



EMPLOYMENT TRIBUNALS

Claimant: Mr L Gray

Respondent: CF Motoring Services Ltd

Heard at: Newcastle (CVP)

On: 6 & 7 December 2020

Before: Employment Judge A.M.S. Green

Representation

Claimant: In Person

Respondent: Ms H Hogben - Counsel

REASONS

Introduction

1. The respondent has requested written reasons for my judgment issued on 7 December 2020.
2. For ease of reference I have referred to the claimant as Mr Gray and the respondent as CFM.
3. I conducted a remote CVP hearing. Mr Gray was not represented. However he was supported by his partner Ms Sophie Beckingham-Smith who helped him with his papers and made closing oral submissions on his behalf. I carefully explained the procedure to Mr Gray and made sure that he understood the process. We worked from a digital and a hard copy bundle. The following people adopted their witness statements and gave oral evidence:
 - a. Mr Leo Calvert.
 - b. Mr Patrick Darroll.
 - c. Mr Andy Fitzgerald.
 - d. Mr Gray.

4. After hearing all of the oral evidence, I gave Mr Gray half an hour to prepare his closing submissions. I heard submissions from both parties.

The claim and response

5. Mr Gray has claimed automatic unfair dismissal contrary to Employment Rights Act 1996, section 103 A (“ERA”) in that the reason for it was that he made a protected disclosure. He claims the following:
 - a. On 11 August 2020 he disclosed information which in his reasonable belief tended to show one or more of the matters set out in section 43B (1) (a), (b) or (c) ERA.
 - b. The information which he provided can clearly be seen in an email of 11 August 2020 where he provides information about the driving hours and why he says they were illegal.
 - c. At the time he raised this he reasonably believed he was doing so in the public interest.
 - d. That the reason CFM dismissed him was that he had made this disclosure.
6. CFM deny the claim and say that the operative reason for dismissing Mr Gray was because of poor performance relating to truck cleanliness, failing to fill a vehicle with fuel, not answering the phone, failing to take photographs at the scene of an accident, issues arising from fuel entries in his Personal Digital Assistant (PDA) and failing to notify CFM about damage to a winch cable. They say his dismissal has nothing to do with any protected disclosure that may have been made by Mr Gray. In any event, they deny that the disclosure he made qualified for protection.

The issues

7. At a private preliminary hearing, Employment Judge Sweeney identified the issues which the Tribunal must determine. These are as follows:
8. Did the Mr Gray disclose information in his email of 11 August 2020 which, in his reasonable belief, tended to show:
 - a. That a criminal offence had been, was being or was likely to be committed.
 - b. That a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject.
 - c. That the health or safety of any individual had been, was being or was likely to be endangered.

9. Did the Mr Gray reasonably believe that in disclosing the above information that he was doing so in the public interest?
10. If the Mr Gray made a protected disclosure as alleged, can he show that the reason for his dismissal was that he made that protected disclosure?
11. If so, and Mr Gray was automatically unfairly dismissed, what remedy is the Mr Gray entitled to?

The basis of the decision and burden of proof

12. In reaching my decision, I have carefully considered the oral and documentary evidence. The fact that I have not referred to every document produced in the bundle should not be taken to mean that I have not considered it.
13. As Mr Gray does not have the requisite qualifying period of service for making a complaint of ordinary unfair dismissal, he must establish that the principal reason for his dismissal was the making of a protected disclosure. The only basis upon which his claim can succeed is if he demonstrates that. If it was, the dismissal is automatically unfair. He has to establish his claim on a balance of probabilities.

Findings of fact

14. Having considered the evidence I make the following findings of fact.
15. CFM operates a 24-hour vehicle roadside rescue service and runs an accident repair workshop. It has been operating in the North-East of England for 40 years and employs approximately 170 staff. CFM is the largest provider of vehicle recovery services in the north-east of England. CFM works for all of the major motoring organisations (AA, RAC, Green Flag etc...) and also Northumbria Police and Highways England. Much of the work that they perform is classified as an emergency, where there is a danger to life. CFM has to be able to respond to the police and Highways England 24 hours a day, 365 days a year in respect of incidents. They are required to arrive on the scene within 30 minutes of being called out.
16. In order to meet its commitments, CFM operates a variety of shift patterns amongst its staff. It has hourly shift work, both day and night and also "3 on, 2 off" shifts. This means that an employee comes into work on the first day of their three days on and collect their truck. They do checks and then contact CFM's Control to let them know that they are available for jobs. They are then assigned jobs by Control over the next 3 days that they are on. If they do not have a job, they can go home or do whatever they want to do. When they have completed their three days on, they have two days off. Drivers are required to comply with the applicable legislation relating to the hours that they are permitted to drive which is summarised in the Vehicle & Operator Services Agency's ("VOSA") "Guide for recovery operations" [108B] (the "Guide").

