EMPLOYMENT TRIBUNALS

Claimant: **Mr S J Kay**

Respondents: **AMK Maintenance Limited**

Heard at: **Nottingham** **On:** **22 & 23 November 2017**

Before: **Employment Judge R J Clark**
Mrs Tidd
Mr Dawson

Representatives:-

Claimant: **In Person**
Respondent: **Mr Morley, Consultant**

JUDGMENT

The Tribunal's unanimous judgment is

1. The claims of suffering detriments on the ground of having made protected disclosures fail and are dismissed.

2. The claims of unfair dismissal fail and are dismissed.

And by consent,

3. The claim of unauthorised deductions from wages succeeds. The Respondent shall pay to the claimant the agreed sum of £700.

REASONS

1. **Introduction**

1.1. This case touches the circumstances of the claimant's employment with the Respondent over recent years and leading up to his dismissal effective from 6 July 2016. The Claimant claims he was automatically unfairly dismissed for making protected disclosures or, in any event, unfairly dismissed. He says those disclosures also led to him suffering detriments short of dismissal. He also claims his pay has been subject to unlawful deductions. The Respondent says he was dismissed fairly for gross misconduct, that he did not make any qualifying protected disclosures, suffer any consequences and, initially at least, that he had been paid correctly. The latter issue was conceded during the hearing and the terms of that concession is reflected in our judgment.

2. **Preliminary Matters**.

2.1. Mr Morley raised a concern about the creeping expansion of the claimant's claim. Further and better particulars had been ordered at an earlier telephone preliminary hearing with permission for the respondent to amend its ET3. Those further particulars were provided on 5 May 2017 and the Respondent amended its ET3 on 3 July 2017. We took the view there are no new claims asserted, but the further particulars appeared to put the existing protected disclosure claim on a broader footing and relied on new facts. Those new matters, however, have been fully responded to in the ET3 and anticipated in the evidence to be presented to us. We treated the claimant as having applied to amend his claim, we concluded there was no prejudice to the respondent in meeting that claim evidentially, indeed there was no objection taken by the respondent when the wider claim was raised in the earlier preliminary hearing. We therefore reached the conclusion it was in the interests of justice to allow the claimant to put the claim as it was pleaded.

3. **Evidence**

3.1. We heard from the claimant in support of his own case.

3.2. For the respondent we heard from Lisa Headington, Administrator; Paul Taylor, Contracts Manager and the claimant's first line manager; Tony Burke, Senior Contracts Manager and dismissing manager; and Neil Appleton, Managing Director who decided the claimant's appeal.

3.3. We received a separate bundle from each party in breach of the directions order but, fortunately, with only limited duplication. The claimant's bundle ran to 128 pages, the respondent's to 247 although a substantial part of it was the timesheet and payroll analysis. Where we refer to page numbers in either bundle they are stated as [C1] or [R1] accordingly. We read the bundles and considered particularly those documents we were referred to in evidence. Both parties made closing submissions.

4. **Issues**

4.1. We identified the issues at the outset. The issues engaged in the wages claim fell away on the later compromise.

4.2. In respect of the alleged protected disclosures they are:-

a Did the claimant make the alleged qualifying protected disclosures under ERA 43(b)(1)(a) and (b), namely:-

i. in or around 1 March to 23 April 2014, verbally to Lisa Headington and Paul Taylor the claimant said" Do you expect me to defraud customers when you are defrauding me?" and "I will have the last laugh when the coppers come and arrest you for corporate fraud"

ii. On diverse dates subsequently in 2014, 2015, 2016 repeating the above comments.

iii. Setting it out in writing in his letter of appeal dated 11 and 24 July 2016.

b Did the claimant make the alleged qualifying protected disclosure under ERA 43(b)(1)(a) (b) (c) and (e), namely, in or around 1 May or

June 2014, verbally to Lisa Headington and Paul Taylor the claimant complained that the respondent was exposing him to and members of the public to dangerous substances, namely asbestos

c Did the claimant make the alleged qualifying protected disclosure under ERA 43(b)(1)(a) and (d), namely, in or around 1 May or June 2014, verbally to Lisa Headington and Paul Taylor the claimant complained that the respondent was sending out untrained and unlicensed employees to work at height on "cherry picker" machines.

d Did the claimant make the alleged qualifying protected disclosure under ERA 43(b)(1)(a) and (b), namely, in or around 15 June 2016, verbally to Lisa Headington and Paul taylor that he had told Lloyds pharmacy that they should check that times were inserted in the job sheets by the Respondent's workers otherwise they would be "defrauded".

e Did the claimant make the alleged qualifying protected disclosure under ERA 43(b)(1)(a) and (b), namely, on or around 1 March to 31 April 2014, verbally to Lisa Headington and Paul taylor and repeated subsequently, that the respondent was defrauding the public by holding him and other employees out as qualified plumbers and electricians when he and the other workmen were not so qualified.

f Did the claimant make the alleged qualifying protected disclosure under ERA 43(b)(1)(a) (b) and (c), namely, on various occasions during 2014, 2015 and 2016, (and in particular during the disciplinary hearing on 6/7/16) verbally to Lisa Headington and Paul Taylor, that the respondent was sending him out on jobs without risk assessments and without method statements.

g Did the claimant make the alleged qualifying protected disclosure under ERA 43(b)(1)(a) (b) and (d), namely, during early 2014, verbally to Lisa Headington and Paul Taylor, the claimant complained that his van had been found to have faulty brakes.

