THE INDUSTRIAL TRIBUNALS

CASE REF: 6394/19

CLAIMANT: **Samuel Wilton**

RESPONDENT: **Sword Security (NI) Limited**

DECISION

The unanimous decision of the tribunal is that all claims are dismissed.

CONSTITUTION OF TRIBUNAL

Vice President: **Mr N Kelly**

Members: **Mr M McKeown**
Mr I Carroll

APPEARANCES:

The claimant was represented by Ms Niamh Horscroft, Barrister-at-Law, instructed by Brian Kelly Solicitors.

The respondent was represented by Mr William Lane of Peninsula Business Services.

BACKGROUND

1. At the relevant times, the claimant had been employed as a Security Officer by the respondent company.

2. The respondent company provided Security Officers to various clients including to the Belfast City Council for St George's Market.

3. The claimant states that at the relevant times he had been employed on a contract for fixed hours (24 hours per week) in St George's Market. The respondent states that at all relevant times the claimant had been employed on a zero hours contract.

4. The last shift worked by the claimant for the respondent company had been on or about 11 December 2018.

5. After that date, the claimant was offered no further shifts by the respondent company.

6. In the present tribunal claim, the claimant alleges that:

   (i) He had been unfairly dismissed.

   (ii) In the alternative, he had been constructively unfairly dismissed.

   (iii) He had made a protected interest disclosure to the respondent and to Belfast City Council.

   (iv) He had been dismissed or constructively unfairly dismissed as a result of that protected interest disclosure.

PROCEDURE

7. This was a claim alleging:

   (i) unfair dismissal;

   (ii) constructive unfair dismissal;

   (iii) public interest disclosure detriment.

8. The claim was case managed on 17 June 2019. Directions were given in relation to the interlocutory procedure. The exchange of witness statements was also directed.

9. At the substantive hearing, each witness swore or affirmed to tell the truth, adopted their previously exchanged witness statement as their entire evidence in chief, and moved immediately into cross-examination and brief re-examination. The claimant gave evidence on his own behalf. Ms Lisa Brankin, who had, at the relevant times been the claimant's primary point of contact with the respondent company, gave evidence on behalf of the respondent company. Ms Hoey of Peninsula Business Services gave evidence in relation to the lodging of the ET3.

10. The evidence was heard on 9 October 2019 and the parties made their submissions on 10 October 2019. The tribunal met immediately thereafter to consider those submissions and the evidence. This document is the unanimous decision of the tribunal.

RELEVANT LAW

<u>Unfair Dismissal</u>

11. The Employment Rights (Northern Ireland) Order 1996 provides:

   "126-(1) An employee has the right not to be unfairly dismissed by his employer.

   127(1) For the purposes of this part an employee is dismissed by his employer if –

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

129-(1) Subject to the following provisions of this Article in this Part "the effective date of termination"

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect,"

Unfair Dismissal

12. The statutory test to be applied by a tribunal, when considering the fairness of a dismissal, appears simple. However it has provoked a lengthy series of appellate decisions.

13. Article 130 of the Employment Rights (Northern Ireland) Order 1996 provides:-

"130(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or if more than one, the principal reason) for the dismissal and

(b) that is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) a reason falls within this paragraph if it –

(b) relates to the conduct of the employee,

(4) where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or

unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case."

14. The Court of Appeal in ***Rogan v South Eastern Health & Social Care Trust [2009] NICA 47*** approved the earlier decision of Court in ***Dobbin v Citybus Ltd [2008] NICA 42*** where the Court held:-

*"(49) The correct approach to [equivalent GB legislation] was settled in two principal cases – **British Home Stores v Burchell [1980] ICR 303** and **Iceland Frozen Foods Ltd v Jones [1983] ICR 17** and explained and refined, principally in the judgements of Mummery LJ, in two further cases **Foley v Post Office** and **HSBC Bank PLC (formerly Midland Bank) v Madden reported at [2000] ICR 1283** (two appeals heard together) and **J Sainsbury v Hitt [2003] ICR 111**.*

*(50) In **Iceland Frozen Foods**, Browne-Wilkinson J offered the following guidance:-*

"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by [equivalent GB legislation] is as follows:-

(1) the starting point should always be the words of [equivalent GB legislation] themselves;

(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another;

(5) the function of an industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair. "

(51) *To that may be added the remarks of Arnold J in* ***British Home Stores*** *where in the context of a misconduct case he stated:-*

> *"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, it must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the Tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the Tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure", as it is now said more normally in a criminal context, or, to use the more old fashioned term such as to put the matter beyond reasonable doubt. The test, and the test all the way through is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."*

15. In ***Bowater v North West London Hospitals NHS Trust [2011] EWCA Civ 63***, the Court of Appeal (GB) considered a decision of the Employment Appeal Tribunal which had set aside a decision of an employment Tribunal. The Employment Tribunal had determined that a remark made by a nurse in an Accident & Emergency Department was not a sufficient basis for a fair dismissal. Lord Justice Longmore stated at Paragraph 18 of the decision that:-

> *"I agree with Stanley Burnton LJ that dismissal of the appellant for her lewd comment was outside the range of reasonable responses open to a reasonable employer in the circumstances of the case. The EAT decided that the ET had substituted its own judgment for that of the judgment to which the employer had come. But the employer cannot be the final arbiter of its own conduct in dismissing an employee. It is for the ET to make its judgment always bearing in mind that the test is whether dismissal is within the range of reasonable options open to a reasonable employer."*

He continued at Paragraph 19:-

> *"It is important that, in cases of this kind, the EAT pays proper respect to the decision of the ET. It is the ET to whom Parliament has entrusted the responsibility of making what are, no doubt, sometimes, difficult and borderline decisions in relation to the fairness of dismissal."*

16. In ***Fuller v London Borough at Brent [2011] EWCA Civ 267***, the Court of Appeal (GB) again considered a decision of the Employment Appeal Tribunal which had set aside the decision of an employment tribunal on the basis that the employment tribunal had substituted its view for the decision of an objective reasonable employer. Lord Justice Mummery stated at Paragraph 7 of the decision that:-

> *"In brief, the council's case on appeal is that the ET erred in law. It did not apply to the circumstances existing at the time of Mrs Fuller's dismissal the objective standard encapsulated in the concept of the 'range or band of reasonable responses'. That favourite form of words is not statutory or mandatory. Its appearance in most ET judgments in unfair dismissal is a reassurance of objectivity. "*

At Paragraph 38 of the decision, he continued:-

> *"On a proper self-direction of law I accept that a reasonable ET could properly conclude that the council's dismissal was outside the band or range of reasonable responses and that it was unfair. If, as I hold, the ET applied the objective test, it did not err in law and there was no ground on which the EAT was entitled to set it aside or to dismiss Mrs Fuller's claim. "*

17. In ***Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721***, the Court of Appeal (GB) again considered a decision of an Employment Appeal Tribunal which had set aside the decision of an employment tribunal on the ground that that tribunal had substituted their judgment of what was a fair dismissal for that of a reasonable employer. At Paragraph 13 of the judgment, Lord Justice Elias stated:-

> *"Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. In **A v B [2003] IRLR 405**, the EAT (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite"*
>
> *"In **A v B** the EAT said this:- Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course even in the most serious cases it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the enquiry should focus no less on any potential evidence that may exculpate or least point*

towards the innocence of the employee as he should on the evidence directed towards proving the charges against him. "

18. The Court of Appeal in Northern Ireland further examined the approach that a tribunal should adopt in claims of unfair dismissal in the case of ***Connolly v Western Health & Social Care Trust [2017] NICA 61***.

In that case, a nurse, who was on duty in a hospital ward and who was experiencing the symptoms of an asthma attack, used a Ventolin inhaler from the locked ward stock. She had intended to replace it with another inhaler which would have been supplied to her on her own prescription. She had not sought prior permission to use the hospital's inhaler; she had not approached any doctor in the hospital for assistance; she had not attended the Accident & Emergency Department for assistance. She did not disclose the use of the inhaler until her next day on duty two days later. It was not in dispute that there had been misconduct on the part of the claimant in using a prescription only medicine which was part of hospital stock. The issue in all of this was whether the misconduct had been sufficiently serious to ground summary dismissal for gross misconduct.

19. The WHSCT had been concerned that the claimant had intended to replace the inhaler from her own supply. That would have broken the chain of supply within the hospital and in the employer's view would have presented a serious risk to the health of patients. The employer was also concerned that the claimant had sought, in response to the disciplinary proceedings, to stress that Ventolin had not been a controlled drug (although it had been a prescription only drug). The employer felt the claimant still believed that her conduct was permissible in certain circumstances and that therefore the behaviour could recur. The claimant was summarily dismissed for gross misconduct.

20. This case was the subject of two separate appeals to the Court of Appeal. However, the later appeal is the one relevant to the present case. It was a split decision. The minority decision, reached by Gillen LJ, found that the tribunal decision had been correct, in that it had held that there had been a fair dismissal for gross misconduct. The hospital rules had made it clear that '*misappropriation*' of drugs was a potential offence. The claimant had not notified any other member of staff of her use of the inhaler before using it or for the rest of that shift. She had attended work for her next shift some two days later and had only then informed her manager that she had used the Ventolin inhaler from ward stock.

21. In essence, Gillen LJ determined that the decision to summarily dismiss the claimant in all the circumstances of the case had been a decision which a reasonable employer could reasonably have reached, even if may not have been the decision that the tribunal or the court would have reached, had it been determining the issue at first instance.

22. After citing the usual authorities, Gillen LJ approved the following statement in the tribunal's findings:-

"It may not re-hear and re-determine the disciplinary decision originally made by the employer; it cannot substitute its own decision for the decision reached by that employer. In the case of a misconduct dismissal, such as the present case, the tribunal must first determine the reason for the

dismissal: that is, whether in this case the dismissal was on the basis of conduct and must determine whether the employer believed that the claimant had been guilty of that misconduct. The tribunal must then consider whether the employer had conducted a reasonable investigation into the alleged misconduct and whether the employer had then acquired reasonable grounds for its belief in guilt. The question is not whether the tribunal will have reached the same decision from the same evidence or even on different evidence. The tribunal must then consider finally whether the decision to dismiss was proportionate in all the circumstances of the case."

23. Gillen LJ then noted that the tribunal had determined that the employer had been concerned by the use of the prescription only inhaler from the ward stock which had been kept under lock and key, the claimant's intention to replace that inhaler with an inhaler from her own supply and that she knew the use of such medication was wrong. The tribunal had determined that the employer had held a genuine belief in gross misconduct which had been reached on reasonable grounds following a reasonable investigation and that it was not for the tribunal to substitute its own opinion or penalty for that of the employer in the circumstances of this case. Gillen LJ determined that:-

> *"49. I consider that there is no basis upon which this court could consider that this conclusion was plainly wrong or that it could not have been reached by any other reasonable tribunal. Taking a prescription drug from under lock and key for the appellant's own use is clearly an extremely serious matter which no hospital can or should tolerate. Not only was the appellant well aware that this was prohibited behaviour but it could easily have been avoided by seeking assistance from A and E or the duty doctor.*
>
> *50. It was not unreasonable to conclude that this was aggravated by her failure to report the matter until two days later. Moreover it was perfectly reasonable for the Panel, made up of employees of the Trust well versed in Trust procedures and policies, to take the view that intent to personally replace it infringed the pharmacy supply chain. Frankly it scarcely requires an expert to inform the court that decisions to replace prescribed medications in principle should not be taken at this level irrespective of how simple an exercise in replacement in individual instances may appear to be."*

24. Gillen LJ concluded:-

> *"57. Whilst this may not necessarily have been the conclusion that this court would have reached had it been hearing the matter at first instance, I find no basis for substituting our view for that of the Panel and the Industrial Tribunal hearing this matter. I therefore dismiss this ground of appeal."*

25. The majority of the Court of Appeal in ***Connolly***, Deeny LJ and Weir LJ, reached a different conclusion. Firstly, they concluded that the decision of the respondent to dismiss the claimant, in all the circumstances of the case, was not a decision which a reasonable employer could reasonably have reached. Secondly, it determined that the decision of the industrial tribunal was '*plainly wrong*'. That second decision

is based on the facts of the ***Connolly*** decision and on the view taken by the majority of the Court of Appeal in relation to the wording of the tribunal decision in that case. The first decision, and the approach taken by the majority to the objective standard of reasonableness, is of primary importance to the present decision.

