# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr M Swirderski**

**Respondent:** **J G Pear (Newark) Limited**

**Heard at:** **Sheffield** **On:** **21, 22 and 23 January 2019**
**11 February 2019 (in chambers)**

**Before:** **Employment Judge Brain**
**Mr M Lewis**
**Mrs P Pepper**

**Representation**

Claimant: Mr A Burke, Solicitor
Respondent: Mr D Flood, Counsel

# RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that the claimant's complaints set out below fail and stand dismissed:

1. Unfair dismissal under section 98 of the Employment Rights Act 1996.
2. Unfair dismissal under section 100(1)(c ) of the 1996 Act.
3. Unlawful deduction from wages under section 13 of the 1996 Act.
4. Breach of contract.
5. Victimisation under sections 27 and 39(4) of the Equality Act 2010.

# REASONS

1. The Tribunal reserved its judgment at the conclusion of the third day of the hearing on 23 January 2019. As judgment was reserved, we set out our reasons for the conclusions that we have reached.

2. According to paragraph 1 of the respondent's grounds of resistance, the respondent *"is in business as an animal rendering business, employing approximately 280 people".* The claimant was employed as a driver. In paragraph 2 of his witness statement he says that, *"my general duties were generally concerned with transporting amongst other things animal waste, and other animal related products. I would also transport other type of products, according to requests issued by the traffic manager".*

3. It is common ground between the parties that the claimant's employment with the respondent came to an end on 28 February 2018. The parties appear to disagree as to the date of commencement of employment. The claimant says that he was employed by the respondent from 10 January 2011 whereas the respondent says that his date of commencement was 15 August 2011. Within the bundle there is a letter (at page 40) dated 27 August 2009 *(sic)* from Newark Transport Limited which shares the same address as the respondent's head office confirming the claimant's employment upon a permanent basis from 11 January 2011. It would appear therefore that the claimant is correct to give his date of commencement as 11 January 2011.

4. The claimant's contract of employment is at pages 36A to G. This appears to be a *pro forma* contract as the claimant's details do not appear within it. That said, Mr Burke confirmed on the claimant's behalf that he took no issue with the respondent's entitlement to make a deduction from remuneration for the cost of repairing any damage to the respondent's property caused by him. Pages 37 and 38 are an extract from the respondent's handbook setting out its disciplinary policy. Page 39 is an extract from the handbook setting out the respondent's grievance policy. The Tribunal was not referred to these documents during the course of the hearing.

5. The case benefited from a preliminary hearing which came before Employment Judge Shulman on 13 September 2018. He identified the issues in the case and then gave case management directions. We shall deal with the issues in further detail in due course. However, in essence, the claimant's case is that:

   5.1. He was unfairly dismissed by the respondent on 28 February 2018.

   5.2. The dismissal was unfair pursuant to section 98 of the Employment Rights Act 1996 (ERA): (this is commonly known as *'ordinary unfair dismissal'*).

   5.3. He was unfairly dismissed for raising health and safety concerns and for asserting a statutory right vested by the 1996 Act: (these are commonly referred to as *'automatically unfair dismissals'*). (The statutory right asserted by the claimant was the protection against dismissal for raising health and safety concerns. The latter is provided for by the 1996 Act (at section 100). Therefore, the claim of automatically unfair dismissal centres upon the claimant raising health and safety concerns with the respondent and is a claim that he was automatically unfairly dismissed under section 100(1) (c ) of the 1996 Act.

5.4. An unauthorised deduction was made from the claimant's wages relating to a bonus and/or that the respondent was in breach of contract by not paying him a bonus.

5.5. There was victimisation of the claimant under the Equality Act 2010. The claimant's complaint is that he did a protected act and as a consequence suffered a detriment and also was dismissed.

6. The Tribunal heard evidence from the claimant. The claimant has limited English and was assisted throughout by an interpreter. We heard evidence from the following witnesses called by the respondent:

6.1. Andrew Bostock. He is employed by the respondent as group logistics manager.
6.2. John Archbald. He is employed by the respondent as traffic planner.
6.3. Kay Frost. She is employed by the respondent as HR manager.
6.4. Graham Pears. He is employed by the respondent as sales director.

7. We shall firstly set out our findings of fact. We shall then go on to consider the issues in the case and the relevant law. We shall then set out our conclusions.

8. Amongst the claimant's duties was a contractual obligation to comply with all current legislation regarding the operation of a HGV vehicle. We refer to page 36A of the contract. (This in fact refers to a *"LGV vehicle"* which we presume to be a typing error as the claimant's job title was *"HGV driver class 1"* and he was required, as a condition of his employment, to hold a HGV class 1 licence at all times).

9. At the outset of his cross-examination, Mr Flood put a number of propositions to the claimant with which the claimant fairly and realistically agreed. It is therefore not in issue that:

9.1. As a HGV class 1 driver, the claimant was required to have a certificate of professional competence *('CPC'*) and to undergo CPC training.

9.2. The CPC training consists of 35 hours of training every four years.

9.3. The claimant was at all material times up to date with his CPC training.

9.4 The CPC training instils in drivers that they are responsible for the load that they are carrying, there are severe penalties for carrying an insecure load and that it is the driver's responsibility to check the security of the load.

9.5 If another person has loaded the wagon then the driver must assume that this has been done incorrectly and check the load himself/herself.

9.6 Checking the load means ensuring that it is safe not only while the wagon is stationary but also in the event of the driver having to make a sudden stop.

9.7 Hauliers such as the respondent need in practice to rely upon their drivers to check the condition of the wagons/tractor unit and the trailers. This must be done before all journeys even if the last journey undertaken by the wagon was by the same driver.

10 Mr Flood suggested that the principle that the driver is responsible for his load is the '*first commandment'* of work in this industry or sector. The claimant agreed with that proposition.

11 The claimant was taken to CPC course notes at pages 53 to 59. He agreed that he had attended the courses at which the material within these pages had been imparted. The material imparts the principles summarised at paragraph 9.

12 The claimant took issue with a suggestion made by Mr Flood that the respondent operated a *'nil defect procedure'*. It was suggested by Mr Flood that it was just as important to maintain a record of a wagon/tractor unit and trailer as having no defects as it was to report one with defects. This record keeping was essential to enable the respondent to know when any defects arose.

13 Having taken issue with the proposition that the respondent has a nil defects procedure, the claimant was taken to the documentation at pages 41 to 43. This consists of a vehicle defect report at page 41. This is written in English and Polish (the respondent having a significant number of Polish employees). Page 42 is a driver's weekly sheet. This is written in Polish. In essence, this is the time sheet completed by the driver. At page 43 is a vehicle safety check sheet. Again, this is written almost entirely in Polish. One can see 15 safety checks beside each of which is a box for each of the seven days of the week. The safety check covers such matters as checking the security of the wheel nuts, the condition of the brakes and lights, the tread upon the tyres, the electrical connection points and that the airlines are connected. It was suggested on behalf of the respondent that the driver would put a tick or a cross in the relevant box to indicate there to be a defect or not and that the box to be ticked would correspond with the relevant day of the week. The claimant disagreed with that proposition. He said he would simply tick the box to say he had done it upon the relevant day but then if there was a defect he would complete the vehicle defect report at page 41.