4.3. In respect of the alleged detriments:-

a Whether the claimant was subjected to unlawful deductions from wages between April 2014 and his dismissal and, if so, whether a material reason for that was the making of the above protected disclosures.

b Whether the claimant was required to pay for tools and equipment and, if so, whether a material reason for that was the making of the above protected disclosures.

c Whether the reason why the claimant was subjected to disciplinary action between 17 July 2014 and up to his dismissal was materially because of making the protected disclosures.

4.4. In respect of the dismissal issues in the case:-

a The reason for dismissal (respondent says conduct, the Claimant says making the protect disclosures).

b Whether the respondent has shown the reason for dismissal to be a potentially fair reason.

c If a potentially fair reason, the reasonableness of the decision to rely on that reason to dismiss the claimant.

5. **FACTS**

5.1. It is not the role of the tribunal to resolve each and every last dispute between the parties but to make the findings necessary to determine the

issues and set them in their proper context. On that basis and on the balance of probabilities we find as follows.

5.2. The respondent is a family business engaged in property maintenance. Its clients are mainly well-known national retail businesses. The work is therefore mainly in commercial buildings and often involves working around the continued operation of the client's business and public access. The respondent's head office is in Leeds. It has two satellite branches, one of which is the Burton office out of which the claimant worked. The respondent is not a large employer but does employ 44 members of staff, 10 of whom are based in the Burton office. It is large enough to expect it to have established employment policies and procedures and employment and management systems in place. It does have disciplinary and grievance procedures which are contained in an extensive staff handbook.

5.3. The Burton office is managed by Paul Taylor, who has been employed by the respondent since 1999 and soon after it opened. In 2005 he became Assistant Manager before being promoted in 2006 to his current role as Contracts Manager. The Burton office is supported by Lisa Headington as Administrator who coordinates the work of the tradesmen.

5.4. Lisa Headington has been employed by the respondent since 2001. The claimant makes an extremely serious allegation attacking her honesty and alleging that she has been "done" for embezzlement in her previous employment. She denies that absolutely. She denies ever working for the particular employer he cites as being embezzled. She asserted in evidence how her past employment record has been impeccable and included working for Social Services and a Police Authority. We have considered whether it is even necessary for us to make any findings at all concerning this allegation. However, as the basis of the claimant's claim makes allegations about the conduct of the management systems operated by the Burton office, particularly in the context of dishonest amendment of records, this is a potentially relevant matter that we must deal with. However, the evidence the claimant has adduced is limited to his belief, apparently based on hearsay with no supporting evidence and no real explanation of when and how this belief was formed. Its cogency comes nowhere near that necessary to match the gravity of the allegation, even on the balance of probabilities. It has not been raised in the pleadings and Ms Headington has had to provide a supplementary witness statement to address it before us. We have concluded that the claimant has fallen a long way short of establishing this allegation. Conversely, we found Ms Headington to be an honest and reliable witness. Where there were examples of practices that Mr Kay found suspicious, she provided perfectly reasonable and, we find, honest explanations. She was diligent in her work and, in particular, prompt and fair in preparing summary notes of the investigative and disciplinary meetings she would be involved in with Mr Kay. In short, Mr Kay's allegation was ill-founded. We interpreted this as a symptom of his personal dislike for Ms Headington and an example what we found to be, at times, his ability to genuinely hold a particular view of the world around him which was at odds with any reasonable objective view.

5.5. The claimant started his employment on 29 November 2000 as a general maintenance operative. He was previously a plasterer. He is not a qualified plumber or electrician. We find the respondent employs qualified electricians and plumbers to undertake that work which requires certification

or is subject to regulation. However, not every task that might be related to plumbing or electrics requires a qualified plumber or electrician to do it. We accept the evidence that certain tasks, such as bleeding a radiator, would not require plumbers. Similarly, a simple like-for-like replacement of an electrical unit would not require an electrician. The claimant did this work from time to time but we find he was not ever expected to undertake tasks that were exclusively the domain of those qualified or certified trades.

5.6. The employment relationship is governed by a contract of employment evidenced in part in a written statement of terms. The written statement given at the commencement of his employment has been superseded by the 2010 version [R244]. This provides, in particular:-

a Normal hours of 45 hours per week 8-5.30.
b Standard rate of pay.
c A call out fee of £25.
d Overtime after 6pm and weekends at various rates.
e Cross referencing to the employee handbook for matters such as sickness and disciplinary.

5.7. In respect of sickness absence, we find there was an established procedure, set out in the Handbook, which provides for the familiar requirement to contact the employer by 10 am on first day of absence.

5.8. The claimant was provided with a company van. We find this was subject to a vehicle maintenance programme as part of the lease arrangements and the respondent paid for repairs as necessary. In addition to planned maintenance, the claimant had a number of accidents in company vehicles which necessitated further examination of his vehicle by motor engineers. We do not find there to have been any incident involving a discovery of failing brakes on the claimant's vehicle nor, irrespective of the underlying facts, that the same was communicated by the claimant to Mr Taylor or Ms Headington.

5.9. Whilst the respondent's business model involves some planned maintenance work for clients, a large part of the work is responsive. In other words, they are called when something has gone wrong at a client's premises. We therefore find the presence of a functioning system for providing a 24 hour, 7 day service is imperative to the respondent's business. This need is largely met with a call out rota. We find the Burton office publishes a call out rota for each year. We have seen the 2015 rota. This shows a 6 week cycle when the claimant and his colleagues would be either first on call, or reserve on call.

