EMPLOYMENT TRIBUNALS

Claimant: Mr D Blessing

Respondent: JWT Commercial Limited

Heard at: Liverpool **On:** 14 and 15 October 2019

Before: Employment Judge Aspinall

REPRESENTATION:

Claimant: Mr Kenward, Counsel
Respondent: Miss Walker, Counsel

REASONS

This case was heard on 14 and 15 October. Following conclusion of the case but prior to oral judgment being given the parties requested a stay in proceedings. A stay was granted until 19 November 2019. On 14 November 2019 the parties requested that the stay be lifted. Short Form judgment for the claimant was sent to the parties on 20 December 2019. The claimant was unfairly dismissed having made a public interest disclosure. The reasons for that judgment are set out below:

Introduction

1. By a claim form presented on 8 October 2018 and following ACAS Early Conciliation between 17 September 2018 and 2 October 2018 the claimant claimed unfair dismissal for having made a public interest disclosure under section 103 Employment Rights Act and he made claim for wrongful dismissal notice pay.

2. The claimant worked for the respondent as an HGV driver from 21 August 2017 until 11 September 2018. He was dismissed, the respondent says, for gross misconduct in failing to carry out pre departure checks on his vehicle and for the saying that he would submit the form at a later date. The claimant says the real

reason for his dismissal is that he raised health and safety concerns about a defective underrun device fitted to a trailer. He did this by text to the transport manager Mr Stuart Buckley-Mellor on 11 September 2018. The respondent accepts that the disclosure was made but says that the claimant made it, not in the public interest, but in his own personal interest in the knowledge that he had committed acts of gross misconduct (failing to report the defective underrun earlier that day and swearing at a colleague on the telephone) for which he could be disciplined.

The Issues

3. A list of issues was agreed at case management stage. They were:

3.1 Did the respondent identify a fair reason for dismissal and if so, was it gross misconduct?

3.2 Did the dismissing officer Mr Gallagher have a genuine belief that the claimant had committed acts of gross misconduct for which he was dismissed, and if so what was the basis of that belief? Was the claimant dismissed on the ground he had made the disclosure?

3.3 Was the disclosure a qualifying disclosure under Section 43 ERA?

3.4 Was it disclosed in the public interest or for personal gain?

3.5 Did the claimant make the disclosure to avoid being disciplined for the earlier acts of gross misconduct?

3.6 Did the respondent act in breach of contract by dismissing the claimant without contractual notice, and refusing his appeal request?

3.7 What remedy if any is due to the claimant?

The Hearing

4. The claimant was represented by Mr Kenward, Counsel. The respondent was represented by Miss Walker, Counsel.

5. The Tribunal heard oral evidence from the claimant and from Mr Gallagher, and Mr Buckley Mellor for the respondent.

6. The Tribunal heard from the claimant. He gave his evidence in a straightforward and believable manner. The Tribunal found him to be credible in his account of his thoughts and actions on 11 September 2018. The chronology of events and the documentation including timed telephone call records and a text message corroborated his account of events that day.

7. The Tribunal heard evidence from the respondent's dismissing officer Mr Gallagher. Mr Gallagher was sometimes evasive, particularly when pressed on the meeting that led to the claimant's dismissal. He said that he couldn't remember things as it was twelve months ago. He was asked about the text the claimant had sent to Mr Buckley Mellor and whether or not it had been read out at the dismissal

meeting. Mr Gallagher hesitated and relied not on his own memory but wanted to look at his witness statement at that point and said, "let me look at my version". He then anchored his response to his witness statement saying yes it was read out. He was then taken to his minute of the meeting which was in the bundle and which did not record the text having been read out. He was asked why the minute did not record it being read out and his reply was that his minute was a "condensed version of a difficult conversation" and that he might not have remembered. It was then pointed out to him that he was saying that he had not remembered it being read out when he made the minute at the end of that week in September 2018 but that he could remember it when he made his witness statement for this case.

8. Mr Gallagher was asked to respond to the claimant's position that the claimant had *not* said that he had not (yet) filled in the pre-use check/defect sheet at the dismissal meeting as the respondent alleges. Mr Gallagher paused and looked at the documents and said, "I am just trying to be on the same page". The question did not relate to a document. The Tribunal infers that he was looking to find an answer to the question in the documents and to avoid saying something that might be contradicted by a document rather than relying on his own memory. He was willing to shift his position to be more credible.

9. Mr Gallagher when under pressure of cross examination also denied things that were part of his own case. He was asked if it was illegal to drive the trailer with the 45 foot container and he said "I don't believe he was ever instructed to (do that). He put it on". He was taken to a document, his colleague Mr Buckley-Mellor's statement which said the claimant "was asked to bring the trailer and container to the depot" at which point Mr Gallagher said that Mr Buckley-Mellor's knowledge was deeper than his. Elsewhere, Mr Gallagher told the tribunal that he was sitting just two feet away from Mr Baker during the telephone call with the claimant in which the instruction to load the trailer was given. Mr Gallagher was selective in his recollection of the content of that call and concerned not to contradict his colleague.

10. Mr Buckley-Mellor was the respondent's witness to the meeting that led to the dismissal but had very little recollection of its content. He accepted that his notes of the dismissal meeting on 11 September 2018, prepared the next morning were very short at 5 lines and left out significant content. He had not taken notes at the meeting but made his note the next day from memory. He often said "I can't recall" in response to important questions. He did not recall the words used to end the claimant's employment. He did not recall health and safety being mentioned (though he accepted that the text was read out and there was discussion about the time the text had arrived) and did not recall Mr Gallagher saying that it was OK to dismiss the claimant without following procedures as the claimant had less than two years' service. He used "I can't recall" to avoid answering questions that might implicate the respondent. He was asked when was trailer AX 16 repaired and he said that he had called someone to come and fix it on site that afternoon of 11 September 2018 and admitted that he had told the claimant so during the meeting. Later in cross examination he said that he had arranged for it to be fixed at the road side on the way to Cannock. Then he said it was to be fixed about 5 miles away just before the M57 at the engineer's request. He later said it was a different trailer that had gone to Cannock, not the one the claimant had used that day. This was not a point on which the Tribunal needed to make a finding of fact but it revealed a witness who was

inconsistent and reluctant to make potentially damaging admissions. He could have stated unequivocally when and where the trailer AX16 was repaired. He had known this would come up at tribunal as the claimant had been asking for documentary evidence of the repair. He did not answer the question definitively and had no documents to record the repair.

11. There was an agreed bundle of documents of around 170 pages.

12. All the witnesses provided witness statements which referred to pages in the bundle. The Tribunal looked at those pages of the bundle to which it was referred by the witness statements or to which it was taken in evidence by the parties.

The missing documentation

13. On the morning of the first day of the hearing the claimant raised a preliminary matter. The claimant argued that there had been a failure to disclose documents that were ordered to be disclosed. The claimant wished to be heard on a detailed application for disclosure. The respondent's position was that the documents did not exist, that it had disclosed all it had and that it had received late disclosure from the claimant at 4.28 pm on the working day before the hearing and that it had taken a pragmatic stance, not objected but added them to the bundle. It was the claimant's position that the missing documentation was central to the credibility issues in the case. The documents had been requested on 26 April 2019. They were:

a. Copies of the precheck form for the trailer AX16 for the 12 weeks prior to 11 September 2018 and

b. The vehicle read out for the vehicle WX66 ZGB for the 11 September 2018.

14. The Tribunal decided to consider the documents issue after reading into the case. The Tribunal went out to read and when the hearing resumed at 12.35 the claimant repeated its desire to be heard on an application for disclosure and in the alternative to have a postponement. It referred the Tribunal to a letter at p160 of the bundle from the claimant's solicitor to the respondent's solicitor on 11 October 2019 repeating the request for disclosure and making a costs warning.

15. Following discussion with both representatives the Tribunal declined to hear the disclosure application at this point in the hearing and indicated that the position would be kept under review. The reasons were that in accordance with the overriding objective focus should be kept on the need to deal fairly and justly with the case. Both parties were present and represented, a list of issues was agreed, the witnesses were ready to give evidence and the Tribunal had read the evidence in chief and could see that much would turn on the oral evidence of the dismissing officer and of the claimant. This was a case about the reason for dismissal, there were witnesses present to give oral evidence of the content of the dismissal meeting and there was a letter of dismissal and notes of the dismissal meeting in the bundle. The respondent had stated that the documents did not exist so making further orders or postponing the case would not change the position. If the claimant had evidence

of the existence of the documents or a deliberate attempt to conceal it could repeat its request for the application to be heard.

The Facts

Claimant's background

16. The claimant is an experienced HGV driver. He has worked in the industry for over forty years and has owned and operated his own HGV business. He is OCR certificated. This certification goes beyond what is necessary to be an HGV driver and qualifies him to be an operator. In the past he witnessed a fatal road traffic accident and gave evidence at a coroner's court. This has made him very health and safety conscious. He had never, until instructed to do so on 11 September 2018 by the respondent, driven a trailer carrying a container with a defective under-run for that container size.

Respondent's background

17. The respondent is an HGV operator in Merseyside. It has over 100 employees. There are 5 office staff and it uses an outsourced personnel company for advice and assistance in HR matters. It owns and operates about 60 heavy goods vehicles. It has 4 Directors and two operational managers; Mr Stuart Buckley-Mellor, Transport Manager and Mr Gallagher, Operations Manager.

18. The respondent has a double green light operating rating with VOSA for both its tachograph and maintenance performances.

19. It has a company handbook and a disciplinary and grievance procedure available in hard copy at its depot.

The Disciplinary Procedure

20. The disciplinary procedure, large parts of which are not numbered, provides:

> "JWT Commercial expects its employees and workers to behave at all times in a professional manner, acting in compliance with the organisation's rules, procedures, values, behaviours and requirements of a professional organisation."

20.1 It has a section headed Professional Conduct and states that:

> "JWT expects employees to behave in a professional manner at all times; to be honest, act with integrity and give respect and consideration to others and to comply with professional codes of practice. Employees should always:
>
> - Be honest.
> - Obey all reasonable and lawful instructions.
> - Act in a manner that is not abusive towards another person.

- Treat everyone with respect and not undermine them.
- Comply with all relevant statutory provisions.
- Comply with JWT's Health and Safety procedures and guidelines."

20.2 The procedure states that employees should not:

- Behave in an insubordinate or inappropriate manner
- Behave in a persistent careless or negligent manner
- Behave in a manner that is likely to disrupt working relationships

20.3 It sets out what might constitute gross misconduct. It includes:

"deliberate refusal or wilful failure to carry out a reasonable and lawful direct instruction given by management during working hours"

"serious cases of bullying, offensive, aggressive, threatening or intimidating behaviour or excessive bad language"

"breach of safety rules and/or any action which seriously endangers the health or safety of an employee or any other person whilst at work"

"deliberately making a false entry into the written records of the company"

21. The Procedure states:

"No formal action will be taken against an employee until the case has been fully investigated."

22. In relation to an investigation it says at paragraph 5.1

"When a potential formal disciplinary matter arises, it is important to investigate and establish the facts promptly to ensure timely recording of events. Written records should be made for later reference, including written statements from any witness where appropriate."

23. At 5.1.3 The Disciplinary Procedure reserves the right for the company to go straight to disciplinary hearing where appropriate:

"The organisation reserves the right to dispense with an investigatory interview and to proceed directly to a formal disciplinary hearing where appropriate."

24. It states at paragraph 3.10

"For formal action the employee will be advised of the nature of the complaint against him or her and will be given the opportunity to state his or her case before any decision at a disciplinary hearing. Employees will be provided

> where appropriate with written copies of evidence and relevant witness statements in advance of a disciplinary hearing."

It goes further:

> "In advance of a formal hearing, the employee must, in good time (at least 2 working days) be informed in writing of the following:
>
> - What they are alleged to have done wrong. The letter should contain enough information for the employee to be able to understand both what it is they are alleged to have done wrong and the reasons why this is not acceptable.
> - Confirmation that the formal procedure is being invoked
> - Whether the consequences of the hearing may be dismissal
> - Their right to be accompanied at the disciplinary hearing

and

> "The employee must be given at least 2 working days' notice of the date of a formal hearing. Where possible, the timing and location of the hearing should be agreed with the employee. The location should be private to ensure there will be no interruptions."

25. In a section headed "informal guidance / coaching" the Procedure states:

> "If, during the discussion, it becomes obvious that the matter may be more serious than originally thought, the meeting should be adjourned. The employee should be told that the matter will be continued under the formal disciplinary procedure."

26. At paragraph 5.6.4 which relates to gross misconduct it says:

> "Where an act of gross misconduct is alleged….if on completion of the investigation and the full disciplinary procedure, the organisation is satisfied that gross misconduct has occurred, the result will normally be summary dismissal. Summary dismissal means dismissal without the normal period of notice or pay in lieu of notice."

<u>The events of 11 September 2018- the pre use checks</u>

27. On 11 September 2018 the claimant was working for the respondent. Around 11.30 am he took charge of a trailer vehicle AX16. It was already loaded with a 40 foot container. He completed the pre-use check list and noticed that the underrun, a part of the trailer that can be extended if a longer contained is to be carried, was bent and inoperable. He ticked the boxes on the respondent's form to indicate the checks he had carried out. There are 27 boxes on the form for different aspects of the vehicle e.g. tyre condition, trailer plate. There is no box for the underrun. There are two further boxes giving 29 in all to show that the driver has completed an "initial

daily" check and "end of shift walk around check". There is a space at the bottom left hand side of the form which says "report defects here" and beneath that heading there are 5 lines, half the width of the page labelled A, B, C, D, E giving space in which to notify defects. The form says, it was at page 50A of the bundle, "defects to be reported to transport manager who will advise of authorised repairer".

28. The claimant ticked 27 boxes and put his initials in box 28 to show he had completed the initial daily check. He did not write anything else on the form at that time. He did not report the inoperable underrun. He was then instructed to drive the trailer and 40 foot container to Widnes. He did this safely. The underrun was not needed. He then headed to his next job at Seaforth. On the way to Seaforth he heard his phone ping to signal he had received a text.

The 45 foot container problem

29. At 2.30pm he had arrived at Seaforth. He looked at the text which said he was to pick up at 45 foot container. To drive this safely the claimant knew that he would need the underrun extending. He knew that the underrun on AX16 was bent and inoperable. He knew this because he had seen it on his checks earlier in the day. He didn't report it to the respondent earlier in the day as it was not relevant with a 40 foot container. The respondent didn't often carry 45 foot containers, more often it carried 20', 30's or two 20's or a 40. The defective underrun only became an issue at 2.30 pm.

30. The claimant did not want to take the 45 foot container on the road without an extended underrun. Not just because of the legalities of the situation, as he believed them to be, but because he was aware of the reality of the risk of driving without the correctly extended underrun.

The telephone call

31. The claimant rang work. The call was answered by one of the planners. The claimant did not know who it was at the time. The telephone log provided in the bundle shows the call on the 11 September at 2.31pm and that it lasted just over two minutes.

"11/09/2018 14.31 00:02:02 07973293310"

32. He reported the problem with the underrun and asked could he bring a 20 or 40 container instead, which would not require an extended underrun. He was told to load up the 45 container and pull it back to the yard.

33. This was a drive of under a mile. He was told by the planner that he was allowed to do this, legally, that the respondent had checked with the regulatory body and that he would be allowed to drive without an underrun if he was coming in for repair.

34. The claimant was not happy about this. He admits that he swore at the person on the other end of the phone. The claimant did not know who it was at the time but now accepts it was Mr Baker. He said "you don't know what you are fucking talking about". That was not uncommon language in the HGV trade. Mr Baker told

Mr Buckley-Mellor what had been said. It was not something that Mr Baker, to whom it was said, ever complained about in writing. The claimant was told to bring the container to the respondent's yard.

35. The claimant completed his pre-use check for this run at Seaforth and recorded on the pre-use check sheet before leaving Seaforth

> "sliding bumpers inoperable- reported to planners at 2.30pm when given 45 container to load 11.9".

He wrote this free hand in the bottom left hand side of the form on lines A, B, C.

The text message

36. The claimant texted the respondent's Mr Buckley-Mellor at 3pm. The text is in the bundle, it says:

> **"Hiya Stu. Need to inform the planners they are giving out misinformation regarding sliding trailer bumpers when pulling 45's. The distance between the bumper and the end of the container has to be within 30cm's otherwise it is illegal to be on the road. If someone was to rearend the trailer and be killed it's the driver that would be facing manslaughter charge as he never used the underrun device correctly i.e. the sliding bumper. Can u explain this to the planners so that they understand why i swear when they try to tell me something they know nothing about. If you want to check this out google underrun devices on VOSA website. Hope this clears up the confusion once and for all"**

37. He then, against his better judgement and on express instruction from the respondent, loaded the 45 foot container and drove the trailer and 45 foot container with a defective underrun back to the respondent's depot. There was no incident and he arrived at safely the respondent's depot.

The meeting which resulted in dismissal

38. Upon arrival back at the depot at around 3.26pm the claimant was called in to an informal chat with Mr Gallagher. Mr Gallagher had heard the call with the planner, Mr Paul Baker, he (Mr Gallagher) had been sitting only two feet away at the time. Mr Gallagher thought the swearing that Mr Baker had reported to him warranted an informal chat.

39. Mr Gallagher did not, whilst the claimant was en route back to the depot, check the Employee Handbook, and its disciplinary procedure, nor ring for advice from the outsourced HR providers that the respondent used. He was not contemplating dismissal at this point. He knew that the claimant had been driving a defective underrun vehicle since 11.30am and he was not contemplating anything other than an informal chat about the swearing.

40. The claimant came in for what he thought was an informal chat about the swearing. The claimant apologised for swearing and made efforts to focus the conversation on his text and the health and safety concern he had raised. There is a

note prepared by the claimant of that meeting at the time. It records that the respondent raised the swearing issue.

41. The claimant explained he swore because of his frustration at the planners about the information they were giving out about trailers. Everyone agreed that at the meeting the claimant offered to apologise for the swearing. The claimant asked Mr Gallagher had he seen the text. Mr Gallagher had not.

42. Mr Gallagher went out of the room to get Mr Buckley-Mellor and when the two of them were together with the claimant, the claimant insisted that the text be read. There was a dispute as to the time at which the text arrived on Mr Buckley-Mellor's phone, either at 3pm or 3.16pm. It does not matter whether it was 3pm or 3.16 pm. It arrived shortly before the claimant's dismissal. The text was read aloud in that meeting.

43. There was further conversation in which the claimant continued to refer to the text and the instruction that he drive the trailer with a 45 foot container without an extended underrun. His note records Mr Gallagher asking him:

> "Did you report the damage on your defect sheet ?"

And the claimant replying:

> "Yes it will be on there but I sent the text before the box was loaded."

44. The meeting, which everyone agreed spiralled very quickly resulted in the claimant's dismissal for gross misconduct. Mr Gallagher said that the claimant's attitude did not work for him and the claimant asked "so are you sacking me for reporting a health and safety issue" and Mr Gallagher said "yes". After this exchange, there was further discussion about whether or not the claimant had reported the defect in the morning. The claimant said he had not as it had not become an issue until he was told to load a 45 foot container. He said he had reported it when he phoned in and he had texted and written on his pre-use check sheet. Mr Gallagher then said that the claimant was submitting a fraudulent document. The meeting ended.

45. The claimant then cleared the cab of trailer AX 16 of his personal effects and was preparing to leave. He was approached by an agency driver who told the claimant he had to take the trailer to Cannock. The claimant explained that the trailer needed the underrun repairing. The claimant saw the agency driver talking to Mr Buckley-Mellor.

46. At around 5pm the claimant saw the agency driver driving the trailer. He flagged the driver down and the driver confirmed he had been instructed to drive to Cannock. The claimant told him the vehicle was illegally on the road with a 45 foot container.

47. After his dismissal on 11 September 2018 the claimant made a note of the dismissal meeting. He sent the note to the respondent on 15 September 2018 and said:

> "somebody should have been present to record our discussion at the time in order to comply with correct procedure. In the absence of this I am providing my own for both Kiefer and Stuart to read and add, or amend anything I have recorded"

48. The claimant appealed against his dismissal. He received a reply on 17 September 2018 saying:

> "the recent notice of dismissal letter you received is JWT's final position and you are no longer employed by JWT. We therefore will no longer be entering into any further personal email/written/telephone exchanges with you as a former JWT employee over this matter"

49. After his dismissal the respondent sent to the claimant a copy of his pre-use check sheet with additional writing on the bottom. It said, at lines D and E of the section in which defects are to be reported (and below the claimant's report "sliding bumper inoperable"):

> "Filled in at the end of the day"

50. There was disagreement between the parties as to the dates and times and states of repair of trailer AX 16 and other trailers in the respondent's business. It has not been necessary for the Tribunal to make findings of fact in relation to those matters.

51. The claimant appealed against his dismissal. His appeal was heard

The Law

52. The relevant legal principles that the Tribunal must apply are not in dispute.

53. "Whistle-blowing" – Section 103A of the Employment Rights Act 1996 (ERA) provides that an employee who is dismissed shall be regarded as being unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

54. Section 43A ERA defines a "protected disclosure" as being a qualifying disclosure as defined by section 43B which is made by a worker in accordance with any of the sections 43C-43H.

55. Section 43B ERA lists disclosures that qualify for protection and provides that a qualifying disclosure is a disclosure of *information* which in *the reasonable belief of the worker* making the disclosure tends to show one or more of the following, namely:

> "(a) That a criminal offence has been committed, is being committed or is likely to be committed;
>
> (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;

(c) That a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) That the health or safety of any individual has been, is being or is likely to be endangered;

(e) That the environment has been, is being or is likely to be damaged; or

(f) That information tending to show any matter falling within any of the preceding paragraphs has been or is likely to be deliberately concealed."

56. A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

57. Sections 43C-43H provide the prescribed methods of making the disclosure which must be to an employer or other responsible person, legal adviser, minister of the Crown, a prescribed person as defined in sections 43C-43F.

58. Sections 43G and 43H ERA provide for disclosure in other cases and where there is "disclosure of exceptionally serious failure".

59. In cases of dismissal related to protected disclosures the key is to ascertain the reason for the respondent's actions, and if they are materially influenced by the disclosure then the claimant may have protection subject to the Tribunal's findings of fact and application of the above law to those facts.

60. An employee does not have to have been employed for a qualifying period before having protection against dismissal for "whistle-blowing". Otherwise, and in respect of "ordinary" unfair dismissal an employee must be employed for two years before having protection and the right not to be unfairly dismissed under section 94 ERA. The exclusion of that right by virtue of the qualifying period of employment is set out at section 108 ERA.

61. Case law is also relevant. Kuzel v Roche Products Limited UKEAT/0516/06/CEA established that in cases where the automatically unfair dismissal is raised by the employee, if he has less than two year's continuous service, and thus is ineligible for "ordinary" unfair dismissal protection, he must establish that his protected disclosure was the employer's reason (or principal reason) for dismissal in order, in the first instance, to found the Tribunal's jurisdiction to entertain his complaint.

Applying the Law to the Facts

Submissions

62. The Tribunal accepts the claimant's Counsel's submissions that:

62.1 the requirement of good faith is no longer relevant in the determination of liability in a whistleblowing case but remains relevant to remedy.

62.2 the Tribunal should avoid substituting its view of whether the disclosure was in the public interest for that of the claimant.

62.3 the recent Employment Appeal Tribunal decision in Okwu v Rise Community Action Limited [2019] UKEAT 0082/19 emphasising that the public interest need not be a claimant's only motivation in making a disclosure may be relevant to this case.

62.4 the decision in Kilraine v London Borough of Wandsworth B [2018] EWCA Civ 1436 assists the Tribunal in determining whether or not the claimant disclosed *information* and avoiding unnecessary deliberation about whether or not it is also an allegation.

63. Counsel for the claimant also submitted, in relation to the respondent's evidence, and the Tribunal accepts:

63.1 Mr Buckley-Mellor agreed with the claimant's statement that other drivers had reported non functioning under-runs.

63.2 Mr Gallagher accepted that the meeting which lead to the claimant's dismissal did not begin as a disciplinary meeting.

63.3 Mr Gallagher's evidence that the meeting became a deliberate justifiable decision to depart from its disciplinary processes as stated in its Handbook is not credible.

64. Counsel for the respondent submitted that the reason for dismissal was gross misconduct and in particular that "if VOSA had inspected between 11.30 and 2.30pm on 11 September 2018 the defect would not have been detailed and that would have been catastrophic". It was submitted, and the submissions are rejected, that the dismissal meeting was for that reason. The submissions are rejected because, by his own evidence, (which is not accepted) Mr Gallagher called the claimant in for an informal chat about swearing. Mr Gallagher knew after the telephone call from the claimant to Mr Baker that the claimant had been driving a defective trailer since 11.30am. If that was the real reason for dismissal then this Tribunal is of the view that the claimant would not have been called in for an informal chat about swearing. He would have been called in for a serious discussion about failure to notify the defect earlier in the day.

65. The respondent's counsel's submissions centred around the argument that the claimant had committed an act of gross misconduct in the morning and that his subsequent behaviour was a cover up. This submission is rejected. The claimant did not think he had committed an act of gross misconduct. He did not think he had anything to cover up for.

Public interest disclosure

66. *Was it a qualifying disclosure?* The disclosure was made by the claimant because he reasonably believed, that he and the respondent would be failing to

comply with legal obligations to run an extended bumper under the 45 foot trailer when driving it on the roads. It was also made because he reasonably believed that he was putting the health and safety of road users, including himself in danger in driving without an extended bumper.

67. *Did it include "information" ?* The claimant's text is specific and is set out in full above. It includes information within the meaning set out in Section 43B ERA and the Kilraine case.

68. *Was it in the public interest?* The claimant refers to VOSA and he says, "if someone was to rear end and be killed". He made his disclosure in the public interest. It does not matter that it may also have been made to protect himself, though not from disciplinary proceedings as he did not believe he had done anything for which he needed protection, but to protect himself in case he was stopped for being about to drive a trailer illegally.

69. *Was it protected S43 C – H?* The claimant disclosed because he reasonably believed that there a breach of the legal obligations for carrying a 45 foot trailer.

70. *Was it made to the employer?* Yes, the disclosure was made on the telephone to the planner, who was later identified as Mr Baker and to Mr Stuart Buckley-Mellor in the text at around 3.00pm.

71. *Can the claimant show that the principal reason for his dismissal was the disclosure?* Yes. The reason for dismissal was the protected disclosure.

72. The respondent submitted that it dismissed for the claimant's failure to report the bent and inoperable underrun on AX16 at 11.31am. That is not credible as the respondent knew about this from the point of the phone call with Paul Baker at 2.30pm. Mr Gallagher told the Tribunal he was sitting two feet away, and yet he went in to the meeting which he described at that time as an informal chat intending only to talk about the swearing. If the failure to report at 11.31am was the real reason for dismissal it would have been uppermost in his mind on the claimant's return to the depot at around 3.30pm. If he had been contemplating dismissal for failure to report the defective underrun at 11.30am he might have taken the time from 2.30 – 3.30pm to consult the company procedure and to consider suspending the claimant and conducting an investigation. Further, it would be implausible for the respondent to have objected so strongly to the failure to report the inoperable underrun at 11.30 am and then instructed the claimant to bring the 45 container back.

73. Alternately, the respondent submitted that it dismissed the claimant for stating his intention to fill in the pre-use check form after the meeting, which it stated would be fraudulent. The form had been completed pre-use. The claimant used the words "will be on there" in the meeting at 3.30pm when referring to the reporting of the defect. He had written the defect report at lines A, B and C before leaving Seaforth. He believed he was about to drive illegally, and he put the paperwork in order to protect himself. The form had the respondent's writing on it at lines D and E "filled in at the end of the day".

74. There are credibility issues arising from the respondent's position in relation to the reason for dismissal. It gave different reasons at different times:

69.1 orally at the dismissal meeting (your attitude);

69.2 in the dismissal letter (failure to report defect prior to leaving yard and intending to fill out the defect sheet after the meeting);

69.3 in the Response Form (failure to carry out pre departure checks and plan to submit form at a later date);

69.4 in the evidence given at Tribunal by Mr Buckley Mellor (that he was unclear at the dismissal meeting whether the claimant had carried out pre-use checks or not and in that he said the reason for dismissal was "not carrying out the necessary checks, or completing the documentation, alongside his abusive and threatening manner towards an employee);

69.5 in the evidence given in his evidence in chief at Tribunal by Mr Gallagher (the reason for dismissing the claimant was a combination of his misconduct in his manner towards Paul Baker….and for failing to carry out the checks before taking a vehicle from the yard) and later in his evidence in chief where he recites that the reason given in the letter of dismissal included "the manner of heated discussions with Paul Baker, myself and Stuart".

All of which lend credibility to the claimant's evidence that he was dismissed for his attitude at the meeting and that his attitude was his protestations about the illegality of carrying the 45 foot container.

75. The claimant's oral evidence of the dismissal meeting was consistent with the timing of the telephone call and the text and the inclusion of Mr Buckley-Mellor in the meeting.

76. The most reliable corroborating evidence on the reason for dismissal comes in the claimant's contemporaneous note of the dismissal meeting at p 35 of the bundle where he states that the respondent said:

"DB(the claimant) Hiya Stu. Have you seen the text I sent you before ?

S (Stuart Buckley-Mellor) Yes I have just read it.

DB Can you read (it) to Keifer

KG (Mr Gallagher) I am not interested in it. I don't like your attitude.

DB You should read it before you say any more."

The text is read to Mr Gallagher.

> "KG I am really not interested it doesn't work for me. Your attitude doesn't work for me, your employment doesn't work for me
>
> DB Hold on you're trying to sack me for reporting a safety issue ?
>
> KG Yes. I don't like your attitude.

This note made immediately after the meeting is consistent with the claimant's version of events throughout, and with his actions after the dismissal. The note was sent to the respondent on 15 September 2018 with an invitation that the respondent could amend its content. It did not.

77. During the meeting, when Mr Gallagher would have the Tribunal believe that he thought the claimant was going to falsify a record, he did not pause to initiate an investigation into what had happened that day. He didn't suspend the claimant. He didn't refer to the respondent's policy documents on discipline or grievance. He didn't call for the document then and there.

78. He made no plans for an investigation into the failure, as he says he saw it, of the claimant to report the inoperable underrun at 11.30 am. He made no plans to document the claimant's health and safety concerns or refer them to the appropriate person within the respondent organisation. He did not advise the claimant of the seriousness of the issues as he saw them, but proceeded, without any prior warning to the claimant, and without giving him any time to arrange to be accompanied, with a meeting under stage 3, gross misconduct of the respondent's policy, to dismiss him.

79. The policy provides at para 3.9:

> "No formal disciplinary action will be taken against an employee until the case has been fully investigated."

80. And at 3.10:

> "For formal action the employee will be advised of the nature of the complaint against him or her and will be given the opportunity to state his or her case before any decision at a disciplinary hearing. Employees will be provided where appropriate with written copies of evidence and relevant witness statements in advance of a disciplinary hearing."

81. The meeting had been instigated by Mr Gallagher for an informal chat about swearing. The policy provides under "informal guidance/coaching"

> "If during the discussion, it becomes obvious that the matter may be more serious than originally thought, the meeting should be adjourned. The employee should be told that the matter will be continued under the formal disciplinary procedure."

82. The failure to follow the procedure goes to the credibility of the reason for dismissal. The parties agreed that the meeting spiralled out of control rapidly and what made it do that was the text message. Prior to the text message being read Mr

Gallagher was talking to the claimant about swearing and his attitude. After Mr Buckley-Mellor joins the meeting and the text (containing the disclosure) is read aloud Mr Gallagher dismisses the claimant.

83. The claimant made a disclosure containing information that was a qualifying disclosure under the Act. He reasonably believed that the disclosure showed the respondent's failure to comply with a legal obligation in relation to the use of the underrun on the 45 foot container. He protested at being instructed to drive the trailer without what he believed to be the legally compliant underrun. He disclosed that to his employer and was dismissed because of it.

Conclusion

84. For the reasons given above, the conclusion of the Tribunal is that the claimant was UNFAIRLY dismissed for making a public interest disclosure.

Employment Judge Aspinall

Date: 14 January 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
27 January 2020

FOR THE TRIBUNAL OFFICE