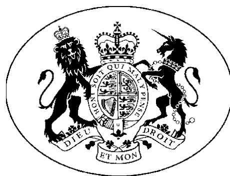

EMPLOYMENT TRIBUNALS

Claimant: Mr D Burt

Respondent: Woodford Pipeline Contracting Limited

HELD AT: Manchester **ON:** 18, 19 and 20 December 2017
22 January 2018
(in Chambers)

BEFORE: Employment Judge Sharkett
Mr R W Harrison
Dr H Vahramian

REPRESENTATION:

Claimant: Miss N Owens of Counsel
Respondent: Mr Powell of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for unauthorised deduction of wages is not well-founded and is dismissed.

2. The claimant's claim in the alternative for breach of contract is not well-founded and is dismissed.

3. The claimant's claim of automatic unfair dismissal – section 103 (on the basis of protected disclosure) is not well-founded and is dismissed.

4. The claimant's claim of automatic unfair dismissal, section 104 Employment Rights Act 1996 (on the basis of asserting a statutory right not to suffer an unlawful deduction of wages under section 13 of the Employment Rights Act 1996) is not well-founded and is dismissed.

5. The claimant's claims of detriment under section 47B of the Employment Rights Act 1996 are not well-founded and are dismissed.

REASONS

1. The claimant brings claims of unauthorised deduction of wages or in the alternative a claim for breach of contract (bonus payment). The claimant brings further claims of automatic unfair dismissal under section 103 of the Employment Rights Act 1996 on the basis that he made a protected disclosure, and a further claim of automatic unfair dismissal under section 104 of the Employment Rights Act 1996 on the basis that he asserted a statutory right not to suffer an unlawful deduction of wages under section 13 of the Employment Rights Act 1996. The claimant brings further claims of detriments as a result of making a protected disclosure under section 47B of the Employment Rights Act 1996.

2. The claimant was represented by Miss Owen of counsel and the respondent by Mr Powell of counsel. The parties had produced a joint bundle of documents.

3. Miss Owen called the claimant to give evidence in support of his claim, and Mr Powell called:

Mr Craig Tattersall, the Managing Director of the respondent;

Paul Livingstone, Business Manager of a sister company of the respondent; and

Katrina McKnight, the Financial Controller for the Group Companies of which the respondent formed part.

The witnesses gave evidence in chief by way of written witness statements which had been exchanged and were taken as read by the Tribunal. In preparation for the hearing the parties had agreed a bundle of documents consisting of some 356 pages to which a number of other documents were added at the beginning of the hearing. The Tribunal heard closing submissions from Mr Powell for the respondent and Miss Owen for the claimant. The Tribunal has had regard to the submissions when reaching its conclusions.

4. Having considered all the evidence, both oral and documentary, the Tribunal make the following findings of fact based on the balance of probabilities. These findings of fact do not reflect all the evidence heard but are the salient facts upon which the Tribunal reached its decision.

Findings of Fact

5. The claimant was employed by the respondent as a Business Manager from 20 April 2015 until his dismissal on 28 October 2016. On the effective date of his dismissal he did not have sufficient continuity of service to bring a claim of ordinary unfair dismissal.

6. The respondent is one of a number of companies which comprised “The Woodford Group”. The group employs approximately 21 employees and is in the business of supplying underground piping services, installation and maintenance, for a variety of commercial and corporate clients. The respondent is one of the leading installers of underground utility services and operates nationwide both in the public and private sectors. The companies which make up the Woodford Group are

Woodford Pipeline Contracting Limited (the respondent); Woodford Plastic Fabrications Limited; Woodford CNC Machining Limited and Pipeline Plus Limited. The parent company is Woodford Corpus Limited which owns 100% of the shares in each of the group companies. The directors and shareholders of Woodford Corpus Limited (Corpus Site), are Mr Craig Tattersall and Mr Brian Whitehead who are joint managing directors ('the directors') of the parent company and each of the companies in the group including the respondent. The decision to arrange the companies in this way was made by the two directors who had first started the business together in 2003. Over time the business developed into four distinct market areas and in 2014 the directors took the decision to form four separate companies so that each company would deal with its own market area. The idea was that it would be easier to monitor and grow the individual market areas if the business was arranged in this way.

7. Having created the new companies, the directors transferred existing employees into the company relevant to their specific work. A number of core staff in the accounts department were retained by Woodford Corpus Ltd because their services would be shared by the four new companies. The directors also appointed a business manager for each of the new companies who would report directly to the board, i.e. Mr Tattersall and Mr Whitehead. Their role was to manage and develop the company in which they were employed and act in a role akin to an assistant managing director. Two of the business managers were promoted from within the existing staff complement with the business manager for the respondent being advertised externally and the post for the Pipeline plus only being filled in April 2016. The idea was that although each business manager would be responsible for his own company there would be an expectation that each business manager would assist its sister companies and work together.

8. The claimant was recruited externally as the business manager for the respondent. The respondent had the highest turnover in the group and the directors were keen to make sure they recruited someone with the necessary experience and skills. In particular they were looking for someone who had experience in negotiating terms of contracts and legal issues. The claimant attended two interviews before being offered the position of business manager for the respondent by letter of 16 March 2015 (P49). In addition to advising him that his salary would be £57,500 the claimant was also provided with two copies of an employment contract setting out the terms of his employment, including his right to a bonus. The basis upon which a bonus would be paid had not been agreed at the time of the offer and the contract made only brief mention of it. However, prior to the claimant starting work with the respondent he emailed Mr Tattersall to request information about how the bonus would be calculated. Mr Tattersall responded by email of 10 April (p58), setting out the terms which were subsequently agreed by the claimant as follows:

> *"The scheme is based on the performance of Woodford Pipeline Contracting Limited. The scheme will run through the company's financial year, 1 May to 30 April. Calculations of any payments due will be made after our company accounts have been signed off by our outside firm of accountants, Wyatt Morris Golland. Payments due will be made through your pay in the next pay cycle after the accounts sign off. Your entitlement to this scheme will come into effect after you have successfully completed your six month probationary period. If for whatever reason your employment ceases with us before the end of the six months probationary period you will not be entitled to any payments*

at that time or any time in the future. After successfully completing your six month probationary period the scheme will come into effect and will be based on the current full financial year at the time the scheme comes into effect. (We will not pro rata down any profit share payments generated due to you not being eligible during your six month probationary period). If you leave the company for whatever reason during the scheme's operation i.e. at any time after your six month probationary period, we will calculate any payments due based on a pro rata basis at the end of that financial year and the accounts have been signed off as described above.

Profit and payment calculations

Profit share payments will be calculated on profits generated that are greater than 4% of turnover (this is the minimum amount of profit we aim to achieve to enable investment and development of the business). Your basic salary package is your incentive to reach this target. For all profits generated greater than 4% you will receive a profit share equal to 15% of the monetary amount in excess of 4%. The scheme does not have a capped level."