5.10. We accept the claimant's evidence that he was rarely called out although we do not accept the actual frequency asserted, which changed during his evidence, at one point to as little as twice in 15 years. Likewise, his reasoning was not consistent. In his statement he suggests the reason for the infrequency of call out was favouritism within the Burton office, allocating weekend work to others. In his oral evidence it was clear that he was avoiding doing weekend work. The respondent's witnesses described the responsive nature of callouts meant there could be a weekend without any work at all, although that was rare. In reality, what we find is that the claimant did not want to do callouts and for some time Mr Taylor had tolerated and acquiesced in the claimant being able to avoid his contractual

obligation. We found Mr Taylor to be a Manager who sought to appease Mr Kay to the extent that he would organise one of the other operatives to pick up the work or, sometimes, would even do it himself. This had created a situation where Mr Kay could almost come and go as he pleased. We find, however, that the flexibility this allowed Mr Kay to be in control of his own work pattern was stretched to breaking point. Eventually, Mr Taylor could not allow this to continue and he sought to bring Mr Kay into line with his contractual obligations.

5.11. We find the work of the operatives such as the claimant would occasionally require use of specialised equipment either to purchase or to hire. There were established practices in both cases. Firstly, we find all employees were expected to carry their own basic tool kit. The respondent did not provide it. However, where specialist equipment was needed, the respondent would either purchase and provide it or, if it arose on the job, the employee could buy it and claim a refund from the respondent. We are entirely satisfied that where a specialised tool was genuinely needed and purchased by an employee, the respondent refunded the cost. We have no doubt that there could be borderline cases whether a particular item fell into the standard toolkit or not. We heard evidence relating to one such example when the claimant bought drill bits. We find Mr Taylor took a fair and balanced approach. He gave due consideration to the circumstances of the job and accepted that the drill bits were of a specialist nature and refunded the expenditure to the claimant. We find, if anything, any ambiguity about the specialised nature of the tools purchased was likely to be resolved in favour of the employee. We have no evidence before us that truly specialist tools were ever purchased by the claimant and for which he was not subsequently refunded.

5.12. Similarly, when equipment was to be hired, the Respondent would arrange it in advance where possible, otherwise the employee was able to arrange hire using the Respondent's account with various tool hire companies. Either way, the respondent would always pay for the hire. We find all employees are expected to act responsibly with the use of hire equipment and its continued need. On one occasion, the claimant hired a jet wash and associated equipment for a job lasting one day. He was unable to return it the same day which, in the circumstances, would have been accepted by the respondent. However, he then negligently failed to return it at all and the item remained in his van, and consequently on hire, firstly for the two weeks immediately following its use and then during a further period of his annual leave. We find the respondent only became aware of it when the statement of account was issued by the hire company. It was able to locate and return the item but not without incurring unnecessary costs of around £220. The respondent found the claimant had been negligent or careless in his conduct which had caused loss and he was required to make a contribution of £100 towards that loss. The respondent has a provision within the written terms to deduct such sums from an employee's wages. We find this was such a case. We also find the reason for this deduction was wholly and exclusively related to the claimant unnecessarily keeping the items on hire. Before us, the claimant maintained that he saw nothing wrong in the fact that he had failed to "off hire" the equipment. He had previously asserted to the employer that the customer should pay the cost. Both were views the claimant seemed to genuinely think were reasonable.

5.13. When on the job itself, we find the claimant was regarded as a generally

competent worker who could produce good work. That contrasts with his self-management. We find that he was not very well organised, and increasingly became dissatisfied with his lot. He harboured a dislike for Mr Taylor and Ms Headington which only grew stronger over time. He did not speak with either of them unless he had to. We find he exploited the flexible working arrangements that came with this sort of isolated, responsive, peripatetic work pattern and which was for a long time ignored by Mr Taylor's predecessor. When Mr Taylor took control of the Burton depot in 2006 this stance continued, probably for a lot longer than Mr Taylor now feels he should have tolerated it. Eventually matters reached a point where even Mr Taylor's informal, relaxed and collegiate approach to management had to adopt a formal response. We accept he was becoming increasingly concerned about the effect that the claimant's attitude to work was having on the business and others in the team.

5.14. Things came to a head in 2014 when the claimant failed to attend a pre-arranged planning meeting on site. This caused the job to be aborted. The disciplinary process was invoked. A hearing took place on 30 July 2014 which resulted in a written warning being issued and remaining live for 12 months [R44]. The claimant did not appeal. We find that whatever the lax state of affairs that had been allowed to exist up to that point, there can be no doubt that from this date in 2014, the employer had set out what was expected of the claimant in respect of his attendance at work.

5.15. Some time after the disciplinary of July 2014, it came to Mr Taylor's notice that the claimant was continuing with late starts, early finishes, not turning up and failing to engage. It appeared to Mr Taylor that the claimant was going out of his way to make life difficult in the management of his work activity. Shortly after the first warning had expired, the need for disciplinary action arose again. In September 2015, the claimant was issued with a written warning for unauthorised absence. He was late for work on a day when the respondent was particularly busy. He was contacted on the day and said he had overslept. He was instructed to attend as soon as he could. He was contacted again to find out where he was and this time said he would not be coming in after all. We have already referred to how Mr Kay could genuinely hold opinions that might seem at odds with what might reasonably be expected. One such example arose in the course of the disciplinary hearing when his attitude to punctuality was expressed in terms that, "if you are 15 minutes late getting up, you don't bother going to work". This stance was maintained as a reasonable one before us. As before, this disciplinary warning would remain live for 12 months [R57]. Again, the claimant did not appeal.

5.16. Further issues arose with the claimant's attendance, this time during the currency of the live written warning. In February 2016, the claimant was issued with a final written warning for failing to show up for work without reporting this fact [R64]. Again, it would remain live for 12 months. Again, the claimant did not appeal. During that disciplinary hearing, we find the claimant's dissatisfaction with his employer was articulated in terms of two specific matters. They were that he had been charged £100 for the hire of the jet wash and that he had not been paid a call out fee for undertaking a call out. As a result of his view of the injustice in these two matters, we find he was thereafter refusing to undertake any call outs and any work that required him to arrange the hire of equipment. During the course of the disciplinary hearing, Mr Taylor stated that it "was not ok for him to refuse

this work and that it amounted to him not doing his job". If there could ever have been any doubt before then, we find it to have been made clear to the claimant that he was thereafter expected to undertake his allocated call out work in the same way as all the employees were.

5.17. This background of dissatisfaction and not talking to his manager or Ms Headington lead, at one stage, to the claimant telling Paul Taylor that he wanted redundancy and would take it if offered. The respondent has told him it is not on offer. We find the picture painted is one of a dissatisfied employee and a relationship that for some time has been destined to come to an end one way or another.

5.18. We must say something more about the call out issue raised by the claimant. His assertion that he had not been paid a call out fee did happen but we find the circumstances did not justify the claimant's expectation or entitlement to a payment. We find that the claimant received a request to attend a job around 4:30pm, before his shift finished. As it happens, he had finished early that day without reporting into the office and had returned home. He regarded the fact he was by then at home as entitling him to a call out fee in addition the hours he would be paid for. The Respondent's terms do not entitle the claimant to a call out fee just because he was already at home. The call out fee arises purely as a result of the time of the call being outside normal working hours. Consequently, we find he was not entitled to receive a call out fee, a situation he described to his employer as "being robbed".

5.19. In the chronology thus far, we have before us an employment record which was poor and deteriorating. In June 2016, the claimant faced yet further disciplinary allegations in respect of his attendance and time keeping, complying with a requirement to tell his employer where he was and, particularly, his refusal to carry out certain tasks within his duties including weekend call out and jobs requiring hire of equipment. An investigation meeting took place on 27 June 2017 [R70]. The claimant explained his failure to attend a call out initially as him being sick which evolved into an explanation of his failure to respond to phone calls as being because he did not carry his phone when he was on call as he had no intention of doing call outs. The background to this was again explored in the investigatory meeting and an explanation given about when the call out fee was payable. The claimant also restated his refusal to do jobs requiring hire of equipment. Again, the respondent explained how his negligent failure to return the hire equipment had caused unnecessary cost.

5.20. Against that background, a disciplinary hearing was convened on 5 July 2016 before Mr Burke. Mr Burke was based in the head office and had had limited contact with the claimant and the Burton office generally. We find he had no knowledge of any of the matters contained in any of the alleged disclosures and no disclosures were made to him directly or indirectly. The disciplinary charges were set out in a letter to the claimant which reminded him that he could be accompanied and warned him that they were viewed as potential gross misconduct that could result in his dismissal. We find the investigation notes prepared by Ms Headington were made available to the claimant in advance. During the hearing the claimant indicated he did not wish to be represented. He maintained his stance that he was not going to work call outs, was not going to answer his phone when on the rota and would not do any work requiring equipment to be hired. He invited the

respondent to sack him and threatened legal action. It is clear to us that he did not intend his employment continuing as he volunteered to his employer the advice he had obtained, the perceived value of his claim against the employer and handed in a letter of appeal before Mr Burke had conveyed his decision. That decision was, however, to dismiss the claimant. His refusal to carry out aspects of his work was held to be gross misconduct and he was dismissed without notice with effect from 6 July 2016.

5.21. This time the claimant appealed against the decision in correspondence dated 11 July 2016 [R80]. This was supplemented with a further letter on 24 July 2016. (The claimant's second appeal letter is not before us but it is agreed that its content was reproduced accurately in the letter at R81). The appeal was set down for Wednesday 27 July 2017. The claimant did not attend. He had indicated in advance that he would not be able to attend due to work commitments. We find he had found new employment very soon after his dismissal which is at odds with what is stated in his ET1 and schedule of loss. The appeal was considered on the papers and rejected with reasons set out in a letter dated 27 July 2016 [R81].

5.22. Following his dismissal, the claimant retained his company mobile phone. It was not returned and in the three days between his dismissal and the respondent cancelling the contract, the claimant ran up data charges in excess of £250. The respondent has not sought a counterclaim.

5.23. We turn to the issue of deductions from pay. It is no longer necessary for us to deal with this insofar as there is no longer a claim for unauthorised deductions to resolve. There is, however, a detriment claim relying on deductions from pay and some findings therefore remain necessary. The claimant has set out a list of payments where he says deductions have been made to the pay that was properly due starting in July 2015 [C9]. The deductions appear to relate not to the rate of pay per se, but rather whether the correct number of hours has been paid and whether they were payable at the correct overtime rates. We have received little further evidence from the claimant to explain why the amount paid is less than the pay that was properly due.

5.24. The respondent has undertaken a similar review of the time sheets and wages paid for the last 3 years. That review does find that the claimant has been paid 40 hours less than the hours he has claimed over the whole period. The shortfall, however, is explained by the fact that he has claimed for hours he was not entitled to be paid for including hours not actually worked, travel time, and overtime when overtime is not payable. Notwithstanding this, the parties have come to an agreement about the deduction from wages claimed, which we understand to be based not on the underlying arithmetic but on the validity of the authority to make deductions. That, of course, is a matter which is no longer before us and we make no comment about the merits of the concession. We do, however, accept the respondent's analysis of why the payments were made as they were in the first place. We find this analysis to be accurate and, moreover, that it was done in a fair manner as it identifies adjustments in the claimant's favour on a number of occasions where it finds that the claimant has actually claimed less than he should have due to miscalculating in his arithmetic.

