



# THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant

and

Respondent

Mr K Mallion

Rambler Coaches Limited

Held at Croydon (By video)

On 16 May 2022

BEFORE: Employment Judge Siddall

## Representation

For the Claimant: In person

For the Respondent: Mr N Donoghue

## JUDGMENT

The decision of the tribunal is that:

1. The claim for unfair dismissal under section 103A of the Employment Rights Act 1996 is well founded and succeeds.
2. The claimant is awarded a compensatory award in the sum of £9811.34
3. The Claimant is not entitled to a basic award.
4. The Claimant is awarded a sum of £5000 representing injury to feelings.
5. The total award made to the Claimant is £14,811.34.

## REASONS

1. The Claimant claims that he was automatically unfairly dismissed for making protected disclosures contrary to section 103A of the Employment Rights Act 1996. I heard evidence from him and from Mr Stuart McIntosh, a former contractor engaged by the Respondent. The Respondent had presented two witness statements for directors of the company, namely Mr Fakhar Ahmed and Mr Wajid Manzoor. However neither of them attended the hearing.
2. I had noted from the file that on 11 April 2022 the Respondent had asked for the hearing to be converted to two days and to take place in person rather than by video. The regional judge had decided that the hearing should proceed by video for one day and notice to this effect had been sent out on 6 May 2022. The application for conversion to an in-person hearing was not renewed following that notice. Nor was any application for postponement made in writing prior to the hearing.

3. At the start of the hearing on 16 May 2022 Mr Donoghue made a request for an adjournment. He advised me that the father of Mr Ahmed was currently in hospital. Mr Manzoor is his brother (or brother in law, according to the Claimant) and both were at the hospital. He said that they had advised the tribunal of this by telephone at some point last week. There was no evidence of any written application for postponement on the file, nor was there any medical evidence to confirm the admission of Mr Ahmed's father to hospital.
4. I took note of the Presidential Guidance on Seeking Postponement of a Hearing. That guidance states that an application for postponement should normally be made in writing and copied to the other party and that all relevant documents should be provided. If these requirements are not complied with, the application will not ordinarily be considered unless there are exceptional circumstances.
5. It seemed clear that Mr Ahmed's father had been in hospital for several days given that the Respondent had tried to contact the tribunal last week to inform them of this development. It was therefore not a sudden emergency that had led to Mr Ahmed being unable to attend the hearing. It was also not clear why Mr Manzoor could not attend as there was a dispute between the parties as to his exact relationship with Mr Ahmed. In any event I am aware that if a party contacted the tribunal by telephone to request an adjournment they would normally have been advised to put the request in writing and provide evidence in support. There was no evidence of a written application having been made and nor was any medical evidence available. In the absence of clear evidence as to the basis for the adjournment request I decided that the hearing should continue. The Presidential Guidance had not been followed and there were no exceptional circumstances.
6. I have read and considered the witness statements of Mr Ahmed and Mr Manzoor before making my decision, whilst reminding myself that they were not available to be questioned on what they have written.
7. The facts I have found are as follows.
8. The Respondent provides coach travel for customers. They employ around 25 people. The Claimant commenced employment with the Respondent, on 11 January 2021 as senior mechanic workshop manager. He is a level 3 qualified fitter and had responsibility for the maintenance and repair of the Respondent's vehicles. BH, who was not qualified, was one of the people employed in the workshop. Mr McIntosh was engaged as a contractor on the recommendation of the Claimant from March to July 2021.
9. The Claimant was not impressed with the standards of inspection, testing and quality that he found at the Respondent's business. He raised his concerns with the Respondent on several occasions. I noted the following examples:
10. In emails dated 8 and 9 February the Claimant sets out his concerns about the competence and standard of work of BH.
11. The Claimant says and I accept that he frequently raised the fact that the Respondent's brake rollers had been assessed as not fit for purpose, but that the Respondent refused to replace them. This concern is also referred to in the Claimant's letter of appeal dated 14 August 2021.
12. Both the Claimant and Mr McIntosh described an incident in March when it was their recommendation that some bus tyres be replaced. Their manager, CH, overruled their decision. Both of them expressed their concern about this. They got out a document setting out MOT standards and pointed out to

