EMPLOYMENT TRIBUNALS

Claimant: Mr Simon Grimshaw

Respondent: Ocado Central Services Ltd

Heard at: Watford Employment Tribunal
On: 15, 16, 17, 18, 19 and 20 January 2023

Before: Judge Bartlett, Mr Boustred and Ms Johnstone

Representation:

Claimant: in person
Respondent: Mr Lawrence

RESERVED JUDGMENT

1. The claims for holiday pay is dismissed by consent.

2. The claimant's claims for constructive unfair dismissal under s98 of the Employment Rights Act 1996 fail in their entirety.

3. The claimant's claims to have been unfairly dismissed under 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 fail in their entirety.

4. The claimant's claims to have suffered detriments under s146 of the Trade Union and Labour Relations (Consolidation) Act 1992 fail in their entirety.

5. The claimant's claims to have been unfairly dismissed for a reason connected to a protected disclosure (whistleblowing) under s103A of the Employment Rights Act 1996 fail in their entirety.

6. The claimant's claims to have suffered a detriment under s47B (whistleblowing) of the Employment Rights Act 1996 fail in their entirety.

Reasons

The Hearing

7. The hearing took place in person and all the witnesses attended the tribunal centre. The morning of the first day was concerned with dealing with the process of the hearing and reading in. The witness evidence commenced in the afternoon with the claimant's witness evidence. This continued into the morning of the second day. Then the respondent called its witnesses who were Mr Mumin, Mr Peterson, Mr Bartlett and Mr St Pierre.

8. At the start of the hearing the claimant started to refer to without prejudice correspondence and he was promptly informed by Judge Bartlett that the tribunal was not permitted to hear or consider discussions that were without prejudice. Nothing further was said on this.

9. When he was giving evidence, the claimant did not agree that the extracts from the recognition agreement of Ocado with USDAW contained in the bundle and Mr Bartlett's statement were accurate. He was asked to bring his copy of the agreement into the tribunal the next day if he thought this was different. The next day confirmed that the extracts in the bundle witness statement were the same as the copy he had.

The Issues

10. Two CMRs were held in this case. The latest of which took place in June 2022. The orders from the latter CMR set out that "The list of issues as discussed and agreed at this hearing is attached." The list of issues is a lengthy document including many allegations under the three main headings of:

    10.1. constructive unfair dismissal;

    10.2. detriment and/or dismissal for Trade union activities; and

    10.3. detriment and/or dismissal for making a protected disclosure.

    It was not considered that the list of issues was particularly helpful in this case though it is noted that the CMR orders refer to a lengthy discussion having taken place at the CMR.

11. There was some discussion of the list of issues at the start of the hearing and the following relatively minor amendments were made. These amendments were made because the claimant cannot rely on his own behaviour as part of the alleged behaviour of the respondent which the claimant alleges breached the duty of trust and confidence. Therefore, the list of issues was amended for the above reason to remove the following issues under paragraph 1 of the list: (f), (h), (i) and (j).

Constructive Unfair Dismissal pursuant to Section 98 Employment Rights Act 1996

1) Did the Respondent's treatment of the Claimant amount to a breach of any express or implied term in the Claimant's contract?

The Claimant relies on the following alleged breaches:

a) *Arranging for Gary Petersen to chair an investigation meeting on 28/12/2018 despite Gary threatening to take disciplinary action against the Claimant if he refused to reveal the source of the information which the Claimant says was provided to Gary on 24/12/2018;*
b) *Removing the Claimant's credentials as both an Usdaw and Council Representative from the staff notice board;*
c) *Arranging for Phil St Pierre to chair the disciplinary and grievance procedures and refusing to change the chair despite Phil's previous history with the Claimant and/or Phil's personal and business relationship with Steven Bartlett (Enfield Spoke Ops Manager);*
d) *Refusing to deal with the disciplinary and grievance as a separate process;*
e) *Phil St Pierre regularly breaking health and safety and site rules, namely failing to ensure visitors were wearing correct PPE, using Marshals to take his personal car through the company van wash and detailing it afterwards;*
f) *The Claimant's prior knowledge of managers ignoring company policy when considering disciplinary and grievance issues;*
g) *Animosity towards the trade union, such as frequently referring to the Claimant's trade union USDAW as 'Useless Skiving Dickheads Avoiding Work';*
h) *The Claimant was instrumental in creating 'WhatsApp' groups both regionally and nationally to highlight failures in H&S leading to issues with management when raising issues across the company;*
i) *In his role as H&S Representative, the Claimant encouraged Chargehands to report H&S failings on LGV's to Paul Clem (Head of H&S) via an Ocado email address. The Claimant also reported H&S failing in this way;*
j) *In his role as H&S Representative, the Claimant encouraged Marshals & CSTMs (drivers) to report overweight vehicles;*