26. Deeny LJ stated that:-

> *"Reaching a conclusion as to whether the dismissal is fair or unfair 'in accordance with equity and the substantial merits of the case' as required by Article 130(4)(b) would appear to involve a mixed question of law and fact."*

27. Deeny LJ then cited the well-known paragraph in ***Iceland Frozen Foods Ltd v Jones*** (above) which sets out the '*reasonable responses*' test. He went on to quote further from that decision to include the following:-

> *"Although the statement of principle in **Vickers Ltd v Smith [1977] IRLR 11** is entirely accurate in law, for the reasons given in **N C Watling & Company Ltd v Richardson [1978] ICR 1049**, we think industrial tribunals would do well not to direct themselves by reference to it. The statement in **Vickers Ltd v Smith** is capable of being misunderstood so as to require such a high degree of unreasonableness to be shown that nothing short of a perverse decision to dismiss can be held to be unfair within the section. This is how the industrial tribunal in the present case seems to have read **Vickers v Smith**. That is not the law. The question in each case is whether the industrial tribunal considers the employer's conduct to fall within the band of reasonable responses and industrial tribunals would be well advised to follow the formulation of the principle in **N C Watling & Company Ltd v Richardson [1978] ICR 1049** or **Rolls Royce Ltd v Walpole [1980] IRLR 343**."*

28. Deeny LJ then pointed out that gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee:-

> *"So the conduct must be a deliberate and wilful contradiction of the contractual terms."*

29. Deeny LJ stated that:-

> *"The facts as found are that she [the claimant] took five puffs of this inhaler when undergoing an asthmatic attack, without permission. The tribunal accepted the Appeal Panel's view that this was aggravated by her failure to report the matter until two days later.*
>
> *It seems to me that, even taking into account the delay, for which an explanation was given and was not rejected as a finding of fact, that cannot constitute 'deliberate and wilful conduct' justifying summary dismissal. Her terms of employment do not seem to have expressly prohibited such a use. The Code of Conduct is ambiguous at best on the topic. If she had asked the Ward Sister for permission before she used the inhaler and the Sister had refused her permission and she had nevertheless gone ahead and had used it one might have had the sort of act of disobedience contemplated by*

*the Court of Appeal in **Laws v London Chronicle Limited**. That would have been a deliberate flouting of essential contractual conditions, ie following the instructions of her clinical superiors. But that is not what happened here. Furthermore, I agree with the statements in Harvey … that dismissals for a single first offence must require the offence to be particularly serious. Given the whole list of matters which the employer included under the hearing of Gross Misconduct it is impossible, in my view, to regard the nurse's actions as 'particularly serious'."*

30. Deeny LJ stated:-

> *"For this court to approbate the tribunal's decision upholding as within a reasonable range of responses the summary dismissal of an employee from her chosen profession on these facts without any prior warning as a 'repudiation of the fundamental terms of the contract' would be to turn language on its head. Employment law is a particular branch of the law of contract. With statutory interventions it has, of course, developed a character of its own. But any dismissed employee opting to go into a court of law and claim damages for breach of contract at common law against an employer who had summarily dismissed them for using a Ventolin inhaler while suffering from an asthmatic attack and delaying two days in reporting that, particularly when it was their 'first offence', could be tolerably confident of success before a judge, in my view."*

31. Deeny LJ held further that:-

> *"The interpretation of what, in this jurisdiction, is Article 130(4)(a) of the 1996 Order has been fixed by a series of appellate courts over the years, ie that whether an employer acted reasonably or unreasonably is to be addressed as whether an employer acted within a band of available decisions for a reasonable employer even if not the decision the tribunal would have made. That test, expressed in various ways, is too long established to be altered by this court, and in any event has persuasive arguments in favour of it. But it is necessary for tribunals to read it alongside the statutory provision of equal status in Article 130(4)(b), ie that that decision 'shall be determined in accordance with equity and the substantial merits of the case'. … ."*

32. The statutory test of unfairness in Article 130 of the 1996 Order (and in its predecessor) is in simple terms, and should be straightforward. It is difficult to see why it has generated such an extended discussion in case law over the last 40 years. The words of Article 130 comprise the only statutory test of unfairness. The formulation of the '*band of reasonable responses*' test, variously worded in different decisions, cannot be a substitution for the proper application of the statutory test. It may best be regarded as a double-check to be applied to ensure that, in applying the statutory test, the tribunal has avoided substituting its own views, on what it would have done in the relevant circumstances, for the decision of the employer. In other words it is, as the Court of Appeal (GB) stated in ***Fuller*** (above), a '*reassurance of objectivity*'.

It is therefore important to remember that the '*reasonable responses*' test, although long-established as pointed out by the Court of Appeal in ***Connolly*** (above),

appears nowhere in the statute. This is a statutory tribunal whose function is to apply the statute. Non-statutory wording or non-statutory paraphrasing of the statutory test can only be of assistance where it is remembered that it cannot substitute for the statutory test which sets out the remit and the function of the tribunal. In ***Iceland*** (above), it was stressed that the starting point should be the words of the legislation. In ***Connolly*** (above) the Court of Appeal (Northern Ireland) emphasised the importance of applying the statutory test as a whole.

33. There is no difference between the formulation of the legal principles expressed in the majority judgment and in the minority judgment in the case of ***Connolly***. The detailed formulation of those principles set out by Gillen LJ at Paragraph 28(i) – (xvi) of the decision covers, in full, the procedure which should be adopted by an industrial tribunal in assessing the fairness or unfairness of a misconduct dismissal. It is not disputed or challenged in any way in the majority judgement.

