



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104919/2022

Held in Glasgow on 23 January 2023

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Employment Judge L Wiseman

Mr I Swales

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**Claimant
Represented by:
Ms N Munro -
Solicitor**

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Novo Technologies Ltd

**Respondent
Represented by:
Mr A McPhail -
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided to dismiss the claim because:

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a. the complaints of unfair dismissal (section 94 - 98 Employment Rights Act) and automatically unfair dismissal (section 103A Employment Rights Act) were withdrawn by the claimant;

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b. a Tribunal does not have jurisdiction to determine the complaint regarding payment of holiday pay because the claimant is not a worker (within the meaning of section 230 Employment Rights Act), and the claim was presented late;

c. a Tribunal does not have jurisdiction to determine the claim regarding an unauthorised deduction from wages because the claimant is not a worker (within the meaning of section 230 Employment Rights Act);

- d. a tribunal does not have jurisdiction to determine the complaint of detriment for making a protected disclosure because the claimant is not a worker within the extended definition in section 43K Employment Rights Act and detriment (a) was presented late and
- 5 e. detriment (d) was struck out for having no reasonable prospect of success in terms of Rule 37(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

REASONS

- io 1. The claimant presented a claim to the Employment Tribunal on the 1 September 2022 claiming that he had been unfairly dismissed; automatically unfairly dismissed because of making a protected disclosure; suffering detriment because of making a protected disclosure; unauthorised deduction of wages and payment in respect of holiday pay.
- 15 2. The respondent entered a response in which it denied the claimant was an ~~amnhx/QQ nr V/crLor and gcnrW. the claim had been brminht nut of timp.~~ The respondent further denied the claimant had made a protected disclosure and denied all of the claims brought.
- 3. A case management preliminary hearing took place on the 31 October 2022.
- 20 The Employment Judge ordered that a preliminary hearing be listed to determine the following preliminary issues:

- a. the claimant's employment status at the relevant time in 2022, in
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respondent (the claimant's case) or an independent contractor
25 providing services to the respondent through his limited company Ian Swales Ltd (the respondent's case);

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should be struck out under Rule 37(1)(a) (no reasonable prospect of success) because the Tribunal lacks jurisdiction to determine those

claims because of the claimant's employment status at the relevant time;

c. if the claimant was an employee of the respondent at the relevant time:

5 i. whether he resigned with immediate effect by an email he sent the respondent on 12 March 2022 at 05.30 which stated (amongst other matters) "*/ will not work another day*",

10 ii. if he did, whether he timely presented his claims of unfair dismissal under sections 94 - 98 and section 103A Employment Rights Act 1996 within 3 months of his effective date of termination;

iii. if not timely presented, whether it was reasonably practicable for the claimant to have timely presented those claims; and

15 iv. if not reasonably practicable, whether such claims were presented within such further period as the Tribunal considers reasonable.

4. The claimant's representative, at the commencement of the hearing, confirmed the claimant was no longer seeking to argue that he was an employee of the respondent, and that he wished to withdraw the claims of ordinary unfair dismissal and automatically unfair dismissal because of making a protected disclosure. The Tribunal decided to dismiss those claims.

5. The Employment Judge clarified and agreed with the parties that the issues for determination today were employee status, timebar and strike out of detriment (d).

25 6. The Tribunal heard evidence from the claimant and from Mr Mark Brady, Operations Director.

7. The Tribunal was referred to a number of jointly produced documents. The tribunal, on the basis of the evidence before it, made the following material findings of fact.

