EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Carter	v	**Mr John Edmunds t/a JSE Transport**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Middlesbrough **On: 3 -5 April 2017**

Before: Employment Judge JM Wade **Members: Mr S Carter**

Ms S Don

Appearance:

For the Claimant: **Ms Semp (lay representative)**

For the Respondent: **Mr French (solicitor)**

Note: The written reasons provided below were provided orally in an extempore Judgment delivered on 5 April 2017, the written record of which was sent to the parties on 2 May 2017. A written request for written reasons was received from the respondent on 10 May 2017. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 5 April 2017 are repeated below:

JUDGMENT

The unanimous judgement of the tribunal is that:

The claims of detriment and unfair dismissal on the ground of public interest disclosure are not well-founded.

The claim of constructive unfair dismissal is not well-founded.

The claim of unlawful deduction from wages is well founded and the respondent shall pay to the claimant the sum of £400.89.

REASONS

Introduction, complaints and issues

1 This is the judgment of the Employment Tribunal sitting in Middlesbrough, Teesside Justice Centre between the 3 and 5 April 2017 in Mr Carter's case against Mr John Edmunds, t/a JSE Transport. Employment Judge JM Wade sitting with Ms Don and Mr Carter.

2 The case concerns the road haulage industry. In this case the Tribunal's lay members have industrial knowledge of that sector, and it is appropriate to mention that in a case where serious allegations of malpractice have been made, and this specialist Tribunal can draw on that experience.

3 The claims are of constructive unfair dismissal, protected disclosure detriment in dismissal, often referred to as whistle-blowing, and unlawful deductions from wages. The claimant has to make out disclosures and a dismissal in law, given that he resigned from his employment.

4 The issues were outlined in case management but at that time the claimant's case was very unclear, particularly in relation to the alleged disclosures about alleged malpractice: what he alleged he had said to whom, when, and whether it was in writing. The claimant's original claim form contained no such details but simply asserted evidence of overloading, and overwork, and health and safety matters, and also contraventions of the Working Time Regulations.

5 The claimant then provided further particulars and the respondent provided a very full response to those. In essence it was denied by the respondent that the claimant had made protective disclosures at all, or that his resignation amounted to a dismissal. Much of this complaint was likely to be resolved by findings of fact. The issues appear as headings to our conclusions.

Evidence

6 As to making those findings of fact, we have heard oral evidence from Mr Carter himself. He suffered a small stroke in August 2016 after his employment with the respondent had ended. His recovery has been such that he told us that his memory was fine, but his writing was sometimes affected and that he might therefore miss things out when writing.

7 For reasons that we set out below we did not consider that the claimant was a good historian on all occasions. We also had a written statement from Mr Lazenby, who was a former employee of the respondent who left on good terms, but who did not want to attend this Tribunal for reasons of holiday and his current employment.

8 We then heard from the respondent Mr Edmunds, Ms Edmunds, the respondent's sister who had worked in the business for a time, and former employee Ms Black the office manager.

9 We had a bundle of some 700 pages, added to during the course of the proceedings. We considered those documents to which we were referred in cross examination, and in the witness statements, and to some extent, a very limited extent, to documents to which we were not referred but which assisted. We did that on the basis that we needed to put the parties on an equal footing, to the extent that we can justly do so, bearing in mind that one party is represented by solicitors and counsel, and the other by a lay representative. We had comprehensive documentation concerning drivers' hours, start and finish times, electronic communications between

the parties and so on. They were of great assistance in establishing the context of the relationship, and assisted us in assessing what was more likely or not, in that context, when there were conflicts.

10 In this Tribunal we make findings of fact on the balance of probabilities, that is whether something is, more likely than not. We have not had the time, nor is it proportionate in this case to examine every document in minute detail. The complaints between the parties are those above, rather than any alleged contravention of regulatory matters.

