EMPLOYMENT TRIBUNALS

Claimants: Miss E Scorgie
Miss S Lomas

Respondent: Golden Egg Group Limited

Heard at: Manchester **On:** 13 February 2023
15 March 2023
(in Chambers)

Before: Employment Judge McDonald
(sitting alone)

REPRESENTATION:

Claimants: In person
Respondent: Not in attendance

JUDGMENT

The judgment of the Tribunal is that:

In relation to the claims brought by Miss Scorgie in case no.2418814/2020:

1. The claim of unfair dismissal fails and is dismissed.

2. The claim of wrongful dismissal fails and is dismissed.

3. The claim of being subjected to a detriment for making a protected disclosure succeeds in relation to detriments D1 and D2 but fails in relation to detriment D3.

4. I order the respondent to pay Miss Scorgie £11,000 as compensation for injury to feelings resulting from detriments D1 and D2.

5. The claim that the respondent made an unauthorised deduction from Miss Scorgie's wages by failing to pay her in full for August and September 2020 succeeds. I order the respondent to pay her the gross sum of £1640.74.

6. The claims in relation to the unauthorised deductions at 9.1.2 and 9.1.3 of the List of Issues annexed to this judgment fail and are dismissed.

7. The claim for accrued holiday pay untaken on termination is well-founded and I order the respondent to pay Miss Scorgie £54.93 gross in relation to that claim.

8. The claim of breach of contract by failing to auto-enrol Miss Scorgie in an occupational scheme fails and is dismissed.

9. The respondent failed to provide Miss Scorgie with any itemised pay statements as required by s.8 of the Employment Rights Act 1996. I make no monetary award in relation to that failure because s.26 of the Employment Rights Act 1996 applies.

10. The respondent unreasonably failed to comply with the ACAS Code of Practice and it is just and equitable to increase the awards by 20% under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

11. The total sum payable by the respondent to Miss Scorgie within 14 days of this judgment is **£15,234.80** (£11,000 + £1640.74 + £54.93 = £12695.67 plus 20% uplift of £2539.13).

<u>In relation to the claims brought by Miss Lomas in case no 2418815/2020:</u>

12. The claim of unfair dismissal fails and is dismissed.

13. The claim of wrongful dismissal fails and is dismissed.

14. The claim of being subjected to a detriment for making a protected disclosure succeeds in relation to detriments D1 and D2 but fails in relation to detriment D3.

15. I order the respondent to pay Miss Lomas £11,000 as compensation for injury to feelings resulting from detriments D1 and D2.

16. The claim that the respondent made an unauthorised deduction from Miss Lomas's wages by failing to pay her in full for August and September 2020 succeeds. I order the respondent to pay her the gross sum of £2273.23.

17. The claims in relation to the unauthorised deductions at 9.1.2 and 9.1.3 of the List of Issues annexed to this judgment fail and are dismissed.

18. The claim for accrued holiday pay untaken on termination is well-founded and I order the respondent to pay Miss Lomas £275.94 gross in relation to that claim.

19. The claim of breach of contract by failing to auto-enrol Miss Lomas in an occupational scheme fails and is dismissed.

20. The respondent failed to provide Miss Lomas with any itemised pay statements as required by s.8 of the Employment Rights Act 1996. I make no

monetary award in relation to that failure because s.26 of the Employment Rights Act 1996 applies.

21. The respondent unreasonably failed to comply with the ACAS Code of Practice and it is just and equitable to increase the awards by 20% under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

22. The total sum payable by the respondent to Miss Lomas within 14 days of this judgment is **£16,259.00** (£11,000 + £2273.23 + £275.94 = £13,549.17 plus 20% uplift of £2709.83).

REASONS

Introduction

1. This was the final hearing of the claimants' claims. The respondent's response had been struck out for failure to comply with an unless order. Each claimant attended and gave evidence. There was no attendance or communication from the respondent.

2. The number of issues arising meant that it was not possible for me to give judgment at the hearing, and I therefore reserved my decision. The claimants provide additional documentation relating to payments received from the respondent and (in Miss Scorgie's case) medical evidence after the hearing which I requested at the hearing.

3. The claimants had provided a trial bundle consisting of 273 pages. Each had also prepared a written witness statement.

The Issues

4. The issues in the case were identified in my case management order dated 1 July 2022. I have included the List of Issues from that order as an annex to this judgment. In reviewing it, I noted that the List did not include the claimants' claims of failures to provide itemised payslips. I have added the issues relating to that at section 11 of the List of Issues.

Findings of Fact

<u>Events up to 13 August 2020</u>

5. I make the following findings of fact based on the documents I read and the sworn evidence of Miss Scorgie and Miss Lomas at the hearing. I have set out only those findings of fact relevant to the issues I have to decide. That means I have not set out findings about all the evidence I heard or read at the hearing.

6. Both Miss Scorgie and Miss Lomas had experience of working in the recruitment industry for a number of years. Both started employment with Golden Egg Recruitment Group Limited ("Recruitment") on 3 February 2020. Miss Scorgie's

role as Business Development Manager was to set up a recruitment business placing permanent candidates in roles initially in the healthcare industry and then in other sectors in IT. Miss Lomas was to be Miss Scorgie's divisional director.

7. They were offered their roles via email on 29 November 2019 following interviews with Neil Brabazon and Benjamin James Kershaw ("Mr Kershaw"). Mr Kershaw was the Managing Director and majority shareholder of Recruitment.

8. Miss Lomas's contract with Recruitment dated 21 January 2020 confirmed her salary was £40,000 per annum, payable monthly by direct credit transfer, normally the last Friday of each month (clause 8). Miss Scorgie's contract dated 30 January 2020 confirmed that her salary was £35,000 per annum plus target based commission agreed at 20% once an initial target of £20,000 was achieved. Clause 8.2 said that Miss Scorgie's salary would be paid monthly by direct credit transfer, normally on the last Friday of each month.

9. Other than that, in all material respects, I find the claimants' contracts were identical. Clause 9 confirmed holiday entitlement was 28 days a year with the holiday year running from January to December each year. Clause 13 said that the company would comply with its employer pension duties in accordance with Part 1 of the Pensions Act 2008.

10. Clause 20 dealt with notice of termination of employment. I find that the entitlement to one week's notice set out in that clause had been varied by agreement so that the notice required of the employer to terminate either of the claimant's employment was 1 month.

11. In February 2020, Miss Lomas and Miss Scorgie verbally raised concerns with Carie-Ann Annison ("Ms Annison"), Recruitment's Office Manager, about compliance with data protection obligations relating to clients and potential candidates for placement. The concerns were about the need to lock away such data and the practice of using the walls in the office to track candidates and placements. That meant that personal data was publicly on view in the office when external people were present. As a result of raising the concerns, both claimants were abruptly called into Mr Kershaw's office and told that they were to get on with their jobs and not be concerned with data protection as it was covered under another part of the business. The claimants were concerned by Mr Kershaw's defensive and dismissive reaction to the concerns they had raised.

12. The claimants received their first monthly payment on 28 February 2020 but did not receive payslips. They had been asking since they joined how they would receive payslips but could not get a straight answer from Mr Kershaw or Ms Annison. By 26 February 2020 Mr Kershaw had decided that they might be a source of problems for him. In a WhatsApp of that date to Ms Annison he asks her to "box off the payroll today "as I'm conscious that if we don't [Miss Scorgie] and [Miss Lomas] will cause a massive headache".

13. On 4 March 2020 Miss Lomas emailed Ms Annison on behalf of herself and Miss Scorgie to ask how they should access their payslips because they had not been told that process. Mr Kershaw emailed them later that afternoon in effect blaming their insistence on being paid monthly (rather than weekly as other staff

were) for the delay in providing payslips. He apologised and assured them that the payslips would be provided as soon as possible. He also said he was looking into using electronic paylips in the future which employees could log in to view.