9. The email went on to inform the claimant that:

"In the current financial year ending 30 April 2015 we are expecting the business to make a loss. The business was in profit for the first nine months but that last quarter depleted what had been built up. However, this should not alarm you as there are many reasons why this has happened."

The email explained the reasons for the loss and concluded by reassuring the claimant that the last 12 months had been a "blip" on their otherwise profitable 12 years and assured him that they would get back on track. The claimant acknowledged receipt of that email on 10 April 2015 (p56), advising Mr Tattersall that everything looked fine.

10. The claimant subsequently signed an amended contract of employment which incorporated the terms set out in the email from Mr Tattersall of 10 April; save for the fact that the words *"and will be based on the current full financial year at the time the scheme comes into effect"* were omitted from the contract. The contract defines the company as 'Woodford Pipeline Contracting Limited'. In oral evidence the claimant accepts that he did not challenge the wording of the contract and agrees that he had been told the way in which the bonus would be calculated.

11. The claimant started work on 20 April 2015. Soon after the claimant started work he was given financial information specific to the respondent. In July 2015 he was given copies of the three sets of what he refers to as the profit and loss accounts. It is clear however that these were not profit and loss accounts, but rather they were internal management accounts. Profit and loss accounts are produced only at the end of each financial year whereas management accounts are usually produced monthly to inform those managing businesses how the business is performing. The three sets of figures handed to the claimant were headed (1) 'Woodford Corpus Ltd – Site Department', (2) Woodford Pipeline Contracting Limited and (3) Consolidation Site and Woodford Pipeline Contracting Limited. The claimant did not understand why there were three sets out figures and raised his concern with the directors.

12. Throughout much of this hearing there has been varying accounts of how the respondent operated within the group as a whole and the legal status of the parent company. However, the Tribunal was assisted greatly by the evidence of the group accountant Katrina McKnight. The Tribunal is satisfied that the workings of the respondent and the group as further referred to in this judgment are as explained in Ms McKnight's clear and credible written and oral evidence. Ms McKnight demonstrated a clear understanding of how the group and its accounts operated and on the balance of probabilities the Tribunal accept her explanation to be both credible and accurate.

13. Mr Tattersall has explained to the Tribunal that whilst it was relatively straightforward to transfer the other divisions into the newly formed companies, and monthly internal management accounts had been prepared for these divisions even prior to the restructure, it was more complicated with the respondent because of the way in which the original business of Woodford Plastics Limited had previously operated. He explained that Woodford Plastics Limited, which had now changed its name to Woodford Corpus Limited, had a number of complicated and long-term contracts with clients that they could not just transfer over to the respondent. What they had to do was allow the existing contracts to run down and then renew them with the respondent. Over time as the contracts expired and were renewed with the respondent all the work would be carried out under the respondent. On the basis of this information the Tribunal find that it is clear that work carried out in the name of Woodford Corpus Limited would have to be accounted for within its own accounts because it is a separate legal entity which remains registered as active with Companies House.

14. The claimant explained that the effect of splitting out the figures in this way and giving credit to Woodford Corpus Limited was that the figures did not reflect the true performance of the respondent when it had actually carried out all the work. The claimant was also concerned that the respondent was bearing significantly higher overheads than Woodford Corpus Limited. While the Consolidated accounts of Woodford Corpus Limited and the respondent showed an accurate picture of the actual work done, the claimant was concerned that the figures apportioned to the respondent showed it making less profit than is actually was and would potentially result in him receiving a reduced bonus than he would otherwise have been entitled to under the terms of his contract of employment. It is the claimant's case that when he raised his concerns with the directors he was told that this was simply an accounting issue and 'that my bonus was to be calculated solely in accordance with the figures for the pipeline business presented as the accounts headed *"Consolidation – Corpus Site and Woodford Pipeline Contracting Limited because all of this work was done by the Respondent Company (Corpus Site as described above not being a legal entity was more a label for the accounts)" (C's w/s para 19).*

15. It is clear that the claimant's account of the status of Corpus Site is incorrect because as already established Corpus Site is the name adopted by the directors for the parent company Woodford Corpus Limited, which is clearly a legal entity. If work is carried out under contracts it has with clients, it is clear that Woodford Corpus Limited would have to account for that work. Whilst the claimant now claims that he had concerns about the legitimacy of the accounting methods adopted by the directors, suggesting that they were misrepresenting the tax/financial position of the respondent, he did not raise this with the directors at the time. He was told by Mr Tattersall that neither he nor the claimant were accountants and the way in which the

accounts were presented in this way was an accounting issue. The claimant accepts that he did nothing more and the issue of the accounts was put to the back of his mind. The respondent had been struggling over the recent months and he wanted to get on with the job of trying to improve the situation.

16. Mr Tattersall denies that he told the claimant that his bonus would be based on the consolidated accounts and maintains that the contract is quite clear about what it would be based on. He accepts that the respondent's employees carried out work on behalf of Woodford Corpus Limited in relation to the contracts it had with clients, but explained that the respondent invoiced Woodford Corpus Limited for the labour provided. This is a fact which was confirmed by Ms McKnight in oral evidence and was not challenged by the claimant. Ms McKnight also explained how the overheads were apportioned between the companies within the group. She explained that since 2011, even before the divisions had formally split into separate legal entities, she had been preparing accounts for each of the divisions. The apportionment of charges was based on square footage of space occupied and turnover. When the original company changed its name to Woodford Corpus Limited and the new companies were created the respondent was the largest both in terms of occupation of footage and turnover. Woodford Corpus Limited as the parent company divides the associated costs of the business including the rent it charges to the other companies on this basis. She explained that this is a well-recognised way of operating and that all accounts are prepared in accordance with the Financial Reporting Standard for Smaller Entities (FRSSE).

17. While the Tribunal does not have the specialist knowledge of Ms McKnight who is an ACCA affiliate with many years' experience of preparing company accounts, it is familiar with businesses operating in this way. Ms McKnight gave a clear and confident explanation of how the group accounts operate which has been of great assistance to the Tribunal. The Tribunal accept on the balance of probabilities, that the explanation given by Ms McKnight of the way in which the group operates and the overhead costs which are apportioned to each of the companies within the group by its parent, Woodford Corpus Limited is correct. The Tribunal find Woodford Corpus Limited is at liberty to apportion costs shared between the new companies in whatever legal way in choses.

18. Turning back now to the claimant's right to a bonus. It is agreed between the parties that in or around September 2015 the claimant expressed his concern about the likely level of his bonus given the current figures. In oral evidence the claimant related a conversation he had had with the contracts manager, Richard Bennet. Mr Bennet had been working within the group longer than the claimant and suggested to him that the figures were not looking good for a bonus that year and that it looked unlikely that they would get one. Although it is not mentioned in the pleadings or in the statement of any witness, the claimant accepted that because of the figures he had at one stage asked the directors to give him a £5000 pay rise instead of a bonus. The directors refused, but in February 2016 when they realised that the claimant was so unhappy about his bonus they offered to include figures of other work carried out by Woodford Corpus Limited to enhance his prospect of a bonus. Although this was communicated to him in writing the claimant did not respond and has explained to the Tribunal that he decided not to accept the offer made because he did not think it would produce any better result in terms of his bonus.

