EMPLOYMENT TRIBUNALS

Claimant: Mr Brian Webster

Respondent: Diamond Bus (North West) Limited

HELD AT: Manchester **ON:** 12-16 June 2023

BEFORE: Tribunal Judge Holt
Ms J. Pennie
Ms H. Sheard

REPRESENTATION:
Claimant: In person
Respondent: Ms Jones (Counsel)

JUDGMENT

1. The Claimant's complaint relating to protected disclosures pursuant to part IVA Employment Rights Act 1996 is not well-founded.

2. The Claimant's complaint relating to whistleblowing detriment pursuant to section 47B Employment Rights Act 1996 is not well-founded.

3. The complaint of automatic unfair dismissal pursuant to section 104 of the Employment Rights Act 1996 is well-founded.

4. Other claims remain that have not been subject to a final determination, namely unlawful deductions from pay pursuant to Part II Employment Rights Act 1996 for unpaid wages and holiday pay (holiday pay to be offset against notice pay).

REASONS

Introduction - The parties to the litigation and summary of claims

1. The Claimant was employed by the Respondent as a bus driver, "PCV Driver non-fixed lines", starting on 9 December 2019. That he was required to work "non-fixed lines" meant that he did not drive fixed routes. He was based in Bolton (which will be dealt with in detail below) and asserted that his fixed place of employment was Bolton Bus Depot, but often ended up finishing his driving

shift leaving a bus some distance from his base, with the result that he had to get back to his base before he could go home. He was paid on a weekly basis. This case arises out of the Claimant's claims regarding the question of where he was contracted to work, where his base was and the status and legal implications for the time that he spent travelling from wherever he had finished his driving shift back to his base. In summary, he brings claims for: breach of contract for failure to record his working time under the Road Transport (Working Time) Regulations 2005 and the Working Time Regulations 1998 ("WTR"); automatic unfair dismissal and detrimental treatment due to protected disclosure; unpaid notice pay, holiday pay, arrears of pay and "other payments". The Claimant was a litigant in person at the hearings.

2. In fact, the Claimant has brought three case which have been consolidated for administrative purposes under the lead case number. The cases are: 2405507/2020 (ET1 dated 12 May 2020) [2-13] with ET3 grounds of resistance [14-27]; 2408947/2020 (ET1 dated 9 July 2020) [28-38] with ET3 grounds of resistance [52-67]; and 2417420/2020 (ET1 dated 27 October 2020) [40-51] with ET3 grounds of resistance [90-104]. (For completeness, it should be noted that the Claimant also submitted a claim for interim relief under claim number 2408947/20 which was refused by Employment Judge Doyle on 21 June 2021).

3. The Respondent defended the claims, in summary, on the basis that: the Claimant was only employed by them for a total of 7 months and that the matters in dispute arose during his one year period of probation; pursuant to the WTR and the details contained within his contract of employment, the Claimant was not at the Respondent's "disposal" and so not working for them when he was travelling having left his last bus at the end of a shift; that his "non-fixed lines" contract meant that he was obliged to start and finish duties away from Bolton Bus Depot if he was rostered to do so; that, in any event, the Claimant was compensated for the time he spent travelling back to the depot by means of an inconvenience payment; consequently, the Respondent did not fail to record the Claimant's working time and associated payments properly; there were no unauthorised deductions from his pay; in fact the Respondent over-paid the Claimant's holiday pay; the Claimant has brought his claims beyond the three month time limit permitted for deductions from pay; the Claimant was contractually entitled to notice pay, but that this has been adjusted in the Respondent's favour because the Claimant took more holiday than he was entitled to; that the Claimant made no protected disclosure pursuant to Part IVA Employment Rights Act 1996 because the Claimant did not make and/or did not believe that he was making a public interest disclose; that the Claimant did not make any protected "whistleblowing" disclosure(s) pursuant to section 47B Employment Rights 1998; and finally, that the Claimant cannot demonstrate that he was dismissed due to a protected disclosure that would amount to an automatically unfair reason for dismissal pursuant to sections 103A and/or 104 of part X pf the Employment Rights Act 1996. The Respondent was represented by Backhouse Jones Solicitors and Ms Rebecca Jones.

The issues

4. Helpfully, Ms Jones provided us with an updated list of issues at the beginning of the hearing on 12 June 2023. (I have copied this at the end of this document as an appendix). The list of issues accurately reflect the underlying legal matrix to be applied to the Claimant's claims and to the Respondent's responses (and which is set out in the section on "relevant legal principles" below). The list of issues document broke down the issues into a series of 14 topics, many of which contained sub-topics. The "headline" issues were:
    a. Did the time taken to travel between the Bolton Depot and Bolton or Bury Interchanges amount to working time and was it recorded properly?
    b. Were there unauthorised deduction from the Claimant's pay applying Part II of the Employment Rights Act 1996?
    c. Were the claims brought within the requisite 3-month time limit?
    d. Did the Claimant suffer a breach of contract in relation to notice pay?
    e. Did the Claimant make protected disclosures pursuant to Part IVA Employment Rights Act 1996?
    f. Did the Claimant suffer a detriment due to a "whistleblowing" protected disclosure pursuant to s47B of the Employment Rights Act 1996?
    g. Was the Claimant subject to unfair dismissal pursuant to Part X of the Employment Rights Act 1996 (sections 103A and/or 104)?

5. The Claimant did not comment on the updated list of issues. It is fair to say that the list of issues seemed to have evolved from the various case management hearings that had taken place on this case, but we also observe that Ms Jones dealt with the Claimant courteously at all times, and even went out of her way to explain things to him in order to assist the Court and in an attempt to save time. We were grateful for her professionalism.

Listing

6. Originally this case had been allocated a 6-day estimate, which was cut to 5-days for operational reasons that we were not party to. The morning of the first day was lost due to a series of administrative and technical problems outside the control of the parties. When the hearing was commenced (late) on the afternoon of 12 June 2023, we were plagued with technical problems and had to abandon the day's hearing slightly early. Nonetheless, the evidence was completed by the third day and submissions by lunchtime on the fourth day. Because Ms Jones had provided a skeleton argument (which she made available on the morning of day 3) I explained to the Claimant what the purpose of the Respondent's skeleton argument was but stated that we did not expect him to provide a skeleton argument (or that he could do something similar if he wanted to). We reserved our decision on day 4 and spent the remainder of the fourth day as well as the fifth day deliberating.

7. Before the parties left on 15 June 2023, I gave directions regarding the future steps in the case and identified 14 July 2023 as a convenient date to list submissions on remedy, if necessary, contingent upon our factual findings. (Please note that I have amended the directions at the end of this document).

8. So far as the evidence was concerned, one Respondent witness (Mr Carroll) now retired, with the agreement of the Claimant, was taken out of turn so as to accommodate his holiday. We also allowed the Claimant time overnight

between days 3 and 4 to consider his submissions on account of his being a litigant in person and at all times bore in mind the guidance in the Equal Treatment Benchbook, so as to ensure that all participants enjoyed a fair hearing, including the Claimant as a litigant in person.

Evidence

9. We were also provided with a bundle which ran to 453 pages. Any reference to page numbers in this Reasons is a reference to that bundle unless otherwise indicated. Separately, we were provided with witness statements from all the witnesses, the updated list of issues (which I have already referred to), a chronology, a cast list and a skeleton argument (the last three documents were helpfully provided by Ms Jones).

10. The Claimant was the only witness on his side and Ms Jones asked him cross-examination questions supplemented by some questions from us.

11. The Respondent called three witnesses, namely, Mr Michael Carroll (recently-retired Staff Manager with the Respondent), Mr Mark Butler (Allocations Manager) and Mr Dave Leonard (Operations Director). The Claimant asked cross-examination questions of the witnesses with some help from me in finessing his questions. I tended to ask questions of clarification as we went along and my panel colleagues also asked some questions of clarification.

Relevant Legal Principles

12. In this part I set out the relevant legal provisions to which we applied our findings of fact set out below.

13. **Unauthorised deductions from pay and Part III Employment Rights Act 1996**: The provisions are set out at sections 28 to 35 of the ERA 1996, but the key provision here is s28(1):

28 Right to guarantee payment.

> *(1) Where throughout a day during any part of which an employee would normally be required to work in accordance with his contract of employment the employee is not provided with work by his employer by reason of—*
>
> *(a) a diminution in the requirements of the employer's business for work of the kind which the employee is employed to do, or*
>
> *(b) any other occurrence affecting the normal working of the employer's business in relation to work of the kind which the employee is employed to do,*
>
> *the employee is entitled to be paid by his employer an amount in respect of that day.*

Section 34 gives an employee the right to present a claim to the Employment Tribunal if their employer has failed to pay the whole or any part of a guarantee payment to which the Claimant is entitled.

14. **Breach of contract and notice pay**: Sections 13 to 27 of the ERA 1996 applies here. The main provision relevant to this case is s13 where an employer shall not make deductions:

> ***S13Right not to suffer unauthorised deductions.***
>
> *(1) An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
>
> *(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*
>
> *(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
>
> *(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
>
> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*
>
> *(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.*
>
> *(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.*
>
> *(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.*
>
> *(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.*

15. **Protected disclosure and Part IVA Employment Rights Act 1996**: Sections 43A to 43L potentially apply to this case, but the key provisions relate to section 43B(1):
    a. Whether the Claimant disclosed information;
    b. Which he reasonably believed tended to show breach of a legal obligation (in relation to regulation of drivers' working hours; and
    c. He reasonably believed that his disclosure was in the public interest.

    See 43B(1) below: "**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—*
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
> *(e) that the environment has been, is being or is likely to be damaged, or*
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*

16. In relation to protected disclosures, **Kilraine v London Borough of Wandsworth** [2018] ICR 1850 CA, notes that the Tribunal will take into account the content and surrounding context of the disclosure. In **Norbrook Laboratories (GB) Ltd v Shaw** [2014] ICR 540 (EAT) Slade J said that "*an earlier communication can be read together with a later one as embedded in it, rending the later communication a protected disclosure, even if taken on their own they would not fall within section 43(B)(1)(d)*." There needs to be both genuine and reasonable belief that the disclosures show a relevant failure (**Korashi v Abertawe Bro Morgannwg Local Health Board** 2012 IRLR 3, EAT). There must be breach of a relevant legal obligation, but any legal obligation potentially suffices, including breach of the employment contract (**Parkins v Sodexo** [2002] IRLR 109). As per s43B(1) there must be a reasonable belief that the disclosure was in the public interest (**Chesterton Global Limited v Nurmohamed** [2018] ICR 731).

17. **Whistleblowing detriment and s47B Employment Rights Act 1996**. The relevant part is s47B(1) which simply states that:

> *(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.*

18. **Unfair Dismissal and Part X employment Rights Act 1996**. There relevant sections are contained within sections 94 to 110 of the ERA 1996. Section 94 asserts the basic right that an employee has a right not to be unfairly dismissed by his employer. In deciding whether the dismissal was fair or unfair under part X of the Employment Rights Act 1996 we applied the general test of fairness in section 98(4).

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal and*
>
> *(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) A reason falls within this sub-section if it … relates to the conduct of the employee …

(3) …

(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends 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

(b) shall be determined in accordance with equity and the substantial merits of the case".

Sections 103(A) ERA regarding Protected Disclosure and s104 which deals with assertion of (a) statutory right(s) are of central relevance in this case:

s103A **"Protected disclosure":**

An employee who is dismissed shall be regarded for the purposes of this Part 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.

s104 "**Assertion of statutory right**".

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—

(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,

(b) the right conferred by section 86 of this Act,

(c) the rights conferred by sections 68, 86, 145A, 145B, 146, 168, 168A, 169 and 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 (deductions from pay, union activities and time off)

> *(d)* ***the rights conferred by the Working Time Regulations 1998****, the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018, the Merchant Shipping (Working Time: Inland Waterway) Regulations 2003, the Fishing Vessels (Working Time: Sea-fisherman) Regulations 2004 or the Cross-border Railway Services (Working Time) Regulations 2008, and*
>
> *(e) the rights conferred by the Transfer of Undertakings (Protection of Employment) Regulations 2006.*
>
> *(5) In this section any reference to an employer includes, where the right in question is conferred by section 63A, the principal (within the meaning of section 63A(3)).*

19. If the employer fails to show a potentially fair reason for a dismissal, then it is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

20. The law is such that the onus is on the employer to show that the dismissal was for one of the five permitted reasons. Where the dismissal falls within one of the five permitted reasons, then the Tribunal has to decide whether the employer acted reasonably in all the circumstances pursuant to ERA 1996 s 98(4).

21. The reason or principal reason for dismissal is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

22. The most important point is that the test to be applied is of the range or band of reasonable responses, a test which originated in the misconduct case of **British Home Stores v Burchell [1980] ICR 303**, but which has been subsequently approved in a number of decisions of the Court of Appeal. An approach based on the "**Burchell** test" can be useful in cases other than conduct cases, albeit that the focus must always be on the statutory wording. If the employer shows a potentially fair reason for dismissal, then the Employment Tribunal must go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

23. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The focus must be on the fairness of the investigation, dismissal and appeal.

24. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.** The seriousness of the effect on the employee of a decision to dismiss is relevant to the question of whether the employer has acted reasonably. (**Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457).**

Relevant Findings of Fact

25. This section of the Reasons sets out the broad chronology of events required to put our decision in context. The fact that I have not set out here every detail of evidence regarding what happened does not mean that we did not consider it in our deliberations.

26. Before I turn to deal with the chronology in so far as it related to our panel findings in, there are a number of matters that I need to explain by way of important contextual background. As set out above, the Claimant was employed as a bus driver and contract of employment (dated 09.12.19) [172-195] describes him as *"PCV driver non-fixed lines"*. During the course of the hearing it was explained that this means that as a bus driver he did not have the same routes or schedules and that his duties varied on a day-to-day, shift-by-shift basis. As will be discussed in detail below, the Claimant worked from Bolton and his contract of employment [174] says that his place of work was: "Diamond Bust North West, Weston St, Bolton", although his bus driving duties with members of the public started from, typically, Bolton Interchange and also sometimes from Bury Interchange. The Claimant lives at an address in Blackley. Blackley is in fact closer to Bury Interchange than either Bolton Interchange or the Bolton Weston Street Depot. Nonetheless, all three places (Weston Street Depot, Bolton and Bury Interchanges) are all well within 25 miles of the Claimant's home address.

27. Due to the Claimant working on non-fixed lines, an issue that arose that is central to our findings in this case, namely that frequently the Claimant would end his duties at Bolton Interchange. Not infrequently, he had to leave the vehicle that he had just been driving and get back to his depot at Weston Street because he took advantage of the free parking at the Weston Street Depot. On other occasions, he would end his driving duties at Bury Interchange having left his car at the Bolton Weston Street Depot. He therefore had to get from Bury Interchange back to the Bolton Weston Street Depot without, obviously, driving a bus. It was the occasions when he finished at Bury Interchange which seemed to have troubled him most.

28. The starting point to the consideration of the evidence is a collateral agreement made on 20 April 2017 which is on *"First Greater Manchester"* notepaper and is headed *"Agreement on additional payment for Bolton/Bury sign-on & sign-off April 2017".* The collateral agreement is contained at [125] of the hearing bundle. I highlight at this stage that April 2017 was long before the Claimant started his employment with the Respondent.

29. Nonetheless, the Agreement says that:

> *"This agreement replaces all previous agreements relating to similar work arrangements."* The first 2 paragraphs of the agreement states *"Where a bus driver signs on at Bolton Depot but finishes their duties/portion of split at Bury, a one-hour additional payment will be given if the driver returns to Bolton after completion of duties/portion of split and reports to the service delivery supervisor at Bolton Depot/Chapel/Interchange/Depot. The driver may pay-in at Bury prior to traveling".*

> *Where a driver signs-on at Bury Interchange but finishes their duty/portion of split at Bolton Depot a one-hour additional payment will be given if the driver reports to service delivery supervisor at Bolton Depot/Chapel prior to travelling to Bury. The driver must ensure they allow themselves sufficient time to travel to Bury where they will sign-on."*

30. The Agreement also states ***"Additional payment to be made in recognition of the distance between Bolton and Bury and is not to be deemed as travel time or duty time."***

31. The same Agreement is said to apply to Bolton drivers covering Bury Depot work. The Agreement also states that the arrangement will be reviewed on a regular basis, not exceeding 6 months. We were not shown any review documents. We noted that the document was signed on behalf of First Manchester by Adrian Worsfold (operations director) and Charlie White of the UNITE union (branch chairman) on 20 April 2017.

32. On 09 December 2019 following a job offer on 05 December 2019 [166] the Claimant signed his contract of employment [172-195]. (We were not shown the advertisement for the job). The Claimant confirmed in oral evidence that he was given his contract of employment and the Respondent's manual along with induction information sheets [162-212]. At [206] the Claimant signed to say that he had received a copy of the Respondent's employment manual and driver's manual handbook for 2019, along with the contract. At the hearing the Claimant confirmed that he had read the key points of the contract on the day of his induction and signed it. He did not sit down and read it in any detail. He did note, however, that the contract of employment stipulated that the Weston Street Depot was his place of employment. The contract of employment did not specify that, whilst his place of work was the Weston Street Depot, there was flexibility regarding where he ended (or started) a shift if it was not the Depot or any arrangements regarding this in terms of working time or travel time or alternative pay arrangements. Crucially we find that there is no evidence that, at the time of signing his contract of employment or at any time subsequently, the Claimant was shown or given a copy of the collective agreement set out above. As will be seen below, he did not learn of the collective agreement until the end of March 2020 and even then, it was never explained to him.

33. On another topic, there was a lot of evidence about bus "ticketer" machines in this case. It transpired that the devices on buses used to take payment and dispense tickets can also be used as a communication device. The Respondent could send group messages to the bus drivers on duty via the ticketer, as well as individual messages to individual bus drivers. This mode of communication had the added advantage that the Respondent could communicate with their drivers whilst enforcing their ban of mobile phone use on duty. The drivers could also use the ticketer to see if they were sticking to the timetable for their route and the devices also collected data as to the time of "running" of the bus, so that the Respondent could investigate whether a bus was running early/late/on time.

<u>January 2020 Grievance (Mr Butler)</u>

34. As per [§3 Claimant's witness statement], the Claimant gave evidence that, despite the contract of employment i.e. the documentation he had seen when he started his employment with the Respondent, he quickly realised that he was being treated and paid as if he was not in fact based at the Weston Street Depot. The Claimant, we note, was paid on a weekly basis and had started on 09 December 2019 but by 24 January 2020 he had raised a grievance [448-453] and we find that there was a grievance hearing with Mr Butler on/around 24 January 2020 because Mr Butler says [§11 of his witness statement] that there was a grievance hearing at Bolton depot on that date. In his witness statement the Claimant said [§4&5] "*The employment manual defines working time as "those employees working away from their normal place of work but travelling to and from external business sites are to record these hours* [144]. *I submit* (sic) a grievance *regarding this and pay issues to Mr Mark Butler in January 2020, his verbal response was, that's how it is. I did not at any stage accept this and was looking to appeal upon receiving a written response. I did not receive anything in writing*". We find that no grievance outcome letter was ever provided.

35. There was limited paperwork in relation to 24 January 2020, but we find that it was common ground that there was a grievance hearing that was dealt with by Mr Butler. In oral evidence Mr Butler claimed that working times were not dealt with on 24 January 2020 because the Claimant did not raise this and that he only raised the issue of pay. In contrast, the Claimant was adamant throughout that his grievance including working time, not least because this was the foundation for his complaints regarding his pay. In contrast to Mr Butler's evidence, we were shown an email from Kirstie Stewart (Respondent's Human Resources staff member) who wrote to the Claimant on 09 June 2020 at 21:04 hours saying *"It is my understanding that your internal grievance regarding* ***working time and travel*** *between the depot and interchange has been considered and concluded".* It is not possible to know, not least because she was not a witness in the case, whether she had access to full records, but it seemed that she *assumed* that the grievance in relation to working time and travel had been dealt with by 09 June 2020. We do not know what documents Kirstie Stuart had access to on 09 June 2020, but the important point is that she effectively acknowledged a grievance regarding working time relating to the Claimant's travel arrangements.

36. At this point I will take a slight diversion from the chronology of events in the beginning of 2020 to deal with the content of the Claimant's written January grievance letter which was not in the bundle of documents as presented at the beginning of the hearing. Consequently, during the cross-examination of Mr Carroll (taken out of time and sequence), the Claimant did not have access to the January grievance document. The Claimant had raised and complained about this generally at the beginning of the hearing, but the Respondent's position was that they did not have a copy of the January grievance document and had not been able to find it.

37. In fact, overnight between the second and third days of the hearing the Claimant did some further research into his old emails, perhaps having seen the bundle for the first time, and discovered a copy of the January 2020 grievance on his device. He was therefore able to bring copies of the grievance to the third day

of the hearing which were added to the end of the bundle. We find that the Claimant submitted his grievance to the Respondent (Mr Thomas Calderbank) by email headed "grievance" on 14 January 2020. Mr Calderbank said that the grievance email would be forwarded to Mark Butler, Operations Manager at Bolton.

This is what the grievance said:

> *"I am Brian Webster…I commenced employment on 09 December 2019 under the Diamond contract terms. I had an induction on 09 December 2019 along with a few other drivers, this was led by one of the depot instructors. The induction consisted of mainly paperwork and such, one being the contract of employment. I recall during this, a mobility clause was discussed and I asked, if required to work at another location, would travel be paid? The instructor's response was yes. I took this term to refer to working from other depots operated by Diamond Bus within a reasonable distance of my base… My place of work is listed in my contract on page 3, section 3 and lists the below as my place of work: Diamond Bus North West, Weston Street, Bolton. I also note the mobility clause at section 3.1 stating: "On successful completion of your probation you will normally be required to work at the location of employment detailed below. However the company reserves the right to require you to work temporarily or permanently at any other location, within the company's current or future Northwest operating areas within a 25-mile radius of the depot. Where possible, preference as to location will be given having regard to residential or other considerations."*
>
> *I have no issue within the mobility clause however under the Working Time Regulations 1998 working time is listed as follows:*
>
> *"(a) Any period during which he is working at his employer's disposal and carrying out his activities or duties.*
>
> *(b) Any period during which he is receiving relevant training.*
>
> *(c)Any additional period which is to be treated as working time for the purpose of these regulations under a relevant agreement."*
>
> *As per my contract of employment, my obligation is to attend the Weston Street Bus Depot is carried out on my time as it is listed as a permanent place of employment however I consider any location other than the depot to be a period during which I am at my employer's disposal and carrying out activity or duties at the request of Diamond Bus [sic]. As such I consider travel to any location, which is not an amendment to my place of work, to be my employer's disposal and carrying out my duties.*
>
> *As per the Working Time Regulations 1998, I feel this travel-to location is not listed as a place of work, and which are under instruction of Diamond Bus either by mobility clause or the way in which duties are constructed should be recorded as working time. [sic]*
>
> *The EC judgement in Tyco, was that travelling workers are at their employer's disposal as it was the employer who had given the instruction*

of where the employee was required to be. Whilst this case is based on mobile engineers who visited various customers during a shift, the principle applies in that during my travel to and from sites other than my work are at the disposal of Diamond Bus.

My grievance does not relate to drivers of the bus to various locations but is due to the shift construction, which can have a shift starting at one location and finishing at an alternative, sometimes at unsociable hours, requiring a vehicle, namely a car, being parked at a location and in the case of travelling from Bolton to Bury or Bury to Bolton is a considerable distance at the disposal entirely of Diamond Bus. This time is currently not recorded nor is it listed with any duty construction and as such I feel it is a breach of the Working Time Regulations.

I have been made aware that the company offers one-hour travel time for employee travel to and from Bury Bus Station however I have not received this so far and my pay has been short every week whilst I have been driving in service. In any event, this one-hour is not recorded as working time.

Brian Webster"

38. Having seen the grievance, the panel find that the Claimant clearly did raise working times in his 14 January 2020 grievance. It clearly raised working time, the issue of where his place of work was and obviously, discusses the CJEU case of Tyco. The grievance clearly found its way to Mr Butler. We found that when Mr Butler told us that the grievance was only about pay, this is not correct. It was clearly about the Claimant's place of work, working time and the travel between Bolton Interchange, Bury Interchange and the Depot. The Claimant also gave evidence that he did not get a note or minutes of the January 2020 grievance hearing, although Mr Butler claimed that the meeting was minuted and there was a document headed "*24th January 2020 Grievance Hearing*" in the hearing bundle [215/6]. Mr Butler said that he did minutes as the meeting progressed and the Claimant was happy with them. However, we noted that the Claimant's signature was not applied the minutes. At the hearing before us, Mr Butler said that he thought he had done an outcome letter, but conceded that he could not find one. He also claimed in oral evidence that the Claimant was happy with the outcome when he had left the meeting. We find that the Claimant was never provided with the minutes or a grievance meeting outcome letter. We find that when Mr Butler said that the grievance was only about pay this was clearly not correct.

39. We also find that by the time of the grievance hearing on 24 January 2020 the Claimant clearly had got wind of and knew about a travel payment in general terms, but he did not know the details or how it was supposed to be applied. There is no evidence that Mr Butler explained the 2017 collective agreement or its consequences to the Claimant. Also, there is no evidence that he was paid for his travel between the depot and Bury or Bolton Interchanges before that time, nor afterwards for a while (he seems to have been paid inconvenience payments from some time in March 2020 which will be dealt with below). In terms of the Claimant complaining about his wages, the document at [215]

suggests that Mr Butler concentrated on emphasising that the Claimant's contract of employment stated that up to 90 minutes could be deducted each shift when the Claimant was on (meal) breaks because he was not paid for these breaks.

February 2020 meeting (Mr Carroll)

40. On 30 January 2020 (i.e. less than a week after the grievance meeting with Mr Butler) the Claimant received an invitation letter from Mike Carroll [217] to say that he was required to attend a disciplinary hearing regarding his *"unsatisfactory attendance"*. The letter included the fact that he could bring a work colleague to the *"disciplinary hearing"*. Looking at the Claimant's work and holiday roster [355], by 30 January 2020 it is evident that the Claimant had taken off Christmas Day (25.12.19) and New Year's Day (01.01.20). It was also noted that he had been late on 08 January 2020. We therefore found that it was surprising that the Claimant was invited to a disciplinary meeting after only one late attendance. Nonetheless, by the time of the disciplinary hearing on 25 February 2020 it was recorded that the Claimant had been absent for 3 days on 09, 14, and 15 February. The Claimant could not remember the reasons why he had had absences recorded but he did not dispute them.

41. In relation to 25 February 2020, we found that it was noteworthy that the Claimant was invited to a disciplinary *hearing* without there being any evidence of an actual *investigation* which we find was in breach of the Respondent's disciplinary procedure [148]. We find that the invitation letter invoked the disciplinary procedure but there was no mention of the formal process and, in particular there is no evidence of an investigation, and, further, the Claimant was not given any information about the substance of the problem to be heard or discussed. Following the meeting we find that the Claimant was not given any written evidence of the outcome, which was in breach of the respondent's procedures as set out in their Employment Manual [150].

42. At the meeting on 25 February 2020 we find that the Claimant explained to Mr Carroll that there had been insufficient rest between the end of one shift and the beginning of another on 08 January 2020. This explanation was accepted by Mr Carroll at the meeting and also at the hearing before us. This problem of an insufficient gap between two shifts was referred to as an *"allocation issue"*. Mr Carroll told us, in relation to 08 January issue and the lateness and we accept as accurate, *"I accepted* [the Claimant's] *explanation and we moved on"*. In relation to the absences on 09, 14 and 15 February, (the dates that the Claimant could not remember and about which we were not given any detail), it seems that these were left sitting on the Claimant's discipline record despite the fact that the Claimant left the meeting with the impression that all his explanations had been accepted and that there would be no consequence for the absences on 09, 14 and 15 February. We note that [§6] Mr Carroll described the meeting as a *"conversation"*, despite having invited the Claimant to a *"disciplinary hearing"*.

43. The fact that the meeting was informal and no action was taken, or at least the Claimant believed that no action had been taken, is corroborated by an email exchange between the Claimant and Mr Butler which seems to have been generated on 20 March 2020 and which was brought up when the Claimant

was dismissed and which he forwarded on 16 July 2020 (and which was finally forwarded to the Respondent's solicitors on 2 June 2021) [283-7]. In this email correspondence, the Claimant wrote to Mr Butler and his re-telling of what had happened included "*At the disciplinary the reasoning for absences prior to 25th Feb was accepted and no action taken*" [283].