14. On 13 March 2020 Miss Scorgie emailed Ms Annison asking for her payroll details and Recruitment's employer reference number for PAYE purposes so that the Student Loans Company could set up appropriate deductions from her pay. Mr Kershaw responded to say he would get the information for the payroll company. He suggested they were still waiting for Miss Scorgie to provide her P45 from her previous employment. That was not correct – both claimants had forwarded their P45s to Ms Annison on 3 February 2020.

15. On 16 March 2020 Ola Grydzuk ("Ms Grydzuk") joined Recruitment as Group Operations Director. Neither claimant had received their payslips for February so on the morning of 17 March 2020 they approached Ms Grydzuk to ask about that. Ms Grydzuk's told them she was setting up everything for the company with HMRC and a new payroll company and that they should leave it with her. At this point other younger colleagues had started asking questions in the office about payslips with many saying that they had not received any payslips either. They asked Miss Lomas and Miss Scorgie for advice about this.

16. On 18 March 2020 everyone was sent home from the office as the country went into lockdown. Ms Annison resigned with effect from 21 March 2020. Ms Grydzuk had by then taken over responsibility for payroll issues.

17. By mid-April 2020 neither claimant had received payslips or their P60 for 2019-2020.

18. On 16 April 2020 Miss Lomas contacted HMRC to check whether she was registered as an employee of Recruitment for PAYE purposes. The HMRC adviser confirmed that she was still shown as being an employee of Connuct Limited, her previous employer. She told Miss Lomas that an employer had 35 days from the start of employment to register an employee for PAYE purposes. Miss Lomas told the adviser it was now 43 days after she and Miss Scorgie started employment with Recruitment.

19. Miss Scorgie decided to check her online tax account with HMRC. Like Miss Lomas, she found that it showed her employer for PAYE purposes for 2020-2021 was Connuct Limited, her previous employer. There was no record of her having been registered as an employee of Recruitment for PAYE purposes. Miss Scorgie queried this with Miss Lomas who advised her that an employer has 35 days from when a new employee starts to work to register as PAYE. Because of her concerns about this Miss Scorgie raised this verbally with Ms Grydzuk the next time she saw her in the office. She also emailed Ms Grydzsuk on 24 April 2020 to inform her that her tax record still showed her as being employed by her previous employer; that she had asked for her payroll number from Mr Kershaw so she could update it; and that he had failed to provide anything.

20. At the end of April, Miss Lomas also spoke to Ms Grydzuk to query the lack of a P60 and to request payslips. She received no response.

21. In early May 2020 Miss Scorgie rang Ms Grydzuk whilst working from home to raise concerns about not having received payslips or her P60 which she knew that she was required to receive by law. Ms Grydzuk told her that she should be grateful that Mr Kershaw had not furloughed any staff and that they were still getting paid. She told Miss Scorgie to "shut up and put up".

22. On 18 May 2020, the claimants spoke to Ms Grydzuk by Teams to point out they had still not received payslips. Later that day Ms Grydzuk sent a message to the claimants and others, copying in Mr Kershaw, to say that payslips and "all paper work" would be brought up to date in the next 2 weeks. The message referenced lockdown, the accountants being on furlough and difficulties accessing post in the building housing the company's office as contributing to problems resolving matters. Despite Ms Grydzuk's assurance, the claimants still did not receive any payslips. Both continued to received a monthly payment from Recruitment up to 31 July 2020 but in the absence of payslips showing what deductions had been made they could not check whether the payments were correct.

23. Miss Scorgie contacted HMRC by phone in early August 2020 and was advised there were no companies referred to on her PAYE record with a name relating to "Golden Egg" but there were two other companies named on her HMRC file. She was advised to send documents showing pay received and advised to contact HMRC's Fraud Department if she felt there was a cause for concern.

Events from 13 August onwards

24. On 13 August 2020 Recruitment's employees were called to a meeting at the offices of Golden Egg Energy (another company, since dissolved, of which Mr Kershaw was a director and shareholder). Miss Scorgie attended but Miss Lomas was on leave and was not invited to attend. At the meeting Mr Kershaw advised all in attendance that Golden Egg Recruitment Group was being made insolvent due to another part of the business, which dealt with temporary staffing, falling into difficulties. He said he was awaiting an insurance payment and he advised that all staff would be moved over to Golden Egg Group Limited ("the Respondent") effective immediately. Their terms of employment were to remain the same including pay, holiday and benefits, and they were to continue and keep all company equipment. Companies House records confirm that Recruitment went into administration on 6 August 2020.

25. At the meeting on 13 August 2020, Mr Kershaw told employees they were to return to work on Monday 17 August 2020 to continue their roles. I find that is what Miss Scorgie and Miss Lomas and their colleagues did. The Respondent in its response to the claimants' claims denied that the claimants' employment TUPE transferred to the Respondent from Recruitment after 13 August 2020. However, at the time it informed its employees that it was a TUPE transfer. I find that from 17 August 2020 Miss Lomas and Miss Scorgie continued doing the work they had been doing prior to 13 August 2020. The Respondent carried on the same business previously carried on by Recruitment with Mr Kershaw and Ms Grydzuk fulfilling the roles they have fulfilled in Recruitment. The evidence in the bundle showed the respondent retained clients which Recruitment had previously dealt with.

26. There was no written contract between Miss Lomas and the Respondent in the evidence before me. Miss Scorgie, however, had a written contract with the Respondent signed by Mr Kershaw as "Group CEO" with a date of commencement of employment as 17 August 2020. It stated that no previous employment counted as part of Miss Scorgie's continuous employment. The clauses dealing with holiday entitlement, pension and notice were, so far as relevant to this case, the same as those in the January 2020 contract with Recruitment. On 19 August 2020 Miss Scorgie emailed Ms Grydzuk asking her to clarify or confirm various matters relating to the August contract. Of relevance to this case she pointed out that the start date of her employment for clause 2.1. was 3 February 2020, i.e. that the employment with Recruitment was part of her continuous employment.

27. Neither of the claimants were furloughed. In August 2020, the claimants were due to be paid on Friday 28 August 2020. No pay was received by that date by the claimants or other employees. The claimants contacted Ms Grydzuk to ask about their wages. Other employees contacted Mr Kershaw over the next few days. Ms Grydzuk sent a WhatsApp to confirm that "payroll has been sorted". Over the following days the claimants were given several alternative payment dates and reasons why they had not been paid. That included Mr Kershaw being in hospital, his not being able to access his account from hospital and his arranging for cash to be paid to the claimants.

28. On 3 September Mr Kershaw paid £1285.00 to Miss Lomas. That was about half the pay she was due for August 2020. On the same date Mr Kershaw paid Miss Scorgie £280 and £863 (£1143 in total) which was about half the pay she was due for August 2020.

29. On 7 September 2020 both claimants wrote to the respondent to confirm their resignations with immediate effect. Neither worked their notice of one week. Each said their resignations were because their position was untenable because of the Respondent's breach of contract, referring to the failure to pay their full August 2020 pay due on 28 August 2020.

30. The claimants were both removed from the Respondent's company WhatsApp group after they resigned. After they were removed, Mr Kershaw sent a message to all members of that group. It said that he was waiting for funds to come into his account but that he was being investigated by HMRC because the claimants had reported him to HMRC for paying staff out of his own money. He said that was the last of his money until the funds he was expecting cleared.

31. On 10 September 2020 Miss Scorgie raised a grievance in writing to Mr Kershaw, copying in Ms Grydzuk and Miss Lomas. Miss Lomas raised a written grievance on 14 September 2020. On 21 September 2020 the claimants were contacted by Ms Grydzuk via email thanking them and advising them that their grievances had been passed to the legal team to deal with. A week before that Ms Grydzuk had informed Miss Scorgie that she had left the business. The grievances raised by the claimants were never substantively addressed. The claimants did not receive the outstanding payments due nor P45s, P60 or payslips.