k) *The Respondent's efforts to preclude CSTMs from receiving representation during the disciplinary processes;*
l) *Being informed by Steve Bartlett that he could not progress within the company 'as long as [he] was union';*
m) *The Claimant's failure to progress through assessment centers, even though he was within the top 10% performing employees on on-line and in-house assessment. The Claimant was provided with no or limited feedback following these assessment centers;*
n) *Being challenged by Roya Anderson (Regional Ops Manager) as to whether there was a need to challenge Ocado on every disciplinary process despite this being a decision for the union member/employee. The Respondent's employees were entitled to representation and the Claimant's professionalism when carrying out this role was sometimes misunderstood by the Respondent's managers including Gary Petersen, Nicholas Hill, Shaik Uddin and Sergio;*
o) *Falsifying roster records to schedule a meeting when the Claimant was not scheduled to work;*
p) *Failure to allow the Claimant to offer dates for meeting as per ACAS Code of Practice;*
q) *Allowing Anwar Mumin and McDonnel Stewart (Team Managers) to be involved in the investigation process despite consoling the alleged victim;*
r) *Proceeding with the investigation meeting without an Usdaw official representative being present;*
s) *Not being provided with all pages of the allegation against him by Gary Peterson during the investigation process;*
t) *Ischim Silvu (Regional Development Team Member) informing his brother-in-law (Constatin) that the Claimant would be sacked for sexual misconduct following the investigation meeting resulting in Chinese Whispers being spread about the Claimant and destroying the Claimant's credibility.*

2) If so, did they amount to a repudiatory breach?

3) Did the Respondent's breach cause the Claimant to resign?

4) Did the Claimant affirm the contract, thus losing the right to claim constructive dismissal?

Detriment and/or dismissal for Trade Union activities – s. 146 and s.152 TULRCA 1992

5) What trade union activities was the Claimant taking part in?

   a) Representing colleagues in disciplinary meetings [dates to be provided];

   b) Carrying out health and safety investigations [dates to be provided].

6) When did the Claimant take part in these activities?

7) If so, was this an appropriate time?

8) If so, was the Claimant subject to detriments for taking part in these trade union activities?

The Claimant relies on the following alleged detriments:

a) Being threatened with disciplinary action by Gary Petersen if he failed to disclose the source of his information;

b) Animosity towards the trade union, such as frequently referring to the Claimant's trade union USDAW as 'Useless Skiving Dickheads Avoiding Work';

c) Telling the Claimant that "we can't run this business around you" in relation to the Claimant acting as a representative to the Respondent's employees and requiring the Claimant to adjust his work rosters so he can attend disciplinary hearings in his capacity as trade union representative

d) 'You will tell me where you got this information from, or you will be brought up on a disciplin ary this information is for management only' GP on 24/12/2018 relating to information prov ided to me by MS, Team Manager, in relation to overweight vans due to go out on 24/12/20 18. It is clear to me that these vans would have been allowed to depart had I not raised this i ssue after all managers had this information from the previous evening and no effort had be en made to reduce the weights of these vans prior to my raising this issue. When I stated I w ould only divulge the information within a disciplinary process this threat was dropped. Even tually Marshals were allocated to the overweight vans and customer orders were removed t o ensure weight compliance prior to leaving site on 24/12/2018.

e) Marshal routes were regularly overweight, as easily obtained evidentiary evidence was avail able, to ensure compliance with van weight limits as and when issues were raised however n ot all vans were ever captured and management always had access to weight load data the evening prior to van dispatches.

f) The issue of representation at disciplinary meetings was never fully resolved and required the claimant to frequently adjust his work roster to accommodate disciplinary meeting, at no ti me did the respondent ever agree to rearranged meetings to be scheduled around worker/R ep availability as per ACAS Code of Practice, this frequently led to fractious discussions with t eam managers as per highlighted team manager comment 'We can't run this business aroun d You' becoming a regular occurrence along with the statement CSTM's were placing on thei r invitation letters having to request representation in formal meetings.

9) If so, was the sole or main purpose of the detriments to prevent of deter the Claimant from taking part in the activities or an independent trade union at an appropriate time or to penalising him for doing so?

10) Was the Claimant dismissed because he had taken part, or proposed to take part, in the activities or an independent trade union at an appropriate time?

Detriment and/or dismissal for making a protected disclosure?

11) Did the Claimant make a disclosure, or disclosures of information, as alleged below, which:

a) in his reasonable belief, tended a show that the health or safety of any individual has been, is being or is likely to be endangered and or failure to comply with a legal obligation? (s.43B(1)(b) and / or (d) Employment Rights Act 1996, "ERA");

b) in his reasonable belief, was in the public interest?

The Claimant relies on the following alleged disclosures:

c) photographic evidence and excel spreadsheets detailing serious breaches of health and safety In unsecured LGV which the Claimant provided to Paul Clem and Steven Bartlett [dates to be provided];

d) *concerns about overloaded Marshal routes and the need for adjustments – made to Nick Hill, Gary Petersen, Sergio, Shaikudding [dates to be provided];*

e) *information provided by the Claimant to Gary Petersen on 24 December 2018 relating to overweight vans ready for dispatch*

12) Was the Claimant subjected to detriments in the following ways, and if so, were any or all of the alleged detriments on the ground that the Claimant had made one or more protected disclosures (contrary to s.47B ERA)? Following *NHS Mancheser v Fecitt and others [2012] IRLR 64*, did the protected disclosures (if made) "materially influence" the detrimental treatment:

The Claimant relies on the following alleged detriments:

a) *Being threatened with disciplinary action by Gary Petersen if he failed to disclose the source of his information;*
b) *Failing to divulge formal remedial action taken in relation to health and safety matters to the Claimant in his role as a health and safety representative;*
c) *Precluding the Claimant from taking part in investigations relating to health and safety matters;*
d) *Placing CSTMs in a position which meant that they would be responsible in law in the event of a incident occurring thereby risking their livelihoods, possible imprisonment and emotional stress/trauma;*
e) *Chinese Whispers being spread around site suggesting that the Claimant would be dismissed for sexual harassment;*
f) *Arranging for Phil St Pierre to chair the disciplinary and grievance procedures and refusing to change the chair;*
g) *Refusing to deal with the disciplinary and grievance as a separate process;*
h) *Removing the Claimant's credentials as both an Usdaw and Council Representative from the staff notice board;*
i) *Treating the Claimant's resignation as being with immediate effect; and/or*
j) *Changing the Claimant's roster to bring the Claimant into a disciplinary meeting when there was no legal right to do so.*
k) *precluding the Claimant from being involved in and carrying out investigations into health and safety matters relating to Arkadiuz Madjeski and Hardeep Oberoi*

13) In determining whether the Claimant was automatically unfairly dismissed (s.103A ERA), was the reason or the principal reason that he had made the alleged protected disclosures outlined at paragraph 11 above?

12. The list of issues in the bundle then goes on for several more pages and appears to be contained in an email from the claimant. I will not set out all of that here but I will set out the following:

As An USDAW Workplace representative I conducted in excess of one hundred meetings, probably two hundred, at every stage these were challenged by management. Judge Maxwell in our meeting only asked for one.

Photographic information, detailed and provided to Paul Clem, Steven Bartlett (including informal discussions) began at least on 14//02 2018 detailing deficiencies within the control of the respondent. These were not only actioned by myself but were also actioned by other chargehands, given my active response to the respondent failing to disclose under the trade union agreement between Ocado and USDAW, my last photographic evidence was on 23/122018), all breaches are photographically documented including trailer/ Tote No's ie, (this list is not exhaustive)

- DT4-429-837, 23/12/2018
- DT4-401-758, 21/12/2018
- Trailer No. AM 7840/CL7840 on 09/12/2018
- Trailer No. AM7742/CL7742 on03/12/2018

The Evidence

13. The Tribunal heard oral evidence from:

13.1. The claimant;

13.2. Mr Anwar Mumin (Team Manager);

13.3. Mr Gary Peterson (Team Manager);

13.4. Mr Steve Bartlett (Operations Manager Enfield); and

13.5. Mr Phil St Pierre (Operations Manager Hatfield).

The Law

Constructive dismissal

14. When deciding if an employee was constructively unfairly dismissed pursuant to section 95(1)(c) of the Employment Rights Act 1996, a Tribunal must consider the following:

14.1. Did the Respondent commit an act or series of act which cumulatively amounted to a breach of the implied term of trust and confidence?

14.2. If there was a series of cumulative acts, what was the last straw?

14.3. Did the Claimant resign in response to that breach?

14.4. Did the Claimant delay too long before resigning?

14.5. Was there a fair reason for the dismissal?

15. The Court of Appeal provided helpful guidance on the last straw doctrine in *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, [2018] IRLR 833* when it approved the comments made by Dyson LJ in *Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493*:

"19. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I

do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred."

Dismissal and/or Detriments for Trade Union Activities s146 and 152 TULCRA 1992

16. Section 146 TULCRA 1992 requires that the worker in question has been subjected to a detriment by an act or deliberate failure to act by the employer. The term detriment is not defined however it is actions short of dismissal and it should be given a wide meaning. In *Yewdall v Secretary of State for Work and Pensions* UKEAT/0071/05 *(19 July 2005, unreported)* the EAT suggested that, like discrimination law, there is an initial burden on the claimant to show a prima facie case. In Serco Ltd v Dahou [2016] EWCA Civ 832 the Court of Appeal cited *Yewdall* with approval, stating that 'the burden of proof only passes to the employer after the employee has established a prima facie or arguable case of unfavourable treatment which requires to be explained'.

17. Section 152 TULCRA 1992 sets out:

"(1)For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee (b)had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time"

Whistle blowing - Dismissal and/or Detriments for making a protected disclosure s47B ERA 1996 and s103ERA 1996

18. The ERA 1996 s 103A sets out 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'.'

19. In a case of automatic unfairness such as under s 103A, the burden of

proving the reason or principal reason remains on the employer

20. The whistleblowing must have been the reason or principal reason for the dismissal. S47B ERA 1996 (in relation to detriment for whistleblowing) and s103A ERA 1996 require that two different tests are used.

21. In a detriment case the test is whether the detriment was 'on the ground that the worker has made a protected disclosure', this means that the disclosure must have been 'a material factor'.

22. In a dismissal case, the test is more stringent, namely whether the whistleblowing was '*the* reason (or, if more than one, the *principal* reason) for the dismissal'. An employee will only succeed in a claim of unfair dismissal where the tribunal is satisfied that the 'principal' reason is that the employee made a protected disclosure. In Lord Denning MR in Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA set out that the principal reason is the reason that operated on the employer's mind at the time of the dismissal. If the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, the employee's claim under S.103A will not succeed. As Lord Justice Elias confirmed in Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA, the causation test for unfair dismissal is stricter than that for unlawful detriment under S.47B. A detriment claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker, whereas S.103A requires the disclosure to be the primary motivation for a dismissal.