- CH what these said about when tyres were required to be changed but he did not agree. Mr McIntosh stated that he had not previously experienced 'such significant pushback' from a management team in relation to changing tyres.
13. On 6 March 2021 there was an incident when the Claimant brought his children onto site. Mr Ahmed says in his witness statement that he observed this on CCTV operating at the site. He was concerned that the child was unsupervised and regarded this as a health and safety matter. The Claimant was given a verbal warning.
  14. On 8 April a hairdresser came on site to cut the hair of both BH and the Claimant. This was at a time when hairdressers were not able to operate due to COVID regulations. The Claimant says that BH had booked the hairdresser and that his manager CH gave permission for this person to come on site. I accept his evidence in the absence of any evidence to the contrary from the Respondent. When Mr Ahmed found out, he ordered the hairdresser to leave the site.
  15. Mr Ahmed says in his witness statement that during the Claimant's probation period he became concerned about whether he was maintaining the condition of the vehicles to an acceptable standard. There is however no evidence that Mr Ahmed ever raised any concerns with the Claimant.
  16. On the 12 April 2021 the Claimant raised a formal grievance asserting that monitoring him on the site on CCTV was not lawful and was a breach of his privacy.
  17. I have seen a written statement from BH dated 14 May 2021 which asserted he felt threatened by the Claimant. He described two incidents. In the first, he had been placed in a headlock by the Claimant. In the second, they had been discussing tattoos. The Claimant held up a razor blade. BH says he panicked and moved his arm, and received a cut.
  18. Mr McIntosh observed both incidents. He said that there was frequent verbal and physical 'banter' in the workshop which the Claimant and others, including the manager CH, took part in. In his witness statement he described an incident where CH 'dead-armed' and kicked another member of staff. He said in relation to the headlock incident that the Claimant was responding to BH flicking an object at him. This is confirmed by BH in his witness statement. In relation to the second, he stated that the cut was accidental and that the Claimant treated it afterwards. Neither BH nor the other witness, JG, assert that the cut was deliberate. Mr McIntosh agreed however that BH, whom he described as a vulnerable individual, was upset by the incident.
  19. Mr McIntosh describes one particularly horrifying incident that he was subjected to. He described being doused with brake cleaner by L, an employee of the Respondent and his arm set alight leaving him with hair loss and red skin. He immediately left the site. He contacted CH to report what had happened. CH asked him if he wanted to make a formal complaint. He said that he did not as he didn't want the hassle and was worried that this would jeopardise any future work that he might receive from the Respondent. There is no evidence that the Respondent took any action against the member of staff concerned.
  20. On 20 May 2021 the Claimant was suspended from work on full pay due to allegations of gross misconduct.
  21. On 29 June 2021 Mr Manzoor heard the Claimant's grievance. He confirmed that at that time the Respondent was not registered with the ICO. He agreed

- that the CCTV policy was out of date and would need to be revised. In other respects, the grievance was not upheld and he asserted that monitoring of the Claimant by CCTV had been justified. The Claimant appealed this decision.
22. Mr Manzoor confirms in his witness statement that he conducted the grievance hearing. In the rest of his witness statement he complains about efforts made by the Claimant to contact him through the firm that he worked for, and said that the Claimant had been threatening towards him.
  23. In his witness statement Mr McIntosh stated that while the Claimant was suspended CH contacted him. CH asked Mr McIntosh to make contact with the Claimant and to encourage him to calm down and withdraw a threat he had made of going to the ICO and the traffic commissioner. CH indicated that if the Claimant wrote a letter of apology to Mr Ahmed this would 'close off everything' by which Mr McIntosh understood that the Respondent would drop any disciplinary procedures. I have noted that the Claimant made reference to this communication in his letter to Mr Manzoor dated 11 July 2021 appealing against the grievance outcome. The Respondent has not addressed this allegation in either witness statement.
  24. Mr Ahmed's witness statement asserts that following his suspension the Claimant had put pressure on witnesses to change their accounts about what had happened and also that he had launched a campaign to 'sabotage' the company reputation in the local area. He says that people linked to the Claimant had taken to social media with false information and images purporting to be from vehicles. The respondent provided a couple of examples but does not make clear how these were linked to the Claimant. I have noted also that it is the Claimant's case that the Respondent put pressure on witnesses to provide evidence against the Claimant which I deal with below.
  25. An independent HR consultant, SL was appointed to conduct the disciplinary hearing. An invite letter was sent to the Claimant setting out six allegations against him including poor work, bringing an unauthorised hairdresser on site, physical assault of BH, failing to carry out instructions, communicating with staff when told not to do so and intimidation of staff to write witness statements.
  26. Mr McIntosh supplied a statement to the Respondent about what he had observed but SL did not speak to him. Other statements were provided by CH and by JG who had also witnessed the incidents with BH.
  27. A disciplinary hearing took place on 24 July 2021. I have read the meeting notes which show that SL discussed the various allegations made against the Claimant. He explained what had happened with BH. He provided an explanation of what had happened in relation to the brake callipers. He denied intimidating witnesses, and pointed out that although he had asked JG for a statement, all JG had done was send him exactly the same statement as he had provided to the Respondent, so that there was no evidence that he had changed his statement in any way.
  28. The Claimant recorded the hearing with the permission of SL. He played an excerpt of the hearing to the tribunal during which SL can be heard saying that this was 'not a dismissal case at all' as there was too much banter going on across the Respondent's business and it was not acceptable to pick on one person. SL added however that given the concerns that the Claimant had been raising, which 'she was not saying were wrong', she did not see how the

- Claimant would be able to move forward in a relationship with the Respondent.
29. The Claimant says that he was relieved following the hearing as he did not think he was going to be dismissed. He then received the outcome letter dated 10 August 2021 in which he was advised that he was being dismissed for gross misconduct with immediate effect.
  30. The letter of dismissal states that the reasons for dismissal are: the physical assault on BH; failing to carry out instruction; communicating with staff when not authorised to do so; brake callipers left in a dangerous condition; and intimidation of staff.
  31. The Claimant asserts at paragraph 11 of his witness statement that the directors of the business put pressure on SL to change her decision after the meeting had taken place.
  32. Mr Donoghue asserts that in the extract played to the tribunal SL was not talking about the allegations of gross misconduct. I cannot accept his interpretation of the taped recording: SL's views on the level of seriousness of the allegations are set out very clearly.
  33. On 12 August 2021 BH contacted the Claimant to say that he felt bad. He said that he would provide a further statement to support the Claimant's appeal and he delivered this to his door. By this time BH had left his employment and was working at a new company. The new statement said that he had been pressurised into making the statement and had tried to retract it, but had been prevented from doing so. He said that CH had suggested ways in which his first statement could be improved. Again this is not denied by the Respondent.
  34. The Claimant provided a copy of this second statement from BH to the Respondent alongside his appeal against dismissal. In his appeal letter dated 15 August 2021 he alleged that staff had been coerced into making statements against him. He stated that he believed that he had been dismissed for 'raising issues concerning CCTV and health and safety'. He says that other employees at the company were told he was going to be sacked before the disciplinary took place. He repeated that CH had asked him to retract his grievance on the basis that disciplinary proceedings would then be dropped. His appeal was not acknowledged and no response was received.

## Decision

35. The first question for me to consider is: did the Claimant make qualifying disclosures to the Respondent within the meaning of section 43B of the Employment Rights Act 1996?
36. I find that the Claimant constantly raised concerns about the standard of work in the workshop. Not all of these amounted to qualifying disclosures but I find that:
37. In March 2021 the Claimant and Mr McIntosh asserted verbally that the Respondent was in breach of its legal obligations, namely MOT standards, by refusing to change the tyres on a bus. Their reference to the MOT standards was information that tended to show that a) the Respondent was not complying with a legal obligation and b) the health and safety of an individual

- (such as a person travelling on one of the coaches) was likely to be endangered; and
38. That the Claimant made a qualifying disclosure on 12 April 2021 when he presented a written grievance alleging that the Respondent's monitoring of their staff by CCTV was unlawful and a breach of his privacy. The grievance contains information that tends to show that the Respondent was not complying with their legal obligations in this regard.
  39. I find that these were qualifying disclosures within section 43B.
  40. Was this the reason or principal reason for the Claimant's dismissal?
  41. I note that the Claimant had completed his probationary period and had been told that his performance was good. In his witness statement Mr Ahmed suggests that there were concerns about the Claimant's performance and that confirmation of his employment may have been an error. Shortly before the probationary period ended, the incident relating to the hairdresser had taken place. Mr Ahmed asserts that they sought the advice of their HR solicitor but by the time they responded, the accounts team had moved Mr Mallion onto full salary. Whilst noting this evidence, by this stage the Claimant had been given a warning about bringing his children onto site. If there was real concern about the way in which the Claimant had been doing his job, the Respondent had the opportunity to extend the probation period or refuse to confirm the employment. They did neither. I find that prior to his suspension the Respondent had not raised any concerns with the Claimant about his performance in his role as senior mechanic. I accept however that the Claimant for his part had raised a number of concerns about the standards of maintenance and repair at the workshop.
  42. I accept the evidence of the Claimant and Mr McIntosh that verbal and physical abuse was fairly common at the site and involved a number of people including the Claimant, BH and their manager CH. That said I entirely accept that the actions of the Claimant towards BH were serious. In many situations, an assault by one employee upon another would amount to gross misconduct. There is however not a great deal of dispute about what happened to BH. In relation to the headlock incident, BH agrees that this followed from him flicking an object at the Claimant. There was therefore a degree of provocation. In relation to the second incident it is clear from the first witness statement of BH and the independent evidence from JG that BH's arm was cut when he moved his arm away suddenly. Whilst it is difficult to see how it can ever be right for an employee to wave a blade in the face of a colleague, none of the evidence suggests a deliberate intent to harm BH.
  43. I then come to the involvement of SL. It is common for a business to request an independent person to come in and conduct a disciplinary process, especially in a small company. Sometimes that person will carry out an investigation and present it to the directors for them to make a decision. In this case however the letter of dismissal is signed by SL herself. I find that she was appointed as the decision-maker by the Respondent.
  44. In his witness statement Mr Ahmed asserts that 'whistleblowing is not the reason for Mr Mallion's dismissal, but the reasons within the dismissal letter'.
  45. This brings me to the recording of what SL said at the disciplinary hearing. The extract played to the tribunal demonstrated that at this point SL had reached the clear view that dismissal would not be appropriate in this case due to the level of poor behaviour being displayed throughout the company.