Findings relating to Pension Issues

32. Auto-enrolment applied to the claimants but neither claimant was enrolled into an occupational pension scheme by Recruitment or the respondent. On 29 June 2020, while still employed by Recruitment, the claimants and colleagues were notified by Recruitment that it had chosen to offer NEST as its workplace pension scheme but had chosen to postpone the date of auto-enrolment into the scheme until 31 August 2020. The claimants calculate that they should have been Auto-enrolled in a pension scheme on 13 May 2020, i.e. prior to any postponement of auto-enrolment.

33. On 4 August 2020 (i.e. while still employed by Recruitment) the claimants were sent a form to complete to opt out of the company pension scheme or email a response to opt into the scheme. Neither opted out of the scheme. There was no evidence before me that the respondent auto-enrolled either claimant into a pension scheme at any point after their employment transferred to it. The absence of any pay slips mean it is not possible to say whether there were any deductions from their gross salary by way of employee pension deduction. There is no evidence of any employer's pension contributions by either Recruitment or the respondent.

Findings relevant to remedy – Miss Lomas

34. I set out below my findings relevant to remedy. Because I have decided there was no constructive dismissal and so no unfair dismissal I have not set out my findings in relation to loss of earnings after employment with the respondent ended.

35. I find that Miss Lomas was never provided with a payslip during her employment with Recruitment or the respondent. On 11 September 2020 she was sent a payslip relating to the period 31 August 2020 to 6 September 2020 by Xceed HR Services who were due to run the payroll on behalf of the respondent. On 17 September Xceed HR Services emailed her saying that she should discard that payslip because they had not received funds from the respondent relating to the pay run so no payment was made.

36. Based on the Schedule of Loss provided by Miss Lomas I find that her gross weekly pay was £769.23 with her net weekly pay being £592.16 and daily gross pay being £153.85.

37. For the period up to 6 August 2020 she received payment from the Redundancy Payments Office of £608.00 net for 7.81 holiday days (£830.33 gross capped at £544 per week). She claims outstanding holiday pay of £275.94.

38. For the period up to 6 August 2020 Miss Lomas received payment from the Redundancy Payments Office for arrears of pay of £457.69 net (£613.70 capped at £544 gross per week).

39. Miss Lomas also claims unlawful deductions were made from her pay each month from March 2020 to July 2020 totalling £115.24. This is her best calculation of the difference between the amounts deducted from her gross pay each month to reach her net pay as received in her bank account and what she calculates should have been deducted. The absence of payslips obviously makes that to some extent

a speculative exercise because Miss Lomas does not know what Recruitment and the respondent purported to deduct.

40. When it comes to the damages suffered as a result of not being enrolled into a pension scheme, the schedule of loss suggested a 3% contribution rate which would amount to £19.48 per week.

41. The total gross pay Miss Lomas was due for August 2020 was £3333.33. After taking into account the payment received from the Redundancy Payment Office which I understand to be £544 gross and the payment of £1285 made on 3 September 2020 that leaves £1504 gross pay unpaid. The gross pay due for September up to the end of employment was £769.23.

42. The failure to receive payment of full wages due in August and September 2020 led to Miss Lomas having to rely on loans from family members to pay mortgage and bills but that figure was not quantified in her schedule of loss.

43. As I explain below, I have found that Miss Lomas was subjected to a detriment in being removed from the Company WhatsApp Group and being blamed by Mr Kershaw in a message to other staff for reporting him to HMRC. It is relevant to make findings of fact about the injury to feelings suffered by Miss Lomas as a result. I find that as a result of her experiences at Recruitment and the respondent she suffered sleep problems and ongoing reflux issues. It has also had an impact on her ability to trust, feeling deceived by Mr Kershaw and Ms Grydzuk and damaging her self-confidence. She did, however, find other work at a higher salary than that she was earning with the respondent after 3 weeks without employment.

<u>Findings relevant to remedy – Miss Scorgie</u>

44. I set out below my findings relevant to remedy in relation to Miss Scorgie. Because I have decided there was no constructive dismissal and so no unfair dismissal I have not set out my findings in relation to loss of earnings after employment with the respondent ended.

45. I find that Miss Scorgie was never provided with a payslip during her employment with Recruitment or the respondent. As with Miss Lomas, on or around 11 September 2020 she was sent a payslip relating to the period 31 August 2020 to 6 September 2020 by Xceed HR Services who were due to run the payroll on behalf of the respondent. I find that (as with Miss Lomas) that payslip had to be discarded because Xceed did not receive funds from the respondent relating to the pay run so no payment was made.

46. Based on the Schedule of Loss provided by Miss Scorgie I find that her gross weekly pay was £673.08 with her net weekly pay being £528.15 and daily gross pay being £134.62.

47. For the period up to 6 August 2020 she received payment from the Redundancy Payments Office of £996.68 net for 12.81 holiday days (capped at £544 gross per week). She claims outstanding holiday pay of £54.93.

48. For the period up to 6 August 2020 Miss Scorgie received a net payment from the Redundancy Payments Office for arrears of pay and pay in lieu of £598.10 (capped at £544 gross per week). Doing my best on the information before me I calculate that equates to £806 gross.

49. Miss Scorgie also claims unlawful deductions were made from her pay each month from March 2020 to July 2020 totalling £136.68. This is her best calculation of the difference between the amounts deducted from her gross pay each month to reach her net pay as received in her bank account and what she calculates should have been deducted. As for Miss Lomas, the absence of payslips obviously makes that to some extent a speculative exercise because Miss Scorgie does not know what Recruitment and the respondent purported to deduct.

50. When it comes to the damages suffered as a result of not being enrolled into a pension scheme, the schedule of loss suggested a 3% contribution rate which would amount to £16.59 per week.

51. The total gross pay Miss Scorgie was due for August 2020 was £2916.66. After taking into account the payments received from the Redundancy Payment Office (gross amount by my calculation £806) and the payment of £1143 made on 3 September 2020 that leaves £967.66 gross pay unpaid. The gross pay due for September up to the end of employment was £673.08.

52. The failure to receive payment of full wages due in August and September 2020 led to Miss Scorgie having to rely on help from family members to pay for household bills but that figure was not quantified in her schedule of loss.

53. As I explain below, I have found that Miss Scorgie was subjected to a detriment in being removed from the Company WhatsApp Group and being blamed by Mr Kershaw in a message to other staff for reporting him to HMRC. It is relevant to make findings of fact about the injury to feelings suffered by Miss Scorgie as a result. I find that as a result of her experiences at Recruitment and the respondent triggered mental health issues for Miss Scorgie, including a recurrence of PTSD, which she normally manages. Based on her evidence I find that some of those issues had arisen at the end of August because of events at the respondent but before the two detriments (which happened on 7 September 2020). The events had a significant, ongoing impact on Miss Scorgie's self confidence and ability to trust. She felt deceived by Mr Kershaw and Ms Grydzuk to the extent that she extensively researched her prospective new employer to ensure they were a trustworthy company. She found other work from October 2021 but on a part-time basis, leading to an ongoing loss of income. She also suffered badly with COVID and long COVID and attributes the severity of that to the stress that she had experienced as a result of events at the respondent.

Relevant Law

TUPE transfers

54. Regulation 3(1)(a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006/246 ('TUPE') provides that the TUPE Regulations will apply where there is a

> **'transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity**'

55. In deciding whether there was an economic entity and if so whether it transferred a Tribunal must adopt a multi-factorial approach. Guidance on that approach was given by the EAT in **Cheesman v R Brewer Contracts Ltd [2001] IRLR 144**. Paragraph 10 of **Cheesman** distils the principles relevant to whether there is an undertaking and paragraph 11 those relevant to whether, if there is, it has been transferred.