19. On 15 June 2016, the claimant was asked to attend a meeting to discuss the year end figures and his bonus. During the course of the meeting the claimant was also advised of the figure it was intended Richard Bennet would receive as a bonus, which was significantly higher than that intended for the claimant. The claimant challenged the profit and loss figures as he said that they did not look as they should. He told the directors that he needed time to check the figures and would return to them in due course. There then followed a number of exchanges between the claimant and Mr Tattersall in which the claimant challenged both the figures presented and the way in which his bonus was calculated. In respect of the figures, the claimant had recruited the assistance of the company's quantity surveyor and between them they had identified that a payment of £148,000 was missing from the accounts. The claimant notified Mr Tattersall informing him of discrepancies in the accounts by email of 24 June 2016 and asked for a meeting with the directors to discuss the same, Mr Tattersall asked for more information about the discrepancies and responded in part to the claimant's queries on 27 June expressing his hope that his explanation had cleared matters up.

20. By email of 1 July 2016 the claimant emailed the directors setting out his view of how he believed his bonus should be calculated under the terms of his contract of employment. He asserted that his bonus should be calculated without reference to the businesses performance in his probationary period. In other words, he claimed it was his contractual right to be paid his annual bonus, not based on the performance of the respondent over the whole of the financial year, which would have produced a lower figure, but rather only on the basis of how the respondent had performed in the latter six months of the year when he was no longer under probation and eligible to be in the bonus scheme. He sent a further email on 4 July 2016 to Mr Tattersall with the further information he asked for in his email of 27 June 2016. He informed Mr Tattersall that he had identified £148,000 missing from the accounts and wanted a meeting to discuss this with the directors.

21. The claimant has complained that the directors delayed in their response to him and that made him suspicious of their motives especially in light of what they had said to him about the accounts at the end of the meeting in June 2015. Because of his suspicions he decided that when he met with them on 6 July 2016, he would tape the meeting without their knowledge. The Tribunal have carefully considered the time line of events from the claimant's first email to the directors of 24 June 2016. It notes that Mr Tattersall responded to this email within three days asking for more information from the claimant. This was not provided by the claimant until 4 July 2016 and within two days of that email a meeting had been arranged for 6 July 2016. On the basis of this evidence, provided by the claimant in his witness statement, the Tribunal does not find that there was any undue or unreasonable delay in dealing with the claimant's concerns once it had been brought to their attention.

22. At the meeting of 6 July 2016 Mr Tattersall expressed his disappointment in the claimant because he felt that the claimant did not trust them. The claimant accepts that he did not trust the directors but he denied that fact to them in the meeting. Mr Tattersall explained to the claimant that as a result of his concern about the interpretation of the clause in his contract relating to his bonus they had been back to their solicitor to check that their interpretation was right and he confirmed that it was. The claimant was then presented with two bonus calculations, the first was based on the figures where some of the work carried out by Woodford Corpus Limited had been added to the figures of the respondent work and gave the claimant

a bonus of £9,729.83, the second was based on the terms of the claimant's contract i.e. figures of the respondent's performance alone which would result in no bonus. The claimant was not happy with what the directors were offering him by way of a bonus and he believed he was entitled to more. It is clear that he also thought the directors thought they were doing him a favour, which he did not like and refused to accept. The directors for their part seemed to be trying to accommodate the claimant and reach some middle ground but the claimant did not accept their explanation and wanted to hear it directly from their solicitor. He insisted that as they had taken legal advice on the matter he too should be able to. The Tribunal have been shown two transcripts of this meeting, one the claimant's version and the other an actual transcript. The Tribunal has not relied on the claimant's version because it does not accurately reflect what was said. It is clear from the actual transcript that the meeting was tense but there is no suggestion in the transcript that the directors were trying to prevent the claimant from taking legal advice and the matter was left until such time as the accounts were finalised.

23. It is the claimant's case that he thought he was already in receipt of the finalised accounts and the directors reference to waiting until they have been finalised made him distrust them even more. He did not ask them about his understanding of the accounts and moved on to question Mr Tattersall about the April 2016 figures. Mr Tattersall advised the claimant that he had not had time to look at them and in oral evidence explained that Ms McKnight was the person who prepared the accounts and she knew everything about them. He was confident that she would have prepared them correctly and that is why he did not check them any further..

24. During the course of the meeting the claimant was also asked about his fuel receipts and told that he had to produce full copies which included the dates, whereas the ones submitted had the dates torn off. The claimant was unhappy about being asked to do this and essentially dismissed the director's requests as unnecessary as they were only needed to reclaim VAT. It is the claimant's case that it is clear that the directors were hiding something from HMRC because when he told them Mr Tattersall said "*we are not bothered about claiming the VAT back we are bothered about when we get an audit and they find there's a problem and start questioning things and delving and spending months here"*. The Tribunal accepts Mr Tattersall's evidence that it was not because they had something to hide that they did not want a visit from HMRC, it was because a failure to provide proper information to HMRC could result in an investigation and, whilst he was confident that everything was in order within the whole group, their presence would be very disruptive to the business. In its industrial experience the Tribunal is aware that investigations by HMRC, whilst clearly necessary if irregularity is suspected, do take up a significant amount of time and that many businesses will be careful to ensure that their accounts are in order to avoid such disruption. The Tribunal find on the balance of probabilities that it was not unreasonable for the directors to require the claimant to produce proper receipts in the format requested and that the comments made by Mr Tattersall do not indicate a fear of HMRC because they had something to hide.

25. By letter of 24 October 2016, the claimant was notified of the amount of bonus he was to receive. This was based on the figures previously discussed and with which the claimant was not happy. The figure had been reduced from £9729.83 to £7640.46. The claimant was asked to sign his acceptance of the figure so that it

could be paid. By email of 26 October 2016, he notified the directors that he did not consider the figures had been calculated correctly and asked for a meeting to discuss this with them. It is the claimant's case that the directors reduced the bonus sum offered in July 2016 because he had raised concerns about the legitimacy of their accounting practises and the reduction in bonus was their way of threatening him.

26. The claimant was told that his bonus could be discussed at the forthcoming sales meeting on 28 October 2016. Again, without the directors' permission or knowledge he covertly taped the meeting and a transcript has been provided for the Tribunal. It is his case that he genuinely feared that the directors were attempting to avoid the respondent paying tax. When he arrived at the meeting Mr Tattersall told him that he and Mr Whitehead had a problem with him because he had been 'banging on' about his bonus for three months and they felt that he had thrown their efforts to help him back in their face. They told him that they felt he did not trust them and that for that reason they could no longer work with him. It is clear that the claimant was not expecting this reaction and tried to remedy the situation. He stated that his solicitor had told him the clause was at best ambiguous and that he believed that he had the right to more than they were offering him. However, the directors felt that they had already offered him more than he was contractually entitled to and he had refused it. Having done so they were not prepared to resurrect the offer and informed him he was to be dismissed with three months' notice. The directors gave the claimant the option of whether or not he wished to work his notice period and at his request allowed him time to think about it.

27. Immediately after leaving the meeting, which according to the transcript, was sometime just after 3pm, the claimant returned to his desk and thereafter copied a substantial number of emails and company property before then deleting the same from the company computer. It is the claimant's evidence that he did this in order to pursue further the matter of the way in which he bonus was calculated and the financial discrepancies. He confirmed that he was worried that they would be deleted if left on his computer and he had concerns about the integrity of how the accounts had been set up and the missing profits he had identified.

28. The claimant did not go into work the following Monday and notified the directors on Tuesday 1st November that he did not wish to work his notice. The directors paid him in lieu of his notice and allowed him to keep his company car until the end of the week. The directors subsequently discovered that the claimant had copied company materials and emails and then deleted the same from the system.

29. On 9 November 2016, the claimant was informed that according to the final accounts he was not entitled to any bonus. Mr Bennet did receive a bonus but on a reduced figure to that notified to the claimant in June 2016. In oral evidence Ms McKnight explained that the final bonuses offered to both the claimant and Mr Bennet were lower than first notified because of adjustments made to the final accounts by the external accountants before they were signed off. She also explained that Mr Bennet was entitled to a higher bonus that the claimant because of his right to have retentions included in the figures for his calculation. The Tribunal was told that when jobs were completed, clients would hold monies on retention for a period of time to ensure there were no problems with the job. The length of time these monies would be retained would vary but when they were ultimately released they were added into the accounts. The way in which the accounts operated was

that you were only entitled to rely on retention monies for calculating the bonus if you had been working there when the job was done. Because Mr Bennet had worked there longer he was eligible to rely on retention monies that came in for work that had taken place during the period of his employment with the company. The Tribunal note that part of the claimant's discontent with the way in which his bonus was calculated was that he was not eligible to rely on retention monies generated by work that had been completed by Woodford Corpus Limited long before the claimant came to work for the respondent but he strongly believed that he should be.

30. By way of further explanation to the evidence heard by the Tribunal, Ms McKnight explained that the nature of the work carried out by the group is that on some jobs materials are nominally charged to clients before they are needed for the job in question. Where this happens, they appear as payments that are certified but not as paid and therefore are not included in the final figures until such time as they are 'paid'. This she explained was the reason why the figure of £148,000 was not included in the final accounts because the payment was only certified not actually paid. The Tribunal were taken to the accounts which showed this figure as certified and accepts Mr McKnight's clear and credible evidence in this respect.

Submissions

31. Mr Powell submits that the claimant's breach of contract claim is not within the jurisdiction of the employment tribunal. He submits that the contractual right of the claimant to a bonus is clearly set out in his contract of employment. Whilst there may have been discussions about varying the terms contained in the contract no agreement was ever reached and the claimant confirms that he did not accept any offers made by the respondent. In respect of the unlawful deduction of wages claim, in accordance with the terms of the contact, the sum properly payable was nothing and therefore there has been no deduction.

32. Mr Powell submits that the claimant has not made a disclosure of information, tending to show a relevant breach under s 43B of the Employment Rights Act 1996 (ERA) and that in any event the claimant did not have a reasonable belief in the alleged protected disclosure and the respondents were completely unaware that such a disclosure had been made. He submits that the claimant did not believe his disclosures to be in the public interest and the alleged detriments were not materially influenced by any protected disclosure. In any event he submits that the detriment claims are out of time and the Tribunal does not have jurisdiction to hear them.

33. In respect of the claimant's assertion of a statutory right; Mr Powell submits that the claimant's statutory right was set out in the express terms of his contract. Attempting to enhance those rights are not an infringement of a statutory right. Whether the terms were unreasonable or unfair are not a matter for this tribunal. He further submits that if the Tribunal was to find that the parties had agreed to a variation of the terms set out in the contract of employment, such terms are incapable of quantification. He submits that if the claimant has asserted a statutory right, it was not made in good faith and he has failed to show that the principle reason for dismissal was in doing so.

34. In addition to her written submissions, Ms Owen submits that the claimant has throughout acted in good faith in raising matters with the directors and to this day remains adamant that the monthly management figures are incorrect. She submits

that the Tribunal does have jurisdiction to consider the claimant's breach of contract claim because it concerns monies arising out of the claimant's contract of employment. The question for the Tribunal is whether the correct figures were used to calculate the claimant's bonus and that to establish this the Tribunal must interpret what is meant in the contract. She does not accept that the figures are not quantifiable because they can be easily extrapolated from the three sets of accounts that were produced each month.

35. Ms Owen accepts that the name of the company is defined but submits that the Tribunal must consider what figures should be rightly used. It is not the case she says that there has been a variation to the contract signed by the claimant, but rather it is what the understanding of the parties was when they entered into the contract. She submits that all parties understood that the figures were to be based on the consolidated accounts which reflected all the work physically undertaken by the respondent's employees. It is not, she says, necessary to consider the rules of accountancy, all that is required is to establish what figures should be used to calculate the bonus. She draws the attention of the Tribunal to the fact that adjustments needed to be made to the internal accounts before the final accounts were signed off and that this is indicative of some errors being made. In respect of apportionment Ms Owen submits that as Woodford Corpus Limited was still a trading company it too should have borne some of the overheads apportioned to the respondent. She submits that is was no mistake that the words *"and will be based on the current full financial year at the time the scheme comes into effect"* were missed out of the claimant's contract, and that even the directors did not know the term on which the bonus should be calculated and that is why they had to return to their lawyer to ask. Ms Owen asks, that in the absence of an express term the Tribunal should find that the correct interpretation is that the bonus should be based only on the six months during which the claimant became eligible to be part of the bonus scheme.

36. Ms Owen submits that just because Ms McKnight has been readily able to explain the missing £148,000 today, does not mean that the claimant did not have a reasonable belief that there was tax evasion going on when he found that there was this amount missing from the April accounts. He had sought the assistance of the quantity surveyor in identifying the missing money and the fact that Ms McKnight expresses the view that he seemed not to accept or understand how the accounts worked does not negate the fact that he had a genuine concern that something was amiss to the extent that it was either that that a criminal offence has been committed, is being committed or is likely to be committed; or that information tending to show a criminal offence has, is or is likely to be committed has been or is likely to be deliberately concealed. Ms Owen submits that it is clear from the transcript of the meeting on 6 July 2016 (p198A), that the directors were keen to avoid any inspection by HMRC and that by saying to the claimant ' *we are not bothered about claiming the VAT back we are bothered about when we get an audit and they find there's a problem and start questioning things and delving and spending months here,* that this shows a fear of HMRC coming and discovering something untoward in the respondent's figures.