34. In ***Reilly v Sandwell Metropolitan Borough Council [2018] UK SC16***, the Supreme Court looked at a case of alleged unfair dismissal. The facts of that particular case are not of assistance to the present matter. However it is notable that Lady Hale, the President of the Supreme Court stated;

> *"the case might have presented an opportunity for this court to consider two points of law of general public importance which have not been raised at this level before."*

The first point is not of relevance to the present matter. However, Lady Hale described the second point in the following way;

> *"nor have we heard any argument on whether the approach to be taken by a tribunal to an employer's decisions, both as to the facts under section 98(1) to (3) as the Employment Rights Act 1996 first led down by the Employment Appeal Tribunal in* ***British Homes Stores Limited v Burchell [1978] ICR 303*** *and definitively endorsed by the Court of Appeal in* ***Foley v Post Office [2000] ICR 1283,*** *is correct."*

She went on to state;

> *"Even in relation to the first part of the inquiry, as to the reason for the dismissal, the* ***Burchell*** *approach can lead to dismissals which were in fact fair being treated as unfair and dismissals which were in fact unfair being treated as fair. Once again, it is not difficult to think of arguments on either side of this question but we have not heard them."*

35. Lady Hale went to state;

> *"34. There may be good reasons why no one has challenged the* ***Burchell*** *test before us. First, it has been applied by Employment Tribunals, in the thousands of cases which have come before them, for forty years now. It remains binding upon them and on the Employment Appeal Tribunal and Court of Appeal. Destabilising the position without a very good reason would be irresponsible. Second, Parliament has had the opportunity to clarify the approach which is intended, should it consider that* ***Burchell*** *is wrong, and it has not done so. Third, those who are experienced in the field, whether*

acting for employees or employers, may consider the approach is correct and does not lead to injustice in practice.

35. It follows that the law remains as it has been for the last 40 years and I express no view about whether that is correct.

36. Therefore, while the Supreme Court recognised the long standing of the ***Burchell*** test, and pointed out the significant difficulties inherent in challenging that non statutory test at this stage, it did, rather pointedly, indicate that they were not expressing any view about whether the non-statutory test is correct and that they had not heard any argument in relation to that point. At the least, the Supreme Court questioned whether the "reasonable responses" test should be challenged at the final appellate level.

Constructive Unfair Dismissal

37. To succeed in a claim of constructive unfair dismissal, an employee must establish that his employer had committed a repudiatory breach of contract. That is a significant breach going to the root of the contract. (***Western Excavating (ECC) Limited v Sharp [1978] ICR 221)***.

38. In this respect, the contract is taken to include not just the written and specific terms laid down in that contract but also an implied term of "trust and confidence" between the employer and the employee. In ***Woods v W M Car Services (Peterborough) Limited [1981] IRLR 347,*** the EAT stated;

> *"17. In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee:* ***Courtaulds Northern Textiles Limited v Andrew [1979] IRLR 84.*** *To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see* ***British Aircraft Corporation Limited v Austin [1978] IRLR 332*** *and* ***Post Office v Roberts [1980] IRLR 347.*** *The conduct of the parties has to be looked at as a whole and its cumulative impact assessed:* ***Post Office v Roberts (Supra) paragraph 50."***

39. In determining whether there has been a fundamental breach of contract, unreasonable conduct alone is not sufficient (see ***Claridge v Daler Rowney Limited [2008] IRLR 672 EAT***); it has to amount to a breach of contract that fundamentally undermines the employment relationship; something which has to be determined objectively by the tribunal as a question of fact.

The EAT stated:

> *"39. It is well established that unreasonable conduct alone is not enough to amount to a constructive dismissal; see* ***Western Excavation v***

Sharpe [1978] IRLR 27*. As that case makes clear, it must be unreasonable conduct amounting to a breach of contract, and in this context of the breach of the trust and confidence term that means that it should fundamentally undermine the employment relationship. If an employer has acted in a way in which the tribunal considers a reasonable employer might act, then we would suggest that it cannot be a proper inference that an employee is entitled to say that nonetheless this was so fundamental a breach of the employer's obligation towards him that he should not be expected to remain in employment. Once the tribunal concedes to itself that there may be more than one view as to whether the conduct is sufficiently unreasonable, that undermines its conclusion that the employment relationship has been sufficiently damaged."*

That task does not, however, import a range of reasonable responses test (as applied ordinarily when determining the fairness of a dismissal for the purposes of 1996 Order). The House of Lords has determined in ***Malik v BCCI SA [1997] ICR 606*** that that test is not appropriate when considering whether there has been a fundamental breach of the implied obligation to maintain trust and confidence. The test to be applied is therefore whether the employer has, without reasonable and proper cause, conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee."

Lord Steyn stated at page 623d:

"But Mount LJ (below) held, at p411, that the obligation

"may be broken not only by an act directed at an individual employee but also by conduct which, when reviewed objectively, is likely seriously to damage the relationship of employer and employee."

That is the correct approach. The motives of the employer cannot be determinative, or even relevant, in judging the employee's claim for damages for breach of the implied obligation. If conduct objectively considered is likely to cause serious damage to the relationship between employer and employee, a breach of the implied obligation may arise."

40. In ***Omilaju v London Borough of Walthan Forest [2005] ICR 481,*** the Court of Appeal (GB) stated at paragraph 14;

"1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: ***Western Excavating (ECC) Limited v Sharp [1978] ICR 221.***

2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, ***Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606, 610E-611A (Lord Nichols of***

Birkenhead) 620H-622C (Lord Steyn). *I shall refer to this as "the implied term of trust and confidence".*

3. *Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, Per Brown-Wilkinson J in* ***Woods v W M Car Services (Peterborough) Limited [1991] ICR 66, 672A.*** *The very essence of a breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.*

4. *The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in* ***Mahmud****, at page 610H, the conduct relied on as constituting the breach must*

> *"impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer."*

5. *A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put in Harvey and Industrial Relations and Employment Law paragraph D1 [480]:*

> *"Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the Courts to warrant their treating the resignation as a constructive dismissal. It may be the "last straw" which causes the employee to terminate a deteriorating relationship.""*

41. At paragraph 16 of the judgement in ***Omilaju,*** Dyson LJ said;

> 16. *Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle is that the law is not concerned with very small things (more elegantly expressed in the maxim, "de minimis non curat lex" is of general application".*

At paragraph 19, he said;

> *"19. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It*

must contribute something to that breach, although what it adds may be relatively insignificant."