17. The relevant CFM personnel in respect of Mr Gray's claim are:

- a. Mr Calvert who is the Operations Manager. He is responsible for CFM's overall operations.
- b. Mr Fitzgerald, who is CFM's Rescue and Recovery Manager. He is responsible for overseeing the whole rescue and recovery department. He manages the people in that department. There are approximately 50 staff, 40 of whom work as Rescue and Recovery Operatives.
- c. Mr Darroll is a Training Instructor. He is responsible for all the training for the Rescue and Recovery Patrols.

18. Mr Gray was employed as a Rescue Recovery Operative. His employment started on 28 October 2019. His job offer was sent out on 18 October 2019 [41]. The offer was based on a three-month trial period which, if successful, would mean that his position became permanent. Mr Gray worked initially worked a "3 on, 2 off" shift pattern.

19. In his witness statement Mr Darroll explains that as part of his training, Mr Gray accompanied him on live jobs. He says this would have been for about 4 or 5 days. Mr Gray would have been in a group of 4 trainees. All of the trainees accompanied Mr Darroll. Part of the training would include refuelling and cleaning the truck at the end of the shift. In terms of cleaning the truck, Mr Gray was shown how the jet wash worked, where the necessary facilities were and was shown precisely how CFM expected the vehicles to be cleaned inside and out. Mr Darroll would watch them cleaning the vehicle and would make sure that they were doing it to an appropriate standard and understand what that standard was. Furthermore, all four trainees were informed that if they were ever unable to clean a vehicle at the end of their shift, for instance because they had returned to site in the early hours of the morning, they had to inform Control, who would then take the necessary steps to ensure that someone else would clean the vehicle prior to the next driver needing it. He goes on to say that Mr Gray was fully aware that he had to clean the vehicle as well as the standard of cleanliness that was expected, and what he should do if he was unable to complete this task at the end of his shift. He says that at the end of this training, Mr Gray was fully aware of the expectations in terms of vehicle maintenance and cleanliness. Although Mr Gray cross examined Mr Darroll, he did not challenge this aspect of his evidence in his witness statement. I have no reason to doubt what Mr Darroll says about Mr Gray's training in terms of cleaning his truck and the protocol to be followed if he was unable to do so. Consequently, Mr Gray knew what was expected of him.

20. Mr Darroll also speaks about why it was necessary for the CFM vehicles to be kept clean. In paragraph 5, he says that standards of cleanliness and tidiness particularly within the crew cabs are very high because CFM

services members of the RAC and the AA will often have to sit in the with the CFM employee. He says “therefore, it really needs to be spotless. It doesn’t give a good impression if it is not clean and if complaints were made to either of those companies, it could put extremely important contracts at risk”. He goes on to say that there is a safety issue with the transporter bed (i.e. where a vehicle is winched on). He explains that if grease or oil is not cleaned up thoroughly, it could become a slip hazard which could be extremely dangerous. He refers to a potential slip hazard in the cab and all the steps leading up to the cab. Consequently, both danger and reputational risks exist which requires a high standard of cleanliness both inside and outside the cab. This was exacerbated by the coronavirus pandemic. Mr Gray did not cross examine Mr Darroll on this aspect of his evidence and I have no reason to doubt what Mr Darroll says. Maintaining the cab and the truck bed so that it was clean, and tidy was very important for CFM both for safety and its reputation.

21. On 22 November 2019 and 9 December 2019, Mr Gray received positive customer feedback [43A and 43B].
22. On 26 January 2020, Mr Darroll spoke to Mr Gray about the cleanliness of his truck. In his witness statement, he says that he does not remember how it had been brought to his attention, but he did regularly carry out spot checks. Alternatively, the next driver who took the truck could have brought it to his attention. There was also an issue with Mr Gray failing to fill the truck with fuel. This matter was recorded in the apex electronic performance record on 27 January 2020 [43C] where it is stated “CF 36 [i.e. Mr Gray] has been given a verbal warning today for truck cleanliness and not filling the vehicle with fuel”. Under cross-examination, Mr Gray accepted that this performance issue had been recorded in the apex system. However, he disagreed with what was written but was unable to provide a plausible explanation for this. Indeed, when it was put to him that Mr Darroll gave him a warning for truck cleanliness he replied, “I would have to say yes”. Mr Gray did not cross examine Mr Darroll on this aspect of his witness statement and I prefer his version to Mr Gray’s. I find as a matter of fact, that Mr Gray had not cleaned his vehicle properly and there was an issue with fuel. Mr Darroll gave him a verbal warning.
23. In his witness statement, Mr Darroll says that less than three weeks later, on 13 February 2020 he had to speak to Mr Gray again. On this occasion, Mr Gray had failed to answer his telephone for police jobs and was still failing to keep his truck clean. He goes on to say in his witness statement that Mr Gray was having problems at home, and he knew that this was affecting his work. The apex performance record for 17 February 2020 [43E] records this. He says that Mr Gray knew that he would be pulled up on this. The apex performance record for 8 February 2020 states “attempted to call CF 36 numerous times for a police job at 01:10 hours on both given telephone numbers. No answer. Had to call CF 32 out to cover as police driver was also on a job” [43 D]. Mr Darroll goes on to say that because of this, he extended Mr Gray’s probation by a further two months. When he was cross examined, Mr Gray denied that there was an issue

about the cleanliness of his vehicle. He did not deny the issue about failing to answer the telephone. However when he was asked why the cleanliness was not an issue that had been raised with him and which was set out in a contemporaneous record, he suggested that it was his word against theirs. On being pressed on this he suggested that Mr Darroll was lying. When asked why he would be lying, he simply said that it was for "their own gain" without elaborating on this other than to say CFM were building a case against him and it was some sort of pre-emptive strike for what happened in the future relating to his public interest disclosure. It was put to him that what he was suggesting was ridiculous. I agree with that conclusion; it is a ridiculous proposition. Furthermore, Mr Gray did not challenge this aspect of Mr Darroll's evidence under cross-examination. His evidence is supported by contemporaneous record which has weight, and I cannot see what possible end would be served in fabricating the issue of cleanliness particularly for the reason given by Mr Gray. He had not, at this stage, raised any issue about the hours that he was driving (see below). Furthermore, Mr Darroll had already warned Mr Gray about the level of cleanliness of his truck. I prefer Mr Darroll's version. I find that Mr Darroll had an issue with the state of the truck and also with Mr Gray's failure to answer the telephone on a police matter. The matter was sufficiently serious to justify extending Mr Gray's probation.

24. On 7 April 2020, Mr Darroll had to speak to Mr Gray about another performance issue. The apex performance record for 7 April 2020 [43 E] says "only 1 photo taken at scene". Mr Darroll explains what this means in his witness statement. He says that on 7 April 2020 he spoke to Mr Gray about failing to take photographs at the scene of an accident and about putting fuel entries onto his PDA with the correct speedometer reading [43H]. He says that he was told that failing to address these issues could result in disciplinary action. He explains in his statement that the police and the RAC and the AA insist that photographs are taken at the scene. This is to record damage to the vehicle. CFM also need it to show the work that they have done. He gives the example of a car going into a ditch which will require to be winched out. CFM charge extra for that service. They require photographic evidence to substantiate the charge. The police need photographic evidence for every single job. CFM are required to upload that evidence onto a secure website. This is also to justify CFM's charges to the police. If CFM fail to do this regularly, Mr Darroll says it would put the contract with the police at risk. Losing the contract would be extremely detrimental to CFM. Regarding fuel entries, CFM are required to do this to keep track of what fuel is used to avoid theft and to ensure that their vehicles are running properly (i.e. there are no leaks or blocks) and to keep an eye on what they are getting in terms of MPG. When he was cross examined on this, Mr Gray accepted that photographs had not been taken but sometimes it was not possible to do so because it could be dangerous. He accepted that he had been warned that failing to correct these omissions could lead to disciplinary action. He accepted that this warning predated his public interest disclosure. Consequently, it follows that there cannot be any link between the warning and his subsequent public interest disclosure. Furthermore, Mr Gray did not cross examine Mr

Darroll on this aspect of his evidence. I have no reason to doubt what Mr Darroll is saying about why he had reason to speak to Mr Gray on this performance issue. Mr Gray had failed to take a sufficient number of photographs at the scene of the accident.