56. Where there is a TUPE transfer, Regulation 4(2) of the TUPE Regulations states that on the completion of a relevant transfer in relation to the contract of employment assigned to the undertaking that transfers:

> **all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred to the transferee — Reg 4(2)(a), and**
>
> **any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee — Reg 4(2)(b)**.

57. The wording of reg 4(2) means that the rights and liabilities which transfer on a TUPE transfer are not limited to contractual rights and liabilities but include those derived from statute.

58. TUPE reg 8 deals with TUPE transfers where the transferor is insolvent. In **Key2Law (Surrey) LLP v De'Antiquis [2011] EWCA Civ 1567** the Court of Appeal confirmed that an Administration does not fall within TUPE Reg 8(7). That means that TUPE Reg 4 does potentially apply where, as in this case, the transferor was in Administration.

59. However, TUPE Reg 8(5) does apply to transferors in Administration and provides that:

> **Regulation 4 shall not operate to transfer liability for the sums payable to the relevant employee under the relevant statutory schemes.**

60. A "relevant employee" includes employees whose contract of employment transfers to the transferee by virtue of TUPE. For the purposes of this case, the relevant sums "payable under relevant statutory schemes" (s.184 ERA) are: arrears of pay (up to 8 weeks' pay at the date the transferor became insolvent); any holiday pay (not exceeding 6 weeks' pay). A week's pay is subject to a statutory cap (s.186 ERA). The appropriate date when it comes to arrears of wages or holiday pay is the date on which the transferor became insolvent, which in the case of Recruitment was 6 August 2020.

61. Subject to what I say about pensions below, statutory and contractual debts and liabilities that fall outside those in the paragraph above do transfer to the transferee under the TUPE Regs as do payments in excess of the statutory limits, e.g. arrears of pay in excess of the week's pay limit or the 8 weeks' arrears of pay

limit (**Graysons Restaurants Ltd v Jones [2018] ICR 670, EAT**) or those arising after the date of insolvency.

62. Regulation 10(1) of the TUPE Regs provides that regs 4 and reg 5 (transfer of the contract of employment and collective agreements) do not apply:

> **(a) to so much of a contract of employment or collective agreement as relates to an occupational pension scheme within the meaning of the Pension Schemes Act 1993; or**
> **(b) to any rights, powers, duties or liabilities under or in connection with any such contract or subsisting by virtue of any such agreement and relating to such a scheme or otherwise arising in connection with that person's employment and relating to such a scheme.**

63. Regulation 10(3) provides that:

> **An employee whose contract of employment is transferred in the circumstances described in regulation 4(1) shall not be entitled to bring a claim against the transferor for—**
> **(a) breach of contract; or**
> **(b) constructive unfair dismissal under section 95(1)(c) of the 1996 Act,**
> **arising out of a loss or reduction in his rights under an occupational pension scheme in consequence of the transfer, save insofar as the alleged breach of contract or dismissal (as the case may be) occurred prior to the date on which these Regulations took effect.**

Protected disclosures – "Whistleblowing"

64. Protected disclosures are governed by Part IVA of the Employment Rights Act 1996 ("the ERA") of which the relevant sections are as follows:-

> **"s43A: in this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of Sections 43C to 43H.**
>
> **s43B(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:**
>
> **……..**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject ……"**

65. The EAT summarised the case law on section 43B(1) as follows in **Parsons v Airplus International Ltd UKEAT/0111/17**:

> **"23. As to whether or not a disclosure is a protected disclosure, the following points can be made:**
>
> **23.1. This is a matter to be determined objectively; see paragraph 80, Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA.**
>
> **23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.**

> **23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT."**

66. **Cavendish** should not be understood to introduce into s.43B(1) a rigid dichotomy between "information" on the one hand and "allegations" on the other. In The question in each case is whether a particular statement or disclosure is a " disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in paragraphs (a) to (f)]". However, in order for a statement or disclosure to be a qualifying disclosure, it has to have a " sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection 43B(1) ". The question of whether or not a particular statement or disclosure does contain sufficient content or specificity is a matter for evaluative judgment by the Tribunal in light of all the facts of the case (**Kilraine** quoted by the EAT in **Simpson v Cantor Fitzgerald Europe (UKEAT/0016/18/DA)).**

67. The worker need only have a reasonable belief that the information tends to show the matter required by Section 43B(1) and that the disclosure is made in the public interest. A subjective belief may be objectively reasonable even if it is wrong or formed for the wrong reasons.

68. In **Chesterton Global Ltd and anor v Nurmohamed [2017[IRLR 837** the Court of Appeal approved a suggestion from counsel that the following factors would normally be relevant to the question of whether there was a reasonable belief that the disclosure was made in the public interest:

(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 – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer.

69. In **Chesterton** Underhill LJ addressed the question of the motivation for the disclosure in paragraph 30, saying that:

> "… **while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at paragraph 17 above, the new ss.49(6A) and 103(6A) would**

> **have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase 'in the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."**

70. A qualifying disclosure will be a protected disclosure if it is made to the employer (S. 43C. ERA) or (of relevance to this case) to a "prescribed person" (S.43F). HMRC is the prescribed person in relation to matters including the administration of the UK's taxes including income tax and the administration of the national insurance system (**Schedule to the Public Interest Disclosure (Prescribed Person) Regulations 2014**).

Protection from Detriment

71. If a protected disclosure has been made, the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

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

72. The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in **Shamoon v The Royal Ulster Constabulary [2003] ICR 337**: the test is whether a reasonable employee would or might take the view that he had been disadvantaged in circumstances in which he had to work. An unjustified sense of grievance cannot amount to a detriment.

73. The right to go to a Tribunal appears in Section 48 and is subject to Section 48(2), which says this:

> **"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".**

74. In **Fecitt and ors v NHS Manchester (Public Concern at Work intervening)** 2012 ICR372, CA, Elias LJ said the correct question is whether the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistleblower.

75. In **International Petroleum Ltd and ors v Osipov and ors UKEAT /0058/17/DA** the EAT (Simler P) summarised the causation test as follows:

> **"...I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:**
>
> **(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 he or she made.**
>
> **(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v. Knight [[2003] IRLR 140]at paragraph 20.**

> **(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."**

76. Where the Tribunal finds that a claimant has been subjected to a detriment for making a protected disclosure it can award compensations for financial loss and for injury to feelings. An approach analogous to that in discrimination cases is appropriate (**Virgo Fidelis School v Boyle 2004 ICR 1210, EAT**). A Tribunal should adopt the general guidelines that apply to discrimination claims, which were set out by the **Court of Appeal in Vento v Chief Constable of West Yorkshire Police 2003 ICR 318, CA**. The "Vento guidelines" provide for three broad bands: a top band applicable to the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment; a middle band applicable to serious cases that do not merit an award in the higher band; and a lower band applicable to less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

Automatically unfair constructive dismissal

77. S.94 of the ERA gives an employee a right not to be unfairly dismissed by their employer. To qualify for that right an employee usually needs 2 years' continuous service at the time they are dismissed. Neither claimant had that required length of service so could not claim "ordinary" unfair dismissal under s.98 ERA. However, both claimants say they were constructively dismissed for an automatically unfair reason, either for making protected disclosures (s.103A ERA) or for asserting a statutory right to itemised payslips (s.104 ERA). Claims that a dismissal was automatically unfair under those sections do not required 2 years' service.