5.25. As we have already mentioned, there was one occasion when a deduction did happen in respect of the reimbursent for the purchase of tools which

was rectified when Mr Taylor accepted the tools were specialised tools. The claimant was reimbursed. Although that may technically not be a deduction of wages, it potentially remains as a detriment. The reason for the delay in its reimbursement was entirely down to the understanding of whether the particular tools were specialist or not.

5.26. We find the claimant's other complaints about pay were raised only in the context of his dissatisfaction with the employer and only in the various disciplinary hearings. We find there was little evidence of pay issues being raised outside that context. The one example we have heard of in evidence was a query over holiday entitlement. We find when this was raised, the respondent investigated it promptly [R66]. An underpayment was identified and rectified. We find the respondent's managers, including Mr Taylor, were genuinely trying to ensure the claimant, and all staff, received the pay that they were due and were prepared to rectify any mistakes that did happen.

5.27. We turn now to the protected disclosures alleged to have been made. They are said to have occurred at various times over the previous years of employment. We start with some general observations. Firstly, apart from three issues (the complaint about not being paid for a call out, the deduction for the unnecessary hire charge and the reference to time sheets having been altered) the alleged disclosures do not appear in any contemporaneous reference either in writing nor in any record of it being made orally. Secondly, only one matter is referred to in the original ET1 in respect of an allegation that the claimant threatened to call the police for fraudulent practices. Thirdly, most of the allegations as pleaded were not addressed in the claimant's witness statement or oral evidence. Fourthly, the claimant's evidence was that since 2013, he had not spoken to Mrs Headington or Mr Taylor, the alleged recipients of the oral disclosures, beyond that which was unavoidable such as simply saying "good morning". Sixthly, when seeking to understand the claimant's evidence on his disclosure case, his evidence was characterised by a consistent theme of seeking to advance the underlying state of affairs alleged. For example, the fact of doing work that plumber should do or that he was not qualified to erect certain types of tower scaffold, rather than the fact of a disclosure to the employer about that state of affairs. We accept that the presence or absence of the underlying subject matter may be relevant evidence to the finding of whether a disclosure was or was not made, but in this case we reached the conclusion that the claimant was confused about the basis of a disclosure claim. It may be that he held an opinion that some or all of the matters that are now relied on as protected disclosures did exist, but his evidence of actually *conveying* those facts to his employer was far from convincing.

5.28. Turning to the individual disclosures, the first is that around 1 March to 23 April 2014, the claimant verbally said to Lisa Headington and Paul Taylor "Do you expect me to defraud customers when you are defrauding me?" and "I will have the last laugh when the coppers come and arrest you for corporate fraud". The claimant gave no evidence on this allegation beyond an assertion that he had at some past date "made threats about calling the police about corporate fraud". The actual content of the alleged threats has not been put before us. The respondent's witnesses denied any knowledge of such a comment. We are not satisfied, on the balance of probabilities, that the words as pleaded were said to either or both of them on this date

or, for that matter, on the diverse dates that it is alleged to have subsequently been repeated in 2014, 2015 or 2016 as are said to form the second of the disclosure allegations. The third allegation is said to be "setting it out in writing in his letters of appeal dated 11 and 24 July 2016". In the first letter, we note that he stated his belief that the reason for his unfair dismissal was "refusing to do call outs and hire equipment" rather than any reference to a disclosure. It concludes that the unfairness was "giving (sic) the discrimination towards me from the burton office staff". The second appeal letter states (as written):-

> ***"Paul Taylor and Lisa Headington have become very bias towards me for telling the other employees about the fraud they commit towards the company they have victimised me for some time for speaking the truth for instance on the 12th may 2015 I worked at screwfix in alfreton derbys from 2pm til 5.30am installing service ducts to the premises I had to reattend on the 21st from 6pm til 3am due to there incompetence as the wrong size ducts were installed (who paid for the hire equipment?) my time sheet was completely re written by them (including signature) placing me at jobs I had not been too this was all done to cover up there mistakes and this happens a lot you should ask lisa why she swapped the hard drive on the last computer before tony changed it for the new one."***

The reference to the alteration of time sheets is what we understand the claimant means by his allegation of fraud. It is an allegation within the company, that is, that the Burton office was hiding the true state of affairs from head office. Whilst the underlying state of affairs is not determinative of whether a disclosure has taken place, we did hear evidence on the circumstances of the alteration to this time sheet and we accepted as a fact that this was done to ensure (a) that the client was not charged twice for what was the respondent's error and (b) that the additional hours put on the claimant's time sheet for a job he did not do was done to ensure he was paid for the hours spent rectifying the job. Whilst we found the process adopted by the respondent unnecessarily clumsy, we accepted that it related to time when operatives' time sheets fed directly into the client billing process and we do not accept that any alteration undertaken was in any way dishonest. The only person who appears to have lost out financially was Mr Taylor who gave his time spent on the alternative job to the claimant to ensure he was paid in full. Similarly, we accept Ms Headington's explanation that the hard drives were not "swapped" as alleged by the claimant. We accept and find that upon a computer failing, she made attempts to connect the old hard drive to the new replacement computer in order to copy over photographs that had been stored on it.

5.29. The letter needs to be considered in terms of it being both a disclosure in its own right and also in terms of its potential evidential value in respect of earlier alleged disclosures. In that respect, we note the broad allegation of fraud, albeit unparticularised, is said to have been conveyed to other employees in a context that must exclude Mr Taylor and Ms Headington. The actual recipients are not identified. We find it likely that Mr Kay did speak with one or more other operatives about his dissatisfaction with the employer in the context of casual exchanges although we have no evidence of the actual content of any such discussion and cannot say that any recipient was in a position that would bind the employer. That is supportive of our conclusion that there had not been verbal disclosures to Mr Taylor or Ms Headington as alleged. We do, however, reach the conclusion that the claimant himself held the view that the information he had in mind, in respect of time sheets and changing disk drives, tended to show a crime or breach of other legal obligations. We do not find the appeal letter adds any weight to the evidential picture relevant to the other alleged disclosures.