25. On 14 April 2020 Mr Gray was placed on furlough. He returned to work on 3 August 2020.
26. On 9 August 2020, Mr Gray went into the Control Room to explain that he was only able to work until 13:30 hours because of GB working hours and it was his second shift [44]. The apex performance record records that he was advised to stay on shift and should speak to management. He is also recorded as saying that he would not answer his telephone after 16:00 hours. Mr Gray also sent a text message saying, "look mate unless Andy or whoever is prepared to actually show me that I need to work past 62.5 hours I'm clocking off at 4 PM". As a matter of fact, Mr Gray had not worked 62.5 hours. His job sheets [97, 98 and 107] indicate that when he was on duty or driving, and he did not exceed 7 hours. In the apex record, there is no reference to criminality or infringement of health and safety law et cetera. It is simply a hearsay record that Mr Gray believed he could only work until 13:30 hours due to "GB working hours".
27. On 11 August 2020 Mr Fitzgerald emailed Mr Darroll at 07: 38 hours requesting that when he next saw Mr Gray, he was to show him several photographs attached to the email. He was referring to what he considered to be an unacceptable way to leave the truck [45]. In his witness statement, Mr Darroll explains that at that point CFM were five months into the Covid pandemic and truck cleanliness was extremely important. Members of breakdown organisations might need to sit in the cab, and it was essential that their safety in terms of the pandemic had been properly taken care of. They also needed to feel confident that cleanliness was being taken seriously at the time. Mr Gray did not cross examine Mr Darroll on this aspect of his evidence in his witness statement. Under cross-examination, he also accepted that it was an unacceptable way to leave the truck. I have no reason to doubt what Mr Darroll said in his witness statement and that he was asked to speak to Mr Gray about the state of the truck as evidenced by the series of photographs attached to Mr Fitzgerald's email.
28. On 11 August 2020, Mr Gray emailed the CFM Patrol Email address at 09:14 hours [60]. The email was entitled "I am sharing 'Layton Working Hours Explanation.docx'" with you. The email contained extracts from the Guide. Mr Gray highlighted various extracts. In particular, he highlighted the following:

The domestic rules regarding goods vehicles are very straightforward and consist of a

10-hour daily driving limit

and a

11-hour daily duty limit.

Furthermore, the daily duty limit is based on accumulated time, and not 11 hours from “clocking on”.

...

As is the position for EC rules, in exceptional circumstances, drivers are exempt from the domestic rules where there’s a “danger to the life or health of people or animals” as described by the Transport Act 1968. The exemption suspends the rules during an emergency and ends once there’s no longer a danger.

29. In the section GB domestic rules the following extracts are highlighted:

You must not drive for more than 10 hours in a day:

...

You must not be on duty for more than 11 hours in any working day.

...

If you work as a driver for a company, duty time is any working time.

...

You must not drive for more than 10 hours in any working day.

...

Duty: In the case of an employee driver, this means being on duty (whether driving or otherwise) for anyone who employs them as a driver. This includes all periods of work and driving, but does not include rest or breaks. Employers should also remember that they have additional obligations to ensure that drivers receive adequate rest under health and safety legislation.

30. Mr Gray added a commentary on his interpretation of the extracts highlighted in the Guide he said:

Based on the information gathered here above, I have realised:

There are 7 days per week, 24 hours in each day, totalling a number of 168 hours within a full week.

One example of a working week sequence could be

Monday, Tuesday and Wednesday 3 days on

Thursday and Friday 2 days off

Saturday and Sunday on

Following week

Monday on

Tuesday Wednesday off

Thursday Friday Saturday on

Sunday off

WEEK 1 consisting of 5 days on 2 days off

WEEK 2 consisting of 4 days on 3 days off

WEEK 1 5 WORKING Days

You must take a rest of at least 10 hours between 2 working days (or spread over)-this can be reduced to 8.5 hours up to 3 times a week.

Reference 10 states you must have 10 hours rest at least between 2 working days Monday to Tuesday, Tuesday to Wednesday, Saturday to Sunday etc. this can however be reduced to 8.5 hours a maximum of 3 times per week.

MONDAY 24-8.5 = 15.5

TUESDAY 24-8.5 = 15.5

WEDNESDAY 24-8.5 = 15.5

SATURDAY 24-10 = 14

SUNDAY 24-10 = 14

After reducing the minimum amounts of sleep per working day, you are left with 3 15.5-hour days and 2 14 hour days, this including hours for breaks as it is only the amount of remaining hours within the day not the available amount of hours available to work.

Ref 7 5 hours 30 minutes of driving you must take a break of at least 30 minutes for rest and refreshment.

Ref 8 Or, within any period of 8 hours 30 minutes, you must take at least 45 minutes and breaks. You must also have a break of at least 30 minutes at the end of this period unless it's the end of the working day.

By studying reference 7 and reference 8, within a 15.5-hour shift, you are entitled to just under 2.5 hours break.

Within a 14-hour shift around about 2 hours.

$$15.5 - 2.5 = 13$$

$$14 - 2 = 12$$

This there leaving remaining working hours available throughout the rest of the day on a 15.5-hour day and 12 hours on a 14 hour day.

This leaving 63 maximum working hours available.

WEEK 2

$$\text{MONDAY } 24 - 8.5 = 15.5$$

$$\text{THURSDAY } 24 - 8.5 = 15.5$$

$$\text{FRIDAY } 24 - 8.5 = 15.5$$

$$\text{SATURDAY } 24 - 10 = 14$$

Again, when taking off the 2.5 hours break Monday Thursday and Friday, and 2 hours on Saturday this leaves 3 lots of 13 and 11 2-hour day.

This leaving a maximum of 51 hours available to work within a 4-day working week

Reference 6 makes it clear that duty time and employed by a company, duty time is classed as any working time, including washing the wagon beds between jobs and at the end of the shift in getting the wagon ready to begin the 3 days on.

Reference 9 states you must not work for more than 16 hours between the times of starting and finishing a shift. This includes non-driving hours and times when you're off. Therefore, if there are no jobs available and drivers at home waiting for another job, if the maximum of either 13 or 12 hours had not been worked yet the shift length reaches 16 hours then the driver is entitled to go to bed for their period of daily rest, whether that being 8.5 hours 10 hours.

Reference 1 states the daily driving limit is 10 hours. If a driver is sent on a longer journey to perform a recovery and their total driving hours maxes 10 hours before their total duty hours then they cannot carry on with the rest of the days duties. Unless there is an emergency stated in ref 11 dealing with an emergency, eg major disruption to public services or danger to life.

All information above has left me with the understanding that in a 5 day working week I am able to work 3x13 hour days and 2x12 hour days

however on call for 16 hours if these are not work due to having no jobs. And available in cases of emergencies-in event of danger to life

In a 4-day working week I'm able to work 3×13-hour shift and one 12 hour shift. Again, on call for 16 hours if hours are not work due to there being no work and in cases of emergencies.

These working hours starting from the beginning of the first job for example if the first job was given or accepted at 07:00 then it would be 13 working hours from then or 16 hours on call.

If the first job was given or accepted at 14:00, again the 13 working hours or 16 hours on call would begin from then.

Furthermore, the duty limit is based on accumulated time, and not 11 hours from "clocking on". There is, however, a requirement to have "adequate rest" under the working time rules.

31. Mr Darroll met with Mr Gray on 13 August 2020. The meeting was recorded with Mr Gray's consent, and a transcript was produced [71]. It is noteworthy that during that conversation, Mr Gray mentioned his working hours and explained that the reason that he had not cleaned the truck was because he was out of his working hours. Mr Darroll is recorded as saying that he was not going to get into a conversation about that because it would be dealt with by Mr Calvert. The two men then looked at the photographs together. In the transcript, Mr Darroll asks Mr Gray whether if he came to work and got into a truck that was left "that way and you took the truck would you be happy". Mr Gray's answer was "I wouldn't be no, I'll admit no". The photographs also indicated the state of tools that were left in various compartments in the truck. These were messy and disorganised. Under cross examination Mr Gray accepted that given the dangerous nature of the work it was important for a driver quickly to find tools rather than rummaging through a messy compartment. Clearly, CFM still had issues with the way in which Mr Gray had left his truck. They were also concerned about the tidiness of the tool compartments.

32. On 18 August 2020, Mr Gray met with Mr Calvert to discuss his concerns over his working hours. A note of the meeting was taken and has been produced [72]. Mr Gray has not challenged the accuracy of that record. I have no reason to doubt that it is an accurate record of what was discussed. From those notes, I discerned that Mr Gray said that he could work 15 hours per day legally. He also referred to his understanding that when he picked the truck up this was on duty time. He said that he could do 11 hours driving. Mr Calvert is noted as saying that he had looked through Mr Gray's explanation referring to the legislation and suggested that he had not read the document as a whole that had been selected as in his interpretation. He referred to the fact that the laws were for logistic companies and transport companies. CFM is a breakdown company and exempted from operating a tachograph within 100 km of base. Mr Gray is

noted as referring to what is said about working extra to cover life in danger jobs. He understood where Mr Calvert was coming from. I also note that Mr Gray was not happy with working the "3 on, 2 off" shift pattern. Mr Calvert offered to change Mr Gray's working hours to Monday-Friday 08:00 hours to 17:00 hours doing collection and delivery. He would be paid £11 per hour and would be on the same money working 40 hours per week. Mr Gray was happy with that arrangement and wanted to know when it would start. Mr Calvert replied that it would be 24th August. Mr Gray agreed with that arrangement.

