EMPLOYMENT TRIBUNALS

Claimant: Mrs H Hughes

Respondent: KingKabs Ltd, company number 03623784 formerly known as Vedamain Ltd

Heard at: Liverpool **On:** 4, 5, 6 and 7 July 2023

Before: Employment Judge Horne

Members: Ms H D Price
Mr R Cunningham

Representatives
For the claimant: in person
For Vedamain Ltd: Mr M Ramsbottom, consultant

Judgment was sent to the parties on 13 July 2023. The claimant has requested written reasons for two disputed decisions recorded in the judgment. Her request complied with rule 62 of the Employment Tribunal Rules of Procedure 2013. Accordingly the following reasons are provided.

REASONS

Scope of these reasons

1. The tribunal has made many disputed decisions during the lifetime of this case. As and when requested, Employment Judge Horne has provided the parties with written reasons. This set of reasons relates to two disputed decisions made at the final hearing. These were:

    1.1. that the claimant had not been subjected to any detriment on the ground that she had made a protected disclosure; and

    1.2. that the respondent had not discriminated against the claimant because of her sex.

2. In an e-mail sent to the tribunal on 10 July 2023, the claimant confirmed that the scope of her request for reasons was confined to these two decisions. We also made other decisions at the final hearing, but the claimant has not asked for written reasons for those.

Terminology

3. As with previous judgments and reasons, we use the following terms:

   3.1. "the old Abbey companies" means Clakim Ltd, Janbar Mg Ltd and Kajoliea Ltd. They were three limited companies directed by Mr Williams and used as corporate entities for the Abbey Taxis business prior to December 2019.

   3.2. "Vedamain" was Vedamain Ltd, trading as KingKabs. It has recently changed its name to KingKabs Ltd, but we continue to refer to it as "Vedamain" to achieve consistency with previous judgments.

   3.3. "CWCC" is an abbreviation for Cheshire West and Cheshire Council.

Issues

4. The issues we had to decide were set out by our employment judge in the schedule to a case management order sent to the parties on 8 June 2023.

5. At the start of the final hearing we allowed the claimant to amend her claim so as to allege that she had made a further protected disclosure orally to Mr Harrison, an employee of CWCC, shortly after 2 July 2020. We gave reasons for that decision orally at the hearing.

6. From the claimant's claim form it appeared to have been the claimant's case that she had also made protected disclosures to two Members of Parliament (MPs). During her closing submissions, the claimant clarified her case about these disclosures. They are relevant, she says, because they lend support to her contention that she reasonably believed her disclosures to CWCC to be in the public interest. She does not, however, contend that her disclosures to the MPs motivated the respondent to subject her to the alleged detriments. It is therefore unnecessary to decide whether the disclosures to the MPs were protected.

7. We now reproduce the relevant parts of the schedule. We have added passages in square brackets to reflect the amendment that we allowed the claimant to make.

Complaints and issues

Complaints

1. The claim now consists of the following complaints…:

   1.1. Detriment by Vedamain Ltd on the ground that the claimant made a protected disclosure, contrary to section 47B of the Employment Rights Act 1996 ("ERA").

   1.2. …

   1.3. …

   1.4. Direct sex discrimination by termination of employment, in contravention of section 39(2)(c) of the Equality Act 2010 ("EqA") and within the meaning of section 13 of EqA.

Protected disclosure

2. The claimant says that she made a protected disclosure by

[2.1] sending an e-mail to [CWCC] between 2 and 6 July 2020[; and

2.2 orally disclosing information to Mr Harrison of CWCC shortly after 2 July 2020.]

3. Her case is that she disclosed the following information to CWCC:

   3.1. **[PD1]** Vedamain Ltd was receiving payments from drivers in cash for settle without issuing receipts or payment slips

   3.2. **[PD2]** Vedamain Ltd was not keeping VAT records

   3.3. **[PD3]** Vedamain Ltd was keeping Covid Retention money that was intended to be paid to drivers

   3.4. **[PD4]** Vedamain Ltd was wrongly classifying drivers as being self-employed.

4. The claimant says that she believed that this information tended to show:

   4.1. that Covid retention money was being illegally used;

   4.2. that Vedamain Ltd and/or CWCC was in breach of tax laws relating to VAT, income tax and national insurance; and

   4.3. that this was either a breach of a legal obligation or a criminal offence or both.

5. The claimant contends that she made this disclosure in accordance with section 43C(1)(b)(ii) of ERA.

6. There is no dispute that the claimant e-mailed CWCC.

7. The issues are:

   7.1. **Did the claimant's e-mail disclose the alleged information?**

   [Did the claimant disclose the alleged information orally to Mr Harrison?]