23. We also took note of El-Megrisi v Azad University (IR) in Oxford UKEAT/0448/08 (4 June 2009, unreported) in which the EAT held that where an employee alleges that she has been dismissed because she made multiple public interest disclosures, s 103A does not require a tribunal to consider each such disclosure separately and in isolation, as their cumulative impact can constitute the principal reason for the dismissal. In that case some of the disclosures took place more than three months before the claimant's dismissal. We must consider whether that cumulative impact was the principal reason for the dismissal.

Findings of Facts and Decision

General

24. The claimant was employed by the respondent from 30 June 2014 until the end of his employment on 13 February 2019 following his resignation letter on 17 February 2019. Sometime in 2016 he became an USDAW representative at the Enfield "spoke" or site at which he worked.

25. On 27 December 2018 the appellant slapped the bottom of a work colleague, Lauren. We were showed CCTV footage of the incident and the claimant accepted that he had acted in this way. It took place in a public part of the respondent and it was not predatory.

26. On 27 December 2018 the claimant was suspended pending a disciplinary

investigation. The disciplinary process was proceeded by an initial investigation meeting with the claimant on 28 December 2018. The claimant submitted a grievance on 7 January 2019 resigning on 17 January 2019. The respondent dealt with the grievance and disciplinary processes together. A number of meetings were scheduled but the claimant did not attend any and he was sent an outcome of the grievance on 14 May 2019.

Constructive Dismissal

27. We make the following findings of fact by reference to the list of issues:

27.1. 1(a) - it was not disputed that Mr Peterson chaired an investigation meeting on 28/12/2018. The respondent disputed that Mr Peterson had threaten to take disciplinary action against the claimant in a discussion on 24 December 2018.

We find that the claimant and Mr Peterson had a robust discussion on 24/12/2018 which arose form the claimant raising an email about overloaded vans which he had been given by a different team manager.

We find that the claimant was focused on the overloaded vans and Mr Peterson was focused on the how the claimant had a copy a confidential email which was sent to the Team Managers. The email detailed overloaded vans for that day. Mr Peterson's evidence, which we accept, was that this email notification was sent to the Team Managers so that they made arrangements to deal with the overloading. We accept that the managers were taking steps to deal with the overloading such as removing drops. Several witness addressed this issue and explained that it was a straightforward process. We do not accept that the respondent took no action because the email was to alert managers to the problem so that it could be resolved. If overweight vans were sent out this could have very serious repercussions for all involved and we did not consider that the witnesses from the respondent would have exposed themselves and others to such serious negative consequences. They presented as professional and process driven with the skills and knowledge to deal with the situation.

We do not accept that Mr Peterson threatened the claimant with disciplinary action. We find that Mr Peterson used the word disciplinary and that he said that an investigation might be needed into the source of the email. Mr Peterson took no further action after the meeting in relation to the email and neither party had any expectation that he would take further action. If Mr Peterson had intended to take further action, we consider that he would have taken steps to initiate it quickly and not wait several days. No action was initiated by the time of the claimant's suspension on 27/12/2018.

27.2. 1(b) in the ET1 the claimant asserted that "*within two weeks of my suspension my credentials were removed from both the USDAW and Ocado council noticeboard*". However in his letter to the respondent dated 20 March 2019 raising further issues in the grievance procedure he states "*Almost immediately I tendered my formal resignation my credentials*

were removed from both the USDAW and Council noticeboards". The claimant's witness statement partially addresses this issue and states that he was informed about his credentials being removed after his suspension. It is unclear what time frame he is referring to but it is assumed he means prior to his resignation. The respondent's witnesses did not have any knowledge of the issue. We rely on the claimant's letters dated 19 February and 20 March 2019 in which he states it happened after his resignation. We prefer these documents because they are closer in time to the events than the evidence before the Tribunal.

Further, the claimant does not refer to this issue in his grievance on 7 January 2019 or his resignation. Therefore, we find that this cannot amount to a breach of the duty of trust and confidence because the claimant cannot establish that it occurred before his resignation;

27.3. 1(c) it was not disputed that Mr St Pierre chaired the disciplinary and grievance meetings and the respondent did not change the chair despite requests from the Claimant. We note that the respondent said they would change the chair but did not. However, this took place after the claimant's resignation.

In the first two invitation to disciplinary meeting letters, the chair of the process was Dwayne Chesmayne. Mr St Pierre was not identified as involved in anyway or the chair of the process until the invitation letter dated 14 January 2019. On 17 January 2019 the claimant resigned and raised concerns that Mr St Pierre had a conflict of interest. It was only after the claimant's resignation did he request a change of chair and the respondent fail to action this. The respondent accepted that Mr St Pierre and Mr Bartlett had a friendly relationship as well as a business relationship;

27.4. 1(d) it is not disputed that the respondent refused to deal with the disciplinary and grievance as separate processes;

27.5. 1(e) this issue is raised in the list of issues by the claimant but no evidence was provide on it in his witness statement. Mr St Pierre denied the allegations. In light of the vague assertions on this issue made by the claimant we find that he has not been able to establish that these events occurred as a matter of fact;

27.6. 1(f) at the start of the hearing the claimant added more detail to this allegation referring to events in 2017 when he was given a final written warning and he asserted that other employees were treated differently. In evidence the claimant said that he received a final written warning near the start of 2017. Even taking into account the claimant's amendments to the issue we have not been provided with sufficient information to establish that there was differential treatment, no individuals were named and the claimant did not cover this in witness evidence;

27.7. 1(g) it was accepted that Steven Bartlett used that phrase;

27.8. 1(h), (i) and (j) were deleted

27.9. 1(k) the claimant relied on an email chain which took place on 24 December 2018. We find that these emails set out that the claimant was the representative for the employee facing disciplinary action and that the respondent had rearranged the meeting several times to accommodate the claimant's availability. In the end the respondent refused to re-arrange it a further time. A further USDAW rep was arranged for the meeting. We find that the email sets out cogent reasons for the respondent's decision and we do not find that this is an attempt to preclude the CSTMs from receiving representation during disciplinary processes. We were not referred to any other evidence to support this issue;

27.10. 1(l) in evidence Mr Bartlett accepted that he sought advice from HR and they informed him that the claimant could not take part in the regional training programme or become a team leader as long as he was a union representative. Mr Bartlett's evidence was that his understanding from HR was that this was because of the risk of the conflict of interest if one had participated in a meeting as a notetaker or manager and may later, in separate proceedings, appear as the union representative for the same employee.

The claimant's allegation was put stronger than what Mr Bartlett accept and was that he had been told he could not progress "*as long as he was union*". The claimant's ET1 also states "*historically I have been informed when applying for promotions I would have to resign as a union rep*." We prefer Mr Bartlett's evidence and that in the claimant's ET1: we find that Mr Bartlett told the claimant that he could not take part in the regional training programme or be a Team Leader as long as he was a union representative not that he could not be in the union. The claimant's ET1 stated that this was historical and did not identify when this discussion took place;

27.11. 1(m) the claimant did not provide any evidence about this issue. It is a mere allegation. The allegation is undated and it is unclear to what it relates. The claimant cannot establish that this happened as a matter of fact;

27.12. 1(n) the respondent did not provide witness evidence to contradict the claimant's evidence about what Roya Anderson said. We find that she did ask if it was necessary for him to represent in all the meetings. The claimant's evidence was that he attended around 200 meetings as a representative in 2 years. This did not include his H&S rep meetings or the Ocado council meetings. This is a substantial number of meetings. We also think that this issue is linked to the issue 1(k). The claimant did not provide evidence that anything further was said or done beyond this statement;

27.13. 1(o) This issue relates to events which occurred after the claimant's resignation and therefore cannot have formed any part of his decision to resign. We find that there was no falsification of roster records. This relates to the respondent treating the claimant as having resigned immediately and without notice on 17 January 2019. This is accepted by the respondent. The claimant's position was that he unequivocally

resigned with notice on 17 January 2019. The claimant's resignation letter is, at best, ambiguous and we find that the respondent's initial interpretation (that the claimant resigned immediately without notice) was reasonable. In any event, when the claimant informed the respondent that he had resigned with notice the respondent immediately took steps to reinstate him on the roster for the period of his notice.

In oral evidence Mr St Pierre gave a detailed account of how rosters were allocated. He stated that he assumed that when the claimant was reallocated back on to the rosters he was reallocated on the wrong day which resulted in him receiving a different roster pattern.

27.14. 1(p) This issue relates to events which occurred after the claimant's resignation and therefore cannot have formed any part of his decision to resign. The claimant's disciplinary meeting was originally scheduled for 9 January 2019 but it was rescheduled because the claimant submitted a grievance. The claimant submitted a grievance on 7 January and resigned on 17 January 2019. This resulted in a joint disciplinary and grievance meeting being scheduled for 18 January 2019, it was then re-scheduled to 31 January 2019 and re-arranged to 12 February 2019. None of these meetings took place and a final re-arranged meeting, which by this time was for the grievance only as the claimant had left the respondent's employment, was arranged for 28 February 2019. The re-arrangements of all the meetings except for the first one were due to reasons arising from the claimant, either his non-availability or that of his representative. Therefore, the claimant cannot establish that there was a failure to allow him to offer dates for the meeting.

27.15. 1(q) it was not disputed that Anwar Mumin and McDonnel Stewart (Team Managers) were involved in the investigation. Mr Stewart's only involvement was that he provided a witness statement for the investigation. Mr Mumin was in the vicinity of the incident on 28/12/2018. Mr Mumin's evidence was that he explained to Lauren that the matter could be dealt with formally or informally and she said she wanted to deal with it formally. We accept this evidence as it is not contradicted in any other evidence and is instead supported by several statements from Lauren;

27.16. 1(r) the respondent accepted that the claimant was not informed that he could bring a trade union representative to his investigation meeting, that the claimant had raised this in the meeting and said that he was happy to proceed without the representative. The respondent accepted that their policy did not set out that employees were entitled to be accompanied by a companion or trade union representative to investigative meetings and we record that this is not a legal requirement;

27.17. 1(s) the claimant was questioned about what he meant by not being provided with all the pages in the investigation meeting. He said that he had only been provided with 1 page out of 2 of Lauren's statement about the incident. We asked him to which document he was referring because there was a 1 page hand written statement by Lauren dated 27 /12/2018 and a 2 page typed document which was notes of the investigation

meeting with Lauren of the same date. At first, the claimant was categorically that he was referring to neither document but could not identify the document in the bundle. The claimant later accepted that it could have been the typed investigation notes. In Mr St Pierre's evidence he said notes were typed up later and we are of the view that the investigation notes with Lauren were the document to which the claimant referred but he was confused because at the meeting he had been shown the handwritten rather than typed notes.

At the investigation meeting with the claimant on 28/12/2018 he accepted that the incident happened and apologized. Mr Peterson who chaired the meeting read out a number of statements but the claimant declined when Mr Peterson asked the claimant if he wanted him to read out notes from a further investigation in the form of Lauren's statement. The notes record that 2 pages were handed to the claimant and that he read them. The claimant disputes that he was given two pages. We accept that he did not read the 2 pages at the meeting. Even if the claimant was not given the two pages at the meeting he was (which is not disputed) sent all the documents which included the two full pages on 31 December 2018 undercover of the invitation to the disciplinary meeting scheduled for 9 January 2019.

27.18. 1(t) we accept that there were Chinese whispers or gossip about the claimant's absence. Given that the incident occurred in an area in which there were a number of employees and the claimant was suspended, we find that there was gossip about the incident and possible consequences. The claimant did not establish who was involved in the gossip. We do not accept the gossip destroyed the claimant's credibility this damage arose from his actions in the incident. The incident happened, the claimant accepted and apologized for it.

The claimant raised a concern about Chinese whispers on 14 January 2019 and that day Kristeen asked HR to look into it and see if there had been any breach of confidentiality.

28. We have found that the following issues occurred after the claimant's resignation and cannot have been a duty of the trust and confidence by the respondent:

28.1. B
28.2. O
28.3. P

29. We found as a matter of fact that the following allegations did not occur or there was insufficient evidence to establish that they did occur:

29.1. E
29.2. F
29.3. K
29.4. M

30. This leaves issues a, c, d, g, l, n, r, s and t.

31. We find that taken cumulatively or individually the issues are not sufficient to amount to a breach of duty and trust of confidence.

32. In relation to the individual issues, we decided that:

32.1. 1 (a) the discussion with Mr Peterson whilst robust did not contain any threats and was not a breach of the duty of trust and confidence;

32.2. 1(c) whilst the claimant did not wish for Mr St Pierre to be the chair we find that he was appropriate for the role: he was sufficiently senior, he was available and experienced in handling such matters. We also accept Mr St Pierre's evidence that he was selected by HR on a random basis. The claimant stated that Mr St Pierre had been the decision manager giving him a final warning on two occasions. This was disputed by Mr St Pierre who stated that he could only recall being the appeal manager who upheld a final written warning against the claimant in 2015. We preferred Mr St Pierre's evidence which was clear and reasoned. He explained how he had searched his emails and calendar and could find no trace of a meeting with the claimant in 2017 and why he remembered the 2015 meeting. The claimant's evidence was vague at times and we found that he struggled to accurately recall events which were from over 4 years ago. We find that Mr St Pierre had been the appeal manager who upheld a final written warning against the claimant in 2015. However, we conclude that this could not be interpreted to mean that Mr St Pierre was unsuitable to take this role. A number of years had passed and Mr St Pierre carried out many (into the hundreds) of disciplinary meetings. In all the circumstances, we find that Mr St Pierre chairing the disciplinary and grievance process, was not a breach of the duty of trust and confidence;

32.3. 1(d) the respondent was reasonable in dealing with the grievance and disciplinary as part of the same process. The content of the grievance was (prior to the claimant's resignation) wholly to do with the disciplinary investigation and process. It is common practice in these circumstances for both matters to be dealt with together. This was not a breach of the duty of trust and confidence;

32.4. 1(g) this phrase was said. However, we do not accept that there was animosity in the respondent towards the trade union or the claimant. We accept there was banter on both sides. The claimant and the managers at Enfield gave consistent evidence they had a good working relationship, that the claimant raised H&S issues and other issues with them and they spoke to each other robustly but they were all careful to maintain a professional and respectful working relationship. In the context of this relationship, we find that the comments were not a breach of the duty of trust and confidence;

32.5. 1(l) the claimant's own ET1 stated that this was historic. The claimant did not raise it as an issue at the time, if it had amounted to a breach of the duty of trust and confidence the claimant affirmed the contract by continuing to work for months or even years afterwards;

32.6. 1(n) as nothing more than the statement was said, this is

insufficient to amount to a breach of the duty trust and confidence;

32.7. 1(q) and (r) these events occurred but they were not untoward in anyway and cannot amount to a breach of the duty of trust and confidence;

32.8. 1(s) as a result of our findings that he received both pages in the letter of 31 December 2018, this cannot amount to a breach of duty of trust and confidence, the claimant was not disadvantaged even if he had not received both pages.