14 The claimant agreed therefore that if he marked (with a tick or a cross) the relevant box at page 43 to say that the check had been undertaken on the day and that such indication was not accompanied by a vehicle defect report the claimant was effectively saying to the respondent that there was nothing wrong with the vehicle. This was the respondent's nil defect system and it was suggested by Mr Flood that the claimant was complying with it as he himself had described it. It was suggested to the claimant that this was contrary to the evidence at paragraph 8(h) of his witness statement that the nil defect procedure did not exist. The claimant fairly accepted that if the document at page 43 was completed by him marking that the check had been done and this was not accompanied by the form at page 41 the respondent could assume there to be no defects. Upon this basis, therefore we find that the respondent did have a nil defects procedure and that the claimant was aware of it and complied with it.

15 Before turning to the events giving rise to the claimant's dismissal, we make some further findings of fact regarding the respondent's operation and the claimant's terms and conditions of employment:

15.1 On 14 May 2013 Mr Bostock circulated a memorandum concerning seatbelts in vehicles (page 52). Mr Bostock said in the memorandum, *"We are receiving an increase in costs for the replacement of frayed seatbelts in vehicles. Seatbelt fraying is caused by the belt being connected to the seat rather than the driver's body. This is not acceptable as the wearing of a seatbelt is a legal requirement. With immediate effect any further costs incurred by the company for frayed seatbelts will be divided by the two drivers allocated to the vehicle and the amount deducted from their driver's bonus*." It was accepted on behalf of the respondent that no memorandum had been issued about seatbelts after the one at page 52. It was accepted by the claimant that no distinction was made in Mr Bostock's memorandum between the use of the seatbelt in the yard and on the public highway. The claimant did not say that he had not received the memorandum (which was in English and Polish). On the contrary, he produced it at the disciplinary hearing held on 21 February 2018 (see paragraph 51). He said that it was not a legal requirement to wear the seatbelt within the respondent's yard. That said, he fairly accepted Mr Flood's proposition that the respondent never said that drivers have permission to dispense with the use of a seatbelt within the yard.

15.2 That the drivers receive a bonus of £100 per week. Deductions may be made from the bonus for any damage caused to the respondent's property or other costs incurred by the respondent because of the fault of a driver. There is a sample of drivers' bonus deduction sheets at pages 172 to 176.

15.3 The claimant's hours of work were between 6am and 6pm. The claimant said in paragraph 3 of his witness statement that he worked 5 or sometimes 6 days a week. The claimant was in no position to challenge the respondent's case that the first run out of the respondent's yard is one to Birmingham which starts at 3am and that another run commences at 4am. These runs are undertaken by others and were never done by the claimant.

15.4 The claimant accepted that the maximum number of hours that a driver can work in any one shift is 13 which may be extended to 15 hours three times a week. Within such a working period, the maximum number of hours spent driving is 9 per day which can be extended to 10 per day twice a week.

15.5 From November 2017, the claimant's longest shift was 12 hours 49 minutes and his shortest shift was 8 hours 44 minutes. His driving time within this period was 5 hours 52 minutes and only upon one occasion did he undertake a maximum of 9 hours driving and at no stage were his driving hours extended to 10 as would have been permissible. In sum, therefore, at no stage did the claimant come close to exceeding the maximum number of hours of driving that were permitted by law.

16 In September 2017, the respondent was made aware of concerns about the claimant's performance. Mr Bostock took the decision to suspend the claimant on 14 September 2017 (page 100). Following a disciplinary hearing held on 26 September 2017 Mr Archbald, who conducted the disciplinary hearing, issued the claimant with a first and final written warning (pages 124 to 127). This was set out in English and Polish. Mr Archbald determined that the claimant had:

- *Failed to check a load on 9 September 2017 which resulted in an insecure load from Brazendale.*
- *Failed to ensure a load was strapped on 11 September 2017.*
- *Failed to check a load on 12 September 2017 resulting in a spillage while travelling to Waddingtons* [being a customer of the respondent].

17 As we shall see, Mr Burke made a submission that to issue the claimant with a final written warning for this conduct was manifestly inappropriate. However, Mr Burke confirmed on the claimant's behalf that the claimant admitted the three failures which led to the issue of the warning. In the light of that admission, it is not necessary for the Tribunal to be concerned with what was said at the disciplinary hearing before Mr Archbald or to make findings of fact about the three failures as they are not in dispute.

18 It was put to Mr Archbald in cross-examination that to issue a final written warning was too harsh a sanction. With this, Mr Archbald disagreed. He maintained that the claimant had committed significant breaches of his duties as a class 1 HGV driver.

19 During the course of the internal disciplinary proceedings that were taking place in September 2017, the claimant raised a grievance on 20 September. This is at pages 111 to 115. The grievance in fact appears to consist of two documents. The first of these is a letter addressed to Mrs Frost (pages 111 and 112). The second appears to be a separate document in English and Polish (pages 113 to 115). The claimant's grievance is referred to in the respondent's list of documents as being from pages 111 to 115 inclusive and therefore we shall proceed upon the basis that both documents in fact comprise the grievance.

20 The claimant complained of a number of issues. In particular, he says that he was bullied and harassed by Marek Trzcinski who is the respondent's transport planner.

21 As Mr Bostock acknowledges in paragraph 2 of his witness statement, this was not in fact the first time that the claimant had raised complaints about Mr Trzcinski. Pages 69 and 70 are complaints raised by the claimant about him in November 2015. The claimant complained (at page 70) that on 17 October 2015 Mr Trzcinski had called him *"idiot"* and a *"cretin*" and had challenged him to a fight.

22 In his witness statement (at paragraphs 4 and 5) the claimant says, *"From the outset of my employment, I would get along with the British members of the workforce. I had no trouble with them, and I think that my skills were being appreciated. However, I had difficulties with low IQ Polish employees of the respondent, who almost all had come from one village and were led by Marek Trzcinski who I consider a bully. I will return to that topic later in my statement".* He goes on to say that at paragraph 7 that, "*In 2014 a Volvo assessor conducted a series of driving tests, and I passed it with a more than a perfect score of 110 out of 100. This made my Polish counterparts really hate me. By that time, I had not become too much of friends anyway, because they had their own world, filled with vodka and primitive entertainment, which I did not want to have anything to do with".*

23 The claimant says (in paragraphs 15 and 17 of his witness statement) that his complaints in 2015 about Mr Trzcinski were not dealt with by the respondent. Mr Bostock said in evidence that an investigation was conducted but that there is no evidence of any bullying having taken place.

24 There was no documentary evidence of any investigation having been carried out by Mr Bostock or for that matter anyone else within the respondent in 2015. We accept the claimant's case that from his point of view his complaints in 2015 were not dealt with. There is no evidence that the respondent reverted to the claimant to let him know the outcome of the investigation which Mr Bostock says was carried out. The claimant then raised a further complaint about Mr Trzcinski in February 2017 (page 73).