46. Despite the Claimant referring to this in his witness statement and providing a copy of the recording, the Respondent has provided no explanation as to the difference between what SL said in the meeting and the outcome decision issued a couple of weeks later stating that the Claimant was summarily dismissed. SL was not called to give evidence. Mr Ahmed does not comment upon this matter in his witness statement and makes no reference to any discussions with SL occurring after the meeting took place and before the dismissal letter was issued.
47. If a company outsources a disciplinary process to an independent professional they might be expected to abide by the decision that person makes. That appears not to have happened here. For whatever reason, SL changed her mind. The Claimant asserts that they did so because the directors were determined to get rid of him because he had raised numerous concerns about the vehicles and was a whistle-blower.
48. I remind myself that as the Claimant had less than two year's employment it is for him to show what the reason for dismissal was. However in this case the tribunal has not heard evidence from the decision maker. The only evidence as to the reason for dismissal comes from Mr Ahmed's written statement which does not address the discrepancy between what SL said during the hearing and the eventual decision to dismiss.
49. In the absence of such evidence concluded on the balance of probabilities that the Claimant was dismissed because he made protected disclosures. I have reached this conclusion for the following reasons:
  - a. There is clear evidence that it was SL's conclusion that dismissal on the grounds of the allegations of gross misconduct would not be reasonable because of the widespread nature of bad behaviour across the company
  - b. There is no evidence from the company to explain why the outcome decision changed between the disciplinary hearing on 24 July 2021 and the dismissal letter issued on 10 August 2021
  - c. The reasons why the Respondent reached a decision that the Claimant should be summarily dismissed are therefore opaque. There is a conflict between what SL said at the hearing and what is set out in the dismissal letter. The Claimant's assertion that the Respondent had put pressure on SL to change her decision is unchallenged. In the absence of an explanation for the conflict, I find it more likely than not that such pressure was applied.
  - d. The Respondent failed to address the Claimant's appeal which raised a serious matter, namely whether BH had been coerced into making his statement and prevented from retracting it.
  - e. I take into account the difference between the Respondent's treatment of the Claimant for allegations of assault upon a fellow employee and their treatment of L who is alleged to have made a highly dangerous assault upon Mr McIntosh.
  - f. I find that on a number of occasions the Respondent had rejected the Claimant's concerns that equipment was not being maintained properly, for example the brake rollers and the incident relating to tyre changes.
  - g. I also take into account Mr McIntosh's evidence that CH asked him to inform the Claimant that if he withdrew his threat to contact the ICO

and the traffic commissioner and wrote a letter of apology, the disciplinary proceedings would not go ahead. This allegation was brought to the Respondent's attention in the letter of appeal but no response was provided to the Claimant. Neither Mr Ahmed nor Mr Manzoor deal with this allegation in their witness statement. The assertion is therefore unchallenged. I therefore find on the balance of probabilities that the Claimant was told indirectly by his line manager, through Mr McIntosh, that if he dropped his grievances and his threat to report to the ICO and traffic commissioner, he would not be subject to disciplinary procedures. This supports the assertion that the Respondent's real concern was not the Claimant's conduct in the workplace but the fact that he had raised concerns that the Respondent was failing to comply with their legal obligations.

- h. I have taken into account the Respondent's evidence that they had concerns about the Claimant's performance and conduct prior to the complaint by BH; and their allegation that he had tried to intimidate witnesses following his suspension. These are referred to in the letter of dismissal dated 10 August 2021. I find that there is no evidence that the Respondent had raised any concerns about the Claimant's maintenance of vehicles prior to his suspension. His employment had been confirmed at the end of his probationary period. I accept that he had been told at that point that his performance was good. The letter of dismissal refers to the Claimant having left brake callipers in a dangerous condition but this is not referred to in Mr Ahmed's statement and is not evidenced. It is not referred to in a statement that CH provided prior to the dismissal hearing. I have noted that the Claimant provided an explanation of what had happened about the brake callipers to SL at the disciplinary hearing. Her conclusion as expressed at the meeting was that dismissal was not an appropriate sanction. The Respondent is not clear about the way in which the Claimant is said to have threatened witnesses. Mr Ahmed's statement makes assertions about this but does not provide specific details. The witness statements provided by other staff members in relation to the incident regarding BH do not suggest there were attempts to intimidate them. There is nothing in JG's statement for example to suggest that the Claimant had pressured him. Indeed the only specific evidence of pressure being applied comes from the second statement of BH, and is alleged against the Respondent. I have noted that Mr Manzoor's statement says that he felt threatened by the Claimant's attempts to contact him through the firm that he worked for. However having considered all the matters which the Respondent puts forward as the reasons for the Claimant's dismissal, I have concluded that their evidence is outweighed by the other factors which I have outlined above.

