EMPLOYMENT TRIBUNALS

Claimant: **Miss R Phillips**

Respondent: **BCA Logistics Limited**

Heard at: **Cardiff** **On: 28 and 29 November 2018**

Before: **Employment Judge RL Brace**

Representation:
Claimant: In person
Respondent: Mr M Crowe (Solicitor)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that the claim under s.103A Employment Rights Act 1996 of automatic unfair dismissal is not well-founded and is dismissed.

REASONS

Preliminary Matters

1. The claimant is a litigant in person and the respondent was represented by Mr Crowe, solicitor.

2. We spent a considerable proportion of the morning of the first day, resolving the issues to be determined by the Tribunal, as it was far from clear what protected disclosure the claimant was relying upon in support of her claim under s.103A Employment Rights Act 1996 ("ERA 1996") that she had been automatically unfairly dismissed on 7 March 2018.

3. Box 8.2 of the ET1 (at page [7] of the agreed bundle before me (the "Bundle")) only stated the following:

> '*I was sacked with no warning, approximately 5 days after I wrote an email to the company bringing up the fact that fact that company planners and coordinators were ignoring their duty of care to drivers on the road'.*

4. The case management order, from 5 October 2018, had not clarified, or made any orders requiring the claimant to particularize, the protected disclosures relied upon.

5. The witness statement from the claimant made only a general reference to a large number of emails regarding planning and hours and of that fact that in February 2018, she had wanted to set up a meeting to discuss issues regarding the working time directive [178]. She stated that this was why she had been '*given advice to contest [her] dismissal on the grounds of internal whistle blowing* [para 10 Claimant WS].

6. When I asked the claimant what disclosures she was relying on, the claimant initially indicated to me that she had had made a number of protected disclosures, made through emails and verbal discussions, which she considered were all relevant.

7. Before discussing the matter further with the claimant, I therefore sought to understand from the respondent their position on the matter. The respondent's representative, Mr Crowe, confirmed to me that the respondent's preparation for the case had been predicated on the basis that the claimant was seeking to rely on the contents of an email of 5 March 2010 [194/193]. This was an email the claimant had sent to a Mr Haroon Ahmed, Drivers/Inspections Planning Team Leader within the respondent organization.

8. Mr Crowe had identified this, as the email referred to in the claimant's ET1 which referred to an email sent by the claimant 5 days before she had been dismissed on 7 March 2018. Whilst the email of 5 March 2018 had been sent less than 5 days before the claimant's dismissal it was, I was told, an effective re-write (from memory by the claimant,) of an email the claimant had believed that sent, but accepted had not been sent, on 28 February 2018 i.e. 5 days before the dismissal.

9. The claimant agreed and accepted that the content of that 5 March 2018 email was being relied upon by her as containing disclosures but also indicated that there were other emails, that were also relevant.

10. Following a lengthy discussion with the parties, when a number of other emails, that had been referred to in the claimant's witness statement, were reviewed and discussed, the claimant confirmed that the only disclosure that she was relying on, was that contained in the 5 March 2018 email at pages 193 and 194 in which she stated that

> *'When doing their jobs the planners and coordinators must realise that the safety of myself and others around me, whilst working and also to and from work, is partly in their hands.*
>
> *When planning today's (Wednesday 28th Feb) jobs the planner/coordinator has totally disregarded his or her legal Duty of Care in regards to safe driving hours on the road along with duty of care in regards to extreme weather conditions due to the fact that my first drop and next pick up are in Essex, part of the region that is in the current extreme yellow weather warning and will therefore obviously make driving slower and more dangerous.'*

11. We also discussed the relevant sub-section of s43B ERA 1996 that the claimant was relying on. Despite the claimant not having particularized her claim in this manner, nor indeed the respondent having defended the claim in any detailed pleading (the ET3 Grounds of resistance para 12 making a general denial only that the claimant has been dismissed for making a disclosure, protected or otherwise,) any required amendments were allowed under the objectives of Rule 2 Employment Tribunal Rules 2013 and it was finally agreed that the issues between the parties to be determined by the Tribunal were as follows:

    a. Did the claimant make a protected disclosure (Sections 43B ERA 1996)?

    b. The disclosure the claimant relies on is the content of the email of 5 March 2018 at page 193 of the Bundle in particular the following:

    > *'When planning today's (Wednesday 28th Feb) jobs the planner/co-ordinator has totally disregarded his or her legal Duty of Care in regards to safe driving hours on the road along with duty of care in regards to extreme weather conditions due to the fact that my first drop and next pick up are in Essex, part of the region that is in the current extreme yellow weather warning and will therefore obviously make driving slower and more dangerous'.*

    c. Was this a qualifying disclosure?

