EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
M Seeley	**v**	**DHL Services Limited**

Heard at: Watford **On**: 17-21 October 2022

Before: Employment Judge Anderson
J Hancock
E Davies

Appearances

For the Claimant: In Person
For the Respondent: R Dunn (counsel)

JUDGMENT

1. The claimant's claim of whistleblowing detriment is dismissed.

2. The claimant's claim of ordinary unfair dismissal is dismissed.

3. The claimant's claim of automatically unfair dismissal is dismissed.

REASONS

Claim

1. By way of a claim filed on 10 December 2019 the claimant, Mark Seeley, brought a claim of detriment resulting from whistleblowing, automatically unfair dismissal due to whistleblowing and ordinary unfair dismissal, against the respondent, DHL Services Limited. The respondent filed a response on 26 February 2020 denying that the claimant had made public interest disclosures and stating that he was dismissed fairly for conduct reasons. The terms whistleblowing and public interest disclosure are used interchangeably below.

2. The claimant filed two claims due to a concern about the respondent's correct name, but the claims were the same and EJ Spencer ordered on 21 March 2020 that they be consolidated.

The Hearing

3. The claimant represented himself at the hearing. Mr Dunn of counsel represented the respondent. The tribunal was provided with a bundle of 1157 pages. It also received a chronology and cast list from the respondent. These documents had not been agreed by the claimant in advance of the hearing, but he agreed them at the hearing. In addition, the tribunal requested, and received, a copy of the respondent's whistleblowing policy during the hearing. Mr Dunn provided written submissions at the end of the hearing.

4. The tribunal received four witness statements, two from the claimant, one from Mr Lee Westgate, the claimant's line manager, and one from Mr Stephen Gooding, the dismissal appeal manager. All three witnesses gave oral evidence.

5. The claimant said that he had wanted to produce other evidence, but the respondent had failed to include it in the bundle. Mr Dunn said that all of the claimant's documents were in the bundle, even where they were duplicates, in order to avoid any disagreement. The claimant said that he had intended to provide voice recordings of various meetings that were relevant to his claim but that these recordings had been deleted by the respondent as it had hacked his phone and computer. He said that he had reported this as a fraud. The tribunal proceeded on the basis that any matter about documents could be raised during the hearing as it became relevant.

Applications

6. The claimant said that he had requested witness orders and had not received a response from the respondent or the tribunal. He said that he had asked for five witness orders. Mr Dunn said that the respondent had told the claimant that he needed to approach the witnesses first and also that he needed to make an application to the tribunal. On checking the tribunal file, it was clear that the claimant had raised in emails to the respondent and the tribunal that he wanted certain witnesses to attend the hearing, but there was no application for witness orders from the claimant.

7. The claimant applied to the tribunal at the hearing to grant witness orders for Tim Martin, Chief Executive of JD Wetherspoon and Sue Doherty who was the respondent's health and safety manager at the site at which the claimant was based at the relevant time. He said Mr Martin could give evidence that he knew rubbish was being placed on vehicles which were used for food deliveries at Wetherspoon's sites and Ms Doherty could give evidence that a report of the claimant's accident had not been made to the Health and Safety Executive (HSE) at the required time. Mr Dunn said that

Mr Martin was not the respondent's employee and had no part in the claimant's case. He said that the respondent admitted that the report to the HSE was filed late so Ms Doherty's evidence was not necessary.

8. The tribunal advised the claimant that before it could make a witness order he would need to approach the witnesses and ask them to provide witness evidence, and it was only if they declined that a witness order could potentially be made. In order to avoid any delay to the hearing the tribunal went on to consider whether, if the witnesses declined to give evidence and orders were requested, it would be likely to grant either or both orders. The tribunal made the following provisional decision:
    a. Sue Doherty – the Tribunal would not grant a witness order as there was no indication that Ms Doherty could offer evidence that would be relevant to the decision the tribunal would need to make, which was whether or not the claimant made protected disclosures and suffered detriments as a result of that. The respondent admitted that the HSE report was filed late and so the matter was not in dispute.
    b. Tim Martin – the claimant had not made any disclosures to this potential witness. There had been no contact between the claimant and Mr Martin. They had never met. The tribunal decided that it would not grant a witness order in respect of Mr Martin as there was no evidence that he could give which would assist with the decisions it needed to make.

List of Issues

9. Despite there having been a case management hearing and an order that the claimant particularise his protected disclosure claim, there was no agreed list of issues at the commencement of the hearing. The claimant filed a list of protected disclosures and detriments in October 2020. The list was unclear in some respects and Mr Dunn suggested that the first detriment listed should be struck out as it was unworkable. As the respondent, who has been represented throughout, had not sought to agree a list of issues with the claimant, the tribunal declined to consider any applications to strike out parts of the claim at this point. In discussion with the parties the following list of issues was agreed:

    a. Unfair dismissal
        i. What was the reason or principal reason for dismissal? The respondents says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
        ii. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
            1. there were reasonable grounds for that belief;

2. at the time the belief was formed the respondent had carried out a reasonable investigation;
3. the respondent otherwise acted in a procedurally fair manner;
4. dismissal was within the range of reasonable responses.

b. Automatically Unfair Dismissal
   i. Was the reason or principal reason for dismissal that the claimant made a protected disclosure etc? If so, the claimant will be regarded as unfairly dismissed.
   ii. The claimant relies on disclosures and detriments numbers 1 and 4 in the list of protected disclosures and detriments below.

c. Whistleblowing Detriment.
   i. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The tribunal will decide: What did the claimant say or write? When? To whom?
   ii. Did he disclose information?
   iii. Did he believe the disclosure of information was made in the public interest?
   iv. Was that belief reasonable?
   v. Did he believe it tended to show that:
      1. a criminal offence had been, was being or was likely to be committed;
      2. a person had failed, was failing or was likely to fail to comply with any legal obligation;
      3. a miscarriage of justice had occurred, was occurring or was likely to occur;
   vi. the health or safety of any individual had been, was being or was likely to be endangered; the environment had been, was being or was likely to be damaged;
   vii. information tending to show any of these things had been, was being or was likely to be deliberately concealed.
   viii. Was that belief reasonable?
   ix. If the claimant made a qualifying disclosure, to whom did he make it?
   x. What actions did the respondent take or not take that caused a detriment to the claimant?
   xi. If so, were they done on the ground that he made a protected disclosure?

10. The alleged protected disclosures and corresponding detriments relied upon by the claimant are as follows:

Details of Qualifying Disclosure	**Who reported to and when**	**Acts of detriment and or deliberate failure**

		alleged
1. The claimant raised concerns surrounding health and safety concerning sites that he delivered to which were dangerous sites. The issues he complained of concerned kerb heights which meant that it was very difficult to decant the cages (weighing 500KG) up steep slopes. The claimant had to control the cages alone as well as pushing cages of food and drink into packed pubs with customers present. He also raised serious concerns about the collection of rubbish which was rat infested being undertaken on the same vehicle as fresh produce being delivered, contravening health and safety and food standards. The site's complained about were the William Morris site, the Moon on the Square and Christopher Creek sites along with many others.	The Claimant says that he repeatedly told the office clerks (nearly all) and managers (all of them) about these risks during the period April 2016 until his dismissal in September 2019. He frequently wrote details of risks that he had identified on his run sheets which were then provided to the transport office at the respondent. The claimant raised these concerns about the Crockerton Inn site before he had his accident. Before he had his accident on 11 April 2017 he spoke to Vince who told the claimant to get on and do his job. Prior to this the claimant had notified Vince about the dangers of the sites.	As a result of the claimant's reporting, he was subject to bullying and harassment by all the managers including Lee Westgate, Rebecca Hetherington (Dillon) and James Nash. They spoke to the claimant in unpleasant and dismissive tones. Lee Westgate called him at home to insist that he attend a meeting. The claimant felt that no one listened to him at meetings. The claimant wrote to Michael Davidson to request that he had no further dealings with Lee Westgate because of how he spoke to him and the accusations that he made about the claimant following any meetings with him. After the claimant had raised concerns with the safety of sites the claimant was subjected to disciplinary action on a number of occasions.
2.The claimant raised concerns over the failure to report his accident at work to the HSE.	The claimant reported to Lee Westgate verbally during a disciplinary meeting 23rd April 2018. He also discussed his reporting concerns with Scott Dempsey during a disciplinary investigation meeting on 28 June 2018.	The claimant was subjected to a disciplinary hearing. The claimant spoke with Samantha Thorpe on 26 February 2018, he requested sight of his run sheet from the day of the accident to prove that the site where he was injured was dangerous. She said that she would e-mail and request the documents. Disciplinary action was taken against the claimant by Lee Westgate on 23 April 2018. The claimant was suspended for six weeks and given a written warning. The claimant asked Michael Davidson three times whether or not a report had been made to the HSE. Mr Davidson denied this twice and then confirmed that a report had not been made about his accident. The claimant advised that it was a criminal offence to not report the accident.
3.The claimant contacted the HSE about the failure of the respondent to report his	The claimant told Lee Westgate on 23 April 2018 that he had spoken to the HSE concerning his accident and the	During the claimants final disciplinary hearing Scott Dempsey in this meeting told the claimant that if he didn't mention the

accident on 11 April 2017 and other accidents.	respondent's failure to report the same.	conversation regarding the reports made to HSE then he could keep his job.
4. The claimant raised concerns about doing payback shifts and long hours which would breach the health and safety rules for class 1 HGV drivers and class 2 drivers and failed to comply with the adjustments put in place by his GP.	The claimant reported these issues to Alan O Neil (training manager). Alan confirmed that there was nothing he could do. On 12 July 2019 the claimant requested a shorter run with the clerk in the office due to the claimant having worked long hours and was tired. Rebecca Hetherington (Dillon) was present.	The claimant upon his return from a period of absence on 26 February 2018, as a result of an accident at work, was told that he would have to do long hours and all pay backs that were required despite having a fit note for reduced hours. He gave this to Samantha Thorpe. The claimant was told that he would do the 12 shifts and payback shifts and if he was unable to do the 12 hour shifts then he would be put back on sick leave. The claimant mentioned the fact that there were able bodied drivers doing shorter runs. The claimant was then subjected to further disciplinary action and his dismissal on 23 September 2019 after requesting a short run because he was tired due to working long hours and also pay back shifts
5.The claimant tried to raise his concerns about the safety of the sites directly with the Wetherspoon representative Mr Brigden.	The claimant wrote two letters to Mr Brigden. These were sent to him via recorded delivery to the Daventry site and also Watford.	The claimant asked for Mr Brigden to sit in on his disciplinary meeting prior to his dismissal and he was not allowed by the respondent. The claimant thinks that the reason for this was because the claimant would have voiced his health and safety concerns. The claimant does not believe that his letters whatever delivered to Mr Brigden.

Facts

11. The claimant, Mark Seely, was employed by the respondent, DHL services Limited, from 25 August 2004. The claimant worked on a contract that serviced premises belonging to JD Wetherspoon and his base was in Daventry. He was managed by first line managers (FLMs) in the Transport Office at Daventry.

12. On 11 April 2017 the claimant had an accident at work. While making a delivery to a public house he injured his Achilles tendon. The claimant said that he did not at first think the injury was serious and continued on to the next delivery at a second public house before realising that he needed to return to Daventry. The claimant says that he called the Transport Office and spoke to Vince, a manager, to advise of the accident then returned to Daventry and went from there to hospital. He was on sick leave thereafter until 27 November 2017.

13. It is disputed by the respondent that the claimant called Vince before returning to Daventry. On his return to base the accident was recorded by a

manager, John Hammerton, on the relevant forms and it is noted that the claimant had not advised the Transport Office of his injury. The claimant says in his witness statement:

"…I phoned the Transport Office and spoke to Vince and told him that I had an accident, he asked me if I was alright to drive back to Daventry, I stated that it was automatic and if I did not move my leg I might be alright to get back…"

14. The issue is raised by the parties as the respondent says that the claimant did not follow procedure as he did not immediately report his accident. As the respondent took no disciplinary action in relation to the alleged failure to follow procedure the tribunal is not required to make a finding on this point.

15. Drivers are provided with 'run sheets' that set out their deliveries for the day. The claimant has written on the run sheet for 11.4.17 as follows:

    On page 1: *Told Vince Pub 1882 Crockerton Inn won't be able to park in pub in artic/200 yards away/high kerbs/told managers 3-4 times no to be done in artic/They don't care.*
    Parked zoom up RO, hurt ankle, putting cage up kerb (staff know about/my injury).
    On page 2: *Couldn't push cages up slope kitchen staff did it for me/in a lot of pain staff know about my injury.*

16. The claimant said that he wrote the comments on page 1 before he did his run and also that he made further notes on the reverse of the run sheet which he says the respondent has failed to produce. He stated that he wrote comments about health and safety issues on many run sheets and that he had raised these issues at the Crockerton site with Vince many times.

17. The respondent denies that health and safety matters were raised to it on run sheets, or verbally, about this or other sites and notes that there is a proper procedure for recording concerns of which the claimant was aware. The relevant form for that is a driver observation form. The tribunal had before it a driver observation form completed by the claimant on 18 October 2018. The respondent says that the copy of the run sheet for 11 April 2017 found in the bundle is a true copy of the original and that there was no writing on the reverse.

18. The tribunal is not satisfied on the evidence that concerns about the Crockerton site were raised by the claimant on or before 11 April 2017 with Vince, or that comments written on the run sheet had been written before the claimant had an accident. It noted that the photographs of the run sheet provided by the claimant were taken after the accident. A further example provided by the claimant of a run sheet he had annotated says simply 'to

walk long way to deliver driver or pedestrians' which is not evidence of a health and safety issue.

19. Mr Westgate, who was at the relevant time the Transport Manager at Daventry told the tribunal that when an accident occurs the Transport Office completes an accident pack which he reviews and signs. This is then passed to the Health and Safety Manager (at this time Sue Doherty) and a decision is made between the Health and Safety Manager and the General Manager as to whether a report (known as a RIDDOR report) is submitted to the Health and Safety Executive (HSE). Mr Gooding, an operations Manager for the respondent, said that the Transport Office should have alerted the Health and Safety Manager immediately so she could consider whether the matter should be reported to the HSE.

20. The accident pack was produced and was checked and signed by Mr Westgate on 13 April 2017. The respondent was unable to say whether the call from the Transport Office to the Health and Safety Manager was made. The respondent admitted that the claimant's injury should have been reported to HSE using a RIDDOR form within 15 days of the claimant's accident and that it did not do this. The report was submitted on 2 November 2018. Neither of the respondent's witnesses was able to explain why this happened, what had brought the oversight to light or when this had happened. Mr Gooding said there had been an investigation in to the issue and it was concluded it was human error and not a pattern. Mr Gooding said that as a result of the error the HSE visited the Daventry site and reminded DHL of its requirements to report on time.

21. The claimant's contention is that the respondent deliberately refrained from filing a RIDDOR report with HSE and tried to hide this fact from him. This matter is considered further below.