Findings of fact

Background

11 The claimant started work on 24 August 2009 as a Class 2 driver. He had a very good relationship with Mr Edmunds who employed three day drivers, two night drivers and three administration staff. The claimant had a set of particulars of employment in 2011, and consistent with the greater attention by the respondent to procedures, practices and general compliance in 2015 in a heavily regulated sector, he had a new statement on 7 April 2015. That comprehensively addressed all matters that were likely to arise in the course of his contract of employment.

12 Mr Edmunds paid for the claimant to qualify as a Class 1 driver and the claimant had been trained and certified as a fork lift driver from his previous employment. Latterly whilst working for the respondent, he principally drove a Class 2 vehicle (the 58 vehicle).

13 He also completed his "CPC" training and from time to time. There may well have been discussion in those early years about equipment needed and training needed, but the respondent did not fail on our findings to provide anything that was required by way of training in those early years.

14 The claimant was a trusted senior driver. He was dependable; he was knowledgeable; he was relied upon by the respondent. At times that meant that his workload was perhaps more difficult than for others. On occasions he was allocated more difficult "runs" for the simple reason that he was a very well respected driver.

15 The respondent operates through "The Pallet Network", which allocates depots and postcodes to operators like Mr Edmunds, who then both deliver and collect freight within, in this case a 15 mile or so radius. Typical journeys backwards and forwards to the respondent's premises are half an hour or so depending on traffic. There is then onward distribution through the night via a depot in Birmingham; and a night driver was employed specifically for that.

16 By 2015 the route planning for the dayshift deliveries, and indeed any changes of those, was undertaken by Mr Edmunds using the latest TPN electronic systems; there was also a failsafe of "paper" loading lists; they were printed each morning from the system and given to each driver. Those were a "back up" for the handheld "Epod" devices which were used by drivers to acknowledge and scan pallets and record and acknowledge deliveries made during the day.

17 The claimant and Mr Edmunds trusted and happily worked together. The claimant was relied upon to be able to do anything that Mr Edmunds required of him: he took vehicles at the weekends and on evenings to the manufacturer for their six or eight week service; that was convenient to his home and he liked to do that task. He fitted cameras and undertook other fitting work from time to time when he was out driving and problems arose.

18 From January 2015 onwards Ms Edmunds, Mr Edmunds' sister, was employed to help secure the freight operators' accreditation, which involved audit of operational matters including health and safety. There were a number of changes introduced, including a health and safety pack for vehicles, pressure gauges and so on, with a requirement generally to document all aspects of health and safety compliance. Examples included insisting upon weekly recording of tyre pressures, daily vehicle defect sheets, and so on. On 18 October 2015 drivers were reminded of a number of matters by a comprehensive memo that included that smoking would not be permitted.

The beginning of difficulties – alleged smoking in the 58 vehicle

19 The only issue raised by the claimant with Ms Edmunds or anyone else at the respondent in 2015 concerned his suspicion that Mr Gregson, who drove the 58 vehicle three nights a week, was smoking in that vehicle. He communicated this with some frustration by recording it on the daily vehicle defect form. These "smell of smoke in vehicle" reports were made by the claimant on 10 and 11 November, on 28 January, 15 March, 24 March and 12 April.

20 As a result of the first two complaints Ms Edmunds gave all drivers a memo on 13 November and highlighted that smoking was not to be permitted when driving, or parked up: disciplinary action would be taken if that were found to be the case, it said.

21 On 8 December Ms Edmunds asked for some time with the claimant because she had been told of complaints best described as him being grumpy with colleagues and customers. She wanted to discuss that. She noted the meeting, and it ended on good terms. The claimant had explained that he was under some strain at home; that day he had written a note highlighting issues that he perceived were there with his workload, in comparison with his colleagues and their behaviour.

22 On 6 January 2016 claimant completed a necessary health questionnaire confirming he suffered from none of the conditions listed, recording that he had had a recent eye test in August 2015, and wore glasses, but was otherwise free from any health issue.

23 On 2 February 2016 the respondent passed its freight operators' audit with bronze standard accreditation; by that stage Ms Edmunds had left the employment of the respondent for a wholly unrelated falling out with her brother.

24 Over the course of the previous year Ms and Mr Edmunds had communicated in regular memos to drivers of any required changes or developments, or necessary health and safety communications. There was a wide selection of those communications available to the Tribunal evidencing compliance with regulatory standards.

25 Onboard cameras were under consideration by the respondent for all the reasons well reported in the road haulage industry. On board cameras were a requirement for the next level of accreditation as a haulier. Mr Edmunds wanted to try different systems because they were differently priced. The claimant had continued to make allegations about the 58 vehicle and its smelling of smoke on a morning, and so the most sophisticated and hard wired system was installed in that vehicle as a trial by 16 March 2016. The claimant sought an inference that this was somehow targeting of him by the respondent. It was not, on our findings, given the respondent's evidence which we accepted.

26 Following another report of smoke on 24 March, Mr Edmunds asked the claimant to bring in the "SD card" from the camera; that was examined to see whether there

was evidence that Mr Gregson had been smoking. He was found to have been eating in the cab on one occasion, but no smoking was revealed.

27 The claimant did not report any threats allegedly made by Mr Gregson to him as a result of that investigation; the respondent had made it very clear that if there was evidence of smoking in the vehicle, it would take action. There was no such camera evidence and the respondent did not take action.

Difficulties wider than smoking allegations

28 The Tribunal's bundle contained the tachograph records for the three daily drivers with whom the claimant compared himself from March to June 2016. The claimant did not suggest, and certainly the documentation did not evidence, that his driving, or duty time, exceeded permitted limits. His complaint was he had been given more difficult routes and longer working hours than his colleagues (accepting that all drivers at the material times drove within permissible limits).

The claimant's injury

29 On 20 April 2016 the claimant slipped and injured his shoulder whilst doing a delivery. He reported that in the accident book in the office. He did not take any time off work.

30 On 16 May he returned to the depot from daily deliveries and told Ms Black, the office manager, that he could not cope, having struggled and been in pain that day. She told him to decide what he was doing (ie whether he was able to work the next day) and let Mr Edmunds know. Mr Edmunds was the boss and she referred enquiries of that nature to him as a general rule.

31 The claimant then texted Mr Edmunds and went for some physiotherapy on 18 May; he was paid for that day. He did a driving job on the Saturday, again, because that suited him, and reflected the relationship he had with the firm, and he was also paid.

32 There were no issues of tension between the claimant and Mr Edmunds apparent at that time; we do not accept, on the balance of probabilities, that the claimant asked for the accident book concerning the struggling in May, and was prevented in some way by Ms Black from accessing it. We heard from Ms Black and from the claimant; their accounts were not the same of that short interaction in May; but we inherently considered the likelihood, given our findings about the relationship and our impression of Ms Black, of her seeking to prevent the claimant from recording an accident, when he there had been no problem previously in doing so. We also weighed up the routine other communications between them.

33 After 18 May 2016 Mr Edmunds tried to plan the claimant's work so that he was not using the tailgate and pallet truck for unloading, and to give him lighter work. That approach was not foolproof, but the claimant did not take any time off work.

34 Mr Edmunds did not seek to increase the claimant's workload in May or June; quite the opposite, he tried his best to manage it appropriately, but as we have said that may not have been fool proof on any particular day.

35 The claimant and Ms Black often communicated by Navnam which is a text message system linked to the respondent's other systems and on occasion by text and by phone. The claimant also communicated with Mr Edmunds by text and by phone. And of course on occasions the claimant used his vehicle inspection report to communicate about smoking allegations.

Complaints about the claimant and the photographs

36 On 27 May the claimant had a conversation with the receptionist in the shared premises, about delivery to him to those premises of a mobile phone, which he had organised, but which had been rejected but that business, not realising it could be for him. The claimant's feelings about the rejection of the delivery were apparent in that conversation.

37 The conversation resulted in the neighbouring business owner complaining to Mr Edmunds. In his own words, Mr Edmunds "sorted" the complaint, having made one call to the claimant in which his frustration may have been evident.

38 The particular business sharing the premises was a very valuable customer to Mr Edmunds; and whatever he offered to that business by way of apology or otherwise resulted in the matter going no further; it resulted in no investigation or disciplinary procedure being invoked towards the claimant. The simple reason for that was, the respondent depended on the claimant as a key driver; but he also needed to keep his customer happy; to that extent he compromised, resolving the matter so very quickly.

39 Mr Edmunds did seek advice at that time from the Road Haulage Association, not being sure that his solution would satisfy the customer. He sought advice about disciplinary procedures, including an "improvement notice", a written warning or a final written warning for the claimant, but it was very clear that he was not seeking advice about potentially dismissing the claimant. In the event he did not proceed with any of that advice having placated the customer.

40 On 1 June the claimant had an ordinary work day and his communications on that day on Navman indicate no strain or stress. He had an accident, damaging a wall, an accident which anybody could have had. Mr Edmunds' approach to that was just that it was an accident, and they had a communication about it, and that was the end of the matter.

41 On Friday, 3 June Mr Edmunds' sister reported that the claimant had upset her daughter, who was covering for Ms Black in the office at the time. Mr Edmunds did not raise that with the claimant that Friday, he was busy in the office; a colleague, Mr Proctor, that afternoon told the claimant not to go into the office. He was no doubt aware that matters were busy and Mr Edmunds may not have been in the best of moods.

42 On Monday 6 June, the claimant saw some papers in the office. We accepted his evidence about that because it is consistent, unlike some other matters, with the chronology in the case. We accept that he did see papers or an email (likely the advice Mr Edmunds had sought which was in our bundle). He perceived them as referencing dismissal, albeit the documents that we have seen did not. He felt under pressure for that reason.

43 That day he had a busy work schedule, and he connected the two events, thinking his workload was heavier than others and a punishment for the complaints about him. He then started to take photographs and he did so on four occasions in June, in his words, to protect himself. He did not provide those photographs to the respondent or complain about health and safety or other matters verbally to Ms Black or anyone else.

44 Let us just say a word about the photographs, disclosed in these proceedings. The Tribunal has some industrial knowledge about these matters. The Tribunal as a whole was satisfied with the respondent's explanations and more importantly its other

contemporaneous documentation concerning those matters. That is all that needs to be said, going as it does, to the credit and reliability of Mr Edmunds and Ms Black.

Events directly leading to resignation

45 On 13 June the claimant asked Ms Black about the notice that he had to give to bring his employment to an end. He was told that he had to give a month. On that day he had had 10 deliveries to make, with difficult loads to configure on his truck and he was very unhappy about it. He took a photo of that configuration on the truck. It did not disclose hazardous goods, it simply disclosed difficult loads and he did no more than that about it.

46 Meanwhile Mr Edmunds took no disciplinary action in respect of the claimant concerning the accident with the wall, or the other issues. We do not accept that he ignored or stared at the claimant. On isolated occasions, such as the phone call immediately after the receptionist complaint, the claimant may rightly have perceived Mr Edmunds was not happy, but that was reactive and isolated. Generally Mr Edmunds behaved as normal and quite the contrarily to the claimant's case: he agreed, for instance, that the claimant could use the works' vehicle for removal purposes for one of the claimant's family members on Saturday, 2 July, indicative of the give and take and good relationship they had had.

47 The claimant had holiday booked in for the second week of July. On 3 July 2016 there was an ordinary text exchange between the claimant and Mr Edmunds about the return of the loaned vehicle and a tyre; the claimant took umbrage at a suggestion by Mr Edmunds that he forward a communication between himself and another member of staff concerning that tyre (which suggested that Mr Edmunds wanted to see evidence about responsibility for the tyre).

The claimant's resignation

48 The claimant's text of his resignation on 3 July said this:

"Hi John, It is with a heavy heart after 7 years of happy employment at JSE Transport that I feel no longer able to be that happy person who has and does give more than 100% at all times. Please find uniform in cab and keys to both van and truck in washer bottle. I'm done as I feel like I'm a bad smell around here now but know not why, please feel free to convince otherwise if this is not the case and I will gladly carry on as an employee. Many thanks for last 7 years, Paul.

49 That text made no reference at all to overloading, health and safety, dangerous goods or training failures. He later, or the next day or perhaps even the same day, posted a message on Facebook saying "Resigned!".

50 The respondent did not seek to dissuade the claimant from his resignation; Mr Edmunds felt very let down and had to secure, at short notice, cover for the claimant. There is a national shortage of HGV drivers.

51 He wrote to the claimant on receipt of his text on 4 July to acknowledge that communication, describing it as a decision not to work the required contractual notice period and highlighting to the claimant that he might be liable for some outstanding sums. That letter of 4 July said this:

"I am writing to you to inform you that there is a proper process that needs to be followed for completing the calculations for your final wages payment and this will be done in the next few weeks. I would like to take this opportunity to advise you that there is an outstanding amount regarding training costs and damages which is owed

by yourself to the company. I would also take this opportunity to thank you for your time with the company and wish you all the best for the future".

52 It is instructive to the Tribunal that the claimant gave no notice to Mr Edmunds by returning his uniform and so on, having asked what notice he needed to give, but instead indicated that he was happy to be persuaded that he was wanted.

53 The claimant commenced new employment as an HGV driver for a new employer later in July on his return from holidays; very sadly he then suffered a minor stroke in August and was prevented then from driving, or earning his living in that way for the time being.

The post employment dispute about sums owing

54 The claimant wrote to the respondent on 29 July including the following:

"Dear John,

It wouldn't be unreasonable to expect to receive this [that was a reference to his two weeks final pay and holiday pay] as I've been a loyal employee of your business for the past 7 years with no problems. However during the past three months I have felt a climate change and having voiced concerns in the office to Helen Black on occasions, after which I was never asked about any problems or if you could help in anyway, I got the impression you were ramping it up, I was getting more stressed and depressed by the day. After texting to you to tell you how I felt I received no reply or communication from you to ask what the problem was I therefore felt this was quite constructive behaviour on your part and didn't help solve the problem or deal with the problem".

55 There then followed an exchange of letters and the respondent went on to make deductions from the claimant's final wages in respect of damage to the wall, which the claimant and his son had in fact repaired, in respect of vehicle damage, and in respect of subcontractor cover and in respect of training costs.

56 The communication about those deductions indicated that documentary evidence supporting those matters could be supplied. Ultimately the claimant accepted that the training costs recovery fell properly to be deducted; as a result of not being able to supply documentary evidence of other matters discussed between the parties, the respondent only pursued a net sum net of some £340 in respect of the contractor costs.

The Law

57 So they are the findings of fact that we have made. We will not repeat the law for the parties' benefit in this case, given the lateness of the hour, but we are very clear about the statutory provisions in the Employment Rights Act 1996 which are applicable: Sections 94, 95, 98, 43, 103A, and 13 (a part 2 complaint in respect of the wages complaint).

58 We have also had regard to the common law test for constructive dismissal, which we are required to apply to determine the Section 95 question.

Discussion and Conclusions

Were oral disclosures made to the respondent business?

59 The claimant's reference to unspecified concerns being expressed in May and June to Ms Black, are not consistent with the later details of alleged oral disclosures provided by the claimant in this case, which themselves were general. The claim form did not include the disclosures that the claimant later said he made, and the

allegations of particular dates in June were simply, on the Tribunal's findings, dates when he had recorded by photography for himself, in his words "to protect himself," dates of early morning loading lists, and on one occasion a picture of a particular load where there were said to be an excessive load. He did not provide these to the respondent.

60 In making these findings, we weigh in the mix, of course, the respondent's comprehensive documentation, and its oral evidence and that of the claimant. We simply do not accept that the alleged disclosures about overloading, health and safety, training and so on were made at all. The only communications to the respondent that we have found are those related to smoking in the cab on the vehicle information sheet.

61 I am also going to pause here to note that when I indicated the Tribunal's industrial knowledge, it is also worth bearing in mind that the claimant's claim form indicated that the details of his protected disclosure claim should be made available to the relevant regulators and he specified those as the DVSA, HSE and HMRC and that process will have duly been completed.

62 Any matters that arise out of the claimant's allegations are such that they might well be investigated by other agencies or possibly in other proceedings. This Tribunal applies a balance of probabilities test, where other jurisdictions may apply a different test and indeed decide different issues. In these circumstances, bearing in mind our findings on the claimant's principal case, it does not strike us as being in the interests of justice to make the very detailed findings of fact that the claimant was seeking about loads and so on, for purposes that do not assist with the issues in this case.

Were written disclosures made?

63 It follows largely from our findings of fact that the only disclosures of information that we have found were made, were in relation to the smell of smoke in the cab, which we accept were genuinely out of a concern for health and safety. In the statutory language, the claimant provided information which in his reasonable belief tended to show that the health and safety of an individual was likely to be endangered. The dangers of passive smoking are well known.

64 We do not however consider that when those vehicle reports were completed the claimant believed, let along reasonably believed, that he was making these disclosures in the public interest. At that time it was very much a private matter: irritation that the 58 vehicle smelled of smoke on a number of occasions when he believed a particular colleague had driven it the night before.

Did the claimant suffer detriment because of having made protected disclosures

65 The claimant has not made out protected disclosures and we do not come to consider this question. Nevertheless we record that on our findings it is very clear that far from resulting in detriment or dismissal, the written disclosures about smoke resulted in action including appropriate memos, appropriate challenge to the colleague and camera installation, and the subsequent investigation of any evidence or allegations which were made.

Did the respondent engage in conduct, without reasonable and proper cause, calculated or likely to destroy or seriously damage trust and confidence?

66 When we look at our other findings of fact it is absolutely clear to this unanimous Tribunal that the respondent's conduct has not been such, whether separately or cumulatively, to destroy or seriously damage trust and confidence without reasonable

and proper cause. The respondent did not act so as to breach the claimant's contract of employment. The claimant did not resign at least in part in response to such breach, but because of his sense that he was no longer in favour and his ability quickly to find another job. It follows from that conclusion that the claimant was in breach of his contractual obligations by failing to give the required one month's notice and by leaving in the way that he did, at the time that he did, having borrowed the respondent's van for the weekend.

Were there sums properly payable to the claimant on the termination of his employment which were not paid to him? Was there an unlawful deduction from his wages?

67 The deduction from wages complaint does succeed to the extent conceded by the respondent. It follows that the respondent shall pay to the claimant the sum of £400.89.

Fees

68 We have made enquiries as to the fee situation in this case and have been told that the claimant applied for and succeeded in full remission from the issue fee of £250 and the hearing fee of £950. We do not need to come to consider the issue of reimbursement of those fees (or not) to the claimant in this case.

69 Those are the reasons of the Tribunal. As I have indicated the principles of law that we have applied we have not rehearsed to you, but we hope that it will be apparent that we have applied them in our judgment to the facts we have found in this case.

70 Of course the Tribunal can only have sympathy for the deterioration in the claimant's health and the chain of events as they unfolded for him, but that cannot inform the findings of fact and conclusions which we have reached on the evidence before the Tribunal.

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Employment Judge JM Wade

26.05.17

Sent to the parties on:

1 June 2017

For the Tribunal:

G Palmer