5.30. The fourth disclosure alleged is that in or around 1 May or June 2014, verbally to Lisa Headington and Paul Taylor the claimant complained that the respondent was exposing him and members of the public to dangerous substances, namely asbestos. The claimant's evidence is silent on this. The respondent denies this. We are not satisfied on the balance of probability that the claimant has established such a disclosure took place.

5.31. The fifth disclosure alleged is that in or around 1 May or June 2014, verbally to Lisa Headington and Paul Taylor the claimant complained that the respondent was sending out untrained and unlicensed employees to work at height on "cherry picker" machines. Again, the claimant's evidence is silent on this. The respondent's witnesses deny such a disclosure happened. We are not satisfied on the balance of probability that the claimant has established such a disclosure took place.

5.32. The sixth disclosure alleged is that on or around 15 June 2016, verbally to Lisa Headington and Paul Taylor the claimant stated that he had told Lloyds pharmacy that they should check that times were inserted in the job sheets by the Respondent's workers otherwise they would be "defrauded". The claimant's evidence was that he told them both that "he had told Lloyds Pharmacy staff to make sure times were put on time sheets". The respondent's witnesses deny such a disclosure happened. Moreover, they explain the monitoring system their larger clients, including Lloyds adopt which does not rely on timesheets. Mr Kay would have been aware of this. The comment sits unnaturally against the system that all knew was in force. We are not satisfied on the balance of probability that the claimant has established such a disclosure took place.

5.33. The seventh disclosure alleged is that on or around 1 March to 31 April 2014, verbally to Lisa Headington and Paul Taylor and repeated subsequently, that the respondent was defrauding the public by holding him and other employees out as qualified plumbers and electricians when he and the other workmen were not so qualified. The claimant's evidence is silent on this. The respondent's witnesses deny such a disclosure happened and we have found not only that the underlying state of affairs does not exist, but that there has not been any refusal by the claimant to undertake any particular tasks on that basis. We are not satisfied on the balance of probability that the claimant has established such a disclosure took place.

5.34. The eighth disclosure alleged is that on various occasions during 2014, 2015 and 2016, verbally to Lisa Headington and Paul Taylor, that the respondent was sending him out on jobs without risk assessments and without method statements. Again, the claimant's evidence was silent on this. There is no evidence of contemporary complaint or refusal in such circumstances. The respondent's witnesses deny such a disclosure happened. We are not satisfied on the balance of probability that the claimant has established such a disclosure took place.

5.35. Ninth disclosure alleged is that during early 2014, verbally to Lisa Headington and Paul Taylor, the claimant complained that his van had been found to have faulty brakes. Again, the claimant's evidence is silent on this. The respondent's witnesses deny such a disclosure happened. We have found the underlying state of affairs not to exist. We are not satisfied on the balance of probability that the claimant has established such a disclosure

took place.

6. **Discussion and Conclusions on the Issues**

6.1. Logically, the first issue is to determine whether the claimant has made any of the nine alleged qualifying protected disclosures. In the case of eight of those allegations, we have dismissed as a fact that there was a conversation conveying the information alleged to have been said and, so far as the any claims rely on those matters, they can go no further.

6.2. In the case of the content of the appeal letters, there clearly has been a communication from the claimant to his employer and it is necessary to consider whether the content of either or both, individually or collectively, satisfies the definition of a qualifying protected disclosure.

6.3. The relevant statutory provisions are contained within Part IVA Employment Rights Act 1996. Section 43A defines a "protected disclosure" as:

> ***"[…] a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."***

6.4. Section 43B provides, so far as is material:

> ***"(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is done in the public interest and tends to show one or more of the following—***

6.5. For a disclosure to be made in the public interest, there is no bright line between that which is private and that which is public. It will suffice that the subject matter of the disclosure is of relevance and benefit to a sufficiently large subsection of the public, even fellow employees (Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979). However, there remains a determination to be made as to whether the claimant did in fact hold such a reasonable belief even though this is a subjective test (Parson v Airplus International Ltd. UKEAT/0111/17).

6.6. Subsections 43B(a) to (e) then set out the five relevant failures that the information conveyed must tend to show. In the case of the appeal letters, the claimant relies on:-

> ***(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;***

6.7. S.43C provides:

> ***"(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure—***
> ***(a) to his employer; …"***

6.8. Pursuant to s.43B, the disclosure must be "of information" as distinguished from "allegations. (Cavendish Munro Professional Risk Management Limited v Geduld [2010] ICR 325 subsequently followed in Goode v Marks & Spencer plc EAT/0442/09 and in Smith v London Metropolitan University [2011] IRLR 884). At para 24 of Cavendish, the EAT put the distinction thus:

> ***"…the ordinary meaning of giving 'information' is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating 'information' would be 'The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around'. Contrasted with that would be a statement that 'you are not complying with Health and Safety requirements'. In our view this would be an allegation not information.***

6.9. However, we remind ourselves not to place too much focus on the label we apply to a particular set of facts as that which is properly labelled "an allegation" may nonetheless convey sufficient information to be a disclosure. We also remind ourselves that the necessary conditions need not be contained in one letter or one exchange but may be found across a course of correspondence or connected dealings. Further, it is not necessary that the information conveyed is not already known to the recipient.