78. Section 103A of the ERA deals with protected disclosures and reads as follows:-

> **"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".**

79. Section 104 of the ERA deals with dismissal for asserting a statutory right and reads as follows:-

> **(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—**
> **(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or**
> **(b) alleged that the employer had infringed a right of his which is a relevant statutory right.**

80. The definition of "a relevant statutory right" includes any right conferred by the ERA for which the remedy for infringement is by way of a complaint or reference to the Tribunal. That means it includes the statutory right to an itemised pay statement under s.8 of the ERA.

Constructive dismissal

81. A constructive dismissal is where "the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct" (s.95(1)(c) ERA). To be a constructive dismissal the employer's actions or conduct must have amounted to a repudiatory breach of the contract of employment entitling the employee to resign and the claimant must have resigned in response to it: **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761.**

82. In this case, the claimants rely on the respondent's failure to pay them moneys lawfully due under their contract as a fundamental breach of contract. A failure to pay moneys due under a contract is a breach of contract. However, it is not necessarily a fundamental or repudiatory breach entitling the employee to resign.

83. In **Cantor Fitzgerald International v Callaghan and ors 1999 ICR 639, CA**, the Court of Appeal explained that the question whether non-payment of agreed wages is or is not fundamental to the continued existence of a contract of employment depends on the critical distinction to be drawn between an employer's failure to pay, or delay in paying, agreed remuneration and his deliberate refusal to do so. Where a failure or delay in payment might represent no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness, or accident, or unexpected events it would be open to a Tribunal to conclude that the breach did not go to the root of the contract. On the other hand, if the failure or delay in payment were repeated and persistent, perhaps also unexplained, the Tribunal might be driven to conclude that the breach or breaches were indeed repudiatory.

The reason for dismissal

84. In a claim of 'ordinary' unfair dismissal, the employer bears the burden of showing that the reason for dismissal was one of the potentially fair reasons in S.98(1) and (2) ERA. However, where, as in this case, the claim is one of automatically unfair dismissal and the employee lacks the 2 years' continuous service to claim ordinary unfair dismissal, they have the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason (**Smith v Hayle Town Council 1978 ICR 996, CA**).

85. Where an employee claims that he or she was constructively dismissed for an automatically unfair reason, the question for consideration is whether the protected disclosure (in a s.103A claim) or the assertion of a statutory right (in a s.104 claim) was the reason or principal reason that the employer committed the fundamental breach of the employee's contract of employment that precipitated the resignation. If it was, then the dismissal will be automatically unfair.

<u>Deductions from wages</u>

86. In relation to a claim for deduction from wages, s.13(1) of the ERA says:

> **"(1) An employer shall not make a deduction from the wages of a worker employed by him unless-**

(a) the deduction is required or authorised to be made by virtue of a statutory provision of a relevant provision of the worker's contract, or

(b) **the worker has previously signified in writing his agreement or consent to the making of the deduction."**

87. S.27(1) of ERA says:

"(1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including-

(a) Any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise"

88. S.13(3) of ERA says:

"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

89. In **Somerset County Council v Chambers EAT 0417/12** the EAT confirmed that a Tribunal did not have jurisdiction to hear a claim of unauthorised deductions based on the Council's failure to make contributions into a superannuation scheme on the claimant's behalf. The EAT thought it clear from the wording of S.27(1)(a) that it covers sums payable to the worker in connection with the worker's employment, not contributions paid to a pension provider on the worker's behalf. Because that decision turns on the definition of "wages" in s.27 ERA it does not appear to prevent a claimant bringing a claim in relation to a failure to make pension contribution as a breach of contract claim.

<u>The Tribunal's Breach of Contract Jurisdiction</u>

90. The Tribunal has jurisdiction to deal with claims of breach of contract by virtue of s.3 Employment Tribunals Act 1996, together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 ('the Order') Under S.3(2) ETA and Article 3 of the Order, for a tribunal to be able to hear a contractual claim brought by an employee, that claim must arise or be outstanding on the termination of the employee's employment and must seek one of the following:

a. damages for breach of a contract of employment or any other contract connected with employment

b. the recovery of a sum due under such a contract, or

c. the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.

91. There is no requirement that the contractual claim arise in circumstances which also give rise to proceedings already or simultaneously before the tribunal.

<u>Holiday Pay</u>

92. The Working Time Regulations 1998 provides a minimum entitlement of 5.6 weeks annual leave. Reg.13(9) provides that it cannot be carried over in to the next holiday year. Unless the contract provides for a different holiday year, the holiday year will start on the date of employment and then start of the anniversary of that date.

93. Under WTR Regulation 14 a worker is entitled to be paid for any holiday untaken at the end of their employment. The formula used to calculate that is (A x B) – C where A is the leave to which the worker is entitled, B is the proportion of the leave year which expired before the termination date and C is the leave already taken in that holiday year.

Failure to provide itemised paylips

94. S.8(1) ERA says that "[A worker] has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement."

95. Where, on a reference to the Tribunal under s.11 ERA a Tribunal determines that an employer has failed to comply with s.8 it shall make a declaration to that effect (s.12(3)). If any unnotified deductions have been made during the thirteen weeks immediately before the employee's application to the Tribunal for a reference, it may order the employer to pay compensation of up to the aggregate amount of those unrecorded deductions (s.12(4)). However, if the breach is a technical breach and there has been no real loss suffered, a Tribunal may make no award or only a token award. S.26 ERA provides that the aggregate of any amount ordered to be paid under s.12(4) and s.24 in respect of a particular deduction shall not exceed the amount of the deduction.

Failure to comply with the ACAS Code on Disciplinary and Grievance procedures

96. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("s.207A") gives the Tribunal a power to adjust compensation where there has been an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. Compensation can be increased where it is just and equitable but by no more than 25%. That provision is relevant because in this case the claimants say that the respondent failed to deal reasonably with a grievance which they raised.

Discussion and Conclusions

97. In this section I set out my conclusions applying the relevant law to the facts I have found. I have used the headings from the List of Issues for this section. The numbers in brackets refer to the specific questions in that List of Issues.

TUPE transfer and liabilities

98. I find that there was a TUPE transfer from Recruitment to the respondent on 17 August 2020. There was a stable economic entity, namely the recruitment

business of which the claimants were part and of which Mr Kershaw was managing director and Ms Grydzuk the Group Operations Director. The nature of the business meant that its primary assets were its workforce and its client rather than, e.g. machinery. I find that the economic entity retained its identity after the transfer. The workforce remained the same as did the business it carried out and management structure. This was a TUPE Regs 3(1)(a) TUPE transfer. The claimants were assigned to the entity that transferred and their employment transferred to the respondent on 17 August 2020 (1.1).

99. Subject to what I say in the following paragraph, I find that Recruitment's liabilities transferred to the respondent and that any acts of omissions by Recruitment in relation to the claimants prior to the TUPE transfer are deemed to have been acts or omissions of the respondent by virtue of TUPE Regs 4(2)(a) and (b) (1.2).

100. There are two categories of exceptions to that finding. The first is that any claims relating to pensions do not transfer to the respondent because of TUPE Reg 10. The second category relates to arrears of pay and holiday pay up to the 6 August 2020 when Recruitment went into Administration. Because TUPE Reg 8(5) applies, liabilities for arrears of pay and holiday pay only transfer to the respondent to the extent that they exceed the limits on payment set out in the relevant statutory scheme, either in terms of the number of weeks paid, sums owed in excess of the relevant statutory cap on a week's pay or arrears of pay or holiday pay relating to the period after 6 August 2020 (1.3).

101. I deal with the detail of the amounts for which the respondent is liable at the relevant points below.

<u>The unfair dismissal claims</u>

Whether there was a dismissal

102. I find that the respondent did breach both the claimants' contracts by failing to pay them the moneys lawfully due to them, namely their full wages for August 2020 (2.1.1). I find the claimants did resign in response to that breach (2.1.3).