44. Nonetheless, the outcome of the 25 February 2020 meeting/hearing seemed to be that Mr Carroll gave the Claimant some sort of verbal warning (and we note that the disciplinary procedures indicate that the outcome of a hearing might include a verbal or written warning). The Respondent's employment manual says: *"In either event you will be advised that such a warning will constitute the first formal stage of the procedure whereby an employee may be dismissed. A note of the warning, and, if in writing, a copy of it will be placed on the company's records. The warning will state the nature of the misconduct, the improvement required and the timescale over which the improvement should be achieved".* However, we note that there was no minute of what occurred at the hearing. Following the meeting there was no letter and nothing in writing evidencing what had been decided by the hearing/meeting nor any evidence of what, if anything, was put on the Claimant's file.

45. The overall tenor of this meeting from the Respondent was that Mr Carroll was not overly concerned about the Claimant's attendance. We note that in evidence [§7 Mr Carroll's witness statement], Mr Carroll said that *"I noted his position and decided that an informal warning would be sufficient in these circumstances and so, rather than trigger formal disciplinary action I put an "advisory standard" note on his file"*. In contrast the Claimant says [§9 witness statement] that no action was taken and [§10] *"As far as I was aware, the disciplinary hearing on 25 February 2020 resulted in no form of warning whatsoever, and if it had done so I would have at that stage sought an appeal and/or further remedy"*. We find that, if an advisory note was added to his record, then the Claimant did not know that an "advisory standard" note had been put on his file and, further, that he would have challenged it had he known.

<u>24 March 2020 Claimant's complaint and first ET1</u>

46. On 24 March 2020 the Claimant contacted the Respondent's HR department and had email communication with Kirstie Stewart [see §12 the Claimant's witness statement]. His email again raised the issue that his working patterns had breached the working time limit [226]. The 24 March 2020 email says *"My duty tomorrow is in breach of working time regulations … I am working from 11:19 until 16:39 at which point I will be travelling back from Bury Bus Station (company allow 1hr travel for this) to the depot. As such I will have continuous working of 6hrs and 20 minutes. (The 1hr travel is not included with the duty time). Brian."*

47. In relation to this communication, we find that the Claimant genuinely was concerned that driving plus travel equated to 6hrs 20minutes and that this working time would have triggered the working time regulations. Ms Stewart did know the answer to the question and said that she would refer the matter back to Mark Butler [224]. We note in passing, however, that this potential grievance was about the Claimant's personal working arrangements. There is no suggestion of a *"public interest"* issue.

48. We also find that, with reference to this email exchange and what was said at paragraph 13 of the Claimant's witness statement, that the travel *"time inconvenience payment"* started around March 2020 but we were not taken to any evidence of when the payments to the Claimant started to be made. This is because [268] there is an email from Mark Butler to the Claimant [dated 24 March 2020 at 14:27hrs] which says *"I have put the 1hr travelling time on the omnidas already for tomorrow and the travel time was initially set up for Bolton staff that operate the Bury duty but still stands for travelling back to Bolton. Come and see me tomorrow and I will explain. Mark Butler (Operations Manager)."* The Claimant immediately responded at 14:59hrs saying, *"Concern is 11:19hrs to 16:39hrs plus the 1hr travel puts me over 6hrs working time regs"*, to which Mark Butler responded at 15:01hrs saying, *"Have a 30-minute break in Bury and then travel back to Bolton."* (It should be noted that the Claimant forwarded this message to the Respondent's solicitors on 02 June 2021 which makes following the correspondence difficult). Having said that Mr Butler would explain the travel time and how it was to be compensated, he never did.

49. It is noteworthy that the very next day that the Claimant contacted ACAS [01] thus triggering the process for the first Employment Tribunal case.

Confusing April 2020 documents in the bundle

50. So far as the chronology is concerned, the Respondent included in the bundle a letter dated 08 April 2020 from Mark Butler addressed to *"Dear Mr"*. It talks about *"your employment"* being a 12 month probationary period and that the contract of employment was being ended because of *"your poor standard of attendance displayed on 8 separate occasions"*. We were unsure why this document was included in the bundle and we note that we were not taken to it during the evidence. Nonetheless, this was included in the chronology prepared by counsel so we have to assume that it was sent to the Claimant. It is said that the employment was being terminated due to unsatisfactory completion of the probationary period and specified the details of the ending of the employment. The first ACAS certificate is dated 09 April 2020, so it may be linked to that, but we were unsure.

51. At [228] there was another curious document dated 30 April 2020 which did not appear to be addressed to the Claimant. (At the hearing we were not taken to this document). The document is addressed *"To driver"* and gives examples of the *"driver"* operating 3 bus journey services early in April 2020. The document goes on to say that, following the operation of the service early on 3 occasions, that the driver (unknown) would be given a final written warning that would be placed on his personnel file for 18 months. Again, this does not fit the chronology of the Claimant's case, but the document was listed in the chronology prepared by counsel. It is also noteworthy that the document was said to have been produced following a disciplinary hearing held in Mr Butler's office. Interestingly this particular "*confirmation of disciplinary award*" letter gave the driver a right of appeal (and gives the details of the appeal process by writing to operations director Matthew Rowlinson). We find that, assuming that it did not relate to the Claimant, then the letter does indicate that an individual had operated early on 3 occasions was given a final written warning, that they

were advised that it would be placed on their personnel file but also that they would be given a right of appeal.

May 2020 – Claimant's first ET1

52. On 12 May 2020 [02] the Claimant issued his 81 Form. At Part 8 [07] his complaint is specifically *"Employer fails to correctly record working time. On three occasions due to this, duties the company had provided was in breach of road transportation working time regulations."*

The 18 May 2020 "early running" incident

53. A significant event in the chronology of the case occurred on 18 May 2020 [238]. This was dealt with at a meeting between Mr Carroll and the Claimant on 11 June 2020 (and the meeting itself will be considered below). As per a handwritten letter which lacked any formalities (such as address, name) the Respondent says that they received a handwritten note from an unknown member of the public complaining about the early running of a bus that he intended to catch to his place of work at Bolton Hospital. We note that 18 May 2020 was at the height of the COVID-19 pandemic first lockdown. The letter says: *"On Monday 18th May 2020 I left my house to catch the 471 at 05:35 on Bury New Road. As I closed my gate I saw a bus go past the top of my road. I did not think it was the 471 at the time as the 561 and 2 go past heading towards Bolton".* The author of the letter whose name, cannot be deciphered, says that, in effect, he missed his bus and was late for his work at Bolton Hospital. The letter does not mention that he was a Covid *"key worker"* but in the proceedings the author of this letter quickly became referred to as a healthcare *"key worker"* by the Respondent. The Respondent's investigations apparently revealed that the offending bus was one which the Claimant drove. When the Claimant was presented with the evidence from this letter (on 11 June 2020) his initial reaction was to admit that he ran early and ahead of the official timetable on 18 May 2020. However, by the time of the hearing before us the Claimant effectively was saying that the letter was a forgery. At the hearing before us, [and with reference to 318-321] the Claimant provided live departure information for buses 471 and 561 from the Transport for Greater Manchester (TfGM) website, attempting to show the bus stops for the routes 471 and 561. Having obtained the ticketer information for the relevant buses on Bury New Road at the time referred to by the customer, the Claimant attempted to demonstrate that no passenger boarded the relevant bus on Bury New Road at the times which accorded with the letter. Despite the Claimant's heroic efforts, we did not find this evidence helpful, not least because we did not know the address of the passenger who allegedly made the handwritten letter complaint at [238], quite which bus stop he was referring to and, crucially, what he did when he saw that he had missed his bus (the Claimant's theories revolved around the other buses being on time and the passenger getting the very next bus and other presumptions that could not be tested).

54. Further, we were not satisfied that the letter is a forgery due to the high standard of cogency expected when allegations of forgery are raised. Nonetheless there

were curious features to the letter (such as the lack of formalities) meaning that cannot ascribe much weight to this letter. In fact, we ascribe far more weight to the fact that the Claimant admitted running early on 18 May 2020 and the evidence [236] from the Respondent's ticketing system of him having run early and ahead of schedule on the specific occasion alleged. We note that, when confronted with the letter the Claimant apologised, said that he had not been observant, that he had run early and waited at the Breightmet stop outside Morrisons supermarket and got back onto schedule.

55. In any event, the Claimant was invited to and attended an investigatory meeting with Mr Carroll on 11 June 2020 about the 18 May 2020 early running incident. Nonetheless, before considering the evidence regarding this meeting there is yet another document in the bundle [240] which does not fit the chronology of the case but which also relates to a disciplinary decision and interview on 03 June 2020 in respect of *"early running"*. Again, it is not clear which driver this related to, but it is noteworthy that the box for a decision of *"formal warning"* was ticked, such that it appears that a formal warning was given in relation to the individual unknown driver concerned. In relation to this document the 03 June 2020 meeting is referred to within the chronology produced by counsel under the reference *"Mark Butler terminated an employee's contract during the probation period due to early running on one route"*. Clearly there is an inconsistency between a "formal warning" and dismissal, another possible sanction indicated on the [240] form. We find that this seems to be evidence that suggests that another driver was treated more leniently than the Claimant. We emphasise that we were not taken to this document, there were no questions on it and we find that it does not relate to the Claimant.

56. Returning to the chronology, in between the time of the early running incident on 18 May 2020 and the meeting about it with Mr Carrol on 11 June 2020, [247] there is another email chain of correspondence between the Claimant and Kirstie Stewart (Human Resources) headed "0688 duty". In this email, the Claimant raised issues about: not having received an updated employment manual; travel time between the Interchange and the depot; alleged that he had not received an outcome from any grievance meeting and noting that, if he had received such an outcome, then he would have appealed to the HR department. He also states *"I also did not have an opportunity to attend the meeting with a witness as would be expected from a formal invite to a grievance meeting."* He goes on to say that his assertion that he was happy with the response to the grievance was incorrect. He also mentioned that he has not had a response to the grievance regarding why the company *"wish me to leave the company as settlement"*. The email states that he did not feel that this was a reasonable response and suspected that the company may be looking to find ways of the to get the Claimant to leave, *"hence the grievance"*. He also says that he found this to be "*a detrimental treatment*" due to his working time issues (having been) raised. Three days later on 12 June [@10:16hrs, 246] Kirstie Stewart responded saying that, firstly grievances could be dealt with on an informal and formal basis; that Mark Butler had had meetings and discussions with him i.e. the Claimant, and believed that the process had been concluded with the Claimant having accepted the response about how the company managed pay and travel times, with no further action or outcomes required. Ms Stuart went on to say that she was unaware of any dispute between him and his (trade) union and could only assume that this was because the union were involved in

the formulation of the collective agreement in place. In response [12 June at 10:20hrs, 246] the Claimant said that the company and the union had agreed travel time on Bury duties and that the Road Transport Working Time Regulations say that this would be working time. Consequently, the Claimant told Ms Stuart that the company were required to record "travel time on Bury buses" and, therefore, when the Claimant had done the duties previously mentioned the company were in breach of the hour rule.

57. After the Claimant had contacted Kirstie but before she responded on 12 June 2020, the Claimant had received a meeting invitation message on his ticketer machine to a meeting with Mr Carroll on 11 June 2020 (and which was minuted [241]). In this meeting Mr Carroll told us that he was investigating the 18 May 2020 compliant from the member of the public and advised the Claimant that he was investigating a concern regarding possible *"early running"* following a complaint from a *"key worker"* who had missed their bus because it operated early on 18 May 2020. The minute of the meeting which suggests that the Claimant was told that this was an *"informal meeting"* and not Mr Butler's role to apportion blame, rather to gather the facts and decide whether the Claimant's action should be referred to another manager. Crucially, the minute of the meeting says that the Claimant recalled the incident and admitted that he had run early adding that it was not intentional and that he had only realised when he got to Morrisons. The Claimant said that he simply had not been observant and apologised.

58. In relation to this meeting with Mr Carroll, we observe that the Respondent's employment manual contains a disciplinary policy [126]. Section 1 (under principles) says that *"At all stages of the procedure the employee will have the right to be accompanied by a work colleague or trade union representative."* A complaint of early running (such as the 18 May 2020 complaint) would appear to fall within the general misconduct section [127] which gives a non-exhaustive example of the types of offence which would be deemed to be *"general misconduct"*. These include bad time keeping (eg lateness for starting work, **early running**, inability to keep to the timetable). In relation to the meeting on 11 June 2020 the Claimant accepts that there was such a meeting but complained vociferously and repeatedly at the hearing before us and in his witness statement that he was not warned in advance about the meeting and did not know what the meeting was about until it was about to commence. He had been sent an invitation by his ticketer machine for the meeting to be held the same day and was not given the opportunity to be accompanied. It should be noted that Mr Butler emphasised in his witness statement, and also at the hearing before us, that early running was a general misconduct issue because of the obligations owed by the Respondent to the Transport Commissioner.

59. On a linked but separate matter, whilst the Claimant admitted early running, and we find that he did run his services a few minutes early on 18 May 2020, we were satisfied by the Claimant's oral evidence that he did not sign the minutes, nor was he given a copy of them. He says *"At that stage I did not have any reason to doubt the documents presented however this meeting was requested without any context and not any notice".* However, overall, in relation to the 18 May2020 incident, we find that the investigation happened, the Claimant was not entitled to any notice, nor to be accompanied (because it was

an investigation only) and, in any event, he did admit early running and that he did in fact run early.

Invitation to employment review meeting

60. The day after his informal meeting with Mr Carroll, Mr Mark Butler wrote to the Claimant by letter dated 12 June 2020 [242] and invited him to an employment/performance review meeting scheduled for 16 June 2020. (The arrangements were for the meeting to be chaired by Mr Butler and Claire Rowley was to take the minutes.) The Claimant was told that he was entitled to be accompanied by a colleague or a trade union representative. The letter says *"I feel it prudent to mention that a possible outcome of this meeting could be to terminate your employment with notice of unsatisfactory standards in your probation period"*. The letter explained that the Claimant was required to attend the review for two issues: (i) early running in relation to the 18 May customer complaint and (ii) the Claimant's attendance record. The letter says *"Your attendance pre your annual leave at the end of May 2020 has also given me cause for concern. I attach a copy of your attendance record".*

61. It is important to consider the Claimant's attendance records which appear at [355] and show a late on 08 January 2020 (which previously had been explained to Mr Carroll and where the explanation had previously been accepted). The record also shows absences on 09, 14 and 15 February 2020 which the Claimant had previously explained to Mr Carroll, as well as one absence on 18 March 2020. We note that the attendance record showed that the Claimant had taken no sick days and holidays were marked as such. We noted that [as per §32 of his witness statement] Mark Butler clearly intended to discuss the Claimant's three periods of absence within one month because Mr Butler's statement says *"I understand that Mr Carroll spoke to the Claimant about absence in February 2020."* We find, however, that Mr Carroll had discussed the absences relating to February 2020 and accepted that there was *"no case"* for the Claimant to answer. Nonetheless, these absences were being brought up again unexpectedly by Mr Butler when the Claimant believed that they were no longer relevant. We found this to be unfair and evidence of the Respondent having decided that they were determined to terminate the Claimant's employment.

62. Upon receipt of Mr Butler's letter of 12 June 2020 [242], the Claimant responded by email on 13 June 2020 to Mr Butler copying in the Respondent's HR department and the Respondent's solicitors [@08:50, 251]. The Claimant said in that email *"I feel the company are using this as a reason to remove me from the company."* He goes on to say that he had previously submitted a grievance regarding the company seeking his leaving the company in response to his Tribunal claim (referring to his first ET1 of 12 May 2020) and states that he feels that the action is being taken because of the Tribunal claim. (In the 13 June 2020 email the Claimant also asked for prior disciplinary documents, copies of all early running between April 2020 and June 2020 and states that he would also like to have the details of what disciplinary action was taken against other drivers because he had information that none had been taken, not even so

much as an investigation.) He goes on to explain in the 13 June 2020 email that (in relation to the 18 May early running incident) he accepts that he left the Taylor's Lane stop early but rectified the mistake by waiting at the Breightmet stop opposite Morrisons. He ends the email by saying *"I expect given the dispute with the company and the company seeking my leave the company I will be dismissed on Tuesday. I will also submit to tribunal, the real reason bring* [typo - he meant to say "being"] *my protected disclosures."* We find that this is very clear evidence that the Claimant felt that he was being pushed out and treated differently from other drivers and that he was laying down a very clear marker that he was being treated in this way.

63. In his 13 June 2020 email letter [251] the Claimant also asked for copies of CCTV on the buses relevant to the NHS worker's 18 May 2020 complaint of early running. This became a point of contention in pre-action hearings in this Tribunal (the Claimant made applications for specific disclosure) and the controversy continued at the hearing before us. This was because it was the Claimant's case that the Defendant had CCTV cameras fitted on the relevant buses, and yet they could not provide any CCTV footage in circumstances where the Claimant was trying to forensically pinpoint "the keyworker" getting on the bus (or not, as per the Claimant's suspicion). In response, the Respondent consistently claimed, whilst there was the potential for CCTV cameras on the relevant vehicles, in fact, the cameras were not set up and working. Therefore, no CCTV footage was available to be provided. At the hearing before us, the Claimant repeatedly brought up this point and did not seem to understand the concept that a bus could have a camera in place but for it not to be working and therefore the Defendant not having any footage that could in fact be disclosed to him. We find that, despite the Claimant's views there was no CCTV footage and so the Respondent were always genuinely unable to provide any such footage to the Claimant.

64. On 15 June 2020 the Claimant wrote to Mark Butler by email [252 @ 15:28] saying that he had asked Eddie Sixsmith to attend the disciplinary meeting.

65. On 16 June 2020 the Respondent moved the employment review meeting to Friday 19 June 2020. For the sake of completeness only, amongst other things, their letter re-arranging [254] explained that the relevant vehicles did not have CCTV footage because the *"roll-out programme"* that had been planned regarding CCTV on the buses had been stalled and hampered due to the Covid-19 pandemic.

66. We also note that on 17 June 2020 [255] the Claimant emailed Mark Butler saying that *all* of the bus drivers were being told not to operate early. The Claimant notes that, on 17 June 2020 he had seen a message via the ticketing machines from Claire Rowley to all of the drivers, saying that they should not run early, and that the company were getting complaints regarding this. The Claimant details that the message apparently said, *"During these quieter times please keep a check on your running times. Disciplinary action could be taken if this is not done."* The Claimant comments that this message clearly indicates that 'drivers' were operating early and that complaints were being received, and yet he had received a disciplinary for one instance for which one complaint was received. Further, implying that he was being singled out, in his case disciplinary action *"has been sought"*. We find that the Claimant was drawing

attention to the fact that what was being communicated through the ticketing machines to all of the bus drivers seemed to be a more generous, gentle warning, whereas he was in the discipline process for one instance of early running.

67. On 18 June 2020 the Claimant went off work due to sickness and provided a sick/fit note [256]. It is noteworthy that the HMRC statutory sick pay certificate filled in by the Claimant [264-5] describes the details of his sickness as being *"victimisation at work"*. The sick/fit note itself [269] dated 19 June 2020 describes the Claimant's condition as *"stress at work"*. The sick/fit note is dated 19 June 2020 running to 03 July 2020.

