EMPLOYMENT TRIBUNALS

Claimant: Mr C Maddocks

Respondent: Gledhill Response Limited

Heard at: Manchester (by CVP) **On:** 18-20 January 2021

Before: Employment Judge McDonald
Mrs L Taylor
Mr J King

REPRESENTATION:

Claimant: In person
Respondent: Mr Warren-Jones, Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's complaint that in breach of s.47B of the Employment Rights Act 1996 ("ERA") he was subjected to detriments for making public interest disclosures fails and is dismissed.

2. The claimant's complaint that in breach of s.44(1)(c) of ERA he was subjected to detriments for raising health and safety matters fails and is dismissed.

3. The claimant was unfairly dismissed. That dismissal was an ordinary unfair dismissal and not an automatically unfair dismissal. We find that the claimant was not dismissed for making public interest disclosures in breach of s.103A ERA nor for health and safety reasons in breach of s.100(1)(c) but that it was an "ordinary" unfair dismissal.

4. A remedy hearing will be listed unless the parties notify the Tribunal that one is not required.

REASONS

1. The claimant's claim is that he was unfairly dismissed and subjected to detriments for making public interest disclosures or for raising health and safety concerns. He also claims that his unfair dismissal was unfair as an "ordinary" unfair dismissal under the Employment Rights Act 1996 ("ERA").

Preliminary Matters

2. As the Code V above indicated, the hearing was held by CVP videolink with all parties, representatives and the Tribunal attending remotely.

3. We heard evidence from the claimant. For the respondent we heard evidence from Mr Hodkinson (Training Manager); from Mr John Reynolds (Operations Director) and from Mr John Beverley (the Northern Area Field Manager). Each had provided a written witness statement, was cross examined and answered questions from the Tribunal.

4. Although the claimant had submitted a written statement for Ms Daniel, she was not called to give evidence and the claimant did not rely on her evidence.

5. We also had a bundle of documents consisting of 172 pages ("the Bundle"). During the hearing some documents were added to that bundle, the most significant was the respondent's employee handbook. References in this judgment to page numbers are to pages in that bundle.

6. We heard evidence on the first two days and on the third day heard oral submissions from Mr Maddocks and Mr Warren-Jones. We gave an oral judgment on the third day. Our judgment dealt with liability only. These reasons were requested in writing.

7. The issues in the case are identified in the Case Management Order made by Employment Judge Leach following the preliminary hearing on 8 January 2020. That List of Issues is annexed to this judgment. In brief, the claimant said that he had made six disclosures which were either protected interest disclosures (or "whistleblowing" disclosures) or disclosures of health and safety concerns. He then said that he had suffered three detriments by reason of making those disclosures. He also said that he had been dismissed for making those disclosures.

8. As explained below, there was one technical legal issue relating to the claimant's length of service which the Tribunal needed to decide in addition to those issues set out in the List of Issues. In brief, the claimant was dismissed shortly before he completed two years' continuous employment with the respondent. If the Tribunal decided that his dismissal was such that he was not entitled to benefit from the statutory one week's notice required by the ERA, his unfair dismissal claim would be limited to a claim of automatic unfair dismissal which does not require two years' continuous service. If in contrast we decided that he was entitled to benefit from that

one week's statutory notice he would be able to claim "ordinary" unfair dismissal as well as automatic unfair dismissal.

Findings of Fact

9. We will now set out our findings of fact, starting with the background facts and then turn to each of the alleged disclosures and detriments and set out our findings of fact about those.

Background facts

10. The claimant was employed by the respondent as a Field Engineer. His job was to undertake work servicing and maintaining boilers. Most of those boilers were in apartments which the respondent serviced. Most of those apartments were in retirement or other homes on a similar nature. There was little day to day contact between the claimant and his managers. He was to a large extent "free range", with parts required for jobs on a particular day being delivered to his home overnight twice a week, and with jobs being notified to him by email from a scheduling centre.

11. The first finding of fact we need to make is when the claimant's employment with the respondent began. For the respondent Mr Warren-Jones suggested that it was 20 November 2017, and the claimant's written statement of evidence does say that he started working at the respondent on that date. However, clause 5 of the claimant's statement of particulars of employment (pages 39-50)("the Contract") clearly states that the date of "commencement in this position" is 16 November 2017. That contract was signed by the claimant on 14 November 2017 and by John Paul Baines on behalf of the respondent on 3 November 2017 (page 50). We find it conclusive and find that the claimant's continuous employment with the respondent started on 16 November 2017.

12. When it comes to the other key terms of the Contract, clause 10 provides for the claimant's normal hours of work to be 45 hour week. He was paid a salary of £29,000 per annum (clause 8 on p.40). Although not mentioned in the Contract, he was entitled to be paid overtime. The agreed evidence was that this was paid at the rate of £10 per hour for hours worked during weekdays over and above 45 hours, and that engineers also received overtime of £15 per hour plus a £50 callout charge when they worked on Saturdays. The claimant's unchallenged evidence was that engineers usually worked one Saturday in four.

13. Of particular significance to this case is that the mobile engineers were supplied by the respondent with company vans. The vans were fitted with trackers which recorded any use of the van, including recording its location. Clause 9.4 of the Contract says that the company vehicle must not be used for personal travel by the employee.

14. The Bundle included extracts from the employee handbook and at paragraph 2.1.2 (page 37) this gave examples of gross misconduct. Mr Warren-Jones highlighted examples of gross misconduct in that paragraph which he submitted were particularly pertinent to this case, specifically "deliberate refusal or wilful failure to carry out a reasonable and lawful direct instruction", "falsification of working hours". Although the examples include a number of other specific examples of gross

misconduct, such as "unauthorised use of mobile phone", it does not include as an example "private use of a company vehicle". We accept, however, that the employee handbook does not purport to provide a comprehensive and exhaustive list of all examples of gross misconduct.

15. At all times relevant for the issues in this case, that is from the end of 2018 onwards, the claimant's manager was Mr John Beverley. However, the evidence from both the claimant and Mr Beverley was that they were not in very regular contact. There was occasional contact by phone and Mr Beverley told us that there was a stocktake of vans carried out each year.

November 2017 - the claimant's induction and concerns raised with Mr Hodkinson

16. In terms of matters relevant to the issues in dispute, we find that when the claimant began working for the company he was inducted by Mr Hodkinson. That was in November 2017. The claimant's evidence, which we accept, was that when he was inducted by Mr Hodkinson he raised a query about electrical work carried out by the respondent's engineers. Specifically, he had concerns that electrical work might need to be carried out by engineers certified to be able to carry out Part P regulated work.

17. The evidence from Mr Hodkinson was that the claimant did indeed raise this issue at induction and that what he said was that the company were looking to train their engineers for Part P qualifications.

18. In terms of evidence from the other witnesses, what we heard, and accept, was that the company did on occasion require work to be carried out which would require Part P certification and compliance. We accept the evidence from Mr Reynolds and Mr Beverley that when this happened the work would be carried out by outsourced electricians.

19. We return below to the claimant's allegation that he on more than one occasion raised concerns with managers that engineers employed by the respondent were in fact carrying out work which required that Part P competence and qualification when they did not have it.

September 2018-January 2019 – use of company vehicle and timesheets

20. On 6 September 2018, Derek Millar of the respondent's office management team emailed Mr Beverley flagging up that the tracker on the claimant's company vehicle had suggested that he was using that van for personal use (p.147). The emails also raised concerns that the tracker information was not consistent with the start and finish times which the claimant had inserted on his timesheets for the corresponding days.