103. The central question is whether that breach of contract was a fundamental breach going to the root of the contract. The critical distinction, as explained in **Cantor Fitzgerald,** is between a failure or delay in paying and a deliberate refusal to do so.

104. I remind myself that the breach relied on by the claimants as justifying their resignations (and the one referred to in their letters of resignation) is the failure to pay full wages in August 2020. The claimants were understandably unhappy about the respondent's failures to provide itemised payslips. They were also understandably unhappy when they found that their tax records with HMRC showed they had not been registered as employees of the respondent for PAYE purposes and that tax and national insurance did not appear to have been remitted to HMRC despite deductions being made from their wages presumably on account of that. However, when it comes to non-payment of wages, this was not a case where there had been a repeated and persistent failure to pay wages. The claimants had been

paid their monthly wages up to and including 31 July 2020, i.e. the last monthly pay. The respondent (via Mr Kershaw) paid around half of their wages for August on 3 September 2020. Full payment was due on 28 August 2020 so was 9 days late when the claimants resigned. That delay would have had a serious impact on the claimants in terms of paying their bills and living expenses. However, in addition to paying half of the wages the respondent had given various reasons for non/late payment including Mr Kershaw being in hospital and his being unable to access his bank account. I accept that given the concerns the claimants had about the respondent's failures relating to payslips, pension and PAYE they may well have had their doubts about those reassurances. I do find this a closely balanced decision, but it seems to me that viewed objectively, at the point when the claimants resigned the failure to pay the full August wages was not a deliberate refusal to pay by the respondent going to the root of the contract. I find that there was not a fundamental breach of contract justifying the claimants treating the contract as at an end (2.1.2). That means there was no constructive dismissal, so the claims of unfair dismissal fail.

Had there been a dismissal, what was the reason or principal reason for it?

105. In case I am wrong about the fundamental breach point, I will set out my conclusions on the reason or dismissal issue (2.2). As I explain below, I find that the claimants did make protected disclosures. The burden of proof is on the claimants to show that the reason or principal reason for the alleged dismissal was an automatically unfair one. The question is whether they have shown on the balance of probabilities that the reason or principal reason for the failure to pay them for August 2020 was the protected disclosures or their assertion of the statutory right to a payslip. I find it was not. I find that the respondent was struggling to pay its employees at the end of August 2020. This was not a case of the respondent targeting the claimants for non-payment because of the protected disclosures or asserting a statutory right. Rather the respondent did not have the funds to pay any employees. Had I found that there was a constructive dismissal in the case of each claimant I would have found it was not for an automatically unfair reason so their claims would have failed at that hurdle. That means the issues as to unfair dismissal remedy (3.1-3.3) do not arise.

<u>Wrongful dismissal / Notice pay</u>

106. I find that each claimant was entitled under their contract to one month's notice from the respondent (4.1). However, as I have explained when setting out my conclusions about the claim of constructive dismissal, I have found that the claimants resigned with immediate effect rather than being constructively dismissed. In those circumstances there was no wrongful dismissal and each claimant's claim for notice pay fails and is dismissed (4.2).

<u>Protected disclosures</u>

107. In relation to the 6 alleged protected disclosures the first question is whether each met the test of a "qualifying disclosure" under s.43B of the ERA (5.1). The second is whether that qualifying disclosure is made in accordance with any of sections 43C to 43H of the ERA (5.2-5.3).

PD1 – data protection concerns raised by Miss Lomas in February 2020

108. As identified in the agreed list of issues, this protected disclosure was made by Miss Lomas. In relation to PD1, I find that in fact both Miss Scorgie and Miss Lomas made a qualifying disclosure to Carie-Ann Annison in February 2020 when they raised their concerns about data protection. The disclosure was of information and I find they both reasonably believed it tended to show a breach of a legal obligation, namely the respondent's data protection obligations. I find both claimants reasonably believed that the disclosure was in the public interest relating as it did to protection of third party data. It was a qualifying disclosure. The disclosure was made to Miss Lomas's employer in accordance with s.43C. it was therefore a protected disclosure for the purposes of s.43A ERA.

PD2 - At the end of April, Miss Lomas querying the lack of P60 and requesting payslips from Ms Grydzuk

109. In relation to PD2, I find that Miss Lomas made a qualifying disclosure to Ms Grydzuk in late April 2020 when she queried the lack of a P60 and asked about payslips. The disclosure was of information and I find Miss Lomas reasonably believed it tended to show a breach of a legal obligation, namely the respondent's obligations to provide payslips and a P60. I find Miss Lomas reasonably believed that the disclosure was in the public interest relating as it did to obligations owed to HMRC and impacting on other employees. It was a qualifying disclosure. The disclosure was made to Miss Lomas's employer in accordance with s.43C. it was therefore a protected disclosure for the purposes of s.43A ERA.

PD3 – Miss Scorgie's email to Ms Grydzuk on 24 April 2020

110. In relation to PD3, I find that Miss Scorgie made a qualifying disclosure to Ms Grydzuk on 24 April 2020 when she informed her by email that her tax record still showed her as employed by her old company. The disclosure was of information and I find Miss Scorgie reasonably believed it tended to show a breach of a legal obligation, namely the respondent's obligations to register employees for PAYE purposes within 35 days of their starting employment. I find Miss Lomas reasonably believed that the disclosure was in the public interest, relating as it did to legal obligations relating to PAYE and tax. It was a qualifying disclosure. The disclosure was made to Miss Scorgie's employer in accordance with s.43C. it was therefore a protected disclosure for the purposes of s.43A ERA.

PD4 – Both claimants on 18 May 2020 participating in a Teams call with Ms Grydzuk in which they asked for payslips pointing out they had still not been received

111. I find that both claimants made a protected disclosure on this occasion. I find they reasonably believed it tended to show a breach of a legal obligation, namely the respondent's obligations to provide itemised payslips. I find the claimants reasonably believed that the disclosure was in the public interest, relating as it did to legal obligations of an employer to its employees. It was a qualifying disclosure. The disclosure was made to the employer in accordance with s.43C. it was therefore a protected disclosure for the purposes of s.43A ERA.

PD5 – Miss Lomas on 16 April 2020 contacting HMRC

112. In relation to PD5, I find that Miss Lomas made a qualifying disclosure to HMRC on 16 April 2020 when she informed the HMRC adviser that she had been employed for 43 days but had not been registered for PAYE purposes. That was a disclosure of information and I find Miss Lomas reasonably believed it tended to show a breach of a legal obligation, namely the respondent's obligations to register employees for PAYE purposes within 35 days of their starting employment. I find Miss Lomas reasonably believed that the disclosure was in the public interest relating as it did to legal obligations relating to PAYE and tax. It was a qualifying disclosure. The disclosure was made to HMRC which is the relevant "Prescribed Person" for the purposes of s.43F ERA for matters relating to income tax (by virtue of The Public Interest (Prescribed Persons) Order 2014. I find Miss Lomas reasonably believed that the failure fell within the description of matters in respect of which HMRC was the prescribed person and that the information disclosed was substantially true. The disclosure was made in accordance with s.43F and was therefore a protected disclosure for the purposes of s.43A ERA.

PD6 – Miss Lomas on 22 August 2020 contacting HMRC

113. In relation to PD6, Miss Lomas did not give evidence in relation to a call on 22 August 2020 to HMRC. In the absence of that evidence I cannot make a finding that this protected disclosure happened.

Detriments for making protected disclosures

114. I find that the claimants were both subjected to the 3 alleged detriments (6.1). I find that D2 and D3 clearly amounted to detriments (6.2). I also find that it was reasonable for the claimants to view being removed from the company WhatsApp group as a disadvantage given that they had unfinished business with the company. They still needed to know what was going to happen about their unpaid wages from August and for the first week of September (6.3).

