. The Claimant was providing information to Mr Antcliffe. The claimant reported the removal of a chair overlooking a pavilion that security officers would sit on to watch a bike shed.

b. Summer 2016 (8)- the claimant sends a grievance in which the claimant questions if Kieron Henderson is the right man for the position he holds.

c. 13th February 2017 (4)- text message sent to Julian Antcliffe about site supervisor Kieron Henderson allegedly causing a health and safety issue by

having guards sit in an empty building without electricity, lights, heating in sub zero temperatures and floor of site covered in potholes.

d. 19th March 2017(11)- claimant alleges that he told Comms and Julian Antcliffe of harassment by Colin Peaker and Mike Johnson.

e.23rd March 2017(12)- The claimant alleges that Julian Antcliffe was informed of Kieron Henderson taunting guards and falsifying EE policy

f. 24th March 2017(13)- The claimant alleges that Julian Antcliffe was informed by email that Security Officer Johnson was not seen on night duty.

g.25th March 2017 (14)- The claimant alleges that Julian Antcliffe was informed by email about Security Officer Johnson leaving site in his car.

h. 7th April 2017 (15)- The claimant alleges that HR is informed that Colin Peaker published a video on YouTube that showed the inside of the Security Office at EE Darlington.

i. 26th May 2017 (5)- The claimant alleges that he sent a text message to Julian Antcliffe that the external lights should be switched to automatic to avoid guards going down" in the dark.

j. 5th July 2017(16)- The claimant alleges that he told Julian Antcliffe in an email that Colin Peaker was harassing a female member of staff.

k. 7th November 2017 (1)- The claimant alleges that at some unspecified date in 2017 he told the external auditors that the assignment instructions are not updated each year

l. Unknown date in 2017(6)- The claimant claims he told Julian Antcliffe that he saw Kieron Henderson victimising William Conn.

m. 5th January 2018 (2)- The claimant alleges that Kieron Henderson allegedly tried to get the claimant to confess that the claimant was in the wrong regarding fire logs that had been signed by the claimant.

n. 6th February 2018 (20)- The claimant alleges that he informed HR that there was harassment and victimisation against a guard.

o. 9th February 2018 (3)- it is alleged that an investigatory meeting about an email is a protected disclosure.

p. 12th February 2018 (10)- the claimant alleges that he informed Mr Gilliland that he had been advised to contact the police over his missing uniform.

q. 18th February 2018 (9)- The claimant alleges that he told Ms McStea that Colin Peaker was banned from the TV maintenance room.

r. 19th February 2018 (21)- the claimant alleges that he brought the issue of theft to the attention of HR via an email. The claimant had already raised this issue in his 12th February 2018 email. All the same points in relation to that email apply to the 19th February email.

s. 26th February 2018 (7(a))- The claimant alleges telling Neil Banks & Craig Stubbs in an email of 26/02/18 that a guard was having to cycle from Catterick to Darlington and back again.

t. 26th February 2018 (7(b))- the claimant alleges telling Neil Banks & Craig Stubbs in an email of 26/02/18 about Kieron Henderson's methods of harassment.

u. 26th February 2018 (7(c))- the claimant alleges telling Neil Banks & Craig Stubbs in an email of 26/02/18 that Kieron Henderson was picking on Kevin Anderson and Sonya Rutherford.

v. 26th February 2018 (19)- the claimant alleges telling Neil Banks & Craig Stubbs in an email of 26/02/18 about a health and safety issue with conducting a disciplinary hearing at the Gateshead office.

w. Dates unknown- (22(a))- the claimant alleges that Will Conn suffered aggravation from Kieron Henderson.

x. Dates unknown- (22(b))- the claimant alleges that Colin Rolf was informed of a fire hazard at St Therese's hospice in Darlington.

y. Dates unknown- (22(c))- the claimant alleges Julian Antcliffe was informed that a guard was suicidal.

z. Dates unknown- (22(d))- The claimant alleges Kieron Henderson was close to a nervous breakdown.

aa. Dates unknown- (22(e))- the claimant alleges that Ward Gilliland and Lynne English were informed about a guard who looked close to a coronary.

7. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions:

7.1. The claimant was employed by the respondent as a Relief Security Officer. As a result of a number of transfers of undertakings the claimant had continuity of employment from 2003 with the respondent and its predecessors.

7.2. There was a history of the claimant having disputes and disagreements with the respondent's site manager at the EE premises in Darlington, Kieron Henderson and another employee, Colin Peaker. The claimant said that he was subject to bullying and harassment over a number of years.

7.3. On the 6 February 2018 the claimant sent an email to HR Admin at the respondent in which he stated:

> "After the latest bout of victimisation and harassment at EE Darlington there is a good chance Kieron and peaker will be dead before I realise what I've done"

7.4. The claimant was invited to an investigatory meeting which took place with Geraldine McStea, Service Delivery Manager on 9 February 2018. The Tribunal was provided with the notes from this meeting. The claimant had signed a copy of the notes and did not dispute their contents. When he was asked, during the meeting, if he realised the severity and that it was a death threat the claimant replied:

> "Yes I wanted to kill Kieron"

He referred to harassment and provocation.

7.5. The claimant also indicated that since an anxiety attack he had sudden outbursts sometimes and when he was asked if it was possible that he could have an outburst that would lead to him killing Keiron the claimant replied:

> "Ok well I will kill myself and them"

7.6. The claimant also stated:

> "All it takes is a pinprick and I could lose it."

