Case Number: 3314603/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Hernandez	v	Swiftclean Ltd
Heard at: Watford Tribunal		**On**: 23 March 2022
Before: Employment Judge Smeaton		

Appearances
For the Claimant: Mr Bennet (caseworker)
For the Respondent: Ms Wood (consultant)

JUDGMENT

1. The Claimant's claim of unfair dismissal contrary to section 94(1) of the Employment Rights Act 1996 ("**ERA 1996**") is well-founded

2. The Claimant's claim of automatic unfair dismissal contrary to section 103A ERA 1996 is well-founded

3. The Claimant's claim of automatic unfair dismissal contrary to section 152(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("**TULR(C)A 1992**") is well-founded

4. The Claimant was subjected to an unlawful detriment contrary to section 146(1) TULR(C)A 1992

5. The Respondent is ordered to pay the Claimant the total sum of £19,749.43 within 21 days from the date this judgment is received.

REASONS

Introduction

1. The Claimant, Mr Hernandez, was employed by the Respondent, Swiftclean Ltd, as a cleaning operative from 4 September 2018 until his dismissal (with effect from 21 September 2020). At the time of his dismissal he earned £9 per hour (gross) and worked 48 hours per week.

2. He was dismissed purportedly on grounds of poor performance. He claims not to have been warned about poor performance prior to his dismissal and maintains that no process was followed in dismissing him.

3. On 4 December 2020, following a period of ACAS Early Conciliation between 22 September 2020 and 7 October 2020, the Claimant brought a claim alleging unfair dismissal, automatic unfair dismissal for raising a protected disclosure, automatic unfair dismissal for making use of trade union services and unlawful detriment on grounds related to union membership or activities.

4. The Claimant's claim, in summary, is as follows:

   (a) on 23 January 2020, he and two colleagues raised a protected disclosure via their trade union representative, in which they raised concerns about, amongst other things, being pressured to work extra time, being provided with inadequate equipment, being required to drive a car with expired insurance, and not being given gloves to use when cleaning toilets. The Claimant maintains that no response was received to that email (this is the first alleged protected disclosure relied upon);
   (b) on 7 May 2020, he and one other colleague raised a further protected disclosure via their trade union representative, in which they reiterated the concerns raised in the 23 January 2020 email and raised concerns about the lack of appropriate information or training in respect of the COVID-19 pandemic and a failure to provide adequate personal protective equipment ("**PPE**") (this is the second protected disclosure relied upon);
   (c) On 22 May 2020, his trade union representative sent a further email on behalf of the Claimant and his colleague seeking formal consultation about the risks posed by the COVID-19 pandemic, the appointment of a competent person to ensure that health and safety laws were complied with, adequate training in respect of COVID-19, the provision of adequate PPE including face masks and the formation of a health and safety committee;
   (d) On 27 July 2020, the Claimant's manager, Augusto Costa told the Claimant he expected him to use his personal mobile phone for work matters outside of his working hours. When the Claimant refused to do so, Mr Costa said words to the effect of "*if you can use your mobile to call your shitty union that is worthless you can also call me"*. The Claimant relies on this as an act done for the purpose of preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so (section 146 TULR(C)A 1992);

(e) On 7 September 2020, the Claimant was informed by letter that he would be dismissed with effect from 21 September 2020 on the basis of poor performance following alleged complaints from clients. The complaints were not shown to the Claimant and no process was followed in dismissing him. The Claimant maintains that his dismissal was substantively and procedurally unfair (section 94(1) ERA 1996) and done for the reason or principal reason that he had raised a protected disclosure (section 103A ERA 1996) and/or had done so with the assistance of his trade union (section 152 TULR(C)A 1992)

(f) On 14 September 2020, the Claimant sought to appeal against his dismissal with the assistance of his trade union. Mr Costa replied to that email but did not provide the Claimant with an appeal hearing.

5. On 7 March 2021, Employment Judge Quill directed that the claim be re-sent to the Respondent at a different address. Although the claim had been sent to the address which was, at the time the claim was issued, the Respondent's registered office, that address changed four days later on 8 December 2020. The claim was validly served on the Respondent at the latest when it was re-sent in March 2021.

6. On 7 August 2021, the Tribunal wrote to the Respondent noting that no response had been received to the claim and stating that, under rule 21 of the Employment Tribunal Rules of Procedure 2013 ("**the 2013 Procedure Rules**") judgment may be issued on the claim. The Respondent was informed that it may participate in any hearing only to the extent permitted by the Employment Judge hearing the claim.

Issues

7. The issues which fall to be determined are as follows:

(a) to what extent, if any, ought the Respondent be permitted to participate in the hearing;

(b) did the Claimant make a protected disclosure within the meaning of section 43B ERA 1996 on 23 January 2020 and/or 7 May 2020;

(c) did the Respondent make the comment as alleged to the Claimant on 27 July 2020. If so, was that done for the sole or main purpose of preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so;

(d) what was the reason or principal reason for the Claimant's dismissal. If a potentially fair reason, did the Respondent follow a fair process and was dismissal fair in all the circumstances of the case.

Hearing and preliminary discussions

8. The Claimant was represented at the hearing by Mr Bennet, a caseworker at his trade union (United Voices of the World). The Respondent was represented by Ms Wood, a litigation consultant with Croner.

9. The hearing was conducted remotely using video conferencing facilities ("**CVP**"). At the outset of the hearing, I satisfied myself that everyone could hear and see each other. I informed everyone that any recording of the hearing (including screenshots and voice recording) was not permitted.

10. I was provided with a bundle of documents by the Claimant comprising 74 pages, a witness statement dated 12 October 2021, a schedule of loss dated 12 October 2021 and written submissions from Mr Bennet dated 23 March 2022.

11. At 12.25 on the day of the hearing (which was listed for 14.00), the Respondent sent to the Tribunal the following:

    (a) an application to respond to the claim out of time dated 22 March 2022;
    (b) a draft ET3 and grounds of resistance; and
    (c) a proposed bundle of documents (with index).

12. Ms Wood, on behalf of the Respondent, addressed me orally seeking an extension of time to lodge the ET3 and permission to participate in the hearing both in respect of liability and, if appropriate, remedy.

13. In summary, the Respondent's position was as follows:

    (a) it had been unable to comply with the 28-day time limit to respond to the claim because of "*circumstances surrounding the case including receiving the claim form late"*;
    (b) it did receive the claim form on 10 March 2021. It had previously been sent to their old address. It had moved to its new address on 8 December 2020;
    (c) upon receipt of the claim on 10 March 2021, it forwarded the claim to Peninsula Legal Services. It had not previously been involved in Employment Tribunal proceedings and was reliant on Peninsula for advice and assistance;
    (d) on 28 June 2021, Peninsula wrote to it indicating that it was coming off the record and would no longer act for it because it had failed to pay the insurer's fees of £1,500 + VAT. Within that email, Peninsula made clear that "*the handling of the Tribunal mater rests solely with you. Any case management directions and obligations are for you to comply with"*;
    (e) it then sought to obtain different legal representation. In January 2022 it received the notice of hearing and directions dated 21 January 2021. Having failed to engage alternative representation, it engaged the services of Peninsula again. After approximately two weeks, it decided to instruct Croner Legal Services instead, who are currently on the record;
    (f) it has good prospects of successfully defending the claim. The Claimant was dismissed for poor performance and, at the time of his dismissal, he had already received two written warnings. Emails complaining about his performance had been received by multiple clients;
    (g) the Claimant did not make any protected disclosures and was not dismissed or subjected to a detriment for doing so or for taking part in trade union activities;

(h) it would be in accordance with the overriding objective for the tribunal to grant an extension of time. It would be unfairly prejudiced if not permitted to defend the claim.

14. Mr Bennet opposed the application.

15. Having considered the submissions made and the documentary evidence in support, I refused the application to extend time to lodge the ET3 and indicated that the Respondent's participation would be limited (both in respect of questioning the Claimant and making submissions) to the issue of remedy. In making my decision, I had regard to the factors identified in Kwik Save Stores Limited v Swain and others [1997] ICR 149, identified in Mr Bennet's written submissions.

16. I gave oral reasons for that decision which were, in summary, as follows:

(a) no good reason had been identified for extending time. The Respondent received the ET1 in March 2021. It was informed by Peninsula in June 2021 that they would no longer act for it given the non-payment of fees to the insurer. No detail or evidence was provided of the steps taken to obtain alternative representation between June 2021 and early 2022. Any suggestion that the delay was due to negligent or unhelpful legal advice is entirely baseless;
(b) the Respondent received the notice of hearing in January 2022. The application to extend time and the draft ET3 were not sent to the Tribunal until the day of the hearing. No good reason was identified for that further delay;
(c) allowing the application would inevitably result in the need for an adjournment, causing further delay;
(d) in all the circumstances of the case, and taking into account the overriding objective, the balance of prejudice clearly fell in favour of refusing the application to extend time;
(e) in considering the extent to which the Respondent should be entitled to participate in the hearing (rule 21(3) of the 2013 Procedure Rules, the Tribunal's power to enable participation should not be lightly invoked in order to subvert or circumvent the essential framework of the 2013 Procedure Rules, which support the importance of responses being entered on time (Limoine v Sharma [2020] ICR 389, EAT;
(f) permitting the Respondent to participate at this hearing beyond the issue of remedy would prejudice the Claimant, who had no advance warning of the Respondent's position on the claim whether by way of pleadings or witness evidence;
(g) the balance of prejudice clearly fell in favour of limiting the Respondent's participation to questioning the Claimant and making submissions on remedy only.

17. In light of my judgment on the preliminary issue, I admitted the Respondent's bundle only to the extent that the documents contained therein addressed the issue of remedy. This covered pages 94-104 only.

18. I heard evidence from the Claimant, who adopted his witness statement dated 12 October 2021. He was cross-examined by Ms Wood who was reminded that I would only take into consideration questions and answers relevant to the issue of remedy.

19. The Claimant confirmed that he was paid two week's notice pay. He said that he started looking for work the week after he was dismissed because he was responsible for supporting his family but that every time he got to the point of providing a reference, the application did not progress. He was out of work between September 2020 and March 2021. He confirmed that he was now in employment which he had got on the basis of a recommendation from a friend.

20. Mr Bennet made closing submissions addressing liability and remedy. He maintained that the disclosures relied upon where protected disclosures within the meaning of section 43B(1)(d) ERA 1996.

21. He maintained that the reason or principal reason for the Claimant's dismissal was that he raised protected disclosures with the assistance of his trade union (section 152 TULR(C)A 1992). He submitted that there was a significant degree of overlap between section 152 TULR(C)A 1992 and section 103A ERA 1996 and that the claim could succeed on the basis of either provision. He invited me to find that the Claimant was subjected to a detriment as alleged.

22. In support of his position, he relied on the lack of process followed in dismissing the Claimant, including the failure to provide a proper appeal. This, Mr Bennet submitted, demonstrated that the Respondent knew that its alleged reason for dismissal did not stand up to scrutiny. Mr Bennet referred to the alleged warnings contained in the Respondent's bundle but submitted that they had not been received by the Claimant (n.b. I did not, in any event, take those documents into account in considering liability, given that they were provided by the Respondent so had not been admitted into evidence for that purpose).

23. As to the fairness of the dismissal generally, Mr Bennet submitted that no procedure had been followed and that the Respondent could not reasonably and honestly have believed that the Claimant was not capable of carrying out the job as alleged. Dismissal was not within the range of reasonable responses and there was no basis for making a Polkey reduction.

24. In respect of remedy, Mr Bennet submitted that the Claimant was entitled to a minimum basic award under section 156(1) TULR(C)A 1992, as set out in the schedule of loss, loss of earnings in the sum of £8,849.94, compensation for loss of statutory rights, loss of right to long notice and an award for injury to feelings. He further submitted that the compensation awarded to the Claimant ought to be subject to an uplift for failure to comply with the ACAS Code of Practice.

25. At the end of the hearing, Mr Bennet indicated that the Claimant had received some benefits during the relevant period. He stated that he would write into the Tribunal with the details of any benefits received for the purpose of any recoupment. In the event, Mr Bennet subsequently confirmed to the Tribunal by

email that the Claimant had not received any benefits during the relevant period. No response was received to that email from the Respondent. Accordingly, I proceed on the basis that no benefits were claimed and no issue of recoupment arises.

26. Ms Wood responded. She submitted that no award for injury to feelings ought to be made. There was no change in the Claimant's behaviour, no complaints made and no obvious unhappiness. He continued to work up until his dismissal.

27. She submitted the Claimant had been given warnings on a number of occasions, such that I could be satisfied that if a fair process had been followed the Claimant would have been fairly dismissed. She said there were serious performance concerns which could have resulted in the Respondent losing a contract with a client.

28. As to procedure, Ms Wood submitted that there had been an appeal of sorts, although she accepted that it was no more than a written response to the appeal from the same person that made the decision to dismiss.

29. She submitted that the Claimant had failed adequately to mitigate his loss. The Respondent only provides neutral references and the Claimant had provided no evidence of attempts to obtain alternative employment. She maintained that the Respondent had not received any requests for references during the relevant period.

30. I reserved my decision, which I now give.

The law

(1) Ordinary unfair dismissal

31. The law relating to unfair dismissal is contained in section s.98 ERA 1996. In order to show that a dismissal was fair, the employer must show that the dismissal was for a potentially fair reason (s.98(1) and (2) ERA 1996).

32. Where, as here, the employer seeks to rely on incapability as the ground for dismissal, it is sufficient that the employer honestly believes on reasonable grounds that the employee is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent.

33. The employer must produce evidence of poor performance and show that this was its real reason for dismissing the employee (Alidair Ltd v Taylor [1978] ICR 445, CA).

34. If satisfied that dismissal was for a potentially fair reason, the Tribunal must turn to consider the question of fairness by reference to the matters set out in s.98(4) ERA 1996.

35. If satisfied that the employer acted within a range of what is reasonable in the circumstances by reference to the standards of a reasonable employer, the Tribunal cannot substitute a different decision for that of the employer.

36. If the Tribunal considers there has been a breach of procedure sufficient to render the decision to dismiss unfair, it must then determine whether, and if so to what degree of likelihood, the employee would still have been dismissed had a proper procedure been followed. This is a matter relevant to remedy (Polkey v A E Dayton Services Ltd).

(2) Protected disclosures

37. The law relating to protected disclosures is set out in Part IVA of the ERA 1996. Section 43A (Meaning of "protected disclosure") provides:

"In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of section 43C to 43H."

38. Section 43B (Disclosures qualifying for protection) provides, so far as is relevant:

"(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 –
…
(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

39. Section 43C (disclosure to employer or other responsible person) provides:

"(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –
(a) to his employer.

40. This means that in order to be protected, the relevant disclosure must satisfy all of the following requirements:

(a) must be a disclosure of information;
(b) the employee must reasonably believe both that the information tends to show one of the listed matters and that the disclosure is in the public interest; and

(c) the disclosure must be made to an appropriate person (here the employee's employer).

41. Whether an identified statement or disclosure in any particular case meets the required standard will be a matter for evaluative judgment by the Tribunal in the light of all the facts of the case.

42. In considering what it means to say that the worker has a reasonable belief that the disclosure is made in the public interest, there is in effect a two-stage test (applying Chesterton Global Ltd (t/a Chestertons) and another v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731, CA:

(a) at the time of making the disclosure, did the claimant actually believe that the disclosure was in the public interest; and
(b) if so, was that belief reasonable.

43. It was also explained in Chesterton that "*while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it".*

44. In a claim under section 103A ERA 1996, if satisfied that the claimant made a protected disclosure, the Tribunal must ask:

(a) whether the claimant has shown that there is a real issue that the reason advanced by the respondent is not the real reason for dismissal;
(b) If so, whether the respondent has proved his reason for dismissal;
(c) If not, whether the respondent has disproved the s.103A reason advanced by the claimant. If it has not, the dismissal will be for the s.103A reason (Kuzel v Roche [2008] IRLR 530).

(3) Trade union activities

45. Section 146(1)(ba) TULR(C)A 1992 gives workers the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so.

46. 'Trade union services' means services made available to the worker by an independent trade union by virtue of his membership of the union, and references to a worker's "making use" of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member' (section 146(2A) TULR(C)A 1992. If a worker is penalised because his union raised a matter on his behalf, this will be treated as penalising the worker contrary to section 146(1)(ba) (section 146(2B)).

47. The right not to be dismissed on trade union grounds is contained in section 152(1) TULR(C)A 1992. A dismissal will be automatically unfair if the reason or principal reason for the dismissal is that the employee had made use, or proposed to make use, of trade union services at an appropriate time. The

question of whether the employer was reasonable in dismissing does not arise. Once the reason (or principal reason) for dismissal is shown to be one of those specified in section 152(1) TULR(C)A 1992, the dismissal is deemed to be automatically unfair.

48. Where, as here, an employee who alleges that he or she was dismissed for a reason prohibited by section 152 TULR(C)A 1992 has sufficient qualifying service to claim unfair dismissal in the normal way, then the burden of proving the reason for dismissal is on the employer, as it is in an ordinary unfair dismissal claim under sections 94/98 ERA 1996. Where the employer argues that dismissal was for a potentially fair reason, the employee acquires an evidential burden to show – without having to prove - that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason that he is advancing. However, once the employee satisfies the tribunal that there is such an issue, the burden reverts to the employer, who must prove, on the balance of probabilities, which of the competing reasons was the principal reason for dismissal (Maund v Penwith District Council [1984] ICR 143, CA).

Findings

49. The Respondent was not permitted to participate in the hearing on liability and so the Claimant's evidence has not been subject to cross-examination and I have not taken into account the documents submitted by the Respondent in assessing liability. Nevertheless, I have not taken the Claimant's evidence at face value and have considered all matters in the round when reaching my findings.

50. The Claimant provided a detailed and consistent witness statement. His written and oral evidence was supported by documentary evidence. I accept, taking all the evidence in the round, that the key events occurred as claimed by him.

51. On 23 January 2020, Sonia Montero, a caseworker at the Claimant's union, United Voices of the World, wrote an email to the Respondent in which she raised concerns on behalf of three employees (including the Claimant).

52. That email contained disclosures of information which tended to show that the Claimant's managers had failed/were failing to comply with a legal obligation to which they were subject and that the health or safety of the Respondent's employees had been/was being endangered (section 43B(1)(b) and (d) ERA 1996). Specifically, that email raised concerns, amongst other things, that the Respondent had made an unlawful deduction from an employee's wages, had failed to provide sufficient uniforms requiring employees to work in dirty clothes and had required employees to carry out work without training and without sufficient staff, putting them in danger.

53. I accept that the Claimant reasonably believed both that the information tended to show one of the listed matters and that the disclosure was in the public interest. It did not concern only him and raised matters relevant to the safety of other employees and the Respondent's clients more widely.

54. I find that the email on 23 January 2020 amounted to a protected disclosure (section 43A ERA 1996).

55. If I am wrong about that, I also find that by engaging Ms Montero to send the email on his behalf, the Claimant was making use of trade union services within the meaning of section 146(2B) and section 146(1)(ba) TULR(C)A 1992.

56. It does not appear that any response was received to that email in writing, although a telephone call may have taken place between Ms Montero and the Claimant's manager, Mr Costa.

57. I accept the Claimant's evidence that, following this email, Mr Costa began to treat him and his colleague less favourably than other employees by allocating them the most difficult work, giving the Claimant an unjustified warning for lateness and failing to provide him with a replacement van when his broke down. Although the Claimant does not raise specific detriment claims in respect of these incidents, they constitute relevant background evidence.

58. On 7 May 2020, Ms Montero sent a further email on behalf of the Claimant and one other employee. In that email, Ms Montero referred back to the 23 January 2020. She raised concerns on the Claimant's behalf about, amongst other things, the COVID-19 pandemic and the failure of the Respondent to provide members with appropriate information and training, to carry out risk assessments or to provide proper PPE.

59. That email also clearly contained disclosures of information which tended to show that the Claimant's managers had failed/were failing to comply with a legal obligation to which they were subject and that the health or safety of the Respondent's employees had been/was being endangered (section 43B(1)(b) and (d) ERA 1996).

60. Again, I accept that the Claimant reasonably believed both that the information tended to show one of the listed matters and that the disclosure was in the public interest. It did not concern only him and raised matters relevant to the safety of other employees and the Respondent's clients more widely.

61. I find that the email on 7 May 2020 also amounted to a protected disclosure (section 43A ERA 1996) and that in sending that email the Claimant was making use of trade union services within the meaning of section 146(2B) and section 146(1)(ba) TULR(C)A 1992.

62. Mr Costa did reply to this email. He largely disputed the points raised by Ms Montero. He did not set up a meeting or an investigation into the points raised, which might have been a more appropriate, and positive, way to respond.

63. Ms Montero replied again on 22 May 2020, reiterating the concerns raised in the previous communications. This is not relied upon by the Claimant as a protected disclosure. Again, in sending that email, the Claimant was making

use of trade union services within the meaning of section 146(2B) and section 146(1)(ba) TULR(C)A 1992.

64. It does not appear that any response was received to that email.

65. On 27 July 2020, Mr Costa approached the Claimant and challenged him for not responding to calls to his personal phone outside of working hours. When the Claimant replied to say he was not obliged to do so, Mr Costa said words (in Spanish) to the effect of "*if you can use your mobile phone to call your shitty union that is worthless, you can also call me"*. The Claimant's evidence on this was detailed, giving information as to where he was and who else was present at the time, and I accept that it occurred as claimed.

66. This clearly amounts to a detriment within the meaning of section 146(1)(ba) TULR(C)A 1992.

67. On 7 September 2020, the Claimant received a letter from Mr Costa informing him that he was being dismissed with effect from 21 September 2020 on the basis of his performance.

68. No or no adequate investigation had been carried out into the Claimant's competence to carry out his role, the Claimant had not been invited to a formal meeting to discuss any concerns, he had not been informed of his right to be accompanied and he had not been warned that dismissal may be the outcome. In short, no process at all was followed in dismissing the Claimant.

69. I do not accept that the Claimant had been subject to any formal warnings in respect of his performance nor that there was evidence of poor performance that could demonstrate an honest and reasonably held belief that the Claimant was incapable or incompetent. The Claimant does not accept that any warnings were received by him.

70. Even if the Respondent had received complaints about work the Claimant had carried out, it had not carried out any or any adequate investigation to determine whether the Claimant was responsible or culpable. In the circumstances, I find that any such complaints received by the Respondent were no more than an excuse to dismiss the Claimant.

71. Given the background, in which the Respondent had failed adequately to engage with the Claimant's concerns raised by email, had treated the Claimant badly after raising those concerns, had specifically reprimanded him for using his trade union and had failed to follow any sort of process in which the fairness of the dismissal could be properly examined, I find that the real reason for the Claimant's dismissal was because the Respondent was annoyed that the Claimant had raised protected disclosures and that he had used his trade union in order to do so and was punishing him as a result.

72. The Claimant sought to appeal against his dismissal. Mr Costa, who had dismissed the Claimant, replied to that letter but did not put in place any sort of appeal process which could reasonably be held to remedy defects in the

dismissal process. I accept Mr Bennet's submission that this provides additional support for the conclusion that the Respondent was seeking to avoid any independent examination of the real reason for the Claimant's dismissal.

73. In light of my findings above, I do not consider there to be any proper basis for making a Polkey deduction. At this stage, because it is a matter relevant to remedy, I have considered the alleged warnings in the bundle. The Claimant denies receiving them. There is no signature on the warnings from him acknowledging receipt and there are no notes of meetings in which the warnings were given to him. In any event, the two warnings taken together do not come close to establishing reasonable grounds for dismissal.

74. Nor do I accept that the photographs or emails from clients raising concerns about specific jobs are sufficient, by themselves, to demonstrate wrongdoing by the Claimant which would justify dismissal.

Conclusions

75. Applying the findings of fact to the law as set out above, I find that the Claimant was subject to an unlawful detriment contrary to section 146(1) TULR(C)A 1992 on 27 July 2020.

76. I also find that the Claimant was not dismissed for a potentially fair reason and was, in fact, dismissed for the reason or principal reason that he had made use of trade union services at an appropriate time (section 152 TULR(C)A 1992).

77. Alternatively, the Claimant was dismissed for the reason or principal reason that he had made protected disclosures (section 103A ERA 1996).

78. Even if I am wrong about that, the Claimant's dismissal was substantively and procedurally unfair (section 94(1) ERA 1996).

79. Accordingly, the Claimant's claims succeed in their entirety.

80. Ms Wood did not make any submissions challenging the underlying figures used in order to produce the calculations in the Claimant's schedule of loss.

81. This is a case to which section 156(1) TULR(C)A 1992 applies. Accordingly, the Claimant is entitled to a minimum basic award. In the schedule of loss this is claimed in the sum of £6,634. That figures applies where the effective date of termination is on or after 6 April 2021. The effective date of determination in this case was 21 September 2020. Accordingly, the correct sum to be awarded as a basic award is £6,562.

82. The Claimant was paid for the period of notice to which he was contractually entitled. Accordingly, no order is made in respect of notice pay.

83. The Claimant did not work between 21 September 2020 and 1 March 2021. I accept the Claimant's evidence that he was actively looking for work during that period. He explained that he was responsible for supporting his family and

provided details of the efforts he had made to obtain work. Notwithstanding that he did not provide copies of job applications, in light of his oral evidence I do not accept that the Respondent has demonstrated that the Claimant failed to take reasonable steps to mitigate his loss. Accordingly, the Respondent must pay the Claimant the sum of £8,849.94 to compensate him for loss of earnings.

84. The Claimant must also be compensated for the loss of his statutory rights. I make an award of £500 as claimed. In my view, given the relatively short period of time the Claimant was employed, it is not appropriate to make a separate award for loss of long notice. The global figure of £500 covers both loss of protection from unfair dismissal and loss of the accrued right to statutory notice.

85. The Respondent failed to follow any process in dismissing the Claimant. In all the circumstances, an uplift of the compensatory award of 25% is appropriate.

86. In total, in respect of the claim for unfair dismissal, the Respondent is ordered to pay the Claimant the sum of £18,249.43.

87. I accept that an award of injury to feelings is appropriate in respect of the successful detriment claim. The Claimant was understandably upset by that comment and it led him to feel that he was being picked on at work. He was, however, able to continue working for the Respondent and did not raise a specific complaint about this comment, which suggests that it did not have a significantly adverse effect on him. In all the circumstances, I find that this falls within the lower band identified in Vento v Chief Constable of West Yorkshire Police [2003] ICR 318 (as updated) and make an award in the sum of £1,500.

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Employment Judge Smeaton

Date: 28 May 2022

Sent to the parties on:……....

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For the Tribunal Office

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