42. The Court of Appeal (GB) stated in ***Lewis v Motorworld Garages Limited [1986] ICR 157*** *that;*

> *"If the employer is in breach of an express term of the contract of employment, of such seriousness that the employee would be justified in leaving and claiming constructive dismissal, and the employee does not leave and accepts the altered terms of employment, and if subsequently a series of actions by the employer might constitute together a breach of the implied obligation of trust and confidence, the employee is entitled to treat the original action by the employer which was a breach of the expressed terms of the contract as a part – the start – of a series of actions which, taken together with the employer's other actions, might cumulatively amount to a breach of the implied terms."*

The application of the final straw principle requires that the series of actions relied on constitute conduct of such seriousness that, taken together, and viewed objectively, they can constitute a breach of contract of sufficient gravity.

43. It is not enough to show merely that the employer has behaved unreasonably or thoughtlessly. However the Court of Appeal (GB) in ***Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445*** *stated:*

> *"Reasonableness is one tools in the Employment Tribunal's factual analysis kit for deciding on whether there has been a fundamental breach".*

In ***Brown v Merchant Ferries Ltd [1998] IRLR 682,*** the Court of Appeal (NI) said that although the correct approach in constructive dismissal cases was to ask whether the employer had been in breach of contract and not to ask whether the employer had simply acted unreasonably; if the employer's conduct is seriously unreasonable, that may provide sufficient evidence that there had been a breach of contract.

44. A breach of contract may be anticipatory rather than an actual breach of contract which has already occurred. It is sufficient that an employer has indicated a clear intention not to fulfil the terms of the contract in future, if the employee accepts that intention to commit a breach as bringing the contract to an end.

45. If a repudiatory breach of contract, including a breach of the implied term of trust and confidence, has been established, the employee must show that he has left his employment because of that breach. The test is whether or not the breach of contract "played a part" in the claimant's decision to resign – see ***Nottinghamshire County Council v Meikle [2004] IRLR 703*** and ***Wright v North Ayrshire Council [2014] IRLR 4*** at paragraphs 8-20. Care needs to be taken to avoid an "effective cause" test being applied.

Protected Interest Disclosures

46. The 1996 Order contains provisions relating to protection for those who make certain disclosures known as '*protected disclosures*'. Those are '*qualifying disclosures*' which comply with certain requirements.

47. Article 67B of the 1996 Order defines '*qualifying disclosures*' and states in relevant part:-

> *"In this Part, a 'qualifying disclosure' means any disclosure of information which in the reasonable belief of the worker making the disclosure, 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."*
>
> *(d) that the health and safety of any individual has been, is being or is likely to be endangered.*

RELEVANT FINDINGS OF FACT

48. The claimant had first been employed by the respondent company on 30 October 2017 as a Security Officer.

49. The practice of the respondent company had been for each new employee to complete an induction pack, including the provision of necessary information for SIA licensing purposes. The respondent's HR Department would then issue a contract of employment for each new employee to sign.

50. The respondent company could not locate a signed contract of employment completed by the claimant. The claimant could not remember signing such a contract, but conceded that he may well have done so.

51. Ms Lisa Brankin, who had been the claimant's point of contact with the respondent company, gave evidence that the only type of employment contract which had been offered at the relevant times by the respondent company to Security Officers (apart from those who had been transferred to the respondent company under the provisions of TUPE) had been a standard zero hours contract. A blank form of that zero hours contract was produced to the tribunal. The claimant did not rebut or even challenge that evidence. The tribunal therefore is content that, with the exception of those Security Officers transferred to the respondent company under TUPE, the only employment contract offered to such Security Officers had been the standard zero hours contract which had been produced to the tribunal.

52. It is clear that the claimant would have entered into some contractual arrangement with the respondent company. Although it is possible, it seems highly improbable that the claimant, uniquely, as a new direct employee had not been employed on the standard form of contract ie a zero hours contract, and that this had been unknown to the claimant and to Ms Brankin.

53. In any event, the claimant accepted that he had been employed originally on a zero hours contract. He stated in his statement that:

> *"4. I was given shifts from Sword via rotas and text messages and phone calls for anything outside this.*
>
> *5. I could turn down shifts if they didn't suit me. Anything extra to the rota was agreed between Sword and me."*

54. Therefore the tribunal concludes, on the balance of probabilities, that the claimant had been originally employed on the standard zero hours contract, which had been produced to the tribunal as a blank pro forma.

55. The claimant, at the relevant times, had also been employed by a local hotel as a doorman and had worked several shifts a week in that employment. Those shifts had occurred generally later in the day after he had already completed work for the respondent company. His hourly rate in that employment had been significantly higher than the hourly rate paid by the respondent company.

56. The claimant alleged that he had been told by Ms Brankin that work in St George's Market at the weekends had been "*his*". He stated in his claim form that he had been given the assurance in his interview for employment and that he had generally worked every Friday, Saturday and Sunday thereafter. His argument to this tribunal was that, thereafter, his contract had been varied from a zero hours contract to a fixed hours contract.

57. The claimant argued that the respondent had conceded in its "*response"* (the ET3) that the nature of the employment contract had been varied from a zero hours contract to a fixed hours contract. That simply was not the case.

58. Ms Hoey gave evidence in relation to this issue.

59. Peninsula had initially taken instructions from Ms Brankin in the course of a telephone call. Peninsula's representative, Ms Hoey, had compiled notes either in the course of that telephone call or shortly after that telephone call. Those were notes solely for internal use and were meant to represent, in brief form, the instructions received from Peninsula's client, the respondent company. They were subject to further clarification and confirmation by the respondent company. Unfortunately, those notes had been inadvertently attached by Peninsula to an email of 17 April 2019 to the tribunal, in place of the standard ET3 form. Immediately after those notes, and still attached to that email, there was an additional document entitled *"grounds of resistance"* which set out the nature of the response to this tribunal. That additional document was the type of document that was normally attached to the standard ET3 form.

