EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr T Rule	**v**	**UK Parking Control Ltd**

Heard at: Watford **On**: 31 January & 1 February 2018

Before: Employment Judge Wyeth

Members: Mrs J Smith and Ms S Timoney

Appearances

For the Claimant: In person
For the Respondent: Mr J Bryan, Counsel

JUDGMENT having been sent to the parties on 8 March 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By way of a claim form dated 25 May 2017, the claimant brought a number of claims against the respondent. At an initial preliminary hearing before Employment Judge Tuck on 6 September 2017 the claimant confirmed that he was seeking to bring two claims: 1) automatic unfair dismissal for making a protected disclosure; and 2) detriment for making a protected disclosure. The claimant had also suggested that there may be an issue of disability, but that complaint was withdrawn at an early stage of these proceedings.

2. The issues in the case were identified by Employment Judge Tuck as follows:

"**Protected disclosures**

3.1 What information did the claimant disclose?

3.2 Did he have a reasonable belief that it was in the public interest, and tended to show that the health and safety of individuals was likely to be endangered (s.43B(1)(d) ERA)?

3.3 The claimant relies on his grievance letters of:

3.3.1 4 May 2016 – in which he gave information to HR complaining about lack of CCTV cameras, body cameras and radios, split DNA swab kits (to collect evidence if customers spit at staff) and lone worker badges. He believed this to be in the public interest as tended to show a potential risk to the health and safety of other lone parking attendants and him.

3.3.2 1 March 2017 – in which he gave information to Melissa Hinchliffe, HR; Fiona Snelgrove, HR; and Tom Bishop of payroll and benefits, about his believe that the health and safety of him, and other lone parking attendances was likely to be endangered, particularly because of the requirement for lone worker badges to be requested (rather than automatically issued) and the failure to issue body cameras.

Automatically unfair dismissal

3.4 Was the reason or principal reason for the claimant's dismissal, that he had made protected disclosure(s), contrary to s.103A ERA?

Detriment

3.5 The claimant accepts that he was paid his notice pay and accrued holiday pay on termination of his employment. His claim for wrongful dismissal is therefore dismissed on withdrawal. However, the respondent's decision to make a payment in lieu of notice, rather than permitting the claimant to attend work during his notice period is claimed to be a detriment on the ground of having made protected disclosures contrary to s.47B ERA. This is said to have deprived the claimant of the opportunity of a fuller consideration of his grievance."

4 The parties agreed at the outset that these remained the issues for this tribunal to determine.

Procedure

5 The tribunal was presented with a bundle of documents exceeding 800 pages. There was some discussion as to whether this was proportionate to the issues in the case and the two day allocated listing. The parties were reminded of the need to conduct this case in accordance with the overriding objective and ensure that the tribunal was referred to relevant material only. Both sides were satisfied that the matter could be concluded within the two day allocation. Notwithstanding the size of the bundle, the tribunal considered everything to which it was referred relevant to the issues to be determined.

6 On the morning of the first day, the claimant produced additional documentation that he requested to have included into the bundle. The claimant did not having a copy available for the respondent's representative and had not provided advance notice of the application to the respondent. Accordingly, contrary to usual practice, the tribunal arranged copies of these documents to be provided to counsel for the respondent, Mr Bryan, and allowed him time to take instructions on the application. Mr Bryan did not

oppose their inclusion in the bundle. As it transpired, the claimant did not, ultimately, refer to all of those documents.

7 Likewise, at the outset of the hearing, Mr Bryan provided the tribunal with a chronology. Initially, the claimant would not agree that chronology and challenged its accuracy. Indeed, the claimant had produced his own chronology, containing far greater detail. It was apparent that the claimant's chronology contained reference to many events that were not material to the issues in the case. Nevertheless we spent time working through the two chronologies to identify where there may be points of dispute. Having undertaken that exercise, other than one comment included in Mr Bryan's chronology for the entry on 28 February 2017, which the tribunal agreed should not be considered as anything other than comment, and the fact that the claimant wanted it recorded that his phone was not working on 1 March 2017, the claimant accepted and agreed the chronology prepared by Mr Bryan was an accurate one.

8 At the claimant's request, we also agreed that he could insert page references into his chronology overnight and email his updated chronology in advance of our deliberations on the second day, which he did.

9 We heard evidence from the claimant first. We then heard evidence from Mrs Hinchliffe and Mrs Snelgrove for the respondent (in that order). At the conclusion, we heard submissions from both sides. Mr Bryan had also provided a short written outline of the respondent's case in advance. We followed the usual order and heard from Mr Bryan first, not least because this enabled the claimant to gain some indication of what was being argued by the respondent on its behalf. We allowed the claimant some time to gather his thoughts so that he was then in a position to respond to those submissions.

10 During the hearing the claimant requested that the tribunal listen to a surreptitious recording that he had made of a phone call between him and Mrs Hinchliffe on 3 March 2017 even though he had prepared a detailed written transcript of that call and included it in the bundle. We were not satisfied there was any good reason to listen to the recording when the claimant had already prepared his own transcript of it that was not in dispute. Furthermore, listening to the recording would not have made any material difference to our findings. Instead, the claimant was provided the opportunity to listen to the recording (which we were told lasted approximately three minutes) over the lunch break and compare the accuracy with the transcript he had already produced yesterday. When the claimant returned from lunch the claimant informed the tribunal that, despite this direction, he had not taken the opportunity to listen again to the recording.

Findings of fact

11 The respondent is a Parking Management company operating at various sites nationwide. At the material times the claimant was employed as a Parking Attendant based at Catford and Lewisham in London. Initially he was

employed from 29 June 2015 (although his written terms at that time erroneously referred to July 2015) until his resignation on 1 September 2015. Nothing material rests on that period of employment, although we note that there were a number of issues between the claimant and the respondent which resulted in the claimant giving his notice to terminate. Notwithstanding his resignation in 2015, the claimant approached the respondent in January 2016 to request his old job back. The respondent agreed to re-employ him and the claimant commenced a second period of employment with the respondent on 8 February 2016.

12 In accordance with the terms of his employment, the first six months were to be a probationary period. Under the terms of his contract the claimant was entitled to one week's notice to terminate prior to completing two years of continuous service. The respondent's employee handbook specifically provides for the respondent to choose to terminate an employee's employment immediately and make a payment in lieu of notice. The claimant disputed that he had signed the handbook. Nevertheless, we find as fact that the claimant would have been aware of its existence and content, not least because it was referred to in the letter offering him employment which referred to section A of this handbook forming part of the contract of employment. We are all the more convinced that the claimant would have known about these terms because it was apparent in evidence before us that he was meticulous about clarifying his entitlements with the respondent.

13 Unfortunately, the day after commencing his second period of employment, the claimant injured his foot whilst working at the Lewisham Retail Park. Despite his injury the claimant continued to work in his role as Parking Attendant for just over a week, but was signed off as unfit for work by his GP. There is a dispute as to whether he was signed off on 17 or 19 February 2016, but for these purposes we accept the claimant's evidence that he was signed off on 19 February 2016. Nothing material rests on this in any event.

14 It was common ground between the parties that the claimant remained continuously absent from work until 8 October 2016. Whilst absent from work the claimant on 4 May 2016 raised a grievance about Parking Attendant's safety conditions. The claimant asserts in evidence that he raised this on 1 June 2016. This cannot be correct because there is an email in existence at page 240 of the bundle from Fiona Snelgrove dated 6 May 2016 referring to his grievance.

15 In his grievance the claimant refers to the fact that the retail park at which he worked in Lewisham and Catford did not have sufficient CCTV coverage in his view and that this had prevented police taking action in a previous incident in which he had been involved. He refers to Parking Attendant's safety being paramount and that lone worker badges were good, but he did not feel that they were a sufficient deterrent to stop members of the public being violent and abusive towards attendants. He then suggested a number of options that could increase safety in his view. He suggested: 1) the provision of body cameras; 2) the provision of radios that communicate with other third parties, security staff and shop staff by one radio channel at the two sites; 3) knowing

the location and functioning of CCTV cameras on the site; 4) the lone worker badge which the claimant had been issued by this time should be compulsory and issued as standard; and 5) the provision of spit DNA swab kits.