68. Whilst he was off due to this sickness, and in the period covered by the sick/fit note, the Respondent invited the Claimant was to an occupational health appointment on 02 July 2020. This is evidenced in a letter from Mr Butler to the Claimant dated 03 July 2020 [270] in which the letter starts by saying that the Claimant failed to attend an occupational health assessment on 02 July 2020. The letter (containing grammatical errors) says *"As you were aware you were scheduled to attend an employment review meeting on 19 June 2020, but you advised me that you were unwell with work related stress. We organised an occupational health assessment to address your reason of absence and despite being advised that you were required to attend, you failed to do so."* The letter goes on to say that the employment review meeting was being rescheduled for Monday 06 July at 09:30hrs and that the area of discussion was the early running complaint, as well as his attendance record which now was said to include his absence from 15 June to date. A new and third disciplinary matter on the agenda was: *"insubordination – failing to attend occupational health assessment on 02 July 2020"*. A fourth new matter was *"your attempts to frustrate the company in addressing these matters with you".* Finally, the letter [270] says that if the Claimant did not attend, then the meeting would go ahead in his absence. The letter also says that, because the Claimant had neglected to attend the occupational health assessment, there was no evidence to suggest that he was not *"fit"* to attend this meeting.

69. We find that the scheduled occupational health meeting was in fact during the currency of the sick/fit note, albeit the day before the sick/fit note was due to end on 03 July 2020. We find that it was wholly inappropriate for the Claimant to be required to attend an occupational health meeting during his period of sickness as per the sick/fit note. Further, the meeting scheduled for 09:30am on 06 July was the next working day after the Claimant's sick/fit note expired. At the very least, this scheduling of the meeting seemed to us to be a very overbearing way to proceed, and entirely consistent with the Claimant's belief that the Respondent wanted to get rid of him.

Termination of the Claimant's employment and second ET1

70. In any event, the Claimant did not attend the 06 July 2020 meeting. As a result, the Respondent wrote to the Claimant through Mark Butler by letter dated 08 July 2020 [272] reminding the Claimant that he had failed to attend the meeting, the failure to attend the meeting led to the Respondent having come to the view that the Claimant had failed to satisfy the minimum standard required for the

role of PCV driver and the letter said that his employment was terminated due to unsatisfactory completion of the probation period with immediate effect. (The letter went on to say that the termination date was effective from the date of the letter, that the Claimant would be provided with 5 days contractual notice pay and that the company reserved the right to deduct any outstanding monies from his final pay.) The letter says that the decision was final and that there was no appeal process (because events had occurred) within the Claimant's probationary period.

71. The Claimant's termination of employment was effective from 09 July 2020 which was also the same date that he issued his second Claim Form [28]. At paragraph 8 of the Claim Form [34], the Claimant says that he had submitted a previous Claim Form [2405507/20] for unpaid wages, holiday pay and breaches of working time regulations. He says that during the conciliation process the Respondent sought his leaving the company as part settlement and he also clarifies that Part 8 of this second Claim Form that the earlier claim did not relate to dismissal and that he had submitted the earlier claim only for the purpose of dispute resolution and conciliation. The Claimant, in relation to the second Claim Form, says that he has now been dismissed with reasons and formally submits that the dismissal of 2405507/20 was an assertion of statutory rights and working time regulations and he also submits that the dismissal reasons would not normally result in dismissal.

72. On 16 July 2020 the Claimant sent an email to Simon Dunn at the Respondent's HR department copying in Kirstie Stewart and Mark Butler. This email correspondence [283-287] shows that the Claimant was trying to explain to them the course of communication and dealings between him and the Respondent and his explanation for rota swaps. In this email the Claimant points out that he was, in effect, treated badly by the Respondent in general, and by Mark Butler in particular.

Third ET1

73. On 23 September 2020 the Claimant contacted ACAS regarding his third claim and on 27 October 2020 [40] he issued his third ET1. At Part 8 he describes the type of claim as automatic unfair dismissal, detrimental treatment due to protected disclosure and [at Part 8.2] claims compensation for dismissal following protected disclosure, notice pay, holiday pay, arrears of pay, detrimental treatment due to protected disclosure, interim relief hearing as dismissal due to protected disclosure and points out that he had previously submitted an interim relief hearing under Claim No 2408947/20.

2017 collective agreement

74. During the course of the hearing the collective agreement [set out at §30 above in full] was revealed to be a huge stumbling block on several different levels. It was clear that the Claimant knew nothing of the 2017 agreement nor what it said. Further, we find that it was hardly surprising that the Claimant was confused about why he was told that periods of time that he spent travelling from Bolton Interchange, or more particularly Bury Interchange, back to the

Weston Street Depot because the Respondent's witnesses never talked about an "inconvenience payment" or payment as "compensation" for having to get back to the Depot; rather they repeatedly referred, in all dealings with the Claimant and also at the hearing before us, to "travel time" and "one hour travel time" being allocated to travel between Bury Interchange and the Depot. This issue was yet further confused by the fact that, under the contract of employment, the Respondent was entitled to deduct from pay (but not some of the time spent "working", time spent on meal/rest breaks) up to 90 minutes per shift. Yet another level of confusion was applied by the Claimant's contract of employment explicitly stating that his "place of work" was the Weston Street Depot, although of course of oral evidence he acknowledged that, as a bus driver, he moved around following the bus routes as per his roster.

75. Because we were not taken to the 2017 collective agreement and the Respondent's witnesses could not explain why the journey between Bury Interchange and the Bolton Weston Street Depot was always allocated one hour travel time (neither Ms Jones nor the panel members had local geographical knowledge whereas I did and recognised that the journey would only take over half an hour in heavy traffic and only an hour if traffic was heavy or if there was a major road-blocking incident), all of the evidence available to the Claimant led to him honestly believing that the journey between the Interchanges, and particularly Bury Interchange, back to the Depot genuinely equated to one hour actual working time under the WTL. In fact, I deduced through my questions of clarification on day three of the hearing, that the travel payment was a payment which only ***notionally equated to time*** and was a "one-off payment". It transpired that it could be claimed by making a specific request at the end of a shift at the depot.

Submissions

76. We were greatly assisted Ms Jones' written submissions contained in her skeleton argument which ran to 11 pages and which she supplemented by oral submissions.

77. The nub of the case really revolved around what "travel time" meant in the context of this case. The Respondent said that the period spent travelling back to the depot was not "work" because the Claimant was not at the Respondent's disposal. He did not have to return to the Depot because there was no obligation to park there (although there was free car parking which the workforce found attractive). Therefore, the WTR did not apply and the Respondent was not obliged to record the Claimant's time spent travelling. Further, once the period of travel back to the depot was disregarded, the Claimant could not point to any working time breaches. Following from this, the Claimant was paid accurately with no unlawful deductions and in fact he owed the Respondent monies because he had taken excess days holiday.

78. In any event, the Respondent submitted that any complaints about his working time would never amount to protected disclosures because his was a private workplace dispute and there was no evidence of any "public interest" element. Consequently, the Claimant could not be said to have made or been subject to a whistleblowing detriment.

79. Finally, the Respondent submitted that the Claimant had not been unfairly dismissed. The dismissal occurred only 7 months into his probationary period and, it was submitted, because there was no protected disclosure, then his dismissal was not automatically unfair pursuant to section 103A of Part X of the Employment Rights Act 1996. Nor could his 12 May 2020 claim amount to automatic dismissal under section 104 ERA 1996 on the basis that he was dismissed because he was asserting his statutory rights.

80. The Claimant made succinct submissions in which he asserted that his place of work as the Weston Street Depot; that on the occasions when he had to travel back to the Depot that this was, and should have been recorded as, working time, as per the CJEU authority of **Federación de Servicios Privados de Sindicato Comisiones Obrereas v Tyco Integrated Security SL** (C-266/14) particularly as per §44; that he had repeatedly complained about the Respondent breaching his working time and not paying him for the time spent travelling back to the depot; that his complaints amounted to a protected disclosure; and, therefore, that his dismissal amounted to automatic unfair dismissal.

Discussion and Conclusions

81. Having made our findings of fact, our deliberations followed the document (referred to earlier) headed *"updated list of issues"* (see the appendix herein).

82. The first preliminary issue was in relation to *"working time"* and whether the time taken to travel between the Bolton Depot and Bolton Interchange or Bury Interchange was working time. We found that in the case of the Claimant specifically (and make no findings which could apply to any other employee) that travel time between the two interchanges and the depot were in fact working time. We so find because the Respondent did not explain the inconvenience payment to the Claimant when he started his employment nor subsequently. We do not know, and we do not speculate, whether this was deliberate or not, but we do find that the Claimant had got wind of payment for travel time in January 2020. The Claimant then realised that he was not being paid for the time that he was losing payment for traveling either from Bolton Interchange back to the Weston Street depot or, particularly, from Bury Interchange back to the depot.

83. As alluded to above the working time issue was further confused by the fact that whenever the Respondent mentioned, what in effect was an inconvenience payment, they repeatedly talked about it and referred to it as *"time"*. Even at the hearing before us when it was obvious that the Claimant was confused by the issue everybody, including the Respondent's witnesses, referred to payment for time spent travelling from either interchange back to the depot as *"time"*. It was only when I asked searching questions of clarification that it came to light during the hearing that in fact there had been an agreement which long pre-dated the Claimant's employment and where the inconvenience payment had been agreed on the basis of a payment that *equated to* one hour, despite the fact that it did not represent a *"real"* period of 60 minutes. The one-hour travel payment was supposed to nominally represent the inconvenience and, in

fact, had nothing to do with the time spent travelling because the journey would usually take less than an hour except in abnormal traffic conditions. Nonetheless, the Claimant's contract said that his place of work was the Bolton Weston Street depot. The 2019 Employment manual, under the "definition of working time" section [144] referred to "(i) *Daily travel to and from* ***your contracted office or depot*** *is not included*". The natural interpretation of this is that the employee's commute to/from work would not be considered to be employment. However, having referred to a "contracted depot" the manual said "(iii) *Those employees working away from their normal place of work, but travelling to and from external business sites, are to record these hours*". We find that it is entirely understandable that the Claimant thought that Bury Interchange in particular was an "external business site". We find, therefore, that the Claimant genuinely believed that the Weston Street depot was his place of work and that he was entitled to be paid for his time travelling there from Bury Interchange or Bolton Interchange if his work duties finished away from the depot.

84. Therefore, as per the second issue in the agreed updated list of issues, the Respondent failed to record the Claimant's working time correctly because they did not record the time that he spent travelling from Bury Interchange back to the depot or from Bolton Interchange back to the depot (although the evidence seemed to be that often he was driving a bus between Bolton Interchange and the depot). We find that the Respondent failed to record the Claimant's time, even after the time, which we find was some point in March 2020, when they started to pay what equated to inconvenience payments in the mind of the Respondent (but actual travel time in the mind of the Claimant). We find that the Claimant repeatedly brought this issue up as a grievance and it was never thoroughly dealt with by the Respondent, which is why he continued to pursue his working time claim. Therefore, in the case of the Claimant (and no other employee that we know about) the Respondent's working time records were incorrect because they did not record his working time from Bury Interchange or Bolton Interchange back to the depot.

85. Turning to the issue of unauthorised deductions from the Claimant's pay under Part 2 of the Employment Rights Act 1996, we turn to deal with issue 3 which was *"Depending on the outcome of the working time issue (see issue 1 above), has the Respondent made an authorised deduction on the Claimant's pay on any occasion by paying him less than the amount properly payable?"* In relation to this issue, we find that there were unauthorised deductions of pay although we cannot pinpoint precisely when they happened. All we can find is that there were <u>*some*</u> unauthorised payments. From the time when the Respondent did start paying the Claimant the inconvenience payments (which the Claimant reasonably believed were travel time payments) then it seems that this issue has been covered and in relation to those shifts there has been no unauthorised deductions from his pay (not that we can pinpoint the relevant shifts/dates). However, there were other occasions, certainly before he started getting the inconvenience payments and, possibly later, when there were unauthorised deductions from his pay. We emphasise that we have not seen the pay records and it is for the Claimant to substantiate his loses and to identify which journeys at the end of his shifts he has done between both Bury Interchange and Bolton Interchange back to the depot where he did not receive any inconvenience payments. In passing we note that we would expect the Respondent to provide

his payslips and rotas to assist the Claimant in identifying the relevant shifts where there have in fact been unauthorised deductions from pay.

86. Turning to holiday pay, the issue is whether the Claimant has been underpaid in respect of holiday pay. We find that the Claimant was entitled to 28 days holiday a year [172] and he worked for 7 months. Therefore, we find that he is entitled to 16.333 days, say 16.5 days holiday pay. As per [355] the Claimant took 23 days holiday. Therefore, it seems that the Claimant was overpaid in relation to his holiday pay. However, in calculating 16.5 days we have not been able to take into account the further hours that he worked representing his time between Bury Interchange and the depot and Bolton Interchange and the depot and, so it is likely that he is, in fact, entitled to slightly more than 16.5 days holiday. In any event, it is still likely that he has been overpaid in terms of his holiday. Therefore, as per issue 5, we find that 5(b) is the most likely outcome which he has been paid for more holidays than accrued to him. In conclusion, as per issue 6, the holiday pay must have been calculated on the basis of shorter working time and he, potentially, is entitled to more, but this is unlikely to equate to (23 days less 16.5 days =) 6.5 days.

87. Issue 7 of the updated list of issues relates to time limits and whether any claims for unauthorised deductions occurred more than 3 months prior to his presentation of his claim. We have considered whether more than 3 months had passed but we find that every deduction was part of a series. Therefore, his first ET1 claim was in relation to unauthorised deductions and he continued to pursue that claim. Further, the Claimant contacted ACAS the day after he found out about what we now understand to be the inconvenience payments which had been agreed between the Respondent and the Union but which he had not been getting. Therefore, we find that, by putting his ET1 claim in, in time, that he is entitled to pursue these claims. For the avoidance of doubt and in relation to issue 8 the Claimant was prompt and repeatedly raised the same issue regarding his travel time, not being paid and he did not have the full information to hand until the end of March, around 24 March 2020 (and even then he thought that he was owed for travel time that was actual working time and did not understand that the union had previously agreed to an inconvenience payment for the bus drivers).

88. As per issue 9, we now turn to consider notice pay and breach of contract. It is accepted that the payment had a contractual entitlement to one week's notice and that the Respondent had authority to make a deduction from his pay if he had taken more holiday than he had accrued to him. As set out above, it seemed that the Claimant had around 6.5 days (subject to the adjustment referred to above) accruing to him under the contract. There is a potential underpayment, subject to the Claimant proving this.

89. We next turn to consider the issue of the Claimant's claimed protected disclosures pursuant to Part IVA Employment Rights Act 1996. We find that the Claimant disclosed relevant information and that he reasonably believed that it tended to show a breach of legal obligation (in relation to the regulation of drivers' working hours). However, we find that he did not reasonably believe that his disclosure was made in the **public interest**. We find that there is zero evidence of public interest disclosure issues in his communication with the Respondent. This is the position in relation to his email grievance in early 2020

(PD1 in the updated issues document) as well as in relation to PD2, namely the presentation of his claim to the Employment Tribunal on 12 May 2020 under case number 2405507/2020. Therefore, in relation to issue 11 in the updated list of issues, the public interest element to the protected disclosure matters falls away because there were no qualified disclosures. We find that the disclosures were in relation to claims for personal payments only.

90. We then turn to deal with the Claimant's asserted whistleblowing detriment pursuant to Section 47B of the Employment Rights Act 1996. Given our findings above we are not satisfied in relation to Section 47B.

91. Finally, we turn to unfair dismissal pursuant to Part X Employment Rights Act 1996. We are required to consider this within the context of the updated issue 13 *"Can the Claimant show that the reason or principal reason for his dismissal was: (a) a protected disclosure (if any are established) in which case dismissal is automatically unfair under section 103A; and/or (b) the assertion of the statutory rights contained in the presentation of the claim in case number 2405507/20 on 12 May 2020, in which case dismissal is automatically unfair under Section 104?*

92. We find that a statutory right was infringed because the Respondent failed to record the Claimant's time travelling from Bolton Interchange, and particularly Bury Interchange, back to the Weston Street depot. We have already found that the Claimant's complaints to the Respondent did not amount to a protected disclosure and so section 103A is not satisfied.

93. However, for the reasons set out above, we do find that on the particular facts and circumstances of this case that the Working Time Regulations 1998 were triggered because the Claimant was not paid for at least some shifts where he had to travel to the depot and because *this time on these occasions was not recorded* nor were any records retained pursuant to regulation 9. This in turn triggers section 104 of the Employment Rights Act 1996.

94. We therefore have had to consider whether the Claimant's attempts to enforce his statutory rights under the WTR was the reason, or the principal reason, for the dismissal as per section 104. In relation to this, we find that the Claimant repeatedly raised the Working Time Regulations 1998 claiming that they applied to him. We find that this was the reason or principal reason that caused the Respondent to want to get rid of the Claimant. His claim to the Employment Tribunal in the first ET1 on 12 May 2020 centred on his working time and breaches of transportation regulations. His original grievance dealt with by Mr Butler on 24 January 2020 had centred on his claims that he was being underpaid because he was not being paid to travel between where his work finished and the Depot, and he raised working time in his encounters with his managers thereafter, often copying in the HR personnel.

95. We find that there is evidence that the Respondent, through Mr Butler, treated the Claimant carelessly on 24 January 2020 in failing to fully deal with his concerns about working time and linked lower-than-anticipated pay, and in failing to explain the inconvenience payment, its existence or the rationale for it. Mr Butler also treated the Claimant unfairly when he resurrected the original absences and late attendance matters sometime after Mr Carroll had dismissed

the concerns on 25 February 2020; that despite the fact that Mr Carroll did not write to the Claimant about the outcome of that February 2020 meeting. The 08 January 2020 had been an allocation mistake. Three absences on 09, 14 and 15 in February were dealt with by Mr Carroll on 28 February 2020 and nothing happened. We find that 18 March 2020 was found to be a rest day change. (Mr Butler denied this initially in oral evidence and then changed his evidence conceding that 18 March issue had been a mistake, but the record had never been amended because, according to the oral evidence, the Respondent's computer system was *"locked"* afterwards). Ultimately, the Respondent dismissed the Claimant because of supposedly unexplained absences, despite the fact that these had been addressed by him back in February 2020 and his explanations had been accepted. In terms of workplace misdemeanours, the Claimant was only ever accused of one early running and only admitted to one early running (i.e. the 18 May 2020 complaint).

96. We find that, because the Claimant repeatedly made grievances regarding the lack of recording of his working time, particularly in relation to travel between Bury Interchange and Bolton Interchange and back to his base at the depot, citing legislation and the Tyco case, the Respondent perceived the Claimant to be a trouble-maker. We find that the Respondent did want to get rid of the Claimant, a factor that he himself perceived, as evidenced when he asserted his belief that this is what the Respondent was trying to engineer in the emails that he sent to the Respondent, such as the 13 June 2020 email. Importantly, the fact that the Respondent failed to address the Claimant's working time grievance head on shows that, indeed they did want to get rid of him. The Respondent could have explained the inconvenience payment to him, that it pre-dated his employment, and that he would be entitled to such payments on the occasions when he ended his shift at Bury having started his shift, and parked his car, at the Bolton Weston Street Depot. They could have paid the Claimant the inconvenience payment from the start of his employment, having explained the system for claiming it. The Respondent could have explained that he was only on duty whilst he was driving a bus, (whether the bus was in services for passengers or not) and that the rest of the time he was on unpaid breaks or getting to or from the beginning or end of whichever service he had been allocated to, and so was not at the Respondent's disposal and could do what he liked with his time. The fact that the Claimant doggedly refused to be fobbed off with vague explanations irritated the Respondent, particularly when the Claimant persisted in drawing their attention to what he considered to be his strict legal rights.

97. We also find that, in relation to the Respondent's dealings with the Claimant and management of his grievance and their purported discipline of him, there was a total lack of impartiality. It was only ever Mr Carroll and Mr Butler who dealt with the Claimant. We see no evidence of anybody else being involved. We also find that Mr Butler's evidence was misleading when he has asserted that the Claimant's grievance was just about pay. In particular, this is highlighted at [§ 21 witness statement] where he says *"I would like to say that the grievance raised by the Claimant in January 2020 related solely to his pay. At this stage the Claimant was not suggesting that there was a working time breach but rather that he considered that he had not received the pay he was entitled to. This was purely down to him misrepresenting his contract of employment and comparing this to the first drivers who were on separate terms*

of employment." This is not correct because it does not accord with the actual grievance eventually produced at the hearing before us [449 & 450] which clearly mentions the Working Time Regulations 1998 and sets out the Claimant's various grievances in detail.

98. Nor did we find that Mr Butler was a credible and reliable witness particularly where he says at paragraph 10 of his witness statement that he had little involvement with the Claimant during his 7 months of employment. This is simply not correct, because Mr Butler had a number of interactions with the Claimant and was the main person that dealt with the Claimant, (in addition to Mr Carroll), throughout his period of employment. We find that on and after 20 January 2020 Mr Butler and Mr Carroll, as representatives for the Respondent, did not take seriously the Claimant's allegations about his working time not being recorded properly; nor his assertions that others were not being treated as harshly as him for early running incidents.

99. We do not find that the Claimant's failure to attend the occupational health appointment whilst he was on sick leave and covered by a sick/fit note as *"insubordination"*. The Respondent's policy of employment says [148] that investigations will be treated flexibly when an employee is absent from work due to sick leave (and we note that the employment manual is said to apply to all employees and the disciplinary policy is said to apply to all employees).

100. We also note that the ACAS Code of Conduct says that disciplinary hearings should be heard by an independent person. We note that the Respondent was a company employing over 500 people at the time and therefore do not find it credible that the Respondent could not find anyone other than Mr Butler to deal with the Claimant's 6 July 2020 disciplinary hearing. Overall, we find that the Respondent had no intention of making the final disciplinary hearing fair and that they set out at the disciplinary hearing specifically to dismiss the Claimant with no intention of doing anything else. Therefore, the dismissal was unfair and in circumstances when the Respondent's lack of satisfaction with the Claimant stemmed from his repeatedly raising his statutory rights under the Working Time Regulations 1998 and commencing the Tribunal Claim on the same topic on 24 March 2020. Consequently, we find that section 104 of Employment Rights Act 1996 is satisfied.

Directions

101. I previously issued on/around 15 June 2023 indicating that my reserved decision would be available by 30 June 2023. This has not been possible due to my other judicial commitments. I therefore vary those earlier June directions to give the Claimant until 10:00 on Monday 10 2023 July **at the latest** to (i) provide an up-dated schedule of loss and (ii) to indicate to the respondent whether he is still seeking reinstatement. I also extent time to the Respondent to 16:00 on 12 July 2023 to, if so advised, (i) serve a counter schedule and (ii) a witness statement dealing with the issue of reinstatement of the Claimant. The proposed hearing date of 14 July 2023 will remain as a firm listing, but the parties are asked to communicate with the Tribunal as soon as possible if it is no longer necessary to hold a remedy hearing.

Decision

1. The Claimant's claim relating to protected disclosures pursuant to part IVA Employment Rights Act 1996 is dismissed as unfounded.

2. The Claimant's claim relating to whistleblowing detriment pursuant to section 47B Employment Rights Act 1996 is dismissed as unfounded.

3. The Claimant was unfairly dismissed pursuant to sections 104 of the Employment Rights Act 1996 and his claims therein succeed.

4. Other claims remain that have not been subject to a final determination, namely unlawful deductions from pay pursuant to Part II Employment Rights Act 1996 for unpaid wages and holiday pay (holiday pay to be off-set against notice pay).

5. A remedy hearing has already been listed provisionally for 14 July 2023 to commence at 09:00.

_____

Tribunal Judge Holt

3 July 2023

JUDGMENT SENT TO THE PARTIES ON

5 July 2023

FOR THE TRIBUNAL OFFICE

Appendix

UPDATED LIST OF ISSUES

Preliminary Issue - Working Time

1. Is the time taken to travel between the Bolton depot and the Bolton or Bury Interchanges working time?
2. If so, has the Respondent failed to record working time correctly?

Unauthorised deductions from pay - Part II Employment Rights Act 1996

Pay for Work Done

3. Depending on the outcome of the working time issue (see issue 1 above), has the Respondent made an authorised deduction from the Claimant's pay on any occasion by paying him less than the amount properly payable?

Holiday Pay

4. Depending on the resolution of the working time issue (see issue 1 above) has the Claimant been underpaid in respect of holiday pay?

5. At the time the employment terminated had the claimant taken:

    a. Fewer holidays than those which had accrued to him;

    b. More holidays than those which had accrued to him; or

    c. The same holidays as had accrued to him?

6. Depending on the answer to the previous question, is there any further entitlement to holiday pay which should have been paid on termination?

Time Limits

7. Insofar as any alleged unauthorised deduction occurred more than three months prior to the presentation of the claim, allowing for the effect of early conciliation, can the claimant show that it formed part of a series of deductions?

8. If not, can the claimant nevertheless show that it was not reasonably practicable for the complaint to have been presented within time and that it was presented within such further period as the Tribunal considers reasonable?

Breach of Contract - Notice Pay

9. It being accepted that the claimant had a contractual entitlement to one week's notice and that the Respondent had authority to make a deduction from his pay if he had taken more holidays than had accrued to him, can the Claimant show that the Respondent was in breach of contract in:

    a. Making a deduction in respect of excess annual leave when in fact no such deduction was appropriate (see issue 5 above); and/or

    b. Underpaying him in respect of notice pay depending on the resolution of the working time issue (see issue 1 above)?

Protected Disclosures - Part IVA Employment Rights Act 1996

10. Can the Claimant show that he made a qualifying disclosure in that:

    a. He disclosed information;

    b. Which he reasonably believed tended to show breach of a legal obligation (in relation to regulation of drivers' workings hours); and

    c. He reasonable believed his disclosure was made in the public interest

    on either of the following occasions

    PD1: In his email grievance in early 2020;

    PD2: In the presentation of his claim to the Employment Tribunal on 12 May 2020 under case number 2405507/2020?

11. If so, can the Claimant show that either of those qualifying disclosures was also a protected disclosure in that:

    PD1 was made to his employment under section 43C;

    PD2 was protected under section 43G because:

a. The Claimant reasonably believed that the information disclosure in it and any allegations contained in the claim form was substantially true;

b. The Claimant did not make the disclosure for the purposes of personal gain;

c. The Claimant had previously made a disclosure of substantially the same information to his employer; and

d. In all the circumstances of the case, including those in section 43G(3) it was reasonable for him to make the disclosure by presenting the claim.

Whistleblowing Detriment - section 47B Employment Rights Act 1996

12. If the Claimant made one or more protected disclosure, and bearing in mind the burden of proof provision in section 48(2), did the Respondent subject the Claimant to any detriment by any act or deliberate failures to act on the grounds that he made a protected disclosure? The Claimant asserts that Respondent:

a. Failed to follow the Respondent's disciplinary policy;

b. Failed to make arrangements for the Claimant's chosen companion to be available at the disciplinary hearing;

c. Refused to allow audio recording of the disciplinary;

d. Failed to investigate the attendance issue;

e. Decided to take action against the Claimant in respect of his absences despite not taking any action on 25 February 2020 even though the Claimant had only been off on one further occasion;

f. Failed to carry out any return to work interviews;

g. Failed to investigate his complaints that the Respondent had not followed the disciplinary policy;

h. Failed to follow its whistleblowing policy;

i. Failed to permit the Claimant to appeal the dismissal.

Unfair Dismissal - Part X Employment Rights Act 1996

13. Can the Claimant show that the reason or principal reason for his dismissal was:

a. A protected disclosure (if any are established), in which case dismissal is automatically unfair under section 103A; and/or

b. The assertion of his statutory rights contained in the presentation of the claim in case number 2405507/20 on 12 May 2020, in which case dismissal is automatically unfair under section 104?

Remedy

14. If any of the above complaints succeed, what is the appropriate remedy? Issues likely to arise include the following:

a. The calculations of any underpayments in relation to pay, holiday pay, or notice pay arising out of the working time issue;

b. The proper calculations in respect of holiday pay if there was an underpayment;

c. Compensation for injury to feelings and financial losses in the event that any whistleblowing detriment complaint succeeds;

d. Whether the Claimant should be re-instated or re-engaged should his unfair dismissal complaint succeed; and

e. If he is not reinstated or re-engaged, the appropriate compensatory award for unfair dismissal.