EMPLOYMENT TRIBUNALS

Claimant: Mr B F Wojcik

Respondent: JM Gorry & Son Limited

Heard at: Manchester **On:** 22 - 25 January 2019

Before: Employment Judge Franey
Mr G Pennie
Mr B J McCaughey

REPRESENTATION:

Claimant: In person
Respondent: Mr A Webster, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of automatic unfair dismissal because of a protected disclosure contrary to section 103A Employment Rights Act 1996 fails and is dismissed.

2. The complaint of automatic unfair dismissal because of health and safety reasons contrary to section 100 Employment Rights Act 1996 fails and is dismissed.

3. The complaint of detriment in employment because of health and safety reasons contrary to section 44 Employment Rights Act 1996 fails and is dismissed.

REASONS

Introduction

1. By a claim form presented on 26 March 2018 the claimant complained that he had been unfairly dismissed from his role as a heavy goods vehicle ("HGV") driver in January 2018. His claim form asserted that he had been dismissed because he had reported problems with the tyres of the lorry he was assigned to drive. He also complained that wages and holiday pay due to him had been delayed because of his complaints about the tyres.

2. By its response form of 9 May 2018 the respondent resisted the complaints on their merits. It denied that the claimant had made any protected disclosure or health and safety disclosure: the tyres were above legal limits and safe at all material times. It also denied that there had been any dismissal. The claimant had resigned by walking out. Any delay in payment had nothing to do with any complaints he had made.

3. The complaints and issues were clarified at a preliminary hearing before Employment Judge Horne on 4 June 2018.

4. Following the hearing the respondent amended its response form on 20 June 2018.

Issues

5. At the start of our hearing we went through the complaints and issues identified by Employment Judge Horne in his Case Management Order. Both parties confirmed that the list remained accurate. It followed, therefore, that the issues to be determined by the Tribunal were as follows:

Protected Disclosure

(1) Can the claimant establish that he made a protected disclosure within Part IVA Employment Rights Act 1996 on one or more of the following occasions in that he disclosed information which he reasonably believed tended to show that the health and safety of any person was being endangered, or that a legal obligation relating to health and safety was being breached, and that he reasonably believed that his disclosure was made in the public interest:

(a) On a series of occasions in December 2017 when the claimant spoke to Mr Thomas and Mr Squires about the tyres on the vehicle provided to him;

(b) On 4 January 2018 when he disclosed the same information to Mr Thomas; and/or

(c) On 8 January 2018 when he disclosed the same information to Mr Thomas again?

Health and Safety Disclosures – sections 44 and 100 Employment Rights Act 1996

(2) Can the claimant establish that on any of the following occasions he took steps protected by section 44 and/or section 100 Employment Rights Act 1996 in that:

(i) On any of the occasions set out in paragraph (1) above, being an employee at a place where there was no safety representative or safety committee, he 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; and/or

(ii) On 8 January 2018 in circumstances of danger which the claimant reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left his place of work; and/or

(iii) On 8 January 2018 in circumstances of danger which he reasonably believed to be serious and imminent, he took appropriate steps to protect himself or other persons from the danger by refusing to drive the vehicle in question?

Unfair Dismissal – Part X Employment Rights Act 1996

(3) Can the claimant establish that on 8 January 2018 he was dismissed by the respondent within the meaning of section 95(1)(a) Employment Rights Act 1996?

(4) If so, what was the reason or principal reason for dismissal? Was it:

(a) One or more protected disclosures, rendering dismissal automatically unfair under section 103A;

(b) One or more actions protected by section 100, rendering dismissal automatically unfair; or

(c) Some other reason, in which case the unfair dismissal complaint fails?

Detriment in Employment – section 44 Employment Rights Act 1996

(5) Did any action protected by section 44 sure have a material influence on:

(a) Any act or deliberate failure to act by the respondent resulting in a delay in payment of wages in January 2018; and/or

(b) Any act or deliberate failure to act by the respondent resulting in delay in payment of holiday pay for holidays in December 2017?

Remedy

(6) If any of the above complaints succeed, what is the appropriate remedy?

Evidence

6. The parties had agreed a bundle of documents which ran to over 250 pages. Any reference in these reasons to page numbers is a reference to that bundle unless otherwise indicated.

7. The claimant gave evidence himself and called two other witnesses. They were Pawel Tloczek, a friend to whom the claimant had been talking about events as

they happened, and Marcin Dudkiewicz, who worked with the claimant for the respondent.

8. The respondent called four witnesses. David Squires was the Garage Foreman, Jayson Thomas the Transport Manager, Stephen Brough the General Manager, and Michael Gorry the Managing Director.

9. During the hearing it was agreed that we did not need to hear in person from Mr Dudkiewicz, Mr Tloczek or Mr Gorry because neither the other party nor the Tribunal had any questions arising out of their witness statements. We took the evidence of these three witnesses into account as written statements.