Findings of fact

8. The respondent is a telecommunications contracting company who take on both specific and end-to-end telecoms infrastructure projects for carrier and enterprise clients.
- 5 9. The respondent's workforce comprises a number of employees (40/45) and a number of people who are provided to the company through various providers.
10. The claimant initially started working for the respondent in 2015. His services were provided to the respondent through Paul Murphy Ltd. The claimant left
io in February 2016.
11. The claimant set up a company called Ian Swales Ltd. The claimant used this company to provide his services to Convergent from March 2016. This relationship came to an end. The claimant then used his company to supply his services to the respondent from the end of 2017 until the relationship
15 ended.
12. There was no contractual documentation governing the relationship between the claimant and Ian Swales Ltd or Ian Swales Ltd and the respondent. The only documentation produced for the tribunal was invoices from Ian Swales Ltd to the respondent for payment for the claimant's services. -
- 20 13. The claimant was a Senior Telecommunications Engineer. The claimant was a "*competent person*" on site which meant he was trained by the Energy and Utility Skills Register to maintain safety and compliance with all the necessary regulations.
- 25 14. The respondent would offer Ian Swales Ltd work which the claimant was free to accept or reject. There was no obligation on the respondent to offer work to Ian Swales Ltd and if the work was rejected, the respondent would approach another provider to enquire whether they could provide services for the work.

15. The claimant set the daily rate for his services and Ian Swales Ltd invoiced the respondent company for payment. The claimant increased the daily rate charged by Ian Swales Ltd from £250 to £275.
16. The claimant drew a salary and dividends from Ian Swales Ltd.
- 5 17. Ian Swales Ltd obtained a Government COVID loan, which was used to pay the claimant during periods of lockdown when people were unable to work.
18. The claimant provided and used some of his own equipment such as hand tools, lifting ropes, safety rescue kit, pulleys and slings. The respondent provided the high value items of equipment such as testers and monitors.
- 10 19. The claimant was provided with a hi-viz vest and jacket to wear on site.
20. The claimant decided when to take time off/holidays. He would, as a matter of courtesy, advise Mr Brady of this and seek to agree the time off. However, if the claimant wanted to take the time off, he would.
- 15 21. The issue of substitution was never discussed but the claimant accepted that it would have been possible for Ian Swales Ltd to have sent another competent person to carry out the work. Mr Brady accepted that it would have been acceptable for Ian Swales Ltd to have sent a competent person other than the claimant to carry out the work.
22. Ian Swales Ltd could take on other clients but did not ever do so.
- 20 23. The claimant was the competent person on site. He would work to the various Permits and use the Method Statement for guidance regarding the work. The claimant was in control of his work on site.
- 25 24. The respondent is an approved contractor for Cellnex. The respondent had accepted work in Southampton commencing in March 2022. The job was due to start on Monday 7 March, but the claimant was not available that day, and so it started on the Wednesday.

25. The claimant drove down to Southampton on the Tuesday and collected the relevant permits on the way. The claimant attended on site on the Wednesday and met the four other members of the team.
26. The claimant raised concerns about the safety of the work on site and a conference call took place on the 11 March between the claimant, Mr Brady, Alan Orr and Jim McDermott. The claimant's concerns were discussed together with the advice which had been obtained from Cellnex and the National Grid. Measures were put in place to mitigate the risks. Mr Brady concluded the call believing the work could proceed.
27. The claimant emailed Mr Brady at 05.30 on Saturday 12 March (page 65) to say he stood by the health and safety concerns he had raised. He referred to having another sleepless night due to stress from that week and stated "*I'll not work another day*".
28. The claimant followed this up with a WhatsApp message to Mr Brady (page 68).
29. Mr Brady phoned the claimant and understood from this that he had locked up the site and left, and was heading back up the road. The claimant told Mr Brady he had had enough of telecoms and was going to do something less arduous, like drive a truck.
30. The claimant subsequently sent Mr Brady another message (page 69) saying he had worked many hours on many sites for Novo, and had tolerated a lot, but it was things like this that made him "*feel good*" about his decision to no longer take work from the company.
31. The claimant and Mr Brady exchanged messages (page 68) regarding the return of the company van and equipment.
32. The respondent did not offer any more work to Ian Swales Ltd after the 12 March 2022.
33. Ian Swales Ltd submitted two invoices for payment (pages 73 and 74) which remain unpaid. The invoice produced at page 73 was for work supplied on

the 8 March 2022 for 5.5 days at the rate of £275 per day (£1512.50) and the invoice produced at page 74 was for work supplied on the 28 February for 4 days at the rate of £275 per day, plus expenses, giving a total of £1143.30.

