EMPLOYMENT TRIBUNALS

Claimant: Mr M Leader

Respondents: ES Cleaning Ltd

Heard: Remotely (by video link) **On:** 15, 16, 17 and 18 February 2021

Before: Employment Judge S Shore
NLM – Mr N Pearse
NLM – Mr J Howarth

Appearances

For the claimant: Mr A Willoughby, Counsel
For the respondent: Mr J Buckle, Counsel

JUDGMENT ON LIABILITY

The unanimous decision of the Tribunal is that:

1. The claimant's claim of unfair dismissal (contrary to section 94 of the Employment Rights Act 1996) was not well-founded. The claimant did not have two years' continuous service as an employee at the date of his dismissal, so the Tribunal does not have the jurisdiction to hear his claim.

2. The claimant's claim of automatic unfair dismissal for the reason or principal reason that he made a protected disclosure contrary to section 103A of the Employment Rights Act 1996 was not well founded. He made a protected disclosure on 21 May 2020, but we find that the protected disclosure was not the sole reason or principal reason for his dismissal.

3. The claimant's claim of automatic unfair dismissal for the sole reason or principal reason connected to a relevant TUPE transfer contrary to regulation 7 of the TUPE Regulations 2006 was not well-founded. The claimant did not have two years' continuous service as an employee at the date of his dismissal, so the Tribunal does not have the jurisdiction to hear his claim

4. The claimant's claims of unauthorised deduction of wages in respect of:

    4.1. Recovery of the cost of damage to a company vehicle; and
    4.2. Holiday pay

fail because the claimant did not set out in his evidence how his holiday pay claim was calculated (i.e. failed to establish his holiday entitlement, how many days' holiday he had taken and how many outstanding days he was entitled to). The payment made by the respondent of £4,559.48 net on 18 November 2020 was more than the remainder of his claim of unauthorised deductions. We did not find that the respondent had made an unauthorised deduction in respect of the claimant's company car in any event.

5. The claimant's claim of breach of contract (failure to pay notice pay) is not well-founded. The respondent did not breach the claimant's contract of employment. Although we find that, after the event, the claimant has shown to the satisfaction of the Tribunal and the respondent that he was the owner of the Renault van, he did not produce the evidence at the time he was dismissed, and we find that the version of events that he (and Mr Cocker) produced were contradictory and disingenuous at best and dishonest at worst.

6. Directions will be sent under separate cover concerning the respondent's intimated application for costs.

REASONS

Introduction

1. The claimant was employed as a Sales Director by the respondent from 1 February 2020 until 1 June 2020, which was the effective date of termination of his employment on summary dismissal. The date upon which the claimant's period of continuous employment began was the subject of dispute between the parties. The claimant started early conciliation with ACAS on 4 August 2020 and obtained a conciliation certificate on the same date. The claimant's ET1 was presented on 4 August 2020. The respondent is a contract cleaning company.

2. The claimant presented claims of:

    2.1. Unfair dismissal (contrary to section 94 of the Employment Rights Act 1996);

    2.2. Automatic unfair dismissal for the reason or principal reason that he made a protected disclosure contrary to section 103A of the Employment Rights Act 1996.

    2.3. Automatic unfair dismissal for the reason or principal reason connected to a relevant TUPE transfer contrary to regulation 7 of the TUPE Regulations 2006.

    2.4. Unauthorised deduction of wages (contrary to section 13 of the Employment Rights Act 1996) in respect of:

        2.4.1. Recovery of the cost of damage to a company vehicle; and

2.4.2. Holiday pay.

2.5. Breach of contract (failure to pay notice pay) contrary to Article 4 of The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

3. The claims were case managed on two occasions. On 15 October 2020, Employment Judge Buckley made case management orders and set out the issues in the case. On 8 February 2021, Employment Judge Davies dealt with an application for specific disclosure of documents and also made case management orders.

4. The claimant originally brought proceedings against two respondents, ES Cleaning Ltd and Green Your Space Group Limited, but the claims against the second respondent were dismissed upon withdrawal by a judgment of EJ Buckley dated 15 October 2020.

Issues

5. The case management order of EJ Buckley dated 15 October 2020 set out the following issues:

*1. **Employment start date***

1.1. What was the start date of the claimant's continuous employment?

*2. **Unfair dismissal***

2.1. What was the reason or principal reason for dismissal?

2.1.1. The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

2.1.2. The claimant says the reason was:

2.1.2.1. The transfer of 21 January 2020 or a reason connected with that transfer that is not an economic, technical or organisational reason entailing changes in the workforce (the claimant's refusal to sign less favourable terms which would have been invalid because the sole or principal reason for the change for the change was the transfer) ; or

2.1.2.2. That he had made a protected disclosure (that the respondent was fraudulently recouping money from HMRC under the furlough scheme).

2.2. Was the reason automatically unfair under regulation 7 TUPE or section 103A of the Employment Rights Act 1996?

2.3. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating it as sufficient reason to dismiss the claimant? The Tribunal will usually decide in particular:

2.3.1. There were reasonable grounds for that belief;
2.3.2. At the time that the belief was formed, the respondent had carried out a reasonable investigation;
2.3.3. The respondent otherwise acted in a procedurally fair manner; and
2.3.4. Dismissal was in the range of reasonable responses.

3. ***Remedy for unfair dismissal***

3.1. If there is a compensatory award, how much should it be? The Tribunal will decide:

3.1.1. What financial losses has the dismissal caused the claimant?
3.1.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
3.1.3. If not, for what period of loss should the claimant be compensated?
3.1.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
3.1.5. If so, should the claimant's compensation be reduced? By how much?
3.1.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
3.1.7. Did the respondent unreasonably fail to comply with the following provisions:

<u>Disciplinary</u>

Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.

The [disciplinary] meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

A decision to dismiss should only be taken by a manager who has the authority to do so.

But a fair disciplinary process should always be followed, before dismissing for gross misconduct.

The appeal should be dealt with impartially.

Grievance

Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.

Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance.

The appeal should be dealt with impartially.

3.1.8. If so, is it just and equitable to increase any award payable to the claimant? By what proportion up to 25%?

3.1.9. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

3.1.10. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.2. What basic award is payable to the claimant if any?

3.3. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. ***Wrongful dismissal/ Notice pay***

4.1. What was the claimant's notice period?

4.2. Was the claimant guilty of gross misconduct?

5. ***Protected disclosure***

5.1. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

5.1.1. What did the claimant say or write? When? To whom? The claimant says he made a disclosure:

5.1.1.1. On 21 May 2020 in his written grievance, the claimant stated "If the company is recouping from HMRC under the scheme, then such reimbursement is clearly fraudulent. I would like this to be investigated and clarified as soon as possible."

5.1.2. Did he disclose information?

5.1.3. Did he believe the disclosure of information was made in the public interest?

5.1.4. Was that belief reasonable?

5.1.5. Did he believe that it tended to show that:

5.1.5.1. A criminal offence had been, was being or was likely to be committed?

5.1.5.2. A person had failed, was failing or was likely to fail to comply with any legal obligation?

5.2. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

6. ***Holiday pay (Working Time Regulations 1998)***

6.1. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

6.2. The claimant says that he had accrued and was not paid for 16 days (at a daily rate of £161.54 = £2,584.64).

7. ***Unauthorised deductions***

7.1. Did the respondent make unauthorised deductions from the claimant's wage and, if so, how much was deducted?

7.2. The claimant says that the respondent withheld £2,458.33 on the grounds of damage to the company car.

8. ***Remedy***

8.1. How much should the claimant be awarded?

8.2. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

8.3. Did the respondent unreasonably fail to comply with it?

8.4. Is it just and equitable to increase any award payable to the claimant?

8.5. By what proportion, up to 25%?

6. The list above is slightly different from the list of issues in EJ Buckley's case management order. Some typographical errors have been amended. We have not

set out our findings on issues that we did not have to consider, such as remedy. Prior to our deliberations on liability, we made it clear to the parties that we would consider the issues of **Polkey** and contributory conduct as part of our decision of liability, notwithstanding that they appear in the remedy section of the issues. As it turned out, we did not have to consider either issue.

Law

7. For the purposes of the unfair dismissal claim, the relevant sections of the Employment Rights Act 1996 are ss.95(1) and 98.

> *"Section 95: Circumstances in which an employee is dismissed*
>
> *(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)—*
>
> *(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*
>
> *[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]*
>
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*
>
> *"Section 98 Employment Rights Act 1996*
>
> *(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 subsection (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 subsection if it-*
>
> *(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
>
> *(b) Relates to the conduct of the employee,*
>
> *(c) Is that the employee was redundant, or*

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was 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."

8. Regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") states:

7.—(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—

(a) the transfer itself; or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

(2) This paragraph applies where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.

(3) Where paragraph (2) applies—

(a) paragraph (1) shall not apply;

(b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), the dismissal shall, for the purposes of sections 98(1) and 135 of that Act (reason for dismissal), be regarded as having been for redundancy where section 98(2)(c) of that Act applies, or otherwise for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(4) The provisions of this regulation apply irrespective of whether the employee in question is assigned to the organised grouping of resources or employees that is, or will be, transferred.

(5) Paragraph (1) shall not apply in relation to the dismissal of any employee which was required by reason of the application of section 5 of the Aliens Restriction (Amendment) Act 1919 to his employment.

(6) Paragraph (1) shall not apply in relation to a dismissal of an employee if the application of section 94 of the 1996 Act to the dismissal of the employee is excluded by or under any provision of the 1996 Act, the 1996 Tribunals Act or the 1992 Act.

9. Section 103A of the Employment Rights Act 1996 states:

103A Protected disclosure.

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

10. The breach of contract claim is based in the common law of contract.

11. We were referred to a number of precedent cases by counsel, which we have quoted in this decision where appropriate:

9.1. **British Home Stores Ltd v Burchell;**
9.2. **Hare Wines Ltd v Kaur and another [2019] EWCA Civ 216;**
9.3. **Sainsbury's Supermarkets Ltd v Hitt**;
9.4. **Iceland Frozen Foods Ltd v Jones;**
9.5. **Polkey v AE Dayton Services Ltd**; **and**
9.6. **Hadjioannou v Coral Casinos Limited**.

<u>Housekeeping</u>

10. The claimant had produced a schedule of loss that put his losses for breach of contract at £84,000.00, which exceeds the maximum the Tribunal may award under its jurisdiction by £59,000.00. He had also included a claim of £5,000 for injury to feelings, which we have no jurisdiction to award in respect of the claims advanced. Mr Willoughby produced a revised schedule that addressed the issues that we raised.

11. The parties produced a joint bundle of 1350 pages. One document, an email from Mr Smith of the respondent to the claimant dated 21 April 2020, was added to the bundle during the hearing and given page number 1351.

12. We had not finished reading the bundle when the hearing started at 10:00am on the first morning, so we adjourned the hearing to complete our reading.

13. Evidence was given in person on behalf of the respondent by:

    13.1. Mr Malcolm Smith, the CEO of Green Your Space Group Limited and a director of the respondent. His witness statement dated 9 February 2021 consisted of 50 paragraphs.

    13.2. Mr Neil Stephens, the Managing Director of the respondent and dismissing officer. His witness statement dated 10 February 2021 consisted of 55 paragraphs.

    13.3. Mr Tom Hickey, Senior Operations Manager of the respondent. His witness statement dated 9 February consisted of 13 paragraphs.

14. Evidence was given in person on behalf of the claimant by:

    14.1. The claimant himself. His witness statement dated 9 February 2021 consisted of 51 paragraphs,

    14.2. Yvonne Boddie, an ICB qualified bookkeeper, who provided bookkeeping services to Enviroserve Training Limited between December 2019 and January 2020 and had previously provided bookkeeping services to the claimant. Her witness statement dated 9 February 2021 consisted of 10 paragraphs.

    14.3. Barry Cocker, who is an employee of the respondent. His witness statement dated 9 February 2021 consisted of 8 paragraphs.

15. If we refer to pages in the bundle, the page number(s) will be in square brackets.

16. At the end of the evidence, we received written and heard closing submissions from Mr Willoughby and Mr Buckle. We considered our decision and gave an oral judgment and reasons. We do not have the facility to record my oral judgment, so this oral judgment and reasons is made from our notes and may differ in some respects to any written reasons that may be requested.

17. The hearing was conducted by video on the CVP application and ran intermittently, with some technical issues. I am grateful to all who attended the hearing for their patience and good humour in the face of the technical glitches.

Findings of Fact

18. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's case over the other. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made.

We have not dealt with every single matter that was raised in evidence or the documents. we have only dealt with matters that we found relevant to the issues we have had to determine. we make the following findings.

19. The respondent is a contract cleaning company that was incorporated on 18 December 2019. We find it was incorporated in order to purchase the business of Enviroserve Training Limited ("Enviroserve"), which entered administration on 31 January 2020. Enviroserve was wholly owned by the claimant.

20. The claimant, at paragraph 4 of his witness statement, said that his continuous employment commenced in 2011 and that he was originally employed by Ecocleen Leeds as a Regional Director. He produced no documents from that employer to corroborate his claim to have been employed by that company. We did not find that the claimant's evidence on this point met the required standard of proof because of the lack of documents and the claimant's general lack of credibility.

21. It is a significant factor in our decision that the claimant failed to produce many documents at all that corroborated his alleged history of employment. Many of the documents he could have produced were easily available to him and would have cleared up many questions about his status. For example:

    21.1. He failed to produce an easily available letter from HRMC that could have confirmed his PAYE income for the entire history of his alleged periods of employment;
    21.2. He could have produced bank statements showing his receipt of wages;
    21.3. He could have produced documents in the possession of his bookkeeper, Yvonne Boddie.

22. We find the claimant's explanations as to why he was unable to produce bank statements not to be credible. He has had a long time to obtain bank statements and his explanation that his former bank had only sent one statement to cover a period of many years did was not credible. He lives at the same address now as he did when he submitted his 2106 tax return [763]. We find that the claimant and his solicitors have been on notice that his continuity of employment had been an issue for some time. No adjournment was sought by the claimant to make more enquiries, so we have dealt with this case on the evidence before us.

23. Mr Buckle's written submissions accurately summarised the totality of the documentary evidence produced by the claimant in support of his claim of continuous employment, which were a total of 23 documents to evidence nine years of employment. Of these, only one document [753] referred to the period between 2011 and 2013. Some of the documents were clearly not evidence of wages paid. Rather, they evidenced loan repayments [756]; dividends [760 and 783]; and expenses [781]. There were incomplete and uncertified tax returns [754, 758, 785-792] and some payslips. However, given the claimant's general lack of credibility, we find that his inability to provide so few documents to evidence his alleged lengthy period of continuous employment and his failure to produce corroborative documents that were easily available mean that he did not meet the standard of proof to show he was an employee of any of the companies that he claimed to have

been employed by prior to the commencement of his employment with the respondent.

24. The payslip disclosed by the claimant dated 12 March 2019 [801] showed gross pay for the month of £3,500 and cumulative pay for the tax year of £10,000 to that date. The claimant disputed the accuracy of the payslip, but we find that his evidence was less credible than the document produced. We do not find that either were credible.

25. The claimant's payslip for 12 August 2019 [802] showed that he had worked 40 hours at £100 per hour with cumulative gross pay of £20,000. The figures on this payslip were not explained with any credibility by the claimant or Ms Boddie. The figures bore no relation to the amount the claimant was paid, his usual working hours in his purported contract or the fact that he was not paid an hourly rate.
26. We find Ms Boddie to have been an unhelpful and obstructive witness who was not credible. We find that the claimant gave Ms Boddie authority to release details of his earnings to the respondent during a conversation that had originally been between her and Mr Smith. We make that finding because it was both the evidence of Mr Smith and the claimant that he did so. Ms Boddie attempted to explain her failure to provide the information on the grounds of GDPR and a lack of clarity about what the claimant had authorised. Whilst this may be a potentially reasonable explanation, it was not a valid one in this case where we have found that the claimant himself gave her authority to release the information. If she had any doubts (which we find that she could not reasonably have held) about what the claimant had authorised, she could and should have asked him to clarify what he was authorising and followed it up in writing with him. For whatever reason, she failed to do either.

27. A key document in this case was the contract of employment dated 14 January 2014 [62-69], which the claimant relied upon as his terms and conditions of employment at the date of the claimed TUPE transfer to the respondent. The claimant says that at the time that the contract was drafted, he was the sole shareholder and his brother was the sole director of the company, Alchemy Facilities Ltd. He says that the very generous terms were his way of protecting himself in case he fell out with his brother.

28. We find that the claimant did not meet the required standard of proof to show that the contract was genuine or contained a record of his terms and conditions with Alchemy Facilities Ltd, which transferred to Enviroserve in December 2018.

29. We acknowledge that the oral evidence of Mr Smith gives the respondent some difficulties, as he said he had no reason to believe that the contract produced by the claimant on 11 May 2020 was not genuine. However, we find that his response related to how he felt on 15 May, when he met the claimant, not how he felt once he had considered matters in the round. We find that his feelings were set out in the response to the claimant's grievance dated 21 May 2021, when he cast doubt on the document.

30. We find that we cannot place any reliance on the contract at pages 62 to 69 being a contract that the claimant can rely upon as evidencing his terms and conditions of employment at the time of the TUPE transfer because:

30.1. Some of its terms, as set out by Mr Smith in his witness statement, were egregiously favourable to the claimant. These include a two-year notice period, two years' sick pay, a 16-hour working week and a clause that the employer was not allowed to dismiss the claimant at any time without notice or a payment in lieu of notice.

30.2. The claimant sought to justify the sick pay clause on the basis that it is the norm in the public sector, where the respondent does much of its business. We find that to be irrelevant. The respondent is a private sector business.

30.3. In the panel's combined experience of more than 80 years in business, none of us have ever seen a clause that forbids an employer from dismissing an employee for any reason without payment of notice, let alone a 2-year period of notice. We find it highly likely that this clause was inserted for the benefit of the claimant in his relationship with the respondent.

30.4. The claimant never produced the purported contract to the administrators. It was specifically stated in the administrator's report that they had not seen the contract.

30.5. We find it highly unlikely that an employee with such a generous contract of employment would not have brought it to the attention of the respondent as soon as possible after the transfer.

30.6. We accept the respondent's evidence that due to the urgency to complete the purchase of Enviroserve over 3 days, there was no time for it to consider any possible contracts of the management that may have existed.

30.7. Mr Smith asked for copies of each manager's contract of employment on 1 May 2020 [370] by email to both Mr Stephens and the claimant. The email exchanges between the claimant and Mr Smith include no suggestion by Mr Leader that he had a contract of employment.

30.8. The issues of contracts had been discussed by email on 1 May 2020 [page number]. In an exchange of messages with Mr Stephens on 1 May 2020 [411], the claimant wrote:

> *"Dropped the ball on that contract email mate. Also there's on (sic) from when we started for you. Don't think was signed but I suggest get contracts on file because the only reason they would want is if they are trying to pull a fast one."*

We find that at the very least, this message is a clear statement by the claimant to Mr Stephens that he had made a mistake by saying that he had no written contract and that he ought to get a signed copy on file. We find the message to be indicative of dishonest behaviour that puts the credibility of the claimant in doubt generally and on the issue of contracts in particular. We do not find that the message goes as far as Mr Buckle suggested it did: inviting us to find that the claimant could have created a contract for Mr Stephens similar to the claimant's 2014 contract.

30.9. Mr Stephens confirmed in his witness statement (§44) and in oral evidence that approximately two weeks after the text exchange, the claimant spoke in the office about an employment contract he had

written himself which made him virtually untouchable and would protect him from being dismissed. The timeline suggested by Mr Stephens fits with that meeting being on or around 15 May 220. We find Mr Stephens' evidence on the point to be more credible that the claimant's.

30.10. Mr Smith sent the claimant a contract [359-363] by email on 5 May 2020 [374]. We find that the employer was named as Green Your Space Limited, but that was no more than a typographical error and could have been amended easily.

30.11. The claimant provided no immediate response detailing any issues with the draft contract he received. We find that if he genuinely believed that the 2014 contract was effective, he would have raised immediate objection to the huge changes that the draft supplied by Mr Smith purported to make to his terms and conditions.

30.12. On 7 May 2020 [376] email from Mr Smith emailed the former Enviroserve management team and expressed the hope that they had reviewed the contracts, and if agreed, would sign and return them the same day. We find it highly unlikely that the clamant would not have immediately raised the conflicting terms of the 2014 contract had he believed it applied.

30.13. The claimant sent the 2014 contract to Mr Smith on 11 May 2020. It was discussed briefly in the meeting between Mr Smith and the claimant (Mr Stephens was in attendance at the start).

30.14. Mr Stephens' evidence in chief and oral evidence was that approximately two weeks after 1 May, the claimant spoke in the office about an employment contract he had written himself which made him virtually untouchable and would protect him from being dismissed. On balance, we find that the claimant made this statement because it is his effective position at this hearing and he was happy to suggest to Mr Stephens on 1 May that they create a false document, which indicates that the claimant trusted him.

30.15. We find Mr Stephens' evidence that he found a memory stick with different versions of the 2014 contract on it in the respondent's office to be credible because the claimant said that the stick was his.

30.16. Accordingly, if the tribunal finds that the Claimant did create this contract post TUPE transfer, then it cannot be relied upon by the Claimant. The Claimant not having a continuous two-year period to bring a claim for unfair dismissal or indeed any claim on this cut and paste employment contract [p62].

31. The respondent says that the process that led to its decision to dismiss the claimant began when Barry Cocker, who had worked for Enviroserve and now works for the respondent, spoke to Tom Hickey in late April or early May 2020 and disclosed that a week before the phone call, the claimant had sold him a Renault van ("the Van") for £900. Mr Hickey says he mentioned it to Mr Stephens when they spoke some time afterwards.

32. Mr Stephens says he asked Mr Hickey to call Mr Cocker on 15 May 2020 to make further enquiries about the transaction. Mr Cocker would not confirm or deny anything and said that he should speak to the claimant.

33. Mr Hickey's evidence in chief was that Mr Cocker then rang him five times, but he missed the calls. When he returned Mr Cocker's calls, he was told by Mr Cocker that he had spent £500 repairing the van and that the claimant had gifted it to him. He had given the claimant £900 to repay him for paying off bailiffs. Mr Cocker had added that the deal for the Van had been completed in 2019, prior to the respondent purchasing the business of Enviroserve.

34. Mr Cocker's evidence in chief was that the claimant had said in December 2019 that he could have the Van for his personal use. He had used the Van for work since he had joined Enviroserve. The claimant told him that he could use the van for personal use as long as he paid for any repairs that were required "as this was not being done by the respondent".

35. As far as Mr Cocker was concerned, the Van was owned by the claimant, but Enviroserve was the registered keeper and the respondent had never switched it into its name.

36. Between 14 and 28 February 2020, Mr Cocker said he messaged Mr Hickey about his cleaning schedule and "regarding the van as it required maintenance/repairs" which he had already arranged.

37. Mr Cocker's witness statement was entirely silent on the conversations with Mr Hickey in April or May. He said that on 17 May, Mr Smith sent him a text and asked him to call him. He rang Mr Smith, who asked him if he had purchased the vehicle. He said he hadn't. He and the claimant had come to an arrangement, but it belonged to the claimant. The claimant had never taken money for the alleged transfer of the vehicle, "and we did not have any conversations to this effect at all." Mr Cocker denied ever being interviewed about this as part of any process.

38. The claimant said in his evidence in chief that the first he had heard of the allegation that he had sold the Van that belonged to the company to Mr Cocker in a meeting with Mr Smith and Mr Stephens on 15 May 2020. He said that Mr Cocker used the van for work as a mobile cleaner and in a personal capacity on condition that there had been no transfer of the Van.

39. We find that it was never in dispute that the Van had been included on the list of unencumbered assets belonging to Enviroserve which had purportedly been transferred to the respondent [183]. We also find that the valuer for the administrator took the details of the vehicles to be included in the sale from the claimant. We preferred Mr Stephens' evidence on the point to that of the claimant. We find that his evidence was corroborated to a degree by the evidence that Mr Lidgett of the Respondent had attended the meeting with the valuer. We found the evidence from the claimant that the inclusion of the vehicle on the list of unencumbered vehicles was a mistake was not credible in the light of his lack of credibility on other matters and the fact that there were only two vehicles in the agreement that were listed as owned by Enviroserve.

40. We find that the claimant's position was weakened further by:

40.1. The clear conflict in his evidence that Mr Cocker was allowed to use the vehicle for work and private mileage and Mr Cocker's own evidence that he had to pay the maintenance for the vehicle as a condition for using it for personal mileage;
40.2. Our finding that it was highly unlikely that Mr Cocker would have paid £500 to repair a vehicle that it was the responsibility of the respondent to repair;
40.3. We found Mr Cocker to be an inconsistent witness. His evidence in chief was internally inconsistent and his oral evidence was even more so. His written evidence was inconsistent with his oral evidence;
40.4. The inconsistency of the claimant's evidence and the undisputed note of his conversation with Mr Smith on 15 May 2020 [424] in which he said he had given the Van to Mr Cocker in December 2019, but could not answer why it was still insured by the respondent or that it had not been transferred to Mr Cocker or why Mr Cocker was denying any transfer;
40.5. We found Mr Hickey's evidence to be credible; and
40.6. We find it most likely that the claimant sold the vehicle to Mr Cocker for £900 and colluded with Mr Cocker to change what Mr Cocker had said to Mr Hickey.

41. The issue of the Van came to a head when Mr Smith decided to check the V5 registration documents of all the vehicles in the Enviroserve fleet. Most were on some form of finance. The claimant managed to produce every V5 except the one for the Renault Van. We find that it was entirely reasonable for Mr Smith to come to the conclusion that there was something to investigate when he had evidence from Mr Hickey that the claimant had allegedly sold an asset that was included as an unencumbered asset in the sale agreement after the sale had been completed. He had then asked the claimant about it on 15 May, and he had been unable to provide a V5 and could only produce the finance agreement for the sale that was in his name. We find that a finance agreement is no proof of ownership, especially on a vehicle that was 10 years old. The claimant may have had to sign a personal finance agreement if his company had insufficient credit history to enter into an agreement on its own account.

42. After the meeting on 15 May, Mr Smith contacted Mr Cocker, as referenced above, on 17 May. We found Mr Smith's evidence to be more credible than Mr Cocker's and find that Mr Cocker admitted paying £500 for the vehicle in December 2019. We find this to be unlikely to be true, but it is an admission that he bought the vehicle at some time after the respondent had purchased Enviroserve's business. We find that after the event, the claimant has shown to the satisfaction of the Tribunal and the respondent that he was the owner of the unencumbered Van, but he did not produce the evidence at the time he was dismissed, and we find that the version of events that he (and Mr Cocker) produced were contradictory and disingenuous at best and dishonest at worst. The claimant had represented to the valuer and, therefore to the respondent, that Enviroserve was the owner of the Van and, therefore, that title in the Van would pass to the respondent on completion.

43. Using the test in **Sainsbury's Supermarkets Limited v Hitt**, we find it within the band of reasonable responses for the respondent to suspend the claimant. He was

invited to a disciplinary hearing on 20 May 2020 at 11:00am at the respondent's offices. The letter was on the letterhead of Green Your Space Limited. The matters to be discussed were:

43.1. Alleged theft/fraud relating to the "sale" of the Van, which was not the claimant's property and had been included on a list of assets transferred when the respondent bought the business.
43.2. Serious financial irregularities regarding the respondent's assets amounting to gross negligence.

44. The claimant was sent a pack of documentary evidence. He responded by email dated 21 May 2020 at 21:48pm [426-427]. He refused to attend any disciplinary until it was explained how Green Your Space Limited had the authority to bring disciplinary proceedings. We find this to be an entirely spurious point. The claimant could not possibly have genuinely believed that he was to be disciplined by a company he did not work for.

45. The claimant then linked the disciplinary process to his refusal to sign the contract he had been sent. He said he was not permitted to be accompanied to his suspension meeting. We find that there was no legal or contractual right for the claimant to be accompanied at an investigatory/suspension meeting or that such is a requirement of the ACAS Code of Practice.

46. Finally, the claimant alleged that he had continued to work whilst purportedly on furlough and as such, the company's actions were "clearly fraudulent". The respondent postponed the disciplinary hearing because of the claimant's email. Mr Stephens respondent to the claimant's email on 26 May 2020 at 14:41pm [429-431]. He answered the questions raised in the claimant's email. Specifically, he confirmed that the claimant was invited to a disciplinary by his employer, the respondent. It was denied that the claimant's contractual position had affected the respondent's decision to take disciplinary action against the claimant. It was confirmed that disciplinary action was not contemplated until the claimant failed to produce the V5 for the Van. Mr Stephens advised the claimant that the disciplinary hearing had been rescheduled for 29 May 2020 at 11:00am at the respondent's offices. He was warned that if the claimant failed to attend that meeting then Mr Stephens would make a decision on the facts before him.

47. At 20.09 on 28 May 2020, the claimant emailed Mr Stephens [433] and advised that he could attend a meeting the following Monday, Wednesday, and Friday, but gave no explanation why he could not attend on the 29 May. We find that the claimant produced no medical evidence of his inability to attend and we found his explanation of illness not to meet the required standard of proof. The claimant's claim to be ill was undermined by his admission that he attended the office of one of his other businesses (which was in the same building at the respondent) on the afternoon of 29 May to pick up a new phone.

48. We find that the claimant did not have a valid reason for not attending the hearing on 29 May and that this was the second disciplinary hearing. He had been warned that the hearing may proceed in his absence, so we find that it was in the band of reasonable responses to carry on with the hearing without the claimant. Mr

Stephens chaired the hearing. Given the size of the respondent and the senior managers who were available, we find that it was in the band of reasonable responses for Mr Stephens to chair the meeting and make the disciplinary decision, notwithstanding that he was a witness of fact on some matters. We do not find this to be a breach of the ACAS Code of Practice.

49. Mr Stephens found the allegations proven and dismissed the claimant by letter dated 1 June 2020 [434-435]. Mr Stephens found that the claimant had sold the Van to Mr Cocker when he had no right to do so and dismissed him without notice. We find that at the time of the dismissal, the respondent had carried out as much investigation as was reasonable in the circumstances, genuinely believed in the claimant's guilt and that it had reasonable grounds for that belief. We find that the reason for dismissal was the claimant's conduct relating to the van and that it was in the band of reasonable responses to characterise his conduct as gross misconduct.

50. We find that the claimant was dismissed for gross misconduct, so was in breach of contract and not entitled to notice pay. For the reasons set out in paragraph 42 above.

51. We find that the claimant's email of 21 May 2020 [426] was a protected disclosure because it disclosed information that either a criminal act or that the respondent was failing to comply with a legal obligation to which it was subject. We find that making a disclosure about a fraud on the taxpayer must be in the public interest. However, we find that the disclosure was not the sole or principal reason for dismissal because we find that the respondent was already set on a course to hold a disciplinary hearing at which the claimant would be charged with an act of gross misconduct and we find that the principal reason for the dismissal was that misconduct. We accept Mr Stephens' evidence on the point.

52. Because of our finding on the question of the alleged TUPE transfer, the claimant's claim of unfair dismissal is doomed to failure. If there was no TUPE transfer, there could not be a dismissal related to or arising from such a transfer. Our findings above also mean that we would not have jurisdiction to hear such a claim because the claimant did not have two years' continuous service.

53. The claimant submitted grounds of appeal [437-439] and grounds of grievance [440-442] on 3 June 2020. The respondent appointed a consultant at its HR provider, Mr Gardiner, to hear the appeal and grievance. We find that Mr Gardiner conducted a fair and reasonable appeal for the dismissal and appeal against the grievance. Mr Gardiner undertook additional investigations and considered evidence from the claimant:
    53.1. Evidence that the claimant was allegedly working on furlough [478];
    53.2. Evidence of the finance for the Van [489];
    53.3. On 16 June 2020 [491], Mr Gardiner asked for further evidence and information;
    53.4. On 17 June, he raised questions of Mr Stephens;
    53.5. On 17 June 2020, Mr Peter Lidgitt wrote to Mr Gardiner that "*at all meetings with Marcel and the valuer prior to administration it was stated that the van was an unencumbered asset, so it was agreed*

before sale specifically that the vehicle was a wholly owned asset of the Co."

54. We find that Mr Gardiner's dismissal of the claimant's appeal om 23 June 2020 [562] was reasonable in all the circumstances. We find that the claimant brought little evidence in support of his holiday pay claim. He brought no evidence of his holiday dates and the contractual basis of his claim (the 2014 contract) was entirely discredited. He brought little evidence of his claim for unauthorised deduction of wages, so did not meet the required standard of proof to evidence a claim of unauthorised deductions, but we find that the claimant agreed that he had been paid the sum of £4,559.48 net on 18 November 2020, which was more than that claim in any event.

Applying the Findings of Fact to the Law and Issues

55. Using the list of issues above, we make the following findings:

    55.1. The claimant's continuous employment began on the date he began working for the respondent – 1 February 2020.
    55.2. The principal reason for the claimant's dismissal was misconduct.
    55.3. The respondent genuinely believed in the claimant's guilt.
    55.4. At the time that the belief was formed, the respondent had carried out a reasonable investigation;
    55.5. The respondent otherwise acted in a procedurally fair manner; and
    55.6. Dismissal was in the range of reasonable responses.
    55.7. The claimant was guilty of gross misconduct, so no notice was payable.
    55.8. The respondent did not fail to pay the claimant for annual leave the claimant had accrued but not taken when his employment ended.
    55.9. The respondent did not make unauthorised deductions from the claimant's wages.

56. Because of our findings in paragraph 55 above, we did not need to address any of the other issues in the agreed list.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
16 March 2021