115. The central issue is whether all or any of the detriments were done on the ground that Miss Lomas and/or Miss Scorgie had made protected disclosures. The question is whether the protected disclosures materially (in the sense of more than trivially) influences the respondent's treatment of them.

116. In relation to Detriments D1 and D2 I find that the disclosures did so. D2 involved Mr Kershaw specifically referencing the claimants having contacted HMRC and blaming them in his WhatsApp message (at least in part) for the difficulties he was having in paying their colleagues. When it comes to D1, there was no evidence as to why the claimants were removed from the WhatsApp group. The burden is on the respondent to explain that. Given the absence of any reason and the fact that Mr Kershaw in that same WhatsApp group blamed the claimants for contacting HMRC I find that the protected disclosures did materially influence the decision to remove them from the group. When it comes to D3, I have found in the context of the unfair dismissal claims that the failure to pay the claimants was not a targeted act but applied to other employees too. I also found it was at least in part due to a lack of funds to make payments. Even allowing for the fact that the test for unfair dismissal (reason or principal reason) is different to the one I am applying (materially influenced), I find that the protected disclosures did not materially influence the non-

payment of the claimants' contractual entitlements (6.3). The claims in relation to detriments D1 and D2 succeed therefore, but the claim in relation to D3 fails.

Remedy for Detriment

117. Neither claimant suggested that either of detriments D1 or D2 had caused them a financial loss and I do not find that they did (7.1-7.3). I do find, however, that both D1 and D2 caused each claimant injury to feelings. I am very conscious that I must ensure the compensation reflects the injury to feelings arising from detriments D1 and D2 only. It is clear to me that both claimants found their period employed by Mr Kershaw's companies as a whole deeply undermining to their confidence in themselves and in others. I find that for both, it damaged their ability to trust prospective employers (particularly so in the case of Miss Scorgie). Detriments D1 and (explicitly) D2 took matters further by ostracising them and making them the scapegoats for Mr Kershaw's failure to pay them and their colleagues. I find that was particularly hurtful to the claimants given that all they had sought to do was to get the respondent and Recruitment to fulfil some of their basic obligations as employers.

118. I do note the detriments which I have found succeeded were 2 one off acts rather than, for example, a campaign of harassment as a result of making the protected disclosures. Taking into account my findings on the impact of what happened it seems to me that the appropriate Vento band for the award of injury to feelings is the lower end of the middle Vento band. For claims brought on or after 6 April 2020 that middle band is from £9000 to £27000. I find the appropriate award for each claimant is £11,000 (7.4).

119. I do not find that there is sufficient evidence to establish that detriments D1 or D2 caused either claimant personal injury. I am not diminishing the impact of what happened to the claimants. I note Miss Scorgie's assertion that the events at the respondent led to a more severe Covid and Long Covid experience on her part. I have considered the medical evidence relating to her back issues which were supplied on 13 March 2023. They date from early in 2021 and without more do not provide sufficient evidence of a link between that medical issue and the detriments I am considering (7.5).

120. I do not find there are grounds for reducing the compensation either on the basis that the disclosures were not made in good faith (7.11 and 7.12) or on the ground that either claimant contributed to the detrimental treatment (7.10).

121. I do, however, find it appropriate to increase this award and the others to which s.207A applies to reflect the respondent's failure to comply with the ACAS Code. It completely failed to engage with the grievances raised by each claimant in writing after their resignation in any meaningful way. I find the failure to do so was unreasonable. I take into account the fact that the respondent may have been a relatively small company which outsourced some of its HR related functions such as payroll. I take into account that Mr Kershaw appears to have had some health problems which meant he was not always available. However, the respondent was in the recruitment business, and as such could be expected to have some grasp of how to deal with employment matters. I find it just and equitable to increase compensation for the relevant claims by 20% (7.7-7.9).

Holiday Pay (Working Time Regulations 1998)

122. I find the respondent did fail to pay each claimant in full for holiday accrued but untaken when they left employment. These claims succeed. In the case of Miss Scorgie I find that amounted to outstanding holiday pay of £54.93. In the case of Miss Lomas it amounted to £275.94. I award those amounts (8.1)

Unauthorised deductions

123. When it comes to the claims of failure to pay the claimants' full salaries in August 2020 and for the first week of September 2020 (9.1.1) I am satisfied that the claimants were entitled to those sums as wages and the failure to pay them amounted to unauthorised deductions. I find that liability for paying the pay up to 6 August 2020 not payable by the Redundancy Payment Service transferred to the respondent under TUPE reg 4. In the case of both claimants the amount they were entitled to under a relevant statutory scheme for the purposes of TUPE Reg 8(5) was limited by the relevant cap on a week's pay of £544. The week's pay to which each claimant was entitled exceeded that amount. I award the wages due on a gross basis. I have decided the best way to calculate the amount due is to calculate the total gross pay due from 1 August 2020 to 7 September 2020 and then deduct the gross equivalent of the RPS payment and deduct the moneys paid to each claimant on 3 September 2020. That gives a gross amount due to Miss Scorgie of £1640.74 and to Miss Lomas of £2273.23.

124. I have found the position in relation to the other two categories of deductions (9.1.2 and 9.1.3) much more difficult to decide. On the one hand, the absence of payslips or any evidence from the respondent makes it difficult to establish on what basis the deductions were made. On the other hand the claimants, as I understand it, accept that the respondent was purporting to make deductions in relation to tax and national insurance which it had a statutory obligation to do. The deductions are potentially therefore authorised deductions as deductions "required or authorised to be made by a statutory provision" (s.13(a) ERA). What the claimants say is that because the respondent did not in fact remit the amounts deducted to HMRC and (when it comes to 9.1.2) made deductions in the wrong amount, s.13(1)(a) does not apply.

125. I have decided that the claims in relation to these deductions fail. When it comes to the deductions not being remitted to HMRC, it seems to me that the issue I have to focus on is the reason why the deduction was made, not what happened to the moneys once deducted – at least in cases, such as this one, where the claimants accept that the deduction was ostensibly to fulfil a statutory obligation. It seems to me that what happens to the moneys once deducted is a matter for HMRC and its enforcement powers rather than for the Tribunal. I find that the deductions on account of tax and national insurance were an authorised deduction (9.1.3).

126. When it comes to the alleged underpayment, the difficulty I face is that I am not in a position to establish that there was an underpayment. The claimants' case is that the respondent deducted too much on account of tax and NI based on the claimants' calculation of what tax and NI they say should have been deducted versus the amounts actually deducted. That is really a dispute about the amount of tax and NI which should have been deducted and again it seems to me that is a matter to be

resolved by or with HMRC. On the evidence before me I cannot say that there is a clear and obvious case of an underpayment amounting to an unauthorised deduction.

127. I find, therefore, that the claim of unauthorised deduction in relation to the claimants' August and September pay succeeds but the claims in relation to the deductions at 9.1.2 and 9.1.3 of the list of issues fails.

Breach of Contract

128. I find that Recruitment did fail to enrol the claimants into a pension scheme. Clause 13 of their contracts of employment required it do so by obliging it comply with its obligations under Part 1 of the Pensions Act 2008. However, I find that any liability relating to a breach of contract by Recruitment relating to its occupational pension scheme did not transfer to the respondent because of the provisions of TUPE Regs 10(1). The claim of breach of contract therefore fails (10.1-10.4).

129. To the extent they have not already done so, it seems to me that this is a matter for the claimants to raise with the Pensions Regulator.

Failure to provide itemised payslips

130. I find Recruitment and the respondent failed to provide the claimants with itemised payslips as required by s.8(1). I find liability for Recruitment's failure to do so transfers to the respondent by virtue of TUPE Reg 4. I do not find that the payslip sent to the claimants by Xceed HR Services on 11 September 2020 complied with s.8(1) since both claimants were told to discard it. I make a declaration to that effect (11.1).