   7.2. **Did the claimant believe that the information tended to show (a) that a criminal offence was being committed and/or (b) that a person was breaching a legal obligation to which they were subject?**

   7.3. **Was that belief reasonable?**

   7.4. **Did the claimant believe that she was making her disclosure in the public interest?**

   7.5. **Was that belief reasonable?**

   7.6. **Did the claimant believe that the offence and/or breach of legal obligation related solely or mainly to a matter for which CWCC was legally responsible?**

   7.7. **Was that belief reasonable?**

Detriment 1 – termination of contract

8. It is common ground that Vedamain Ltd terminated the claimant's contract and that she reasonably understood the termination to be detrimental to her.

9. The issues are:

   9.1. **Did the claimant make a protected disclosure (see above)?**

   9.2. **Was the decision to terminate the claimant's contract materially influenced by the fact that the claimant had made that disclosure?**

Detriment 2 – refusal to discuss employment status

10. It is common ground that Mr Thomas told the claimant on 29 July 2020 that she was self-employed, but there is an issue about whether Mr Thomas refused to discuss the matter at all.

11. The tribunal will need to decide:

   11.1. **Did the claimant make a protected disclosure (see above)?**

   11.2. **Did Mr Thomas refuse to discuss the claimant's employment status?**

   11.3. **Did the claimant reasonably understand that refusal to be detrimental to her?**

   11.4. **If so, was the refusal materially influenced by the fact that the claimant had made the protected disclosure?**

…

Direct sex discrimination

22. The complaint of direct sex discrimination is about only one act of less favourable treatment. That was the termination of the claimant's employment.

23. The claimant's case is that the respondent treated her less favourably than it actually treated, and hypothetically would treat, male drivers who raised issues about their employment status. They were not dismissed; she was.

24. It is not in dispute that the respondent terminated the contract. The issue is:

> **What is the reason why the respondent terminated it? Was it because the claimant is a woman? Or was it wholly for other reasons?**

Evidence

8. We considered evidence in a bundle of 320 pages, including 17 pages that were added during the course of the hearing.

9. The claimant gave oral evidence. She called Mr Evans, Ms Barron and Mr Moore as witnesses. The respondent called Mr Thomas as a witness. All five witnesses confirmed the truth of their written witness statements and answered questions.

10. One dispute of fact was about what happened during a meeting when only three people were present in the room. Two of these people (the claimant and Mr Thomas) gave oral evidence about what the claimant said and did at that meeting. The third person in the room was Mr Swift. The respondent had called Mr Swift as a witness at an earlier preliminary hearing. There was no reason put forward by the respondent to explain why it could not call Mr Swift at this hearing. The respondent's failure to call Mr Swift helped us to conclude that the claimant's version of how she behaved was more likely to be true than Mr Thomas' version. We did not think that any other adverse inference was appropriate.

Facts

11. Much of the factual background to the case is set out in written reasons previously sent to the parties on 3 April 2023. These were findings made at a preliminary hearing conducted by our employment judge sitting alone. Our tribunal (including the non-legal members) read those reasons and adopted those findings. Neither party asked us to go behind them. Here are those findings, so far as they are relevant to our decision:

> 37. The claimant is a taxi driver. She drives a multi-passenger vehicle which she owns. This has been the case for the whole of the time with which this claim has been concerned. The vehicle is fitted with a tail-lift to make it easier to accommodate a wheelchair. She insures the vehicle herself.
>
> 38. At the relevant times, the claimant had a private hire driver's licence, meaning that she was authorised to drive pre-booked passengers for a fare. Her licence conditions were determined by the Licensing Authority. Conditions included:
>
> 38.1 specification of the vehicle,
>
> 38.2 maintenance requirements for the vehicle,
>
> 38.3 restrictions on signage and advertising,

38.4 the requirement to keep the vehicle and interior clean and tidy,

38.5 prescribed fares to be charged or programmed into the taxi meter.

39. Some drivers (often called “Hackney drivers”) have their own operator’s licence. This means that they can pick up passengers on the street without a booking. The claimant was not a Hackney driver.

…

40.…

41. In February 2011, the claimant spoke to Mr Williams with a view to driving in the Chester area. She remained in contact with the Flintshire drivers.

42.…She began working for Abbey Taxis in April 2011.

43. There was no written agreement between the claimant and Mr Williams, or between her and any of the old Abbey companies. The parties’ rights and obligations were determined orally and by custom and practice. In broad terms, the agreement was that:

43.1 Abbey Taxis provided the claimant with a radio for her vehicle.

43.2 Abbey Taxis agreed to accept private hire bookings under its operator’s licence.

43.3 Those bookings would then be allocated to drivers including the claimant.

43.4 Passengers generally paid their fare by handing cash to the claimant. When this happened, the claimant was entitled to keep the cash.