37. Ms Owen submits that the claimant was not required to set out the legal basis of his disclosure or to say that he suspected tax evasion. It would have been clear, she submits that the directors would have been wholly aware of what the claimant was saying when he raised these matters with him. She submits that the claimant

made clear his concerns were linked to irregularities in the monthly reports and his bonus not being calculated as it should have been.

38. Ms Owen submits that her primary case in relation to the dismissal of the claimant was that he was dismissed for asserting his statutory right to be paid the correct amount of wages under the bonus scheme. The claimant, she says genuinely believed that his bonus was being calculated incorrectly and therefore this amounted to an unlawful deduction of wages. She submits the claimant was not trying to negotiate a better deal, he simply wanted what he was contractually entitled to.

39. She asks the Tribunal to have regard to the fact that the subject of his bonus was the opening topic in the meeting where he was informed of his dismissal. She submits that despite never raising any performance issues with the claimant, or addressing him about his alleged 'bad mouthing' of the directors, they now seek to rely on such matters as reasons which contributed to their decision to dismiss him. This she says is indicative of the directors of the respondent grasping at straws, which would in any event not have been serious enough to dismiss him if they had never previously raised any of the matters with him. She also submits that the fact that the claimant was given a good reference by Mr Tattersall does not bear close scrutiny even if he was unaware that the claimant had copied and deleted company emails and property at the time it was made.

The Law

40. It is the claimant's case that he was dismissed because he made a protected disclosure under Part IV A of the Employment Rights Act 1996.

41. Section 103 of the Employment Rights Act 1996 provides:

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

42. Under section 43A a protected disclosure is defined as a qualifying disclosure which is made by a worker in accordance with any of the sections 43c-43H of the Employment Rights Act 1996. Under section 43B a disclosure will be a qualifying disclosure if it is a disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:

(a) that a criminal offence has been committed, is being committed or is likely to be committed;

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) that the health and safety of any individual has been, is being or is likely to be endangered;

(e) that the environment has been, is being or is likely to be damaged; or

(f) that information tending to show any matter falling within one of the preceding paragraphs has been or is likely to be deliberately concealed.

43. It is clear therefore that there is a requirement that there must be both a reasonable belief on the part of the claimant and that the relevant disclosure is made in the public interest.

44. The reasonable belief test requires that the claimant must have a reasonable belief that the information disclosed tends to show that one of the relevant failures has or is likely to occur. Whilst the test is largely subjective there must be some basis upon which the claimant reasonably holds that belief. The EAT in *Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT*, held that reasonableness under S.43B(1) 'involves of course an objective standard', meaning that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe. The question for the Tribunal is whether on the facts believed to exist by the claimant, a judgment must be made as to whether or not: first, the belief was reasonable; and secondly, whether objectively on the basis of those perceived facts, there was a reasonable belief in the truth of the complaints *Phoenix House Ltd v Stockman and anor 2017 ICR 84, EAT*. The fact that the claimant may have been mistaken about the facts does not mean that he would be unable to avail himself of the statutory protection as long as his belief was reasonably held as above.

45. The public interest test will be satisfied if the claimant had a reasonable belief that his disclosure was made in the public interest. In submissions Ms Owen referred to *Chesterton Global Limited v Nurmohamed [2017] EWCA Civ 979* and the guidance of Underhill LJ that :

…..where the disclosure relates to a breach of the worker's own contract of employment or some other matter under s43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the interest of the worker… The question is one to be answered by the Tribunal on a consideration of all the circumstances…

He then went on to refer to four classification of relevant factors to be considered (subject to a strong note of caution in relation to the number of employees who interests the matter disclosed may affected)

Ms Owen submitted that the monthly figures presented for the respondent were not a true reflection of the sales and overheads and that the bonuses of other people would be affected by this such as Richard Bennett. Therefore even though there was a personal interest on the part of the claimant, there was also another interest which she argues was sufficient to pass the threshold of their being a reasonable belief that the disclosure was in the public interest. It is also the claimant's case that there would inevitably be tax implications arising from the missing £148,000 and therefore the wider public interest would be engaged.

46. Under section 43C a disclosure will be a qualifying disclosure if it is made in accordance with this section if the worker makes the disclosure to his employer.

47. The claimant claims that as a result of making a protected disclosure he was subjected to detriments, namely a threat to be paid no bonus at all and an offer of a reduced bonus. Section 47B provides that:

(1) 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.
[
(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
(a) by another worker of W's employer in the course of that other worker's employment, or
(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.
(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer

48. The claimant also claims that his dismissal was automatically unfair because he asserted a statutory right not to suffer an unlawful deduction of wages. His assertion is that by failing to pay him his bonus payment in accordance with the provisions of his contract of employment he has suffered an unlawful deduction of wages, and that his dismissal was by reason of asserting that right.

49. Section 104 of the Employment Rights Act 1996 provides:

"(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 alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1) –

(a) whether or not the employee has the right; or

(b) whether or not the right has been infringed;

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

(3) It is sufficient for subsection (1) to apply without the employee specifying the right, as long as the employee has made it reasonably clear to the employer what the right claim to have been infringed was.

An unlawful deduction of wages is a relevant statutory right for the purposes of this section.

50. The meaning of wages is set out in s47 ERA 996 and includes any fee, bonus, commission, holiday pay or other emolument referable to employment, whether payable under contract or otherwise.

Breach of Contract

51. 76 The Tribunal has jurisdiction over a claim for damages or some other sum in respect of a breach of contract which arises or is outstanding on termination of employment, if presented within three months of the effective date of termination (allowing for early conciliation): see Articles 3 and 7 of the Employment Tribunals (England and Wales) Extension of Jurisdiction Order 1994.

52. 77 Article 3 provides that a Tribunal has no jurisdiction over a claim for damages or a sum due in respect of personal injuries.

Reasons and Secondary findings of fact

53. Whilst the claimant brings a number of claims, each in reality stem from the claimant first raising concerns about his contractual right to a bonus and how that should be calculated.

Breach of contract/unlawful deduction of wages/assertion of statutory right

54. The Tribunal has first considered whether it has jurisdiction to hear this part of the claimant's claim. It is not disputed that the claimant had a contractual right to a bonus under the terms of his written contract of employment. Therefore, monies payable under the same will satisfy the statutory definition of wages under s27 ERA 1996 which includes *"any fee, bonus, commission, holiday pay or other emolument referable to employment whether payable under contract or otherwise"*. The Tribunal has jurisdiction to hear a claim of unlawful deduction of wages as long as it is brought within the requisite time limit.