50. In summary I find that the Respondent was not happy that the Claimant had continued to raise concerns about the standard of work and equipment in the workshop. I find that their dissatisfaction with the Claimant increased after he raised a grievance in April alleging that the company was in breach of their legal duties relating to monitoring of staff and the right of privacy.



51. I therefore conclude on balance taking the available evidence into account that the Claimant has established that it is more likely than not that the principal reason for the dismissal is that he had made protected disclosures.
52. That said I must also consider whether the Claimant contributed to his own dismissal and I find that he did. Both the Claimant and Mr McIntosh agreed that BH was a vulnerable individual. Mr McIntosh agreed that BH was upset by what the Claimant did, which involved a physical assault. The behaviour might have been commonplace within the workshop, but it must be viewed seriously. I find that any compensation awarded to the Claimant must be reduced by 30% to reflect this.

## Remedy

53. I refer to the Claimant's schedule of loss. He claims past loss of earnings totalling £21006.80 (including pension loss of £807.60 and expenses looking for work of £150). He earned net pay of £501.23 per week from the Respondent. The Claimant was dismissed on 12 August 2021. Following his dismissal the Claimant obtained new employment in Medway Kent from early September. He was employed by that company for around 29 weeks until the end of February or beginning of March. Over this period he earned £15606 (£538.15 per week). However he was incurring additional petrol expenses of £412 per month. He stopped working there when the travelling got too much for him. He has earned £3000 on a self employed basis since then. His net losses to the date of the tribunal hearing, taking into account sums earned but making allowance for his additional petrol costs are £7300. I find that the Claimant made reasonable efforts to mitigate his lost earnings and I award him this sum.
54. The Claimant continues to work on a self-employed basis but he has obtained both a PSV and an HGV licence. He could therefore get a driving job and estimates that he could earn £1700 per month (based on £10 per hour (the rate paid to the Respondent's drivers) and a 40-hour week). On a net basis that would be about £1450 take home pay per month.
55. The Claimant is a well-qualified individual with engineering qualifications and experience in the armed forces. He obtained new employment quickly and has now set himself up as self-employed. He is considering a driving role. This might pay a little less than his previous job but I have no doubt that within 6 months he would be able to find other employment at a salary level equal to that he enjoyed with the respondent.
56. I have therefore awarded him future loss of 26 weeks from today's date which would come to loss of salary and pension at £13,572. From this I have deducted notional earnings from driving of £1450 pcm or £334pw. This gives me a figure of £8684 which I have deducted from £13,572 to reach a figure of £4888 for future losses.
57. I add that sum to the figure for past loss of earnings of £7300 which comes to £12,188.
58. The Claimant seeks an uplift because the Respondent failed to address his appeal. I take note of the fact that the Respondent is a small business with limited financial resources although they were able to obtain the services of an HR consultant in relation to the disciplinary proceedings (which raises the question of why they did not seek advice in relation to the appeal). I do not

- consider that a 25% uplift would be appropriate but I award an uplift of 15% or £1828. I add this to the figure for total loss of earnings of £12,188. That comes to a total of £14016.20 from which I deduct 30% to reach a total compensatory award of £9811.34.
59. In relation to injury to feelings the Claimant says that he was greatly affected by his dismissal. He did not seek the support of his GP for personal reasons that he outlined to the tribunal. He managed the symptoms himself by speaking to his family and exercising.
60. The Claimant sought an award at the top end of the middle band of Vento which I do not consider appropriate given the lack of any medical evidence. I consider that as the Claimant has dealt with the distress he experienced quite robustly on his own, an award in the lower band is appropriate. I award him a figure in the middle of the lower band, at £5000.
61. The total award made to the Claimant is therefore £14,811.34

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Employment Judge Siddall  
Date: 23 June 2022.

Sent to the parties on  
Date: 23 June 2022