Relevant Legal Principles

10. The relevant legal principles which the Tribunal applied can be summarised as follows.

Protected Disclosure

11. Whether a protected disclosure has been made is covered by Part IVA of the Employment Rights Act 1996. Section 43B identifies disclosures which will qualify for protection if they are made to the employer. The relevant parts are as follows:

> **"(1) In this Part 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…that the health or safety of any individual has been, is being or is likely to be endangered…"**

12. This is something to be determined objectively: **Beatt v Croydon Health Services NHS Trust [2017] IRLR 748** (Court of Appeal. There must be information disclosed, not simply a bare allegation, although often the two are intertwined: **Kilraine v London Borough of Wandsworth [2018] ICR 1850**. It matters not if the information disclosed is already known to the recipient: see section 43L(3).

13. The belief that the information tends to show that health and safety will be endangered need only be a reasonable belief: it does not matter if that belief is incorrect if it is nevertheless reasonable.

Health and Safety Disclosures/Actions

14. The protection for health and safety disclosures or actions provided by section 44 (detriment claims) and section 100 (unfair dismissal) overlaps with the concept of a protected disclosure. Section 100 provides that:

> **"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that…**
>
> **(c) being an employee at a place –**
>
> **(i) there was no such representative or safety committee, or**

> **(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,**
>
> **he 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;**
>
> **(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work; or**
>
> **(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger."**

15. Section 44 provides protection against being subjected to a detriment short of dismissal for the same reasons.

16. Both sections provide (section 100(2) and section 44(2)) that:

> **"…Whether the steps which [**an**] employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time."**

Detriment Complaints - causation

17. In any complaint under section 44 that there has been a detriment by any act or deliberate failure to act the test is whether the protected step had any material influence on the decision.

18. As explained by the Employment Appeal tribunal in **International Petroleum Ltd and ors v Osipov and ors UKEAT /0058/17/DA,** if the claimant proves facts from which an inference to that effect could be drawn, the respondent will need to be ready to show the ground on which any act or deliberate failure to act was done (section 48(2)).

Unfair Dismissal

19. The first question is whether there has been a dismissal as defined by section 95(1). That is a question of who really ended the contract.

20. Where ambiguous words or conduct are used, the test is essentially an objective one. All the surrounding circumstances (both preceding and following the incident) and the nature of the workplace must be considered, and if the words are ambiguous the Tribunal should ask itself how a reasonable employer would have understood them in the light of those circumstances. The subjective intention of the speaker is not determinative. This position can be ascertained from the decisions of the Employment Appeal Tribunal in **Martin v Yeoman Aggregates Ltd [1983] IRLR 49** and **J & J Stern v Simpson [1983] IRLR 52**.

21. If dismissal is established, the key question is what was the reason or principal reason for it. The reason or principal reason for dismissal is derived from considering the factors that operate on the employer's mind so as to cause him to

dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

22. Section 103A provides as follows:

> **"An employee who is dismissed shall be regarded for the purposes of this Part 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."**

23. Section 100 (quoted above) contains the equivalent provision for health and safety dismissals.

Relevant Findings of Fact

24. This section of our reasons sets out the broad chronology of events necessary to put our decision into context. There were some disputed issues of fact which we had to resolve and these will be addressed in the discussion and conclusions section below. Not every matter raised in the evidence was relevant to our decision; irrelevant matters are excluded.

The Respondent

25. The respondent is a haulage company based in Morecambe on the Lancashire coast which has just over 60 employees and operates a fleet of approximately 45- 50 heavy goods vehicles. Each HGV vehicle is a cab unit with three axles to which standardised trailers are fixed. The rearmost axle (sometimes called the drive axle) drives the wheels, and has four wheels with tyres affixed to it.

26. The respondent's area of operations is the whole of the UK. Many of its drivers operate on a day by day basis, returning to the depot each day from deliveries within a reasonable distance. Some are known as "roamers" and will deliver over long distances spending a few nights away before returning to the depot.

27. The respondent must ensure that its vehicles are roadworthy whenever they are in use. As well as the annual MOT, vehicles are subject to a five weekly inspection. This takes about an hour and a half. There is a checklist which is filled in which includes a check on the tyre tread wear and tyre pressures. If the condition of the tyres is not satisfactory they can be replaced.

28. They are also replaced when they near the legal minimum for an HGV vehicle: a depth of at least 1mm across three quarters of the breadth of the tread and in a continuous band around the entire circumference.

29. In addition to five weekly checks, each day that a driver takes a vehicle out the driver must complete a "walk round check". The sheet which must be completed by the driver runs to two pages and includes a check on the condition of the tyres. The walk round check must be done again during the day if a different trailer is fixed to the cab.

30. There is also a system by which drivers can report defects on vehicles by means of a defect report. The form identifies the vehicle, the driver, the date and the problem which has been identified. A manager or technician completes the section where the action taken in relation to the fault is recorded, and signs the form.

31. The vehicles undertake extremely high mileage, and tyres periodically wear out and have to be replaced. There are broadly three different categories of tyre in use.

- **New** tyres are generally used for vehicles which are away from the depot for several nights at a time.

- The majority of the vehicles used on a day by day basis have **part worn** tyres. These are tyres which have already been run on a different vehicle but which are still within the legal limit.

- Finally, only 2-3% of the respondent's vehicles (perhaps one or two cabs at a time) are fitted with **recut tyres.** Tyres can be recut in accordance with manufacturer guidelines so as to renew the tread pattern and depth. This is common practice in the industry as it ensures that maximum road life is gained from each tyre.

The Claimant

32. The claimant is a qualified HGV driver. He is from Poland but has worked in the UK since 2004. He does speak English but participated in our hearing with the assistance of an interpreter. He had previously been employed by the company some years earlier, but the relevant period of employment began in January 2017.

33. His contract appeared between pages 70 and 73, and the staff handbook at pages 74-89. The contract authorised deductions from pay where profit was lost due to a driver not making a delivery (page 72).

34. The documents provided to the claimant included the health and safety policy. This appeared at page 65 and there was a health and safety policy statement in the staff handbook between pages 91 and 95. The company health and safety supervisor was Mr Thomas and the policy said that staff unsure about duties they may be asked to perform should consult Mr Thomas about it.

35. The induction check sheet (page 66) showed that he was given a file with walk round sheets and defect reports, and his training record at pages 68 and 69 showed that he signed to confirm he had been trained on daily vehicle checks and the defect reporting system. His knowledge of the defect reporting system was evident from the fact that between January and June 2017 he supplied four defect reports (pages 114-117) about a range of problems on the vehicle which he was allocated to drive every day.

36. That vehicle had registration number CX08 FEG and we will refer to it as the claimant's vehicle. He was engaged on daily deliveries rather than "roaming" deliveries at the material time.

Claimant's Vehicle

37. The claimant's vehicle was subject to a five weekly inspection on 3 November 2017. The completed checklist appeared at pages 102-103. One of the tyres on the middle axle was replaced because it had been cut and the cords which were part of the structure of the tyre were showing. The tread depths across the four tyres on the drive axle were recorded as 6mm (three tyres) and 4mm (one tyre).

38. The vehicle passed its MOT on 6 November 2017 (page 165).

39. There was a further inspection on 28 November 2017 (pages 105-106). Two of the tyres on the drive axle remained at 6mm, one had gone down from 6mm to 4mm, but one of the tyres that had been 4mm was now showing with 5mm of tread. They were all within legal limits.

December 2017

40. In December 2017 the claimant spoke to Mr Squires on more than one occasion with a concern about the tyres. There was a difference between the witnesses about exactly what the claimant said, and we will return to that in our conclusions. It was common ground, however, that the claimant mentioned low temperature or ice and that the tyres were losing grip.

41. The claimant explained in evidence to our hearing that he was not concerned with the tread depth but rather with the fact that when the temperature fell to 0˚ or below the tyres on his vehicle would become very slippery, as though the rubber was like plastic. He believed that this was because the tyres had been changed without his knowledge and the tyres now fitted were recut to a level where rubber of a harder compound was in contact with the road surface. This was not evident on his walk round checks, as often the temperature at the depot near the coast would be higher than inland, but he would experience problems with the tyres when he left the depot and the temperature fell to 0˚ or below.

42. On each occasion Mr Squires checked the tyres and found that they were above the legal minimum for tread depth. There was no record of any change to the vehicle's tyres. No further action was taken.

43. The claimant also maintained that he raised the same concerns with Mr Thomas later that month, and we will return to that in our conclusions.

44. The claimant did a series of walk round checks on his vehicle during December which appeared in our bundle between pages 118-130. None of them recorded any concern about the condition of the tyres. No defect report was completed by the claimant.

45. On 29 December 2017 the claimant took a photograph using his personal mobile telephone whilst driving the vehicle on the M6 motorway. It showed significant amounts of snow on the carriageway leaving only one lane clear.

2 January 2018

46. Mr Squires did another inspection of the vehicle on 2 January 2018 (page 107-108). A tyre on the middle axle was replaced. The tyres on the drive axle did not require attention.

4 January 2018

47. The claimant said that he raised the same concerns with Mr Thomas on 4 January 2018. On his walk round check that day he made no entry about tyres (page 132). It was common ground that the claimant had spoken to Mr Thomas about tyres that day but there was a difference in detail about what was recalled about that conversation. The claimant was telling Mr Thomas that he had told Mr Squires about the problem in December but nothing had been done. Mr Thomas said that if the tyres had been checked by Mr Squires and found to be safe and legal there was nothing he could do. Once again no defect report about tyres was completed by the claimant.

48. Shortly after this exchange Mr Thomas sent an email to Mr Gorry. His email appeared at page 173. It read as follows:

> **"Driver Bogumil Wojcik came to the office this morning very upset and complaining about the tyres on his unit, he explained that twice he had defected them to Dave Squires but he is constantly being told these are legal and fine for the road. I told him he must complete a written defect report and hand it in but he just kept repeating himself and saying 'I'm now reporting to you as I won't speak with the garage staff, they don't listen!' I told them if Dave Squires has said the tyres are safe and legal I'm not going in there to challenge his decision because end of the day he is our garage foreman and this is not my job, so again I instructed Bogumil to complete a written defect report so I would sign and date it and also photocopy it so he could keep a copy to prove he has handed this into the garage just to cover his back side in case an 'accident' occurred as a result of the tyres, but again he didn't want to do this."**

5 January 2018

49. No mention of tyre problems was made on the walk round check on 5 January 2018 (page 134).

8 January 2018

50. Matters came to a head on Monday 8 January 2018. The claimant attended for work at the start of the day. Unusually the temperature was already -3˚ or thereabouts at the depot. The other vehicles went out and his was the only one left.

51. He went to speak to Mr Thomas at the office window, told Mr Thomas the problem and a brief discussion ended with the claimant saying he was going home, and he left the premises. There was an important dispute of fact about the precise words used and we will return to this exchange in our conclusions.

52. Mr Thomas believed the claimant had resigned and left the job. He told Mr Brough what had happened. Mr Brough got Mr Squires to check the tyres again. The tread was safely above the legal minimum.

53. The claimant rang back at around 11.00am. His call was taken by Mr Ferguson. The claimant asked what work he was doing "tomorrow". Mr Ferguson passed him to Mr Thomas. The claimant did not know that it was Mr Thomas he was speaking to, but they spoke on the telephone. There was a dispute about precisely what was said during this conversation but the claimant formed the view that he was being dismissed on the telephone.

54. Although the claimant did not realise this, part of the conversation was overheard by the Managing Director, Mr Gorry, in the office. He asked Mr Thomas if the person on the telephone was the driver who had walked out on them that morning. Mr Thomas confirmed it. Mr Gorry said to Mr Thomas that if the claimant wanted to come back he would have to go and see Mr Gorry. The claimant was not aware of this exchange.

55. His employment having ended, the claimant came into the office on the afternoon of 8 January and returned his gate key and downloaded his digital tachograph.

9 January 2018

56. On 9 January Mr Thomas sent Mr Brough an email summarising what had happened the previous morning. His email said:

> **"As per conversation – Bogumil yesterday morning 08.01.2018 came into work at the office window, and started his conversation with today is too cold for the tyres again and nothing I see has been done to replace them so I'm going home and finishing. He kept on repeating himself about how many times he reported this to Dave Squires, he also said this was my fault as he reported it to me last time! But again I said that I offered to help him by completing a defect report form (which is part of his job) but he just ignored me and carried on talking and then left. He then called the traffic phone around 11.00am and spoke to Chris Ferguson saying he will be back to work tomorrow as long as the tyres are replaced, I was then handed the phone from Chris and Bogumil started saying 'if this was in my country it wouldn't be allowed' to which I told him this was irrelevant as he isn't in Poland and the rules and regulations here are different. I then informed him the tyres on his truck are safe and legal and were re-measured by yourself (Steve Brough) this very morning for tread depth which read 4-5mm, Mick Gorry was in the office at the time and overheard the conversation and said as he has walked out on the job he isn't to return or at least come and see him if he does, that's where the conversation ended. He came to our office roughly about 13.30 hours to shake my hand and to say thank you for the job, but if no defects like this get rectified then he cannot work no longer, he handed in his key and told me he already has a new job."**

Payments

57. The claimant was due to be paid his wages for the previous week on Thursday 11 January 2018. Payment of wages for that week was delayed and we will return to that issue in our conclusions. Payment was eventually made by cheque on 23 January 2018. It cleared into the claimant's account on 28 January 2018.

58. The claimant was also due some holiday pay. He had been paid on 2 January for two days' off on Christmas Day and Boxing Day 2017, and in his payslip of 16 January (page 234) he received payment for ten days of accrued but untaken leave. That was paid into his account on 18 January.

59. Having raised holiday pay in his letter of 15 January (see below), on 23 January the claimant was paid for two days of leave on 1 and 2 January 2018.

Letters after Termination

60. The claimant's letter of 15 January 2018 appeared at page 174. He said he had been employed without any offences, verbal or written warnings, but then on Monday after refusing for specific reasons was dismissed from work immediately. He asked for a detailed explanation of why he was fired, why his pay had been delayed, and why money had been stopped for his holiday.

61. The reply came on 17 January from Mr Brough at pages 175-176. The relevant parts included the following:

> **"I should like to point out firstly that at no point were you dismissed from work immediately, as stated in your letter, you refused to do the work given to you on the morning of Monday 08/01/2018, stating that it was 'too cold'. You walked out and went home, the company accepted this as your resignation without notice and such, the delivery and collection that was planned for you by the traffic office was not completed, letting down the customer and giving the company a bad name on reliability.**
>
> **At no point did you attempt while you were in the depot to make contact with the General Manager to discuss the issue of 'too cold'. On the day in question, every other driver who left our depot made their delivery and collection without incident or delay.**
>
> **You contacted the traffic office later in the morning to find out 'what you would be doing on Tuesday', to be told that you no longer worked for us, as you in essence refused to do your work allocated and went home, leaving the company accepting that you resigned from your position with no notice period…**
>
> **The company retained your wages for the week worked previously as we suffered a loss on the failed delivery and collection, we have since taken advice and appreciate that we have to pay your wage for that week, which is enclosed by cheque with relevant deductions for tax etc.**
>
> **The company have paid all outstanding holidays due to you including days carried over from the holiday period 2016/17, which equates to ten days, which will be paid into your allocated account on Thursday 18/01/2018.**
>
> **Following the hand delivery of your letter on Monday 15.01.2018, I requested Mr Jayson Thomas explain the sequence of events on Monday 09/01/2018, where yet again, you stated that you refused to do the work because it was 'too cold' and were going home. I would say that if every driver that was employed by JM Gorry & Son Ltd refused work due to it being 'too cold', the company would not be in business.**
>
> **Previously you expressed concern to the workshop about the treat on your rear tyres on vehicle CX08 FEG, these tyres were checked twice and deemed to be road legal with 3 to 5mm of tread across the full width of each tyre, the legal limit is 1mm, the company have photographed the tyres clearly showing the tread depth. You spoke to Mr Jayson Thomas about tyres on 04/01/2018, you were advised to complete a defect note, which in the event of an incident could be used as evidence, this you refused to do, even though it is part of your legal responsibilities as HGV driver to show that you have performed a daily walk round check and identified defects.**
>
> **Having answered your concerns, I now consider this matter closed."**

New Employment

62. On 12 January the claimant completed an application form for an employment agency. He started a new job on 29 January 2018. In our hearing he was cross examined as to why in a letter to the respondent of 30 October 2018 during these proceedings he had referred to that as his "second job". He denied having undertaken any other job prior to starting that one. It was the claimant's case that he did not have another job to go to on 8 January, and that he would not have resigned in those circumstances when he had a family to support.

63. The vehicle was inspected again on 8 February 2018 and the tyres were replaced (page 111).

Submissions

64. At the conclusion of the evidence each side made an oral submission to the Tribunal.

Respondent's Submission

65. For the respondent Mr Webster began by suggesting that where there was a conflict of fact the evidence of the respondent's witnesses should be preferred to that of the claimant. He drew attention to the way in which he suggested the claimant had answered questions, the issue over whether he had had a job before his current role, and his belief without evidence that the tyres on the vehicle had been changed in December.

66. Turning to the question of how employment ended on 8 January 2018, he submitted that there had been no dismissal. The claimant had used the word "finishing" which had a particular meaning in the haulage industry. There was an unambiguous resignation. Even if the words used were found to be ambiguous, the reasonable interpretation was that his employment was ending. There was no need for him to leave the site otherwise. He had raised the same issue on 4 January but had still driven his vehicle that day.

67. As to the subsequent phone call, Mr Webster submitted that the claimant's account was improbable. The conversation could not have been that brief. The words used by Mr Thomas were themselves ambiguous and therefore in reality if the claimant had not resigned in the morning he had done so in the afternoon when he returned his gate key and downloaded his tachograph information. He urged us to find there had been no dismissal.

68. Turning to the protected disclosures, Mr Webster conceded that the Tribunal could find the claimant had disclosed information, and did not challenge the assertion that the claimant reasonably believed his disclosure was in the public interest, but concentrated on whether the claimant had a reasonable belief that the health and safety of any person was likely to be endangered. He submitted that the UK road network and haulage industry is heavily regulated and at no stage had there been any suggestion that there had been a breach of a legal requirement. There was no expert evidence to support the view that it was the tyre compound which was the problem. No other vehicles had suffered this difficulty. Most significantly the claimant

had not done any defect form or mentioned tyres on the daily checks. In addition, the claimant had taken photographs whilst driving that vehicle in snowy conditions on the M6. Accordingly, he invited us to conclude that the claimant had lacked any reasonable belief sufficient for either a protected disclosure or a health and safety disclosure.

69. In any event, he submitted that Mr Thomas had been a safety representative in a way which prevented the claimant relying on the relevant part of section 100.

70. As to the reason for the dismissal, Mr Webster submitted that even if there had been protected disclosures or health and safety disclosures they were not the reason or principal reason for any dismissal that might be found to have occurred. If the claimant was dismissed by Mr Thomas it was because of a mistaken belief the claimant had already resigned. Similarly, there was no causal connection between any disclosures and the delay in payments which had all been clearly explained by the respondent. We were invited to dismiss all the claims.

Claimant's Submission

71. The claimant had prepared a written submission which was read to the Tribunal before we asked him some specific questions about points we had to consider.

72. The claimant began by emphasising the difficult of getting information out of the respondent in this case. Some things had become clear only on seeing the respondent's witness statements. He emphasised the role of Mr Gorry as Managing Director, particularly his involvement on 4 January when all he was concerned about was that the tread depths were legal. There had been no effort to drive the vehicle to test whether what he was saying was true. The tyres on his vehicle had been the worst ones in the company. If only 3% of vehicles had re-cut tyres that would make it one or two vehicles, probably his vehicle and the one driven by Mr Dudkiewicz.

73. The claimant submitted that there was no requirement for defects to be reported in writing. There had been examples in the evidence of faults being repaired without a written report. There was no requirement for a health and safety report to be made in writing. When Mr Thomas told him to fill in a defect report it was not to prevent an accident but simply to cover his back if an accident happened. That was not the purpose of the defect reports.

74. The photograph taken in the snow on the M6 had been taken using a camera which was mounted on the windscreen and it required only one press of a button. It was no different to receiving a text message from the office, which did happen from time to time when drivers were driving.

75. The claimant then expanded on the theme of the company's approach to health and safety. He referred to problems with trailers and night heating in the vehicles. He underlined the steps he had taken to bring the problem with his tyres to attention. As a driver he was responsible for the safety of the vehicle he was driving and he could see that there was a problem. The complaints he made were the main reason he was dismissed. The failure to pay him on time was also punishment for how he had behaved.

76. The Tribunal asked the claimant why he considered that when he left site on 8 January there was serious and imminent danger which he could not reasonably have averted. The claimant said that the vehicle was his place of work, and the temperature that day was such that driving the vehicle was not safe.

77. As to whether there might have been a dismissal because of a mistaken belief he had resigned, the claimant said he saw the situation differently. He reiterated the events of 8 January and said that he gave the company no reason to believe he was leaving the job. He invited us to find in his favour on all the claims.

Discussion and Conclusions

78. Having reminded ourselves of the legal framework summarised above, we considered the list of issues.

Issue (1)(a): Protected Disclosures December 2017

79. The first question we considered was whether the claimant made protected disclosures in December. We needed to make a finding of fact about what he actually said.

80. Mr Squires accepted the claimant spoke to him more than once and that the claimant raised a concern about the tyres on the vehicle, a problem with ice and with wheelspin on a couple of occasions. He understood the claimant to be asking for new tyres on the vehicle. In his evidence to our hearing the claimant denied using the word “ice” but said he was complaining about temperatures at zero or below. He was emphasising that the tyres lost grip and became slippery in those conditions. There was not much factual difference between those two accounts and we found as a fact the claimant told Mr Squires more than once that he wanted new tyres because the ones on his vehicle would slip and lose grip at zero or below.

81. We found that the claimant did not tell Mr Thomas this in December because the claimant did not give clear evidence about any discussions with Mr Thomas. Mr Thomas did not recall any such discussions.

82. We then had to apply the law to our findings of fact. We were satisfied the claimant did convey some information, which was that the tyres on his vehicle tended to lose grip in zero or sub-zero temperatures. He reasonably believed that his disclosure was in the public interest because it was a matter of safety on the public roads. The question was whether he had a reasonable belief that the information tended to show that health and safety would be endangered.

83. For the company Mr Webster argued that the belief was not reasonable. He relied on a range of points including the regulation of the road network and the haulage industry, the fact the tyres were above the legal minimum for tread limits at all times, the claimant's unreasonable belief that the tyres had been changed in December, the fact that the claimant did not report this in daily checks or by a defect report form, and the fact that no problem with the tyres was recorded in the five weekly inspections. He also suggested that if the tyres were really that dangerous the claimant would not have taken the photograph on the M6 motorway.

84. We considered those points carefully. We were not convinced by the point about the motorway photograph. The claimant explained that his mobile phone was mounted so he only had to press one button. The photograph does not show any traffic immediately in front of him. That was not inconsistent with a belief the tyres might be dangerous.

85. The fact the tyres were above legal minimum levels at all times also did not suggest that the claimant's belief was unreasonable. His concern was about the performance of the tyres in a specific temperature range.

86. We agreed that there was no evidence the tyres had been changed in December, but the claimant's vehicle was one of only one or two with recut tyres and the problem began when temperatures dropped in December. Mr Dudkiewicz had reported similar concerns and he thought that his tyres might be from the same bad series.