6.10. Applying those principals to the letters of appeal, the first letter dated 11 July 2016 does not convey any facts (other than at that time the claimant attributed his dismissal to his refusal to do certain work, and not any disclosure). The nearest it gets to a protected disclosure is in the general assertion that the unfairness the claimant has suffered arising from the sentence "giving (sic) the discrimination towards me from the Burton office staff". This does not amount to a protected disclosure on its own.

6.11. The second letter dated 24 July does state matters of relevance to a potential disclosure. There are, broadly, three matters advanced. The fraud allegation, the alteration of time sheets and the swapping of hard disk drives. The allegation of fraud does not, in itself convey any facts and we therefore conclude it is an allegation which cannot stand as a disclosure in isolation. It may, however, be considered in the context of the second and third matters raised, each effectively being particulars of that fraud allegation. The second matter does contain specific facts going to alteration of timesheets in respect of the work done at Screwfix and advances a belief that it was done to cover up mistakes. The inference is that the change of computer hard drives was similarly related to the fraud allegation.

6.12. We have to consider the reasonableness and genuineness of Mr Kay's subjective beliefs about what he was disclosing. The fact that we have accepted the Respondent's evidence of the underlying state of affairs in respect of the time sheet and the hard drive does not, of course, mean that Mr Kay did not have a genuine belief that a relevant failure had occurred. We have found Mr Kay genuinely believed this state of affairs tended to show an offence was being committed and the disclosure sufficiently identifies the nature of the legal breach and/or offence. However, we have had some difficulty satisfying ourselves that Mr Kay genuinely held the belief that this disclosure was made in the public interest. His disclosure arises in the course of defending a disciplinary sanction of dismissal. It is advanced explicitly as a ground of appeal. It is clearly aimed at undermining the two people he dislikes and whom he blames for his predicament. Those circumstances don't prevent a disclosure from being one made in the public interest, only that we have to be satisfied it was. Other factors are his long standing subjective belief in the underlying state of affairs, wrong though it has been in many respects, and the extent to which Mr Kay clearly did not expect his dismissal to be overturned such that his disclosure must have been made for purposes other than his own employment position. Overall,

we are just persuaded that there was the necessary belief that the disclosure was in the public interest.

6.13. That conclusion therefore means that one of the alleged disclosures is made out. It is, however, of limited value to the claimant as it comes at a time after all of the alleged detriments and the decision to dismiss him have occurred. Logically, a later disclosure cannot be causative of an earlier detriment.

6.14. For completeness, we have considered the alleged detriments short of dismissal. Section s.48 provides that such a complaint is to be brought before an Employment Tribunal and that:

> ***"(2) On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done. …"***

6.15. The first alleged detriment is suffering unlawful deductions from wages. In the face of the respondent's concession, we have to conclude the claimant was subject to that detriment. The reason for that cannot, however, be the later making of the protected disclosure. In fact, we are satisfied that the reason there were deductions was down to the manner in which the timesheet claim was made and processed in the respondent's honest belief that hours had been claimed to which the claimant was not entitled.

6.16. The second alleged detriment was being required to pay for tools and equipment. We have evidence of only two matters that go to this allegation. The first is in respect of the claimant purchasing drill bits. The second is the charge made for the negligent failure to return the jet wash. In respect of the drill bits, we are not satisfied that the claimant suffered any detriment. There was a period when the reimbursement was initially not going to be made which was overturned by Mr Taylor and the claimant received the money. That period of delay could amount to a detriment but we have not been told anything about the circumstances that could reasonably support the period between expenditure and reimbursement being properly called a detriment. The second matter did occur and clearly is a detriment. In both cases, however, we are entirely satisfied of reason why the two matters happened as they did. In the first case, there was doubt about whether the drill bits fell within the scope of the claimant's own tool kit, which was resolved in his favour. In the second case, it was because of his own inexcusable actions in not returning the items. Both matters occur before the one protected disclosure which cannot therefore be causative. In any event, even if any of the other alleged disclosures were in fact protected disclosures, we cannot see that they would displace the positive reason why these detriments happened.

6.17. The final detriment is being subject to disciplinary action between 17 July 2014 and up to his dismissal. Disciplinary action clearly is a detriment. The only protected disclosure occurs after the dismissal decision and cannot be causative of the decision to invoke disciplinary proceedings. Moreover, we are entirely satisfied that the reason why the disciplinary proceedings were started was entirely down to the claimant's failure to carry out his call out responsibilities and his declared position of refusing to undertake call out and other work in the future. For that reason, even if any of the other alleged disclosures had been protected disclosures, we cannot see that they would displace the positive reason why this detriment occurred.

6.18. The final issue before us is the fairness of the dismissal. As dismissal is conceded, it is for the respondent to show the reason for dismissal and, having done so, that the reason falls within one of the potentially fair reasons for dismissal as defined in Section 98(1) of the 1996 Act. The reason is simply the set of facts or beliefs operating on the mind of the employer at the time it takes the decision, and causing him, to dismiss. (Abernethy –v- Mott Hay and Anderson [1974] ICR 323)

6.19. The right not to be unfairly dismissed for the reason of having made a protected disclosure is set out in s.103A under Part X of the 1996 Act. In this case the claimant has sufficient qualifying service to bring a claim for unfair dismissal and, subject to the claimant's evidential burden to advance his case, the legal burden of proving the reason for dismissal remains with the respondent (Maund v Penwith District Council 1984 ICR 143, CA)**.** If the respondent's reason is not accepted, that will be powerful grounds for inferring the real reason was the protected disclosure(s) but it does not automatically follow (Kuzel v Roche Products Ltd (2008) ICR 799, CA)**.** The tribunal must still be satisfied on the evidence what the real reason for dismissal was but, if it is held to be because of making a protected disclosure, the claimant's claim succeeds without having to go further.