21. Engineers like the claimant were required to fill in their timesheets on a weekly basis. It is relevant to make findings about the significance of that. As we have already found, the claimant was paid a salary. This was not therefore a case where his pay on a weekly or monthly basis was solely determined by the number of hours worked as recorded on his timesheets. However, the number of hours recorded on his timesheets could potentially be relevant to his pay, because if they

showed that he worked more than 45 hours during a week or worked on Saturdays he would be entitled to overtime.

22. We find that although Mr Beverley was alerted in September 2018 to the fact that the claimant was using, or apparently using, his company van for personal use, and that his timesheets did not match up with his tracker information, he took no action about this until January 2019. We do find that relevant to our consideration of the seriousness with which the respondent viewed failures to ensure timesheet information was accurate and employees making limited personal use of the company vans.

23. In January 2019 there was a meeting between the claimant and Mr Beverley. There was some measure of agreement between them as to what was discussed, but there was a significant dispute of fact as to what Mr Beverley said was allowable in terms of use of the company van.

24. In it convenient at this point to set out our findings about the relative credibility of the claimant and Mr Beverley. When it comes to the claimant, we found that he was a sincere witness in that he believed that his evidence was correct. We do find, however, that he had a tendency to exaggerate some of the events that happened, both in terms of how often things happened and also the extent of things. When it comes to Mr Beverley, we found that his evidence was, in relation to a number of questions in cross examination, evasive and unsatisfactory. When it comes to disputes of fact between them, on balance we have tended to prefer the claimant's evidence to that of Mr Beverley.

25. On that basis we find that what happened at the meeting of January 2019 was essentially as set out in the claimant's witness statement. That is that the claimant was asked to attend a meeting with Mr Beverley, and that at that meeting Mr Beverley put it to him that the tracker information on his van did not tally up with the timesheet information he had submitted for the corresponding days. We accept that the claimant gave an explanation for this, namely that he would always, before setting off for his day of work and at the end of that day, carry out various tasks. At the start of the day this would include checking the jobs that he had to do that day and contacting the customers to give them an expected time of arrival. He also said that he would clean his van and ensure that he had all the parts required for the job. Twice a week he would also check the parts which had been delivered and left in the van by UPS and put them in the relevant part of his van for the jobs to be done that day.

26. When it comes to personal use of the van, we accept the claimant’s account about this in his witness statement (paragraph 9), namely that the claimant confirmed that he did sometimes use the van for personal local journeys and explained that this was because his father had cancer and that he was visiting him. The claimant's evidence was that the company van was the only vehicle that he had.

27. We accept the claimant’s evidence that at the meeting he told Mr Beverley that he would not drive the van and would stop visiting his father, and that caused the claimant to become upset and tearful. Mr Beverley accepted in his evidence that that had indeed happened.

28. Mr Beverley, however, denied the claimant's account of the next part of their conversation. The claimant said Mr Beverley told him that it would be ok for him to continue to use the van to see his dad. On this point we prefer the claimant's evidence. We find Mr Beverley did tell him it was ok for him to use the van to visit his dad.

29. On one point we do prefer Mr Beverley's evidence about what happened at that meeting. In the list of disclosures set out in the Case Management Order the first specific one referred to by Employment Judge Leach at paragraph 4(i) is that the claimant raised concerns with Mr Beverley about electrical work being carried out by unqualified employees at that meeting in January 2019. On balance we find that he did not do so. We do accept, having heard the claimant's evidence, that he did on more than one occasion raise concerns about this issue with Mr Hodkinson. However, we think the context of the meeting makes it unlikely he would have raised such an issue with Mr Beverley. Secondly, we noted a tendency on the part of the claimant to refer in unspecific terms to the dates on which he had raised concerns. It seems to us, on the balance of probabilities, likely the claimant mistook the date on which he raised this issue and we find that he did not raise it with Mr Beverley in January 2019.

30. Because what ultimately happened in this case was that the claimant was dismissed for continuing to use the vehicle for personal use and continuing discrepancies between his tracker information and timesheets, it is relevant to make findings about what the claimant had understood had happened as a result of the meeting in January 2019.

31. The key point, we find, was that Mr Beverley did not confirm the outcome of the meeting in writing. There was no formal disciplinary action taken, there was no warning given, and no confirmation in writing to the claimant of the position with regards to personal use of the vehicle or about the importance the tracker and timesheet information matching up or the consequences if it didn't. We find that the claimant genuinely believed that in those circumstances he was allowed to continue to use the vehicle in order to visit his father, and that it was also within the spirit of that to make short journeys using the vehicle for caring responsibilities.

Events from January 2019 to October 2019

32. The Bundle included print out of the tracker records for the claimant's company vehicle. They identified the journeys made by the claimant in the van and the locations he visited. We find that what the claimant had done primarily was to use the company vehicle to visit his grandmother who lived a few miles nearby as well as visiting his father. The claimant's evidence, which we accept, was that he was going to see his nan because his father was too ill to do so. We accept that Mr Beverley did not specifically say that this was allowed, however we find that the claimant genuinely believed that that was something he would be allowed to do in the spirit of the agreement reached with Mr Beverley at the meeting in January 2019.

33. In terms of events relevant to the issues we need to decide, the next specific event happened in October 2019.

34. The claimant suffered an injury which he said was as a result of having to repeatedly go into a loft at a customer's premises without an appropriate ladder. Although we heard a fair amount of evidence about that incident it is not something we have to make findings about because it is not part of the complaints made by the claimant. What we do find, however, is that the claimant did, from October 2019, have a period off sick which was due to a back problem. We do not need to make findings about the severity of that problem or the cause of it because that is not something that is relevant to the issues in this case. The timeline is however, we think, important. What that timeline shows is that after the injury in October 2019, and the time off that he had, there was a measure of dispute between the respondent and the claimant.

35. The claimant's version of events is that he was not given the lighter duties which he says he required to enable him to continue at work until he provided a fit note dated 25 October 2019. That fit note was at page 62 of the bundle, and it stated that the claimant had back pain and that he would be able to continue to work subject to conditions set out in the fit note by his GP. They were that the "[respondent] should carry out a risk review of the patient and his duties prior to further work. The amended duties will likely include no heavy lifting and reduced driving times and no more than an hour".

36. The claimant's evidence was that he had had to obtain that fit note to get the respondent to take any action. He claimed that even subsequent to that he was not actually given lighter duties but had to raise concerns about specific jobs which were only then converted to lighter duties. As we have said, the issue of how the injury arose and whether or not it was dealt with appropriately is not central to this case. We do find, however, that there was evidence that the company did in fact take steps in order to try and place the claimant on lighter duties.

<u>November 2019-the disciplinary process, grievance and dismissal</u>

37. What happened next was that on 6 November 2019 the claimant was invited to a disciplinary hearing. The respondent's own grievance procedure (paragraph 26) states that any disciplinary hearing should be held with at least five days' notice and also required that details of the allegations be provided to the relevant employee. In this case the invitation letter sent on 6 November 2019 (page 63) told the claimant that the meeting would be held on 13 November 2019, thus giving seven days' notice. In terms of the reason for the disciplinary, the letter stated that contrary to the company handbook the claimant had been guilty of gross misconduct, specifically:

- "Falsifying timesheets, deliberately making a false entry in the written records of the company, falsification of working hours;
- Using company vehicles out of working hours;
- Using company vehicle on a sick day."

38. At that point the claimant was not provided with details of the specific occasions on which he was said to have used the company vehicle out of working hours nor was he provided with details of the timesheets which were said to be

falsified. He was also not told what form the alleged falsification took. The letter went on to say that the purpose of the disciplinary meeting was to put the allegations to the claimant to establish whether or not he had committed the alleged acts, and if appropriate to decide on the sanction. It warned him that one appropriate sanction in this case might be dismissal.

39. As Mr Warren-Jones pointed out, the final paragraph of the letter stated that if the claimant could not attend the meeting or needed more time to prepare he should let Mr Beverley know as soon as possible.

40. On 8 November 2019 the claimant submitted a grievance. It was in the form of an email and at pages 103-104 there was a copy of that email annotated by Mr Beverley. In summary, the grievance was that the respondent had failed to ensure that proper steps were taken to implement a back to work plan and to ensure that the claimant was put on lighter duties. The grievance email sets out five grievances. In terms of the issues we need to decide, the question is whether any of them amount to public interest disclosures and/or raise concerns about health and safety matters as alleged in para 4(v) of the List of Issues.

41. So far as that is concerned, the majority of the grievance deals with the claimant's own circumstances and his back injury. However, the third (page 104) relates to a breach of data protection; the fourth grievance relates to an allegation of differential treatment and being victimised; and the fifth grievance relates to a failure to provide a safe place or system of work.

42. There is no reference in that grievance to the concern which the claimant says he had raised elsewhere about engineers carrying out work which they were not qualified to do. What we do find, however, is that there are issues raised in that letter which are of wider concern rather than simply relating to the claimant. In particular they are the failure to provide a safe place or system of work, and the alleged breach of data protection.

43. Of relevance to our findings about the fairness of the dismissal which we will deal with below is what the claimant says under the heading of the fourth grievance in the email about his then understanding of the position when it comes to completion of timesheets and use of the company vehicle. He notes that a year previously (which we take to be a reference to the January 2019 meeting) John Beverley met him and had a meeting and asked about his timesheets. He confirms that he explained about loading his tools each morning and reading his emails before setting off. He states that he has never deliberately falsified a timesheet and queries why if those timesheets were reviewed every week he had not been asked to account for the discrepancies prior to the disciplinary letter being sent. In relation to use of the company vehicle, what the claimant says is that he was at first unaware that he was not allowed to use the vehicle outside of company hours, that other engineers did drive out of hours, and that he was made aware by Mr Beverley in January 2019 of this issue: he pointed out to him that he was only going to his father's (who had cancer at the time), and that Mr Beverley had said it was ok to keep visiting his dad, therefore he had driven it locally for the last year, including filling the van up with petrol.

44. We quote that at this point because it seems to us relevant to the finding that we need to make about whether the claimant was at any point deliberately falsifying his timesheets and/or using the company vehicle in a situation which he knew to be entirely wrong.

45. In terms of what happened next, the claimant's requested (and the respondent agreed) to move the disciplinary meeting to a venue nearer to the claimant's home because of his back injury. The time of the meeting was moved to 3.00pm on 13 November 2019, which was actually a later time than originally set.

46. On 12 November 2019 John Paul Baines, an HR Business Partner at the respondent, emailed the claimant an email with ten attachments (page 105). They were copies of timesheets for September and October 2019 and an excel spreadsheet setting out the tracker data from the claimant’s company van for the corresponding period. It was accepted by the respondent that the excel spreadsheet was in the form of raw data. Although in the Bundle there were a number of tables which helped to lay out the tracker information in that spreadsheet in a much clearer way, there was no suggestion that the claimant had had those pages prior to the email on 12 November.

47. In terms of the timesheets themselves, the copies in the Bundle had annotations made by Mr Beverley which showed the discrepancies between the time shown on the timesheet and the times on the tracker. Mr Beverley accepted that the timesheets emailed to the claimant did not have those annotations.

48. We therefore find that on the afternoon prior to the disciplinary hearing what the claimant received was unannotated timesheets together with a spreadsheet, which would seem to require him to plough through the spreadsheet to try and work out where there were discrepancies.

49. On 13 November Mr Beverley travelled down to the venue for the hearing along with Mr Baines. He also picked up the Southern Area Manager to attend the meeting. However, at 13:05 the claimant emailed Mr Baines and Mr Beverley to say that he was too unwell to attend the hearing. The claimant's explanation was that he had as sick bug (pp.112-113). He told us in evidence, however, that the real reason was that he was suffering from anxiety because of the disciplinary hearing and having received the mass of evidence the evening before that hearing. We accept Mr Warren-Jones’ submission that there are some inconsistencies in the claimant’s evidence. For example, he said that he had not been able to open the Excel spreadsheet on his phone. In cross examination, however, he confirmed that he had eventually been able to do so, but he had needed to download an app in order to access the spreadsheet. We accept that, as we have noted, the claimant was prone to exaggeration in his evidence but also accept that it was a difficult task for him to interpret raw data on a spreadsheet and tally it with nine timesheets which had not in any way been annotated to clarify where the discrepancies were said to arise. On balance we accept his evidence that he felt he had to postpone the hearing because of anxiety but that he was too embarrassed to give that as the reason.

50. The respondent refused to postpone the disciplinary hearing and decided to go ahead in the absence of the claimant. In cross examination, Mr Beverley was asked for making this decision. He gave two reasons. The first was that he thought

that the request to postpone due to sickness was simply a smokescreen and an attempt to delay the disciplinary hearing. In particular, he thought that the claimant was aware that if he could delay the hearing until he was employed for two years he would be able to claim unfair dismissal. The second reason was the cost involved in hiring the venue and the inconvenience of having to travel the long distance which he had and colleagues had to travel to attend the hearing. We accept that those were his reasons for deciding not to postpone the meeting.

51. Having decided not to postpone the hearing, Mr Beverley then went on to consider what action should be taken in relation to the claimant. He decided to dismiss the claimant. We find that he had decided to dismiss the claimant, in part at least, because the claimant had as a result of the discrepancies in the timesheets been paid overtime. At paragraph 20 of his statement Mr Beverley said that the claimant had, as a result of the timesheets, been paid 17.5 hours in overtime during the seven week period which he had investigated.

52. The payslips relevant to the period subject to allegations are at page 128 of the bundle. They do show the claimant being paid overtime. However, the payments are shown as being calculated at the rate of £15 per hour. That being so, our finding is that those overtime payments related to work being carried out on a Saturday rather than to additional hours being paid for weekdays. We say that because the evidence from the respondent was that any weekday overtime was paid at £10 per hour. Although it is not easy to corollate the payslip with the timesheets, we note that the timesheet for the week of 30 September at page 97 of the bundle does show the claimant working that weekend. It seems to us, therefore, that the calculations on which paragraph 20 of Mr Beverley's statement is based take into account time which the claimant did actually work as overtime on weekends and to which he was entitled.

53. When the decision to dismiss had been made Mr Beverley's evidence was that attempts were made to collect the company's van from the claimant's home. The claimant suggested that one of the detriments he was subjected to was that the van had been collected without notice on 13 November, and that it had been removed without his knowledge. The respondent's witnesses' evidence, which we accept, was that the van was removed because the claimant was signed off for two weeks and therefore the respondent would need to use the van and reallocate it. Although the claimant suggested in his submissions that he had not received an email from Mr Baines of 13 November 2019 (p.112) which made clear that this was the case, we do not accept that he did not receive it. He did not prior to his submissions give any evidence to suggest that the email was not received. The only basis on which he said that it had not been received was that it did not have a time on it in the copy in the bundle. It was however part of an email string including emails from the claimant (pages 112-113). On the balance of probabilities, we find that the respondent did email the claimant and that he did therefore receive an email stating that the van would be collected.

54. The claimant in submissions also stated that it was detrimental to him that the respondent had not at least tried to knock on the door to see whether he was in and to ask for the key for the van and to enable him to remove any personal effects. The evidence from Mr Beverley was that this was not done because the claimant

was signed off sick and had also emailed the respondent on that day to say that he was too unwell to attend a disciplinary hearing. We accept that the reason that the claimant was not contacted was because he had sent that email saying that he was too unwell to interact with the respondent on that day.

55. On 14 November 2019 Mr Beverley wrote to the claimant confirming the outcome of the disciplinary meeting (pages 115-116). Citing those same allegations of breaches of the disciplinary procedure as set out in the disciplinary hearing invitation, he confirmed that “having given this matter the utmost consideration and in particular with reference to the evidential documents supplied, I confirm it has been decided that your employment should be terminated with immediate effect”. The letter went on to say that his final day of employment would be 13 November 2019 but that he would be entitled to one month’s notice of termination. We find he was not paid notice moneys and that the reference to notice was an error. The intention was to dismiss with immediate effect. The letter also confirmed that there was a right to appeal and that that appeal should be submitted in writing to the respondent’s HR team no later than 21 November 2019. The letter stated that the grounds for appeal should be set out in full. The letter concluded by saying that the respondent would arrange for company property to be collected from him at a mutually convenient and appropriate time.

Post November 2019- the appeal

56. The claimant did write a short letter on 20 November simply stating, “I would like to appeal the dismissal made against me” (page 117).

57. On 25 November 2019 the respondent responded by asking for grounds of appeal. That letter was at page 118 of the Bundle.

58. At page 119 of the Bundle there was a document headed “Grounds of Appeal” dated 28 November 2019. The respondent’s case was that this Grounds of Appeal document was never received. The claimant's evidence was that it was sent to the respondent in the post. We find that the document was sent in the post but accept the respondent’s evidence that it was not received. We do not find on the balance of probability that the respondent would have ignored that document had it in fact been received. In addition, we note that when the claimant wrote on 23 January 2020 chasing the outcome of the appeal the respondent’s response was to re-send the letter of 25 November 2019 stating that it had not received a reply from him (pages 123 and 124 respectively). That seems to us consistent with the respondent not having received the grounds of appeal.

59. We find that the grievance lodged by the claimant was not dealt with by the respondent. The explanation given by Mr Beverley was that it was superseded by the disciplinary proceedings.

Findings of fact about the alleged disclosures

60. Finally, in terms of findings of fact we turn to the various disclosures which the claimant alleged he made. Of the alleged disclosures set out at paragraph 4 of the Case Management Order, the claimant did not provide evidence about the specific instances when he raised concerns with Mr Beverley about engineers doing work for

which they were not certified (4(i)). The exception was in relation to the meeting in January 2019 but we preferred Mr Beverley's evidence that the claimant did not raise those concerns at that meeting. We do not find it implausible that the claimant voiced queries about this issue with Mr Beverley but there is no evidence on which we can make a finding that there were specific instances when the claimant raised specific concerns with Mr Beverley. As we have recorded above, we do accept that the claimant during his induction in November 2017 asked Mr Hodkinson about engineers doing Part P work.

61. We also find that the claimant did (as alleged as paragraph 4(ii)) subsequently raise matters with Keith Hodkinson to the extent that he did refuse to carry out some electrical work. We find that that refusal was not a proactive disclosure of information.

62. In relation to 4(iii) we do accept the claimant's evidence that he did ask Mr Hodkinson about the fact that his vehicle had a sticker on it saying that the respondent was a member ELECSA. This is a Regulatory Body which a company like the respondent would be a member of if it was regulated and competent to carry out certain electrical work. The evidence from Mr Reynolds was that all the vans had had ELECSA stickers on them but that the company had made a decision no longer to be a member of that organisation. The van which the claimant had was an old van and had had the sticker on it for some time. The respondent's evidence was that it did not change the liveries of the van too regularly because of the cost of doing so. The claimant's own evidence was that after he had had his first van for 18 months he was given a new van, and that van did not have the ELECSA logo on it.

63. The claimant's issue in relation to ELECSA is that he said that having the sticker on the van suggested that the respondent had appropriate electrical accreditation, which it did not. We find that the claimant reasonably believed that this was an issue and did raise it with Mr Hodkinson.

64. In relation to alleged disclosure 4(iv), which is concerns raised with other installers that electrical work was being carried out, the claimant did not provide evidence of specific incidents when he did this.

65. In relation to disclosure 4(v), we find as a matter of fact that the claimant had raised that grievance and have already noted above our findings of fact about its contents.

66. Finally, when it comes to 4(vi) the fit note dated 25 October 2019, we find that although it did raise recommendations about what the company should do, it did not provide information to the respondent which would amount, in our view, to a disclosure of information for the purposes of public interest disclosure. We also find as a matter of fact that it did not include "circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety". We find instead that it was a GP recommending steps to be taken in relation to the claimant rather than a statement of more general concerns about health and safety matters.

<u>Findings of fact about the first alleged detriment</u>

67. Of the three detriments alleged by the claimant, the first is not receiving regular employee reviews following January 2019. The employee reviews in this case consisted of a report which was sent monthly to engineers setting out their completion rates, the hours worked and so on. On the evidence we find that this was sent out by Danielle Lee and was sent direct to the engineers rather than via Mr Beverley or other managers.

68. The claimant's evidence, which we accept, was that he did not receive these monthly figures for four or five months. He did not know why that was the case. Mr Beverley's evidence was that this was because there was a delay in compiling those figures. We accept that explanation. The claimant suggested that other engineers did receive their information more regularly than he did. On balance of probabilities we find that that was not the case. We prefer Mr Beverley's evidence that if the information was sent out it would have been sent out when all engineers' information had been inputted rather than some.

The Law

69. Turning to the relevant law, there is a significant amount of law which is relevant to the various issues in this case. We summarise it relatively briefly.

Unfair Dismissal

70. The right of an employee to claim unfair dismissal is set out in section 94 ERA, and as noted already to claim "ordinary" unfair dismissal an employee is required to have two years' continuous service.

"Ordinary" unfair dismissal

71. If a potentially fair reason within section 98 ERA is shown, such as a reason relating to conduct, the general test of fairness in section 98(4) will apply. Section 98 reads as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> > **(a) the reason (or, if more than one, the principal reason) for the dismissal and**
> >
> > **(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this sub-section if it … relates to the conduct of the employee …**
>
> **(3) …**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> > **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer**

acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case".

72. The test to be applied in conduct dismissals is derived from **British Home Stores v Burchell [1980] ICR 303**. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

73. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

74. If a genuine belief is established, the band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.** The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

75. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: **A v B [2003] IRLR 405**.

76. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

77. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

78. If the three parts of the **Burchell** test are met, the Tribunal must then go on to decide whether the decision to dismiss the employee (instead of imposing a lesser sanction) was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

"Automatic" unfair dismissal

79. Section 100(1)(c) of ERA provides that an employee is unfairly dismissed if the reason, or where there is more than one reason, the principal reason why he was dismissed, was for bringing to the employer's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

80. Section 103 of ERA says that an employee who is dismissed is unfairly dismissed if the reason or the principal reason for dismissal is that the employee made a protected disclosure.

81. If the reason for dismissal is one of these automatically unfair reasons the employee does not require two years' continuous service to bring an unfair dismissal claim.

82. Where there is a dispute about the real reason for the dismissal, the case law says that the Tribunal has to identify one reason or one principal reason for the dismissal. That reason or principal reason is a question of fact for the Tribunal. As such it is a matter of either direct evidence or inference from the primary facts, and the burden of proving the reason or principal reason for dismissal is on the employer. (**Kuzel v Roche [2008] IRLR 530)**.

83. When the employee contests the reason for dismissal put forward by the employer there is no burden on the employee to disprove it. However, where an employee is positively asserting a different reason he must produce some evidence to support the positive case as having made protected disclosures.

The effective date of termination of employment

84. The right to claim "ordinary" unfair dismissal is excluded where the effective date of termination is less than two years after the start of employment. The effective date of termination is defined in section 97(1) ERA as the date on which notice of termination expires or, where no notice is given, the date when termination takes effect. However, section 97(2) says that where a contract is terminated by the employer and the minimum statutory notice required by section 86 ERA is not given the effective date of termination for the purposes of the right to bring an unfair dismissal claim is the date on which the contract would have terminated had that statutory minimum notice been given.

85. As we have said, in the claimant's case, if the statutory minimum notice of one week should have been given he would have two years' continuous service and will be able to claim ordinary unfair dismissal.

86. In **Lancaster & Duke Ltd v Wileman [2019] ICR 125** the EAT confirmed that the statutory minimum notice is not added on in calculating the length of service where section 86(6) ERA applies. Section 86(6) provides that the statutory minimum notice requirements in s.86 do not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other. What that means, in short, is that if the respondent can establish that the claimant's conduct was such as to entitle it to summarily terminate the contract as a matter of common law the statutory minimum notice will not be added to the claimant's continuous service. That would mean he would not be able to bring an "ordinary" unfair dismissal claim in this case.

87. The question of whether or not an employer was entitled to summarily terminate the contract is one for the Tribunal to determine: it is not enough for the respondent simply to assert that it could dismiss for gross misconduct. The Tribunal must apply the test in common law, i.e. whether the claimant in this case committed

a repudiatory breach of contract and the respondent has accepted it by terminating the contract.

88. To do so the employee's conduct must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment (**Neary and anor v Dean of Westminster [1999] IRLR 288**). The employee's conduct has to be viewed objectively so an employee can repudiate the contract without an intention to do so **(Briscoe v Lubrizol Ltd [2002] IRLR 607, CA)**.

89. In this case we are looking at allegations of dishonesty or falsification of records and also of disobedience in terms of wilful failure to follow an instruction. The Court of Appeal in **Laws v London Chronicle [1959] 1 WLRR 698** made it clear that not all acts of disobedience are repudiatory breaches. To be repudiatory the disobedience must at least the quality that it is wilful, i.e. it connates a deliberate flouting of the essential contractual conditions.

90. Where a question arises as to whether the conduct is dishonest, the Tribunal must first ascertain the actual state of the individual's knowledge and the question of whether the conduct is honest should then be determined by applying the objective standards or ordinary decent people (**Ivy v Genting Casinos [2018] AC 391, Supreme Court**).

Detriment for making public interest disclosures

Protected disclosures

91. Turning to public interest disclosure, section 43B of ERA sets out the test to be applied in deciding whether there has been a disclosure qualifying for protection. The disclosure has to be of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the various matters set out at s.43B(1). In this case the claimant says the information disclosed tended to show that the health or safety of any individual has been, is being or is likely to be endangered. The person making the disclosure has to have a reasonable belief that it is in the public interest to do so.

92. In order for a statement or disclosure to be a qualifying disclosure, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection s.43B(1) (**Kilraine v Wandsworth LBC [2018] I.C.R. 1850, CA.**)

93. In **Chesterton Global Ltd and anor v Nurmohamed [2017[IRLR 837** the Court of Appeal approved a suggestion from counsel that the following factors would normally be relevant to the question of whether there was a reasonable belief that the disclosure was made in the public interest:

(a) the numbers in the group whose interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the

public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer.

94. In **Chesterton** Underhill LJ addressed the question of the motivation for the disclosure in paragraph 30, saying that:

> "… **while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at paragraph 17 above, the new ss.49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase 'in the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."**

95. If a qualifying disclosure is made, it will qualify for protection if to an employer (s.43A and s.43C ERA).

Protection from detriment

96. If a protected disclosure has been made, the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

> **"A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure."**

97. The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in **Shamoon v The Royal Ulster Constabulary [2003] ICR 337**: the test is whether a reasonable employee would or might take the view that he had been disadvantaged in circumstances in which he had to work. An unjustified sense of grievance cannot amount to a detriment.

98. There are special rules which apply in terms of the burden of proof when it comes to public interest disclosure detriment claims. Section 48(2) says:

> **"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".**

99. In **International Petroleum Ltd and ors v Osipov and ors UKEAT /0058/17/DA** the EAT (Simler P) summarised the causation test as follows:

> **"...I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:**

(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.

(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v. Knight [[2003] IRLR 140]at paragraph 20.

(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."

100. The time limit provision is in section 48(3). A complaint presented more than three months after the act or failure to act is out of time unless it formed part of a series of similar acts or failures ending less than three months before presentation, failing which the claimant has to show that it was not reasonably practicable for him to have presented the claim within time and that it was presented within a further reasonable period.

Detriment for raising health and safety concerns

101. S.44(1)(c) ERA provides that an employee has a right not to be subjected to a detriment on the ground that:

"(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety."

102. In **Von Goetz v St George's Healthcare NHS Trust (No.1)EAT 1395/97** the EAT saw no reason to limit the ambit of S.100 (and, in particular, subsections 1(c) and 1(e)) to harm — or the possibility of harm — to fellow employees, or to harm occurring in the workplace. It held that those sub-paragraphs could cover situations where the employee is concerned for non-employees and/or people outside the workplace.

103. The time limit provision in section 48(3) ERA applies to a complaint that an employee has been subjected to a detriment in breach of s.44(1)(c).

Discussion and Conclusions

104. Applying the law to our findings of fact we turn to the List of Issues set out in the Case Management Order made by Employment Judge Leach.

The protected disclosures and health and safety "disclosures".

105. Taking those slightly out of order, we deal first with the question of whether or not the claimant did indeed make disclosures which were either protected disclosures for the purposes of s.43A of ERA or "disclosures" relating to health and

safety within s.44(1)(c) ERA. The relevant disclosures are set out at paras 4(i) to (vi) of the List of Issues.

106. Taking each of those in turn, what we find in relation to the first element of 4(i) ("raising concerns about electrical work") is that although the claimant may have raised generalised concerns about engineers carrying out work with Mr Beverley, there was no evidence from which we could find that the claimant raised specific concerns which would amount to "information" of sufficient specificity to satisfy the definition in s.43B ERA. Similarly, we find those generalised concerns did not amount to a specific health and safety "disclosure" within s.44(1)(c).

107. We do accept that the second element in 4(i) did occur, i.e. that the claimant had raised concerns with Keith Hodkinson shortly after his employment commenced. Mr Hodkinson agreed that the claimant did raise with him concerns about engineers carrying out work when not Part P qualified. In relation to that disclosure, therefore, we do find that there was a protected interest disclosure to the extent of the claimant asking Mr Hodkinson about engineers being Part P qualified. We also accept that was raising a health and safety concern for the purposes of s.44(1)(c).

108. In relation to 4(ii), raising matters with Keith Hodkinson on later occasions, it seems to us the only evidence we had for this was the claimant refusing to carry out electrical installation work. We do not find that that was a disclosure of information or raising circumstances which would amount either to a public interest disclosure or to raising health and safety concerns. We therefore find (ii) is not made out as a disclosure on either basis.

109. In relation to 4(iii) we do find that the claimant did raise with Keith Hodkinson the fact that the vehicle was carrying a logo suggesting that the respondent was a member of ELCESA when it was not. It was submitted for the respondent that this could not be a public interest disclosure because there was no reasonable belief that this was in the public interest. Having heard the claimant's evidence we are satisfied that he did reasonably believe that this was a matter in the public interest. We note that it is not necessary for the claimant to show that there was actually a breach of a regulation by having the logo on the company van. We find that the claimant did reasonably believe that effectively suggesting that the respondent did have accreditation, which it did not, was a matter which was in the public interest and also was something which in his reasonable belief might be relevant to the matters set out in section 43B(1)(c). We do not think that it amounted to circumstances "harmful or potentially harmful to health" for the purposes of s.44(1)(c) ERA. We therefore find that (iii) was a public interest disclosure but was not a health and safety "disclosure".

110. When it comes to 4(iv) we did not hear evidence to substantiate that such disclosures were made. Even if they were, we find that they would not amount to qualifying disclosures within s.43A and s.43C giving rise to protection from detriment because they were not disclosures to the claimant's employer.

111. In relation to 4(v), we do accept the claimant's evidence that he reasonably believed that raising matters about health and safety and risk assessments was in the public interest. We note the authorities make a distinction between that reasonable belief and the claimant's motivation for raising that matter. The fact that

the claimant's motivation for raising the matter is not necessarily that it is in the public interest does not negate a belief that the matter was in the public interest. We find therefore that the claimant's grievance did include protected disclosures and a health and safety "disclosure" raised by the claimant's grievance.

112. When it comes to the fit note, which is 4(vi), we do not find that this was a protected disclosure nor that it constituted a health and safety "disclosure". The reason for that is that the fit note is simply making a recommendation or statement of expert opinion by the GP for the claimant rather than disclosing "information" tending to show the matters within s.43B(1)(c). For the same reason we do not believe the fit note satisfies the requirements of s.44(1)(c).

113. On that basis, therefore, what we have found is:

(a) that (i) was a protected disclosure for the purposes of s.43A and a "disclosure" within s.44(1)(c) to the extent of the claimant raising matters with Keith Hodkinson;

(b) that (iii) was a protected disclosure for the purposes of s.43A but not a health and safety disclosure for the purposes of s.44(1)(c);

(c) that (v) was a protected disclosure for the purposes of s.43A and a "disclosure" within s.44(1)(c).

<u>The detriments and their cause</u>

114. We turn next to the alleged detriments which are set out at 7(i) to (iii) of the List of Issues and whether the claimant was subjected to those alleged detriment on the ground that he made the disclosures in para 113.

115. When it comes to 7(i) (not receiving the reviews) we found that the claimant was not treated any differently to any other engineers. In other words, there were no basis for saying that (if the delay in receiving the review reports was a detriment) that detriment was on the ground of the claimant having made protected disclosures or raised health and safety matters.

116. We are bolstered in that finding by the fact that the reviews were sent out by Danielle Lee and there was no evidence that Mr Beverley had any influence on who was sent the reviews and when. There was no suggestion that Danielle Lee had been privy to any protected disclosure or health and safety "disclosures" made by the claimant. There is therefore no causal link between those disclosures and the failure to send out the reviews. That means the claim in relation to the first detriment fails.

117. When it comes to detriment 7(ii) (attending the claimant's home without notice on 13 November and removing the company van without his knowledge), our findings of fact were that this was done because the claimant was off sick and the van would be needed for another engineer and could be reallocated. We accept the respondent's evidence that its practice was to remove vans when employees were on relatively long-term sick. We also accept the respondent's evidence that it did send an email to the claimant telling him that they would remove the van, and accept

that it would be detrimental for the respondent to have knocked on the claimant's door to ask for the van key when he had a few hours earlier sent an email saying that he was too unwell to attend a disciplinary hearing and deal with matters.

118. When it comes to 7(ii), therefore, our finding is that there was no detriment to the claimant. We do not think a reasonable employee would have viewed the respondent's actions as detrimental or a disadvantage to him. If we are wrong about this and this incident did amount to a detriment, we find that it was not caused by the protected disclosures or any health and safety "disclosures". Instead it was a consequence of the claimant informing the respondent that he would not be at work for two weeks. As submitted by Mr Warren-Jones, the van was the company's property and it was therefore quite within its rights to take away that van when the claimant was not able to use it for two weeks.

119. When it comes to the third alleged detriment (7(iii)) of taking disciplinary action against the claimant in bad faith, there is no dispute that disciplinary action was taken against the claimant. The question is whether that action was taken on the ground that the claimant made protected disclosures or health and safety "disclosures".

120. Firstly, we note that the disclosures contained in the grievance could not have been part of the decision to instigate disciplinary action against the claimant. That grievance was received after the disciplinary action had been instigated. Of the other disclosures made, the disclosures in (i) and (iii) we found were made to Mr Hodkinson. Although the claimant suggested that all the respondent's managers were involved in making the decision to take disciplinary action and dismiss him, we heard no evidence which supported Mr Hodkinson having any involvement.

121. There was no evidence to link the decision to bring disciplinary proceedings against the claimant to the disclosures made to Mr Hodkinson. Although we found that the claimant did make protected disclosures and raised health and safety matters, he did not pursue those to any extent or with any great persistence. We do not find any evidence to support the suggestion that the real reason why disciplinary action was taken was the public interest disclosures made or the health and safety matters raised. It seems to us that those matters were simply disregarded by the respondent to the extent they were raised and did not play any material part in the decisions taken in relation to the disciplinary action.

Unfair dismissal – the Effective Date of Termination

122. Moving on then to the unfair dismissal complaint, the first question is whether the claimant is entitled to claim "ordinary" unfair dismissal.

123. The respondent's case is that the activities for which the claimant was disciplined amounted to a repudiatory breach of the contract entitling it to dismiss summarily for gross misconduct. In reaching our decision about this we have taken into account the way that the respondent approached these matters while having in mind that ultimately it is an objective decision for us to take as to whether this amounted to a repudiatory breach. What we find is that based on the evidence given by Mr Beverley and Mr Reynolds, there had previously been disciplinary action taken against employees who had used a company vehicle for personal use. In terms of

the company's stance more generally, the respondent's evidence was that there had been one dismissal of an employee for similar activities, but that disciplinary action had been taken in some three cases, suggesting that not all those cases had resulted in dismissal.

124. We find that when it came to the approach taken to the claimant, there was no great urgency or seriousness attached to the matter at the end of 2018 and in January 2019 when previous concerns about use of the vehicle and discrepancies between the timesheets and the tracker were raised. As we have said, this matter was flagged up to Mr Beverley in September 2018 but he did not take any action until January 2019 when he met with the claimant. When he did so this did not result in any disciplinary action nor indeed any written confirmation of the position in terms of its policies.

125. In terms of the company's stance more generally, the evidence given was that there had been one prior dismissal for similar activities, but that disciplinary action had been taken in some three cases, suggesting that not all those cases had resulted in dismissal.

126. What is more, we note that the evidence we heard clearly suggested that the claimant did not change his practice in terms of use of the company van or in terms of the timesheets between January and November 2019. Despite that it was only in October 2019 that the company appeared to have flagged up to Mr Beverley an issue around the claimant's use of the company van, which ultimately led to identification of the discrepancies between the tracker and the timesheet. It seems to us that the claimant's submission on this point is correct, namely that if this was such a serious matter the company would have been keeping a far closer eye on matters and raised what he was doing with him earlier than November 2019.

127. The other aspect we take into account is the claimant's approach to these matters. We accept that he was not falsifying timesheets in the sense of deliberately setting out to obtain a gain by falsifying those timesheets. We accept his evidence and find that what he thought he was doing was simply recording the hours he was actually working and that included tasks related to work that he carried out prior to setting out for his jobs. Although we did hear some evidence from Mr Reynolds and from Mr Beverley that the time set down for these items by the claimant was excessive, it seems to us that Mr Reynolds was not in a position to give detailed evidence about this, not being involved at ground level.

128. In terms of Mr Beverley, we found that he had very little contact with the claimant and therefore could not really know what he was doing when he was preparing to set out for the day or tidying up at the end of it. We also think there is a great deal of force in the claimant's point that if the respondent was correct it would lead to the conclusion that what he should have been doing was to start his engine running and then do the tasks that he did prior to setting out (so the tracker was activated) rather than doing those tasks before starting the van running.

129. We remind ourselves that when it comes to the legal test we need to apply what we are looking for is a repudiatory breach by the employee if the respondent is to be justified in dismissing without notice.

130. On balance we find that the use of the company vehicle in this case does not have that quality of wilful or deliberately flouting the essential contractual conditions which the cases suggest is necessary to justify a summary dismissal. As we have already suggested, we also do not find that the claimant was acting dishonestly in the sense of deliberately falsifying his timesheets.

131. On balance, therefore, we find that this was not a case where an employer was entitled to summarily dismiss an employee. The claimant was not in repudiatory breach of contract. What that means is that section 86(6) ERA does not apply and in this case, therefore, the claimant is entitled to add the one week's statutory notice in s.86 to his continuous employment. The effect of that is that he did have the two years' continuous employment required to claim ordinary unfair dismissal.

Was the dismissal unfair?

132. Moving on then to the issue of unfair dismissal, taking in turn paragraphs (1), (2) and (3) in the List of Issues.

133. In relation to unfair dismissal, the first question is: what was the potential reason for dismissal and was it a potentially fair one? The respondent in this case asserts that the reason was the claimant's conduct. The claimant says that the real reason was that he had made protected disclosures or raised health and safety concerns.

134. Dealing with that first, we find that the protected disclosures and raising health and safety matters did not play a part in the claimant's dismissal. We have recorded above why we found that the disciplinary action was not initiated on the grounds of the disclosures made by the claimant. We note that in the grievance letter, which was sent prior to the disciplinary hearing, the claimant does not make any link between his having raised matters, such as health and safety matters, and the decision to take disciplinary action against him. During the hearing he suggested that the real reason for his dismissal arose from the injury that he had suffered at work.

135. Applying **Kuzel** we find that the claimant has not put forward any evidence to substantiate his claim that the real reason for his dismissal was his having made protected disclosures or raised health and safety matters.

136. We find that the reason put forward by the respondent in this case for dismissal i.e. conduct, was the real reason for the dismissal and that it is a potentially fair reason.

137. Question (2) in the List of Issues is whether the dismissal was fair in accordance with section 98(4) of the Employment Rights Act 1996, and in particular whether the respondent in all respects acted within the so-called band of reasonable responses.

138. In reaching our conclusion on this we have applied the **Burchell** test. First of all dealing with the reasonableness of the investigation, we find that the investigation in this case was not within the band of reasonable responses. Firstly, we find that the claimant was not provided with an opportunity to set out his case in response to

the allegations against him. That failure takes two forms. First, the claimant was not sent the specific detailed information which led to the allegations until after 4.00pm on the day before the disciplinary hearing. Mr Beverley in his evidence accepted that collating the tracker information in the Excel spreadsheet into manageable information was not an easy task. Given that the claimant did not have Mr Beverley's annotated version of the timesheets or the versions of the tracker data which had been tidied up and tabulated (as included in the Bundle), we find that he did not have an adequate opportunity of preparing for the disciplinary hearing or understanding the detailed case against him.

139. Second, we also find that the refusal of a postponement of the hearing was not within the band of reasonable responses. Mr Beverley suggested that it was important that matters were dealt with in a timely fashion. While we agree with that as a general principle, the disciplinary action in this case had been instigated on 6 November 2019. Postponing the hearing from 13 November 2019 would not have meant that this was a long drawn out disciplinary matter, as we see in some cases. Given that the claimant was already signed off sick, refusing to allow postponement when he cited further ill health reasons seems to us not to be at all reasonable. If there were any concerns, as Mr Beverley suggested, that the claimant was seeking to delay the process in order to, for example, obtain the benefit of the two years' continuous service, then it seems to us that the appropriate cause of action would be for the respondent to seek evidence to substantiate the fact that the claimant was unwell. We also note this was the first postponement requested by the claimant. In all those circumstances we do not think it was within the band of reasonable responses to refuse to postpone. We find that means the investigation was not within the band of reasonable responses.

140. When it comes to the reasonableness of the decision that the claimant had acted in a way which amounted to gross misconduct, we are of the view that the decision was not a reasonable one. That is partly because in the absence of the claimant having attended the disciplinary hearing the respondent had no indication of why the claimant had acted the way he did. Mr Beverley had already, in January 2019, some indication of the circumstances which might lead the claimant to use a vehicle for personal use. He had also had some indication at that time of the reasons why the claimant might have discrepancies between the timesheets and the trackers. This was not a case where it was so open and shut that the respondent could make a decision without having some input from the claimant.

141. It also seems to us that the information which Mr Beverley used as the basis for his decision was flawed. In checking the arithmetic used in calculating the discrepancies we find some errors. In addition, as we have indicated, it seems to us that Mr Beverley either misunderstood or exaggerated the overtime claimed by the claimant as a result of discrepancies. As we noted above the payslip on page 128 actually shows overtime for working weekends not, it seems to us, overtime gained by working more than 45 hours during the week. The timesheets included in the bundle also do not suggest that the discrepancies led to the claimant working more than 45 hours during the week and therefore gaining weekday overtime because of that.

142. Applying the **Burchell** test, therefore, our finding is that this dismissal was not a fair dismissal. There was a failure to carry out a reasonable investigation and the belief that the claimant was guilty of gross misconduct, even if genuinely held, was not one based on reasonable grounds.

143. Summarising our conclusions, what we have found is that although the claimant did not suffer a detriment and was not dismissed for making protected interest disclosures or raising health and safety matters, his dismissal for misconduct was an "ordinary" unfair dismissal.

144. Question 3 is whether it is appropriate to make deductions from any compensation. Given the time, we were not able to deal with remedy at the hearing, so unless the parties can resolve the issue of compensation between them there will need to be a remedy hearing. We did as part of our deliberations consider whether this was a case where it would be appropriate to reduce the compensation on the **Polkey** basis i.e. on the basis that a fair dismissal could have happened had the respondent followed a fair procedure (question 3(i) on the List of Issues). Our conclusion was that there was no appropriate **Polkey** reduction in this case. We find that had the claimant attended a disciplinary hearing and given the explanation that he did, no reasonable employer would have decided to dismiss, even with notice.

145. The basis of that conclusion is similar to the basis for our conclusion that this was not a repudiatory breach by the employee. We find that there was no dishonesty on the part of the claimant. We also find that the respondent itself had, back in January 2019, been faced with the same issues but had not decided to take any disciplinary action. The claimant had not been put on notice that this was a serious matter, either by being issued with a written or an oral warning nor even of being told in writing that this must not happen again otherwise further disciplinary action would happen.

146. We do take into account that we must not substitute our decision for that of the employer. The question is rather whether there could have been a fair dismissal within the band of reasonable responses. Having considered carefully, our decision is that while it might well have been appropriate for an employer to take disciplinary action in relation to these matters, the conduct of the employee in this case was not such as to justify a dismissal, and therefore we would not be making a reduction on the **Polkey** basis.

Contributory fault

147. Although we did not hear evidence or submissions on remedy, at the parties' request we took some time at the end of the hearing to consider the issue of contributory fault under s 123(6) of the ERA which provides that:

> "Where the Tribunal finds the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of compensatory award by such proportion as it considers just and equitable having regard to that finding."

148. The case law confirms that the question for the Tribunal is whether the claimant was culpable or blameworthy, by which is meant "deserving of blame".

That was confirmed most recently in the Employment Appeal Tribunal case of **Sanha v Facilicom Cleaning Services Limited**.

149. If the Tribunal finds that the claimant did contribute to the dismissal then it must make a reduction, although the amount of reduction is for it to decide on a just and equitable basis. The Employment Appeal Tribunal in the case of **Hollier v Plysu Limited [1983] IRLR 260** provided guidance, suggesting that broadly a reduction should be as follows:

- Where the claimant is wholly to blame there should be a 100% reduction in the compensatory award;
- Where they are largely to blame, a 75% reduction;
- Where the employer and the employee are equally to blame, a 50% reduction;
- Where the claimant is slightly to blame, a 25% reduction.

150. In this case, as our findings on liability have indicated, we have found that the claimant did know that personal use of the van was restricted. As our finding indicated, we did think that there was conduct which might entitle an employer to take some disciplinary action, although short of dismissal. On that basis we do find that the claimant's conduct was culpable and blameworthy and therefore must make a reduction under section 123(6).

151. When it comes to conduct, we have found that the conduct relating to timesheets and tracker was not something for which the claimant was deserving of blame, but that his conduct in using the van for journeys other than to see his father was something which was deserving of blame. However, we have found that this only amounts to contribution equivalent to being slightly to blame under the **Hollier v Plysu** guidance.

152. We have therefore decided that the reduction in compensation which would be appropriate in this case for contribution would be 25%. We made that finding to assist the parties in seeking to resolve the matter without need for a remedy hearing.

153. We also directed that the parties write to the Tribunal within 28 days of receipt of this judgment to confirm whether a remedy hearing was necessary and, if so provides their dates to avoid for a hearing in the period April-October 2021.

Employment Judge McDonald

Date: 16 February 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
18 February 2021

FOR THE TRIBUNAL OFFICE

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Annex -List of Issues

Unfair Dismissal

1. What was the potential reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the ERA? The respondent asserts that it was a reason relating to the claimant's conduct.

2. If so, was the dismissal fair or unfair in accordance with section 98(4) ERA, and in particular did the respondent in all respects act within the so-called band of reasonable responses?

3. If the claimant was unfairly dismissed and the remedy is compensation:

    (i) If the dismissal was procedurally unfair what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed? (See **Polkey v A E Dayton Services Limited [1987] UKHL 8**)

    (ii) Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal pursuant to section 122(2) ERA, and if so to what extent?

    (iii) Did the claimant by blameworthy or culpable actions cause or contribute to dismissal to any extent, and if so by what proportion if at all would it be just and equitable to reduce the amount of any compensatory award, pursuant to section 123(6) ERA?

Health and Safety

4. Did the claimant bring 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 (pursuant to section 44(1)(c) and section 100(1)(c) of the ERA)? The claimant claims that he did so by:

    (i) Raising concerns about electrical work carried out by the respondent employees. The claimant claims these concerns were

raised on a number of occasions with John Beverley, including specifically at a meeting in January 2019. The claimant also claims that these concerns were raised with another manager called Keith Hodgkinson shortly after the claimant's employment with the respondent commenced (late 2017) when he was informed that the respondent was looking at ensuring their engineers were "part P" qualified (which is reference to a recognised electrician qualification).

(ii) The claimant also claims that he raised matters with Keith Hodgkinson on later occasions including by the fact that he refused to carry out electrical installation work whenever requested to do so at all times up to his date of termination of employment.

(iii) Related to this the claimant also claims that he raised with Keith Hodgkinson the fact that his vehicle noted that the company was a member of "ELECSA", which indicated that the company had appropriate electrical accreditation whereas it did not.

(iv) The claimant also claims to have raised his concerns about other installers carrying out electrical work with those installers directly.

(v) The claimant issued a grievance dated 8 November 2019 raising concerns about the way he claims to have been treated following the alleged incidents at the beginning of October 2019 and also raised other health and safety concerns in that grievance.

(vi) By the fit note dated 25 October 2019 that the claimant claims to have requested from his doctor noting that the company should carry out a risk review in relation to restricted duties as the claimant's direct requests had been ignored.

5. What was the principal reason the claimant was dismissed and was it that he had raised health and safety concerns?

6. Did the respondent subject the claimant to any detriments as set out below? Included in this issue are the questions of what happened as a matter of fact, and whether what happened was a detriment to the claimant as a matter of law.

7. Was this done on the ground that the claimant raised health and safety concerns as claimed? The alleged detriments the claimant relies on are as follows:

(i) Not receiving regular employee reviews following January 2019 when he had raised health and safety concerns with John Beverley;

(ii) Attending the claimant's home without notice on 13 November 2019 and removing the company van without his knowledge and

containing a number of the claimant's tools and personal belongings;

(iii) Taking disciplinary action against the claimant in bad faith for matters that had been addressed with the claimant some nine months previously.

<u>Protected Interest Disclosure</u>

8. Did the claimant make one or more protected disclosures (section 43B ERA)? The claimant relies on section 43B(1)(d), “that the health or safety of any individual has been, is being or is likely to be endangered”. The claimant relies on the same alleged disclosures as under health and safety above (paragraph 4 (i) to (vi) above).

9. What was the principal reason the claimant was dismissed and was it that he had made one or more protected disclosure?

10. Did the respondent subject the claimant to any detriments as set out below? Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law. The alleged detriments the claimant relies on are the same as at paragraph 7(i) to (iii) above.