87. As to the absence of a defect report, it would have been preferable if the claimant had completed a defect report but his failure to do that did not make his concerns unreasonable. It was clear that sometimes problems were addressed without a written form. He had reported the problem verbally to Mr Squires in December more than once, but was told that the tyres had been checked and met the legal requirement so nothing was done.

88. Overall the Tribunal was satisfied that even without a defect form or any written report by the claimant his belief was still a reasonable one based on his experience of actually driving the vehicle in sub-zero temperatures.

89. We therefore found the claimant did make a protected disclosure to Mr Squires in December.

Issue 1(b): Protected Disclosure 4 January 2018

90. We accepted the details given by Mr Thomas in his email at page 173. It was an email sent very soon after the discussion. The claimant had not recorded the discussion anywhere. The claimant told Mr Thomas that Mr Squires had done nothing about his complaints.

91. However, in addition we were satisfied that he must have told Mr Thomas, even if briefly, what the problem was. On our findings he had not already spoken to Mr Thomas in December. We concluded that Mr Thomas did not put that in his email because the underlying issue was a matter for Mr Squires not for him. His focus was on the suggestion the problem had not been addressed by Mr Squires.

92. We therefore concluded that the claimant conveyed the same information to Mr Thomas as he had done to Mr Squires, and for the same reasons that was a protected disclosure.

Issue 1(c): Protected Disclosure 8 January 2018

93. That left the question of whether a protected disclosure was made on 8 January.

94. Although the words they recalled were different, Mr Thomas and the claimant both conveyed that the same thing had been said. The claimant was saying it was too cold to mean that the tyres could safely be used. The claimant was conveying two pieces of information: the temperature and the fact the tyres on the vehicle were the same ones as before. We were satisfied that he still had a reasonable belief the information tended to show a health and safety risk, even though he had signed the walk round check on 5 January without identifying any problem with the tyres. The claimant regarded that form as confirming the tyre treads were legal. Further, the continued absence of a written defect report did not make his belief unreasonable. The claimant believed prior to 4 January that if he put a defect report in he would not be taking the vehicle out until the defect was rectified, so he preferred to address it informally. Mr Thomas made clear to him on 4 January that he would still have to take the vehicle out even if he did a defect form, so the claimant correctly understood that supplying a form would not prevent an accident happening.

95. Our decision was that he had made another protected disclosure on 8 January.

Issue (2)(i): Health and Safety Disclosures

96. We then considered whether those disclosures were also disclosures protected by section 44 and section 100.

97. There was a question about whether this was a workplace without a safety representative. We noted that Mr Thomas was named in the health and safety policy as a health and safety supervisor. We concluded that he was not a representative of workers in the way the legislation requires.

98. The disclosures would therefore be protected if the claimant was bringing the circumstances to attention by reasonable means. It would have been better if he had raised these concerns by way of a defect report, but for reasons explained previously we were satisfied it was reasonable to raise it informally as well. In addition, there was no requirement for a health and safety report to be in writing. We therefore concluded that the disclosures in December and on 4 and 8 January were also health and safety disclosures.

Issue (3): Dismissal

99. We then turned to the question of whether the claimant was dismissed or whether he resigned on 8 January. We had to find what the facts were before applying the law.

100. The first discussion that day occurred at the start of the morning. It is clear the claimant said he was going home and that he then left the depot, but there was a dispute about whether he said he was “finishing”. The claimant denied using that word but Mr Thomas said he did use that word. There was no independent record or any other person present. We doubted that the discussion was as brief as paragraph 14 of the claimant's witness statement indicated. We noted that the following morning Mr Thomas sent an email (page 173) where he referred to the claimant using the word “finishing”, but that did not appear in direct speech quotes unlike some words later on in the email. The email was also sent at a time when it was

clear that the company's belief (shared by Mr Gorry and Mr Brough) was that the claimant had resigned.

101. We concluded that the word used by Mr Thomas in the email was his interpretation of what had happened and a convenient shorthand for his understanding of what the claimant meant. We accepted the claimant's evidence that he did not use that word and simply said "I'm going home".

102. We applied the law to that finding of fact. Those are ambiguous words; it is not clear whether those words mean going home for the day or leaving the job entirely. The legal test is not what the claimant intended but how the words would reasonably be understood in all the circumstances by the person hearing them.

103. The circumstances which were relevant were as follows. The claimant had repeatedly raised his concern about the tyres but management did not accept there was a problem. In the discussion with Mr Thomas the claimant was frustrated and angry. English is not his first language. Because of what Mr Thomas had told him on 4 January, the claimant believed that even if he stayed in work and completed a defect form he would still be instructed to drive the vehicle. The problem he was complaining about only arose when temperatures were very low. Within two or three hours he rang back asking about work for the next day.

104. In those circumstances the Tribunal was satisfied that the reasonable interpretation of the ambiguous words was that the claimant was going home for the day and would be back in tomorrow to drive the vehicle if temperatures were above zero. We therefore found that the claimant did not resign by using those words at the start of the day.

105. That took us to the telephone call at around 11.00am or 11.30am. The claimant asked about work the next day and Mr Ferguson passed him over to Mr Thomas. We had to decide as a fact what words were used. The claimant's evidence was that it was a very short call and Mr Thomas simply said, "you no longer work here". Mr Thomas gave a different account. He said there was a longer discussion, that the claimant mentioned the rules in Poland and that Mr Thomas said the tyres were safe. He said that whilst he was talking to the claimant Mr Gorry was speaking to him in the background, and that the words he (Mr Thomas) used were, "but you've walked out on us and finished". It was unclear exactly how the call ended.

106. The claimant's account amounted to a very blunt statement by Mr Thomas. It did not seem likely to us that the conversation would have been so short and so blunt. We concluded that the conversation must have been longer than the claimant recalled. We concluded on the balance of probabilities that Mr Thomas used the words set out in his witness statement, saying "but you've walked out on us and finished".

107. We applied the law. Mr Webster suggested that these words would be ambiguous words but we rejected that argument. The words were unambiguous in the sense they clearly conveyed the message that employment had ended – indeed, it had "finished" in the sense understood in the industry. The fact that there was confusion about how it had ended did not affect the clarity of the words. The claimant

understood the words to mean he was no longer employed. That was the reasonable interpretation of those words.

108. We therefore concluded that Mr Thomas had dismissed the claimant, perhaps inadvertently, by using those words on the telephone on 8 January 2018.

109. The events of the afternoon of that day when the claimant returned to the depot and handed in his gate key and downloaded his tachograph data did not help us because it was clear to both sides employment had ended by then.

Issue (4): Reason for Dismissal

110. Having found that the claimant was dismissed on 8 January we turned to the question of the reason for that dismissal.

111. The reason for dismissal is a set of facts or beliefs in the mind of the person who makes the decision.

112. Mr Thomas had three facts or beliefs in his mind:

- He knew that the claimant had complained about the tyres (complaints which we found were protected disclosures and health and safety disclosures).
- He believed that the claimant had resigned without notice when he walked out that morning.
- He knew that Mr Gorry had said in his ear, “Tell him as he’s walked out on the job he isn’t to return”.

113. We were satisfied that the principal reason in the mind of Mr Thomas for confirming that employment had ended was not the disclosures about the tyres but the (mistaken) belief the claimant had resigned by walking out earlier that day. In reaching that conclusion we noted that Mr Dudkiewicz had made similar complaints but not been dismissed.

114. The complaint that the claimant was dismissed because of protected disclosures (section 103A) or health and safety disclosures (section 100(1)(c)) failed.

Issue (2)(ii) and (iii): Health and Safety Actions

115. There was, however, a further question for us to decide: by walking out did the claimant fall within the protection of section 100(1)(d) or (e)?

116. The protection for leaving the place of work only arises if there are circumstances of danger which the claimant reasonably believes are serious and imminent and which he could not reasonably have been expected to avert.

117. We found that that test was not met. The place of work was the depot, not the cab of the vehicle. The claimant could not reasonably have thought that the danger was imminent (in the sense of about to happen immediately) when the vehicle was stationary in the depot. Further, he could reasonably have been expected to have

averted the danger by completing a defect report and refusing to drive the vehicle that day. Section 100(1)(d) was not applicable.

118. Nor was section 100(1)(e). The danger could not reasonably be viewed as imminent. Leaving the premises entirely for the day was not an appropriate step to take to protect himself or other persons. Refusing to drive the vehicle would have been. By leaving in that way he went beyond what would have been appropriate.

119. Accordingly, the complaint that the dismissal was automatically unfair under section 100(1)(d) or (e) also failed.

120. Because the claimant had not been employed continuously for two years or more he did not have the right to complain of "ordinary" unfair dismissal.

Issue (5): Delay in Payments

121. That left the question of the delay to the payments of wages and holiday pay.

122. The claimant's case was that these payments were delayed as a punishment for walking out on 8 January. For reasons explained above, we found that his walking out went beyond what is protected by section 44 (which is identical to section 100), and for that reason his claim failed.

123. However, even if his actions had been protected he would have failed on causation. The evidence from the respondent about the delays in payment showed that they had nothing to do with the fact he had walked out that morning. The contract at page 72 gave the employer a right to deduct from wages if there was a loss of profit where a driver did not make a delivery, and the delays in holiday pay were due to payroll administration issues.

124. The complaint of detriment under section 44 failed and was dismissed.

Employment Judge Franey

6 February 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON
11th February 2019

FOR THE TRIBUNAL OFFICE