55. In order to establish what sum was properly payable to the claimant it is necessary to identify the terms under which the bonus was to be calculated. The conventional approach to considering the meaning of the terms of a contract is to ask "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*"? (**Arnold v Britton** [2015] 1 AC 1619 per Lord Neuberger PCS at paragraph 15 of his judgment).

56. There are two limbs to the claimant's claim in respect of the calculation of the bonus. The first relates to the figures to be used in calculating the amount, the second is the period of time to be taken into account once the probationary period has finished. Although the claimant's contract sets out in clear terms how the bonus will be calculated, the Tribunal notes that prior to the terms being incorporated into the claimant's contract of employment there was email correspondence between the claimant and Mr Tattersall. The terms prior to incorporation were:

> *"The scheme is based on the performance of Woodford Pipeline Contracting Limited. The scheme will run through the company's financial year, 1 May to 30 April. Calculations of any payments due will be made after our company accounts have been signed off by our outside firm of accountants, Wyatt Morris Golland. Payments due will be made through your pay in the next pay cycle after the accounts sign off. Your entitlement to this scheme will come into effect after you have successfully completed your six-month probationary period. If for whatever reason your employment ceases with us before the end of the six months probationary period you will not be entitled to any payments*

at that time or any time in the future. After successfully completing your six month probationary period the scheme will come into effect and will be based on the current full financial year at the time the scheme comes into effect. (We will not pro rata down any profit share payments generated due to you not being eligible during your six month probationary period). If you leave the company for whatever reason during the scheme's operation i.e. at any time after your six month probationary period, we will calculate any payments due based on a pro rata basis at the end of that financial year and the accounts have been signed off as described above.

Profit and payment calculations

Profit share payments will be calculated on profits generated that are greater than 4% of turnover (this is the minimum amount of profit we aim to achieve to enable investment and development of the business). Your basic salary package is your incentive to reach this target. For all profits generated greater than 4% you will receive a profit share equal to 15% of the monetary amount in excess of 4%. The scheme does not have a capped level."

57. In asking itself "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*"? it is clear that

a. the scheme ran through the financial year i.e. in this case 1 May to 30 April

b. calculations of any payments due were to be made after the company accounts had been signed off by the outside firm of accountants, Wyatt Morris Golland.

c. any payments due would be made through payrole in the next pay cycle after the accounts had been signed off.

d. That the claimant would gain entitlement to the scheme once he had completed a six-month probationary period and if he left before the probationary period was over he would not be entitled to anything under the scheme. However, if he left at a time after he had completed his six month probation, the company would calculate any payments due on a pro-rata basis at the end of the financial year after the accounts had been signed off

e. After successfully completing the six-month probationary period the scheme would come into effect and be based on the current full financial year at the time the scheme came into effect.

f. There would be no pro rating of the profit share generated at a time during which the claimant was in his six-month probation. The Tribunal have given the ordinary meaning of these words to be, if the claimant started work at any time during that financial year his time spent under probation would be included in calculating his bonus once the probationary period had been completed. For example, if an employee started work 1 August he would become eligible to join the scheme at the end of his probationary period in January. At the end of the financial year he would have worked for the company for 9 months and the company would calculate his bonus

on the 9 months worked and not just the 3 months he had been out of his probationary period.

58. The claimant accepted the terms offered at that time without further question indicating that everything looked fine. He further signed his employment contract incorporating the terms of his bonus. The terms are almost identical save for the fact that the words *"and will be based on the current full financial year at the time the scheme comes into effect"* are missing from the signed contract. It is worth looking at the effect the omission of these words has on the clause in general

> *"The scheme is based on the performance of Woodford Pipeline Contracting Limited. The scheme will run through the company's financial year, 1 May to 30 April. Calculations of any payments due will be made after our company accounts have been signed off by our outside firm of accountants, Wyatt Morris Golland. Payments due will be made through your pay in the next pay cycle after the accounts sign off. Your entitlement to this scheme will come into effect after you have successfully completed your six-month probationary period. If for whatever reason your employment ceases with us before the end of the six months probationary period you will not be entitled to any payments at that time or any time in the future. After successfully completing your six month probationary period the scheme will come into effect* ***and will be based on the current full financial year at the time the scheme comes into effect.*** *(We will not pro rata down any profit share payments generated due to you not being eligible during your six month probationary period). If you leave the company for whatever reason during the scheme's operation i.e. at any time after your six month probationary period, we will calculate any payments due based on a pro rata basis at the end of that financial year and the accounts have been signed off as described above.*

59. The Tribunal find that the meaning of the clause remains clear. The scheme operates through the financial year and the claimant became eligible to join once he had completed his six-month probation. At the end of the financial year when bonuses were to be calculated any profits that had been generated during the time he was not eligible to be part of the scheme because he was in his probationary period, would not be pro rated down, in other words the profits generated during those six months would be included in calculating his bonus. It is clear, as is the common practice in industry, that end of year bonuses are based on the end of year figures. It is clear from the wording of the clause that the respondent intended to make sure its employees were not prejudiced by being a 'new' employee once they had completed their probationary period but would have the benefit of all the profit generated during their time there.

60. The Tribunal note that when the claimant first expressed concern about the likely level of his bonus in September 2015, he did not say that under the terms of his contract of employment his bonus should only be calculated on the business performance of the respondent in the six months after he had completed his probationary period. It is clear that at that time he was contemplating a bonus based on the whole financial year because he was expressing concern about the figures and the impact on his bonus, yet he had only just completed his probationary period. Nor did he raise it in February 2016 when the directors offered to put additional figures in to enhance the claimant's opportunity of a bonus. He didn't raise it either when he was first told on 15 June 2016 what his anticipated bonus was going to be.

It was only by email of 1 July 2016, that the claimant for the first time raises this as an argument about the way in which his bonus should be calculated. The Tribunal note that one of the reasons that the claimant was employed was because of his expertise in interpreting and negotiating contracts. The Tribunal also note that the claimant did not raise this argument about his bonus calculation until he had seen the figures and worked out that he would be better off if his bonus was calculated only on the basis of the last six months of the financial year. The fact that the directors sought advice from their solicitor does not indicate an uncertainty on their part. The Tribunal finds that in doing so the directors are seeking to be fair to the claimant and ensure that they are doing the right thing.

61. The Tribunal accepts that complaining that money owed under a contract and not being calculated the correct way can amount to an assertion of a statutory right and, that it is irrelevant whether or not the claimant has the right or whether or not the right has been infringed, however the Tribunal do not accept that the claimant had a genuine belief that his rights were being infringed or that he was entitled to calculation of his bonus on the performance of the respondent in the last six months of the financial year only. The Tribunal find that this was a calculated attempt on the part of the claimant to use his experience in drafting and amending contractual clauses to seize on the missing words and use that to put his own interpretation forward in the hope of securing a more advantageous bonus. His complaint was not made in good faith and therefore he is not afforded protection under s104 ERA 1996 for this aspect of his claim.