131. I can make a monetary award of an amount up to the aggregate amount of unnotified deductions in the 13 weeks prior to the application for a reference being made. In this case the claim form was lodged on 4 December 2020 so the period of 13 weeks prior to that begins on 4 September 2020. However, I have already made an award under s.24 ERA for the unauthorised deductions from the claimants' September 2020 pay. S.26 ERA prevents me from also making a monetary award under s.12(4) in relation to the same deduction so I make no monetary award (11.2).

Employment Judge McDonald
Date: 10 May 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 17 May 2023

FOR THE TRIBUNAL OFFICE

Appendix
Complaints and Issues

1. TUPE transfer and liabilities

1.1 Were the claimants' employments transferred from Golden Egg Recruitment Group Limited to Golden Egg Group Limited on 13 August 2020?

1.2 In relation to each of the claims below (if successful) is Golden Egg Group Limited liable for those claims, either directly or by transfer of liabilities under the TUPE Regulations 2006?

1.3 In particular, does regulation 8(5) of the TUPE Regulations 2006 mean that liability does not transfer to Group in relation to any of the claims?

2. Unfair dismissal

Dismissal

2.1 Can the claimants prove that there was a dismissal?

2.1.1 Did the respondent breach the claimants' contracts by failing to pay them the monies lawfully due under their contracts?

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

2.1.3 Did the claimants resign in response to that breach?

Reason

2.2 Was the reason or principal for the fundamental breach of contract:

2.2.1 That the claimants had made protected disclosures (para 5.1.1 below) (section 103A); or

2.2.2 That the claimants had asserted statutory rights (section 104) namely their right to itemised payslips?

2.3 If so, the claimants will be regarded as unfairly dismissed.

3. Remedy for unfair dismissal

3.1 What basic award is payable to each claimant, if any?

3.2 Would it be just and equitable to reduce the basic award because of any conduct of each claimant before the dismissal? If so, to what extent?

3.3 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.3.1 What financial losses has the dismissal caused each claimant?

3.3.2 Has each claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.3.3 If not, for what period of loss should each claimant be compensated?

3.3.4 Is there a chance that each claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.3.5 If so, should each claimant's compensation be reduced? By how much?

3.3.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.3.7 Did the respondent or each claimant unreasonably fail to comply with it by failing to deal with the grievance raised by each claimant.?

3.3.8 If so, is it just and equitable to increase or decrease any award payable to each claimant? By what proportion, up to 25%?

3.3.9 If each claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

3.3.10 If so, would it be just and equitable to reduce each claimant's compensatory award? By what proportion?

3.3.11 Does the statutory cap of fifty-two weeks' pay or £88,519 apply?

4. Wrongful dismissal / Notice pay

4.1 What was each claimant's notice period?

4.2 Was each claimant paid for that notice period?

5. Protected disclosures

5.1 Did the claimants make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

5.1.1 What did each claimant say or write? When? To whom? The claimants say they made disclosures on these occasions:

PD1 In February 2020 (in the first weeks of February and in any event before 19 February) Miss Lomas spoke to Carrie-Ann Annison (Office Manager) to point out that having candidate details written on the walls of the office was a breach of data protection requirements as their personal data was accessible to anybody coming into the office, including clients.

PD2 At the end of April 2020 Miss Lomas phoned Ms Grydzuk to query the lack of a P60 and to request payslips, asserting that the respondent was in breach of contract and its duties as an employer not to provide payslips. That was a conversation on the phone.

PD3 Miss Scorgie, on 24 April 2020, spoke to Ms Grydzuk on the phone and followed up with an email asking why HMRC had no PAYE record in relation to her for employment with Recruitment and why tax had not been paid in relation to her employment.

PD4 On 18 May 2020 both claimants participated in a Teams call with Ms Grydzuk in which they asked for payslips pointing out they had still not been received and that this was a breach of contract and amounted to an unlawful deduction.

PD5 On 16 April 2020 Miss Lomas contacted HMRC by phone to check whether she had been added to the PAYE records for Recruitment and highlight that that had not been done when it should have been.

PD6 On 22 August 2020 Miss Lomas spoke to HMRC (Kevin) to check whether the tax records in relation to her employment were up to date and highlight that the respondent had failed to record her on the PAYE system.

5.1.2 Did the relevant claimant disclose information?

5.1.3 Did the relevant claimant believe the disclosure of information was made in the public interest?

5.1.4 Was that belief reasonable?

5.1.5 Did the relevant claimant believe it tended to show that:

5.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation.

5.1.6 Was that belief reasonable?

5.2 If a claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

or

5.3 In the case of disclosures made to HMRC, to a prescribed person for the purposes of section 43F of the Employment Rights Act 1996.

If so, it was a protected disclosure.

6. Detriment (Employment Rights Act 1996 section 48)

6.1 What are the facts in relation to the following alleged acts or deliberate failures to act by the respondent?

D1 On 7 September 2020 removing both claimants from the company WhatsApp group.

D2 Later on 7 September 2020 blaming both claimants in a WhatsApp message to employees for delays in paying colleagues because they had raised matters with HMRC.

D3 Not being paid sums due to them under their contracts of employment.

6.2 Did each claimant reasonably see that act or deliberate failure to act as subjecting her to a detriment?

6.3 If so, was it done on the ground that she made a protected disclosure?

7. Remedy for Detriment

7.1 What financial losses has the detrimental treatment caused each claimant?

7.2 Has each claimant taken reasonable steps to replace any lost earnings, for example by looking for another job?

7.3 If not, for what period of loss should each claimant be compensated?

7.4 What injury to feelings has the detrimental treatment caused each claimant and how much compensation should be awarded for that?

7.5 Has the detrimental treatment caused each claimant personal injury and how much compensation should be awarded for that?

7.6 Is it just and equitable to award each claimant other compensation?

7.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.8 Did the respondent or each claimant unreasonably fail to comply with it?

7.9 If so, is it just and equitable to increase or decrease any award payable to teach claimant? By what proportion, up to 25%?

7.10 Did each claimant cause or contribute to the detrimental treatment by their own actions and if so, would it be just and equitable to reduce each claimant's compensation? By what proportion?

7.11 Was any protected disclosure made in good faith?

7.12 If not, is it just and equitable to reduce each claimant's compensation? By what proportion, up to 25%?

8. Holiday Pay (Working Time Regulations 1998)

8.1 Did the respondent fail to pay each claimant for annual leave the claimant had accrued but not taken when their employment ended?

9. Unauthorised deductions

9.1 Did the respondent make unauthorised deductions from the claimants' wages, and if so how much was deducted? The alleged deductions are:

9.1.1 A failure to pay salary for August 2020 and for September 2020 up to the date of termination of employment on 7 September 2020;

9.1.2 By underpaying each claimant for each month from 3 February 2020 until 31 July 2020;

9.1.3 By deducting monies from the claimants' pay for tax and national insurance but failing to remit those monies to HMRC.

10. Breach of Contract

10.1 Did this claim arise or was it outstanding when the claimants' employment ended?

10.2 Did the respondent do the following:

10.2.1 Fail to enrol each claimant in a pension scheme?

10.3 Was that a breach of contract?

10.4 How much should the claimants be awarded as damages?

11. Failure to provide payslips

11.1 Did the respondent fail to provide the claimants with an itemised pay statement as required by section 8 of the ERA.

11.2 If so, what, if any, monetary award should the Tribunal make under s.12(4) of the ERA in relation to any unnotified deductions.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **2418814/2020 & Other**

Name of case: **Miss E Scorgie & Other** v **Golden Egg Group Limited**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 17 May 2023

the calculation day in this case is: 18 May 2023

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.