7.7. On 22 February 2018 Geraldine McStea wrote to the claimant requiring him to attend a disciplinary hearing at the respondents Gateshead premises with Neil Banks, Service Delivery Manager in the letter it was stated that the hearing had been arranged to discuss allegations of gross misconduct in that the claimant:

> "Displayed threatening behaviour in an email sent to Securitas HR whereby you mention two of your work colleagues by name with threats to kill them.
>
> Gross misconduct – this is considered to be part of the company's formal disciplinary procedure and therefore could result in disciplinary action being taken against you. The allegations made against, should they be proven, would amount to gross misconduct and therefore may result in your dismissal from the employment of Securitas"

7.8. The notes of the disciplinary hearing before Neil Banks on 5 March 2018 show that the claimant said that the sending of the email was a spur of the moment thing due to the harassment. When asked whether he regretted sending the email he replied:

> "No, but I could have worded it better."

7.9. The claimant was dismissed at the end of the disciplinary hearing and this was confirmed in a letter dated 6 March 2018 from Neil Banks. The claimant was summarily dismissed for gross misconduct.

7.10. The claimant appealed against his dismissal. He referred to bullying and harassment and that the matter of why he had sent the email had ever been properly addressed. The claimant referred to other incidents including, coming back from holiday and seeing a memorandum which other guards said was targeted at him, the missing uniform that had been sent to him and was well hidden, a complaint about Colin Peaker when he threatened to launch the claimant through a window. The claimant also referred to a guard who had attempted suicide. He also stated:

> "As to why I sent the email I have given it deep thought. The truth. I don't know. It's as if something inside of me told me to do it as a cry for help, to let off steam or maybe that I have had enough of the victimisation and harassment that happens on the site."

7.11. The claimant's appeal was heard by Stuart Hillier, Protective Services Branch Manager. The notes show that the claimant indicated that he was happy to proceed without representation. He was asked, since his minutes had come late, whether he wanted to continue with the hearing and he said he wanted to get it over with and confirm that he was definitely happy to continue.

7.12. On 21 March 2018 Stuart Hillier wrote to the claimant. In that letter it was indicated that the following points had been specifically considered:

- "Your lack of concern over the aggressive and threatening content made in the email still evident in your appeal hearing with myself .
- You felt that your meetings had been prejudged and that the outcome was already made prior to attending the hearings. We discussed this point and the evidence which you feel proved that your meeting had been prejudged. You received an employment letter, upon your request from Laura Bell on 26 February 2018, which use the past terminology in regards to your employment, we discussed that this letter had no bearing on your appeal as this is a standard employment letter. The letter also stated that you were employed to date with the company, which clearly gives no reference to no longer working for Securitas.

- I considered during our meeting that you apologized for the email. You stated that you should have worded your email better, when I asked you how you would have done this, you could not answer this, however you did not show remorse for your email during the Disciplinary Hearing.

- Whilst you advised upon questioning that you do not intend to act upon these threats, as discussed in your disciplinary hearing, I

had to ask if you felt any regret and only then did you say you now regret it after being asked.

- There was no immediate incident that prompted your email or your comments and that it was your general feeling toward your colleagues that spurred your email. I find this extremely concerning that whilst emails of this kind of wholly unacceptable to Securitas, I have to consider why you sent this and I can find no reasonable explanation, there was also the explanation offered by yourself that I did not feel warranted such aggressive and threatening behaviour.

- I considered that you state you are having difficulties on site, and as per our discussion you are aware of the Grievance Policy and procedure and have previously raised a Grievance in line with this Policy, I am unsure why in any event you did not follow the formal company policy or send emails of an appropriate nature which as discussed you are fully aware of, but you said this would not work.

- We also discussed your reaction at the disciplinary hearing with Neil Banks that you gave Neil the middle finger on leaving the meeting, I asked you why you acted in the manner and you said this was a “mild reaction”. I’m alarmed by these comments that you feel aggression in this manner towards a member of Securitas staff is to be considered a “mild reaction”. I do not believe it is a mild reaction and further evidences aggressive behaviour on your part, subsequently I have a serious concern for the welfare and safety of my other employees. That you said you held all your frustrations in and sometimes just need to release, and that’s normally by talking to people.

These points are relevant and were given due consideration.

In considering all the information available at the hearing, it has been concluded that the following allegations have, on balance been proven:

- Displayed threatening behaviour in an email to Securitas HR whereby you mention two of your work colleagues by name with threats to kill them.

Having considered the points raised in your appeal, it has been concluded that your appeal is to be rejected. The reason for reaching this decision is as follows:

That you showed no remorse for your actions until the appeal hearing and only when asked and not given freely.

- I have to consider my other employee’s health/welfare and safety in the workplace. I am not confident that you would react in an

appropriate way going forward and believe your aggressive comments are wholly unacceptable to a positive, safe working environment.

- That you told me that you hold things in and sometimes just let it all out without thinking or realising what you have done.

- Your aggressive reaction to Neil Banks at your disciplinary hearing by giving him the middle finger on leaving the meeting."

7.13. After going through the ACAS early conciliation procedure, the claimant issued a claim to the Employment Tribunal on 15 May 2018. He brought complaints of unfair dismissal, unauthorised deduction from wages, failure to make a redundancy payment, being subjected to detriment speakers he made protected disclosures and being automatically unfairly dismissed for complaining about matters relating to health and safety. The claimant withdrew his claim for redundancy pay.

The law

Unfair dismissal

8. Where an employee brings an unfair dismissal claim before an Employment tribunal, it is for the employer to demonstrate that its reason for dismissing the employee was one of the potentially fair reasons in section 98(1) and (2) of the Employment Rights Act 1996. If the employer establishes such a reason the Tribunal must then determine the fairness or otherwise of the dismissal by deciding in accordance with section 98(4) of the Employment Rights Act 1996 whether the employer acted reasonably in dismissing the employee. Conduct is a potentially fair reason for dismissal under section 98(2).