Credibility and notes on the evidence

- 5 34. There were no issues of credibility in this case. The claimant gave his evidence in a very straightforward manner. He conceded or accepted points where it was appropriate to do so and his evidence was reliable.
35. The respondent's witness, Mr Brady, was also a credible and reliable witness.
36. There were no real factual issues in dispute in this case. There was one
10 disagreement where the claimant maintained company policies had been issued to him, but this was denied by Mr Brady. The claimant was unable to say which policies had been issued to him or when this had happened. The tribunal, in the circumstances, preferred Mr Brady's evidence because the claimant's evidence was too general.

15 Respondent's submissions

37. Mr McPhail addressed the tribunal on the general themes emerging from the case law. He submitted firstly that there was no contract between the respondent and the claimant. There was an informal contract between the respondent and Ian Swales Ltd, and this was evidenced by the fact invoices
20 were sent to the respondent for payment for the claimant's services. The claimant, in turn, took a salary and dividends from Ian Swales Ltd.
38. Mr McPhail submitted the claimant had chosen to set up his company and to work in this way. It was not a sham arrangement: the company had been used to provide services to other companies (Convergent) and had obtained
25 a Government Covid loan.
39. The parties accepted there was no mutuality of obligation. The respondent was not obliged to offer work to the claimant and the claimant was free to accept or reject the work offered.

40. Mr McPhail invited the Tribunal to accept the claimant had not needed to seek permission to take holidays. The evidence of both parties appeared to be that Mr Brady would be notified of time off and holidays as a matter of courtesy by the claimant.
- 5 41. The claimant accepted there was no requirement for him to perform the work personally and Ian Swales Ltd could have provided another competent person to undertake the work.
42. Mr McPhail submitted the fact the claimant brought a lot of his own tools and equipment to site indicated he was self-employed.
- 10 43. Mr McPhail invited the Tribunal to find the claimant was not a worker within section 230(3)(b) Employment Rights Act.
44. Mr McPhail submitted the claim had not been presented in time. The claimant's message of the 12 March where he said he would not work another day was accepted by the respondent as terminating the relationship. This was supported by the claimant's subsequent message (page 69) and returning the company van and equipment.
- 15 45. Mr McPhail submitted it had been reasonably practicable to present the claim in time. The claimant had obtained advice in April and there was no real explanation why ACAS had not been approached earlier.
- 20 46. The respondent invited the Tribunal to dismiss the claims of unfair dismissal and automatically unfair dismissal because they had been withdrawn; and to dismiss the claim for payment of holiday pay because the claimant was not a worker and because it had been presented late. The respondent further invited the tribunal to dismiss the claim of unauthorised deduction of wages because the claimant was not a worker (the respondent accepted this claim had been brought in time) and to dismiss the claim of detriment for making a protected disclosure because the claimant was not a worker (within the meaning of section 43K Employment Rights Act).
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Claimant's submissions

47. Ms Munro referred to the case of ***Sejpal v Rodericks Dental Ltd [2022] EAT 91*** where it had been emphasised by the EAT that in determining whether someone is a worker, the starting point and constant focus should be on the statutory wording. A structured approach should be adopted where the starting point should be a determination of whether there was a contract between the worker and the employer. The Tribunal should focus on the wording of the contract and the concepts of mutuality of obligation, irreducible minimum and umbrella contract. The Tribunal should next consider whether there was a requirement for personal service and lastly the tribunal should consider whether the claimant carried on a profession or business.
48. Ms Munro also referred the Tribunal to the cases of ***Pimlico Plumbers Ltd v Smith [2018] UKSC 29; Community Based Care Health Ltd v Narayan UAEAT/0162/18; Plastering Contractors Stanmore Ltd v Holden UAEAT/0074/14*** and ***Byrne Brothers (Formwork) Ltd v Baird [2002] IRLR 96***.
49. Ms Munro referred to ***Croke v Hydro Aluminium Worcester Ltd EAT/0238/05*** where the EAT had considered the extended definition of worker set out in section 43K Employment Rights Act.
50. Ms Munro invited the tribunal to find the claimant was a worker within the terms of section 230 and section 43K Employment Rights Act. Ms Munro noted the respondent accepted the complaint of unauthorised deduction from wages had been brought in time and also detriments (b) and (c) of the section 47B claim.

Discussion and decision

51. The claims being brought by the claimant were set out in the Note following the preliminary hearing on the 31 October 2022. The claims are:
- a. a claim of ordinary unfair dismissal under sections 94 - 98 Employment Rights Act;

- b. a claim of automatically unfair dismissal under section 103A Employment Rights Act;
- c. a claim that after making the protected disclosure on the 8 March 2022, the respondent breached section 47B Employment Rights Act by
 5 subjecting the claimant to four detriments:-
- i. not offering him any more work after the 12 March 2022;
 - ii. not paying him the sum of £1512.50 as invoiced;
 - iii. not paying him the sum of £1143.44 as invoiced and
 - iv. taking unknown steps to prevent or discourage others in the
 10 industry in Scotland from hiring him;
- d. a claim under section 13 Employment Rights Act in respect of the two invoices which the respondent failed to pay; and
- e. a claim for holiday pay in respect of holidays accrued and not taken as at the termination of his employment.
- 15 52. The claimant, as stated above, conceded at the start of the hearing, that he had not been an employee of the respondent, and accordingly he withdrew the complaints of ordinary unfair dismissal and automatically unfair dismissal
 ~ (claimsXa) and (b) respectively above). The Tribunal decided that the claims, having been withdrawn, are dismissed.
- 20 53. The Tribunal next had regard to the statutory provisions relevant to complaints (c), (d), and (e) above.
54. Section 47B Employment Rights Act provides that “a *worker*¹ 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
 25 disclosure. Section 43K Employment Rights Act provides that for the purposes of this Part, “*worker*¹ includes an individual who is not a worker as defined by section 230(3) Employment Rights Act but who works or worked for a person in circumstances in which he is or was introduced or supplied to

do that work by a third person and the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them.

5 55. Section 230 Employment Rights Act provides that in this Act “*employee*” means an individual who has entered into or works/worked under a contract of employment. A “*worker*” means an individual who has entered into or works/worked under a contract of employment or any other contract, whether express or implied, (and if it is express whether oral or in writing) whereby the
10 individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

15 56. Section 23 Employment Rights Act provides that “a *worker* may present a complaint to an employment Tribunal that his employer has made an unauthorised deduction from his wages.

20 57. Section 47B and 23 Employment Rights Act make clear that in order to proceed with a claim brought under those sections, the individual must be a worker. Section 230(3) Employment Rights Act sets out what the term “*worker*’ means and there are three elements to the definition

- a. the individual has entered into or worked under a contract to perform work or services for the other party;
- b. the individual undertakes to perform the work or services personally and
- 25 c. the other party to the contract must not be a client or customer of any profession or undertaking carried on by the individual.

30 58. The Tribunal was referred to a number of cases by the claimant’s representative. The Tribunal considered that the points to extract from those cases is that there is no one factor which is determinative of a worker relationship and a Tribunal considering the issue of whether an individual is a

worker must have regard to the contractual documentation and to all the circumstances of the particular case. We accepted Mr McPhail's submission that the general themes arising from case law (and which should be considered by a tribunal determining the issue) are the terms of the contract, mutuality of obligations, substitution and control.

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59. The first issue to be considered by the Tribunal is whether there was a contract between the claimant and the respondent. The Tribunal noted there was no dispute in this case regarding the fact that Ian Swales Ltd provided the claimant's services to the respondent. There was no contract between the claimant, Ian Swales and the respondent, Novo Technologies Ltd. Further, there was no contractual documentation evidencing the relationship between Ian Swales Ltd and the respondent. There must have been an informal contract between Ian Swales Ltd and the respondent because invoices were sent by Ian Swales Ltd to the respondent for payment for the claimant's services. The respondent paid these invoices (with the exception of the last two invoices).

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60. The claimant took a salary from Ian Swales Ltd and dividends and accepted that it was for him to make decisions about these payments.