33. After the meeting on 18 August 2020, Mr Gray never raised the question about his working hours again with senior management. He did not raise any grievance or report his actions to an external body such as VOSA. Having read the record of the transcript I believe that Mr Gray simply didn't want to work a shift pattern of "3 on, 2 off". In his witness statement he suggests that at the end of the next three days on shift, he was told that it was not working for him and was informed that he would work from Monday-Friday 08:00 hours to 17:00 hours. That contradicts what is set out in the record of the meeting where it is clear that he was offered the opportunity to work fixed hours from Monday to Friday which would start the following week. The gist of the record is that he readily accepted that offer.
34. On 25 August 2020, Mr Fitzgerald emailed Mr Darroll regarding a further concern with Mr Gray failing to leave his truck in a clean state before going off shift [73]. Mr Fitzgerald had previously emailed the Control Room, the HGV Workshop and Mr Darroll on 21 August 2020 attaching a manuscript note that Mr Gray had left in the cabin of his truck. The gist of the note was that Mr Gray did not have enough time to fill up the truck with fuel or to clean it. He also referred to a really loud noise coming from the rear wheel/brake. He referred to the steering wheel shaking badly when braking [74]. In his email of 21 August 2020, Mr Fitzgerald noted that this was not how to report faults and, "once again cleaning the truck is still not acceptable". He indicated to Mr Darroll that there should be a "final warning please Pat, all trucks must be left clean no matter what". Mr Darrell spoke to Mr Gray on 25 August 2020 about the issue concerning fuelling and cleaning his vehicle and he was told that from then on, if he left his vehicle uncleaned again, it would result in disciplinary action. This was recorded on apex [75].
35. On 15 October 2020, a further performance record was logged on apex by Mr Gray [76]. Mr Darroll refers to this in his witness statement. Mr Darroll was asked to provide some additional training on the use of the twin deck truck. He had to go over the differences between a transporter and a twin deck with Mr Gray.
36. On 16 October 2020, Mr Fitzgerald sent another email to Mr Darroll. He said that he had had to speak to Mr Gray about truck cleanliness. Mr Fitzgerald told Mr Gray that this was a final warning on that point. The apex record has been produced which substantiates this [77].

37. On 21 October 2020, Mr Fitzgerald wrote to Mr Gray following a meeting that took place on 19 October 2020 [78]. The meeting had been convened to discuss the loss of keys of a vehicle, damage to a Land Rover and truck cleanliness. In the letter, Mr Fitzgerald confirmed that Mr Gray would not be re-charged for the loss of the keys as the vehicle had been written off by insurers. He asked Mr Gray to ensure that this did not happen again in the future, and he should take care with the possession of all keys during a recovery process. Regarding the damage to the Land Rover, Mr Fitzgerald noted that he had listened to Mr Gray's points and confirmed that he would not be re-charged on that occasion. He scheduled some further training with Mr Darroll on 22 October 2020 on the same truck to ensure that there would be no repeat of the damage moving forwards should he use that type of truck again. On the question of truck cleanliness, Mr Fitzgerald recorded the issue of leaving fleet vehicles dirty both inside and out. He stated that it was unacceptable, especially during the ongoing Covid 19 pandemic. He notes that Mr Gray agreed that every time he went off shift, he would clean and tidy the truck both inside and out. He said that if there were any further issues regarding this, CFM would take further action. In his oral evidence under cross-examination, Mr Gray accepted that he had not received a warning and that he had not been re-charged for the lost keys. He also accepted that he had been spoken to at least twice on previous occasions about vehicle cleanliness and disciplinary action. He also accepted that he needed to change his behaviour.
38. On 29 October 2020, Mr Darroll planned to use vehicle D03 for training purposes. In his witness statement he says that he found it in a mess and took photographs. He went into the Control Room to find out who had last used the vehicle and he was informed that it was Mr Gray. He spoke to Mr Gray about this, and it was agreed that the matter needed to be dealt with formally because it had been an ongoing issue.
39. Mr Gray met with Mr Darroll on 29 October 2020. Notes of the meeting were taken and have been produced [84]. In his oral evidence under cross-examination, Mr Gray accepted that the meeting had been triggered by a complaint from another driver who had picked up the truck. He admitted that the truck's condition was unacceptable. He said there was mud all over the place at the yard and he could not remember being able to clean it because he thought the wash bay was broken. He could not remember if he had cleaned the inside of the vehicle. He also admitted that if he had found the vehicle in that condition he would not have been impressed. Mr Darroll also raised an issue regarding damage to a two-week old winch cable on the truck. In the meeting record, I note that Mr Gray accepted that it was company procedure to fully unspool and to rewind the winch to check the cable [86].
40. The winch cable is used to pull vehicles onto the truck bed. It operates under tension. If it fails, there can be very serious health and safety consequences. A person standing behind the cable or to one side could

be decapitated as the cable snaps and is released from being under tension.