9. In determining the reasonableness of the dismissal with regard to section 98(4) a Tribunal should have regard to the three-part test set out by the Employment Appeals Tribunal in **British Home Stores Limited v Burchell [1978] IRLR379**. That provides that an employer, before dismissing an employee, by reason of misconduct, should hold a genuine belief in the employee's guilt, held on reasonable grounds after a reasonable investigation. Further, the Tribunal should take heed of the Employment Appeal Tribunal's guidance in **Iceland Foods Limited v Jones [1982] IRLR439**. In that case the EAT stated that a Tribunal should not substitute its own views as to what should have been done for that of the employer, but should rather consider whether the dismissal had been within "the band of reasonable responses" available to the employer. In the case of **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR23** the Court of Appeal confirmed that the "band of reasonable responses" approach applies to the conduct of investigations as much as to other procedural and substantive decisions to dismiss. Providing an employer carries out an appropriate investigation and gives the employee a fair opportunity to explain his conduct, it would be wrong for the Employment Tribunal to suggest that further investigation should have been carried out. For, by doing so, they are substituting their own standards as to what was an adequate investigation for the standard that could be objectively

expected from a reasonable employer. In **Ucatt v Brain [1981] IRLR225** Sir John Donaldson stated:

> "Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, 'Would a reasonable employer in those circumstances dismiss', seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question 'Would we dismiss', because you sometimes have a situation in which one reasonable employer would and one would not. In those circumstances, the employer is entitled to say to the Tribunal, 'Well, you should be satisfied that a reasonable employer would regard these circumstances as a sufficient reason for dismissing', because the statute does not require the employer to satisfy the Tribunal of the rather more difficult consideration that all reasonable employers would dismiss in those circumstances".

Stephenson L J stated in **Weddel v Tepper [1980] IRLR 96**:

> "Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, per Burchell, 'carried out as much investigation into the matter as was reasonable in all the circumstances of the case'. That means that they must act reasonably in all the circumstances, and must make reasonable enquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate enquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are not acting reasonably".

10. In the employment context the term "gross misconduct" is used as convenient shorthand for conduct which amounts to a repudiatory breach of the contract of employment entitling the employer to terminate it without notice. In the unfair dismissal context, a finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Exactly what type of conduct amounts to gross misconduct will depend on the facts of the individual case. Generally, to be gross misconduct, the misconduct should so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment. Thus, in the context of section 98(4) of the 1996 Act it is for the Tribunal to consider:

> (a) Was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct and

(b) Was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, the employee's length of service and disciplinary record are relevant as is his attitude towards his conduct.

Protected Disclosure Claim

11. Section 43B(1) of the Employment Rights Act 1996

"(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 or is likely to fail to comply with any legal obligation to which he is subject;
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
(d) that the health or safety of an 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 matter falling within any one the preceding paragraphs has been or is likely to be deliberately concealed".

12. Section 47B (1)

"A worker has the right not to be subjected to any detriment by an act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

Section 103A

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

13. The definition of a qualifying disclosure breaks down into several elements which the Tribunal must consider in turn.

Disclosure

14. In **Cavendish Munro Professional Risks Management Limited v Geduld 2010 IRLR 37** Slade J stated:

> "That the Employment Rights Act 1996 recognises a distinction between "information" and an "allegation" is illustrated by the reference to both of these terms in S43F……It is instructive that those two terms are treated differently and can therefore be regarded as having been intended to have different

> meanings……the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that "you are not complying with Health and Safety requirements". In our view this would be an allegation not information. In the employment context, an employee may be dissatisfied, as here, with the way he is being treated. He or his solicitor may complain to the employer that if they are not going to be treated better, they will resign and claim constructive dismissal. Assume that the employer, having received that outline of the employee's position from him or from his solicitor, then dismisses the employee. In our judgment, that dismissal does not follow from any disclosure of information. It follows a statement of the employee's position. In our judgment, that situation would not fall within the scope of the Employment Rights Act section 43 … The natural meaning of the word "disclose" is to reveal something to someone who does not know it already. However, s43L (3) provides that" disclosure" for the purpose of s 43 has the effect so that "bringing information to a person's attention" albeit that he is aware of it already is a disclosure of that information. There would be no need for the extended definition of "disclosure" if it were intended by the legislature that "disclosure" should mean no more than "communication".

Simply voicing a concern, raising an issue or setting out an objection is not the same as disclosing information. The Tribunal notes that a communication – whether written or oral – which conveys facts and makes an allegation can amount to a qualifying disclosure.

15. In **Kilraine –v- London Borough of Wandsworth UKEAT/0260/15** Langstaff J stated:

> "I would caution some care in the application of the principle arising out of **Cavendish Munro**. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the Claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point".

