EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104546/20 (V)

Held on 21 & 22 January, 8 March and 19 April 2021

Employment Judge J M Hendry
Members C A Jackson
J McCaig

Mr D Pickard	**Claimant** **In Person**
Perfect Hygiene Ltd	**Respondent** **Ms L Hatch, Counsel** **Instructed by** **Mr D James, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claim for automatically unfair dismissal under Section 103A of the Employment Rights Act 1996 not being well founded is dismissed.

REASONS

1. The claimant in his ET1 contended that he had been unfairly dismissed and that although he did not have sufficient qualifying service to make a claim for "ordinary'' unfair dismissal that his dismissal was automatically unfair as he had been dismissed for making a protected disclosure in terms of section 103A of the Employment Rights Act 1996.

2. The respondent company denied that the claimant had been dismissed for making a whistleblowing disclosure. Their position was that the claimant had been dismissed for unrelated matters relating to his misconduct.

Issues

3. The principal issue for the Tribunal was whether or not the claimant had been unfairly dismissed in terms of section 103A of the Employment Rights Act 1996 (''the Act'') which provides that an employee is "automatically unfairly dismissed" if the reason (or if more than one reason, the principal reason) for the dismissal is that the claimant made a protected disclosure as defined in section 43A of the Act.

Evidence

4. The claimant gave evidence on his own behalf. He also led evidence from his partner Ms Claire Fisher. The respondent led evidence from the following:

- Stewart Gardner, a Director of the company.
- William ('Billy') Robertson Operation Supervisor.
- Ellie Birnie and Administrator.

The Tribunal had access to a hearing bundle (JB1, pages 1-217) to which some additional documents were added by agreement. The respondent's Counsel also made reference to a written statement of Mrs Margaret Walker. Mrs Walker did not attend the hearing to give evidence.

5. The respondent company accepted prior to the hearing that contact made by the claimant with Stewart Gardner on 13 February 2020 was capable of amounting to a protected disclosure.

Facts

General Background

6. The claimant was employed by the respondent as a clinical waste operative from 10 September 2019 until his dismissal on 1 June 2020. He was given a contract of employment (JBp75-83) He was subject to the respondent's disciplinary and grievance policy (JBp84-88). He had previously worked with the Local Authority in their waste management service.

7. The claimant's place of work was given as the respondent's premises at Unit B, Blackburn Industrial Estate, Woodburn Road, Kinellar, Aberdeenshire. The claimant's salary was £9.50 per hour. The contract provided:

"*Normal Hours*

(a) An Employee's normal working hours are based on 40 hours per week but the Employee may be required to work additional hours as the Employer shall require from time-to-time. Overtime pay at 1.25 will be applied from working 48 hours per week. Evening work will be notified to the Employee in advance.
(b) The Employee's days of work will namely be Monday to Friday but the Employee may be required to work additional hours as the employer shall require from time-to-time.
(c) The Employee is entitled to no rest breaks unless stated otherwise as required by the employer.
(d) The Employee shall not be required to work more than an average of 40 hours per week unless the employee signs an Opt out – Agreement under the Working Time Regulations 1998.

Company Vehicles

(a) The Employer may, at it's entire discretion and where it deems appropriate, provide the Employee with the use of a vehicle for the better performance of the Employee's duties unless specifically authorised to do so by Steve Kennedy or Claire Bell the Employee will not be entitled to take the vehicle home and it must be used solely during working hours for business use only. The vehicle will be taxed, insured, maintained and repaired by the Employer and replaced as and when the Employer decided that a replacement is required."

8. The respondent is a limited company offering washroom and hygiene services to the private sector and to the NHS.

9. The respondent employs approximately 9 employees and is based at Blackburn just outside Aberdeen.

10. The respondent has an electronic tracking policy. Each vehicle is fitted with a tracker (JBp105-108). The fact that the respondent company had a tracker on vehicles was widely known to staff. The claimant was told about the existence of the trackers during his training. He was later reminded of their existence by Mr Billy Robertson in about May 2019 when he asked to borrow the company vehicle. The respondent has a Data Protection Policy (JBp109-114).

11. The claimant's tasks were risk assessed on the 20 March 2020 by the respondent company and the risk rating assessed as low (JBp129-133).

Waste service operative

12. The advertisement for the post which the claimant had answered referred to the collection of ''non-hazardous waste'' (JBp74). The claimant along with others would collect clinical waste from a variety of sites such as doctor's surgeries and hospitals. It was then taken to a waste transfer station run by the NHS for disposal.

13. The respondent company has an open plan office. The senior Administrator who had the most dealings with the claimant and other Operatives was Margaret (''Mags'') Walker. She retired in January 2020 and was succeeded by Ms Ellie Birnie. There was a handover period lasting a couple of weeks.

14. If there was a query about wages or a request for equipment such as for nitrile gloves these would usually be dealt with by Mrs Walker or later by Ms Birnie. Apart from these gloves the company did not provide PPE although it provided a branded uniform made of ordinary fabric. The purpose of the gloves was to protect users from picking up infections when handling the waste. They were disposable and were to be changed after each pick up.

15. The claimant did not receive his uniform straight away. He asked at the office on a number of occasions when it would arrive. He would refer to the uniform as PPE. He was surprised at the lack of other PPE equipment provided to him compared to the equipment provided when he worked with the Local Authority.

16. On the 12 November 2018 in the course of his duties paint was spilled on his trousers when working. The claimant had to return to the office and he queried when his uniform would arrive.

17. The respondent compensated the claimant for the damage to his trousers. The trousers that were part of the uniform had not been supplied at the same time as the shirts had been.

18. The claimant worked on his own driving between sites and collecting waste. He had a weekly timesheet to fill in which he handed to the respondents' office towards the end of the month to allow his pay to be calculated. He was allowed one daily twenty-minute break. His van had a 'tracker' device fitted that showed when it was started in the morning and stopped in the evening. His superviser was Mr Billy Robertson. The claimant would often txt Mr Robertson and they would chat when they met up in the course of work. The claimant regularly raised the delay in issuing a uniform to him with Mr Robertson referring to PPE. In December the claimant was supplied with branded T-Shirts, a jacket and trousers.

19. The claimant returned the trousers that had been issued to him in December and asked ''Mags' to replace them. He was supplied with another pair which were too tight. The claimant believed that the trousers should have been more robust ''ballistic'' trousers which would protect users from sharp objects.

20. The respondent's management allowed a degree of flexibility about the route taken by drivers such as the claimant. They were not required to attend the site at 8am. It was expected that they would arrive at the first premises at 8am as their initial driving time was not counted as being ''at work''.

21. Used hypodermic needles known as "sharps" were deposited by customers in specially designed plastic bins. These bins allowed needles to be put into the bin which was constructed with a lockable flap opening on the lid to prevent the contents falling out. The flaps were required to be secured by the customer before they were picked up. The bins came in various sizes.

Accident

22. On 13 February 2020 the claimant was collecting plastic bins from a surgery in Pitmedden. He entered the store room intending to pick up a number of bins at the same time. He put one under his left arm and when reaching with his right hand for another the bin slipped out of his hold and fell. The bin flap appeared to be open and the contents spilled out. He sustained a needle stick injury from a 'sharp' to his left palm. He completed an Accident Report there (JBp89). He described the accident in the following terms:

> "*When picking up sharps, bins, one had slipped out my grasp. This resulted in one-to-one sharp bin falling to the floor. The bin was not secured and opened dispersing needles within. As I was picking up other sharps with my other hand at the same time one needle had pierced my skin on the palm of my left hand.*"

23. It was the customer's responsibility to ensure that the flaps were secure. The claimant was required to make a visual check before lifting the boxes to ensure the flap was secure. The claimant believed that the flap had not been secured.

24. Following the injury, the claimant telephoned Stewart Gardner a Director of the company and advised him about the incident. Mr Gardner noted the claimant seemed shaken. He instructed someone to give the claimant a lift to

the hospital where he received treatment for the injury. He was tested for any infections and was later found not to have any. Mr. Gardiner was waiting outside his office when the claimant arrived back. He discussed the accident in the car park with the claimant. Mr. Gardiner checked on the claimant's wellbeing by txt message over the weekend and on Monday 16 March.

25. The claimant later attended the office where he filled in an accident report book entry. Mr. Gardiner did not receive any photographic evidence from the claimant but arranged for the respondent's risk assessment to be reviewed and updated.

26. The respondent company have had no similar incident in the past where employees have been injured by needles. Their position was that if the "sharps" were properly deposited in the plastic boxes and the flap secured then the chance of any injury from a "sharp" to their employees was low.

27. The claimant along with other operatives had been given "nitrile" protective gloves to wear. These were made of a thin layer of rubber like material. They would not protect the skin from contact with sharp objects such as ''sharps'' but were held to be sufficient protection against infection which was seen as the main risk.

28. The respondent company commissioned a Risk Assessment (JBp90) of their employees' waste collection activities which recognised the danger of needlestick injury but assessed it as low risk.

29. On the 24 March 2020 the claimant had a txt exchange with Mr Robertson. The exchange was initially about masks. This was the start of the Covid Pandemic. The claimant txt'ed: ''*You've also asked for proper gloves after I've been asking since day one and still waiting. What was it he said yesterday? Can't get any wasn't it. Arco sell them. The fact is they don't care as long as they were making a profit*" Mr Robertson responded: *''I've meeting tomorrow ill give list of what I WANT''*.

30. The claimant's solicitors sent a pre-action protocol letter dated 14 May 2020 which described the accident as follows:

"*The client required to collect clinical waste. Our client entered a storage unit room in the surgery building. Our client began to pick up sharps bins. A sharps bin had not been locked properly. Our client had lifted a sharps bin when suddenly and without warning a needle on top of the sharps bin fell striking him on the left hand to his injury.*"

Alleged Disclosures to Margaret Walker

Disclosure 1 - 11/9/2019

31. On the 11 September 2019 which was the claimant's second day of his employment the claimant spoke to Mrs. Walker (who was known as 'Mags'') in the office. The claimant asked about gloves that were provided. He had been accustomed to having had PPE when working for the Local Authority.

Disclosure 2 – 13/09/2019

32. On the 13 September 2019 the claimant once more raised the question of gloves with Mrs Walker. He could not understand why more robust gloves were not provided.

Disclosure 3 – 18/08/2019

33. At some point around the 18 August 2019 the claimant mentioned to Mrs Walker that his van did not have a defects book or checklist for him to complete. He had been given such a defects book in past employment. He asked about reporting defects. Mrs Walker advised him that none of the vans had a book in them to list any problems. She explained the defect reporting procedure to him namely he should carry out daily checks and advise Mrs. Walker or someone in the office if there were any defects or problems.

Alleged Disclosure 4 –24/09/2019

34. On or about the 24 September 2019 and on other occasions the claimant asked when he would be likely to receive his uniform.

Alleged disclosures to Stewart Gardiner

Alleged Disclosure 5 – 12/11/2019

35. On the 12 November 2019 the claimant asked Stewart Gardiner about when he would get his uniform.

Alleged Disclosure 6 – 22/12/2019

36. After the claimant had paint spilled on his trousers he once more asked about the claimant stated in his when he would receive his uniform or PPE. At this point he had not received work trousers.

Alleged disclosures to Billy Robertson

Alleged Disclosure 7 – December 2019

37. The claimant would often meet Billy Robertson at what was known as the waste transfer station. He often discussed the trousers issued to him which Mr Robertson observed looked tight. He also raised the type of gloves supplied to him on this and on other occasions. He was told that the nitrile gloves were the only ones issued. The claimant thought that more robust gloves should be issued.

Alleged disclosures to Elie Birnie

Alleged Disclosure 8 – 11/01/2020

38. On or about the 11 January the claimant asked in the office whether any gloves or trousers had arrived for him. He was told that there were only nitrile gloves and no trousers.

Alleged Disclosure 9 – 16/02/2020

39. On or about the 16 January the claimant asked Ms Birnie whether there were different gloves available following his accident on 13/03/2020, but she told him he should discuss it with Stewart Gardiner.

Final disclosure to Stewart Gardiner and Billy Robertson

40. On or about 23 March 2020 the claimant was in the vicinity of the office and saw Billy Robertson and Stewart Gardiner. He asked Mr Gardiner about protective gloves. He was told that the company could not get any at present.

Use of Company Vehicle

41. In April the claimant was 'furloughed' returning to work in May.

42. On the 4 May 2020 the claimant returned to work when he was told by his partner that their dog needed urgent treatment. The claimant contacted Mr Robertson and asked to use the company vehicle to take the dog to the vet which he did. Mr Robertson raised no objection. On another occasion the claimant also used the van to collect IT equipment for his partner. He did not get specific authority to do so.

43. The claimant's car had been left by him in the respondent's car park. On the 6 May the claimant asked Mr Robertson if he could use the van for shopping. Mr Robertson agreed. The claimant's car remained in the car park.

44. On the 11 May the claimant used the vehicle to attend another veterinary appointment. He did not ask for authorisation but assumed he had it. His car remained in the car park until the 12 or 13 May.

Disciplinary Action

45. An allegation was made by a fellow employee, Steve Megginson, one of the respondents' longest serving employees. He was angry that he had heard that the claimant had on a number of occasions expressed negative comments about the respondent company at the waste transfer station and about him personally. He had become aware of this from staff at the waste transfer station. Mr Gardiner spoke to him and noted that he was furious with the claimant. He thought it best to suspend the claimant until the matter could be investigated.

46. The claimant received a letter from his employers dated 25 May 2020 (JBp.94-95). It was in the following terms:-

"*Dear Mr David Pickard,*

Re: your suspension from duty

A serious allegation you have brought to my attention regarding your conduct in the workplace. In my capacity as your manager I have a duty to ensure that you have full proper investigation of the matter as conducted.

Whilst this investigation is being undertaken you will suspended from your duties with immediate effect. During the period of your suspension, you will continue to be paid your salary and receive other contractual benefits in the usual way.

I have considered carefully whether steps other than suspension could be put in place whilst the issue is investigated. In the circumstances I believe it is appropriate and reasonable to suspend you for a short period while the matter is fully investigated, as you are a loan worker who works without direct supervision and we have received a number of accusations that you have on occasion expressed negative comments about both the company and your colleagues. In taking this action we assess there is a risk that further comments may cause the company harm should you remain in the

workplace, whilst an investigation is ongoing. I am mindful that a possible outcome of the investigation might be there is no case to answer, so I will review your suspension on a daily basis to ensure that the suspension continues for no longer than is reasonably necessary to arrive at a decision whether disciplinary action is required."

47. The purpose of the suspension was said to be to allow an investigation into a ‘‘serious allegation’’. The allegation was not specified.

48. The investigation found that there was no corroboration of the allegations. Mr Gardiner decided not to pursue the matter.

49. On or about the 14 May 2020, Billy Robertson, in his role as superviser did a check of time sheets. He would carry out such a periodic check. The claimant’s time sheet drew his attention. He noticed that the claimant had put his finishing time as 4pm every day including the 4 May when he took his dog to the vet’s. He had become suspicious that the claimant was not pulling his weight. Mr Robertson recalled that he had asked the claimant to complete a job but was told that by him that he was running late and could not complete the job in time. This meant that other drivers were asked to do the work. This was not the first occasion this had occurred. This prompted Mr Robertson to ask Ellie Birnie to look at the vehicle tracker which later confirmed that the claimant appeared to be at home at 14.53pm on the 4 May. The claimant’s usual finish time would be around 4pm.

50. Mr Robertson reported his concerns and Mr Gardiner asked for an audit of the claimant’s start and finish times to be carried out. This was carried out by Ms Birnie and a Director Claire Bell using the onboard tracker. They looked at the claimant’s timesheets and then the data from the tracker. The claimant put in his timesheets that he started at 8am and finished at 4pm every day.

51. The respondent’s staff prepared an audit of the claimant’s start and stop times from the 4 May 2020 until 20 May 2020 (JBp98).

52. Mr Gardiner also became aware that the claimant appeared to have used his vehicle from some personal errands contrary to the company's policy.

53. The claimant received a letter from his employer dated 28 May 2020 (JBp.96-97) in the following terms:-

"*Dear Mr David Pickard*

Re- Notification of your Disciplinary Hearing

An investigation of the facts surrounding your current suspension was completed on 28 May 2020. The findings from that investigation have led me to believe that this matter should be progressed to a disciplinary hearing. You are therefore invited to attend a disciplinary hearing on 1 June 2020……. At the disciplinary hearing you will be expected to provide your response to the following allegations:

1. ***Falsifying data on timesheet;***
2. ***Unauthorised private use of a company vehicle;***
3. ***Your conduct as outlined in (1) and (2) above has led to financial loss to the business.***

The allegations as set out above, if proven will constitute gross misconduct offences. Furthermore, if proven, the allegations are considered so grave that they will amount to a fundamental breach of mutual trust and confidence.

For your information copies of the following documents are enclosed by way of evidence:
Perfect Hygiene driver audit - David Pickard

These documents are on the basis of the complaint and will therefore be relied on in support of the allegations made against you. If you would like to submit a written statement for consideration in advance of the hearing you may do so. This should be forwarded to Stewart Gardner.

At the hearing, when responding to the allegations, you may also ask questions, dispute the evidence, provide your own evidence and put forward any relevant mitigating factors. Due consideration will be given to your response when considering what, if any, disciplinary sanctions are to be imposed."

54. The claimant was informed of his right to be accompanied. He was given details of an audit of the times he started and stopped work between the 4 and 20 May which suggested that he was starting late and finishing early (JBp98).

55. The disciplinary hearing took place on 1 June 2020. The disciplinary hearing was chaired by Stewart Gardner. Ms Claire Bell attended as a notetaker. She took written notes that were then typed up (JBp117-123). The claimant asked Mr Robertson to accompany him which he agreed to do.

56. The claimant at the outset questioned why the allegations to be considered were different from the allegations which had led to his suspension. The claimant mentioned that on the 4 May he had taken his dog to the ‘‘vets’’ and that Mr Robertson had been aware of that. Mr Robertson was not asked by either the claimant or Mr Gardiner to confirm his understanding. The claimant explained that he had made an error putting his finish time at 4pm that day on his timesheet. The claimant also alleged that he routinely inspected his van first thing before 8am. and this was why it was after 8am before the van was started. He was asked why had not claimed the time for the checks and said that he just didn’t. He was asked why one particular trip too so long and explained that he had to queue because of Covid to enter the premises. The claimant also said that as he was entitled to a break he would take it once he had finished to allow him to end his day early. This would mean he had no lunch break. He accepted that he used the van for a follow up appointment to the vets. He said his car had been left at work and he had to use the van. He explained that Mr Robertson had told him it was ‘ok’. He was reminded that his contract specified who could authorise the use of the van. He responded he had signed it 8 months earlier and was being ‘persecuted’. He said he had not consented to the use of a tracker and had no notice of it.

57. Mr Gardiner considered that the claimant had not been filling in his time sheets correctly, had not been carrying out a full day’s work and pulling his weight. At this point the respondent company’s contract with the NHS was ending and he was concerned that the claimant’s poor timekeeping was discovered by their clients that would not reflect favourably on the company and might imperil continuation of the contract. He decided to dismiss the claimant.

58. By e-mail dated 1 June 2020 the claimant explained that he was not happy with the notes that had been taken from the hearing. The claimant suggested that discussion was not fully documented. He said that he had offered to pay the costs of using the van and that there had been no intent on his part to defraud the company as *''I had offered to rectify the problems mentioned''* (JBp124) The notes were amended (JBp125-127). The claimant did not appeal the dismissal but made a Subject Access Request.

59. The claimant received a letter from his employers on 1 June dismissing him for gross misconduct. The letter stated:

> "*Further to your disciplinary hearing held on 1 June 2020 regarding "falsifying data on your timesheet and unauthorised private use of a company vehicle" this letter confirms the termination of your contract of employment without notice with effect from the 2 June 2020……a full investigation of the facts surrounding the complaint against you is made by Claire Bell. At the disciplinary hearing you were afforded the opportunity to respond to the allegations arising from that investigation. Having carefully considered the representations that you made at the hearing I have found that your explanations are insufficient and you have been unable to provide any reason which might mitigate the circumstances presented. We have also carefully considered your employment as a whole and any mitigatory factors, including previous disciplinary conduct, employment position, length of service, experience and your individual circumstances in order to consider whether a lesser sanction in place of dismissal may be appropriate, such as redeployment or a final written warning. Unfortunately, we have not been able to identify any mitigating circumstances or appropriate alternative to dismissal. For this reason, I find that the appropriate course of action to take in response to your conduct, is to terminate your employment on grounds of gross misconduct and because I believe that going forward no further trust and confidence have been placed in you.*"

Witnesses

60. The claimant was an outwardly plausible witness but his position on a number of crucial matters although often stated with confidence did not instil similar confidence in the Tribunal. We were left with the impression that his evidence

evolved somewhat from the ET1 and throughout the case. We formed the view that he was not wholly reliable or credible as a witness.

61. The claimant's partner was in our view an honest and intelligent witness. Much of what she knew she had learned from the claimant and accordingly she was of limited assistance to us. She did confirm that he had often raised the issue of PPE with her, this did not surprise us, and asked her about her experiences of PPE in the oil industry. She was overall credible and reliable.

62. We found Mr Gardiner generally credible and reliable. Despite his clearly jaundiced view of the claimant's evidence he seemed to be answering questions directly and without evasion. Ms Birnie was a patently honest witness on whom the Tribunal could rely. She was credible and reliable and thought seriously and carefully about her answers.

63. Mr Robertson perhaps because he was in the middle as it were between management and the workforce gave the impression that he tried to be friends with both sides for example agreeing with the claimant that he had been badly treated when in his company and later upholding the company line when not. He described his texts with the claimant as being merely ''banter''. However unsatisfactory overall he was as a witness there were some parts of his evidence that struck us as genuine particularly the evidence that he was annoyed at the claimant 'skiving off''. He seems to have started to distance himself from the claimant and we noted that in his text exchange with the claimant on the 24 March (JBp159) during dialogue about masks and PPE he commented that ''I've a meeting tomorrow ill give them a list of what I WANT'' as opposed to what the claimant was seeking.

Submissions

Respondent's Submissions

64. Counsel for the respondent began by addressing the 10 qualifying disclosures the claimant alleged he made between 11/09/19 and 23/02/2020. As a preliminary observation she noted that none of the alleged "disclosures" were documented in any way and there was no email or other documentary evidence to corroborate the claimant's evidence. It was notable she said that the claimant never alleged in the course of the disciplinary procedure that ultimately led to his dismissal, that he had made protected disclosures or that he was disciplined/dismissed because of them. The claimant did not appeal the decision to dismiss him, so there were no protected disclosure issues raised on appeal. The first time the claimant alleged he had made any protected disclosures was on 21/08/2020 when he filed his ET1. Even at that point he did not give details. They were only provided later.

65. The Tribunal was reminded of the terms of s.43B of the ERA defining what amounts to a qualifying disclosure of information. Information in this context meant a disclosure of facts; merely voicing a concern, expressing an opinion or making allegations is not enough. It has to have a sufficient factual content and specificity such as is capable of tending to show one of the relevant types of wrongdoing (**Cavendish Munro Professional Risks Management v. Geduld** [2010] IRLR 38 & **Kilraine v. London Borough of Wandsworth** [2018] IRLR 846).

66. The Court of Appeal in ***Kilraine*** confirmed that in effect there is a spectrum to be applied and that, although pure allegation is insufficient (the result in *Cavendish*), a disclosure may contain sufficient information even if it also includes allegations. The 'information' must also be construed within the phrase 'which tends to show …'

67. Counsel then turned to the alleged disclosures. There were, she suggested, a number of disputes of fact between the parties and she invited the Tribunal to accept the evidence of the respondent's witnesses where those disputes arose.

68. The respondent's position was that even if taken at the highest the evidence did not make out a qualifying disclosure within the meaning of s.43B ERA 1996 as in most cases the claimant did not disclose "information" and/or it was not information made in the public interest which tended to show legal wrongdoing.

69. Counsel then addressed the various alleged disclosures to Margaret Walker, Stewart Gardiner, Billy Robertson and Ms Ellie Birnie.

70. In relation to the personal injury claim Counsel observed that the claimant had placed heavy emphasis on the fact that he commenced a personal injury claim following the accident at a client's surgery. Unfortunately, she suggested many of the points he raised were more relevant to that claim which is still continuing. It was submitted that the respondent responded to the accident in a sympathetic and entirely reasonable way. Mr Gardiner's evidence was that the letter from the claimant's solicitors intimating a claim did not cause any bad feeling as the Directors considered that if, as a result of the accident, the claimant was entitled to bring claim, then the respondent had insurance to cover any such claim. He had, in addition, instructed a fresh Risk Assessment.

71. The respondent's primary submission was that Mr Pickard did not make any qualifying disclosure within the meaning of s.43B ERA 1996. If the tribunal found that the claimant did make any such disclosure, then it was submitted that the evidence plainly showed that the real reason for the claimant's dismissal was not because of a public interest disclosure, but because of his conduct (a potentially fair reason under s.98(2) ERA 1996) namely for falsification of time sheets, which would have resulted in financial loss to the company, as well as his unauthorised use of the company vehicle.

72. Counsel continued that the claimant had claimed wages for 13 hrs and 55 minutes that he had not worked. While he continued to dispute the exact number of hours he overclaimed, there could be no dispute that even when

time is taken off for breaks and vehicle checks, he did overclaim. He offered to make the time up. Prior to the timesheet misconduct emerging, Mr. Gardiner had received a separate complaint from Steve Megginson, the respondent's longest standing operative, a valued employee, that he had received reports that claimant had been openly insulting him and the company to third parties at the NHS clinical waste station. Mr. Megginson was very upset and made a formal complaint. Mr. Gardiner was concerned by the allegation and suspended the claimant. That investigation was never completed in light of another more serious allegation which was being investigated around the same time originating from the claimant's line manager who had become concerned that the claimant had been telephoning the office and asking if colleagues could help him complete his work. Mr. Robertson checked the tracking data and it became apparent to him that not only was the claimant asking colleagues to help him out when he was at home, but was actually claiming for more hours than he worked.

73. Initially, Mr. Robertson and Ms. Birnie examined the claimant's vehicle tracking data, and then, on 21 May, Claire Bell and Ellie Birnie compiled a tracking data report (JBp49) which demonstrated that the tracking data, when considered in conjunction with the claimant's timesheets, revealed a pattern of the claimant overclaiming the hours he had worked. This then led to the disciplinary hearing.

74. At no point in the course of the meeting (or indeed during the process) did Mr Pickard claim that he was being disciplined (and later dismissed) because he had made a public interest disclosure (or even by having brought a personal injury claim). At the end of the meeting the claimant apologised and offered to make up the time over the following months. It is submitted that the claimant clearly knew that he had committed a wrong. Mr. Gardiner took the reasonable view that there was evidence that the claimant had falsified his timesheet and he could not justify the discrepancies. This amounted to gross misconduct. As Mr. Gardiner pointed out, this was at the start of the Pandemic, and the respondent's contract with the NHS was due to expire in

July and he and his fellow directors were trying to run a company in a very difficult situation.

75. It was submitted that the respondent conducted a fair and reasonable investigation and following a disciplinary meeting, Mr. Gardiner had good grounds to believe that C was guilty of the alleged misconduct which he reasonably regarded as gross misconduct. Mr. Gardiner clarified in his evidence that he felt that the charge for falsifying data was the most serious charge. Mr. Gardiner decided to dismiss C, and his dismissal was confirmed by a letter. It was submitted that, (although the *Burchell* test is of no application to the legal issues in this case), the decision to dismiss was within the range of reasonable responses. It was striking in this case that the claimant chose not to appeal the decision to dismiss.

Claimant's submissions

76. Following the hearing the claimant lodged written submissions containing his proposed findings in fact and argument. In summary his position was that the respondent company had breached their legal obligations. Mr Pickard's position was that he suffered an automatic unfair dismissal under S103A ERA 1996. His dismissal related to protected disclosures he had made. He referred to the *Road Traffic Act 1988 S74* and to the *''Operator's duty to inspect, and keep inspections of, goods vehicles''* which he quoted. Section 1B provided for records to be kept of inspections of vehicles. He also quoted the ''*DVLA Guide to Maintaining Road Worthiness 2020 (updated VOSA Guide 2009)* which indicated that there should be a system for recording and reporting defects and the liability of both the driver and operator for ensuring the vehicle is safe to drive.

> "*3.1 A system of recording and reporting defects*
>
> *There must be a system of reporting and recording defects that may affect the road worthiness of the vehicle. This must include how they were rectified before the vehicle is used.* ***Daily defect checks are vital, and the results of such checks must be recorded as part of the maintenance system.***"

77. The claimant also referred to the following regulations:

> "- *PPE at Work Regulations 1992*
>
> *4-(1) Every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work*
>
> *4-(3) Without prejudice to the generality of paragraphs (1) and (2) personal protective equipment shall not be suitable unless –*
>
> *(a) It is appropriate for the risk or risks involved and the conditions at the place where exposure to the risk may occur*
>
> *(d) So far as is reasonably practicable, it is effective to prevent or adequately control the risk or risks involved without increasing overall risk*
>
> *6-(1) Before choosing any personal protective equipment which by virtue of regulation 4 he is required to ensure is provided, an employer or self-employed person shall ensure that an assessment is made to determine whether the personal protective equipment he intends will be provided is suitable."*

78. He submitted that the absence of ''health and safety'' was also evident referring to the *Management of Health and Safety at Work Regulations 1999* and the requirements for risk assessments to be carried out.

79. In his view the respondent also failed under the *Health and Safety (Sharp Instruments in Healthcare) Regulations 2013* which he quoted.

> *''The information provided to employees must cover:*
>
> - *The risks from injuries involving medical sharps*
> - *Relevant legal duties on employers and workers*
> - *Good practice in preventing injury*
> - *The benefits and drawbacks of vaccination*
> - *The support available to an injured person from their employer".*

80. The claimant referred to the *General Data Protection Regulation 2018* Articles 5,6 and 7 and to the Health and Safety at Work Act 1974 as providing the legal background for his claims. He then submitted that the disclosures he made were straightforward and simple facts all of which were made to his superiors who he believed had legal responsibility over such matters. These were why he was dismissed along with the fact that his solicitor had highlighted these failings in his claim for personal injury.

81. The claimant made reference to **Cavendish Management Ltd v Mr M Geduld**. And the guidance in that case as to the meaning of giving information.

82. He then turned to the second characteristic of a qualifying disclosure that of having a reasonable belief. He held a reasonable belief that what he was disclosing showed that there was a law/legal obligation to which his employers were subject, and that the information tended to show that they were breaching legal obligations or were likely to do so. In particular the respondent's failure to supply their workforce with adequate personal protection equipment (as admitted by the respondents on 21st January 2020) meant that they were in breach of their obligations.

83. In **Darnton v University of Surrey** (2003) ICR615, the EAT held that the truth (or accuracy) of alleged protected disclosures whilst not necessarily determinative, will often be evidentially relevant to an employee's reasonable belief. The EAT went a step further in **Sir Robert McAlpine v Telford** (EATS/0018/03, 13th May 2003) and suggested that the truth of the information will always be material.

84. The claimant referred to Whistleblowing Law and Practice which stated in its cumulative supplement (chapter 3 (pages 1-2)), that provided that it is objectively reasonable, neither the fact that the belief turned out to be wrong nor the fact that the information which the claimant believed to be true did not in law amount to a breach of a legal obligation was sufficient, of itself, to render the belief unreasonable.

85. The claimant then looked at whether the disclosures were in the public interest. He had asked for PPE not just for himself but for his colleagues. The failure to provide a Defects Book to record daily vehicle inspections extended even further in his opinion. Firstly, to the other drivers who may not have been aware of the necessity of such a document or even the legal aspect of it needed when approached by the DVSA. The wider situation was the impact this would have on the general public. If an accident were to occur whilst

driving a works van, there would be a burden of proof to be able to demonstrate the vehicle used was road worthy.

86. Throughout the hearing the Tribunal, he submitted, had heard from the respondent's workers, Director and even representative still maintaining nitrile gloves were adequate. They have also stated that there was no need for ballistic trousers in the role. Both points are contrary to the risk assessment (JBp90 point 8) which specifies the potential for injury from needlesticks and are clear breaches of the ***PPE at Work Regulations 1992 Reg4 (3) (a) & (d).***

87. In addition, he suggested that the risk assessment (JBp89-91) did not include every potential hazard. The respondent has intimated that they used a method for recording daily checks but this was not taken into account in the risk assessment. The risk of injury from a needle (JBp90) was identified.

88. Turning to the actual disclosures the claimant's position was that it was noted in point 4 of his Witness Statement, that during his first day when he had noted hazardous waste was also being collected. He had a discussion with Steve Megginson as to why we were not provided specific gloves for working with the conditions we were presented with. He said that all they supplied were nitrile gloves. This was corroborated in Mr Megginson's own statement (JBp 209) where it is noted that we spoke about PPE.

89. The importance of personal protective equipment could not he said be overstated in the claimant's submission, especially so, when Mr Gardiner himself advised under cross-examination that staff were not offered inoculations prior to starting a job that that would entail collecting hazardous waste. It was the respondent's duty to provide staff with suitable personal protective equipment. The claimant referred to his previous experience as a Refuse Collector with Aberdeen City Council during which he was made aware of specific health and safety policies and back-up regulations and guidelines that are in place to govern such responsibilities.

90. The first disclosure took place on the 11 September 2019. The claimant had made a verbal request to Mrs Walker for PPE for gloves. He had referred to 'stab-proof gloves'. The claimant conceded that under cross-examination he accepted that the request was for "suitable" or "job-specific" gloves. Regardless of the wording in the Witness Statement, the request was clearly for gloves over and above the nitrile gloves already supplied. In both instances it showed he was making a clear disclosure of information.

91. The next disclosure took place on the 13 September. The legal obligation comes from the **Health and Safety at Work etc. Act 1974 (General Duties of Employers to their Employees S2(1))**. On page 40 (para 3) of the Witness Statement it records that when back in the office the claimant asked Margaret (Walker) for gloves due to the nature of the business. He also asked for PPE in the shape of a uniform. The respondent claimed that on this occasion the claimant had 'merely' requested gloves again. It is noted in the respondent's reply (JBp40, para 4) that the uniform did not constitute PPE. The claimant was not aware of this at the time as he had yet to receive his uniform, but as per the **HSE Collecting Waste and Recyclables guidance** it clearly stated that the use of appropriate personal protective equipment e.g. high visibility clothing and cut-resistant is an essential requirement.

92. The disclosure on the 18 September was made under the **Road Traffic Act 1988 S74 (1b) and (3).** This was the first day that the claimant was given his personal work vehicle. He made a request to Margaret Walker for a daily defect book to record daily van inspections and maintenance details in line with DVSA Guidelines. No training had been provided by the respondent in such matters, however given his previous experience in van driving, he had a sound knowledge of these requirements and the implications of not fulfilling such requirements. It was acknowledged by the respondent (JBp 41 (para 2) and within Margaret Walker's own statement on (JBp217), that the conversation had taken place. Contrary to Margaret Walker saying, *"our previous timesheets had a section at the bottom that the driver had to date*

and sign to say they had checked the van for defects but the timesheets no longer had this on", it is noted under the DVSA Guide 3.1 that there must be a system of reporting and recording defects and that these daily defect checks are vital and must be recorded. The fact remained that the respondent could not provide an example of this in the Tribunal Bundle and through cross-examination the claimant had confirmed that he had never seen such documents since the start of my employment and was only ever provided with the timesheets (JBp99).

93. A disclosure was made on the 12 September. The legal obligation here was under the **Health and Safety Act 1974 S2(1)** and the **Road Traffic Act 1988 S74 (1b) and (3).**It was on this occasion that he was made aware that Mr Stewart Gardiner's capacity in the company was as a Director. In the presence of a new colleague (Mantas Daunoravicius) to ask Mr Gardiner for PPE and defect books as per my previous disclosures. In the course of the tribunal, this event was confirmed by Mr Gardiner however, he claimed that the claimant did not ask for defect books or PPE and the request was for a branded uniform. A further point to note, is that during cross-examination Mr Gardiner, stated *"You won't get me to admit that a branded uniform is PPE Dave"*. This statement supports the claimant's point that the branded uniform did not constitute suitable PPE.

94. The next was on the 22 November. This was under the **PPE at Work Regulations 1992 Reg 4-(1)**. This disclosure occurred following on from an accident at a customer's premises which resulted in his clothes being damaged by paint (page 136). The claimant had reiterated to Mr Gardiner the importance of being able to supply us with PPE.

95. On the 7 and 8 December further disclosures were made These were under the **Health and Safety Act 1974 S2(1)** and **PPE at Work Regulations 1992 Reg 4-(1)** as well as the **Road Traffic Act 1988 S74 (1b) and (3)**. Mr Robertson confirmed in cross-examination when he said the claimant was asking about this "all the time". It was accepted that he had asked for stab-proof gloves. During the cross-examination of Mr Billy Robertson stated that

the claimant was merely asking for gloves. However, as he was already being provided with nitrile gloves, it is evident that he must have been asking for a more suitable type of glove to protect me in my duties. Mr Robertson advised that nitrile gloves met the minimum standards for PPE, however, as determined by Mr Gardiner in cross-examination, it was agreed that nitrile gloves would only stop the risk of infection or contamination when picking up clinical waste.

96. The claimant had also provided Mr Robertson with specific information of the procedure that the DVSA take in regard to random road checks. He had been made him aware that the first thing traffic inspectors do when approaching a driver, is to ask for the defect book to ensure compliance with the **Road Traffic Act 1988.** Billy Robertson stated that the procedure was merely to alert a supervisor or manager who would then rectify the problem.

97. The next disclosure was on the 11 January 2020. The legal obligation falls under the **PPE at Work Regulations 1992 Reg 4-(1)**. The claimant asked Ms Ellie Birnie who was taking over in the role provided by the recently retired Margaret Walker if there were any gloves or trousers. The claimant's position is that he had informed her that it was gloves that would prevent a needlestick injury that he was looking for.

98. The next disclosure was on the 16 March 2020. The legal obligation here falls under the **Health and Safety Act 1974 S2(1)** and **PPE at Work Regulations 1992 Reg 4-(1).** On 13 March the claimant had been wearing the provided nitrile gloves whilst performing duties at Pitmedden Surgery and sustained a needlestick injury. He visited the respondent's office premises on the 16 March and made a disclosure relating to the accident. The disclosure was made to Ellie Birnie. She acknowledged the conversation but denied that she had said that the claimant should not be sticking his hands in the bins.

99. The next disclosure was on the 23 March 2020.The legal obligation engaged falls under the **Health and Safety Act 1974 S2(1),** the **PPE at Work Regulations 1992 Reg 4-(1), 4(3) and 6(1)** as well as the **Management of Health and Safety at Work Regulations 1999 3-(3)(a)**. The claimant had made a further disclosure to Mr Gardiner in the presence of Billy Robertson in the form of a request for gloves. The respondent avers that the claimant did not request stab-proof gloves on this occasion but his position was that it would be reasonable to assume that he meant stab-proof gloves given that he was already being supplied with nitrile gloves. In relation to this disclosure, Mr Gardiner claimed that stab-proof gloves would "not actually be practical for use" by their operatives. When questioned by Mr McCaig a Tribunal member in the course of the hearing, Mr Gardiner went on to further state that they were in fact "too-expensive".

100. The claimant's position was that the next disclosure took place on the 7 April. The legal obligation engaged here fell under the **Health and Safety Act 1974 S2(1)** and **PPE at Work Regulations 1992 Reg 4-(1).** The claimant had approached a solicitor to deal with his personal injury following the accident which claim was being pursued through civil courts. It should be noted on page 94 that the subsequent pre-action protocol claim form was sent to Perfect Hygiene dated 114 May 2019 and this had highlighted the respondent's failure to follow relevant health and safety regulations. This was the catalyst that led to his automatically unfair dismissal.

101. The next disclosure took place on the 1 June. The disclosure was made under the **Road Traffic Act 1988 S74 (1b) and (3)**. During the disciplinary meeting the claimant disclosed information to Mr Stewart Gardiner about the necessity of daily van maintenance and once again requested defect sheets to allow compliance with the **RTA 1988.** The Minutes were edited by the respondent and this has been reduced to the claimant merely requesting daily van sheets for the van. Mr Gardiner acknowledged that the claimant had made such a request. The respondent had received a letter from the claimant's legal representative with regards the claim he was pursuing in the

civil courts which highlighted the respondent's failure in regard to health and safety obligations. Under cross-examination, Mr Gardiner confirmed that he received the claim on the 21 May. The claimant received a letter of suspension and an invitation to a disciplinary meeting the following week. On the 21 May (the same day the respondent claimed to have received the personal injury claim), an investigation was allegedly instigated surrounding the timesheets.

102. The sample period for the investigation started on the 4 May. The claimant had already made Billy Robertson aware that his dog required an emergency vet appointment on 4 May, and he had also requested use of the works van. It is noted (JBp111 (point 8) that Billy Robertson was aware of this and this is further proven by an email sent on 7 March 2021 about the dog's veterinary history. It makes no sense in the claimant's view that an investigation was started following reports the claimant was at home during work hours for this date. Under cross-examination Mr. Robertson stated that the investigation allegedly started on 14 May after he checked the van tracker and saw that the claimant was not at work during work hours. On this occasion he was not at work due to needing to pick up IT equipment for his partner's new job which Mr Robertson was aware of. This was also noted on page 112. It also made no sense in the claimant's submission that an investigation was started on the basis of a report that he was not at work on this date given the respondent was aware in advance that he would not be. The Tribunal should prefer the claimant's evidence to that of Mr. Robertson's.

103. It was a matter of fact that the respondent initially stated in their grounds of resistance that the audit regarding my hours took place after the suspension This was further referenced on page 27 (point 19). A few days later, an email (JBp30) had been sent to the Tribunal stating the date was incorrect and the audit took place on 21 May. The claimant was suspended from work on 25 May. The reason the claimant says he was given was that he had allegedly made negative comments about the respondent and my work colleagues. The detail of the allegations were never put to him. Mr Gardiner advised the

tribunal that the suspension took place in case he was assaulted by Steve Megginson.

104. In terms of the ACAS Code of Practice different people should carry out the investigation and the disciplinary hearing. The investigation was being carried out by Claire Bell page 122 (line 7). Mr Gardiner admitted that both he and Ms Ellie Birnie, both were involved in the investigation.

105. The van times included by Mr Gardiner led to the main point of the disciplinary hearing. Although Mr Gardiner maintained that the claimant should have been at the customers by 8am (JBp112, point 13) and again confirmed in his oral evidence, the respondent stated in their response (JBp28 point 21) that the issue was not that the claimant was to be at a customer's premises for 8am, but the claimant should have started work at 8am. The claimant started work before 8am each day when he completed the regulatory van checks each morning (JBp111, point 9).

131. In regard to the falsifying of timesheets the claimant's time without the breaks or additional time for van checks were not very far from a full 8 hours every day. With this additional time taken into account, every shift surpassed 8 hours (some by more than 40 minutes). The fact here is that as it shows from page 150-153, 3 drafts of the same timesheet audit were required by the respondent before Stewart added the van start/stop times (JBp152) as admitted by Mr Gardiner in cross-examination. This shows that selective evidence had been used by the respondent.

132. The claimant's position was that the investigation made by his employers was incomplete and not a full investigation as required by the ACAS Code. The claimant had also had his telephone with GPS data it at the meeting to help establish facts. This was mentioned (JBp112 (point 16). However, in the respondent's pleadings, it states on page 49 (para 2) that the claimant did not have GPS evidence. When questioned Mr Gardiner acknowledged that the

claimant had it but had not presented it as evidence. The disciplinary lasted at least one and a half hours yet there are only 48 points in the meeting minutes. A substantial part was omitted from the notes. The respondent has only added one point to the amended notes when challenged. Further inconsistencies and failings were highlighted through the course of the tribunal hearing. Billy Robertson agreed to be the claimant's companion to the disciplinary meeting. Unbeknownst to the claimant at the time of my suspension when he asked Mr Robertson to accompany me to the meeting, it that it was in fact Mr Robertson who instigated the audit.

133. He argued that he was unaware that there was a tracker in the van. Stewart Gardiner was quoted as saying "No-one ever mentioned the tracker on the van?". Following the disciplinary process, the claimant made DSAR (JBp114, line 7 of email). This supports his position that he had no prior knowledge of the tracking policy. Mr Gardiner said that this was reflected in Steve Megginson's statement and Margaret Walker's statement but they do not contain any such information. This showed a further inconsistency on the respondent's part. This was also a clear breach of **GDPR, Articles 5, 6 and 7**.

134. The claimant did not appeal the decision to dismiss because the process had caused him sleepless nights and anxiety. In addition, it was evident that the respondent had already made their mind up about the claimant and no appeal would be successful.

Discussion and decision

135. A "qualifying disclosure" (sometimes called a ''whistleblowing disclosure'') is defined by section 43B Employment Rights Act 1996 ("ERA 1996"), which provides:

"43B.

Disclosures qualifying for protection. (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following— (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, … (d) that the health or safety of any individual has been, is being or is likely to be endangered, … or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

136. There must be a disclosure of information. It may be made as a part of making an allegation. (**Kilraine v London Borough of Wandsworth [2018] ICR 1850)**.

137. A worker making the disclosure must have a reasonable belief that the information must tend to show one of the matters set out at paras. 43B(1) (a) to (f) ERA 1996. The disclosure must be made, in the reasonable belief of the worker that some sort of 'wrongdoing' has or will take place. It must be in the public interest.

138. Section 43C ERA 1996 states:

"43C.—
Disclosure to employer or other responsible person. (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure — (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to— (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person."

139. Accordingly, a qualifying disclosure becomes a protected disclosure because of whom it is made to and providing that it fulfils these other conditions.

140. Employees such as the claimant are protected against being subject to detriment done on the ground that they made protected disclosures by section 47B ERA 1996:

"47B.— Protected disclosures. (1) 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. … "

141. Employees are protected against being dismissed for making protected disclosures by section 103A ERA 1996:

"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."

142. Where, such as here, the claimant lacks the qualifying service to make a claim for 'ordinary' unfair dismissal a dismissed employee has the burden of showing on the balance of probabilities, that the unfair dismissal was an automatically unfair reason (**Ross v Eddie Stobart Ltd** EAT 0068/13.

143. In his ET1 the claimant writes: *"Claim is for automatic unfair dismissal due to myself reporting lack of PPE since starting employment."* He refers to telling the company about what he regarded as unlawful work practices. In evidence he also claimed that the failure to have a Defects Log to record defects and repairs to the company vehicles was another protected disclosure which he had made.

144. The claimant is a person who does not appear to be slow to express his views but as Counsel for the respondent noted a protected disclosure requires more than the expression of concern or opinion but also the disclosure of information. It was surprising that there were no formal grievances raised by him, no emails or even texts specifically recording or noting the claimant's apparent contemporaneous concerns which in his evidence were being repeatedly ignored. At his disciplinary he is noted as saying that he was being

persecuted but does not say why or if he did he did not seek to have it added to the Minutes.

145. Part of the background here was that, in our view, the claimant had worked for a Local Authority although in a different role and he was genuinely surprised at the respondent company for not issuing PPE to him or at least PPE as he regarded it. We do not doubt that the claimant discussed the lack of ‘‘PPE’’ with his partner and probably with Mr Robertson but that also has to be seen in the context of his asking for his branded uniform on a number of occasions and his concerns over the time taken to provide it and finally the difficulties over the fit of trousers supplied. This uniform, however, had no particular protective qualities but was often referred to by the claimant, including in his evidence, as PPE when in the strict sense it was not.

146. Another feature of this case is that events took place against the backdrop of the start of the Covid Pandemic. This was clear during the exchange of texts the claimant had with Mr Robertson about the availability of protective face masks. This evidence also seems to suggest a shortage of nitrile gloves and we concluded that this is more probably the context in which Mr Gardiner said that he could not source gloves.

147. We had to try and identify when the alleged disclosures were said to have been made. This was not an easy task as these were transitory and relatively brief conversations or incidents that are only regarded now in retrospect as having significance. There appears to be some convergence between the claimant’s suggested dates and those suggested by the respondents that the dates for four alleged disclosures were the 11 and 13 September (Mrs Walker),11 March (Ms Birnie) and 23 March (Billy Robertson and Stewart Gardiner).

148. The claimant also suggested that on the 22 November he asked Mr Gardiner for PPE after paint had been spilled on his trousers. The evidence was vague

as to what exactly had been said. The claimant was probably given the context enquiring about his uniform describing it as PPE and he says in his statement (paragraph11) *''I asked Stewart once again if I could have PPE as I had yet to receive any''*. This was not a request for what he later describes in his pleadings as "stab proof gloves'' but for his uniform. There was no expression by him of what could be described as suggested wrongdoing on the part of the employers. The claimant has not demonstrated that this amounts to a protected disclosure.

149. In December the claimant says he spoke to Mr Robertson about PPE. In his statement (paragraph 13) he said: *''I would ask him for PPE in the light of not receiving''* He then says that his uniform appeared a short time later. In mid-December he alleges that he raised issues over his trousers with Mr Robertson and Mrs Walker (paragaph14 We also don't accept that he requested ''ballistic'' trousers at this point or later or explained why a failure to provide them was a breach of health and safety law. There was no expression of suggested wrongdoing by the employers. The issues raised again appear to have been about the uniform. The claimant has failed to demonstrate that there was a protected disclosure.

150. At paragraph 22 of the witness statement the claimant suggests that he had a discussion with Ms Birnie on the 16 March, shortly after the accident, asking her about PPE. Ms Birnie did not recollect the conversation. This like other conversations were undoubtedly affected by the passage of time on witnesses memories. We are not sure what was said at this encounter although we accept that the claimant probably did go to the office and speak to her. Given that this occurred just after the accident it is likely that the accident was mentioned and we are prepared to accept that the claimant may have spoken about what additional PPE was available and perhaps whether more robust gloves were available. There was no expression of the respondent's alleged wrongdoing arising from some failure by them to provide adequate PPE. He puts it thus: *''I had asked Ellie Birnie if they had any PPE in light of recent events''*. He does not go further. Once more we are not

convinced that the claimant has demonstrated a basis for a protected disclosure.

151. In his submissions the claimant also refers to disclosures on the 7 April. We do not recall evidence about this matter although the claimant did suggest in the course of his evidence that the pre-action protocol letter sent by his agents amounted to a protected disclosure. This was ruled inadmissible after being objected to on the basis that it had not formed part of the claimant's case to that point and the respondents had no fair notice of this matter. For completeness we would observe that the form was not meant to be a disclosure although it is arguable that it fulfils the criteria of Section 43B(d). It is difficult to envisage how it could be said that this letter was made in the public interest as the service of the form is clearly a precursor to the claimant raising proceedings for his own benefit.

152. Finally, the claimant also suggested that he had made a disclosure at the disciplinary meeting on the 1 June and that related to the need for a defects log. There was a dispute as to what was actually said at that meeting. Contemporaneous written notes were produced but these are summary in form and the issue of 'Defect Book or Log'' was not a major issue or concern for either the claimant or respondent. They simply record *''daily defect sheets requested by Dave''* in the context of discussing van checks that the claimant said he carried out daily. The claimant now suggests that he spoke at great length about the matter and seems to suggest that he drew attention to the RTA 1988 or to VOSA. In his witness statement he states that he asked for a daily defect book ''in accordance with DVSA legislation'' We noted that there is no mention in these terms of such a disclosure in the ET1. This is missing from the Minutes (JBp115). Even in the claimant's later pleadings (JBp53) he says he told his employers about the legal obligation to keep the van roadworthy (a matter that they must surely have been aware of) not that there was a legal obligation to keep a Defect Log. There is reference to complaints about ''work practices'' in his ET1 but the earliest reference to a Defect Book or Log is in October (JBp38).

153. It is noteworthy that the claimant did not make much of the matter at the time. He wrote to Ms Bell about the Minutes she had produced after the disciplinary hearing (JBp124) saying that the following had been missed: *''I had said to Stewart that due to VOSA van driving regulations daily walk rounds were necessary…''* There was no reference to the RTA or to any suggested wrongdoing not having such a record. The claimant accepts that he was told to report defects. The respondent had in place a system which they were content with and seem to have paid little notice to this issue raised in these terms by the claimant. It occurs in the Minutes only briefly as his request for defect sheets. The claimant has not demonstrated to us that a protected disclosure had been made. This seems to be a situation where as he delved into the matter he saw he was on strong ground in suggesting that the company should keep such a record (and for what it's worth we agree) and is now making more of the matter than either he or the respondent did at the time.

154. The claimant would express the view that he had been repeatedly asking for PPE but in our view, that was more likely to have meant by him and understood by the respondent's staff as being a reference to the uniform. If the claimant could have convinced us that he had asked for stab proof gloves either before or after his accident this would have been helpful to his case but not sufficient on it's own. If he could demonstrate that he had said ''I think we should have stab proof gloves'' or ''I need stab proof gloves because of the danger of injuring myself from sharps'' (whether he was actually justified in holding that view or not) although that assertion would not be enough on it's own it would be an important first element. However, we were not convinced that even this threshold had been reached in his evidence and that he had ever asked for stab proof gloves in those terms. Certainly, the respondent's witnesses didn't recognise that expression. We were also not convinced that the claimant had asked for ''ballistic'' trousers using that form of words or said they were necessary for the work let alone did he draw some apparent breach of health and safety to his employer's attention.

155. One aspect of the case that struck us was that the respondent's management appear to have acted promptly and sympathetically when the claimant was injured. There is really no evidence that their attitude changed in some way towards the claimant either immediately after the incident or later when notice that a claim was being made. We noted that the respondent had a risk assessment (JBp90) carried out quickly after the accident (18 March 2020). It bolsters the respondent's position that nitrile gloves are suitable, recording in relation to picking up waste, *"Wear suitable PPE including wearing nitrile gloves – gloves to be to be disposed of after each collection".* We accepted Mr Gardiner's evidence that the accident was one that had not occurred before. He seemed relaxed that a modest claim was being pursued in the knowledge that the company was insured and would be insulated against any successful claim. The claimant is wrong to suggest that he accepted in evidence that the more robust gloves were too expensive implying that this was why they were not bought. The witness explained that the major perceived risk was the risk of infection and that it would be too expensive to but more robust gloves, which would be themselves more costly, and then to change them numerous times a day after each pick up.

156. We then turned to consider the disciplinary process and the events leading up to it. The problem the Tribunal ultimately had was that the respondent company had grounds to discipline the claimant both for his time keeping and for the use of the vehicle for personal purposes although it was mitigatory that he had asked for and been given permission by Mr Robertson for one or two uses of the van. Even if the claimant had demonstrated that he had made protected disclosures and for the reasons we have given we do not accept this, the principal reason for his dismissal was his timekeeping and to a much lesser extent the personal use of the van. This might have been harsh in the claimant's view but the employers appear to have acted for these reasons not because of any issues over gloves or Defect Books.

157. The claimant does not, without a protected disclosure, have protection from unfair dismissal and the points he makes about the process being unfair, the ACAS Code and so on do not assist him. If he had demonstrated a protected disclosure then this evidence might have assisted the Tribunal in gauging the employer's mindset/motives and inferring that a hurried or incomplete or unfair disciplinary process pointed to the principal reason for dismissal being the disclosure.

158. The difficulty he has is that he submitted timesheets that were inaccurate. We accept that the employers are perhaps open to criticism in that they do not seem to have a written policy on checking the van before the start of work and when the work should actually start. The system in place seems lax and open to abuse. The claimant did not record his breaks nor tell his employers he was taking his break after he had finished work (which frankly seems highly unusual and unlikely). He claimed justified finishing before 4.pm. It is not apparent from the written notes that he made it clear to his employers that he was adding on the 20 minutes to his finishing time to allow him to put a 4pm finish. The employers were entitled to reject these explanations and it seems to us likely that these explanations were something which the claimant said he did only after being challenged about his times. He took time off on the 4 May and whether that was agreed with Mr Robertson or not he was not entitled to sign off his time sheet at 4pm (JBp101). He accepted that it was an error but the respondent's Director Mr Gardiner did not accept that explanation.

159. We do not intend going through the disciplinary process in any detail other than to observe that it was bizarre for Mr Robertson to agree to be the claimant's representative and equally odd that Mr Robertson was sitting next to the claimant at the disciplinary hearing and was not asked to comment on some of the disciplinary matters of which he had direct knowledge by either side.

160. The claimant expressed the view that he felt disadvantaged by the fact that he did not have access to legal advice. While the Tribunal can understand why he holds these views the quality of his submissions and other lodged papers

shows an ability to put his position in some considerable detail and with obvious care. This has allowed the Tribunal to assess his position which we have done with care. The claimant also alluded to his medical problems which he believed compounded his own difficulties in presenting the case. These were not apparent to the Tribunal which was sensitive to his position as a party litigant and assisted him present his case as far as it felt able to do so.

161. Finally, in relation to the tracker that fact that they are fitted to each van does not appear in the claimant's contract of employment. Nevertheless, we accepted that the fact that such trackers are fitted was well known. It is unfortunate that there is no written record of staff acknowledging their existence but we accept that it is likely that Mr Megginson told the claimant during the period when he was being trained or that he became aware of it at the latest when he was reminded by Mr Robertson about the tracker on one of the occasions he asked to use the van privately. This issue one way or another does not have any impact on our decision.

Employment Judge	**J M Hendry**
Dated	**28th of April 2021**
Date sent to parties	**28th of April 2021**