60. The tribunal concludes that the response to the tribunal was properly restricted to the document entitled *"grounds of resistance".* The internal and brief notes had never been intended by the respondent company or by its representative to form part of the response to this tribunal. They cannot rationally be argued by the claimant to form part of the response to this tribunal. This had simply been a mistake on the part of Peninsula; a clerical error.

61. Part of the confusion may have arisen because part of the internal notes, which appears to have been a summary of the telephone call, was headed "*client response"*. Part of those notes stated:

> *"Actual start date 30 October 2017 and no end date as never dismissed and never resigned. Preliminary meeting, never guaranteed hours [Tribunal's emphasis]* as on zero hour contract, brought in during the *Christmas period. Respondent aware that he worked other jobs so they worked only additional shifts when it suited him as he was employed on zero hour contract, gradually moving to a 24 hour contract.*"

62. The claimant argued that this was a concession that the contract had been varied to a contract for 24 hours rather than a zero hours contract.

63. That argument, with respect to the claimant, is simply picking out words in isolation in a rough internal note, which was subject to correction, and seeking to elevate those isolated words to a response to the tribunal. There never was a response of this nature to the tribunal and there never was any such concession. The wording, looked at as a whole, makes it plain that he had been employed "*on a zero hour contract"*. Ms Brankin was clear and convincing when she stated that she would never have indicated to Ms Hoey that the claimant had been guaranteed a 24 hour contract and that she would never have said that. After listening to the claimant and to Ms Brankin and indeed to the arguments put by both parties, the tribunal concludes that this internal note was simply a brief and inaccurate record of the discussion and recorded no more than that the claimant would often have worked for 24 hours but that he was at all relevant times on a zero contract.

Furthermore, the reference in the internal note to *"gradually moving to a 24 hours contract"* on which the claimant sought to rely, is inconsistent with his argument that he had been promised 24 hours per week at his initial interview and that his contract had been varied at that point.

64. The tribunal does not accept that the claimant's zero hour contract had been varied at any stage to a contract for fixed hours of any duration but in particular for 24 hours per week.

(i) Ms Brankin had been clear and convincing when she had stated that the only assurance that she had given the claimant had been that the hours of work in St George's Market would ordinarily have been available for the claimant if he had wanted them. The respondent company had found difficulty in identifying anyone willing to work those hours in that location. There had never been at any stage any obligation on the part of the claimant to work those hours or indeed any contractual obligation on the respondent company to offer the claimant those hours. The claimant remained throughout on a zero hours contract. The flexibility of a zero hours contract suited both parties.

(ii) At some stage during each week, either the claimant had telephoned Ms Brankin or Ms Brankin had telephoned the claimant, to confirm that the available hours at the weekend in St George's Market would be worked by the claimant. That is entirely inconsistent with a contract of employment providing for a mutuality of obligation for 24 fixed hours per week.

(iii) The claimant in fact did not work for those 24 hours on each and every week. The claimant accepted that he worked "*most"* of those hours but not all those hours. According to the evidence before the tribunal, those occasions when he did not work those hours were not as a result of sick leave or as a result of an annual leave application, which would have been the case if there had been a contract for fixed hours of that particular duration or, for any duration.

Furthermore, the payslips provided by the respondent do not demonstrate any regular pattern of employment at St George's Market for 24 hours per week after his appointment. For example the first nine payslips produced from 23 November 2017 onwards had been (in total) for 18 hours, 10 hours, 16 hours, 30 hours, 17 hours, 32 hours, 17 hours, 38 hours and 17 hours. All those weeks followed the interview when the claimant alleges that he had been promised 24 hours per week at St George's Market and when he alleges that his contract had been varied to a contract for 24 hours per week.

(iv) No document, letter, text, or other record has been produced to show any variation of a contract. If, uniquely amongst the Security Officers employed (other than as a TUPE transferee) by the respondent company, the claimant had been on a fixed hours contract in relation to a particular site, the tribunal would have expected that to have been recorded in some way.

(v) The claimant did not suggest in his witness statement, that his contract which had originally been a zero hours contract had been varied at any point to a fixed hours contract. In fact, the claimant suggested in that ET1 that in the course of his interview and preliminary meeting he had been advised that "*there would be regular hours available for me, particularly each weekend where I was mainly based at St George's Market and generally worked every Friday, Saturday and Sunday there from the commencement of my employment*". There is no suggestion there that his contract had been originally a zero hours contract which had been varied at a particular point in time to a fixed contract for 24 hours per week. At it is height, the claimant suggested in his claim form that he had been advised that there would have been "*regular hours"* available for him and that he had *"generally"* worked those hours. That is consistent with Ms Brankin's evidence that the claimant had been told that hours would have been available if he was available and if he wanted to work those hours. That falls a long way short of a contract for a fixed number of hours per week.

(vi) There was no evidence of a regular pattern of hours of a sufficient duration to ground any argument of a change to the contractual terms through custom and practice.

65. Therefore the tribunal concludes that the claimant's original zero hours contract had never been varied as alleged in the course of the hearing, by the claimant. The claimant remained throughout his employment on a zero hours contract even during those periods when he had worked frequently at the market.

PUBLIC INTEREST DISCLOSURE

66. The claimant alleged that he had made a public interest disclosure on 8 December 2018 to both an individual who was called "*Martin"* and to Ms Brankin.

The claimant alleged that he had told both *"Martin"* and Ms Brankin of concerns about the numbers of security staff employed in the market, the availability of fire wardens and the performance of fire drills.

67. The individual called *"Martin"* by the claimant has not been identified. The claimant is unable to provide his surname and was unable in cross-examination to be precise about his role in Belfast City Council. He stated in cross-examination that he had observed this individual in what he described as the management office in the Market where management employees of Belfast City Council had been located. However he was unable to be precise about the alleged role or job title held by this individual.

68. Ms Brankin stated in evidence and maintained in cross-examination that she was unaware of any such person employed by Belfast City Council. The tribunal notes that the claimant has had some 11 months to identify and to locate this individual and that he has failed to do so. The tribunal accepts the clear and unrebutted evidence of Ms Brankin that she knew of no such individual.