22. The claimant remained on sick leave until 20 November 2017 but because of accrued holiday did not return until early in 2018. He had a number of health review meetings during his absence and adjustments were made on his return so that he was doing little or no driving but acted as a driver's mate. Adjustments were set out in a letter dated 24 November 2017 and were to last for a period of 8 weeks.

23. The claimant commenced a personal injury claim against the respondent in respect of the accident on 11 April 2017, on 6 December 2017.

24. On 23 February 2018 the claimant commenced a grievance in respect of 'pay back hours'. Drivers work annualised hours on a four day a week basis. Where fewer hours are worked than expected, a deficit accrues, wages are not reduced but a driver must 'pay back' those hours. The grievance was concluded on 15 March 2018. It was not upheld. The claimant did not appeal.

25. On 26 February 2018 the claimant asked Samantha Thorpe, an FLM, for some documents relating to his personal injury claim. This was the second time he had asked. Ms Thorpe and a witness said that he had acted in a threatening way in the discussion and had shouted. An investigation into the incident was made by Steven Adlam.

26. On 11 April 2018 the claimant attended a health review meeting with Mr Westgate as he had at this point still not resumed full duties since his return to work. Mr Westgate wanted to make a referral to OH and for the claimant to give access to his GP records. The claimant refused to agree to this until he spoke to his solicitor. Mr Westgate asked for the forms to be returned after the claimant's next set of four working days. On the evening before the meeting Mr Westgate called the claimant at home to check he had received the meeting invitation and would attend the meeting. Mr Westgate gave evidence to the tribunal that this was his usual practice when conducting such a meeting and the tribunal accepts that evidence.

27. The forms were not returned, and Mr Westgate asked Steven Adlam to bring the claimant to a meeting with him on 23 April 2018 to discuss this matter and the claimant's requests for documents relating to his personal injury claim, which he had made to Ms Thorpe and others. The claimant said that he did not wish to attend as he did not like meeting with Mr Westgate who he felt had bullied him in meetings in the past. He was concerned that he had no representation. Mr Adlam told him that it was not a formal meeting and the claimant reluctantly attended.

28. It is agreed between the parties that matters of the OH report and GP consent were discussed, as were the claimant's reduced duties and the claimant's request for documents, including the RIDDOR report of his accident on 11 April 2017. The claimant says that at the outset of the meeting Mr Westgate immediately demanded to see the claimant's letter from his solicitor about his PI claim. He says that he asked Mr Westgate for a copy of the RIDDOR form and Mr Westgate said he would supply it or that it should already have been supplied to the claimant's solicitor. He says that Mr Westgate said the RIDDOR form had been submitted to the HSE. The claimant said he then told Mr Westgate he was a liar because he had already checked with HSE and knew no RIDDOR report had been submitted. Mr Westgate's evidence is that the first part of the conversation was about the OH referral, they then moved on to the RIDDOR report and he had asked to see the solicitor's letter in order to try and understand what the issue was. He said that he did not say that the RIDODR report had been submitted as the claimant had not asked that question. The claimant admits that he called Mr Westgate a liar. Mr Westgate and Steven Adlam gave witness statement on 25 April 2018 in which the claimant is described as being aggressive, shouting, gritting his teeth, defensive, rude and

obnoxious. Both statements note that the Claimant called Mr Westgate a liar in response to a comment made about spare drivers (drivers not allocated a delivery). The tribunal finds that the relevant matter here is that the claimant called a senior manager a liar, rather than which part of the conversation led to the comment, and the parties are in agreement on that fact. Mr Westgate then suspended the claimant due to his behaviour and Mr Adlam escorted him from the premises.

29. The tribunal finds that Mr Westgate was not responsible for the submission of RIDDOR reports and did not know whether the report had been made, but assumed it had. It accepts that he did not say it had been submitted but because he assumed it had been, as evidenced by the fact that he told the claimant that his solicitor would have a copy, the claimant understood him to be saying that it had been.

30. The claimant's evidence is that he had contacted HSE before this meeting and had been told that the RIDDOR report had not been submitted. The evidence in the bundle is that the claimant contacted HSE around September/October 2018 as he received a written response from it on 9 October 2018. Further the claimant wrote to Mr Davidson on 26 April 2018 and stated in that letter that if he was not given the RIDDOR report by the respondent he would ask HSE for it, which indicates that he did not at that point know it had not been filed.

31. The claimant raised a grievance against Mr Westgate on 26 April 2018. This was partly upheld in a decision dated 18 July 2018 in which it was concluded that Mr Westgate should not have asked to see the claimant's letter from his solicitor, though there was no malice or ill intent in the request.

32. Following an investigation, a disciplinary meeting took place between the claimant and Scott Dempsey on 8 June 2018 in which the claimant's behaviour on 26 February 2018 and 23 April 2018 were considered. The claimant was issued with a disciplinary warning in relation to two incidents of misconduct on 26 February 2018 and 23 April 2018 where his behaviour was intimidating and/or aggressive. He was issued with a written warning that would remain open for 9 months. The claimant did not appeal.

33. On 28 September 2018 the claimant had an accident at work in which he strained his back. He was found not to have reported the injury in the proper manner and was suspended on 5 October 2018. Following an investigation, he attended a disciplinary hearing with Paul James on 31 October 2018. Mr James concluded that the claimant had breached the respondent's health and safety policy. He was issued with a final written warning that would remain live for 12 months. The claimant did not appeal.

34. On 8 October 2018 the claimant raised a grievance against Rebecca Dillon, an FLM, regarding a conversation he had with her which he had tried to record, and which she had refused to allow. The grievance was not upheld. It was noted by Michael Davidson, General Manager, in a letter dated 11 October 2018 that company policy prohibited the recording of meetings.

35. On 23 November 2018 Mr Westgate wrote to the claimant about an incident that occurred on 15 November 2018 in which the claimant shouted at Steven Adlam and accused Mr Adlam and Rebecca Dillon of being liars. Mr Westgate noted that the claimant had a live final written warning and stated that he had decided to give only an informal warning. He said that any further breaches of the diversity and respect policy would be progressed through the formal process.

36. On 27 January 2019 the claimant raised a further grievance against Rebecca Dillon over the issue of pay back shifts. He said that his hours were excessive and dangerous. He said she harassed him at every opportunity. Mr Westgate wrote to the claimant on 4 February 2019 noting that the respondent's position on pay back hours had been set out to the claimant previously, Ms Dillon was managing him, as was her job, and that further unfounded grievances would be dealt with accordingly.

37. On 18 February 2019 the claimant emailed the HSE stating that his accident and others at Daventry were not reported to the HSE and the respondent had a disregard for health and safety at all sites.

38. On 20 February 2019 the claimant received a verbal warning due to having three unauthorised absences and therefore reaching a trigger point for the purposes of the respondent's absence policy.

39. On 14 July 2019 the claimant was suspended for aggressive and intimidating behaviour towards Rebecca Dillon. The claimant had requested a short run for the following day and Ms Dillon had refused to provide one. She had offered the claimant a day off instead. He argued about this, and she took him to a different room. Ms Dillon said in a statement to the respondent that the claimant ranted and said that he had recorded many meetings which he would use in court and that he recorded this meeting. A witness noted that the claimant raised his voice and said that managers were liars. Another witness, who was asked to escort the claimant from the premises, said he raised his voice to her.

40. An investigation meeting took place on 6 August 2019, rescheduled at the claimant's request from 2 August 2019. On 21 August 2019 the claimant raised a further grievance against Ms Dillon to Michael Davison and asked to speak to a Wetherspoon representative. He followed up this letter on 4 September 2019 and raised again the matter of the Wetherspoon

representative. HR responded on 16 September 2019 that the claimant could write directly to the Wetherspoon representative (Lewis Brigden).

41. A disciplinary hearing was scheduled for 6 September 2019 and then rescheduled to 23 September 2019 in order that the claimant's preferred union representative could attend. Scott Dempsey, the disciplinary hearing manager, made the decision to dismiss the claimant for a breach of the diversity and respect at work policy, noting that the usual sanction would be a written warning, but the claimant currently had a live final written warning on record.

42. The claimant appealed and his appeal was heard by Stephen Gooding on 17 and 24 October 2019. The appeal hearing was adjourned on 17 October 2019 to allow the appeal manager to carry out investigations including into an allegation by the claimant that Scott Dempsey had said to him that 'if you don't mention what I said to you in previous meetings you may win your appeal'. He said this was bribery. Mr Dempsey denied saying this when questioned by Mr Gooding. He suggested the claimant had misinterpreted his request to provide evidence which might change the nature of the allegations being brought against him.

43. On 24 October 2019 Mr Gooding dismissed the claimant's appeal.

44. The claimant denied throughout the various disciplinary processes and at this hearing that he had ever acted in an aggressive or intimidatory manner. He said that he had recorded many of the conversations in which he was alleged to be aggressive and had intended to disclose these at the hearing, but the respondent had hacked his phone and deleted the recordings. In the disciplinary hearings the disciplinary managers asked the claimant to provide the recordings as he claimed they evidenced his innocence. He said he could not do so as he had to retain them for court. He told the tribunal he meant that he wanted to use them in connection with his PI claim. He said that the witness statements submitted by those who witnessed his behaviour were incorrect or coerced. He said that notes of meetings had been tampered with and his signature forged.

45. The tribunal notes that there are numerous witness statements within the bundle detailing very similar behaviour from the claimant in that he acted aggressively, raised his voice, threatened court action and referred to managers as liars. The tribunal finds that the allegation that the respondent has hacked the claimant's phone or computer to remove specific recordings is without foundation and quite fantastical. The evidence of those who witnessed his behaviour and gave statements for the disciplinary processes is cogent and consistent. The tribunal does not accept that the respondent forced witnesses to make statements that were untrue. There is no evidence for this. The tribunal notes particularly the witness statement of Jo Wright, a

note taker in two meetings with the claimant who said that the claimant's behaviour had affected her to the extent that she had to remove herself from the work area to compose herself after the first meeting and led her to leave the second meeting crying. The tribunal finds that on the balance of probabilities, the claimant's behaviour was as described by the respondent.

46. The claimant said that he believed that all of the managers at the respondent, together with ACAS, his trade union representative and his personal injury solicitor colluded to have him dismissed and stop him bringing a legal claim. And as mentioned above, all witness statements evidencing his behaviour at work were false or coerced. He has provided no substantive evidence whatsoever to support these claims. On the matter of ACAS collusion, for example, his evidence is that the ACAS conciliator gave him an incorrect ACAS number over the phone. The claimant appears not to have considered that either the conciliator made a mistake, or that the claimant himself took down the number incorrectly but instead proposed that it was a deliberate act to scupper his attempts to file a valid claim. The tribunal finds that the claimant's claims of collusion and conspiracy are, at best, without foundation.

Submissions

47. The following is a summary of the submissions made by the parties.

48. Mr Dunn, for the respondent, relied on written submission and made the following points orally. He said that the tribunal had heard from three witnesses who were very different but that the respondent's witnesses had given clear and candid evidence, made appropriate concessions, and admitted when they could not remember events. He said their evidence demonstrated that the respondent had nothing to hide. In contrast the claimant had raised wild conspiracy theories linking ten managers, all witnesses, ACAS, his trade union and Tim Martin in collusion against him. He had failed to make appropriate concessions, for example where leniency had been shown to him. If someone disagreed with him, he said they were lying. Mr Dunn said that the respondent had demonstrated that it had a genuine belief in the claimant's misconduct, that his dismissal was reasonable and if there were any procedural failings the claimant would have been dismissed in any event. Mr Dunn took the tribunal through the reasons why the respondent believed that the protected disclosure case was not made out. He said that even if the tribunal found that there were protected disclosures which resulted in detriment, the detriments were prior to 9 August 2019 and therefore out of time.

49. The claimant denied that he had acted aggressively at disciplinary or other meetings. He said that the respondent had disregarded his health and safety concerns, all it had to do was speak to him, but he had been put in a position whereby he had no choice other than to come to the tribunal. He said that

he had grounds for calling Mr Westgate a liar because Mr Westgate had lied about the filing of the RIDDOR report and the claimant had to endure many meetings where people lied to him. The claimant said that the respondent made out that it was generous to him in terms of time off work but his time off was for physiotherapy and on one occasion was because the weather was too bad for driving.

50. The claimant said that drivers were repeatedly telling the respondent that sites were dangerous and said that in relation to the driver observation form in the disclosure pack no action was taken by the respondent on the matters highlighted by the claimant. The claimant referred to an accident he had when trying to couple a trailer to a vehicle previous to the time covered by this claim and said the respondent had blamed him for it, but it was not his fault. He said he was dismissed because he found out that the respondent had not reported his accident to the HSE. Disciplinary procedures had gone on an on and it was obvious he would eventually be dismissed.

Law

51. Whistle-blowing dismissal
    a. Section 103A Employment Rights Act 1996 provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure as defined in section 43A ERA.

52. Protected disclosure detriment (“whistleblowing”)
    a. The Employment Rights Act 1996 contains the following provisions:

> 43B Disclosures qualifying for protection.
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-
> …
> (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 and safety of any individual has been or is likely to be endangered.
>
> 43C.— Disclosure to employer or other responsible person.
> (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —
> (a) to his employer, …
>
> 43F.— Disclosure to prescribed person.
> (1) A qualifying disclosure is made in accordance with this section if the worker—
> (a) makes the disclosure to a person prescribed by an order made by the Secretary of State for the purposes of this section, and
> (b) reasonably believes—

(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and
(ii) that the information disclosed, and any allegation contained in it, are substantially true.

47B Protected disclosures.
(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

48.— Complaints to employment tribunals.
(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.
(3) An employment tribunal shall not consider a complaint under this section unless it is presented—
(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

53. Unfair dismissal
    a. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.

    b. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

54. Misconduct is a potentially fair reason for dismissal under section 98(2).

55. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

56. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in *Burchell 1978 IRLR 379* and *Post Office v Foley 2000 IRLR 827*. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563*).

Decision and Reasons

Protected Disclosures

Alleged Protected Disclosure 1.

57. That the claimant raised health and safety concerns about deliveries to Wetherspoon's sites to clerks and managers from 2016 to 2019, recorded these on his run sheets and told Vince about the issues at the Crockerton Inn site.

58. The tribunal received no evidence of any potential disclosure other than on the run sheet of 11 April 2017. The comments on the run sheet are vague and not clearly relating to health and safety. The tribunal finds that they do not amount to a disclosure of information.

59. The tribunal has considered whether there is any other evidence of a disclosure on health and safety issues in the bundle and has considered the driver observation sheet of 18 October 2018 as part of that exercise. This is a form on which drivers can raise potential health and safety issues at sites. The respondent has clearly considered and dealt with the matter as shown on the form. This does not constitute a disclosure showing that the health and safety of an individual has been endangered or a failure to comply with a legal obligation.

60. The tribunal concludes that this allegation does not amount to a qualifying disclosure for the purposes of s43B Employment Rights Act 1996.

Alleged Protected Disclosure 2

61. The claimant raised concerns over the failure to report his accident at work on 11 April 2017 to HSE.

62. The tribunal accepts that the claimant raised these concerns on a number of occasions such as at his disciplinary hearing with Paul James on 31 October 2018 as well as at his disciplinary hearing with Scott Dempsey on 23 September 2019, and his appeal meeting on 17 October 2019.

63. The tribunal accepts that the claimant believed that a failure to report accidents to the HSE was a matter of public interest and finds that such a failure would be of sufficient public interest to satisfy the test in *Chesterton Global v Nuromohamed [2017] EWCA Civ 979*. Furthermore, it finds that the claimant believed that the wrongdoing he raised was deliberate rather than inadvertent.

64. This disclosure was a qualifying disclosure for the purposes of s43B Employment Rights Act 1996.

65. The tribunal must then go on to consider whether under s47B Employment Rights Act 1996 the claimant has been subjected to a detriment by his employer on the ground that he had made a protected disclosure. The claimant says that he was subjected to a disciplinary hearing following his discussion with Samantha Thorpe on 26 February 2018 and meeting with Lee Westgate on 23 April 2018, also that he was suspended following that meeting. The tribunal finds that the reason for the disciplinary hearing and suspension were the claimant's behaviour on these two dates and not any disclosure he had made. Furthermore, it does not accept that such a disclosure had been made at the time of these two claimed detriments. The claimant claims that his contacts with Mr Davidson about the submission of the RIDDOR report were a detriment. Correspondence about the submission of a report is not detrimental treatment.

66. The tribunal does not find that the claimant suffered a detriment as a result of raising his concerns that a RIDDOR report had not been submitted to HSE regarding his accident on 11 April 2017.

Alleged Protected Disclosure 3

67. That the claimant contacted the HSE about the failure of the respondent to report his accident and other accidents.

68. The claimant claims to have called the HSE to ask if his accident had been reported. Such a call would not be a qualifying disclosure.

69. HSE wrote to the claimant on 9 October 2018 confirming that he had raised with them that the accident was unreported, and it had contacted the respondent to remind it.

70. The tribunal accepts that the claimant believed that a failure to report accidents to the HSE was a matter of public interest and finds that such a failure would be of sufficient public interest to satisfy the test in *Chesterton Global v Nuromohamed [2017] EWCA Civ 979*. Furthermore, it finds that the

claimant believed that the wrongdoing he raised was deliberate rather than inadvertent.

71. This disclosure was a qualifying disclosure for the purposes of s43B Employment Rights Act 1996 and also meets the requirements of S43F in that it was a disclosure to a prescribed person.

72. The tribunal must then go on to consider whether under s47B Employment Rights Act 1996 the claimant has been subjected to a detriment by his employer on the ground that he had made a protected disclosure. The claimant says that the detriment he suffered was that during a meeting with Scott Dempsey at which the claimant was dismissed on 23 September 2019 Scott Dempsey tried to bribe him to keep quiet about the respondent's alleged failings to report the accident. The tribunal has already found that Mr Dempsey did not make such an offer and the tribunal's decision is that the claimant did not suffer any detriment because he contacted the HSE.

Alleged Protected Disclosure 4

73. That the claimant raised concerns about health and safety in relation to long hours and the respondent failed to comply with adjustments suggested by the claimant's GP.

74. The claimant has provided no information about whom this disclosure was made to or details of its content except as follows: that he made it to Alan O'Neil, a manager, on an unspecified date and that on 12 July 2019 he requested a short run because he was tired in the presence of Rebecca Dillon. There is no evidence to support the disclosure to Alan O'Neill. There is no detail about what, specifically, the disclosure was, and the conversation in front of Rebecca Dillon was a request. The tribunal does not accept that there was any duty on the respondent to provide adjustments suggested by the claimant's GP and this is, in any event, not a matter of public interest but is particular to the claimant.

75. The tribunal concludes that this does not amount to a qualifying disclosure for the purposes of s43B Employment Rights Act 1996.

Alleged Protected Disclosure 5

76. That the claimant tried to raise his concerns about health and safety with the customer JD Wetherspoon.

77. The tribunal found that this allegation made no sense as an alleged protected disclosure. It cannot be a disclosure that he tried to raise something. The claimant did in fact raise his concerns with Wetherspoon, but this was after he was dismissed. Before he was dismissed, he was explicitly told by the respondent that he could raise concerns with Wetherspoon. The alleged detriment claimed by the claimant is that he was prevented from having a Wetherspoon representative attend his disciplinary meeting. This alleged detriment took place before he made any disclosure to Wetherspoon.

78. The tribunal concludes that this does not amount to a qualifying disclosure for the purposes of s43B Employment Rights Act 1996.

79. The claimant's claim of detriment due to making protected disclosures is dismissed.

Time

80. The respondent's case is that all acts (detriments) before 9 August 2019 are out of time as they took place more than three months (plus early conciliation time) before the claimant filed his claim. The tribunal has found that the claimant either did not make the disclosures alleged or where he did, he did not suffer a detriment, however, its decision is that had it found in the claimant's favour in relation to any of the five allegations, the detriments relied upon were out of time. The claimant's only evidence on why the tribunal should extend time was that he was in employment at the time, i.e. that he could not bring a claim until he was dismissed. The tribunal does not accept that the claimant's continuing employment meant that it was not reasonably practicable for him to bring a claim in time. The claimant had raised complaints with many managers, instigated various grievances and was actively pursuing a personal injury claim with the help of a solicitor. He could have issued a timely whistleblowing claim in this tribunal.

Unfair dismissal

81. The question the tribunal need to answer is whether the dismissal was fair or unfair. This is a two-stage process. The first stage is for the respondent to show a potentially fair reason for dismissal, and secondly if that is achieved, the question then arises whether dismissal is fair or unfair.

82. Section 98 of the Employment Rights Act 1996 identifies a number of potentially fair reasons for dismissal which include at s98(2)(b) the conduct of the employee. The tribunal is satisfied on the evidence that the Claimant was dismissed for misconduct.

83. At the outset of the hearing the claimant confirmed that the claim he was making was that the dismissal was unfair because the respondent had intended to dismiss him since he had called Mr Westgate a liar on 23 April 2018 and because it did not want him to speak to its customer JD Wetherspoon. As the respondent did not dismiss the claimant after calling Mr Westgate a liar or in relation to a number of subsequent misconduct matters and because it did not, and could not have, stopped the claimant speaking to Wetherspoon, the tribunal finds that there was no reason for the claimant's dismissal other than the respondent's belief in his misconduct. Furthermore, the tribunal notes that in oral evidence the claimant agreed that the decisions of both Mr Dempsey and Mr Gooding were made on the basis of the evidence before them.

84. The second stage as set out at s98(4) of the Employment Rights Act 1996 is to consider whether the dismissal was fair or unfair. In misconduct dismissals, there is well-established guidance for tribunals on fairness within section 98(4) in the decisions in *Burchell 1978 IRLR 379* and *Post Office v Foley 2000 IRLR 827*. The tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case the tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances.

85. The tribunal is satisfied that the respondent had a genuine belief in the claimant's misconduct. The claimant raised his voice to a manager on 14 July 2019. He recorded the discussion and talked about other recordings he had made which he would use in court, and which was contrary to the respondent's policy. He referred to managers as liars. This behaviour was witnessed by a number of employees who made statements. The behaviour followed a pattern of behaviour displayed by the claimant over the preceding two years.

86. The tribunal must then consider whether the respondent's genuine belief in the claimant's misconduct was based on reasonable grounds and after carrying out a reasonable investigation.

87. Ms Dillon made a statement about the events of 14 July 2019. In addition, statements were made by D Kucharczyk, M Tandy, R Pengelly and A Goddard. These either corroborated Ms Dillon's account or were neutral to it. The claimant said in oral evidence that there was no-one else he could suggest that should have been interviewed as part of the investigation.

88. The tribunal finds that the investigation into the incident was adequate and reasonable.

89. Following the investigation, the claimant was invited to a disciplinary hearing, he was given the opportunity to be accompanied and the meeting was rescheduled to allow for his chosen representative to attend. After the respondent dismissed the claimant, he was given the opportunity to appeal the decision. He attended a hearing with the appeal manager and again had his trade union representative with him at the meeting. The appeal manager adjourned the appeal hearing to investigate further some points that the claimant had raised before reconvening to make his final decision.

90. The tribunal finds that the disciplinary process carried out was reasonable.

91. It must then consider whether the decision to dismiss was within the range of reasonable responses. Mr Dempsey is clear in his decision that the

incident of 14 July 2019 taken alone would have resulted in a written warning but notes that the claimant was subject to a live final written warning and also that he had been given an informal warning on conduct in November 2018, when the respondent had grounds to take formal action. It is not the place of the tribunal to look into warnings and decision made prior to the process which led to the claimant's dismissal (*Davies v Sandwell [2013] EWCA Civ 135*), particularly where the claimant has not appealed those prior decisions. Mr Gooding confirmed in oral evidence that he had taken both the claimant's record of the 15-year duration of his employment into account, and the history of disciplinary actions brought since June 2018. A contravention of the diversity and respect at work policy is potentially gross misconduct as set out in the respondent's disciplinary policy. The tribunal finds that the decision to dismiss the claimant was one that was open to the respondent on the evidence.

92. The tribunal concludes that the dismissal of the claimant by the respondent on 23 September 2019 was fair, and the claimant's claim of unfair dismissal is dismissed.

Automatically Unfair Dismissal

93. In order to succeed in a claim of automatic unfair dismissal the claimant must show that the principal reason for his dismissal was that he made a protected disclosure. As the tribunal has found that the respondent was dismissed for misconduct relating to his behaviour on 14 July 2019 and being subject to a final written warning due to a breach of health and safety policy, the claim of automatically unfair dismissal does not succeed.

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Employment Judge Anderson

Date: 7 November 2022

Sent to the parties on: 29.11.2022

GDJ
For the Tribunal Office