41. On 30 October 2020, Mr Fitzgerald met with Mr Gray and Mr Johnson. Notes were taken and have been produced [89]. During that meeting Mr Fitzgerald decided to terminate Mr Gray's employment.
42. Mr Fitzgerald confirmed his decision in a letter to Mr Gray dated 30 October 2020 [91]. The reasons that he gave for the dismissal were:
 - a. A continued lack of care for company property, in particular leaving the vehicles dirty.
 - b. Failing to respond to receiving warnings which Mr Fitzgerald considered demonstrated an utter disregard for the company and colleagues.
 - c. Failing to comply with company procedures by not checking the inventory for fleet vehicles.
 - d. Damaging a winch cable.

The effective date of termination of employment was 30 October 2020.

Applicable law

43. I now turn to the law. Sections 43A to 43L and 103A ERA protect workers reporting malpractice by their employers or third parties against victimisation or dismissal.
44. The dismissal of an employee will be automatically unfair if the reason or the principal reason for their dismissal is that they have made a "protected disclosure." There is no financial cap on compensation in whistleblowing claims and no requirement for a minimum period of service.
45. For Mr Gray to succeed depends on him satisfying the following tests:
46. Did he make a qualifying disclosure? There are several requirements for a qualifying disclosure (ERA section 43B):
 - a. Did he disclose information? Merely gathering evidence or threatening to make a disclosure is not enough.
 - b. The information must relate to one of six types of "relevant" failure.
 - c. Mr Gray must have reasonable belief that the information tends to show one of the relevant failures.

- d. Mr Gray must have a reasonable belief that the disclosure is made in the public interest.
- e. The disclosure must also qualify as a protected disclosure (ERA sections 43C-43 H). Broadly this means making the disclosure to the employer (internal disclosure) as the primary method of whistleblowing. The law also permits disclosure to third parties (external) disclosure under more limited circumstances.
- f. For a qualifying disclosure to be protected the authorities show that its timing is crucial. There are various times when a disclosure is protected, including during employment with the respondent employer (as is the case here).

47. Disclosure is not defined in the legislation, but it is wide enough to include being made in writing or verbally. In one case, it was held that a video recording amounted to a disclosure. There must be disclosure of information. In **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38** the EAT held that to be protected a disclosure must involve information, and not simply voice concern or raise an allegation. It suggested that:

The ordinary meaning of giving “information” is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating “information” would be “The wards have not been cleaned for the last two weeks. Yesterday, sharps were left lying around. Contrasted with that would be a statement that “You are not complying with Health and Safety requirements.” In our view this would be an allegation and not information.

48.A qualifying disclosure is a disclosure of information which, in the reasonable belief of the worker making it, tends to show that one or more of the six specified types of malpractice has taken place, is taking place, or is likely to take place (ERA section 43B (1)). In this case, Mr Gray claims he had made a disclosure tending to show:

- a. That a criminal offence had been, was being or was likely to be committed.
- b. That a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject.
- c. That the health or safety of any individual had been, was being or was likely to be endangered.

49. The claimant’s disclosure will only qualify if he reasonably believed that it was in the public interest. I am reminded that in **Chesterton Global (t/a Chesterton) v Nurmohamed [2017] EWCA Civ 979**, the Court of Appeal gave the following guidance:

- a. The Tribunal must determine whether the worker subjectively believed at the time that the disclosure was in the public interest and, if so, whether the belief was objectively reasonable.
- b. There might be more than one reasonable view as to whether a particular disclosure was in the public interest, and the Tribunal should not substitute its own view.
- c. The reasons why the worker believes disclosure is in the public interest are not of the essence, although the lack of any credible reason might cast doubt on whether the belief was genuine. However, since reasonableness is judged objectively, it is open to the Tribunal to find that a worker's belief was reasonable on grounds which the worker did not have in mind at the time.
- d. Belief in the public interest need not be the predominant motive for making the disclosure, or even form part of the worker's motivation. The statute uses the phrase "in the belief..." which is not the same as "motivated by the belief..."
- e. There are no "absolute rules" about what it is reasonable to view as being in the public interest. Parliament had chosen not to define what "the public interest" means in the context of a qualifying disclosure, and it must therefore have intended employment tribunals to apply it "as a matter of educated impression."

50. Mr Gray does not have to prove that the facts or allegations disclosed are true, or that they are capable in law of amounting to one of the categories of wrongdoing listed in the legislation. He must subjectively believe that the relevant behaviour has occurred or is likely to occur and his belief is, in the Tribunal's view, objectively reasonable. It does not matter that his belief subsequently turned out to be wrong or that the facts that he alleged would not amount in law to the relevant failure.

Discussion and conclusion

51. Applying the law to the facts I conclude as follows.

52. In her closing submissions Ms Hogben stated that CFM did not take issue that there was a disclosure of information regarding Mr Gray's working hours. I was invited to look at the apex record of 9 August 2020, the email of 11 August 2020 combined with what he said at the meeting on 18 August 2020. Mr Gray thought that he had been working beyond 62.5 hours and, therefore, a relevant failure had occurred. Ms Hogben submitted that he did not have a reasonable belief in that fact. First, he suggested that a criminal offence had been committed but this was misconceived. During his evidence, he had been cross examined on the potential criminal offence or legal obligation that had been breached. He was unable to answer that question and did not know. I agree with this

analysis. Furthermore, there is no specific reference to any breach of the criminal law in the disclosures. I acknowledge that there is a reference to working what is permitted under GB law. This may be taken to mean breach of a relevant legal obligation and, potentially a health and safety issue. However, I disagree with Ms Hogben's submission that information had been disclosed as that is understood in **Cavendish Munro Professional Risks Management Ltd v Geduld**. Mr Gray had simply raised a concern or made an allegation without providing information. Consequently, his claim must fail because of that.

53. If I am wrong in concluding that no information was disclosed, I do not accept that Mr Gray had reasonable grounds for believing that there had been a relevant failure. As a matter of fact, he had not worked more than 62.5 hours. On this basis, Mr Gray's claim fails.
54. If I am wrong in concluding that Mr Gray did not have a reasonable belief, I do not believe that he disclosed information in the public interest. The evidence points to Mr Gray being unhappy with his "3 on, 2 off" shift pattern. There is nothing in the evidence to show that he was concerned about the potential harm that colleagues or members of the public or that he himself would suffer by working excessive hours. What is clear is that at the meeting on 18 August 2020, when he was offered the option of working Monday to Friday from 08:00 hours to 17:00 hours, he readily accepted that offer. That is indicative of a personal interest in wanting to work regular hours. Furthermore, he did not escalate the matter by raising a grievance or reporting CFM to VOSA. He was not acting for anyone's interest but his own.
55. The evidence overwhelmingly points to a completely different reason for Mr Gray's dismissal. Prior to his disclosure of 11 August 2020, he had been spoken to about his performance relating to such matters as keeping the truck clean, correctly recording fuelling, answering calls from the police, failing to take photographs at the scene of an accident etc... Matters had been sufficiently serious to warrant extending his probationary period. This all happened before he raised the issue of working hours. I simply cannot accept his explanation that CFM were plotting some sort of pre-emptive strike which they could use in the future should he be a troublemaker by blowing the whistle. There is no basis whatsoever for making such an allegation and it is simply fanciful. After Mr Gray raised issues about working hours, there were further problems with his performance which was simply variations of a common theme. He hadn't kept the vehicle clean. There were new problems and that he managed to lose the keys of the vehicle as well as damaging a Land Rover. At that point, if CFM had wanted to dismiss him because of his issues regarding working hours, they would have had the perfect opportunity and could have disguised the real reason by referring to the lost keys and the damage Land Rover. Instead, they kept him on. They decided not to recharge him for the cost of the keys or for the damage to the Land Rover. They gave him a chance to improve and to remember to clean his truck

after finishing using it. However, he was also told that if he didn't improve, he would be subject to disciplinary action. He knew what he needed to do.

56. Mr Gray's performance didn't improve, and the last straw came on 29 October 2020. Once again, there was an issue with truck cleanliness. The complaint didn't come from Mr Darroll or Mr Fitzgerald or Mr Calvert but from another driver. Mr Gray admitted that the state of the truck was unacceptable. He also overlooked checking the winch rope and failed to report it. He had not carried out the appropriate checks or documented the damage to a two-week-old winch rope which could have failed with catastrophic consequences. I am not surprised that CFM decided to dismiss Mr Gray. His performance was unacceptable.

57. Under all the circumstances, the claim is not well founded and is dismissed.

Employment Judge Green

Date 8 December 2021