69. The claimant produced excerpts from his diary which he alleged had been completed contemporaneously during his period of employment with the respondent. It would appear that there is only one reference to *"Martin"* and that is in the diary entry for 8 December 2018. It seems odd to this tribunal that if Mr Martin had been *"the Belfast City Council manager for the market"* as alleged by the claimant in his ET1, there had been only one brief reference to him throughout the diary excerpts.

70. In relation to the alleged public interest disclosure to Ms Brankin, the claimant alleged in his ET1 that, after speaking to *"Martin"*:

> *"I told Lisa my line manager at Sword about the day's events. I finished my shift."*

71. The claimant's evidence in relation to this alleged public interest disclosure to Ms Brankin in his witness statement, which was to take the place of his entire evidence in chief, was markedly different. In that witness statement he does not suggest that he spoke to Ms Brankin. He states instead:

> *"Lisa was then called and we couldn't get her, and then she was texted off my phone or Akelbar's phone, I can't remember whose phone. We raised our concerns about short staff, health and safety, and no fire warden."*

In cross-examination, the claimant was extremely vague about the nature of this alleged public interest disclosure. He did not allege that he had spoken to Ms Brankin. He stated that he and Mr Akelbar Osman, a colleague, had tried to contact Ms Brankin and had been unable to do so. He stated that a text had then been sent by either Mr Osman or by himself to Ms Brankin. He could not remember who had sent the text but he felt that it might have been Mr Osman.

72. The tribunal notes that the claimant has not called Mr Osman to give evidence even though he now appears to be arguing that the disclosure, if such a disclosure had occurred, had been made by Mr Osman as part of some form of joint enterprise. Counsel for the claimant indicated that the reason that Mr Osman had not been

called to give evidence was because it had been indicated by Ms Brankin that Mr Osman had passed on complaints about the claimant to her. If it is alleged that Mr Osman could give evidence in relation to the alleged public interest disclosure, the fact that it was also alleged by Ms Brankin that he had passed on complaints about the claimant does not appear to the tribunal to be an adequate explanation for the claimant's failure to call Mr Osman to give evidence, even on foot of a Witness Attendance Order. It appears odd to the tribunal that such a crucial witness was not called by the claimant. In any event, the tribunal accepts the clear and consistent evidence of Ms Brankin, unrebutted by any evidence whatsoever, apart from the claimant's unsupported assertion, that she had received no such text.

73. The onus of proof is on the claimant to establish that he had made a public interest disclosure as alleged on 8 December 2018 to *"Martin"* and to Ms Brankin. He has failed to identify the individual who he alleged in his IT1 had been the manager employed by Belfast City Council at the market, despite having had some 11 months to do so. He has failed to produce corroborative evidence in relation to the alleged disclosure to Ms Brankin by simply calling Mr Osman, even though again he has had some 11 months to arrange that evidence. No request has been made to the tribunal for a Witness Attendance Order in that respect. If, as the claimant alleges, he had been concerned about serious public safety issues including the availability of fire wardens, overcrowding and the operation of fire drills, it seems extremely odd that the claimant did not attempt to follow-up these alleged concerns in writing with the respondent company or with Belfast City Council after the alleged disclosure.

74. On the balance of probabilities, the tribunal finds as a fact that no such disclosure was made by the claimant, either singly or jointly with Mr Osman on 8 December 2018, as alleged, to either a Belfast City Council employee called *"Martin"* or to Ms Brankin.

DISCIPLINARY INVESTIGATION

75. Ms Brankin stated in evidence that, in early November and early December 2018, concerns had been expressed to her verbally about the claimant's performance at work by both his colleagues and by duty managers who worked at the market and who had been Belfast City Council employees. She stated that she did not pursue that matter formally or at all at that stage because she had been distracted by a bereavement and because those initial concerns had been made to her verbally and not in any formal manner. She also stated that the respondent company had had a shortage of Security Officers available and that meant that she had been reluctant to pursue the matter formally at that stage.

76. Ms Brankin accepted that she should have taken action earlier than she did by carrying out an investigation.

77. The tribunal has listened carefully to Ms Brankin and indeed to the claimant. Ms Brankin's evidence in this respect has not been rebutted by any evidence from any other party. The claimant has not sought to call in evidence any of his former colleagues or indeed any of the Belfast City Council employees who could have shed light on this matter. It also has to be said that Ms Brankin has not produced the notes which she had compiled at the time and which are no longer apparently

available. She is no longer an employee of the respondent company. That said, the tribunal concludes that the evidence given by Ms Brankin in this respect was truthful. She was clear and consistent and convincing.

78. Ms Brankin gave further evidence that a more serious concern had then been raised by one of the claimant's colleagues Mr Osman, who had been the senior Security Officer working at the market. Ms Brankin stated that Ms Osman had told her verbally that he had been very frustrated about the claimant leaving his duties during his shift and that, due to that frustration, Mr Osman was going to request a transfer away from the market. Mr Osman stated that Ms Brankin needed to take formal action in relation to the claimant.

79. Ms Brankin gave evidence that at the same time, the Duty Managers who had been Belfast City Council employees had also communicated to her that they had lost patience with the claimant leaving the market during his shifts.

80. Again there is a distinct lack of corroborative evidence from the respondent company and indeed from the claimant in relation to this matter. Neither has sought to call Mr Osman to give evidence and neither has produced any contemporaneous documentation apart from brief text messages.

81. Nevertheless the tribunal has to assess the evidence before it. The tribunal was impressed throughout the hearing with Ms Brankin's evidence and preferred it to the evidence of the claimant who appeared to suggest at various points that no such complaints had ever been made. The tribunal concludes on the balance of probabilities that complaints had been made about the claimant as described by Ms Brankin. The tribunal does not have to determine whether those complaints, or any of them, had been justified.

82. On 14 December 2018 Ms Brankin sent the claimant a text message saying that she would need him to attend a meeting during the following week for the purposes of a disciplinary investigation. It is also clear that shortly after receiving that text message the claimant asked Ms Brankin what the meeting was about. Ms Brankin explained in general terms that it was to look into complaints which had been raised in relation to his conduct.