25 In his grievance raised on 20 September 2017 the claimant reiterated his complaints about the actions of Mr Trzcinski towards him in 2015 and the early part of 2017. This corroborates our finding that the claimant was justified in his perception that no investigation had been carried out at the time by the respondent. Had there been then the claimant may not have felt the need to raise those historic matters again in September 2017.

26 In the grievance at page 111, the claimant complains of unequal treatment and of being treated in a discriminatory manner. These are detailed at pages 111 and 112. The claimant concludes at page 112 by observing that he considered himself having been excluded *"from the Polish community here"* by reason of wishing to associate with British workmates. The respondent accepts the claimant's grievance of 20 September 2017 to include a complaint of discrimination related to race (that being Polish nationality) and that it is a protected act for the purposes of section 27(2)(d) of the 2010 Act. (The respondent made the same concession about the claimant's letter of 20 January 2018 at page 129 to which we shall come in due course).

27 The claimant's grievance of September 2017 also raised an issue about non-payment of bonus. He said he had not been paid any bonus between March and August 2017.

28 The claimant did not appeal against the final written warning issued to him by Mr Archbald following the disciplinary hearing of 26 September 2017. As we have said, the final written warning was dated 29 September 2017 and is at pages 124 to 127. It is in English and Polish. The claimant was given the right of appeal against Mr Archbald's decision. The claimant therefore understood that he had received a final written warning and that he had a right of appeal.

29 The claimant did not do so. He explained in evidence that on 26 September 2017 he received some sad news from Poland about his mother's health. He flew out the day after. Sadly, the claimant's mother passed away on 30 September 2017. The claimant then had to attend to the funeral arrangements and other matters. The funeral took place on 4 October 2017 after which the claimant returned to England. The claimant explained that by the time he returned home the time within which for him to appeal had expired. However, he did not seek an extension of time for appealing which in the circumstances we would expect to have been sympathetically dealt with by the respondent.

30 Mrs Frost dealt with the claimant's grievance of September 2017. Mrs Frost's evidence is that a grievance hearing was held on 26 September 2017. Minutes of that meeting are at pages 119 to 123. We can see that the minutes recorded the meeting as having commenced at 1pm. The respondent made arrangements for Jola Klosowska to attend in order to interpret for the claimant. This in fact took place straight after the disciplinary hearing. The minutes of the disciplinary hearing before Mr Archbold are at pages 118A to 118F. The minutes record that hearing as having commenced at 11am. Again, Ms Klosowska was in attendance to help translate and interpret.

31 The claimant's witness statement says at paragraph 51 that, *"The meeting of 26 September 2017 at 1pm did not take place. The notes at page 119 are false. The meeting took place, but at 11am (notes at page 118A to F)."* In evidence given under cross-examination the claimant's account was that the grievance hearing did not take place at all. The claimant acknowledged in cross examination that the meeting that took place at 11am on 26 September 2017 was a disciplinary hearing. He then gave an account of telephoning his wife at 12.20pm and then taking a call at 2pm from a friend. That call lasted about 30 minutes. He said that there was no second meeting that day.

32 The minutes of the grievance hearing commencing at page 119 record the claimant complaining about Mr Trzcinski's behaviour towards him. There was also a discussion about the claimant's bonus. Mrs Frost then says (at page 123) that she would need to speak to Mr Bostock who was in fact away from work that week. It was therefore agreed that there would be a further meeting following Mrs Frost's investigations.

33 Mrs Frost fairly accepted that there was a delay in progressing matters and in fact the claimant's grievance was not picked up again until early in 2018. The respondent's less than satisfactory dealings with the claimant's grievance of September 2017 corroborates our earlier findings that the claimant was not informed of the outcome of the 2015 grievance and that he reasonably reached a conclusion that the respondent had failed to deal with it.

34 We accept the respondent's account that a grievance hearing took place on 26 September 2017 commencing at 1pm. It is difficult to understand why Mrs Frost would have prepared minutes of a meeting that had not in fact taken place. That said, we can understand the claimant's account and understanding that the grievance hearing did not take place. Making due allowance for language difficulties, the Tribunal's understanding of what the claimant is saying is that the grievance hearing was not concluded following the adjournment to enable Mrs Frost to make further enquiries.

35 There appear to have been no further developments until 20 January 2018. On that day, the claimant's wife Aleksandra Zimowska emailed Mr Bostock (page 129). The email was in fact a letter from the claimant. Once again, the claimant raised a complaint about Mr Trzcinski. He said that following his return from holiday he was again not allocating jobs fairly. The claimant's complaints were:

35.1 That the claimant was being allocated an unfair burden of offloading sludge which is hard physical work. The claimant said this used to be

allocated fairly pursuant to *"an efficient rotation system so that all drivers were evenly burdened with work"* but this was no longer the case. As a consequence of the unfair burden of work the claimant complained of feeling tendon and muscle pains in his right forearm.

*35.2* That the surface of the yard had become icy which made it hazardous to manoeuvre vehicles around the *yard "where precision and extreme caution are required".*

36 We have already commented that the respondent fairly accepts this letter to be a protected act for the purposes of section 27(2)(d) of the 2010 Act. In our judgment, this is a fair and realistic concession from the respondent given that the claimant plainly was complaining about his treatment at the hands of Mr Trzcinski. When read in the context of previous complaints about the claimant's treatment at his hands because of the claimant's Polish nationality the claimant's letter of 20 January 2018 plainly is a protected act. The respondent also accepted the letter of 20 January 2018 to be a disclosure for the purposes of section 100(1)(c) of the 1996 Act.

37 Mrs Frost arranged for the respondent's health and safety manager Paul Cunningham to investigate the issues by shadowing the claimant and identifying any potential health and safety risks associated with his work. The claimant was in fact absent for several days and returned to work on 23 January 2018.

38 Mr Cunningham's report is at pages 133 and 134. Mr Cunningham observed the claimant on 23 January 2018 and prepared his report on 24 January. Mr Cunningham raised a number of issues of concern. These were in particular:

38.1 That the claimant was using a device in the seatbelt buckle to override the vehicle's safety feature.

38.2 That the claimant failed to carry out a 'tuck' test.

39 It was common ground between the parties that the tuck test is an operation undertaken by the driver to make sure that the wagon/tractor unit is affixed to the trailer. Once the wagon is connected to the trailer (and before the airlines are connected) the driver checks that the connection has been made by seeking to move the wagon or tracker unit forward. As the airlines have not been connected to the trailer and the brakes of the trailer are still on (and thus not disabled by connecting the airlines) if properly connected the tractor unit will not move forward.