62. The second limb of the claimant's claim relating to his bonus is that the respondent has failed to calculate his bonus in accordance with the terms of his contract. In doing so he says the respondent has made an unlawful deduction from his wages and has subsequently dismissed him because he complained about it. For the claimant Ms Owen submits that there has been no variation to the terms of the contract signed by the claimant, but that in order to properly establish what is payable under it, it is necessary to establish which of the three sets of monthly internal accounts accurately reflect the "performance and profits of the respondent'. It is the claimant's case that it can only be the consolidated accounts which show the true picture. In determining this aspect of the claimant's claim the Tribunal have considered the written contract of employment together with all relevant documentary and oral evidence whether or not specifically referred to. The starting point is both the email correspondence between the parties prior to the claimant commencing employment and the written contract of employment. The Tribunal has regard to the fact that the claimant was employed by the respondent, with an expectation that he would assist other companies within the group for the overall benefit of the group.

63. The clear written terms of the contract state that the bonus scheme is based on the performance of Woodford Pipeline Contracting Limited, which is clearly defined as the company, and that the scheme will run through the company's financial year. It goes on to state that calculation of any payments will be made after our company accounts have been signed off. It further sets out the basis upon which the bonus will be calculated as:

> *Profit share payments will be calculated on profits generated that are greater than 4% of turnover (this is the minimum amount of profit we aim to achieve to enable investment and development of the business). Your basic salary package is your*

incentive to reach this target. For all profits generated greater than 4% you will receive a profit share equal to 15% of the monetary amount in excess of 4%. The scheme does not have a capped level."

64. Although the claimant had not been used to working under a bonus scheme prior to taking up employment with the respondent, it is clear that he has had experience of working in businesses at a fairly senior level. It may be that he is not familiar with employment contracts, but there can be no doubt that in his experience he would have been familiar with ensuring that the parties to contracts he was responsible for negotiating would be clearly identified in order to avoid problems at a later stage. The claimant did not question the identity or his employer or the fact that his bonus would be based on the performance of that employer i.e. Woodford Pipeline Contracting Limited. It may be that he did not fully understand the basis of the agreement he was entering into or the way in which the group operated. He was however told of the restructure and the fact that the company was expecting to make a loss for the year ending April 2015.

65. It is the claimant's evidence that he believed that Woodford Corpus Limited was not a trading company, or even a legal entity. This is clearly not the case as it was both; whilst it intended to wind down and become the holding company of the four new companies created, it was unable to do this until such time was it is able to renew some of its contracts in the name of the respondent. In the meantime, it was still a party to those pre-existing contracts and responsible for ensuring the performance of the same. Given that the contracts were in the name of Woodford Corpus Limited it follows that invoices for work would be generated by it and that it would have to complete its own company accounts, both internally and externally. It is clear to the Tribunal that this is why there were three sets of accounts created each month, one for the respondent, one for Woodford Corpus Limited and one showing the overall performance of the two which would ultimately revert to one set once Woodford Corpus Limited had completed its obligations under its current contracts. The Tribunal is somewhat surprised that someone who had worked at the claimant's level would not have been aware of, or understood this information

66. The fact that the contracts held by Woodford Corpus Limited were more lucrative is unfortunate for the claimant but the fact remains that the contracts were in the name of Woodford Corpus Limited and it was entitled to the profits generated from them as it was entitled to the retention monies coming in that related to work that had already been carried out by Woodford Corpus Limited. The respondent did carry out the work on these contracts on behalf of Woodford Corpus Limited, and raised invoices for the work it carried out which were credited to the respondent's accounts. It is clear that the respondent did not receive the profit generated from the work as that went to the company who had the contract with the client, but it was paid for what was essentially sub-contracting work

67. The claimant also complains that the respondent was charged an unfair amount of the overall overheads of the group whilst Woodford Corpus Limited had proportionately much less to pay. Ms McKnight explained to the Tribunal how the apportionment of the overheads was worked out, and that it had essentially been apportioned in this way since 2011. The reality of the situation is that Woodford Corpus Group is the only shareholder of all four of the new companies including the respondent and the directors are the managers of it and the other companies. Whilst

it may seem unfair Woodford Corpus Limited is at liberty to apportion the costs of its overheads in a manner that it deems appropriate.

68. The terms of the claimant's contract do not make any mention of the claimant's bonus scheme being calculated on the performance of anything other than that of Woodford Pipeline Contracting Limited. The Tribunal does not accept that the claimant believed it would be calculated on any other basis than that provided for in his contract of employment because given his experience the claimant would have questioned the same at the outset if he had thought anything different to ensure that the contract correctly reflected the intention of the parties. The Tribunal accepts that he may not have understood how the accounts operated within the group or how Woodford Corpus Limited intended to deal with existing contracts and retention payments however, it does not accept for the reasons given above that he genuinely believed that his bonus would be calculated in accordance with anything other than the terms set out in his contract.

69. It is not disputed that the claimant expressed concern about his prospects of getting a bonus once Richard Bennet had told him it looked unlikely that they would be getting one. It was after this that the claimant decided that he would prefer to be given a pay rise of £5000 per annum instead of a bonus. The Tribunal does not accept that the claimant genuinely believed that he was entitled to a 15% share of all profits above 4% turnover of the respondent and Woodford Corpus Limited, because if had he would not have asked for a £5000 pay rise instead of the bonus he believed he was entitled to. The Tribunal finds that the claimant was aware that his bonus would be calculated on the performance of the respondent as particularised in his contract of employment. The Tribunal do not accept that the claimant had a genuine belief that his rights were being infringed or that he was entitled to calculation of his bonus on the performance of both the respondent and Woodford Corpus Limited, whilst that may indeed have been fair to the claimant, it was not the basis of the agreement he entered into. When he realised that, through no fault of his own, the respondent's figures were unlikely to yield a bonus he set about finding a way to improve his financial position.

70. The directors were not willing to exchange the bonus for a pay rise but when they realised how unhappy the claimant was in February 2016, they decided to include some Woodford Corpus payments in the calculation of his bonus. However, the claimant was not satisfied with the enhanced offer made and he pushed the matter further using his considerable experience in negotiating contracts to gain a better offer. He also suggested financial irregularities on the part of the directors and the group. The fact that the claimant chose to decline the directors more advantageous offer was a matter for him. What that left him with were the terms of his contract which were clear; that those terms may not favour the claimant was perhaps a bad deal, but this is not a claim of ordinary or constructive unfair dismissal.