43.5 The claimant agreed to pay a weekly fee (known as the "settle") to Abbey Taxis.

44. The claimant gave receipts to customers as and when required.

45. Abbey Taxis prohibited drivers from promoting any other taxi business, including any taxi business of their own, either on the livery of their own vehicles or on business cards or receipts handed to passengers.

46. Drivers did not have a minimum number of trips that they were required to do, or a minimum length of time for which they were required to be available for work. They did, however, have a strong economic incentive to be available at peak times and to drive as many trips as they could. This was because they had to pay the same amount of settle, regardless of how much driving they did.

47. …

48. A few years after the claimant started driving for Abbey Taxis, the business started using a smartphone app instead of allocating jobs by radio. Each driver was issued with a company phone with the app pre-installed. Drivers would open the app when they were available to work. The software tracked the physical location of driver's vehicles and divided them into zones. Each zone had a separate queue of drivers. When a driver reached the front of the queue, the app would send a notification of the next job to that driver. The claimant was given no information at that stage about the number of passengers or what the destination would be. (This changed when the Abbey Taxis business was taken over by Vedamain Ltd.) The driver would then have a few seconds in which to decide whether to accept the trip or not.

49. …

50. …

51. …

52. ...

53. Drivers never took paid sick leave. They never took paid annual leave. Certain drivers were treated as being on sick leave or on holiday if they were not available for driving. I do not know one way or the other whether drivers on holiday or sick leave benefited from any reduction in their settle. Drivers did not pay any Pay As You Earn income tax or employee National Insurance Contributions. They described themselves as self-employed. They were described by Abbey Taxis as self-employed.

54. The old Abbey companies had contracts with local authorities to provide school transport. Here is an overview of the contractual framework. The local authority set up an online portal. Through the portal, private hire operators could tender for a regular school journey (called "the Services") for a particular child or group of children. The local authority would accept the lowest-priced tender for the Services, creating a contract between the local authority and the operator (called the "Contractor"). The contract was subject to the local authority's standard terms and conditions.

55. …

56. ....

57. There was no separate agreement between the driver and the local authority.

58. None of Abbey Taxis' private hire drivers was required to do school transport work if they did not want to do it.

59. …

60. The claimant was accompanied by the same Passenger Assistant for many years. Her name was Mrs Evans. They worked well together. Mrs Evans had her own local authority badge. The claimant recommended her to Abbey Taxis as the Passenger Assistant for the school runs that she was driving. Ultimately, however, it was for Abbey Taxis to decide who the regular Passenger Assistant should be for each school run. It was also Abbey Taxis' responsibility to notify the local authority who the regular Passenger Assistant was going to be, in accordance with clauses 5.4.2 and 5.4.2.2 of the standard terms.

    …

63. The claimant bought her own fuel and paid her own vehicle maintenance costs. This was the case whether she was driving a school run or driving on the app.

    …

65. Vedamain Ltd bought the Abbey Taxis business in 2019. An asset purchase agreement was concluded on 17 December 2019 between Vedamain Ltd and the old Abbey companies.

66. Schedule 5 of the asset purchase agreement listed 12 employees whose employment would transfer to Vedamain Ltd under TUPE. These employees were all office staff, such as dispatch controllers and telephonists.

67. In a further table (variously described as "Schedule 5 … Part 4" and "Schedule 6") the asset purchase agreement contained a list of "Self Employed Drivers". There were approximately 110 drivers in that list. The claimant was one of them. One driver was described as

being on “sick leave”. The table indicated that six other drivers were on “holiday”.

68. The settle fee charged by Vedamain Ltd was £120.00 per week, regardless of how much driving the driver had done.

69. Similarly to the old Abbey companies, Vedamain Ltd did not enter into any written agreements directly with the Abbey Taxis drivers.

70. Following the acquisition by Vedamain, the claimant continued on the same school run as she had done with Abbey Taxis. This was under the same contractual framework as she had driven before. Other than the school journeys, she did not do any other driving for Vedamain. She did not, for example, do private hire driving on the app.

71. What of the 110 or so drivers who had previously been driving for the old Abbey companies? For them, the working arrangements continued more or less as normal. They continued using the same app. Because the Abbey Taxis app was slightly different from the KingKabs app, Vedamain Ltd put some measures in place to harmonise the two platforms. One of these measures was to provide information about the passengers and the destination at the point of first notifying the driver of the trip. In other respects, however, the essential custom and practice remained unchanged. They continued under the same zone and queue system. They continued to pay their settle. They remained forbidden to advertise their own taxi business or any other competitor’s business. They remained at risk of being “switched off” if they were found driving for Uber.