83. The claimant accepted in initial cross-examination that if concerns had been raised about a Security Officer leaving the site without authorisation, those concerns would have to be investigated and that it had been entirely reasonable for the respondent to have sought to do so. The claimant further accepted in initial cross-examination that during that investigation it would have been unreasonable for any employer to allocate such a Security Officer to work on other sites.

84. The tribunal agrees with both those points. Ms Brankin had received complaints or concerns about the claimant's conduct in his role as a Security Officer. Those concerns had raised a serious issue ie whether the claimant had left the site on several occasions without authorisation. In such circumstances Ms Brankin had been entirely correct to decide to investigate those concerns and entirely correct during the period when that investigation was pending, not to allocate other duties. The claimant had been on a zero hours contract and had had no contractual right to any hours.

85. Ms Brankin did not hear further from the claimant for the rest of December 2018 and indeed until 9 January 2019 when she telephoned him.

86. It is therefore clear that there was a delay in progressing this matter between 14 December 2018 and 9 January 2019. Ms Brankin stated that during this period she had simply assumed that the claimant had been occupied with his other employment at the local hotel. This would have been during the busy Christmas period. The claimant would have received a higher hourly rate in that employment than in any employment with the respondent company. The respondent company paid the minimum wage and the local hotel paid an hourly rate of £13.33. Clearly that had been an assumption on the part of Ms Brankin but, during this period, it had been a reasonable assumption.

87. The tribunal concludes that at that time of the year a relatively short delay of just over three weeks was regrettable but it cannot be regarded as particularly exceptional. This delay covered the Christmas and New Year Periods which were particularly busy for the security industry, and therefore for both the claimant and the respondent company.

88. On 9 January 2019 Ms Brankin then telephoned the claimant to discuss a suitable date for the investigation meeting. Ms Brankin states that the claimant had been angry and aggressive during this call. She states that he swore at her and stated that the respondent company would *"hear from my solicitor"* and then hung up the telephone.

89. The claimant disputed that he had been angry or aggressive or that he had sworn at Ms Brankin. In his witness statement, he was fairly vague about the telephone conversation. He stated that Ms Brankin had discussed the complaints. He stated and maintained in evidence before the tribunal that he had "*assumed*" after this telephone call, and as a result of this telephone call, that there would not be any further work available for him.

90. He did not address in the course of his witness statement how he had made such an assumption. If an investigation meeting was pending and if Ms Brankin had telephoned him, it can only have been to progress that meeting. If the claimant had had an answer to the complaints about his conduct, that answer could and should have been provided by the claimant in the course of any such investigation meeting. It is entirely unclear how the claimant had formed the assumption from that telephone call that there would not be any further work available for him unless the telephone call had been conducted in the manner stated by Ms Brankin ie that it had ended in a row with a total breakdown in relations. None of that is mentioned in the claimant's witness statement.

91. Furthermore the clear evidence of the claimant that he had formed the assumption that he had been dismissed after this telephone call is not consistent with what he alleges had been his contemporaneous diary entries which, in respect of 21, 22 and 23 December, some two weeks before that telephone call, stated in respect of each day *"sacked"*. Again in respect of the following weekend on 28, 29 and 30 December he also recorded that he had been sacked. He further records a meeting with Ms Horscroft at the High Court. However that preceded the telephone call after which he, according to his evidence, had concluded that no further work would be available for him.

92. The respondent argues that the claimant is still on the books of the respondent company as a zero hours Security Officer. The tribunal accepts that the claimant had been employed on a zero hours contract and that there had never been at any stage any obligation on the respondent company to offer him work or at any stage any obligation on the claimant to accept any such work if offered. That is entirely consistent with a situation where the claimant had other employment and where the respondent company had been content to operate the employment on a flexible basis with shifts being offered on a weekly basis and accepted, or not accepted, again on weekly basis.

93. The claimant alleges first of all that he had been dismissed. However there is no evidence of any dismissal or of the date of any such dismissal. There has been no such communication from the respondent company; either oral or written.

94. In the alternative, the claimant then alleges that he had resigned. However there is again no evidence of any resignation by the claimant.

95. The tribunal accepts on the balance of probabilities that the telephone conversation on 9 January 2019 had been conducted as described as Ms Brankin. In those circumstances, Ms Brankin did not seek to contact the claimant further to progress the disciplinary investigation. She concluded, quite reasonably, that the claimant had no intention of co-operating with any such disciplinary investigation. She did not offer any further shifts in the market, or indeed in any other location, to the claimant but she had been under no contractual obligation to do so. The only breach of contract which can be laid at the door of the respondent company is a possible failure to progress disciplinary investigation as quickly as it otherwise might have done.

96. The delay is a delay between 14 December 2018 and 9 January 2010, over the Christmas and New Year period, when the claimant, through his conduct in the course of the telephone call, had indicated that he was not prepared to co-operate properly with a disciplinary investigation. That delay is at best minor. The respondent company would have had to move very quickly indeed to have held a disciplinary investigation meeting before the Christmas and New Year season had started. The telephone call was on 9 January 2019. This was not an excessive delay. It is difficult for this tribunal to conclude that this delay, as minimal as it was, amounted to a fundamental breach of contract entitling the claimant to resign, particularly in circumstances when there is no evidence of any such resignation.

SUMMARY

97. The tribunal concludes that the claimant had at all times been employed on a zero hours contract and on the basis of the standard contract provided by the respondent company to the tribunal.

98. The tribunal concludes that that contract had never at any stage been varied either expressly or through custom and practice in the relatively brief period of employment.

99. The tribunal concludes that no protected interest disclosure was made by the claimant to either a Belfast City Council Manager *"Martin"* or to Ms Brankin.

100. The tribunal further concludes that the respondent had not been dismissed by the respondent company at any stage and further concludes that the claimant had not resigned from the respondent company at any stage. The zero hours contract subsists.

101. The claims of unfair dismissal, constructive unfair dismissal and protected interest disclosure detriment are therefore dismissed.

Vice President:

Date and place of hearing: 9 and 10 October 2019, Belfast.

Date decision recorded in register and issued to parties: