Case No: 2304616/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mrs F Simmonds**

Respondent: **Sutton Community Transport Charity Company**

Heard on: **5th, 6th and 7th July 2021**

Before: **Employment Judge Pritchard**
Members: **Ms L Hawkins**
Mr M Cann

Representation
Claimant: Ms C Ibbotson, counsel
Respondent: Mr C Murray, counsel

JUDGMENT

It is the unanimous decision of the Tribunal that:

1. The Claimant's claim that she was unfairly dismissed under section 103A of the Employment Rights Act 1996 is well-founded.

2. By dismissing the Claimant the Respondent subjected her to a detriment under section 47B of the Employment Rights Act 1996.

3. The Claimant was not unfairly dismissed under section 100 of the Employment Rights Act 1996.

4. The Respondent was not in breach of its duty to provide the Claimant with a written statement of employment particulars when these proceedings were begun.

REASONS

1. The Claimant claimed she was automatically unfairly dismissed and subjected to a detriment by reason of dismissal for having blown the whistle. She also claimed she had been automatically dismissed because she had brought health and safety matters to the Respondent's attention. The Respondent resisted the claims.

2. The Tribunal heard evidence from the Claimant and from the Respondent's witnesses: Sharon Sadler (Administration Manager); Bob Harris (Chief Executive Officer); and Andrew Theobald (Chair of the Board of Trustees). The Tribunal was provided with a bundle of documents to which the parties variously referred. At the conclusion of the hearing, the parties made oral submissions, expanding upon their written submissions/skeleton arguments.

Issues

3. The issues falling for consideration had been agreed between the parties and set out in a case management order dated 24 April 2020 issued by Employment Judge Wright. Following the Claimant's successful application to amend her claim an agreed amendment was made to the list of issues which read as follows:

Protected disclosure

3.1. What did the Claimant say or write:

3.1.1. on 10/6/2019 in a voicemail message to Sharon Sadler;

3.1.2. on 11/6/2019 in an email to Sharon Sadler; or

3.1.3. on 11/6/2019 orally to Emma Raper?

3.2. The Claimant refers to the 'new vehicle' being unsuitable for several reasons, those reasons were: the change in the vehicle caused problems as a consistent approach was needed for disabled children who needed to stay calm; not enough space between the seats which caused the children to misbehave or become stressed; not enough space in the vehicle in general; and getting on and off the vehicle causing problems for one child with mobility problems.

3.3. It is the Claimant's case that she raised these issues orally on the 10/6/2019 and then repeated them in the email of the 11/6/2019.

3.4. Ms Raper is a teacher at the school which the children attended. The claimant relies upon s.43G of the ERA in respect of her.

3.5. In any or all of these, was information disclosed which in the claimant's reasonable belief tended to show that:

3.5.1. A person [the Respondent] had failed to comply with a legal obligation [safeguarding of children and their health and safety] to which he was subject [due to the substandard vehicle]; or

3.5.2. The health or safety of any individual [the children] had been put at risk [due to the substandard vehicle]?

3.6. If so, did the Claimant reasonably believe that the disclosure was made in the public interest? The Claimant relies on the following as going to show the reasonable belief; the nature of the legal obligations said to be breached, the health and safety of the children, by their very nature these are concerns which are in the public interest.

3.7. If so, was that disclosure made to:

3.7.1. the employer;

3.7.2. to another person whose conduct the Claimant reasonably believed related to the failure?

3.8. If not, was it made in circumstances where:

3.8.1. it was made other than for personal gain;

3.8.2. the Claimant reasonably believed that the information disclosed and any allegation contained in it were substantially true; and

3.8.3. it was reasonable for her to make the disclosure [having regard to the identity of the person to whom it was made, its seriousness, whether it was continuing, the action which had been or might have been expected to have been taken and any procedures authorised by the employer];

and where:

3.8.4. it was likely that she would be subject to a detriment by the employer;

3.8.5. that evidence would be concealed by the employer if the disclosure was made to him; or

3.8.6. the employer had failed to respond appropriately to an earlier disclosure?

<u>Automatic unfair dismissal under section 103A ERA 1996</u>

3.9. Was the making of any proven protected disclosure the principal reason for the dismissal?

3.9.1. The burden is on the Claimant to show jurisdiction and therefore to prove that the reason or if more than one the principal reason for the dismissal was the protected disclosure(s).

If not, does the Tribunal accept the reason put forward by the claimant or does it decide that there was a different reason for the dismissal?

<u>Detriment complaint under s. 47B (1B) ERA 1996</u>

3.10. Did the Respondent dismiss the Claimant on the ground that she had made any of the proven protected disclosures? ("On the ground that" means that the protected disclosure(s) must have "materially influenced (in the sense of being more than a trivial influence)" the decision to dismiss).

<u>Automatic unfair dismissal under section 100 ERA 1996</u>

3.11. Was the Claimant an employee at a place where:

3.11.1. there was no health and safety representative; or

3.11.2. there was a health and safety representative but it was not reasonably practicable for the Claimant to raise the matter by that means [s.100(1)(c) ERA]?

3.12. In any or all of these, was information disclosed which in the claimant's reasonable belief tended to show that:

3.12.1. she brought to the respondent's [Sharon Sadler] attention, by reasonable means [voicemail message and email], circumstances connected with her work [the unsuitability of the vehicle] which she reasonably believed were harmful or potentially harmful to health and safety;

3.12.2. in circumstances of danger which the Claimant reasonably believed to be serious and imminent [the unsuitability of the vehicle], took (or proposed to take) appropriate steps to protect herself or others from the danger [making the disclosures to Ms Sadler and Ms Raper].

3.13. For those reasons (or, if more than one, the principal reason) was the Claimant dismissed?

4. During the hearing it became clear that the Tribunal would also have to consider whether, when proceedings had begun, the Respondent was in breach of its duty to provide the Claimant with a written statement of employment particulars such that it might be appropriate to make an award/increase any award of compensation should the Tribunal otherwise find in the Claimant's favour.

5. The Tribunal informed the parties that only issues relating to liability, contribution and Polkey would be considered at this hearing. A further hearing would be listed to take place should the Claimant succeed in all or any of her claims.

Findings of fact

6. The Respondent is a charity which provides accessible transport to community groups in the London Borough of Sutton. This includes the provision of home/school transport for pupils with special educational needs (SEN) and disabilities.

7. There was no evidence before the Tribunal to suggest that there was a safety representative or safety committee in the workplace.

8. The Claimant commenced employment with the Respondent on 1 September 2018 as a Passenger Assistant. The Claimant's role involved accompanying and assisting children with SEN and disabilities travelling to and from school (Carew Manor Academy) in the Respondent's minibus.

9. The Home to School Transport Policy issued by Sutton Borough Council includes the following:

> *A Passenger Assistant is a person who accompanies students on a route to ensure their safety and the safety of the vehicle*
>
> *A Passenger Assistant will only be provided where they are necessary for the safe operation of vehicles or the care of children and young people*
>
> *…*

> *Transport staff will assist a child or young person to board a vehicle by steadying them, but cannot lift a child or young person into the vehicle. If a child or young person cannot board without such assistance, consideration must be given to whether they would be more able to travel in a crash-tested wheelchair or similar. It is unlikely that a parent would be allowed to lift a child or young person into the vehicle as most schools also operate a 'no lifting' policy which would cause the passenger to be unable to exit the vehicle, or to board for the return journey.*
>
> *…*
>
> - *If the passenger assistant has a concern for any child in their care, they must report their concern to their supervisor, who will inform the transport team*
>
> - *the passenger assistant should assist children on and off the vehicle and ensure they are seated safely while the vehicle is moving*

10. Mr Harris and Mr Theobald sought to downplay the Claimant's responsibilities. However, it was clear to the Tribunal, both from these extracts in the Home to School Policy and from the Claimant's oral evidence, that the Claimant's primary role was to ensure the health, safety and welfare of the children accessing and during transport. The Tribunal does not accept, to the extent suggested by the Respondent's witnesses, that the Claimant's role was limited to helping children on and off the minibus and travelling with them.

11. In the morning, the Claimant was picked up from her home by the driver of the minibus, the regular driver being Bill Ryan at relevant times, and then dropped off at home after the trip. The afternoon collection of children from school followed a similar pattern. The school run to which the Claimant was assigned took one hour each way.

12. The Claimant's role was a challenging one. As she told the Tribunal:

> *I was responsible for supervising five children, aged 10-12, who had varying degrees of autism, ADHD, Oppositional Defiant Disorder, and other learning and physical disabilities. As is common in people with autism, all of the children had major anxiety disorders which could cause them to lash out angrily, or get extremely upset, very quickly, at the slightest change of routine or environment. Furthermore, one child had a physical disability that severely impaired his movement, balance, and ability to walk. Consequently, he needed help getting on and off the minibus and doing up and releasing his seatbelt.*

13. Emma Raper was the School Transport Liaison Teacher at Carew Manor Academy. The Tribunal accepts the Claimant's clear oral evidence that she would usually only meet with Emma Raper in the afternoon when the children were being collected from school. Ms Raper would ensure that the children got onto the correct minibus and might also get on the minibus herself from time to time to ensure they were settled.

14. The Claimant raised concerns with the Respondent from time to time about the Respondent's minibus. Ms Raper too raised a concern she had about a piece of metal she had seen hanging from the underside of the minibus. This had caused much noise and had disturbed the children. Mr Harris explained that a step had become detached and cabling had dragged along the ground.

15. The Claimant, driver and children on the Carew Manor run would usually travel in a 16 seat minibus. The children would usually sit in the same seat each day to avoid their unease should their routine be interrupted.

16. On 10 June 2019 the Claimant and Bill Ryan were required to use a different minibus, a 12 seater. Although a smaller vehicle, it required passengers to step up higher than the larger vehicle to get on board. At about 7.30 am the Claimant spoke to David Stubbings, Fleet Manager, to express her concerns about the change of vehicle. At about 8.30 am the Claimant left a voicemail message for Sharon Sadler explaining that the vehicle was unsuitable (as further described below). Sharon Sadler did not reply to the Claimant's voicemail.

17. The smaller minibus was used for the Carew Manor run again the following day, 11 June 2019. Bill Ryan told the Claimant that he had spoken to Dave Stubbings and that they would be required to use the same vehicle for two weeks.

18. After the morning school run, the Claimant emailed Sharon Sadler as follows:

> *Subject: change of minibus to a totally unsuitable one*
>
> *Hi Sharon,*
>
> *I apologise for leaving a message on the answer phone yesterday as I realise it probably made me sound like a mad woman. So today I spoke to Dave, on the mobile about the situation. As I said before, the children on our minibus are all autistic. They need a consistent approach every morning and afternoon, on the minibus, in order to stay calm and happy on the journey. Yesterday's and today's change of minibus caused a number of problems that we have worked hard to address since the kids started at the school. Our kids are very volatile and unpredictable. They need plenty of space between their seats as a couple of them throw things or try to hit others if they become stressed. Consequently changing the minibus for no apparent reason really caused us problems.*
>
> - *Firstly getting on and off the bus with a child who is disabled and has mobility problems was really difficult. I had to practically lift him into the bus. Despite finding and using the small plastic step provided it still proved difficult. Especially as it was raining yesterday causing the step to become wet. This meant he nearly fell and hurt himself.*
>
> - *Secondly having less space is a huge problem because as I've already said two volatile kids often lash out when they are stressed. Which they all were by the time we got to school and went home again.*

- *Thirdly, I hit my head numerous times on the door frame. You have to bend down quite a long way to open the door. The space you have to manoeuvre added to the lack of height meant I hit my head each time I opened the door.*

- *Finally, yesterday afternoon [name of child] our very autistic kid screamed and cried all the way home. More so than usual and because we were in a confined space gave everyone a headache and upset us all. It is not fair on these kids that we constantly have our minibus changed.*

I rang Dave this morning to highlight and discuss these problems and ask why he changed the minibus. He said it was because it had to go to Redhill for an MOT and to get the tax done. I completely understand that this has to happen. But I asked why can't someone take the bus during the six hours we don't use the bus. He also said that we didn't have the minibus we usually have because he needed someone else to have a minibus with more seats. He then said this was because the route which needs more seats has to go out straight after we have completed our school run. I suggested that we have our usual bus, and he get Bill to take the other people after we had dropped our kids off. He then said that the reason we didn't have the usual bus was because he didn't have enough buses if one was off the road. I told Dave that I think is unacceptable to constantly change the minibus we have. Is not fair on the children, they deserve better.

I'm sorry to say this but Dave lied continuously during our conversation. The minibus we usually have had an MOT a couple of weeks ago according to Bill. Dave told him that. As for getting it taxed, that is done online. I have also had to text Dave the following:

> *"Further to our conversation this morning we have just seen the bus that we usually have! There are only 3 children on it! Can u explain again why you took autistic, volatile kids off a minibus that they were used to and put them on a cramped bus that is unsuitable, especially for a child with limited mobility and a disability? As well as causing friction between the kids with challenging behaviour. Because they are now having to sit close to each other? Can u explain please? Frances"*
>
> *Sharon, this is causing stress not only for the children but for myself and Bill. I know when I was off sick the other people who covered for me told Bill they thought we had horrible job because of the volatility of the kids. Strangely enough I like the kids and the challenge, but I'm really concerned that it is our kids who have to put up with unnecessary changes.*
>
> *Please can you help*
> *Kind regards*
> *Frances*

19. The Tribunal heard disputed evidence as to what the Claimant had said in her voicemail to Sharon Sadler the previous day. In cross examination Ms Sadler was unable to remember the detail of the message and was unable to state that the Claimant's evidence was wrong. The Claimant, on the other hand, was

"pretty sure" she had spoken of the access step being too high for the child with mobility problems and had provided details of the unsuitability of the vehicle and her concerns which could be summarised as relating to health and safety and/or the children's welfare. The Tribunal accepts the Claimant's evidence that the content of her voicemail contained similar information to that in her email.

20. Ms Sadler promptly forwarded the Claimant's email to Bob Harris who suggested the reply that Ms Sadler should send to the Claimant. In accordance with that suggestion, Ms Sadler emailed the Claimant at 2:56 pm as follows:

> *Hi Frances*
>
> *We are well aware of the challenges managing the needs of SEN children, the issues that you refer to are mirrored on other routes and evidenced in the same way by other staff. The change of the vehicle is for operational reasons and will last for the next two weeks. This is more a driver issue and as such Bill does understand the reasons. Bill is unable to do the time required to do the other job.*
>
> *You are correct to say the bus had only three people on it but that was the job before the one that it is required for during the morning after the school run.*
>
> *Finally I have to say that your use of inflammatory language "Dave lied" is totally unacceptable.*

21. In the absence of any credible evidence in rebuttal, the Tribunal accepts the Claimant's clear evidence that she read Ms Sadler's reply on her mobile 'phone shortly after it was sent while waiting for the children at the school. This was before she spoke to Ms Raper as described below. Mr Harris conceded that if that is what the Claimant said about when she read the email, he had "no problem with it".

22. Shortly afterwards, Ms Raper asked the Claimant if she had any concerns about the children. The Claimant alerted Ms Raper to her concerns about the minibus and showed her how difficult it was for the child with mobility problems to climb on board. It is clear that Ms Raper was sufficiently concerned to feel the need to complain to the Respondent about the unsuitability of the minibus. The Tribunal finds it likely that the information disclosed by the Claimant to Ms Raper would have been similar in substance to that disclosed in the Claimant's email. In the event, Ms Raper was unable to make contact with the Respondent and instead spoke to the Council's Transport Co-ordinator.

23. When the Claimant returned home, she replied to Ms Sadler's email as follows:

> *I'm sorry that you feel that way. But you need to know that this is causing all of us stress.*

24. The smaller minibus was used again the following day 12 June 2019, use of the larger minibus resuming the next day, 13 June 2019.

25. On 13 June 2019, the Claimant received an email from Bob Harris informing her that she was not required report to work on 14 June 2019. Instead, was

required to attend a meeting with him. In advance of the meeting, Mr Harris sought the agreement of the Trustees to dismiss the Claimant and he prepared a letter of dismissal in readiness.

26. The Tribunal heard disputed evidence as to the extent of the discussions, if any, which took place at the meeting on 14 June 2019. Mr Harris's memory was, as he put it himself "hazy" on this point. The Claimant's clear evidence was that she attended with her husband and was almost immediately told by Mr Harris that she was dismissed for gross professional misconduct and handed a termination letter. The Tribunal prefers the Claimant's clear evidence that this is what happened.

27. The termination letter reads as follows:

> *Dear Mrs Simmonds*
>
> *I have decided in the light of recent events, having discussed this with the Board of Trustees, to terminate your employment with the Charity with immediate effect.*
>
> *This is by reason of gross professional misconduct. Unfortunately, there had been other occasions since she started working with us last September, that you acted in a way that could be classed under the same heading. It is totally unacceptable that you have chosen to air your grievances against the company in the public arena without even engaging the company grievance procedure.*
>
> *I have decided to continue paying you until the 30th of June. At which time the payroll company will issue you with your P45.*

28. By letter to Mr Harris dated 27 June 2019, the Claimant addressed her concerns about the meeting of 14 June 2019, complained that she did not know the reasons for her dismissal, and set out what she perceived as the Respondent's health and safety transgressions, in particular in relation to the 12 seater vehicle used on 10, 11 and 12 June 2019, as well as other vehicle related issues. The Claimant said she was of the view that she was being treated as a whistleblower. She requested a meeting to address the issues.

29. By letter dated 8 July 2019, Mr Harris wrote to the Claimant enclosing a copy of her contract of employment and stated that there were two reasons for her dismissal:

> *The first was communicating your concerns about SCT operational issues outside the company. I note your comments about regarding our client's teaching staff as partners, but they are not employees of SCT so have the status of third parties and to discuss these issues with them risks bringing SCT into serious disrepute and it is therefore a breach of your contract of employment. The second issue was your email to Sharon dated 11th June 2019 in which you libelled Dave by accusing him of lying to you. Whilst it is within your role as a passenger assistant to bring to management's attention any reasonable concerns that you have, libelling a colleague is unacceptable.*

The purpose of speaking to you on 14th June was to explain to you why your conduct is unacceptable and is such that I've come to the conclusion that you are unsuitable for the role for which we have been employing you. This is why I have taken the decision to terminate your employment.

30. By email dated 13 July 2019, the Claimant informed Mr Harris that she wanted to appeal.

31. On 10 September 2019, Mr Theobald chaired an appeal meeting, the panel consisting of Mr Theobald and Helen Green, Trustee. At Mr Theobald's request, Mr Harris had prepared a written summary of the circumstances leading to the Claimant's dismissal. This was not provided to the Claimant in advance of the appeal meeting but was referred to at the appeal meeting. Among other things, Mr Harris stated:

> *It appears that Frances had chosen to raise her concerns immediately and directly with the school. Bill told us she had sought out the transport officer at the school and had a private conversation raising her concerns. All this before we had received Frances' email stating those same concerns to the office manager, Sharon. I was concerned that our operational procedures seemed to have been discussed in open forum outside the offices of the company. Not only that but seemingly by a person not fully in possession of all the operational facts.*
>
> *…*
>
> *At the meeting with Frances it became apparent that she had taken these matters outside the company and I became of the opinion that in doing so she had committed an act of gross professional misconduct. I was also of the opinion that accusing Dave of lying in her email to Sharon fell into the same category.*

32. The Claimant chose not to speak during the appeal meeting because she was upset. Instead, she left the talking for her companion, Patrick Watson.

33. It was only after these proceedings were instituted that Mr Theobald prepared notes of the appeal meeting. He told the Tribunal that he had done so with the benefit of his own contemporaneous manuscript notes, which he had not retained, and those of Ms Green. The Claimant did not agree that Mr Theobald's notes reflected an accurate account of what was said. The Tribunal adjourned while enquiries were made in order to ascertain whether Ms Green's manuscript notes could be located and placed before the Tribunal. However, the Tribunal was informed that Ms Green's manuscript notes had not been retained.

34. In the notes of the meeting prepared by Mr Theobald he states:

> *Mrs Simmonds gave her account and confirmed that she had expressed her concerns to Carew Manor staff before raising them with SCT management.*
>
> *…*

However, the call from Cognus on 11 June and Mrs Simmonds own admission that she raised her concern with Carew Manor staff before speaking to Miss Sadler and Mr Stubbings, were sufficient to prove that this act had taken place and the panel members agreed that this act did of itself constitute gross professional misconduct.

35. When questioned about this alleged admission, Mr Theobald told the Tribunal that he had included these statements in his note because the Claimant had not challenged what Mr Harris had said in his written summary. In circumstances in which the Claimant had not spoken at the appeal meeting, the Tribunal is not persuaded that Mr Theobald's notes can be relied on to provide an accurate, fair or reasonable summary of what was said.

36. By letter dated 10 September 2019, Mr Theobald informed the Claimant of the panel's decision. Although the panel concluded that the Claimant had been guilty of gross professional misconduct by discussing operational matters with persons outside SCT and by accusing a colleague of lying, references to gross professional misconduct would be removed from her file and any reference to a potential employer would reflect positively on her professional ability.

Applicable law

Whistleblowing

37. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure is a qualifying disclosure which is made by a worker in accordance with any sections of 43C to 43H.

38. Section 43B provides that 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, insofar as relevant to this case, tends to show one or more of the following: under (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, and under (d) that the health or safety of any individual has been, is being or is likely to be endangered.

39. Mr Murray referred the Tribunal to the case of Boulding v Land Securities Trillium (Media Services) Ltd UKEAT/0023/06 in which the Appeal Tribunal stated:

The legal principles appear to us to be as follow. The approach in ALM v Bladon is one to be followed in whistle-blowing cases. That is, there is a certain generosity in the construction of the statute and in the treatment of the facts. Whistle-blowing is a form of discrimination claim (see Lucas v Chichester UKEAT/0713/04). As to any of the alleged failures, the burden of the proof is upon the Claimant to establish upon the balance of probabilities any of the following:

(a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on.

(b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

Likely is concisely summarised in the headnote to Kraus v Penna pIc [2004] IRLR 260, EAT Cox J and members:

In this respect 'likely" requires more than a possibility or risk that the employer (or other person) might fail to comply with a relevant obligation. The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable, or more probable than not that the employer (or other person) will fail to comply with the relevant legal obligation. If the Claimant's belief is limited to the possibility or risk of a breach of relevant legislation, this would not meet the statutory test of likely to fail to comply.

40. In determining whether an employee has made a qualifying disclosure, the Tribunal must decide whether or not the employee believes that the information he is disclosing meets the criterion set in one or more of the subsections of section 43B(1) and, secondly, decide objectively, whether or not that belief is reasonable; see: Babula v Waltham Forest College [2007] IRLR 346 CA.

41. Section 43C provides, amongst other things, that a qualifying disclosure is made if the worker makes the disclosure to his employer.

42. Section 43G provides for disclosure in other cases. Under subsection (1) a qualifying disclosure is made in accordance with this section if:

    (a) …
    (b) The worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
    (c) He does not make the disclosure for purposes of personal gain,
    (d) Any of the conditions in subsection (2) is met, and
    (e) In all the circumstances of the case, it is reasonable for him to make the disclosure.

Subsection (2)(c)(i) provides:

That the worker has previously made a disclosure of substantially the same information to his employer.

Subsection (3) provides:

In determining for the purposes of subsection(1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to:

(a) The identity of the person to whom the disclosure is made,
(b) the seriousness of the relevant failure,
(c) whether the relevant failure is continuing or is likely to occur in the future,
(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
(e) in a case falling within subsection (2)(c)(i) … any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) In a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

Subsection (4) provides:

> For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

43. In Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 the Employment Appeal Tribunal held that a protected disclosure must be a disclosure of information and not merely an allegation. The ordinary meaning of giving information is conveying facts. In Kilraine v London Borough of Wandsworth [2018] IRLR 846, the Court of Appeal held that the concept of "information" used in section 43B(1) is capable of covering statements which might also be characterised as allegations and that there is no rigid dichotomy between the two. Whether an identified statement or disclosure in any particular case does not meet the standard of being "information" is a matter of evaluative judgment by the Tribunal in light of all the facts.

Whistleblowing/automatic unfair dismissal

44. Section 103A provides that an employee who is dismissed shall be regarded 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. The causation test is not legal but factual. A Tribunal should ask why the alleged discriminator acted as he did, consciously or unconsciously; see West Yorkshire Police v Khan 2001 ICR 1065 HL. That was a race discrimination case but it was cited with approval on this point in a section 103A case in Trustees of Mama East Africa Women's Group v Dobson EAT 0219-20/05. In that case the Employment Appeal Tribunal stated that it would be contrary to the purpose of the whistleblowing legislation if an employer could put forward an explanation for the dismissal which was not the disclosure itself but something intimately connected with it in order to avoid liability.

45. Where an employee brings a whistleblowing claim but does not have sufficient continuity of service to bring and ordinary unfair dismissal claim under section 98 of the Employment Rights Act 1996, and the legislation placing no burden on the employer to show the reason for the dismissal, the burden of proof is on the employee to show on the balance of probabilities that he was dismissed for an automatically unfair reason; see Smith v Hayle Town Council 1978 996 CA; Tedeschi v Hosiden Besson Ltd EAT 959/95; and Ross v Eddie Stobart Ltd EAT 0068/13.

Whistleblowing/detriment

46. Section 47B provides that 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.

47. Section 48(2) provides that on such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done. In London

Borough of Harrow v Knight [2003] IRLR 140 the Employment Appeal Tribunal stated that the ground on which an employer acted in victimisation cases requires an analysis of the mental processes (conscious or unconscious) which caused him to act. Section 47B will be infringed if the protected disclosure "*materially influences (in the sense of being more than a trivial influence)"* the employer's treatment of the claimant: see Manchester NHS Trust v Fecitt [2012] ICR 372.

48. It is open to an employee to bring a claim under section 47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, i.e. for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against an employer in respect of its own act of dismissal; see Timis v Osipov [2018] EWCA Civ 2321. In Royal Mail Group Limited v Jhuti [2019] UKSC 55**,** Underhill LJ stated at para 69:

> *… for the avoidance of doubt I should make it clear that,…, it would not depend on Mr Widmer being named as a respondent. All that would matter is that Royal Mail's liability arose, vicariously, under section 47B (1B). It is perfectly open to a claimant to advance a claim against an employer under sub-section (1B) without proceeding against the worker who actually did the deed: indeed that is probably the more usual course.*

Health and safety/automatic unfair dimissal

49. Section 100 of the Employment Rights Act 1996 provides:

> (1) An employee who is dismissed shall be regarded … as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that:
>
> …
>
> (c) being an employee at a place where there was no such representative or safety committee,
>
> …
>
> he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety,
>
> …
>
> (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

50. Ms Ibbotson referred the Tribunal to the case of Balfour Kilpatrick Ltd v Acheson [2003] IRLR 683 in which it was said that subsection (e) should read: *'in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger or to communicate these circumstances by any appropriate means to the employer'.*

Failure to provide a written statement of employment particulars

51. Section 1 of the Employment Rights Act 1996 provides that an employer must provide an employee with a written statement of employment particulars not later than two months after the beginning of employment containing the particulars set out in that section and as further described in sections 2 and 3.

52. Section 38 of the Employment Act 2002 provides that if in a case to which the proceedings relate (which includes proceedings relating to unfair dismissal) the Tribunal finds in favour of an employee and, when the proceedings were begun the employer was in breach of his duty under section 1(1) or 4(1) of the Employment Rights Act 1996, the Tribunal must, unless there are exceptional circumstances which would make an award or increase unjust or inequitable, award the employee two weeks' pay (subject to the cap specified in section 227 of the Employment Rights Act 1995). If the Tribunal considers it just and equitable in all the circumstances, the Tribunal may award four weeks' pay (subject to the cap specified in section 227 of the Employment Rights Act 1996).

Conclusion

Protected disclosures

53. The content of the Claimant's email of 11 June 2019 to Sharon Sadler was clearly a disclosure of information tending to show that the health and safety of children had been, and was likely to be, endangered. The Tribunal has concluded, as stated above, that the Claimant's disclosures in the voicemail to Sharon Sadler on 10 June 2019 and orally to Emma Raper on 11 June 2019 were similar in substance to the contents of the Claimant's email. The Claimant made her disclosures to her employer by voicemail and email; she made her disclosures orally to Emma Raper.

54. Having heard the Claimant give evidence, the Tribunal is satisfied that she believed that the health and safety of the children had been, was being, and was likely to be put at risk. The Tribunal is also satisfied that the Claimant's belief was objectively reasonable: children were lashing out because they were in close confines and, in particular, there was a risk that the child with mobility problems might fall and injure himself and/or risk injury to the Claimant herself who had to "practically lift him into the bus".

55. The evidence clearly demonstrated that the Claimant believed that her disclosures were made in the public interest, namely the health, safety and welfare of children. As sensibly submitted by Mr Murray, he would have some difficulty in persuading the Tribunal otherwise. The disclosure was undoubtedly in the public interest.

56. The Claimant failed to state with any precision or detail the legal obligation upon which she seeks to rely for the purposes of her claim under section 43B(1)(b) and her claim in relation to this aspect does not succeed and will not be considered further.

57. Turning to the Claimant's disclosure to Ms Raper, the Tribunal has considered the tests set out under section 43G and concludes as follows:

57.1. The evidence shows on the balance of probabilities that the Claimant reasonably believed the information disclosed, and to the extent that it contained allegations, was substantially true;

57.2. There was no credible evidence that the Claimant made the disclosure for personal gain. The Tribunal does not accept Mr Murray's submission that the Claimant made the disclosure in attempt to get her own way to have use of the 16 seat vehicle. The thrust of the evidence suggests that it was the health, safety and welfare of the children which motivated the Claimant to inform Ms Raper of her concerns.

57.3. The Claimant had previously made a disclosure of substantially the same information to her employer.

57.4. It was eminently reasonable for the Claimant to have made the disclosure to Ms Raper who was the School Transport Liaison Teacher. Ms Raper was equally concerned about children's welfare and, as far as transport was concerned, had some responsibility for it. Although the disclosure did not concern matters of the utmost seriousness, in the Tribunal's view the disclosure which related to the health and safety of vulnerable children was of sufficient seriousness to justify the disclosure to Ms Raper. The Respondent had addressed the Claimant's concerns by informing her that the smaller vehicle would be used for the Carew Manor school run for the next two weeks; the failure to comply with the obligation to ensure the health and safety of the children was continuing and likely to continue for two weeks. There was no evidence to suggest that the disclosure was in breach of a duty of confidentiality owed by the Respondent to any third party (in submissions, Mr Murray conceded that this test had not been engaged in this case). As to compliance with any procedure, there was no evidence to show the Respondent had a dedicated whistleblowing policy in place. Mr Harris told the Tribunal that the staff handbook containing a grievance procedure which was kept in the staff crew room but the Claimant only attended the Respondent's premises at interview and the meetings referred to above. Although the Respondent had a grievance procedure in place, it had not been provided to the Claimant.

57.5. In all the circumstances, it was reasonable for the Claimant to have made the disclosure to Ms Raper.

58. The Claimant made protected disclosures to her employer in a voice mail on 10 June 2019 and an email on 11 June 2019; and orally to Ms Raper on 11 June 2019.

<u>Automatic unfair dismissal under section 103A ERA 1996</u>

59. The Respondent states that there were two reasons for the dismissal: one of which related to disclosure, the other which related to libel. The Tribunal considers the principal reason was the first reason, not least because the second reason was not mentioned in the letter of dismissal dated 14 June 2019 which was prepared in advance. It was only after the Claimant queried the reason for her dismissal that Mr Harris stated in writing, in his letter of 8 July

2019, that libel was also a reason. The thrust of the evidence suggested that it was the Claimant's disclosure to Ms Raper which was the principal reason for the Claimant's dismissal.

60. The Claimant has shown the principal reason for her dismissal: it was because she had made the disclosure to Ms Raper. The Claimant was unfairly dismissed.

Detriment on grounds of dismissal

61. As conceded by the Respondent, it follows that by dismissing the Claimant because she had made a protected disclosure, the Respondent subjected her to a detriment on the ground that she had made a protected disclosure.

Automatic unfair dismissal / health and safety

62. Turning to the Claimant's claim under section 100, the Tribunal is not persuaded that the Claimant was dismissed because she raised her concerns with her employer; rather, she was dismissed because she had raised her concerns with Ms Raper. The Claimant's claim under subsection (1)(c) does not succeed.

63. Nor is the Tribunal persuaded that the principal reason for the Claimant's dismissal was that she communicated circumstances of danger "to her employer" as was the case in Balfour Kilpatrick Ltd v Acheson [2003] IRLR 683. She was dismissed because she had communicated her concerns to Ms Raper.

Written statement of employment particulars

64. The Tribunal accepts the Claimant's evidence that she was not provided with a contract of employment during her employment. However, the letter from Mr Harris dated 8 July 2019 states that a copy the contract was enclosed. If the contract had not been enclosed, no doubt the Claimant would have questioned it; there was no evidence to suggest she had. On the balance of probabilities, the Tribunal concludes that the Claimant had been provided with a written statement of employment particulars by the time proceedings had begun.

Remedy

65. There was insufficient evidence upon which the Tribunal could conclude that deductions to any award should be reduced by reason of the Claimant's contributory conduct. In light of the Tribunal's conclusion that the principal reason for the Claimant's dismissal was her protected disclosure, Mr Murray's argument that the Claimant acted in breach of confidence with a client was singularly unattractive. The Tribunal will not reduce any award by reason of contributory conduct on the Claimant's part.

66. Contrary to Mr Murray's submission, there was no credible evidence upon which the Tribunal could conclude that the Claimant would or might have been dismissed such that it might be appropriate to make a Polkey reduction.

67. The parties are encouraged to seek settlement without the recourse to the cost and inconvenience of a further hearing. If the parties are able to agree terms of settlement, they should inform the Tribunal promptly. In the meantime, this case will be listed for hearing before the same Tribunal with an allocation of one day to consider remedy. Notice of hearing will be issued in due course.

Note

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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Employment Judge Pritchard
Date: 16 July 2021

Sent to the parties on
Date: 30 July 2021