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61. The Tribunal accepted this was not a sham arrangement. The claimant chose to set up Ian Swales Ltd and to operate in this way. There was evidence to suggest that prior to Ian Swales Ltd being established in 2015/2016 the claimant's services had been provided to the respondent through Paul Murphy Ltd. It appeared the respondent had approximately 6 "providers" who provided individuals in this way.

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62. The Tribunal next considered whether the claimant had undertaken to perform the work/services personally. The claimant very candidly accepted that Ian Swales Ltd could have sent another competent person to carry out the work, although this had never happened. The respondent also accepted that if Ian Swales Ltd had sent someone other than the claimant they would have had no objection provided the other person was a competent person. The evidence supported the clear finding that there was the option of substitution.

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63. The Tribunal noted there was no dispute between the claimant and the respondent regarding the fact there was no obligation on the respondent to offer work to Ian Swales Ltd, and there was no obligation on Ian Swales Ltd or the claimant to accept work which was offered.
- 5 64. The claimant took time off and holidays when he wanted although, as a matter of courtesy and good practice, he advised Mr Brady of this and endeavoured to agree times/dates to suit not only himself but also the company. There was a suggestion that the claimant had to seek "*permission*" to take holidays, but the evidence did not support that suggestion. The way in which the claimant operated was clearly demonstrated in relation to the job in Southampton. The job should have started on the Monday, but the claimant did not work that day because he had worked nine days and needed a break. Mr Brady accepted this and so it was agreed the claimant would be travelling on the Tuesday and on site on the Wednesday. It was the claimant who was in control of this and stipulating when he would be available.
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65. The Tribunal noted there was no dispute regarding the fact the claimant wore a hi-viz vest and jacket when working on site for the respondent. The claimant provided his own tools and some equipment, with the respondent providing large/big value items of equipment.
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66. The claimant accepted he was in control of his work on site. The Tribunal understood permits would be issued to not only allow work to proceed, but also to stipulate the times when work could be carried out. There would also be a Method Statement providing guidelines of what was to be done. These are standard on site. The claimant would work to the Method Statement but within that, he would be in control of what he did and how he did it.
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67. There was some very weak evidence regarding to whom the claimant would speak if he had a complaint or grievance. The claimant said he would raise it with Mr Brady. Mr Brady said the claimant would speak to HR. The claimant's position was supported by the fact that when there was an issue on the site at Southampton, it was Mr Brady he raised it with.
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68. The Tribunal concluded, having had regard to all of the above points, that the claimant was not a worker within the meaning of section 230(3) Employment Rights Act. The Tribunal reached that conclusion because the lack of mutuality of obligation, the lack of any need to personally perform the work/services and the lack of control together with the fact the claimant decided to establish Ian Swales Ltd and operate in this way all tended to support the fact that he was not a worker.
69. The Tribunal next considered whether the claimant was a worker in terms of the extended definition in section 43K Employment Rights Act. The Tribunal was referred to the case of ***Croke v Hydro Aluminium Worcester Ltd*** **UKEAT/0238/05** where the EAT held that the introduction or supply of an individual for the purpose of section 43K can include an individual introduced or supplied by an agency even where that person is operating through their own service company. The Tribunal also had regard to the case of ***Keppel Seghers UK Ltd v Hinds*** [2014] IRLR 745.
70. The Tribunal accepted the claimant operated through his own service company and was supplied, by that company, to provide services to the respondent. The Tribunal however understood that section 43K only applied to individuals supplied via an intermediary provided that the terms are not set by the worker themselves. The only evidence before the tribunal relating to terms was in relation to payment. The undisputed evidence was that the claimant did set his own terms: the claimant's daily rate was £250 and increased to £275. This was a decision made by the claimant.
71. The Tribunal concluded, for this reason, that the claimant did not come within the extended definition of worker set out in section 43K.
72. The Tribunal decided the claimant was not a worker for the purposes of either section 230 or 43K Employment Rights Act. The Tribunal further decided that because the claimant was not a worker, he was not entitled to proceed with his complaints regarding an unauthorised deduction from wages, holiday pay or detriment for having made a protected disclosure.

73. The Tribunal did continue to consider the respondent's argument that the complaint regarding holiday pay had been presented late and should not be allowed to proceed. The Tribunal, in considering this issue, found as a matter of fact the claimant's employment terminated on the 12 March 2022. The claimant did not, in his evidence, suggest this was incorrect. The claimant said he had not really intended to resign, but he also said in a subsequent message that he "fe/t good" about his decision to no longer take work from the company. The claimant also returned the van and company equipment promptly. The Tribunal concluded the respondent was entitled to accept the clear, unambiguous words of the claimant that he would not "*work another day*" as meaning just that. The claimant packed up and left the site. The relationship between the claimant and the respondent came to an end on the 12 March 2022.
74. The claimant did not contact ACAS until the 24 June 2022 and was issued with an ACAS certificate on the 5 August 2022. The claim was presented to the Employment Tribunal on the 1 September 2022. The claimant ought to have been in contact with ACAS within three months of the effective date of termination. The claimant was almost 2 weeks late in contacting ACAS. The Tribunal concluded from this that the claim had been presented late.
75. The Tribunal must consider whether it had been reasonably practicable for the claim to be presented on time. The claimant told the Tribunal he had initially taken advice from Mr Jim McCourt (who works for an Advice Centre) in early April. The claimant had then taken advice from Strathclyde Law Clinic. The claimant was guided by the advice he obtained.
76. The Tribunal, in considering the claimant's evidence, noted the claimant did not offer any real explanation why he had not acted sooner to approach ACAS and present his claim. The Tribunal acknowledged the claimant may not have known of the time limits for presenting a claim, but he was seeking advice from early April and it seemed to the Tribunal that he could reasonably have asked those questions. The Tribunal concluded in the circumstances that it had been reasonably practicable for the claimant to present his claim in time because he had access to advice.

77. The Tribunal decided the complaint regarding holiday pay had been presented out of time (in circumstances where it was said that holiday pay had accrued and was due to be paid on the termination of employment).
78. The Tribunal noted the respondent's representative accepted the complaint in respect of wages had been made in time.
79. The Tribunal further noted that in terms of the detriment claim and the four matters identified as being detriments, the respondent accepted points (b) and (c) were in time. The Tribunal accepted point (a) had not been made in time in circumstances where the clock must have started at the point the claimant left work, which was the 12 March 2022. The Tribunal acknowledged that it was arguable the date was later because time had to pass in order for the claimant to understand he was not being given any more work, but in the absence of any evidence suggesting how long a period should be allowed (and taking into account Mr Brady's evidence that he usually offered work 7/10 days in advance) the Tribunal decided this claim had been made out of time.
80. The fourth detriment was *"taking unknown steps to prevent or discourage others in the industry in Scotland from hiring him"*. The Tribunal considered this claim was insufficiently specified and that it had no reasonable prospect of success. The Tribunal decided to strike out this complaint under the terms of Rule 37(a) Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.
81. The Tribunal, in conclusion, made the following decisions in respect of the claims brought by the claimant:
- a. the complaints of unfair dismissal (section 94- 98 Employment Rights Act) and automatically unfair dismissal (section 103A Employment Rights Act) having been withdrawn by the claimant, are dismissed;
 - b. the complaint regarding payment of holiday pay is dismissed because the tribunal does not have jurisdiction to determine the claim because the claimant is not a worker and the claim was presented late;

c. the complaint of an unauthorised deduction from wages is dismissed because the tribunal does not have jurisdiction to determine the claim because the claimant is not a worker and

5 d. the complaint of detriment for making a protected disclosure is dismissed because the tribunal does not have jurisdiction to determine this claim because the claimant is not a worker (within the extended definition in section 43K Employment Rights Act). Further, the detriment specified at (a) had been presented late and the detriment specified at (d) was struck out in terms of Rule 37(a) of the
io Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

82. The Tribunal decided to dismiss the claim.

Employment Judge: L Wiseman
Date of Judgment: 31 January 2023
Entered in register: 31 January 2023
and copied to parties

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