16 Mrs Snelgrove held a grievance hearing with the claimant on 7 June 2016 by telephone at the claimant's request. All the issues raised by the claimant in his grievance were discussed and considered at that hearing. Indeed, a further issue of dummy cameras, which the claimant had not raised in his written grievance, was also discussed. On 22 June 2016, Mrs Snelgrove sent the claimant a letter detailing the outcome of the grievance. In essence, she concluded that the CCTV and radio suggestions by the claimant were not possible not least because the respondent did not own the relevant site. With regard to lone worker badges she confirmed that anyone who requested such a badge would receive one and these would be issued regardless if a risk assessment deemed appropriate. Finally, the suggestion of body cameras, DNA swabs and dummy cameras were the subject of further investigation. Mrs Snelgrove did, however, express concern about the practicality due to potential data protection issues that would arise.

17 In the penultimate paragraph of her letter she states:

> "I hope you feel that all points raised and discussed have been resolved or escalated accordingly and that you feel that this grievance has been resolved in accordance with our policy. However, should you not feel this way you have the right to escalate the grievance for a final hearing."

Notably the claimant did not seek to pursue the matter any further and we find as fact that he was satisfied with the response he received at that time.

18 On 23 August 2016, the respondent wrote to the claimant advising him that his probationary period of six months was to be extended for a further three months notwithstanding the fact that the claimant had been absent for all but the first seven working days of that period. Indeed, the respondent was offering the extended probationary period precisely because the claimant had been absent for such a substantial period of time. We consider this to be highly significant because the offer to extend his probationary period came after he had raised his grievance upon which he relies as a protected disclosure, something he claims led to his dismissal. Rather than terminating his employment on the grounds of his considerable absence which we accept the respondent would have been entitled to do at this stage, the respondent offered the claimant an opportunity to continue working for them. This is wholly inconsistent with the actions of an employer who, according to the claimant, was seeking to be rid of an employee who raised concerns about working conditions or health and safety matters.

19 As referred to above, the claimant did not return to work until 8 October 2016. His return was somewhat short lived because the claimant states that he was attacked by a member of the public on 20 October 2016, which led to him sustaining various injuries including a dislocated finger. Somewhat surprisingly, the claimant did not complete the incident report form despite being sent one by the respondent on that day.

20 The claimant commenced a further period of absence on 20 October 2016 never to return to work. The claimant produced a MED3 certificate from his GP stating that he was unfit for work due to finger dislocation and was signed off work for a minimum of one month. On 2 February 2017 the respondent's HR Manager Mrs Hinchliffe emailed the claimant attaching a copy of a letter dated 20 January from her to him requesting his consent to obtain a medical report from his GP because of his substantial period of long-term absence with only a brief return in October 2016. We are satisfied that this request was entirely reasonable and appropriate in the circumstances. Indeed, it was the proper approach for the respondent to take. In response to that reasonable request the claimant sent a very curt email six days later on 8 February 2017 with the subject heading "*Tyrone Rule no consent GP records*" stating:

> "Hi Melissa I do not give consent for UK PC to view my medical records."

The claimant did not offer any reason for refusing to consent nor did he seek any clarification as to what the respondent would have accepted to enable a fully informed decision to be taken about the claimant's future employment with the respondent. The claimant's response from any objective view appeared obstructive.

21 In response, on 28 February 2017, Mrs Hinchliffe emailed the claimant indicating that she wished to schedule a call with him possibly that afternoon. We accept Mrs Hinchliffe's evidence that the purpose of seeking to arrange a telephone call with the claimant that day was to inform him that his employment was to be terminated because of his excessive absence and that the decision to dismiss him had been determined at that point.

22 On 1 March 2017, the claimant responded with two emails both recorded as being sent at 10.38am. One of the emails indicates that the claimant was unavailable by telephone and requested that Mrs Hinchliffe set out in an email what the phone call was regarding and any information required. The second email was sent to Mrs Snelgrove, Mr Bishop and Mrs Hinchliffe with the subject heading: "*Tyrone Rule Safety Conditions Grievance 2*". It was addressed "*To whom it may concern*". In essence, it repeated the issues the claimant had raised in his grievance of 4 May 2016 (as summarised above) and queried some of the responses Mrs Snelgrove had provided to him in her reply over eight months previously, of which he had not appealed. Towards the end of this second grievance, the claimant states that he feels that UK PC are not taking work safety conditions seriously and he:

> "will be reporting this to the Health and Safety Authority asap along with your past letters and incident report which I have submitted.
>
> ….."

23 We were deeply concerned by an allegation that the claimant made in evidence before us in which he claimed that the solicitor for the respondent had tampered with the stated time that the "grievance 2" email was sent. The

claimant alleged that this grievance email was sent at 10.37am and not 10.38am. We do not consider that the one minute difference is of any relevance when determining the issues in this case and the allegation reflected poorly upon the claimant's own credibility as a witness. We consider it wholly implausible that the email before us had been tampered with, not least because the timing was insignificant in terms of the evidence as a whole. We consider it more than coincidence that the claimant sought to revive the issues that he did not seek to appeal in June 2016 almost immediately after he had received the email from Mrs Hinchliffe indicating a wish to speak to him about his employment. By this point he had been absent since October 2016 and yet made no complaints until receipt of Mrs Hinchliffe's communication which followed his refusal to consent to access to a medical report from his GP.

24 Accordingly, we regard the claimant's second grievance, which he stated to be a further protected disclosure, to have been made in bad faith with a view to seeking to rely on it at some later stage for ulterior purposes.

25 On 3 March 2017, in the afternoon Mrs Hinchliffe emailed the claimant (page 321 of the Bundle) in reply to his request for information and informed him that the purpose of wanting to speak to him was to conduct a probationary review meeting. After receiving this email, the claimant telephoned Mrs Hinchliffe, unexpectedly for her, at which point she told him that she would gather together relevant paperwork and call him back. In an email to her dated the same day, the claimant referred to that fact that Mrs Hinchliffe called him back at 17.44 that afternoon and told him that he had failed his probation due to absence and that he would not need to return to work for his notice period. The claimant complained that he was required to be given a period of one week's notice, but Mrs Hinchliffe explained that he would be paid in lieu. Notably the claimant surreptitiously recorded this later telephone call with Mrs Hinchliffe and provided a transcript of it in the Bundle at page 786.

26 His dismissal was summarised in a letter of 7 March 2017. The reason given was "*high level of absence*." We are in no doubt that this stated reason by the respondent was indeed the real and genuine reason for the claimant's dismissal.

27 Subsequently the claimant appealed the decision to dismiss him in a letter dated 12 March 2017. Mrs Snelgrove heard the appeal on 22 March 2017 and informed the claimant in a letter dated 29 March 2017 that his appeal was unsuccessful. Nothing material rests on the appeal in any event.

28 Mrs Hinchliffe also provided a detailed response to the claimant's second grievance by way of a letter dated 21 March 2017. That letter referred to the respondent adopting the modified grievance procedure and no meeting was held with the claimant about his second grievance. Even if the claimant had been entitled to work his one week's notice period instead of being paid in lieu, it would have made no difference to the decision by the respondent to the adopt the modified procedure and respond to the claimant's grievance in writing. As such the claimant suffered no detriment by being paid in lieu.

Furthermore, if, in the alternative, adopting the modified grievance procedure could be regarded as a detriment (which is not how the claimant has put his case before us) this tribunal is satisfied that the decision taken by the respondent to provide a response in writing was one based on practicality and was not in any way influenced by or because of the fact that the claimant had made a protected disclosure.