40 Mr Cunningham's concern when he shadowed the claimant on 23 January 2018 is that he was not seen to carry out the tuck test. Mr Cunningham observed, *"I felt the shunt of the tractor unit and the noise of the fifth wheel safety lock engaged, at this point the driver engaged the handbrake on the dashboard and proceeded out of the cab. (There was no pull test done* [this being another term for the tuck test: this test was also referred to as a 'tug test' in places within the bundle (for instance at page 136)] *to check the trailer and the fifth wheel had locked and the driver did not conduct a visual safety inspection of the trailer)."* Mr Cunningham observed the claimant undertaking this operation from the passenger seat of the cab. After carrying out the visual inspection Mr Cunningham observed that the claimant attached the airlines and retracted the extendable trailer legs.

Therefore, he had not (before attaching the airlines and disabling the brakes of the trailer) attempted to move the wagon or tractor unit forward to ensure the tractor had engaged with the trailer.

41 Mr Cunningham was also concerned that *"the driver did not adorn his safety belt"* when undertaking manoeuvres within the yard. Mr Cunningham did see the claimant put on the seatbelt before driving on to the public highway.

42 Mr Cunningham observed the claimant to be using a device which he inserted in the safety belt buckle while manoeuvring around the yard. This device was placed on to the dash of the cab in front of him before the claimant put his seatbelt on as he drove away from the yard onto the public highway.

43 At paragraph 59 of his witness statement the claimant tells us more about the device. He says *"Mr Marek Mitula (a night driver, my sub) apparently brought it and left it inside the truck's cabin. It is a buckle that you can place inside the device connecting the belt together, not to start the alarm sound. I used this buckle when manoeuvring inside the depot, because it was there, not because I brought it in to cheat the system. I never used it on a public highway".* The claimant went on to say that the vehicle's alarm will start if the vehicle is driven at in excess of 10 miles per hour without the seatbelt being connected. Mr Bostock's evidence is that it would be difficult if not impossible to achieve a speed of 10 miles per hour within the confines of the yard given the size of the vehicles in question and therefore the claimant's contention that the alarm would go off frequently and distract him from his work was incorrect.

44 A decision was taken to suspend the claimant (page 135). He then attended an investigation meeting chaired by Mr Archbald on 13 February 2018 (page 137). Mr Archbald asked the claimant where he had obtained the seatbelt device. The claimant told him that he had got it from Mr Mitula and accepted that he had not received authorisation to use it. He maintained that he only used it within the yard. Mr Archbald pointed out to the claimant a provision within the Highway Code that a driver must always use a seatbelt when driving a car, van or other goods vehicle if one is provided.

45 Mrs Frost wrote to the claimant inviting him to attend a grievance hearing. Her letter is at page 140. She said, *"Having reviewed your file I noticed that the second part of your grievance hearing* [from September 2017] *didn't take place due to bad weather".* In our judgment, this is somewhat disingenuous because the respondent had had from the end of September 2017 within which to re-arrange the grievance hearing. The respondent cannot blame bad weather for the entirety of the long delay. The claimant was informed that Mr Bostock would chair the grievance hearing which would take place on 20 February 2018.

46 On 15 February 2018 the claimant was invited to attend a disciplinary hearing (pages 141 and 142) scheduled for 21 February 2018. This too was to be chaired by Mr Bostock. The claimant faced the following allegations:

*46.1 That he failed to carry out driver checks on 23 January 2018.*

*46.2 That he deliberately overrode a piece of safety equipment.*

47 In the event, the disciplinary hearing and grievance hearing both took place on 21 February 2018. The minutes are at pages 143 to 148 and 149 to 151 respectively.

48. We summarise what was discussed at the disciplinary hearing at paragraphs 49 to 56.

49.

50. It was put to the claimant by Mr Bostock that he told Mr Cunningham that he never does the tuck test. The minutes record the claimant saying that he doesn't do so because of the uneven nature of the floor in the yard.

51. The claimant said he did not do a nil defect report. Mr Bostock said that was contrary to the respondent's procedure. The claimant maintained that nobody had told him to do a nil defect report.

52. Mr Bostock then turned to the question of the safety belt. The claimant said that the memorandum of 14 May 2013 (at page 52 of the bundle) did not make it mandatory to wear the seatbelt. The claimant in fact produced a copy of this memorandum. The claimant maintained that the sound of the alarm distracted him. Mr Bostock appeared unimpressed with that argument given that it would be difficult to build up a speed of in excess of 10 miles per hour which would cause the alarm to activate.

53. Mr Bostock told the claimant that there had been a serious accident involving Sam O'Neill. It appears that the cab in which he was sitting within the yard had (shortly before the disciplinary hearing) tipped over due to high winds and serious injury or fatality had been avoided because he had been wearing his seatbelt. The claimant said that he had been in Poland at the time of this incident but accepted that he knew of it.

54. The claimant maintained that he did not use the device on the public highway but only within the yard.

55. The claimant said that the device that he was seen using by Mr Cunningham was in fact the second one that had come into the claimant's possession as the first one had gone missing. The claimant said that Mr Mitula had purchased the second one.

56. The claimant complained that he had received holiday pay for a pre-booked holiday which he said indicated to him that the outcome of the disciplinary hearing was pre-determined.

57. The claimant's trade union representative concluded that by accepting that there were issues with the claimant's work. He said, *"I sit with people who like to cut corners, fair cop".* He went on to say, "I have discussed the tuck test with him, he genuinely sees that what he has done is correct. This is fortunate and good that PC (Mr Cunningham) was there and needs to deal with". In other words, there was an acceptance by the claimant's representative that he had not done the tuck test when being observed by Mr Cunningham. The claimant's representative recommended the claimant undergo further training.

58. Mr Bostock then went on to chair the grievance hearing. The claimant's trade union representative attended on the claimant's behalf. At the

outset, Mr Bostock was asked to disregard the papers that had been placed before him and it was suggested that the claimant address the grievance hearing with his concerns. These centred upon his relationship with an employee named Rafal Kusynski (wrongly referred to as Makowski in the minutes). It appears that the claimant was blaming Mr Kusynski for influencing Mr Trzcinski against him. Mr Bostock pointed out to the claimant that his driving hours were such that he may find himself being asked to undertake the sludge dumping route of which he complained in his letter of 20 January 2018 more than others because other drivers will have exhausted their driving time by the time the sludge run was due to be undertaken.

59. The claimant's trade union representative during the course of the grievance hearing then suggested that clear the air talks take place between the claimant, Mr Kusynski and Mr Trzcinski. Mr Bostock wrote to approve of this suggestion on 23 January 2018 (page 152). The claimant's trade union representative considered this to be the way forward in order to *"get rid of playground politics".* In the event, the clear the air talks did not take place because the claimant was dismissed.

60. On 28 February 2018 Mr Bostock wrote to the claimant (page 154). He dismissed the claimant. The respondent acknowledged that the claimant was entitled to seven weeks' notice to bring the contract of employment to an end given that the claimant was not being dismissed for gross misconduct. However, the respondent elected to pay the claimant seven weeks' pay in lieu of notice. Mr Bostock said:

    *"I accept that you carried out checks visually, however the procedure of a nil defect should be completed at each check, this was discussed at the disciplinary hearing on 26 September 2017 which he received a final written warning 29 September 2017.*

    *We discussed at length the clasp that you had acquired to override the seatbelt safety function of the HGV truck, the business takes health and safety seriously and has brought in extra numerous safety features on HGV trucks to ensure your safety. I cannot accept someone overriding the equipment putting yourself at risk.*

    *Taking the above into account I have no alternative than to terminate your contract with immediate effect from 28 February 2018".*

61. Although Mr Bostock did not say so in the letter, it appears to be understood by the claimant that Mr Bostock was dismissing the claimant because of the instant failures coupled with the fact of him being on a final written warning. That this is the case is evident from Mr Bostock's decision to pay the claimant a sum of money in lieu of notice. That would not of course have been the case had the claimant been dismissed for gross misconduct and it is no part of the respondent's case that he was.

62. The claimant appealed against Mr Bostock's decision to dismiss him. The letter of appeal is at page 158. The following were given as the grounds of appeal:

    1. *The manner in which the dismissal decision was handled did not abide by the employer's disciplinary policy.*

*2. The case investigation and the process of evidence completing were carried out improperly without due care and accuracy.*

*3. I have grounds to believe that I was dismissed from work as a result of:*

*(a) Asking for my legal rights at work;*

*(b) Taking action about health and safety issues;*

*(c) Whistle blowing;*

*(d) Reporting right arm orthopaedic problem due to a repetitive and strenuous work related activity."*

63. The claimant also lodged an appeal notice (page 157) *'against grievance procedure.'* He gave *"obstructiveness and intentional delaying the grievance hearing, which led to significant escalation of problems in the workplace"* as his grounds for appeal. He complained that there had been no outcome to the grievance because the respondent had *"conveniently"* taken the decision to dismiss him.

64. The appeal hearing against the decision to dismiss the claimant took place on 10 April 2018. It was chaired by Mr Pears. The claimant was not accompanied by his trade union representative.

65. The claimant maintained that it was permissible to not wear the seatbelt to manoeuvre around the yard. He conceded to having not done a tuck test because he feared causing damage to the respondent's property. The claimant maintained that he had been dismissed for raising health and safety issues with the respondent being the issues raised in the email of 20 January 2018 at page 129 concerning the sludge work and the ice in the respondent's yard. (It was those issues that comprised grounds 3(a) to (d) in the letter of 17 March 2018). The claimant appeared not to pursue the procedural issues at paragraphs 1 and 2 of his appeal letter.

*66.* Mr Pears wrote to the claimant on 16 April 2018 (pages 165 to 168). The claimant's appeal was dismissed. Mr Pears was satisfied that the claimant had not carried out the tuck test and had used a device or a clasp to override vehicle safety features. Mr Pears said that the claimant had not been dismissed for raising health and safety issues. He concluded that, *"You were already under a final written warning for failure to carry out driver checks dated 29 September 2017. A reoccurrence means we can go to the next stage and then you choose to put yourself in danger by overriding the seatbelt safety feature. All this was taken into account before making the decision to terminate your employment."*

*67.* Upon the issue of holiday pay, Mr Pears said that he had investigated matters. He said that, *"Holiday pay was paid to you following the holiday request form you completed on 28 December 2017 (see attached) which was on payroll and ran concurrent with your suspension. In the interest of total fairness to you I am prepared to accept that suspension may arguably override holidays already booked, therefore we would owe you 10 days suspension pay. However, during my investigations with payroll I note that you were paid seven weeks pay in lieu of notice as part of the termination, which should have been six weeks as notice pay is calculated for complete*

*years' service (date of commencement 15.8.11). Taking this into account we owe you three days' pay and I will arrange for you to be paid as soon as possible".*

68. The following evidence emerged from the cross-examination of Mr Bostock:

    1. He denied that the allegations against the claimant that formed the basis of the disciplinary hearing in February 2018 are trivial.

    2. He denied that drivers commonly do not wear a seatbelt when manoeuvring around the yard.

    3. There was no evidence that the claimant was driving upon the public highway without wearing a seatbelt.

69. Under questioning from the Employment Judge, Mr Bostock said that drivers may drive round the respondent's yard without wearing a seatbelt. The main issue for Mr Bostock was the claimant having driven the respondent's vehicle upon the public highway without wearing a seatbelt.

70. In evidence given under re-examination, Mr Bostock confirmed that the tuck test was part of the driver check to which he was referring in the letter of dismissal at page 154.

*71.* It was put to Mr Pears in cross-examination that it was not a strict requirement for seatbelts to be worn within the yard. Mr Pears said, *"no, strictly speaking no but you should wear your safety belt in the yard".*

72. The following emerged from the cross-examination of the claimant (additional to the matters that we have already referred to):

    1. The claimant admitted that he was aware of his vulnerability following the issue of the final written warning and that thereafter there was a need for him to do everything *"by the book"* (as it was put by Mr Flood).

    *2.* The claimant said that he had done the tuck test (on the day he was observed by Mr Cunningham) manually as he did not hear *"the click".* Although the claimant maintained in evidence before us that he had done the tuck test (by attempting to move the tractor unit forward) after he had got back into the cab after doing the manual inspection he had not said so within the disciplinary hearing (at page 143). When asked why the notes do not record the claimant saying that he had done the tuck test. He said, *"it could be that I didn't say it because no one asked me the question".*

    3. The claimant accepted that the respondent's yard was small and that it would be difficult to achieve a speed of over 10 miles per hour (being the applicable speed limit within the yard). That was also the speed which at the alarm would sound if the seatbelt was not attached. The claimant accepted that occasionally the alarm would sound if the vehicle achieved the speed of in excess of 10 miles per hour which may arise if for example it was parked upon an incline. He said that this would happen *"once a week or once a month".* In the light of this evidence the claimant was challenged to his assertion at page 145 that the alarm would sound and distract him while going about his duties.

4. The claimant denied that he had driven upon the public highway without the use of a safety belt.

5. The claimant accepted that he had raised no grievance at any stage that any of the respondent's actions against him were part of a plot to be rid of him.

73. It was put to the claimant that his accrued holiday entitlement to the date of dismissal was 27 days and that was precisely the number of days of holiday that he had taken. The claimant said that he was paid on 9 February 2018 for the holiday that he had requested (being five days between 29 January and 2 February 2018 and 5 February to 9 February 2018).

74. Upon the issue of bonus, it was suggested to the claimant that he had caused £800 worth of damage to the respondent's property (being damage to the rear of one of the respondent's tractor units). He had also caused £400 worth of damage to barriers at Penistone. It was for this reason he had suffered 12 weeks of deductions from his bonus (being £100 per week to defray the total cost of £1200).

75. Mr Flood made the following submissions upon behalf of the respondent:

1. That the issue of the final written warning in September 2017 was reasonable and proportionate given that the claimant had failed to adhere to the *'first commandment'* to be followed by class 1 HGV drivers (namely to take responsibility for the load that they are carrying).

2. That of the two incidents the subject of the disciplinary charges levelled against the claimant in February 2018, the seatbelt issue was the most important.

3. That Mr Bostock raised a reasonable inference that the claimant was using the device to override the safety feature upon the vehicle enabling him to drive the vehicle upon the public road without wearing a seatbelt. This was a reasonable inference to draw because of the speed limit and restrictions within the yard which meant that in reality the device was of little utility because the alarm would seldom sound within the yard anyway. This was corroborated by the claimant's own evidence as to the lack of frequency with which he was able to drive a wagon within the confines of the yard at a speed in excess of 10 miles per hour. Mr Bostock was particularly concerned about this given the unfortunate event which had befallen Sam O'Neill.

4. That Mr Bostock was content to resolve the claimant's grievance around his fellow employees by them holding a clear the air meeting. Such is inconsistent with a determination upon the part of the respondent to dismiss the claimant for having raised health and safety concerns.

5. That the reason that the claimant was assigned the sludge run more frequently than others is because he was working a shift from 6am to 6pm and seldom exceeded his permitted driving hours in circumstances where others had done and therefore did not have a sufficient number of hours available to them to undertake that work.

6. That there was no causal connection between the claimant's treatment by the respondent on the one hand and his doing the protected acts and raising the health and safety concerns on the other. The cause of the claimant's dismissal related to his conduct and nothing else.

76. Mr Burke on behalf of the claimant made the following submissions:

 1. The final written warning issued in September 2017 was too harsh a sanction. The claimant did not appeal against it because he was going through a difficult period with his mother's unfortunate illness.
 2. It is too much of a coincidence for the disciplinary allegation raised in February 2018 to have followed so hot upon the heels of the claimant's health and safety complaint of 20 January 2018.
 3. An adverse inference should be drawn against the respondent for failing to entertain the claimant's grievances about his treatment at the hands of Mr Trzcinski and focussing instead upon health and safety issues.
 4. There was no evidence that the claimant used the clasp to override the vehicle safety features upon the public highway.
 5. It was inappropriate for Mr Bostock to deal with both the disciplinary and grievance issues in February 2018.

77. We now turn to consideration of the relevant law. We shall deal firstly with the complaint of unfair dismissal. Upon the complaint of ordinary unfair dismissal it is for the respondent to show the reason or principal reason for dismissal. In this case, that reason relates to the claimant's conduct. The Tribunal has to decide whether the respondent believed the employee to be guilty of misconduct and to have had reasonable grounds upon which to sustain that belief having carried out as much investigation as was reasonable in all the circumstances of the case.

78. The burden of proving a potentially fair reason is upon the respondent. There is a neutral burden upon the question of whether the respondent had reasonable grounds to entertain the belief for which it contends. If the Tribunal is satisfied that the respondent had reasonable grounds to sustain that belief then the Tribunal must go on to consider whether dismissal fell within the range of reasonable responses open to the reasonable employer. The objective standard of the reasonable employer must be applied to all aspects of the question of whether an employee was fairly and reasonably dismissed (including the investigation and procedure followed). The Tribunal should not retry the factual issues regarding misconduct before the employer at the dismissal stage including appeal and must not substitute its view for that of the respondent.

79. If the respondent does not show to the satisfaction of the Tribunal the reason for dismissal was the one put forward by it then it is open to the Tribunal to find that the real reason or principal reason for the dismissal was that asserted by the claimant: that 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 was unfairly dismissed under section 100(1)(c ) of the 1996 Act. It does not follow that the Tribunal must find that, if the reason was

not that put forward by the employer, then it must have been that asserted by the employee. It is open to the Tribunal to find on a consideration of all of the evidence that the true reason for dismissal was not one advanced by either side.

80. As he has over two years of service, it is not the case that the claimant bears the burden of proof that the dismissal was for a prohibited reason related to the drawing to the employer's attention by reasonable means of circumstances connected with health and safety that he reasonably believed to be harmful. Where the employee has more than two years of service, as here, he acquires an evidential burden to show – without having to prove – that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason being advanced. Once the employee satisfies the Tribunal that there is such an issue, the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal.

81. We now turn to the claimant's complaint brought under the 2010 Act. Victimisation for having done a protected act is, by virtue of section 27(2) of the 2010 Act, prohibited conduct which is made unlawful in the workplace pursuant to section 39(4).

82. The burden of proof is upon the claimant to show a *prima facie* case that an unlawful act of discrimination has taken place. Where there are facts from which the Tribunal could decide, in the absence of any other explanation, that there has been a contravention of the 2010 Act then the Tribunal must hold the contravention occurred. However, that is disapplied where the employer shows that it did not contravene the relevant provision.

83. It is therefore for the claimant to show that following him doing the protected acts (which the respondent accepts that he did in September 2017 and January 2018) he was subjected to a detriment or was dismissed. The protected acts must be a material reason for the treatment. A detriment in this context is anything which an individual might reasonably consider changed their position for the worse or put them at a disadvantage.

84. An issue has arisen in this case about the status of the final written warning issued to the claimant in September 2017. Generally, it is not for the Tribunal to sit in judgment on whether a final warning was reasonably given. However, the Tribunal is entitled to satisfy itself that the warning in question was issued in good faith and that there were *prima facie* grounds for it. In particular, if there is anything to suggest that the warning was issued for an oblique motive or it was manifestly inappropriate, the Tribunal could take that into account in determining the fairness of a later dismissal in reliance upon the warning. The question is whether it was reasonable for the employer to treat the conduct reason which led to the dismissal, taken together with the circumstances of the final warning, as sufficient to dismiss the claimant.

85. We now come to our conclusions. We shall start with the complaint of ordinary unfair dismissal.

86. The respondent's case is that it had reasonable grounds upon which to sustain a belief that the claimant had failed to carry out driver checks on 23 January 2018 and had overridden a piece of safety equipment (being the vehicle's safety belt feature). The respondent's case is that there was no basis upon which for the claimant to impugn the final written warning which had been served upon him in September 2017. This had said in terms (at page 125) that *"should there be any repeat of these issues* [being the issues for which the claimant was given a final written warning being those set out at paragraph 16 above] *or any other misconduct on your part, further disciplinary action will be commenced which may result in an extension of this warning or your dismissal".* Therefore, it fell within the band of reasonable responses of the reasonable employer in the circumstances to dismiss the claimant.

87. The Tribunal finds that there was no reasonable basis upon which for the respondent to have concluded that the claimant unacceptably and deliberately overrode the safety belt system upon the tractor unit that he was driving on 23 January 2018.

88. The disciplinary charge levelled against the claimant in the letter of 15 February 2018 (at page 151) alleged that he had deliberately overridden the relevant piece of safety equipment (being the safety belt). This allegation was not specific as to when the claimant had so acted (and in particular whether the respondent's concern was about him driving upon the public highway without using a safety belt).

89. In so far as the accusation concerns driving around the yard, the respondent had good grounds for believing that the claimant was using the device or clasp to override the safety system. He accepted he did so. Mr Cunningham saw him doing so. However, the respondent's case that it was mandatory to wear a safety belt while driving around the yard was significantly undermined by the evidence of Mr Bostock by Mr Pears both of whom accepted that drivers did drive around the yard without seatbelts. The memorandum which the claimant himself in fact introduced at the disciplinary hearing drew no distinction between the use of the seatbelt in the yard and on the public highway. However, there was no injunction from the respondent (in the form of a memorandum issued to the drivers) setting out clearly that use of the safety belt within the yard was mandatory and compulsory. This continued to be the case even after the unfortunate accident which befell Sam O'Neill (to which we refer at paragraph 52).

90. There was simply no evidence of the claimant using the device and overriding the relevant feature upon the public highway. This was candidly accepted by Mr Bostock under cross-examination (paragraph 67). Indeed, Mr Cunningham witnessed the claimant using the safety belt upon the public highway (paragraphs 41and 42).

91. Therefore, the respondent's case upon this issue rested upon the inferences to which we refer at paragraph 74.3 being drawn against the claimant to found a belief that he drove upon the public highway without using his safety belt. In our judgment, this falls short of a reasonable basis upon which to believe that the claimant had driven upon the public highway without using his safety belt and that he was using the device or clasp to override that safety feature.

92. We can go so far with the respondent as to accept that the claimant's contention that the alarm in the tractor being a constant distraction was

unconvincing given the confines of the yard and at the times upon which the alarm would be triggered would be less frequent than the claimant contended for. On the other hand, it is in our judgment credible that on occasions the alarm would be triggered, it being plausible that heavy goods vehicles would quickly reach a speed of in excess of 10 miles per hour if going down an incline.

93. We do not accept therefore that the alarm would never go off within the confines of the yard. That said, it is a considerable stretch to say that because the device or clasp was of little utility within the yard that this must mean that the claimant had dispensed with the use of his safety belt when driving upon the public highway. The respondent's assertion is significantly undermined by our finding that the device or clasp would be of some utility within the yard (albeit infrequently) coupled with Mr Bostock's and Mr Pear's acceptance that drivers frequently dispensed with the use of their safety belt when manoeuvring around the yard.

94. In sum, upon this issue we find that the respondent could not have reasonably believed that the claimant was overriding the safety feature on the public highway. The respondent could reasonably believe that the claimant was using the device in the yard but that it was acceptable practice to dispense with the safety feature while moving around the yard. Had this charge stood alone, then it would have fallen outside the band of reasonable responses to dismiss the claimant even though he was the subject of a final written warning at the material time given that he was not doing anything outside condoned practice within the yard and there was a complete absence of evidence as to his conduct outside the yard.

95. We also find there to be no basis upon which for the respondent to have reached the conclusion that the claimant was dispensing with driver checks in so far as those checks relate to the nil defects procedure that we described earlier. There was no evidence that the claimant did not complete the document at page 43 upon 23 January 2018. Further, the claimant failing to undertake the nil defects procedure did not form part of Mr Flood's closing submissions. We do not therefore understand the respondent to have advanced such failure (if any) as part of its case.

96. The respondent is on firmer ground upon the issue of the tuck test. There was good evidence that the claimant had failed to undertake the tuck test on 23 January 2018. Mr Cunningham had observed him failing to do so. Furthermore, the claimant's trade union representative accepted this to be the case at this disciplinary hearing. We refer to paragraph 57.

97. That being the case, therefore, we find that the respondent did have reasonable grounds upon which to sustain a belief that the claimant had failed to carry out driver checks on 23 January 2018, that specifically being the tuck test.

98. The question therefore is whether the respondent's response fell within the band of reasonable managerial responses to the situation in which the respondent found itself. We agree with Mr Flood's submission that there was no basis upon which to impugn the final written warning. The claimant, as he candidly admitted before us, committed three health and safety breaches within a short space of time in September 2017. We take Mr Burke's point that the sanction of a final written warning may be viewed as harsh. However,

that does not render it manifestly inappropriate. Although the test is one of manifest inappropriateness we derive some assistance upon this issue from the band of reasonable responses test when assessing the fairness or unfairness of a dismissal. Plainly, there will be circumstances in which one employer will take a more lenient view than will another. That does not necessarily mean that the employer taking the less lenient view is acting inappropriately or outside the band of reasonable managerial responses.

99. Mr Burke's challenge to the warning of 29 September 2017 was simply that it was too harsh. Nothing else was advanced to suggest that it was given for an oblique or ulterior motive or was otherwise manifestly inappropriate. Given that the *"first commandment"* of work in this industry or sector is that the driver is responsible for his load it is difficult to see the basis upon which it could be said that a final written warning for three failures over a space of four days was manifestly inappropriate. Nothing was realistically advanced upon the part of the claimant to suggest that the respondent issued the warning for an ulterior or improper purpose.

100. Therefore, the respondent was, in January and February 2018, faced with a situation where the claimant, an employee under an appropriately issued final written warning for health and safety breaches, had committed a further serious health and safety breach by failing to undertake the tuck test. The consequences of a trailer running out of control because a tuck test was not carried out are potentially very grave. This subsequent conduct fell squarely within the ambit of the final written warning. In the circumstances, it is our judgment that the dismissal of the claimant for the failure to undertake the tuck test on 23 January 2018 fell within the band of reasonable responses of the reasonable employer given the circumstances (in particular that the claimant was under a live final written warning for other health and safety breaches).

101. We now turn to the complaint raised under section 100(1)(c) of the 1996 Act that the dismissal was automatically unfair as the principal reason for it was that the claimant had raised by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety. As we have said, the respondent accepts the claimant to have raised a health and safety concern by reasonable means on 20 January 2018. The question is whether him doing so was the reason or (if more than one) the principal reason for his dismissal.

102. Certain inferences may be drawn against the respondent. The claimant's case upon this issue is not without merit. Firstly, the respondent took the step of having the claimant observed while undertaking his work almost immediately after he raised his health and safety complaint. Secondly, the respondent had failed to deal adequately with the claimant's grievances about Mr Trzcinski. The claimant had raised complaints in 2015, in February 2017 and in September 2017 and was still awaiting an outcome in the early part of 2018. The respondent failed to give any adequate explanation as to why it failed to properly address this issue until the grievance hearing held in February 2018. Thirdly, the claimant gave unchallenged evidence that he had achieved a perfect score in a series of driving tests undertaken in 2014. Fourthly, the respondent had in our judgment reached an unsafe conclusion in February 2018 around the safety belt issue. Fifthly, the respondent's answer to the grievance raised by the claimant against Mr Trzcinski was to

encourage all of those involved in the grievance to meet up and mediate some kind of agreement and cease *"playground politics".* This may be suggestive a reluctance for some reason upon the part of the respondent to deal with the claimant's grievance against Mr Trzcinski and for the claimant to have been in the eye of respondent's management.

103. Against that, there is compelling evidence of the claimant committing a serious health and safety breaches upon two occasions: in September 2017 and in January 2018. The respondent reasonably concluded that the claimant had so acted in September 2017 and, as we have said, the claimant fairly accepted and admitted to those breaches. There is also in our judgment strong evidence of the claimant committing a health and safety breach in January 2018 when observed by Mr Cunningham not performing the tuck test. The claimant's trade union representative admitted that he had failed so to do.

104. It was an option under the respondent's disciplinary procedure at page 38 (and as referred to in the disciplinary warning letter at page 125) to extend the period of the final written warning. Certainly, this was an option open to the respondent. The respondent eschewed that opportunity. For the reasons given in paragraphs 101 and 102 it is our judgment that the respondent had some mixed motives for the dismissal of the claimant. The claimant had provided several years of service and as we say had been assessed to a very high standard by Volvo. Against that, the claimant did not have an unblemished disciplinary record and there were certainly issues and tensions between the claimant on the one hand and other members of the workforce of Polish nationality on the other.

105. Therefore, some employers in the circumstances may have taken the option of extending the period of the final written warning. We are however persuaded that although there were mixed motives the principal reason for the dismissal of the claimant was the failure to carry out the tuck test on 23 January 2018 coupled with the extant final written warning. In a health and safety critical industry such as that in which the respondent operates it plainly fell within the reasonable range of managerial responses to dismiss the claimant in the circumstances and that in our judgment was the principal motivating factor for the respondent's actions.

106. Indeed, although this was not the case before us of course instant dismissal for the incidents in September 2017 may well have fallen within the range of reasonable responses. It is to the respondent's credit that it stepped back from the ultimate sanction and gave the claimant an opportunity to improve. At that time, the respondent was well aware of the issues between the claimant and other members of the Polish workforce as the claimant had raised grievances in 2015 and 2017. The respondent's actions in September 2017 tell against its principal motivation in 2018 being the raising by the claimant of health and safety issues one of which directly implicated Mr Trzcinski (by reason of the workload allocation of which the claimant complained). This was a complaint in a similar vein to that which he had raised already and he nonetheless remained in employment.

107. What changed the picture from the respondent's point of view was Mr Cunningham's observation of the health and safety checks carried out by the

claimant on 23 January 2018. This we find to be the decisive issue and principal reason for the dismissal.

108. Therefore, on balance, we prefer the respondent's case and find that the principal reason for the claimant's dismissal was the failure to carry out the tuck test on 23 January 2018 coupled with the extant final written warning. We find that the principal reason for the claimant's dismissal was not because he raised a health and safety concern on 20 January 2018.

109. We now turn to the victimisation complaint. The respondent accepts that the claimant did two protected acts (those being the grievance of 20 September 2017 at pages 111 to 115 and the email of 20 January 2018 at page 129). The issue for the Tribunal is whether the claimant was subjected to a detriment or dismissed because of the protected acts (or because of one of them).

110. The detriment alleged by the claimant is the allocation to him of the sludge work by Mr Trzcinski. The protected act of 20 January 2018 can be of no relevance to this issue because the claimant in fact never returned to work after 23 January 2018 and never did the sludge work after 20 January 2018. Therefore, that protected act was not causative of the alleged detriment.

111. There was no evidence that Mr Trzcinski was aware of the earlier protected act. It was not suggested on behalf of the claimant that he was so aware. We therefore find as a fact that he was not aware of the protected act of 20 September 2017 and therefore cannot have been motivated to treat the claimant to the detriment of doing more than his fair share of the sludge work because of it.

112. For the same reasons as at paragraphs 104 and 105 above we find that the September 2017 grievance was not a material reason for the claimant's dismissal. As has been said, the respondent contented itself with issuing a final written warning in September 2017. Thus, it is difficult to see any causal connection between the grievance issued on 20 September 2017 on the one hand and the respondent's decision to dismiss the claimant for a further health and safety breach on 23 January 2018 on the other. In September 2017, the respondent did not act so as to victimise the claimant by dismissing him. There seems to be no basis upon which to base a case that him doing a protected act in September 2017 caused the respondent to dismiss him four months later.

113. The test for causation under the Equality Act 2010 is whether the discriminatory act in question was a material factor or reason for the treatment complained of.

114. It was not suggested to Mr Bostock or Mr Pears that they were influenced against the claimant because he had done a protected act under the 2010 Act. It is difficult to see therefore a proper basis upon which it could be said on behalf of the claimant that the decision makers who dismissed the claimant and who dismissed his appeal were materially influenced by him having done a protected act under the 2010 Act. The respondent did attempt to deal with the claimant's grievances in September 2017 and January 2018. Albeit these were somewhat inadequate, the respondent did not simply ignore them. It is significant that the respondent did not dismiss the claimant in September 2017 when it may have done so for the health and safety breaches.

115. The circumstances that prevailed then were similar to those in January 2018: a health and safety breach coupled with a grievance about Mr Trzinski. The respondent was prepared to tolerate the ongoing tension between the claimant and Mr Trzinski in September 2017 and arrived at what it hoped may be a solution to that in January 2018. What changed the claimant's health and safety breaches in January 2018. There is no proper basis upon which for us to be able to find that the doing by the claimant of protected acts was a material factor for the decision taken by the decision makers acting on behalf of the respondent.

116. We now turn to the breach of contract and unlawful deduction from wages claim. It was accepted on behalf of the claimant that the respondent was in principle entitled to make deductions from his salary for the cost of repairing any damage to the respondent's property caused by him. The deduction in question matched precisely the amount of damage caused by the claimant to the respondent's property. The claimant caused £1200 worth of damage and suffered three months' worth of deductions which equates to £1200. The respondent therefore did not breach the claimant's contract by making those deductions as the respondent was entitled so to do. The respondent also did not make an unlawful deduction from wages as the respondent was permitted so to do pursuant to the contract of employment which had been entered into by the claimant before the event giving rise to the deduction arose.

117. We find as a fact that the commencement day for the claimant's employment with the respondent was in January 2011. He was therefore entitled to seven weeks' notice to bring his contract of employment to an end. Mr Pears proceeded upon the basis that he had an entitlement of six weeks' notice (paragraph 66 above). Therefore, the respondent did breach the contract of employment treating the claimant as entitled to only six weeks' pay lieu of notice of termination as opposed to his full seven weeks' entitlement.

118. A difficulty for the claimant is that the breach of contract claim relating to notice pay was withdrawn at the preliminary hearing held on 13 September 2018. As we understand matters, that complaint has not been dismissed. There is therefore nothing to stop the claimant from issuing a fresh claim for breach of contract in the Employment Tribunal. That will however inevitably be met with an answer that it has been presented out of time. The claimant could pursue an action in the county court where a complaint for breach of contract has a much longer limitation period of six years from the date of the breach. We express the hope that the respondent will deal with this aspect of the matter sensibly and not put the claimant to the trouble of issuing fresh proceedings.

119. For the sake of completeness, we agree with Mr Pears' findings upon the issue of holiday pay recited in paragraph 66. No inference may be drawn against the respondent from the way in which it handled the claimant's entitlement to holiday pay for the reasons given by him.

**Employment Judge Brain**

Date 20 February 2019