32.9. 1(t) the claimant relies on this allegation in his resignation letter but puts it higher that managers on site had openly discussed his suspension and inaccurate reasons for it. We accept that there was gossip, in a letter from the claimant on or around 14 January 2019 the claimant refers to Chinese whispers surrounding his suspension and that he has been suspended for sexual harassment. His evidence to the tribunal was not detailed and he did not allege that anything more was part of the gossip. The incident itself, which the claimant, admitted was seen by other employees, had noticeable consequences such as the claimant's suspension and the facts of the incident were observed by numerous employees. There was no evidence that there was a breach of confidentiality and that anything other than his own conduct damaged his reputation. This cannot amount to a breach of the duty of trust and confidence.

33. As we have found that none of the issues are individually a breach of trust and confidence, we have also considered them cumulatively and we find that even taken them altogether they insufficient to amount to a breach of trust and confidence.

34. Even if we were wrong in the above, we find that any breach by the respondent did not cause the claimant to resign. In evidence the claimant said that he only intended to stay with the respondent for 2 years but he became involved with the trade union in 2016 and he found that role fulfilling which motivated him to stay. He said "*if it wasn't for this stupid incident I would probably still be there now*." He also admitted being embarrassed by his conduct and regrets it. By January 2019 he was facing disciplinary action which anyone would think would almost certainly result in serious disciplinary action and potentially dismissal. It would possibly have other consequences such as removal from the Ocado Council and for his role representing employees. This would have made the role less desirable for the claimant. We consider that these were the fundamental factors in the claimant's decision to resign rather than any actions by the respondent.

Trade Union Activities

35. In relation to what Trade Union activities was that claimant taking part in we make the following findings:

35.1. 5(a) We accept the claimant's unchallenged evidence that from around the start of 2017 until the end of 2018 he appeared as a USDAW

representative for fellow employees in disciplinary and similar meetings. We find that these were trade union activities;

35.2. 5(b) this issue is put as carrying out H&S investigations and further details were provided later in the list of issues. We accept that duties as the USDAW H&S representative such as attending and conducted monthly H&S reviews were trade union activities. The claimant has only provided vague allegations about being precluded from conducting investigations and he has not discharged the burden of proof to establish this happened as a matter of fact. We find that providing photographic information about alleged H&S breaches of trailers was trade union activities.

35.3. In relation to 5(b) we find that he carried out these activities from around the start of 2017 until the end of 2018.

35.4. We find that the Trade Union activities were at the appropriate time.

36. We make the following findings of fact in relation to the alleged detriments:

36.1. 8(a) as set out above in relation to 1(a) we find that this did not happen as a matter of fact;

36.2. 8(b) as set out above we found that this phrase was said but that there was no animosity;

36.3. 8(c) this issue is linked to 1(k) and we repeat our findings above. It was not disputed that the claimant's rosters were changed to accommodate his meetings in his different roles as representatives. There is insufficient evidence to conclude when or who, if anyone said the words "*we can't run the company around you*". However, we accept that there was some frustration in the respondent about the changes needed to the claimant's rosters to accommodate his frequent representative duties;

36.4. 8(d) this is largely a repetition of 1(a) and 8(a): we have found that the disciplinary threats were not made;

36.5. 8(e) this was deleted from the issues at the start of the hearing as it is a complaint about working practices and cannot amount to a detriment;

36.6. 8(f) this is partly a repetition of 8(c) and 1(k). We have found that the respondent did rearrange meetings around the claimant's availability. The claimant's allegation is that the meetings should have been re-arranged rather than his roster changed. Given the number of meetings in which he was involved, we find that it would have been impracticable and unreasonable to re-arrange meetings which involved other employees rather than re-arrange the claimant's roster.

37. In light of the findings above, we find that there are no facts which can amount to detriments.

38. For completeness and if we were wrong on the above and there were

detriments, we find that the sole or main purpose was not to deter the claimant from taking part in trade union activities or to penalise him. In relation to any frustration about accommodating the claimant's representative duties, we find that this was just an expression of frustration and it did not go further into having the purpose of deterring or penalizing him. In relation to 24/12/2018 meeting with Mr Peterson, Mr Peterson's purpose at the meeting was to deal with what he considered to be a potential breach of confidential information which had nothing to do with the claimant's trade union activities or his H&S role. There was no action taken to prevent or deter him from carrying out the trade union activities and/or his H&S role or to penalise him. We understand from the claimant's perspective in the discussion on 24/12/2018 with Mr Peterson, the claimant was concerned with overweight vans. Mr Peterson's evidence, which we accept, was that the managers were aware of the issue and it was being dealt with according to procedures. Therefore, it was not in Mr Peterson's mind to do something to the claimant to deter or penalise him for trade union activities.

39. We find that the claimant was not dismissed and therefore there was no breach of s152 TULCRA 1992.

Whistleblowing

40. We are prepared to accept that 11(c), (d) and (e) are protected acts. The respondent did not dispute that the claimant sent to appropriate employees photographic evidence about alleged H&S breaches, excel spreadsheets on the same and overloaded vans. The claimant has not been specific about dates when he provided the information but we consider that he did this regularly and until around his suspension on 27 December 2018. For example, there is an email attaching photos the claimant sent on 20 December 2018 and the meeting with Mr Peterson took place on 24 December 2018. In relation to 11(c) and (d) the claimant has not identified the date on which the disclosures of information which he relies on to amount to the protected act happened. It is quite possible that this failure to identify the date means that he has failed to identify the protected act. However, for the purposes of this judgement we will proceed as if 11(c), (d) and (e) were protected acts when we consider the other requirements that must be fulfilled to establish that he has suffered detriments or dismissal for whistleblowing.

41. We make the following findings in relation to the alleged detriments:

41.1. 12(a) as we have set out above we find that Mr Peterson did into threaten the claimant with disciplinary action. There was no detriment but even if there was we find that Mr Peterson's actions arose from his concern about confidential information and not from the protected disclosures;

41.2. 12(b) it is unclear what the claimant is referring to here. The claimant referred to the H&S Committee not communicating outcomes or actions to the committee itself after issues had been raised. We find that this is criticism of how the H&S committee operated and there was nothing in its actions related to any protected disclosures by the claimant. They were not influenced in anyway by the claiamnt's protected

disclosures.

41.3. 12(c) it is unclear what the claimant is referring to as the detriment even having read the Claimant's witness statement, the list of issues and the amended ET1. We have taken this as a duplicate of 12(k). We will deal with these two issues together. No date is specified in 12(k) but the documentation shows that one of the these happened in mid 2017 and we are unsure when the other one happened. The claimant said that he was precluded from investigating these incidents. We acknowledge that the USDAW/Ocado Safety Representative Safety Guidance refers to the ability of a Safety Representative to request their own investigation into Level 3/4 incidents, but it also records that this request maybe refused and discussed at the Safety Committee. The claimant has not established that there is a detriment, the respondent caried out an action which it was permitted to do under the agreement. We find that there is no connection whatsoever to the protected disclsoures.

These alleged detriments predate the discussion with Gary Peterson on 24 December 2018 and so that discussion could not have any impact on acts which predate it. In the claimant's witness statement it states that he started carrying out the actions which comprise the disclosures he identifies in 11(c) and (d) after these incidents. Therefore, the protected disclosures postdate the alleged detriments. For this reason this allegation must fail.

41.4. 12(d) this allegation is undated and vague. It seems to refer to a practice the clamant says affects CSTMs and not him specifically. As such, if this is a practice, it is not targeted at the claimant. We find that this undermines any claim that the claimant was treated this way because of protected disclosures.

We assume the allegation this refers to overweight vans. The respondent's evidence was that it had a practice for identifying overweight vans, timely flagging of this to team managers, an awareness by the managers of the straightforward steps to address the issue and that they took these steps. We accept this evidence it was consistent and coherent. Further, the claimant also said that the vans did not go out overweight but that this was because he intervened. We do not accept that it was his interventions which stopped the vans going out overweight. Therefore, even on his own evidence this allegation did not factually occur and therefore it must fail.

41.5. 12(e) this is a natural consequence of the nature of the disciplinary incident on 27 Dec 2018, it occurring in a public place and the suspension of the claimant. We find this has no connection whatsoever to any protected disclosures.

41.6. 12(f) We have found that HR decided who chaired the disciplinary and grievance meeting. It is utterly untenable that HR was influenced in anyway by protected disclosures made by the claimant to other parts of the business in selecting the chair. We find this has no connection whatsoever to any protected disclosures.

In relation to not changing Mr St Pierre as the chair we found that he was a suitable chair and despite the claimant's requests for a change (which were never actioned) there was no other reason to change the chair. There is no evidence or suggestion by the claimant that Mr St Pierre engineered his role as chair and endeavored to keep it. We are not satisfied that this was anything other than a decision by HR and we do not accept that they were influenced in anyway by protected disclosures made to another part of the business. The decisions were not in anyway connected to the protected disclosures;

41.7. 12(g) we repeat our findings above, it was open to the respondent to deal with the grievance and disciplinary together and we found it was a sensible way of dealing with a grievance which initially was only concerned with the disciplinary process. Even when the claimant added more to the grievance it was still largely concerned with the disciplinary process, We find this has no connection whatsoever to any protected disclosures.

41.8. 12(h) We have found that this occurred after his resignation and that the removal of his credentials was due to his resignation. We find this has no connection whatsoever to any protected disclosures;

41.9. 12(i) we find that a natural and reasonable reading of the claimant's resignation was that it was with immediate effect. Further, this was a decision by HR to which the protected disclosures were not made and we find it untenable that they would have been influenced by the protected disclosures. We find this has no connection whatsoever to any protected disclosures; and

41.10. 12(j) we repeated our findings above in relating to issues 1(o). We find that the claimant's roster was changed because he was removed from the roster when it was thought he resigned without notice and he was added back onto a different roster when this was corrected. We find that this was an administrative step and it had nothing whatsoever to do with a protected disclosure.

Decision

42. For the reasons set out above, all of the claimant's claims are dismissed.

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Employment Judge **Bartlett**

Date_25 January 2023_____

JUDGMENT SENT TO THE PARTIES ON

15 February 2023

FOR THE TRIBUNAL OFFICE

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