Public interest

16. In **Chesterton Global Ltd -v- Nurmohamed [2015] IRLR** Supperstone J stated:

> "I accept Ms Mayhew's submission that applying the **Babula** approach to section 43B (1) as amended, the public interest test can be satisfied where the basis of the public interest disclosure is wrong and/or there was no public interest in the disclosure being made provided that the worker's belief that the disclosure was made in the public interest was objectively reasonable. In my view the Tribunal properly asked itself the question whether the Respondent made the disclosures in the reasonable belief that they were in the public interest…… The objective of the protected disclosure provisions is to protect employees from unfair treatment for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace (see **ALM Medical Services Ltd v Bladon** at paragraph 16 above). It is clear from the parliamentary materials to which referen**ce can be made pursuant to Pepper (Inspector of Taxes) v Hart [1993] AC 593** that the sole purpose of the amendment to section 43B(1) of the 1996 Ac**t** by section 17 of the 2013 Act was to reverse the effect of **Parkins v Sodexho Ltd.** The words "in the public interest" were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. As the Minister observed: "the clause in no way takes away rights from those who seek to blow the whistle on matters of genuine public interest" (see paragraph 19 above) …… I reject Mr Palmer's submission that the fact that a group of affected workers, in this case the 100 senior managers, may have a common characteristic of mutuality of obligations is relevant when considering the public interest test under section 43B (1). The words of the section provide no support for this contention……. In the present case the protected disclosures made by the Respondent concerned manipulation of the accounts by the First Appellant's management which potentially adversely affected the bonuses of 100 senior managers. Whilst recognising that the person the Respondent was most concerned about was himself, the tribunal was satisfied that he did have the other office managers in mind. He referred to the central London area and suggested to Ms Farley that she should be looking at other central London office accounts (paragraph 151). He believed that the First Appellant, a well-known firm of estate agents, was deliberately miss-stating £2-3million of actual costs and liabilities throughout the entire office and department network. All this led the Tribunal to conclude that a section of the public would be affected and the public interest test was satisfied*".*

Reasonable Belief

17. In **Darnton v University of Surrey** and **Babula v Waltham Forest College 2007 ICR 1026** it was confirmed that the worker making the disclosure does not have to be correct in the assertion he makes. His belief must be reasonable. In **Babula** Wall LJ said: -

> "… I agree with the EAT in **Darnton** that a belief may be reasonably held and yet be wrong… if a whistle blower reasonably believes that a criminal offence has been committed, is being committed or is likely to be committed. Provided that his belief (which is inevitably subjective) is held by the Tribunal to be objectively reasonable neither (i) the fact that the belief turns out to be wrong – nor (ii) the fact that the information which the claimant believed to be true (and

> may indeed be true) does not in law amount to a criminal offence – is in my judgment sufficient of itself to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute… An employment Tribunal hearing a claim for automatic unfair dismissal has to make three key findings. The first is whether or not the employee believes that the information he is disclosing meets the criteria set out in one or more of the subsections in the 1996 Act section 43B(1)(a) to (f). The second is to decide objectively whether or not that belief is reasonable. The third is to decide whether or not the disclosure is made in good faith".

Legal Obligation

18. A disclosure which in the reasonable belief of the employee making it tends to show that a breach of legal obligation has occurred (or is occurring or is likely to occur) amounts to a qualifying disclosure. It is necessary for the employee to identify the particular legal obligation which is alleged to have been breached. In **Fincham v HM Prison Service** EAT0925/01 and 0991/01 Elias J observed: "There must in our view be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the worker is relying." In this regard the EAT was clearly referring to the provisions of section 43B (1) b of the 1996 Act.

19. The Tribunal has noted the criticism by the EAT in **Fincham** of the decision of the Employment Tribunal in that case that a statement made by the claimant to the effect "*I am under pressure and stress"* did not amount to a statement that the claimant's health and safety was being or at least was likely to be endangered.

20. In the case of **Eiger Securities LLP v Korshunova** UKEAT/0149/16/DM Slade J stated:

"The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. However, in my judgement the ET failed to decide whether and if so what legal obligation the claimant believed to have been breached."

21. In **Goode –v- Marks and Spencer plc UKEAT/0042/09** Wilkie J stated the judgment of the EAT at paragraph 38 to be:

> "…the Tribunal was entitled to conclude that an expression of opinion about that proposal could not amount to the conveying of information which, even if contextualised by reference to the document of 11 July, could form the basis of any reasonable belief such as would make it a qualifying disclosure."

Claim for Automatic Unfair Dismissal Section 103A 1996 Act

22. Section 103A

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

23. The burden of proof lies with the respondent to establish the reason for dismissal. If the reason is established it will normally be for the employee who argues that the real reason for dismissal was an automatically unfair reason to establish some evidence to require that matter to be investigated. Once that has been done the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal.

24. In the case of **Eiger Securities LLP v Korshunova** UKEAT/0149/16/DM Slade J referred to the distinction between automatically unfair dismissal by reason of making a protected disclosure and detriment on the ground of making a protected disclosure as follows

> "The Claimant's claim for "ordinary" unfair dismissal under ERA section 98 had been struck out as she did not have the necessary qualifying period of employment to bring such a claim. A claim for unfair dismissal for making a protected disclosure requires no qualifying period of employment and is brought under ERA section 103A. Section 103A provides:
>
> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure claim."

25. The tribunal was referred to the Court of Appeal decision **in Royal Mail v Jhuti [2018] IRLR 251** in which Underhill LJ stated:

> "… For the purpose of determining 'the reason for the dismissal' under s98(1) the Tribunal is obliged to consider only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss (that may be subject to possible qualifications discussed below; but they are marginal and not relevant to the present case). Section 103A falls under Pat X of the 1996 Act and it must be interpreted consistently with the other provisions governing liability for unfair dismissals."