i. Did it, in the reasonable belief of the claimant tend to show one or more of the matters set out in 43B(1)(a)-(f) ERA 1996.

ii. The claimant relies on subsection(s) (b), (c) and (e) of s.43B(1)(a-f):

1. s.43B(1)(b) - a person had failed to comply with a legal obligation to which he was subject*;*
2. s.43B(1)(d) - the health or safety of any individual had been put at risk;
3. s.43B(1)(e) - the environment had been put at risk.

d. In respect of each subsection relied upon the claimant relies on the same set of facts i.e. that the claimant complained to her employer that they had obliged the claimant to drive in dangerous weather conditions in an area where a yellow weather warning had been given. The claimant states that this was in breach of its legal duty of care/negligence to her and other road users as well as general health and safety obligations. She maintained that it also put the personal (as opposed to physical) environment of other road users at risk.

e. Did the claimant reasonably believe that the disclosure was made in the public interest?

f. The disclosure was made to the employer - Mr Haroon Ahmed on 5 March 2018. If the disclosure was a qualifying disclosure, it is agreed that it is a protected disclosure because the claimant made the disclosure to her employer (s.43C(1)(a) ERA 1996).

g. The respondent defends the claim on the following basis in particular:

i. That the email of 5 March 2018 did not contain information;
ii. The claimant did not have a reasonable belief that the disclosure was made in the public interest;
iii. The disclosure was not made in the public interest.

h. Finally, what was the principal reason the claimant was dismissed, and was it that she had made a protected disclosure?

Additional documentation

12. At the outset of the hearing the claimant also sought adduce a two-sided hand-written document, which she told me were her notes that she had

prepared in anticipation of a December 2017 meeting with Mr Philp Atkins, Southern Regional Hub Manager of the respondent.

13. This document had not been disclosed to the respondent prior to the morning of the first day of hearing, having been located by the claimant over the previous weekend. The only copy she brought with her was the original and she had not brought along additional copies for the tribunal or the respondent.

14. After an adjournment to enable me to read the witness statements and documents referred to in the witness statements, during which time I had asked the respondent's representative to consider their position on whether they consented to the document being included in the evidence before me, Mr Crower confirmed that there was no objection to include this within the Bundle. As a result, this was allowed by me to be adduced as evidence by the claimant and included at page 97a and 97b of the Bundle.

Schedule of Loss / Remedy

15. No Schedule of Loss, nor indeed documents relevant to remedy, had been disclosed by the claimant, despite being ordered to do so by the employment judge from the case management in her order of 5 October 2018.

16. After giving some consideration to the question of whether I would order the claimant to produce a Schedule of Loss and remedy documents overnight, as I considered it unlikely that there would be sufficient time to deal with remedy on the second day in any event, I made no further Order in relation to this at this point, but confirmed that if I found in favour of the claimant, I would be making further case management orders to ensure that the parties were fully prepared for any subsequent remedy hearing.

Evidence

17. I heard evidence from the claimant on her own behalf, and from witnesses for the respondent: Mr Philip Atkins and Mr Dugmore, Operations Service Manager. All three witnesses relied upon witness statements which were taken as read and they were then subject to cross examination, my questions and re-examination. I was referred selectively to documents contained in the Bundle

18. I am satisfied that all three witnesses gave their evidence honestly and to the best of their information and belief. I did not consider it necessary to reject a witness's evidence by regarding any witness as unreliable or not telling the truth in this case.

19. The claimant was reminded, before and during her cross-examination of the witnesses of the law in relation to protected disclosures and the burden of proof as well as the requirement for me to consider the employer's conscious and unconscious reasons for acting as it did and that in doing so I needed to consider:

    a. why did the dismissing officer act as he did?
    b. What, consciously or unconsciously, was his reason?

Findings of fact

20. The claimant was employed by the respondent as an Executive Driver and she commenced employment on 7 July 207. Her contractual terms were set out in the terms of Statement of Particulars of Employment [60] provided in conjunction with her offer letter, Drivers Handbook and Employee Handbook. Copies of these additional documents were not contained in the Bundle but a copy of the Disciplinary Policy (which was to be found within the Employee Handbook) was provided [23A-23E].

21. The claimant's employment was subject to a satisfactory probationary period of six months and the respondent reserved the right to extend that period at its discretion.

22. Section 8 of the Disciplinary Policy provided that in cases of misconduct during the first 23 months of employment the respondent reserved the right to dismiss an employee without following the Disciplinary Procedure.

23. The claimant was initially based in Newport and she worked as a 'Hub Rider'. I make no finding on what that role entailed, nor is it necessary for me to do so. By 16 August 2017 the claimant wished to change roles, to become an Outrider or Outbased Rider, where her role would be to collect and deliver vehicles nationally, as she was unhappy in the role of Hub Rider and she worked on the border of the Outbased Rider region.

24. In dealing with her request Mr Atkins received verbal communication from those that dealt routinely with the claimant, that by that time the claimant was considered to be a 'difficult character' who created 'problems where there are none'. Some drivers had reported that they would not work with her.

25. Whilst there is no documentation from those third parties to this effect, as all discussions held by Mr Atkins with others within the respondent regarding Miss Phillips were verbal, the contemporaneous email at page 70/71 confirmed that which had been communicated to him at the time. These concerns were not communicated to Miss Phillips by Mr Atkins.

26. Mr Atkins agreed with the claimant that she could work as Out Rider. He used this transfer as a means of managing the difficulties that others had stated that they had experienced with Miss Phillips in her role as Hub Rider.

27. She commenced in that role in the latter part of September 2018. She enjoyed that role, although the work hours were demanding, with the claimant regularly working 30-40 hours over a 3 - 4 day week [59A and 59B].

28. The claimant's role involved delivering vehicles to customers on a nationwide basis with car deliveries or 'Jobs' being allocated to her by Planners based in Birmingham. Planners would plan two to three Jobs per driver per day, based on what they considered was a reasonable achievement taking into account the distances involved. These Jobs were notified to the driver and to Driver Co-ordinators, based in Newport.

29. The driver would plan their day and arrange how they would travel from one delivery point for a Job, to the collection point/delivery point for the next Job. If any issues arose during the working day, the driver would contact Co-ordinator at the Newport Hub, who managed the driving Jobs each day, to deal with queries and make any necessary changes to the Jobs.

30. If a driver failed to complete a delivery or Job for any reason, this was classed as a failed Job. Procedures were in place for customer checks when taking delivery of any vehicle, including ensuring the customer's attention had been drawn to the pre-signature report before signing for delivery, as well as procedures for collecting cars for delivery and managing breakdown. The claimant clocked in and out of work via a handheld device which also indicated to the respondent the length of any daily breaks taken by the driver.

31. Between the summer of 2017 and the Christmas of that year, the respondent had cause for concern with regard to a number of performance and conduct issues relating to Miss Phillips. These included the following:

    a. In October 2017, when the respondent had concluded that the claimant had not shown the customer the pre-signature report before obtaining a signature from the customer [75/76];

    b. In October 2017 when the respondent had concluded that the claimant had been using the mobile phone for purposes other than work or emergency use [78-85];

c. On 6 December 2017, the Driving Co-ordinator, Karen Barlow had complained that the claimant had refused, and in turn, failed to complete two jobs allocated to her as she had a lunch date booked. She also complained that the claimant had also been aggressive to her, had shouted at her and had refused a request from her to go back to the respondent's office [88];

d. On 18 December 2018 Ms Barlow complained again about the claimant, that she was refusing to take a vehicle back to the Newport Hub as instructed, as she had already made plans to stay with friends overnight;

e. Mr Gary Maher (Operations Manager based at Goole) also complained that the claimant had not followed the respondent's breakdown procedures when a warning light was showing on a particular vehicle that she was driving.

32. A meeting was arranged between Miss Phillips and Mr Atkins which took place on 19th December 2018 in which these issues were discussed. This has been referred to as a Concerns meeting. Due to the amount of complaints that had been received about the claimant, Mr Atkins had entered the meeting intending to terminate the claimant's employment.

33. A note was prepared of the meeting which I accepted as reliable [98]. It was not challenged by the claimant. The following was discussed:

a. with regard to the 6 December 2017 incident, the claimant was advised that having made herself available for the Jobs for a whole day, if that should change, she should let the Co-ordinator know in advance if that was not to be the case;

b. there were concerns that she was bypassing Co-ordinators at the Newport Hub, who managed the driving Jobs each day and any necessary changes, and instead was speaking direct to the Planners based in Birmingham;

c. if she was finishing work late, she needed to let the Co-ordinators know if she would start a job late the following day as re-planning might be required;

d. with regard to the 18 December 2017 warning light issue, the claimant had to obtain authority from the non-conformance department of the respondent before taking a vehicle, if there were any issues with a vehicle.

e. she was told she needed to behave in a more professional manner and that shouting and aggressive behaviour was not acceptable.

34. Mr Atkins arranged for Karen Barlow to be the claimant's first point of contact for all communication.

35. Mr Atkins did not dismiss the claimant at that meeting however, as he determined that he would give the claimant 'another chance'. It was not at any point agreed with the claimant by Mr Atkins that these matters were not going to be taken into account at any later review. It was agreed that there would be a review to her position in a month. Due to weight of operational work, Mr Atkins did not undertake that review.

36. On 18 December 2017 the claimant was involved in a small vehicle collision [101]. This was not addressed or discussed at the Concerns meeting. It was not a contentious point, but it is likely that this was a result of the accident not having come to Mr Atkin's attention by the time of the meeting.

37. Mr Atkins investigated the incident and interviewed the claimant on 8 January 2018 [101]. He decided to take no action against the claimant as the impact was small and the accident had arisen in a congested area. She was warned that any future fault accidents would automatically trigger the disciplinary process. The claimant was not involved in any future accidents.

38. On 9 January 2018 Mr Atkins received an email from another of the Driver Co-ordinators at the Newport Hub complaining that the claimant had made arrangements with another driver to start a Job late, as she had a late finish the night before, and that the claimant was insisting on continuing with that plan to start late despite being told by the Co-ordinators that it was putting a number of other jobs at risk [107].

39. On 22 January 2018 a member of the respondent's Non-Conformance department raised a concern to, amongst others, Mr Atkins, that the claimant had collected a vehicle and failed to notice damage to the windscreen on collection. On further review, it was noted that there was a clear photograph of the windscreen on collection taken by the claimant which showed no damage, but that the claimant had driven the vehicle without screen wash.

40. The matter was dealt with by a Compliance Team Leader, who reported to Mr Atkins that he had spoken to the claimant to ensure that the collection site provided screen wash before she completed her appraisal of the vehicle so that she was able to identify possible screen damage. He

further reported to Mr Atkins that the claimant '*took the advice on-board'* [129/130].

41. On 12 February 2018 the Co-ordinators at Newport had cause to raise an issue regarding the claimant's availability to undertake Jobs that had been allocated to her by the Planners [154-156]. The claimant had changed her availability for work late in the working week. This was not disputed by the claimant on cross-examination or contemporaneously. She considered that because she had notified them before the start of the Job that this could be changed.

42. The respondent had a system whereby drivers were required to input their availability for the following week, by the Wednesday. The following week's work is then planned by the Planners and if, after a Wednesday a driver wished to change their availability, they were required to contact the Co-ordinator with at least 48 hours' notice otherwise it would be classed as an absence.

43. The claimant had confirmed her availability for work but had changed that availability on the Friday whilst she was off work on annual leave. The Co-ordinator reported to Mr Atkins that her reaction was typical blaming planners and asked him to look into the claimant. Mr Atkins was away on business that week and the matter wasn't addressed at the time due to work pressures.

44. On 21 February 2018 Karen Barlow, Newport Co-ordinator emailed Mr Atkins outlining the issues she had experienced with the claimant [186-187].

45. A specific complaint raised by Ms Barlow related to the claimant's refusal to pull over and speak to Non-Conformance when an engine management warning light had shown on a vehicle. It was reported that the claimant refused to do so as she had theatre tickets for that evening and that by the time breakdown had arrived, she would have worked a 14-hour day, which she felt was in breach of the working time directive.

46. The email indicated that the incident was typical of the claimant's behaviour and that there were many examples.

47. There was also a general complaint that the claimant was unwilling '*to listen and take heed, her problematic relationship with others compounded by unrealistic expectations of the role*'. Ms Barker felt that the claimant had chosen to ignore, or was not capable of acting upon, the feedback that had been given to her at the Concerns meeting.

48. On 26 February 2018 a Newport Co-ordinator contacted Mr Atkins by email to ask whether the claimant was still on review as she was refusing to go to a dealership until they called her and when he tried to give her instruction to go there anyway, she had hung up on him [179].

49. As a result, Mr Atkins asked the Co-ordinator to collate the issues that they had with the claimant, which he did by way of email dated 28 February 2018 [186] which attached Ms Barlow's email of 26 February 2018.

50. In that email Ms Barlow had reported to Mr Atkins that she had spoken to the claimant that morning who had complained about planning and her work-load generally. in response the Co-ordinator had removed one of her Jobs despite believing that her work plan was achievable. The email ended with the Co-ordinator opining to Mr Atkins that after 'several *conversations/confrontations I am of the firm opinion that she does not fully grasp the role requirements and lacks the skills and personal attributes to mater the role*.'

51. On 28 February 2018 the claimant had intended to send an email to Mr Haroon Ahmed (Driver / Inspections Planning Team Leader) expressing concern regarding the planning of her Jobs that day. This email was never sent by the claimant and this is not in dispute. The email would have been part of an exchange of email correspondence that the claimant had already been engaged in with Mr Ahmed since 15 February 2018. A copy of the email thread between the claimant and Mr Ahmed from that date through to 5 March 2018 (at 21.41) was contained in the Bundle from pages 193-198. The email containing the qualifying disclosure relied upon was part of that email exchange and was at page 193 and 194.

52. The email exchange had commenced on 15 February 2018 with the claimant complaining of concerns regarding the planning for her Jobs which she was alleging were impossible to complete. She attached a daily plan by way of example [166]. Later, on 19 February 2018 she asked Mr Ahmed for a copy of the working time directive that planners were supposed to be adhering to as she wanted to know where she stood in relation to driving.

53. On 5 March 2018 at 7.36am the claimant emailed Mr Ahmed an email containing, to the best of her recollection, the issues that she had sought to raise with him by email on 28 February 2018. This is the email containing the disclosures the claimant seeks to rely on as protected disclosures.

54. She copied in Ms Barlow to that email and sought to copy in Mr Atkins. The claimant had however incorrectly typed Mr Atkins email address into that email and it was not received by him. Mr Atkins did not discuss the email with Ms Barlow or Mr Ahmed that day and was not aware that it had been sent.

55. Later that day Mr Atkins arranged for the claimant to meet with him on Wednesday 7 March at 11am in order to discuss her employment. This was confirmed to the claimant by way of email from Ben Simms, Compliance Team Leader sent to the claimant at 13.57 [199]. Mr Simms was unaware of the content or purpose of the meeting [201].

56. The meeting was therefore arranged by Mr Atkins prior to him having knowledge of the fact and content of the email from the claimant of 5 March 2018.

57. Later that day, at 21.41pm Mr Ahmed responded to the claimant's email sent earlier that day. Again Ms Barlow and Mr Atkins were copied into his response. There was no suggestion that Mr Atkins' email address was not correct on this occasion. This email would therefore have been in Mr Atkins' inbox after the meeting had been arranged with the claimant, but before he met with her and before he sent his email to the respondent's HR provider on 6 March 2018 at 15.59.

58. In this email Mr Atkins advised that he was seeing a number of drivers the following day, including the claimant, with the intention of terminating their employment [207A]. He gave some examples of why he held concerns regarding the claimant's performance and conduct, explained that due to business needs he had not managed to undertake the intended review after the Concerns meeting and indicated that he did not consider that the claimant would benefit from a further review.

59. I asked Mr Atkins whether he had seen this email, and in turn the email thread which included the earlier email from 5 March from the claimant. He confirmed to me that he had not. Whilst I found that it was likely that Mr Atkins would have received that email into his inbox, I accepted Mr Atkins' evidence and that Mr Atkins had not read or noticed the earlier email in the thread, timed at 7.36am i.e. the email that contained the disclosure relied upon.

60. Mr Atkins met with the claimant on 7 March 2018 in which he confirmed to her his decision to terminate her employment. This was confirmed in his letter to the claimant of 9 March 2018. The meeting was brief and neither party gave any or any significant evidence on the content of that meeting.

61. On 31 May 2018 the claimant emailed Mr Mark Dugmore, the respondent's Operations Manager asking him to look into the termination of her employment. She stated that she believed that no proper procedure had been followed and she believed she had a case of whistleblowing.

62. As the claimant's employment had ended nearly three months' previously, the matter was not treated as an appeal. Mr Dugmore sought information from Mr Atkins regarding the claimant's termination and reviewed documentation relating to the claimant including the email of 5 March 2018. He concluded that he could not see how the claimant could connect her dismissal to her alleged whistleblowing.

63. On 4 July 2018 the claimant issued proceedings.

The Law

64. s.103A ERA states that an employee will be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for that dismissal is that the employee made a protected disclosure.

65. s.43A ERA 1996 provides that a 'protected disclosure' means a qualifying disclosure as defined by s.43B, which is made by a worker in accordance with any of the sections 43C to 43H ERA 1996.

66. A 'qualifying disclosure' means a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the matters set out in 43B(1)(a)-(f) ERA 1996.

67. Section 43B(1) also requires that in order for any disclosure to qualify for protection, the disclosure must, in the reasonable belief' of the worker:

    a. be made in the public interest, and
    b. tend to show that one, of the six relevant failures, has occurred, is occurring or is likely to occur.

68. The test is a subjective one, with the focus on what the worker in question believed rather than what anyone else might or might not have believed in the same circumstances. That it is made in the context of an employment disagreement does not preclude that conclusion.

69. An employee will only succeed in a claim of unfair dismissal if the tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure and a 'principal reason' is the reason that operated in the employer's mind at the time of the dismissal

(as per lord Denning MR in **Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA**). If the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under s.103A ERA 1996 will not be made out.

70. In this case, the claimant did not have the requisite two years' service to claim ordinary unfair dismissal and as such has the burden of showing, on balance of probabilities, that the reason for dismissal was an automatically unfair dismissal (**Smith v Hayle Town Council 1978 ICR 996 CA** and confirmed in **Ross v Eddie Stobart Ltd EAT 0068/13** as applying in whistleblowing cases).

71. With regard to causation, as confirmed in **Chief Constable of Werst Yorkshire Police v Khan 2001 ICR 1065** HL (a case concerning victimization contrary to the Race Relations Act 1976 but approved for the purposes of s130A ERA 1996 in **Trustees of Mama East African Women's Group v Dobson EAT 0220/05**) this is a factual not legal exercise. In establishing the reason for dismissal in a s.103A ERA 1996 claim I am required to determine the decision-making process in the mind of the dismissing officer. This requires the tribunal to consider the employer's conscious and unconscious reasons for acting as it did. In doing so I need to consider:

    a. why did the dismissing officer act as he did?
    b. What, consciously or unconsciously, was his reason?

Conclusions

72. What is in dispute is:

    a. whether the claimant's email amounted to a qualifying disclosure, it being accepted that if it was a qualifying disclosure, it would be a protected disclosure;

    b. whether the principal reason for the claimant's dismissal was because she made such a protected disclosure.

73. If I am satisfied that there was no qualifying disclosure, the complaint fails as only s.103A ERA 1996 claim is before me the claimant only having just over 7 months' continuous employment. Even if I am satisfied that there was a qualifying, and in turn protected disclosure, I must be satisfied that, on the balance of probabilities, that the claimant has established that the principal reason for the dismissal was because she had made the protected disclosure.

Protected Disclosure

74. Turning firstly to the 5 May 2018 email from the claimant to Mr Ahmed relied on as the qualifying disclosure. The matters claimed fall into three categories:

    a. breach of legal obligations (legal duty of care) (s.43B(b))
    b. health and safety (the asserted effect on the claimant and other drivers generally) (s.43B(d)); and
    c. putting the environment at risk (the personal environment of other road users) (s.43B(e))

75. I conclude that the disclosure is a qualifying disclosure under s.43B(1)(b) and (d) but not s.43B(1)(e). That does not affect the outcome. The provisions of s47(B)(1) ERA 1996 are clear a qualifying disclosure is something disclosed which in the reasonable belief of the worker, is made in the public interest and tends to show one of the headings that follow is met.

76. Taking matters in terms of breach of a legal obligation and health and safety together, my conclusions are the same. It was reasonable of the claimant to believe in the circumstances of this case, that the respondent's planning of her vehicle car drop-offs or jobs, in areas where there were yellow weather earnings, could breach the employer's general duty of care in looking after her health and safety, and the health and safety of the public road users more generally.

77. The fact that at the time claimant sent the email on 5 March 2018, her jobs had been reduced and she had not in fact spent lengthy hours in dangerous driving conditions, I did not consider to be a relevant consideration.

78. The claimant made it clear that the concerns she held more generally was that planners did not take into account driving conditions when planning jobs for drivers. I accept that it might have been helpful for the claimant to have clarified to Mr Ahmed that her jobs that day had reduced and that she had not, in fact, had to take all jobs allocated to her, but this does not undermine the primary argument that the claimant was making a qualifying disclosure.

79. In this case the claimant relied on the 'duty of care' i.e. general common law duty in negligence, but was not able to be precise about what legal obligation she envisaged is being breached or is likely to be breached with regard to working hours for the purpose of a qualifying disclosure under S.43B(1)(b).

80. I concluded that this was not necessary in this case where it was obvious that some legal obligation was engaged (i.e. duty of care) then the disclosure can potentially qualify for protection without specifics as to the legal obligation envisaged.

81. The respondent has sought to argue that the email simply contains a statement which is general and devoid of specific factual content and cannot be said to be a disclosure of information tending to show a relevant failure.

82. There is a distinction between 'information' and the making of an 'allegation' and the ordinary meaning of giving 'information' is 'conveying facts'.

83. In this case, having considered the email of 5 March 2018 I concluded that the claimant was conveying more than just a general allegation of negligence and was conveying facts; specifically that

    a. the planning for the allocated driving jobs;
    b. on Wednesday 28 February;
    c. disregarded duty of care and health and safety concerns;
    d. as a result of the yellow weather warning, particularly in Essex;
    e. which made driving conditions dangerous and slower.

84. Further I accepted that whilst the focus of the email did relate to the claimant's personal position, she did highlight that her concerns were not just related to her but also to other drivers. I concluded that the claimant had a reasonable belief that the disclosures were made in the interests of other drivers and that this was a sufficient group of the public for the matter to engage the public interest.

85. With the regard to the disclosure qualifying under s.43B(1)(e), I concluded that the information contained in the email of 5 March did not tend to show that the environment has been, is being, or is likely to be damaged. Whilst no definition of 'environment' is given for these purposes, and I accepted that the word is intended to have a wide compass and could in certain circumstances include the personal as well as the physical environment, as had been presented by the claimant, on any reading of the email, I could not read into the words used, that the disclosure tended to show environmental damage (personal or otherwise).

Dismissal

86. With regard to the reason for the claimant's dismissal, the reasons that had been given by Mr Atkins for the claimant's dismissal, were that he dismissed her because of her poor performance, attitude and conduct

during her time at the respondent and that he could not envisage her behavior improving in the future and so did not think it was necessary to hold any further review meetings [para 39 witness statement].

87. This was also reflected in the email he had sent on 6 March 2018 [207A] in his dismissal letter of 9 March 2018 [208] his email to Mr Dugmore [219A].

88. The documentary evidence was consistent with that which was contained in Mr Atkins' witness statement and repeated by him on cross examination in live evidence and he did not waiver from that position in his evidence.

89. However when considering why Mr Atkins, as the dismissing officer acted as he did, I had to ask myself what consciously, or unconsciously, was his reason for dismissing the claimant. In doing so, I accepted that the stated reasons for dismissal may not be the real reasons for dismissal and that if Mr Atkins had consciously dismissed the claimant for having made this protected disclosure it was unlikely that he would commit that to writing.

90. I also accepted that if Mr Atkins had consciously dismissed the claimant for having made this protected disclosure it was possible that he would be less than candid in admitting to that fact.

91. I found Mr Atkins however to be a reliable and straightforward witness and concluded that nothing in the responses he gave, to the questions on cross examination of him, could lead me to conclude that consciously, or unconsciously, he dismissed the claimant for any reason other than the stated reasons relating to the claimant's poor performance, attitude and conduct.

92. When reaching this conclusion, I considered the state of Mr Atkin's knowledge of the claimant's protected disclosure of 5 March 2018 which was that he did not know of the protected disclosure at the point of dismissal.

93. At first blush, the timing of the disclosure and the timing of the decision to dismiss could have led to a conclusion that there was a real possibility, in the absence of a credible explanation from the respondent, of a causal link between the disclosure and the dismissal.

94. The claimant herself had acknowledged, when it was pointed out to her on cross examination, that Mr Atkins' email address as typed by the her in her email of 5 March 2018 (07.36) was incorrect and that Mr Atkins would not have received that email at that point in time. I also accepted that he had not been told about the email and on the face of that information,

would not have known about the protected disclosure before he requested to meet the claimant.

95. That email was however part of a longer email thread which did find its way to Mr Atkins later that day at 21.41 [193] as Mr Ahmed had copied him into his own response to the claimant. Had Mr Atkins read that email thread in its entirety at that stage at that point, then he would have been aware of the protected disclosure before he requested the claimant to the meeting in which he dismissed her.

96. I accepted his evidence that he had not, and therefore did not know about the disclosure at the point he made the decision to terminate the claimant's employment.

97. I also concluded that Mr Atkins had, in any event, by the time that the claimant had sent her protected disclosure, already started to pull together information in order to assess whether or not he should be terminating the claimant's employment having concerns regarding her attitude, performance and conduct personally after receiving feedback from the Driving Co-ordinators. This was reflected in the emails to and from the Driving co-ordinators at the Newport Hub [178, 179, 186,187 and 192].

98. Whilst the claimant was not bringing a claim of ordinary unfair dismissal, the claimant was cross examined and sought to cross examine Mr Atkins on the issues that were before him regarding the claimant's attitude, conduct and performance. I concluded that if the evidence did not support the reasons provided by Mr Atkins for the claimant's dismissal, this could assist the claimant in that it may be appropriate to draw inferences as to the real reason for the employer's action and might assist in establishing that the real reason was in fact some other reason and was the fact that the claimant had made the protected disclosures.

99. There was little to no challenge from the claimant regarding the issues which had arisen prior to the Concerns meeting. There was a suggestion by the claimant that this should have been disregarded by Mr Atkins when reaching the later decision to dismiss her on the basis that these had already been dealt with by him at that December meeting. Mr Atkins rejected this suggestion indicating that he had looked at her performance and conduct as a whole, from the beginning of the employment, when reviewing whether her employment should be terminated. I concluded that this was reasonable approach to take to an employee which such short service.

100. There were essentially general concerns regarding the claimant's attitude and skill set and 6 further discrete issues:

a. 18 December 2017 – collision;

b. 9 January 2018 - complaint that the claimant had made arrangements with another driver to start a Job late, as she had a late finish the night before, and that the claimant was insisting on continuing with that plan to start late despite being told by the Co-ordinators that it was putting a number of other jobs at risk;

c. 22 January 2018 – complaint that the claimant had failed to notice damage to a windscreen;

d. 12 February 20188 – complaint regarding the claimant's availability;

e. 21 February 2018 – complaint that the claimant had refused to stop and deal with an engine management warning light;

f. 26 February 2018 – complaint that the claimant was refusing to comply with an instruction from the Driving Co-ordinator.

101. With regard to the collision there was little dispute from the claimant that there had been a collision and I concluded that it was reasonable for the respondent to have raised this as a performance issue.

102. With regard to the 9 January 2018 on cross examination the claimant disagreed with the matters included within the email. However, this was at odds with the matters contained in her witness statement at paragraph 6, in which she stated that after this incident anytime a driver contacted her to make such arrangements, she would tell them she needed to clear it with the Co-Ordinator first. Despite the fact that Mr Atkins had not spoken to the Co-Ordinator to ascertain the veracity of his concerns, he did speak to the claimant at the time and I concluded that it was reasonable of Mr Atkins to rely on the representations made to him by one of the Co-ordinators in dealing with this.

103. From that I drew the conclusion that on balance it was likely that the claimant had accepted her failing at the time and the respondent did have a reasonable cause for concern regarding the claimant's performance and attitude in relation to this incident.

104. With regard to the 22 January 2018 complaint, the evidence was confused in relation to this issue as, despite no contrary indication from the claimant in documentary evidence at the time, in her evidence in her witness statement and on cross-examination, the claimant maintained that she had put water in the car, therefore had put screen wash in the car and had noticed the chip on delivery. On cross examination however, the

claimant also confirmed that she had recorded on collection of the vehicle, that there was no screen wash despite having added water.

105. In his witness statement Mr Atkins had repeated the contents of the email exchange at page 129, but on cross examination responded to the claimant's evidence that she had recorded on collection that there had been no screen wash and that because she had recorded that there had been no screen wash, this made the respondent liable for the damage.

106. The claimant's failure, as presented to the claimant and Mr Atkins at the time by the Compliance i.e. failure to notice damage and knowingly driving the vehicle with no screen wash, differed to that presented at the hearing i.e. failure to follow procedure in recording that there was no screen-wash.

107. I found that the matters before the respondent at the time of the incident were that the claimant had failed to put screen wash in the car and had therefore not complied with the respondent's process; that this was a matter that was reasonably addressed with the claimant as a failing based on the information before the Compliance Team at the time.

108. With regard to the 12 February 2018, this was not addressed with the claimant on a contemporaneous basis, but I accepted Mr Atkins' evidence that there was a process to follow regarding booking time off and that the claimant had failed to comply with that process. I also accepted that despite the fact that the business dealt with the issue at the time, that this was another instance of the respondent having concerns regarding the claimant's performance and general attitude.

109. With regard to the 21 February 2018 again, the claimant was cross-examined on this issue and she confirmed that she wanted to get home and did not want to wait on the M5. She admitted that she had refused to wait for recovery. I concluded that concerns regarding the claimant's attitude were therefore reasonably held.

110. With regard to the 26 February 2018 claimant sought to suggest in her responses to cross examination that she did not hang up on the Co-ordinator, that she had simply finished the call. In this regard, I concluded that the claimant was not willing to openly accept that she had hung up on the caller but had in fact done so. I concluded that it was reasonable to consider such conduct unacceptable.

111. I concluded that in respect of each issue of concern raised by the respondent, irrespective of whether the claimant had challenge to those concerns, there was cogent evidence to conclude that the claimant's

attitude, conduct and performance were the real and principal reasons for her dismissal.

112. I therefore concluded that the claimant had not demonstrated that the reason for her dismissal was because she made a protected disclosure and that the claimant's claim of automatic unfair dismissal under s.103 A Employment Rights Act 1996 was not well-founded and is dismissed.

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Employment Judge RL Brace
Dated: 16 December 2019

JUDGMENT SENT TO THE PARTIES ON

……22 December 2019…….

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS