EMPLOYMENT TRIBUNALS

Claimant: Mr N Brown
Respondent: York Timber Products Ltd

HELD AT: Leeds **ON:** 28, 29, 30 November 2018

BEFORE: Employment Judge D N Jones
Ms Y Fisher
Mr K Lannaman

REPRESENTATION:

Claimant: Ms R Campbell, Citizen's Advice representative
Respondent: Miss C Elvin, consultant

JUDGMENT having been sent to the parties on 3 December 2018 and the claimant having made an application in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the Tribunal provides the following

REASONS

Introduction

1. These claims were presented to the tribunal on 17 April 2018. They relate to the circumstances in which the claimant worked as a driver and the reason he resigned from that job on 1 February 2018. Mr Brown, the claimant, says that he was required to drive a 3.5-ton truck which was frequently overloaded, or the loads protruded beyond the end of the rear of the vehicle to an unsafe degree. He says that on 44 occasions he raised these concerns with various managers and he refused to drive on those occasions. He says his managers were not prepared to do anything about it. He says he was left with nothing to do at work on those days. Another driver substituted for him and took out the vehicle. He says that this continuing state of affairs, ultimately, led to his resignation, albeit following a disagreement about a fixed penalty notice which his employers were requiring him to pay.
2. The legal claims to which these facts give rise are:

[i] unfair constructive dismissal contrary to section 103A of the Employment Rights Act 1996 (ERA), whereby the reason, or principal reason, was that he had made a protected disclosure;

[ii] unfair constructive dismissal contrary to section 100 of the ERA, whereby the reason, or principal reason, was that he had brought to his employer's attention, by reasonable means, circumstances connected with his work which were harmful to health or safety;

[iii] being subjected to detriments for having made protected disclosures or for drawing attention to such health and safety concerns contrary to sections 47B and 44(1)(c) of the ERA respectively.

Issues

3. The issues are:

Protected disclosures

3.1 Did the claimant speak to Mr Lightfoot on repeated occasions and say, "*I can't take all that timber. I'm not going out with all that timber it is dangerous. It is overloaded*", or "*I'm not taking it, I'm not taking that out on the road because when someone dies on the road because of my negligent overloading of that vehicle, I'm the one who's going to prison, not them in the office that are taking all these orders. I'm not going to be held responsible for death on the road caused by me negligently driving a truck you overloaded*", and "*whatever they tell you to put in my truck that's their business but I won't be taking it out if it is illegal*".

3.2 Did the claimant point out to Mr Lightfoot, Mr Wilson and Mr Baxter, on a number of occasions, the fact that his truck was overloaded so that the wheel arch would scrape the tyres?

3.3 Did the claimant point out to Mr Lightfoot, and on occasions to Mr Wilson and Mr Baxter, that the load hung over the rear of his vehicle by as much as 3.5 m?

3.4 Did the claimant tell Mr Wilson on about 20 occasions that the vehicle was overloaded and "*I'm not taking that truck out, look at how low the springs are at the back, you can tell just by looking at it just how dangerously overloaded it is*" and "*it is excessively overloaded*"?

3.5 Did the claimant speak to Mr Baxter on a number of occasions, at about 8 am, and tell him that there was too much timber on the trucks which were being sent out?

3.6 Did any of the above amount to disclosure of information which in the reasonable belief of the claimant was in the public interest and tended to show that a criminal offence had been, or was likely to be committed, that a person had failed, was failing or was likely to fail to comply with a legal obligation and/or that the health or safety of an individual was likely to be endangered?

Health and safety

3.7 It being accepted that there was no health and safety representative or safety committee, did the claimant bring to the

respondent's attention by reasonable means, circumstances connected with his work, as described out above?

3.8 If so, did he reasonably believe they were harmful or potentially harmful to health or safety?

Detriment

3.9 Was the claimant subjected to a detriment by any act or failure to act of his employer, of not being provided with any work on the days he raised any of the above matters, because he had made the disclosures or brought to their attention those matters?

Constructive dismissal

3.10 Did the respondent act in a manner, for the above reasons, which was calculated or likely to destroy or seriously undermine the relationship of trust and confidence between the claimant and the respondent?

3.11 If so, was that without reasonable and proper cause?

3.12 If so, did the claimant resign as a consequence?

3.13 If so, did the claimant otherwise affirm the contract by continuing to work for a sufficient period to waive his right to terminate the contract after the last event which constituted a fundamental breach of contract?

Unfair dismissal (protected disclosure)

3.14 If so, was the reason, or if more than one the principal reason, for the constructive dismissal, that the circumstances giving rise to the breaches of contract arose from the claimant having made protected disclosures?

Unfair dismissal (health and safety)

3.15 Further, or alternatively, was the reason, or if more than one the principal reason, for the constructive dismissal, that the breach of contract arose from the claimant having brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety?

Time limits

3.16 In respect of any detriment which arose before 27 December 2017, was the act or failure to act part of a series, the last of which fell after 27 December 2017, or was it otherwise not reasonably practicable for the claimant to have presented them before that time and if so, did he present them within a reasonable period thereafter?

The law

4. The relevant statutory provisions are contained within Part IVA of the ERA, sections 43A, 43B and 43C, Part V Section 44(1)(c), 47B and 48, and in Part X of the ERA, sections 94, 95, 100, and 103A.

5. In **Fecitt v NHS Manchester [2012] ICR 372**, the Court of Appeal held that the words 'on the ground that' in section 47B of the ERA should be construed as meaning 'significantly influenced by'. That was to be contrasted with the language of section 103A of the ERA. For a dismissal to be unfair the protected disclosure must be the sole or principal reason, under that provision.

Evidence

6. The Tribunal heard evidence from the claimant and from Mr Nigel Walton and Gary Thackeray, both of whom had been employed as drivers by the respondent. The respondent called Mr Philip Wilson, transport manager, Ian Baxter, sales manager, Karl Lightfoot, warehouse manager, Mr Robert Sutcliffe, managing director and Mr Vincent Newman, driver and warehouse labourer.

7. A bundle of documents of 240 pages was submitted. This was augmented during the hearing after further disclosure.

Background

8. The respondent employs about 60 employees. There are 11 vehicles at its disposal. Three were 3.5 ton vehicles, known as sprinters, and one vehicle which was 7.5 ton used for timber deliveries. Mr Brown started work for York Timber Products Limited on 17 May 2016 as a driver. Although he did not obtain his statement of particulars in writing until May 2017, it was agreed he would deliver timber from the warehouse of the respondent in Selby to customers throughout the United Kingdom. His written particulars assured a minimum working week of 24 hours.

9. The claimant has sciatica, for which he has been treated in hospital and he takes cocodamol. On occasions he would be asked to undertake work in the warehouse but he refused these offers because of the pain which arose when he bended or twisted. He did occasionally undertake work washing the vehicle but this would be up to a maximum of two hours.

10. The warehouse of the respondent opened at 6 am and closed at 5 pm. Typically, the drivers would collect the vehicle at 6 am to depart upon deliveries, the vehicle having been loaded the previous afternoon by Mr Lightfoot or others in the warehouse. Sometimes drivers would take the vehicle to their homes the previous evening, preloaded, to ensure an early start at 5am.

11. There was a weighbridge within 800 yards of the respondent's premises. It was owned by another company, but an arrangement had been entered into with the respondent to allow its vehicles to use it. Mr Thackray had taken a vehicle he was to drive to the weighbridge on one occasion, because he believed it was overloaded. His suspicion was confirmed and he removed two packages which were left at the warehouse before he embarked upon his day of deliveries. This was discovered by Mr Baxter who expressed concerns about what Mr Thackray had done. Mr Baxter had no recollection of this, but we accepted Mr Thackray's evidence. He recollected this in a straightforward way and had no obvious motive to invent it.

12. Most of the drivers knew about the weighbridge. The claimant said he was unaware of it until he left. In cross-examination, he said that he had never been told about it, "*I learned that after I left there – or late on – the weighbridge was at another business, a scrap recycling company about half a mile away, on an airfield*". Mr Walton said the drivers told each other about the weighbridge. In cross-examination he corrected paragraph 4 of his witness statement, to say that he had told Mr Brown about it at the latter end of his employment. We are satisfied that it is likely the claimant knew about the weighbridge before he left the respondent, at least for the last few weeks.
13. The claimant would typically work 42 hours a week. He was responsible for filling in his timesheets. More often than not the working day was anything between 10 and 18 hours and on occasions 19. According to his timesheet he did not always take a break, but sometimes it would be 30 minutes.
14. On 22 January 2018, the claimant attended a meeting at the respondent's premises with other drivers. There was a discussion about responsibility for fines incurred whilst using a vehicle of the respondent. The claimant believes there was a change of policy, whereby the drivers were to be responsible for all fines, including tolls and had sole responsibility for their loads. A document was produced after the evidence had been given which constituted a summary of the duties of drivers and had been signed by the claimant and dated 28 April 2015. On the first page it stated the claimant's start date was 10 May 2016, when in fact it was 17 May 2016. Mr Wilson believed that must have been the date of the claimant's interview and he thought he had failed to change the date which is next to the claimant's signature. The claimant believed this was a document he signed on 22 January 2018. The document stated that the drivers would be expected to pay their own speeding, weight limit and parking restriction fines unless otherwise advised and that fixed penalties would also be payable by the driver unless it had otherwise been agreed by the transport manager. We are satisfied this document was probably signed by the claimant shortly before he commenced his employment. The discussion on 22 January 2018 had, in all likelihood, included discussion of the responsibility of drivers to pay their fines, but it also involved the completion of documentation concerning health. The claimant had signed and dated a pro forma health questionnaire. We do not consider it likely another document he filled in would have had an incorrect date if that questionnaire had the correct date on it.
15. On 24 January 2018 Mrs Val Beety, the office administrator, told the claimant that the respondent had received a fixed penalty notice concerning the vehicle he had driven in London having been photographed illegally in a yellow marked area. She said he would have to pay the fine, but he told her that if she put her hand in his wages he would take her to a tribunal. The claimant then spoke to Mr Wilson and Mr Baxter who told him he knew the rules had changed and he would be responsible for fines, but if spoke to Mr Sutcliffe they were sure he would pay them. Shortly afterwards there was a heated discussion with Mrs Beety, during which the claimant said that he had been working 16 hours a day for £85 and they wanted to take £65 out of that. Mr Baxter, who was present, said the claimant was their best driver but too much trouble, always complained about the loads and hours he worked. He said that if he walked away that would be the end of his employment at the firm. Mr

Baxter denied saying this, but we consider the claimant's recollection is more reliable.

16. The claimant was clearly very upset. He left the premises and spoke to a support worker who had assisted him, in the past, in writing out applications for employment. With his assistance he prepared a resignation letter on 1 February 2018 and sent it to the respondent. In it, the claimant referred to the meeting on 22 January 2018 and how drivers had been told they would have to take full and sole responsibility for the health and safety of the company vehicles and any charges, traffic penalties incurred during any delivery route. He said, "*I feel as a result of this meeting and the forms/paperwork that the drivers were encouraged to sign (though weren't given copies of the signed forms), I have no option but to terminate my employment. I feel it isn't my entire responsibility and the company management should themselves advise on every delivery load, which are often clearly above the legal weight limits for the 3.5 ton flatbed trucks, let alone the length of the timber that can often exceed the maximum legal length beyond these trucks of 1 m.… In the past I have raised on more than one occasion, my concerns about the excessive loaded weights and the length of loads carried by my vehicle. This resulted in being told that if I didn't take out the entire loaded delivery (even if it clearly exceeded the safety limits of that vehicle), I would not be working much longer"*.

Discussion, analysis and conclusions

Protected disclosures

17. There was a flat contradiction between the evidence of the claimant on the one hand and that of Mr Lightfoot, Mr Wilson and Mr Baxter on the other as to whether or not the comments summarised at paragraph 3.1 to 3.5 above were made. No record of any such discussion exists. The claimant did not keep a diary nor make any formal complaint by way of grievance or otherwise. Miss Elvin suggests that his failure to do so damages his credibility.

18. We do not consider that in this working environment, and in the light of the claimant's acknowledged difficulties with literacy, in respect of which he sought assistance from a support worker, that the absence of any record undermines the validity of his account that he made complaints. However, the absence of any contemporaneous material creates evidential difficulties when discussions which occurred over a matter of a minute or two, many months ago, are in dispute. We would have not been satisfied on a balance of probabilities that the claimant had raised these matters as he says, on his contested evidence alone.

19. There is other material which is supportive. Mr Walton said that he was unwilling to take out over-loaded wagons and this was why he left. He often drove the 7.5 ton truck and was given a final written warning for working excessive hours in that vehicle. He said that his managers had wanted him to take out the 3.5 ton truck for long hours, but he had refused and this had led him to working only three days per week. Mr Thackray also said that he had concerns about his 3.5 ton vehicle being overloaded and he had been reprimanded for removing two packages by Mr Baxter. The managers of the respondent draw attention to their records, which demonstrate that there has been no financial penalty or prohibition notice imposed for overloading vehicles between 1 January 2017 on 30 June 2018. Moreover, this is confirmed in a

response from the DVSA to Ms Campbell, confirming that there have been no such fines. This contradicts the claimant's evidence who said he had been fined on two such occasions for driving an overloaded vehicle and these have been paid by the respondent.

20. Taking all these factors into account, we consider the claimant did speak to Mr Lightfoot, Mr Wilson and Mr Baxter on a number of occasions to express his belief that the vehicle he was to drive was overloaded and he drew attention to the lack of space between the wheel arch on the tyre and the compression on the springs. We are not satisfied from the evidence of the claimant that he has identified the occasions specifically, when he made these complaints. He has sought retrospectively to attribute them to the days when he was off work. For reasons we shall set out, we are not satisfied about his account of why he did not work on those days. That does not deflect from our finding that there had been disclosure of information about his belief there was overloading on a number of occasions over his period of employment.

21. We are satisfied that the claimant had a reasonable belief that this tended to show a commission of a criminal offence, breach of a legal obligation and that it might endanger the health or safety of an individual. It is common knowledge that regulations exist in respect of the weights which may be transported in vehicles on the highway and this had been specifically drawn to the driver's attention by the managers of the respondent. By reference to the compressed springs and narrow gap in the wheel arch, a reasonable belief arose generating a proper expression of concern. That this would have been in the public interest was not contested by Miss Elvin. Whilst we accept that the claimant had become aware that there was a weighbridge, towards the end of his employment, we do not consider his failure to weigh his vehicle detracted from the reasonableness of his belief. It was a concern other drivers had shared, such a Mr Walton and Mr Thackeray.

Health and safety

22. These complaints concerned circumstances about the claimant's work which he reasonably believed were harmful or potentially harmful to health and which he drew to his employer's attention by reasonable means.

Detriment

23. The claimant said in evidence that on those occasions when he had marked himself on a day off in his timesheets, he had not worked because he had refused to take out a truck which was, in his view, visibly unsafe because it was overloaded. He said he had photographed the vehicle on some of those occasions and a number of photographs were included in the bundle of documents. There is no date provided for these photographs and they portray the truck parked at the side of a major road with trees in the background. There is no reference to where these photographs were taken. They demonstrate timber which extends beyond the rear of the vehicle, in some instances by nearly 2m, according to Mr Wilson, who was questioned about them. He agreed that they were unsafe, but said this was because the timber had slipped during the journey and after some deliveries had been made. The respondent's managers were adamant that no timber was transported in these vehicles in excess of 6 m and therefore, if properly loaded, there could never be an

extension beyond 1.8 m. We accepted that in principle as well as the explanation that the photographs showed timber which had shifted during transportation.

24. It is lawful for an overhang of 1m without any additional requirements, but for an overhang between 1m and 2m it is necessary to have a visual sign at the rear of the overhang. A visible jacket can be seen in the photograph at the end of the protruding timber.

25. The explanation of Mr Wilson and Mr Lightfoot as to how these loads had come to be unsafe was a credible one and may well have reflected upon the carelessness of the driver to re-secure the load after a delivery. The claimant was stopped by the DVSA because of an unsafe load. This may well have been an occasion on which the claimant photographed this vehicle. The evidence of these photographs did not establish that the vehicle had left the premises of the respondent unsafe either by reason of it being overloaded or by reason of an unlawful overhang. The claimant never provided copies of these photographs to his managers at any time during his employment. This, as well the lack of particulars about when they were taken and for what purpose, troubled us and limited the reliance that could placed upon them as supportive of the claimant's arguments. They did not assist at all on the question of whether the vehicle was overloaded.

26. In response to the suggestion of the claimant that he had refused to take out the vehicle on the days in which he had marked himself as off work, Mr Lightfoot and Mr Wilson suggested this may have coincided with a long previous day's work, such that a rest day was then afforded to him. Ms Campbell properly illustrated that no such pattern could be discerned from the claimant's records. Indeed, as she pointed out, the claimant regularly worked very long days, one after the other, in contravention of the legal requirement for drivers to work only an 11 hour day and for only 10 hours driving, with appropriate breaks. This undermined the reliance placed on the written warning provided to Mr Walton, by the respondent to establish it took seriously health and safety concerns and regulations. That arose from a tacograph taken from the 7.5 ton vehicle and would readily be open to the inspectorate, for which the respondent could be held liable. The use of the 3.5 ton trucks had no tacographs and Mr Walton said he had been pressured to work excessive hours on those and refused. The claimant's records support a suggestion that these vehicles were driven for longer than was appropriate.

27. Notwithstanding, we were not satisfied, on balance, that the claimant did refuse to take out vehicles on these days. He made no reference to this in his resignation letter, but his concern then was principally that the drivers were being held solely responsible for their vehicles and how they had been loaded. We accept the submission of Miss Elvin, that if the claimant had not worked on these days because he had refused to drive a vehicle which was unsafe, he would have been unlikely to record this in his own timesheet as a day off. He might have put 'sent home' or 'no work'. In addition, as she pointed out, one would expect him to have claimed for some of the time he was at the warehouse, before leaving on a day he had reported for work. The claimant said that he had waited for up to 2 hours, until 8 am, for Mr Wilson or Mr Baxter to arrive to lodge his complaint about the safety of the vehicle, on between 12 and 20 occasions. If he had been deprived of work, because he had declined to take out an unsafe vehicle, we would have expected him to claim that time. On a number of occasions, there are claims for two hours of work, but later in

the day, no doubt when he would have been cleaning or collecting his vehicle. This undermines the claimant's evidence that he refused to drive on up to 44 occasions, which would be nearly once per fortnight. The claimant chose to drive the vehicle on many occasions he said he believed it was unsafe. We are not satisfied that he made selective decisions, as he now says, not to drive. In addition we accepted Mr Baxter's evidence that this employer would not have been likely to tolerate an employee refusing to do deliveries, certainly more than on three occasions. We therefore reject the claimant's evidence that he refused to take out any deliveries.

28. We have considered whether there was any other act or failure to act which may constitute a detriment, on the ground that the claimant had made these complaints. He might have been expected to be offered alternative work in the warehouse. Mr Lightfoot said that whenever the claimant was offered work in the warehouse he declined it, and the claimant himself said that he could do not do this because of his back condition.

29. It follows that we are not satisfied that the claimant was subjected to any detriment, that is that the respondent acted or failed to act, to his disadvantage, as a consequence of the concerns he had expressed about the safety of the vehicles.

Constructive dismissal

30. It would have been a breach of the implied term of trust and confidence for the respondent to require the claimant to drive vehicles which were overloaded or unsafe because the load protruded dangerously beyond the rear of the vehicle. This case, however, concerns a resignation relating to action taken by the respondent because of the claimant's complaints. Had the claimant had been employed for more than two years, and had he resigned as a consequence of an unsafe system of work, he may have had a good claim based upon a resignation for that reason, under section 98 of the ERA. (That is not to say that we have found that the respondent did require him to drive unsafe vehicles, but rather that the claimant had a genuine and reasonable belief that it had. We would have had to make that further finding, in such a claim). Because the claimant does not have the qualifying period, it is necessary for him to establish a different type of claim, under section 100 or 103A, of unfair dismissal. These provisions are designed to protect employees from the adverse consequences of action taken in response to their complaints.

32. We have rejected the claims that the claimant had been subjected to any detriment as a consequence of the concerns he had raised about health and safety and legal obligations. There is not a history of acts calculated or likely to destroy trust and confidence which spring from the raising of complaints.

33. The reasons the claimant chose to leave his employment are well expressed in the letter of resignation. We are satisfied that the claimant was very angry about the prospect of having his pay reduced substantially, if he had to pay fines, particularly if that arose because his vehicle had been in an unsafe condition for which he believed his employers were evading responsibility. In one sense, this is connected to the earlier complaints the claimant had raised, because he believed the managers had ignored them. However we are not satisfied that the respondent did anything in response to the claimant's expression of concern. They were indifferent to them. We are satisfied that his resignation was because he was being expected to pay a fine and feared that he may be exposed to further financial penalties, some of which he feared would be as a result of driving a vehicle which he believed was overloaded.

That is not sufficient to bring the unfair dismissal claims within the meaning of sections 100 and 103A of the ERA.

Employment Judge D N Jones

Dated: 17 December 2018