The Applicable Law

29 Section 47B of the Employment Rights Act 1996 ("ERA") provides that a worker has the right not to be subjected to any detriment on the grounds that they have made a protected disclosure. Dismissal is not a detriment so as to be covered by this section (s47B(2)).

30 Under section 103A ERA, an employee shall be regarded as unfairly dismissed if the reason, or if more than one, the principal reason for the dismissal is that the employee made a protected disclosure.

31 In accordance with the relevant parts of section 43B(1) ERA, a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:

> "(a) that a criminal offence has been committed, is being committed or is likely to be committed;
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
> (c)....
> (d) that the health or safety of any individual has been, it is being or is likely to be endangered;
> (e)....
> (f)...."

32 Section 43C of the ERA requires the disclosure to be made to the worker's employer or other responsible person. Whilst there is no longer any requirement for the disclosure to be made in good faith, absence of good faith will result in compensation being reduced.

33 It is also important to emphasise that whether the disclosure was in fact in the public interest is not the test when determining whether it is a qualifying disclosure. The test is whether the person making the disclosure *reasonably* believed it was in the public interest. This is a mix of subjective and objective elements: what did the claimant believe? (subjective) and was such a belief reasonable? (objective). The ERA does not define "public interest". Instead, account is to be taken of the guidance provided by the Court of Appeal in Chesterton Global Ltd and anor v Nurmohamed (Public Concern at Work intervening) [2017] IRLR 837.

34 Should the tribunal find that the claimant was unfairly dismissed it is still under a statutory obligation to consider whether the claimant contributed in any way to his dismissal and, if so, by what percentage the claimant's compensation should be reduced.

35 Additionally, the tribunal must consider whether the claimant's employment would have terminated anyway regardless of any (automatic) unfairness. If such circumstances arise, the tribunal will form a view as to the percentage chance of the claimant's employment ending regardless of whether a fair procedure was followed or not. This is of course the well-known *Polkey* principle.

Conclusions

36 Applying the law to the facts, the claimant was dismissed for his poor absence record and nothing else. He himself acknowledged in evidence before us that his attendance record was very poor. The claimant sought to persuade us that because he had sustained so much absence and was only dismissed around the time that he had raised his grievance for the second time, we should infer that the true reason for his dismissal was the second grievance, combined with the first grievance on 4 May 2016. We reject that entirely. We are satisfied from the evidence of Mrs Hinchliffe that the decision to dismiss the claimant had been taken by 28 February 2017, prior to the claimant submitting his second grievance. In any event, if, as the claimant seeks to persuade us, the claimant's absence record was a pretext for his dismissal and the real motivation was the fact that he had raised issues in his grievances (the second grievance being very similar if not identical to the first), we are firmly of the view that the respondent would have seized on the opportunity to dismiss him in June 2016 and certainly would not have extended his probationary period in August 2016.

37 For the reasons already stated, we are satisfied that the making of the payment in lieu of notice was not a detriment. It made no difference to the process followed by the respondent in respect of the claimant's second grievance. Furthermore, even if we are wrong and it did amount to a detriment, the claimant did not suffer any such detriment as a consequence of making a protected disclosure.

38 We are satisfied that the two grievances referred to above and relied on by the claimant did contain qualifying protected disclosures. The claimant was giving information about how the safety of Parking Attendants including himself might be compromised and suggested ways of reducing risks. Regardless of whether or not he was right about that, we accept that he did hold a reasonable belief that such a matter was in the public interest. Notwithstanding this, we are without any doubt that these protected disclosures had absolutely nothing to do with the claimant's dismissal and no detriment resulted from them. Additionally, as we have already stated in our findings of fact, the second grievance and protected disclosure was made in bad faith and as such, had remedy been relevant, this tribunal considers that

any award should have been subject to a reduction of the full 25%. Given our conclusions, matters of contributory conduct and polkey are irrelevant.

39 The claimant did not suffer a detriment and was not automatically unfair dismissed as a consequence of make a protected disclosure.

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Employment Judge Wyeth

Date: 25.4.2017

Sent to the parties on: ....

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For the Tribunal Office