71. The claimant did not genuinely believe that he was entitled to a share of both the respondent and Woodford Corpus Limited profits because if he had such a belief he would not have asked to exchange that right for a £5000 pay rise. When the directors refused to give him a pay rise in exchange for his right to a bonus the claimant decided to use his experience to try to renegotiate better terms. The fact that he was unsuccessful in his attempts was unfortunate but he attempts at renegotiating the terms was not an assertion of a statutory right and nor was his

complaint made in good faith. Therefore he is not afforded protection under s104 ERA 1996 for this aspect of his claim

Protected Disclosure

72. In his oral and written evidence, it is the claimant's case that he raised concerns about the legitimacy of the accounting method adopted by the directors on behalf of the respondent and Woodford Corpus in that he thought they indicated that the respondent was misstating their tax/financial position. The Tribunal accept that the claimant questioned the need for three sets of accounts in the early days of his employment with the respondent. He was told it was an accounting issue and by his own evidence he then put it to the back of his mind. Even if the accounts referred to amounted to a disclosure of information, the Tribunal find that the claimant did not have a reasonable belief that the information disclosed showed that one of the relevant failures has or is likely to occur because by the claimant's own evidence the combined figures which would ultimately be included in accounts of each of the companies added up to the correct figures. The reasonable belief test requires that the claimant must have a reasonable belief that the information disclosed tends to show that one of the relevant failures has or is likely to occur. Whilst the test is largely subjective there must be some basis upon which the claimant reasonably holds that belief. The Tribunal find on the basis of the evidence before it that the claimant could not have held a reasonable belief in the truth of the complaint that the directors were evading tax as alleged because the totality of the figures reflected the correct amount of money coming in overall. Consequently, the disclosure of information is not a protected disclosure for the purposes of s43 ERA 1996

73. In June 2016, the claimant complained that there was £148,000 missing from the April 2016 accounts. The Tribunal accepts that this amounts to a disclosure of information which tends to show one of the relevant failures and that the claimant held a reasonable belief in the truth of the complaint, albeit it ultimately turned out to be a mistaken belief. The fact that the claimant may have been mistaken about the facts does not mean that he would be unable to avail himself of the statutory protection as long as his belief was reasonably held as above and in the public interest. The public interest test will be satisfied if the claimant had a reasonable belief that his disclosure was made in the public interest. The fact that the main motive of the claimant was to ensure that all relevant figures were included in the calculation of his bonus does not exclude engagement of the public interest. It is the claimant's case that there would inevitably be tax implications arising from the missing £148,000 and therefore the wider public interest would be engaged. However, the Tribunal is satisfied from the oral evidence of the claimant that when he made this disclosure he had only his own self-interest in mind and that had he got what he wanted he would have taken the matter no further. The disclosure was not in the public interest and therefore does not amount to a protected disclosure for the purposes of ERA 1996

74. The claimant also claims that by advising the directors that he did not believe that the bonus proposed was a true reflection of his contract terms he has made a protected disclosure. The Tribunal accept that the claimant did assert that his contractual terms in relation to his bonus was not being correctly applied, however for the reasons stated in the paragraphs above the Tribunal find that the claimant knew that he was not entitled to the terms he was asking for and could not therefore have a reasonable belief that the information disclosed tends to show that one of the

relevant failures has or is likely to occur. There must be some basis upon which the claimant reasonably holds that belief. The Tribunal find for the reasons already given that the claimant could not have held a reasonable belief in the truth of the complaint that his contractual terms in relation to his bonus were being incorrectly applied. This was not a genuine but mistaken belief, the claimant knew what he was entitled to under his contract and attempted to enhance his position by first asking for a pay rise instead of a bonus and thereafter attempting to negotiate a better deal. Even if the claimant had held a reasonable belief in his complaint, the Tribunal do not accept the submissions of Ms Owen that the public interest test is met because having considered all the circumstances, there are no features of this case that would make it reasonable to regard the disclosure as being in the public interest as well as in the interest of the claimant. The claimant had only has his own self-interest in mind when he raised the issue of the missing £148,000 because his only interest was to ensure that nothing was missed out of the calculation of his bonus.

Detriment - s47B ERA 1996

75. It follows that as the Tribunal have found that the claimant has not made any disclosures that are protected under ERA 1996, he cannot have suffered a detriment under s47B ERA 1996. However, the Tribunal find that the offers made to the claimant in relation to his bonus were perfectly legitimate. The first was the enhanced bonus that the directors had offered because they were aware that the claimant was unhappy. The second was his contractual entitlement in the event that he did not want to accept the enhanced offer. Even had the claimant made a protected disclosure the claimant cannot be said to have been subjected to a detriment, one offer was his contractual entitlement, the other an enhanced offer.

76. In respect of the second alleged detriment, the claimant claims that because he had continued to dispute his contractual entitlement the directors reduced the original enhanced offer. The Tribunal note that the bonus payments of both the claimant and Richard Bennet were reduced after the accounts had been finalised. Ms McKnight has explained that this is because adjustments were made to the final accounts by the external accountants. Ms Owen submits that the fact that there had to be adjustments made to the final accounts is indicative that there were mistakes within them. While the Tribunal does not have experience of accountancy practices, it is aware that adjustments are often necessary when accounts are finalised and the fact that this has happened does not give rise to suspicion. The Tribunal does not accept that the directors would subject Richard Bennet to a detriment so that it would be able to do the same to the claimant. The Tribunal accepts that the reason why a lower bonus figure was offered to both the claimant and Richard Bennet is for the reason given by Ms McKnight and had nothing to do with the claimant complaining about his bonus payment, missing monies or accounting practices.

77. The Tribunal find that the directors were entitled to withdraw their offer of an enhanced bonus payment and revert back to the claimant's entitlement under his contract. He had not accepted the enhanced offer and had made it clear that he was not going to accept it. Unfortunately, he misjudged how far he would be able to push the directors for more money and when he realised he had gone too far he wanted to turn the clock back and take what had now been withdrawn. Unfortunately, by this stage the directors had lost all trust in the claimant, not because he had asserted a statutory right or because he had made a protected disclosure, but because of the way he had conducted himself towards them in relation to the bonus payment.

Conclusion

78. The claimant was entitled to a bonus payment calculated in accordance with the terms set out in his contract of employment. The directors on behalf of the respondent did not fail to calculate this sum correctly and did not make an unlawful deduction from the claimant's wages. Nor did they breach the terms of his contract in respect of the calculation of his bonus payment.

79. The claimant actions in complaining about the way in which his bonus payment was calculated was capable of being an assertion of a statutory right but it was not made in good faith because the claimant knew that he was not entitled to more payment that that provided for in his contract of employment. Consequently, his dismissal was not automatically unfair under s104 ERA 1996

80. The claimant made disclosures about matters in relation to accounting methods, missing monies and calculation of his bonus. For the reasons stated above none of these disclosures amounted to protected disclosures under ERA 1996. Consequently, the claimant's dismissal was not automatically unfair under s103 ERA 1996.

81. The claimant did not suffer detriments under s47B or at all

82. None of the claimant's claims are well founded and all are dismissed

Employment Judge Sharkett

Date 27 March 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
28 March 2018

FOR THE TRIBUNAL OFFICE