Detriment

26. Section 103A, automatic unfair dismissal by reason of making a protected disclosure, and section 47B (1), a right not to be subjected to a detriment on the ground of making a protected disclosure, are in different Parts of the ERA, Part IX and IV respectively and use different language. The consequences of these differences for the tests in establishing claims for unfair dismissal under ERA section 103A and being subjected to detriment under ERA section 47B (1) were authoritatively determined by the Court of Appeal in **Fecitt v NHS Manchester [2012] IRLR 64**, a claim under ERA section 47B (1). These differences were explained by Elias LJ in paragraph 44 in which he held:

> "I accept, as Mr Linden argues, that this creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair. However, it

> seems to me that it is simply the result of placing dismissal for this particular reason into the general run of unfair dismissal law. As Mummery LJ cautioned in **Kuzel v Roche Products Ltd [2008] ICR 799**, para 48, in the context of a protected disclosure.
>
> Unfair dismissal and discrimination on specific prohibited grounds are, however, different causes of action. The statutory structure of the unfair dismissal legislation is so different from that of the discrimination legislation that an attempt at cross fertilisation or legal transplants runs a risk of complicating rather than clarifying the legal concepts**."**

27. Different tests are to be applied to claims under ERA sections 103A and 47B (1). Thus, for a claim under ERA section 103A to succeed the ET must be satisfied that the reason or the principal reason for the dismissal is the protected disclosure whereas for a claim under ERA section 47B (1) to be made out the ET must be satisfied that the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's detrimental treatment of the Claimant."

Conclusions

28. The Tribunal has considered each of the alleged protected disclosures as agreed by the claimant at the outset of the Hearing. Ms Young had placed these in chronological order and the claimant agreed that they were the alleged disclosures he relied upon and he identified the relevant subsection of section 43B of the. Employment Rights Act 1996.

> a. 7 March 2016 (17)- the claimant alleges that he told Mr Julian Antcliffe of a health and safety issue created by Kieron Henderson. The claimant was providing information to Mr Antcliffe. The claimant reported the removal of a chair overlooking a pavilion that security officers would sit on to watch a bike shed.

The claimant indicated that this disclosure was a disclosure under section 43B (1) (d) that the health or safety of an individual has been, is being or is likely to be endangered.

29. The claimant had sent an email on 7 March 2016 to Julian Antcliffe in which he had indicated that a chair had been taken from the pavilion of EE Darlington. He referred to guards who had ailments such as arthritis and he raised it as a Health and safety issue. The respondent said there was no public interest in the removal of a chair as security officers are expected to be alert and a deterrence in their role.

30. The Tribunal finds that by complaining about this issue, the claimant had disclosed information that shows that the health and safety of an individual has been, is being or is likely to be endangered. It was submitted that there was no public interest since the issue was pertinent to one employee with a medical issue. However, the Tribunal finds that the claimant did have a subjective belief at the time that his allegation was made that it was in the public interest. His concern was with regard to the health and safety of a number of security guards. Taking into account the judgment in **Chesterton**

Global Ltd -v- Nurmohamed and subsequent decisions, although the disclosure was with regard to only the security operatives who might undertake those duties, the Tribunal is satisfied that this could be seen as a protected disclosure. However, this was a disclosure that was made in March 2016 some two years before the claimant was dismissed and the Tribunal is satisfied that it did not play a part in the decision to dismiss the claimant. It was not raised at any time during the investigation or disciplinary process.

b. Summer 2016 (8)- the claimant sends a grievance in which the claimant questions if Kieron Henderson is the right man for the position he holds.

31. This was an expression of the claimant's opinion about another of the respondent's employees. It was not raised during the investigatory or dismissal procedure and the Tribunal is satisfied it had no impact on the decision to dismiss the claimant. During his evidence to the Tribunal the claimant accepted that this was not a public interest disclosure.

c. 13th February 2017 (4)- text message sent to Julian Antcliffe about site supervisor Kieron Henderson allegedly causing a health and safety issue by having guards sit in an empty building without electricity, lights, heating in sub zero temperatures and floor of site covered in potholes.

32. The claimant sent an email to Julian Antcliffe on 13 February 2017 in relation to working in a building with no heating, lighting or a torch. The claimant confirmed that this matter had been resolved within two weeks. It was with regard to EE's building. The Tribunal accepts that this could be a disclosure in relation to health and safety issues. It was over a year before the claimant's dismissal. It was not raised during the investigatory or disciplinary process and the Tribunal is not satisfied that it played any part in the decision to dismiss the claimant.

d. 19th March 2017(11)- claimant alleges that he told Comms and Julian Antcliffe of harassment by Colin Peaker and Mike Johnson.

33. There was no documentary evidence in support of this disclosure. This is a complaint about harassment by colleagues. The claimant accepted that this was not a protected disclosure. In any event, the Tribunal is satisfied that this was not an issue raised during the investigation or disciplinary procedures and had no influence on the decision to dismiss.

e.23rd March 2017(12)- The claimant alleges that Julian Antcliffe was informed of Kieron Henderson taunting guards and falsifying EE policy

34. The email of 23 March 2017 has no reference to what is being falsified with regard to EE policy. The claimant accepted that this was not a protected disclosure. The Tribunal is satisfied that it had no influence on the decision to dismiss the claimant.

f. 24th March 2017(13)- The claimant alleges that Julian Antcliffe was informed by email that Security Officer Johnson was not seen on night duty.

35. The claimant Antcliffe informing him that another security officer was nowhere to be seen. It was submitted on behalf of the respondent that this was not a protected disclosure as it was not in the public interest. It was investigated. The Tribunal is not satisfied that the claimant could reasonably believe that this was a disclosure in the public interest and he accepted that this was the case. The Tribunal is satisfied that it was not raised during the investigation or disciplinary procedure and formed no part of the decision to dismiss.

g.25th March 2017 (14)- The claimant alleges that Julian Antcliffe was informed by email about Security Officer Johnson leaving site in his car.

36. The claimant alleged that Julian Antcliffe was informed about the Security Officer leaving the site in his car. The email in question refers to the Security Officer driving onto the site. It was submitted that this was not a protected disclosure and that there was nothing in the nature of the allegation that would suggest that it was in the public interest. The claimant accepted that it was not brought to the attention of Neil Banks or Stuart Hillier and it was not in the public interest. The Tribunal is satisfied that this was not a protected disclosure and it played no part in the claimant's dismissal.

h. 7th April 2017 (15)- The claimant alleges that HR is informed that Colin Peaker published a video on YouTube that showed the inside of the Security Office at EE Darlington.

37. The claimant accepted that this was not brought to the attention of the investigating, dismissal or appeal officers and was not in the public interest. The Tribunal is satisfied that this formed no part of the reason for the claimant's dismissal.

i. 26th May 2017 (5)- The claimant alleges that he sent a text message to Julian Antcliffe that the external lights should be switched to automatic to avoid guards "going down" in the dark.

38. The claimant accepted that this was not a protected disclosure and the Tribunal is satisfied that it played no part in the decision to dismiss the claimant.

j. 5th July 2017(16)- The claimant alleges that he told Julian Antcliffe in an email that Colin Peaker was harassing a female member of staff.

39. The email referred to Colin Peaker "singling out one lasses desk for desk clearance on a day shift and the lass was not happy." It was submitted on behalf of the respondent that this was not a public interest disclosure. It was a comment about what the claimant perceived and it does not state that the "lass" expressed her own happiness. The claimant accepted that this was not a protected disclosure and the Tribunal is satisfied that it was not raised during the investigation, disciplinary or appeal procedure and did not have any influence on the decision to dismiss the claimant.

k. 7th November 2017 (1)- The claimant alleges that at some unspecified date in 2017 he told the external auditors that the assignment instructions are not updated each year.

40. This was an allegation that the claimant, at an unspecified date in 2017 had told external auditors that the assignment instructions were not updated every year. It was submitted by the respondent that whether the assignment instructions are updated every year or not is of no concern to anyone other than the customer who was on the site to whom assignment instructions applied. The claimant accepted that this was not brought to the attention of Neil Banks or Simon Hillier. They were not aware of it and the Tribunal is satisfied that it played no part in the decision to dismiss the claimant.

l. Unknown date in 2017(6)- The claimant claims he told Julian Antcliffe that he saw Kieron Henderson victimising William Conn.

41. This was an allegation that the claimant told Julian Antcliffe that he saw Kieron Henderson victimising another employee. The claimant accepted that this was not disclosure in the public interest. The Tribunal is satisfied that it did not influence the decision to dismiss the claimant.

m. 5th January 2018 (2)- The claimant alleges that Kieron Henderson allegedly tried to get the claimant to confess that the Claimant was in the wrong regarding fire logs that had been signed by the Claimant.

42. The claimant accepted that this was not a protected disclosure. The claimant did not provide any details about to whom he disclosed this allegation. This allegation was investigated by Geraldine McStea and no further action was taken against the claimant regarding the fire logs. It was not raised during the investigation, disciplinary or appeal procedure and the Tribunal is satisfied that it had no influence on the decision to dismiss the claimant.

n. 6th February 2018 (20)- The claimant alleges that he informed HR that there was harassment and victimisation against a guard.

43. The claimant accepted that this was not a protected disclosure. The email in question stated, “after the latest bout of victimisation harassment at EE Darlington there is a good chance Kieron and peaker will be dead before I realise what I’ve done”. The claimant accepted that this was not a protected disclosure. In any event, the claimant said in the disciplinary hearing that the email was in relation to him being bullied, harassed and victimised. The respondent contended that the email fell within the section 43B exception as this was also the email where the claimant threatened to kill his colleagues. The Tribunal is satisfied that the claimant was not dismissed for stating that he was bullied or harassed but because of his threat to kill the other employees.

o. 9th February 2018 (3)- it is alleged that an investigatory meeting about an email is a protected disclosure.

44. The claimant did attend an investigatory meeting in respect of the fire logs which took place after the investigatory meeting in respect of the email of 6 February 2018. The claimant did not specify what he was saying was a protected disclosure and, it was submitted that he accepted when giving evidence that this was not a protected disclosure. It was submitted that this description of his version of events that took place on 9 February 2018 was not protected disclosure and the issue was not raised at the disciplinary or appeal hearings. The Tribunal is satisfied that this did not have any influence on the decision to dismiss the claimant.

p. 12th February 2018 (10)- the claimant alleges that he informed Mr Gilliland that he had been advised to contact the police over his missing uniform.

45. The claimant sent an email to William Gilliland with regard to a uniform that had been delivered whilst the claimant was on holiday. He said that another security guard had said that he should get the police involved. On 19 February 2018 the claimant sent an email to HR about his uniform. Mr Gilliland replied on the same day indicating that the claimant's uniform been put away for safekeeping until his return from holiday. It had been returned to the claimant. This was not a protected disclosure. This event took place after the claimant was investigated for gross misconduct and the dismissing and appeals officers knew nothing about the allegation of theft and it had no impact on the decision to dismiss the claimant.

q. 18th February 2018 (9)- The claimant alleges that he told Ms McStea that Colin Peaker was banned from the TV maintenance room.

46. The claimant accepted that this was not a protected disclosure. The claimant did send an email to Geraldine McStea in which he referred to Colin Peaker being banned from the television room and the kitchen. The claimant accepted that this was not a protected disclosure. The information was not in the public interest and it did not influence the decision to dismiss the claimant.

r. 19th February 2018 (21)- the claimant alleges that he brought the issue of theft to the attention of HR via an email. The claimant had already raised this issue in his 12th February 2018 email. All the same points in relation to that email apply to the 19th February email.

47. This email is not a protected disclosure and is not in the public interest. The claimant accepted that this was not a protected disclosure and it did not have any influence on the decision to dismiss him.

s. 26th February 2018 (7(a))- The claimant alleges telling Neil Banks & Craig Stubbs in an email of 26/02/18 that a guard was having to cycle from Catterick to Darlington and back again.

48. In that email the claimant stated that Alec Atkinson took great exception to being described as having a heart problem. He did not complain about having to cycle to work. The claimant, in the email stated that it was an ongoing health and safety issue of the 61-year-old being made to cycle from Catterick to Darlington every so often. He had also referred to a 61-year-old with a heart condition and, it appears, this is why this was thought to be Mr Anderson. It was submitted that it is

not the respondent's responsibility as to how their employees get to work. This was not a protected disclosure. Alec Atkinson admitted in evidence that he never complained or had an issue with regard to cycling to work. This was not a protected disclosure and had no influence on the decision to dismiss the claimant.

t. 26th February 2018 (7(b))- the claimant alleges telling Neil Banks & Craig Stubbs in an email of 26/02/18 about Kieron Henderson's methods of harassment.

49. The email does not disclose any alleged methods of harassment it is not a protected disclosure and is not in the public interest. The raising of these allegations did not influence the decision to dismiss the claimant. Stuart Hillier made enquiries and was told that all previous grievances or concerns had been dealt with and these issues did not affect his decision or that of Neil Banks.

u. 26th February 2018 (7(c))- the claimant alleges telling Neil Banks & Craig Stubbs in an email of 26/02/18 that Kieron Henderson was picking on Kevin Anderson and Sonya Rutherford.

50. The claimant accepted that this was not a protected disclosure. William Gilliland said that he had been going to investigate allegations of harassment of Kevin Anderson by Kieron but Kevin Anderson specifically stated that he did not want any action taken. He did not recall receiving any allegations of harassment from Sonia Richardson. The Tribunal is satisfied that this had no influence on the decision to dismiss the claimant.

v. 26th February 2018 (19)- the claimant alleges telling Neil Banks & Craig Stubbs in an email of 26/02/18 about a health and safety issue with conducting a disciplinary hearing at the Gateshead office.

51. The claimant had been invited to a disciplinary hearing in the Gateshead office. The email referred to "it has also been asked why a 61-year-old with a heart condition and no transport has to travel to place that is difficult to get to". This is not a protected disclosure. It is not a health and safety issue and it is not in the public interest. The claimant accepted that this was not a protected disclosure. The claimant did not ask for the venue for the hearing to be moved and his email is not entirely clear. It did not state to the person who had the health and safety issue was. The Tribunal is satisfied that this did not influence the decision to dismiss the claimant

w. Dates unknown- (22(a))- the claimant alleges that Will Conn suffered aggravation from Kieron Henderson.

52. The claimant accepted that this was not a protected disclosure. There was no indication as to who the claimant said he told this to or when he alleged that it happened. It did not influence the decision to dismiss the claimant.

x. Dates unknown- (22(b))- the claimant alleges that Colin Rolf was informed of a fire hazard at St Therese's hospice in Darlington.

53. This alleged disclosure was entirely unclear, the claimant referred to informing Colin Rolf about a fire hazard sometime in 2016. Colin Rolf left the respondents employment in 2016. The claimant admitted that he had not pursued this matter are not raised it at his disciplinary or appeal hearing. The Tribunal is satisfied that it had no influence on the decision to dismiss the claimant.

y. Dates unknown- (22(c))- the claimant alleges Julian Antcliffe was informed that a guard was suicidal.

54. The claimant was unable to be specific as to when he told Julian Antcliffe about this. It was submitted that there was nothing to suggest that there was any wrongdoing on the part of the respondent and it reads as if this is an expression of the claimant's view and is therefore not a protected disclosure and is not in the public interest. The Tribunal is satisfied that this was not a protected disclosure and there was no evidence that it influenced the decision to dismiss the claimant.

z. Dates unknown- (22(d))- The claimant alleges Kieron Henderson was close to a nervous breakdown.

55. It was submitted that this allegation was an expression of the claimant's opinion. The claimant did not say that Kieron Henderson had told him this. He said that Kieron Henderson had continued to work a full day and had returned to work the next day and said it was amazing what Calpol could do. The Tribunal is satisfied this is not a protected disclosure and the claimant did not raise the issue with either the dismissing officer or the appeals officer and it did not influence the decision to dismiss the claimant.

aa. Dates unknown- (22(e))- the claimant alleges that Ward Gilliland and Lynne English were informed about a guard who looked close to a coronary.

56. Lynn English is not an employee of the Respondent but a customer of EE Darlington. The claimant did not provide any details as to who the guard was or when this occurred. The claimant said that he had to do car park duties with Neil Thaine. William Gilliland told the Tribunal that the claimant sent an email on 16 February 2018 in which he referred to being worried that a security guard was going to have a coronary. William Gilliland had replied indicating that he thanked the claimant for letting him know about Neil Thain and that he was suffering from sore feet. The Security Guard in question sent an email directly to William Gilliland indicating that he was finding it difficult to complete the car park duties and that security guard was provided with assistance. The concern the claimant raised was not one of suggesting wrongdoing on the part of the respondent. It was raised with William Gilliland and neither the dismissing officer nor the appeals officer were aware of the issue and the Tribunal is satisfied that it had no influence the decision to dismiss the claimant.

57. The Tribunal is satisfied that the claimant's dismissal was not by reason of making a protected disclosure.

58. With regard to a claim of detriment on the grounds of the protected disclosure, when the question of detriment was discussed at the outset of the substantive hearing,

the claimant referred to the detriment as being the investigation, disciplinary procedure and dismissal. The parties were released from the hearing while the Tribunal carried out the initial reading. During this time the claimant was asked to specify any detriment and an agreed note was provided. This stated:

> Detriment
>
> 1. Harassment by Keiron Henderson over the years.
> 2. Victimisation – same as above.
> 3. Bullying – Colin Peaker Jan 2018.
> 4. Hidden uniform – Colin Peaker
> 5. Threat to launch through window Colin Peaker – 2017. 20/11/17

59. These alleged detriments appear to be concerns the claimant has with regard to his relationship with the site supervisor and fellow employees throughout a number of years. There is no evidence that these were detriments as a result of making protected disclosures. The claimant's case was difficult to follow. However, the Tribunal has considered the position carefully and is not satisfied that the claimant has suffered any detriment as a result of making public interest disclosures.

60. With regard to the claim of unfair dismissal pursuant to section 98 of the Employment Rights Act 1996, the Tribunal is satisfied that the reason for the claimant's dismissal was gross misconduct. The respondent had a genuine belief in the claimant's guilt. The contents of the email of 6 February 2018 were considered by the respondent to be a threat to kill other employees. The claimant said that the decision was prejudged and referred to a letter of 26 February 2018 which referred to the dates claimant "was" employed by the respondent and a letter dated 22 February 2018 which provided confirmation of the claimant's employment with the respondent and set out his length of service. The letter did refer to the claimant being employed "to date" and the Tribunal is not satisfied that this or the letter providing details of the claimant's length of service were indicative of a decision having already been made. The decision to dismiss was made by Neil Banks and the appeal decision was by Stuart Hillier. The Tribunal is satisfied that the decision-makers had not prejudged the situation and the claimant was given the opportunity to defend himself against the allegations.

61. The Tribunal is not satisfied that the issues he raised over the years led to the claimant being targeted. It was submitted on behalf of the respondent that the claimant's case did not make sense and that it makes no sense for the claimant to raise multiple health and safety issues and other matters over the years and then that the respondent waited years before dismissing the claimant.

62. The claimant said that the email was misinterpreted. He referred to phrases such as 'I could kill for…". The Tribunal is satisfied that there was no misinterpretation and that the claimant, during the course of the investigatory meeting, disciplinary meeting and appeal hearing, referred to having sudden outbursts and that he could have an episode that could lead to him killing another employee. He referred to all it takes was a pinprick and he could lose it. The claimant had exhibited aggressive and threatening behaviour and it is clear that the

respondent had lost trust in the claimant and had serious concerns for the safety of other employees. It was clear that the respondent had reasonable grounds for its belief.

63. The respondent carried out a thorough investigation. The claimant was given the opportunity to respond to the allegation. The claimant was offered more time and could have requested a postponement of the appeal hearing. He indicated that he wished to go ahead. The fact that the claimant did not make the threat directly to the other employees did not take it outside the consideration of gross misconduct. This was not merely foolish off-the-cuff remark as the claimant repeated his feelings towards the other employees and indicated that could happen again. It was submitted that the claimant's lack of understanding of the gravity of his actions supported the respondent's belief that the claimant could not be trusted. The Tribunal accepts this submission, it is clear that the respondent had a genuine belief on reasonable grounds following a reasonable investigation. The respondent had lost trust in the claimant and had to consider the safety of other employees.

64. The Tribunal has some sympathy with the claimant. This was clearly a headstrong email. If he had apologised, shown remorse and indicated that it was not a threat he would make again, or ever carry out, then the respondent may not have dismissed the claimant. Both Neil Banks and Simon Hillier indicated that they had considered sanctions other than dismissal but they concluded that dismissal was appropriate in the circumstances. The Tribunal cannot substitute its decision for that of the respondent. Taking into account the objective test of the band of reasonable responses, it is sufficient that a reasonable employer would regard the circumstances as a sufficient reason for dismissing. It is not necessary that all reasonable employers would dismiss in the circumstances. The decision to dismiss was within the band of reasonable responses in which a reasonable employer could dismiss the claimant.

65. The Tribunal is satisfied that the respondent followed a reasonable procedure. The claimant was given the opportunity to respond to the allegations against him he was also given the opportunity to ask for further time at the appeal stage. The procedure was within the band of reasonable responses. If there were any procedural defects which took it outside that band then the Tribunal is satisfied that the claimant would have been dismissed in any event.

66. The claim of unauthorised deduction from wages was on the basis that the claimant was not paid for 48 hours in February 2018. He was paid for 36 hours per week that month. The claimant's contract of employment refers to the claimant's hours of work as an "average of 48 hours – subject to variation" it also states "Your normal hours of work as set out in clause 1.6 and cannot be taken as contracted hours as are subject to variation. If you do not work in any particular day or week you will not be entitled to pay, apart from any holiday or sickness pay to which you're entitled for the period." The claimant agreed that his hours were variable and not guaranteed. He received pay for more than 48 hours a week during November 2017.The payslips showed that his earnings varied and it was not established that there was a contractual entitlement to a further 12 hours pay and the claim of unauthorised deduction from wages is not well founded and is dismissed.

Employment Judge Shepherd

11 **February 2019**