6.20. If the reason (or, if more than one, the principal reason) for dismissal was not the making of a protected disclosure, and if that reason is a potentially fair reason for dismissal, it is then for the tribunal to determine on the evidence put before it whether the employer acted reasonably in relying on that reason as a sufficient reason to dismiss the claimant having regard to Section 98(4) of the 1996 Act. At this stage, the burden is neutral. This being advanced by the respondent as a conduct dismissal, we have regard to the guidance in BHS –v- Burchell [1978] IRLR 379; Iceland Frozen Foods –v- Jones [1982] IRLR 439, in particular that a dismissal will be fair if the employer held a genuine belief in the employee's "guilt" in the alleged misconduct and it was reasonable to hold that belief following a reasonable investigation. We also remind ourselves of Post office –v- Foley [2000] IRLR 2000 and Sainsburys –v- Hitt [2003] IRLR 23 CA in that what we are concerned with is whether this employer acted within the range of reasonable responses open to a reasonable employer in the circumstances in both the substance of the decisions it makes and the procedure it adopts to reach them.

6.21. The reason advanced by the respondent is the claimant's conduct in failing to carry out the call out and his settled position of refusing to undertake call out and any work involving the hire of equipment. In evaluating the claimant's automatic unfair dismissal claim and assessing whether that stated reason is genuine, it is obviously significant that the only protected disclosure occurs not only after the decision to invoke the disciplinary process, but after the decision to dismiss the claimant has already been taken. We have no doubt that the dismissing officer was acting on his genuinely held belief in the claimant's misconduct as stated. Moreover, it is significant that the decision to dismiss was taken by an individual other than those to whom the other alleged disclosures were said to have been made. Even if we had accepted some or all of the other alleged disclosures were protected disclosures, there was no basis for finding any communication between the recipient and Mr Burke on those matters. To the extent that we must of course have regard to the appeal stage as part and parcel of the fairness of the dismissal, Mr Kay's protected disclosure can only really

assist him if this is otherwise a case where the appeal would have overturned the initial decision to dismiss but, because of the protected disclosure, the appeal manager chose not to do so. Even then, the analysis does not fit comfortably with the *reason* for dismissal being the protected disclosure which, had not been made at the time of dismissal. In any event, we are entirely satisfied that Mr Appleton based his appeal decision on the facts of the disciplinary allegations and, whether or not there had been the disclosure (or any of the other alleged disclosures had been protected disclosures) the appeal outcome would have been the same.

6.22. We are therefore satisfied that the stated reason for dismissal is genuine and that the circumstances amount to a belief in the claimant's [mis]conduct which is a potentially fair reason for dismissal. That, therefore, means the automatic unfair dismissal claim fails but we must go on to consider the reasonableness of the dismissal under s.98(4).

6.23. We start with the procedure adopted although there is no explicit case put which challenges the process. The claimant was notified of the charges against him. He attended an investigation meeting where we are satisfied he was fully aware of the issues and gave as full a response as he wanted to. In the circumstances, he had been given sufficient notice of that, and the subsequent disciplinary hearing and, in respect of the latter, was reminded of his right to be represented which he positively declined. The hearing explored the claimant's side of things and a decision was reached and communicated in writing. A right of appeal was given which was exercised, albeit on paper at the claimant's request, and the matter reconsidered by an appeal manager of higher authority than the original decision maker. The appeal outcome was confirmed in writing. We see no unreasonableness in the process adopted which satisfies the minimum requirements of the ACAS code and, for an employer of this size, falls well within the range of reasonableness a reasonable employer could adopt.

6.24. As to the substance of the decision, we are satisfied that Mr Burke had a genuine belief that the claimant had unreasonably refused to undertake call out work and was stating that he would not do that or hire equipment in the future. It was reasonable for Mr Burke to hold that belief following both the initial investigation meeting and the further exploration of the issues at the disciplinary hearing itself as the claimant was stating as much. It was reasonable in the circumstances for a reasonable employer to reject the short lived initial explanation that the claimant was unwell on the call out weekend. To the extent that the claimant sought to justify why he was refusing to undertake call out or hire equipment, it was reasonably open to Mr Burke to reject that justification. The need for operatives to undertake call out and to hire equipment was a crucial part of the business model. The claimant's unreasonable stance was a fundamental attack on the necessary trust and confidence in the employee to carry out the job he was employed to do. A warning would be of limited value in the circumstances of his settled position, not least for the reason that he was already subject to a final written warning and he was, in any event, firmly maintaining his stance and inviting the employer to "sack" him in the face of it. In the circumstances, it was open to a reasonable employer to dismiss. Accordingly, we are satisfied the dismissal was fair.

6.25. We would add that if, for any reason, we were wrong about the fairness of the dismissal, the facts of this case would give rise to a significant level of

reduction in any award for the claimant's contributory conduct. Moreover, in considering where the parties' relationship had got to by July 2016, we would have to consider under the wider principles of *Polkey*, whether this employment would have continued long into the future in any event. We have no doubt that had the claimant not been dismissed when he was, a lawful termination of the relationship would have occurred one way or another within three months. Taken together with the fact that the claimant obtained new employment within a matter of days of his dismissal, if there had been an unfair dismissal under s.98(4), we cannot see that there would have been any meaningful financial compensation awarded.

Employment Judge Clark

Date 4 February 2018

JUDGMENT SENT TO THE PARTIES ON

06 February 2018

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FOR THE TRIBUNAL OFFICE