72. Mr Ward was a driver at Vedamain Ltd. He worked on a very similar school run to that driven by the claimant. He described to me the process by which Vedamain Ltd paid the driver. I accepted his evidence as truthful. He gave the example of the claimant’s actual school run. The tender price was £55.00 per trip. That was how much the local authority paid Vedamain Ltd. Of that £55.00 contract price, £40.00 was paid to the driver, £14.00 was paid to the Passenger Assistant and £1.00 was kept by the operator (Vedamain Ltd) as a mark-up. From the driver’s £40.00 was deducted a 6% operator’s commission. This commission did not count towards the £120.00 per week settle, which had to be paid

separately by the driver. There was no room for negotiation between the driver and Vedamain Ltd. The driver's remuneration package was presented by the operator to the driver as "take it or leave it".

12. We made further findings about the agreement to pay the claimant for school journeys:

    12.1. When driving for both Abbey Taxis and Vedamain, the claimant understood that, if she drove school journeys as an Abbey Taxis or KingKabs driver, she would be accepting the fee structure that was on offer.

    12.2. On a typical school day, the claimant earned a fee of £80.00 (that is, £40.00 for taking the students to school at the start of the day and a further £40.00 for bringing them home in the afternoon).

    12.3. Vedamain invoiced CWCC monthly in arrears for the school contract work done by its drivers. The drivers, by contrast, were paid by Vedamain weekly in arrears. This meant that, in normal times, Vedamain would be temporarily out of pocket whilst it waited for the month to end, and then for CWCC to pay that month's invoice. This was the rationale explained to the drivers for the 6% commission.

    12.4. When the claimant started driving for Abbey Taxis in 2011, the agreed percentage rate of commission was lower than 6%. It is not entirely clear how and when the rate went up, but the evidence was consistent (and we find as a fact) that all school drivers (including the claimant) had accepted the rate rise to 6% by the time of the transfer to Vedamain.

13. The vast majority of Vedamain's drivers were men. None of them, so far as we know, asserted to Mr Thomas that they were employees or workers or entitled to the minimum wage or holiday pay.

14. There were approximately 600 drivers doing taxi driving through Vedamain in the Chester area.

15. It was fundamental to Vedamain's business model that drivers were treated as independent contractors. Each driver was regarded as owning their own micro-business, whose turnover would be unlikely to exceed the Value Added Tax (VAT) threshold. This meant that the drivers did not have to charge VAT on their fares, which would undercut the fares of any VAT-registered taxi business. Vedamain's business was registered for VAT. In its dealings with (now) His Majesty's Revenue and Customs (HMRC), Vedamain presented itself purely as a taxi operator. It charged VAT when invoicing CWCC for school journeys. It charged VAT on settle payments from drivers, which would otherwise have been £100.00. VAT from both sources of revenue was declared and paid to HMRC. If Vedamain was found to be in the business of actually transporting private-hire customers through a staff of employed drivers, all that would change. Vedamain would have to declare to HMRC all the fares received by its drivers and pay HMRC 20% of that aggregate sum. That would be a very substantial operating cost for Vedamain, which it would be unlikely to be able to absorb. Some or all of the VAT would have to come out of the driver's slice of the fare. The amount could not simply be passed onto the customer, because fares were set by the licensing authority. Even if Vedamain could put the fares up, they would be likely to lose business. Passengers might get into a competitor's taxi, or choose a different means of transport altogether.

16. We accept Mr Thomas' evidence that HMRC had previously investigated Vedamain's tax affairs and had not raised any concerns.

17. In March 2020, the world was in the grip of the COVID-19 pandemic. England began what came to be known as the "lockdown".

18. On 19 March 2020, the Prime Minister announced that all schools would close the following week. Most students in the CWCC area had their final day of school on 20 March 2020 and did not return to school at all until the second half of the summer term.

19. From 23 March 2020, members of the public were prohibited from leaving their homes without reasonable excuse.

20. The lockdown caused a sharp fall in private taxi journeys and an almost complete cessation of school runs. Through no fault of their own, self-employed taxi drivers across England found that their income virtually disappeared overnight.

21. On 20 March 2020, the Government announced that there would be a job retention scheme, given the title of "Coronavirus Job Retention Scheme", or "CJRS" for short, and popularly known as the "furlough scheme". To be eligible under the CJRS, an employer had to have employed its workers on a certain qualifying date. The CJRS was administered by HMRC. Vedamain's stance in relation to HMRC at that time, and since, was that it did not employ its drivers. On the basis of that position, Vedamain could not claim any furlough pay for its drivers under the CJRS.

22. Ineligibility under the CJRS was a serious problem for Vedamain's drivers. Unless they could find a source of replacement income, they risked severe financial hardship.

23. The financial difficulties of the drivers also caused potential problems for CWCC. It had to prepare for the re-opening of schools at some unknown point in the future. They had duty to transport for some children to and from school. If taxi drivers left the industry to find other work, there was a risk that nobody would be available to do the school runs and CWCC would be failing in its duty.

24. CWCC's solution was a scheme that came to be known as the "Covid Retention Fund", which we abbreviate to "CRF". This was an emergency response. Its terms were not initially as clear as the drivers hoped. Broadly speaking, the CRF applied to drivers who had been regularly driving school runs prior to the pandemic. These drivers would be on standby and agree to resume school driving work as and when required. Whilst they were on standby, CWCC would make a monthly payment to Vedamain that would go some way to replacing the lost income from the school runs.

25. On or about 17 April 2020 Mike Jones at CWCC informed the claimant that there was shortly to be a meeting to take place about the CRF.

26. During April 2020, the claimant had a number of conversations with Mr Ward at Vedamain's office. She made it clear that she believed that the April claim should start getting processed. She also championed the cause of other drivers and of the passenger assistants as well.

27. By email on 28 April 2020, Vedamain asked drivers to provide information in support of their claims for CRF payments. The claimant was one of the drivers who responded. As well as providing her driver details, she also indicated that she accepted the terms of the scheme.

28. One of the communications from Vedamain included providing a template form which drivers were expected to sign. This included a declaration from the driver that he or she was self-employed. It is hard to understand why Vedamain thought it necessary to require drivers to sign that declaration before becoming eligible for payment under the Covid Retention Fund. Our finding is that Mr Thomas, and others at Vedamain, saw this as an opportunity to reinforce Vedamain's position that drivers were independent contractors. They wanted to leave no room for doubt in the drivers' minds that they continued to be self-employed, and to head off any attempt by a driver to rely on the CRF payments as evidence that Vedamain was their employer.

29. The way in which Vedamain administered the CRF for its school drivers broadly reflected the agreement under which it paid drivers for school runs. The starting point was that, for each "workable day", the driver would be paid 2 school journey fees, that is, one for the morning and one for the afternoon. The daily fee would be reduced, as usual, 6% for commission before the flat rate of settle was subtracted.

30. There were, however, some differences between CRF payments and the usual payments for school journeys.

    30.1. The CRF payment for a non-working school driver was further reduced by a "covid cover work reduction". This was essentially a redistribution between Vedamain drivers. It is not necessary to explain every detail of the redistribution mechanism. In outline, Vedamain accounted to CWCC for taxi fares earned by its drivers for work other than school journeys (for example, transporting essential workers). CWCC reduced the overall monthly CRF payment by the aggregate of those fares. That reduction was passed onto the school drivers who did no other driving work. The claimant was one of those drivers. For the month of May 2020, that reduction was reflected in further 8% cut in what would otherwise have been the school journey fees net of commission. Drivers who made themselves available for regular driving on the app were not affected by the 8% reduction. This was to compensate them for what could be hours of waiting for a passenger that might never come. People were not, in general, taking taxis to go anywhere.

    30.2. The settle was calculated daily at a rate of £24 per day (rather than £120 per week). It was applied after the further 8% reduction had been made.

    30.3. Vedamain had to wait until the end of each month before knowing how much of the CRF money CWCC would hold back on account of non-school driving work. Until they knew what reduction CWCC would make, Vedamain would not know what percentage reduction to pass onto its inactive drivers. To avoid this difficulty, Vedamain decided to pay its drivers monthly, instead of weekly as it had done before. It continued to take its 6% commission out of the school journey fees.

31. The claimant received her first CRF payment on 21 May 2020. It covered "April retention pay". The method of calculation was explained to her in an e-mail dated 3 Jul 2020. For 12 "workable" days, she was paid £960.00 (12 x 2 x £40), less 8% covid cover work reduction and 6% commission, with 11 days' settle taken off at £24.00 per day. This resulted in a payment of £566.20 for the month.

32. Schools in the CWCC area reopened in June 2020. They operated strict COVID protocols. Classes were segregated and divided into "bubbles". The claimant's usual school was closed each Wednesday to prepare for a bubble change. On Mondays and Tuesdays, Thursdays and Fridays, the claimant drove the students to and from school as she had done before the pandemic.

33. The claimant did not do any driving on the app. This was not a change. Even before the lockdown started, the claimant had not made herself available for general private hire work; indeed, she never did any driving on the app whilst employed by Vedamain. During the pandemic, she had an additional reason not to want to do private hire work. She was worried about the risk of infection with the coronavirus and the danger it would cause to her elderly relatives.

34. Whilst all of this was going on, a separate dispute arose between Vedamain and an individual called Mr Fairclough. We do not know the full detail of what Mr Fairclough did for a living, but it appears to be common ground that it included a taxi garage and a taxi hire business. Vedamain recommended to its private hire drivers that they get Mr Fairclough to service and repair their vehicles. If a driver did not have a suitable vehicle of their own, Vedamain would recommend that they hire one from Mr Fairclough. This business relationship went sour in 2020, when Vedamain discovered that Mr Fairclough was hiring taxis out to a competitor. In retaliation, Vedamain instructed its drivers who hired taxis from Mr Fairclough to swap suppliers immediately. Vedamain also required the drivers not to have their cars serviced or repaired at Mr Fairclough's garage.

35. Predictably, Vedamain's actions caused a great deal of disaffection amongst some Vedamain drivers. After all, it was not their fault that they were caught in the middle of Vedamain's commercial dispute with Mr Fairclough. Some drivers posted hostile comments on social media. One of them was a man who had been driving on school contracts. We do not know what words he posted. We accept, in broad terms, the claimant's evidence that the driver's language was "unpleasant".

36. The claimant says that the driver was "not sacked". We find that he was not prevented from driving for Vedamain during this dispute. Although we cannot recall this proposition having been put to Mr Thomas, we do not think this omission results in any unfairness. The claimant made this assertion at the start of a four-day hearing. If the driver had been taken off Vedamain's books in 2020, Vedamain would in all probability have some documentary evidence, either in the form of app records or settle records. It would have been a relatively straightforward exercise for Vedamain to have produced those documents during the hearing had it been Vedamain's case that the driver's services had been terminated.

37. On 2 July 2020 the claimant e-mailed a written complaint to CWCC. During the days that followed she copied that complaint to a number of different

officers within the council, including the leader of the council, and to two Members of Parliament.

38. At no time did the claimant copy her complaint to anybody at Vedamain. When she was asked about this, she explained (truthfully in our view) that she did not want Vedamain to find out that she had made a written complaint to CWCC. This was because she expected that there would be repercussions for her if Mr Thomas knew that she had complained. Whether the claimant was right or wrong to fear repercussions, what is clear to us is that the claimant was not expecting CWCC to forward her complaint on to Vedamain at that time. She had deliberately chosen a method of complaining to CWCC without Vedamain knowing.

39. Here are some passages from the claimant's complaint to CWCC:

> "Kingkab maladministration is not fulfilling the spirit in which [the CRF] funds were given. It is my understanding it is to help retain the service (drivers, [passenger assistants] and the vehicles) to assist you in your present and future legal obligations. This capability is in serious doubt, the monies are not filtering down to all concerned…I am working for nothing or very little (not the minimum wage) Modern Slavery is illegal in this country, even if you are classed as self-employed.
>
> …The Maladministration by Kingkab of [CRF] is at the very least immoral. I will argue and I believe prove, they are possibly discriminative, extortionate, fraudulent and illegal…
>
> I have been forced into this position of spokesperson, due to the fact, drivers and passenger assistants… are coming to me asking questions…
>
> …
>
> Kingkab deduct a commission on all contract/credit work, we the drivers were told, this is the charge they will take by way off an administration fee, for paying the contract payments weekly instead of monthly, this has not been the case with the funds you have been providing, although he still deducts this charge.
>
> There is also a Covid charge of at least 10% being deducted, nobody agreed or understands this deduction.
>
> I will claim the charge is unlawful as they are administering a financial service to/for a third party, as he claims we are self-employed (this I dispute) If this is the case they should have a Consumer Credit License, I am not aware they have one, this matter needs investigating.
>
> …I will argue Kingkab cannot charge a fee of £120 for a service they are unable to provide.
>
> …
>
> Kingkab deducted nearly 42% from my £400 a week monies in April, paid on 28/5/20. My may payment was finally paid on 1 July 2020, again unjust deductions have been taken without my

> consent, however, drivers not currently working have not received their May pay yet…
>
> I believe the law states only NIC, Tax and pension payments can legally be deducted from a persons pay, whatever their status, our status is questionable, especially when we are fulfilling contract work for yourselves. I have concerns, as I believe if our employment is not legal our insurance may be invalid (this was confirmed to me by a barrister and the Financial Conduct Authority).
>
> We the drivers and [passenger assistants] do not have a written contract stating clearly of our terms and conditions, the [passenger assistants] are not receiving Holiday pay or pension contributions, and there is no pay slip informing them of their deductions, as is the same for us drivers.
>
> …
>
> I am using this information as I believe it brings to light the fact that Kingkabs Directors may not be "fit and Proper" people to undertake the responsibility of transporting the public, who may all be considered vulnerable at some time in the course of our business."

40. At the time of sending this complaint to CWCC, the claimant believed that the information in it tended to show:

40.1. that Vedamain was breaching its legal obligation by deducting settle, commission and "Covid charge" from CRF payments to drivers without the drivers' consent;

40.2. that Vedamain, in the case of commission, was breaching its reciprocal legal obligation to provide weekly payment; and

40.3. that Vedamain was committing a fraud by keeping some of the CRF money for itself rather than paying drivers to be on standby, and that this fraud was a criminal offence a breach of a legal obligation or both.

41. It may be that the claimant also believed that the information in her complaint tended to show other breaches of legal obligations, but the claimant did not refer to any such belief when formulating her case as to why the disclosures were protected.

42. The complaint was passed to Mr Lee Harrison, a Regional Investigator at CWCC.

43. Mr Harrison had some conversations with the claimant over the telephone in early July 2020. During the course of the conversations, the claimant raised further concerns to Mr Harrison. What follows is the gist of what she said:

43.1. She said to Mr Harrison that Vedamain was misclassifying its employees as self-employed drivers.

43.2. She told Mr Harrison that Vedamain was deducting £120 of settle from the CRF payments for a service that was not being provided.

43.3. She mentioned VAT. She explained to Mr Harrison her point of view that Vedamain was effectively charging VAT twice to account customers – once in the fare that was the agreed fee for transporting the customer, and once in the VAT invoice to the customer.

43.4. The claimant also said to Mr Harrison that there had been maladministration, that there was a lack of paperwork or paper trail, and that if Vedamain changed her name or her number there would be little evidence that she worked at Vedamain. The claimant also said that VAT was payable on settle in cash and that invoices and receipts were not issued for settle.

44. As well as recording our findings about what the claimant said to Mr Harrison, it is also important for us to be clear about what was *not* said. In particular:

44.1. The claimant has asked us to make a finding that during her conversations with Mr Harrison, Mr Harrison told her that Mr Thomas had had a conversation with him in which he had said that she was not available for work. We have not made that finding. It was not mentioned in her oral evidence, it was not in her witness statement, there was no document which tended to show that that conversation had taken place and the proposition was not put to Mr Thomas when he was giving his evidence.

44.2. The claimant did not say to Mr Harrison that Vedamain was legally required to issue a VAT invoice each time they collected settle, and she did not tell Mr Harrison that Vedamain were breaking tax laws by not issuing receipts or invoices. Nor did the claimant believe that the information that she was disclosing to Mr Harrison tended to show that such laws had been broken, or were being broken.

45. At the time of speaking to Mr Harrison, the claimant believed that what she was telling him tended to show:

45.1. that Vedamain was breaching its legal obligation by pretending that its employees were self-employed, and, in particular, by failing to pay tax and national insurance at source, which she believed employers were legally required to do for their employees;

45.2. that Vedamain was breaching its legal obligation by deducting settle from CRF payments to drivers without the drivers' consent;

45.3. that Vedamain was committing a fraud by keeping some of the CRF money for itself rather than paying drivers to be on standby, and that this fraud was a criminal offence a breach of a legal obligation or both; and

45.4. that Vedamain was breaching a legal obligation by charging VAT twice for the same fare. (We will return to this belief under the heading of our conclusions.)

46. When disclosing the information in her written complaint and in her conversations with Mr Harrison, the claimant believed that she was acting in the public interest. She thought she was complaining on behalf of up to 600 other drivers and passenger assistants as well as on her own behalf. She also believed that she was disclosing the information in the interests of passengers, especially school children. Our conclusion that the claimant thought she was speaking up in the

public interest is reinforced by the fact that, as well as complaining to CWCC, she also sent her complaint to two Members of Parliament. It is also supported by the fact that, over the next few days, the claimant provided specific information to Mr Harrison about another driver who allegedly had not been paid, and obtained permission from a Bulgarian driver to share with Mr Harrison the details of how he had allegedly been treated.

47. When sending her 2 July written complaint, and when speaking to Mr Harrison, the claimant believed that Vedamain's breaches of legal obligation and/or fraudulent activity related to two matters:

47.1. The impact of misusing CRF money on the service of transporting children to and from school. CWCC was legally responsible for transporting certain children to and from school. At any rate, that is what the claimant believed. Here is how the claimant subjectively made the connection between this legal responsibility and the breaches of obligation that she thought she was disclosing. As the claimant saw it, the purpose of the CRF was to preserve the service of transporting children to school as and when needed. The claimant believed that if Vedamain illegally failed to pass on the full payment to drivers under the CRF, there was a risk that drivers would not be available as and when required. If that happened, CWCC would b

47.2. Employees being disguised as self-employed, with consequent non-payment of tax. CWCC would be aiding and abetting any unlawful breaches of tax obligations by Vedamain if CWCC was paying Vedamain for the work of hidden off-payroll employees and deliberately turning a blind eye to Vedamain disguising their status as self-employment. She formed that view partly based on advice that had been given to her by a barrister. The barrister had told her that if CWCC had paid money to Vedamain in the knowledge that the money would be going towards and unlawful activity, CWCC itself could be considered to have aided and abetted that unlawful activity. She also relied on her own knowledge of a tax rule known to her (and more widely) as IR35. Her understanding of IR35 was that an organisation such as CWCC could not avoid the requirement to pay employees' tax at source simply because those employees happened to be employed by an intermediary company. She thought of Vedamain as the intermediary.

48. The claimant submitted a formal grievance to Vedamain on 18 July 2020.

49. The essential points of her grievance were:

49.1. She was an employee or worker, and Vedamain was wrong to treat her as being self-employed; and

49.2. Vedamain was not paying her holiday pay or the National Minimum Wage.

50. The claimant's grievance did not mention that she had made any complaint to CWCC. Nor did it make any reference to her having raised any concerns externally about the way the CRF was being administered or about VAT arrangements.

51. The claimant did not do any work for the respondent after 20 July 2020.

52. On 20 July 2020, she chased Vedamain for the progress of her grievance. She did not mention her complaint to CWCC in her reminder e-mail.

53. The claimant was invited to a meeting on 22 July 2020, the meeting being scheduled to take place later that day. The claimant declined, because she had nobody to accompany her. The meeting was therefore rearranged to 29 July 2020.

54. On 23 July 2020, Mr Harrison e-mailed the claimant to inform her that the information she had provided had been forwarded to the Contracts and Licensing Department in order for them to review the circumstances. Mr Harrison added,

> "I expect this will happen in the next number of weeks. Once this has been completed they will decide if, and what the next action would be and I expect they will update you at that stage."

55. We conclude from the phrase, "next number of weeks" that Mr Harrison was not expecting much to happen in CWCC's investigation between 23 and 29 July 2020. It would be an odd thing for Mr Harrison to say if, as the claimant contends, CWCC had already approached Vedamain for their comments on the claimant's complaint, or Mr Harrison believed Vedamain was just about to take that step.

56. On 29 July 2020, the claimant met with Mr Thomas. They had never met before. There was no union representative present. Mr Swift joined the conversation at Mr Thomas' suggestion and with the claimant's agreement.

57. Early in the meeting the claimant explained her point of view that she was employed by Vedamain.

58. The claimant did not make her points to Mr Thomas particularly clearly. Her oral evidence to us, which we accept, is that she had "rambled on". Mr Thomas listened for a time. He then made it clear to the claimant that he was not prepared to entertain the idea that Vedamain drivers were workers or employees and was not prepared to discuss that point any further.

59. We were able to make clear findings about what Mr Thomas was thinking at this point in the conversation. That is not to say that we found all of Mr Thomas' evidence to be reliable. But when it came to Mr Thomas' motivation for insisting that his drivers were self-employed, we found his evidence to be straightforward and consistent with the surrounding context.

60. This is what was going through Mr Thomas' mind during the meeting. He needed Vedamain's drivers to be self-employed for his business model to work. He was aware that the Uber drivers had successfully established they were workers in litigation that was at that time subject to appeal. But he thought there were enough differences between his model and Uber's model to be able to say credibly that his drivers were self-employed. He was worried that if drivers were acknowledged to be workers or employees, Vedamain would fundamentally have to change the way it operated. This was for the reasons we have already described.

61. These findings fully explain why Mr Thomas decided to shut down the conversation about the claimant being an employee or a worker. It was nothing to do with the claimant having raised concerns to CWCC about the CRF or VAT or anything else.

62. The meeting continued. Somebody in the meeting brought up the CRF. We were unable to find which of the three people in the room instigated this part of the conversation. Whoever raised the subject, it led to the claimant and Mr Thomas exchanging their views. The claimant told Mr Thomas that she thought Vedamain was keeping Covid money for themselves.

63. At no point in the meeting did the claimant tell Mr Thomas that she had complained to CWCC. She did not say that she had raised concerns externally about the CRF, VAT arrangements, misclassification of worker status, or anything else.

64. Towards the end of the meeting Mr Thomas told the claimant that Vedamain would no longer be making use of her services as a driver. As if to underline the point, he offered the claimant Mr Swift's assistance in enabling her to get her own operator's licence so she could continue to do school contracts.

65. One of the core disputes in this case is Mr Thomas' motivation for terminating the claimant's work for Vedamain. We will return to consider this question when we state our conclusions.

66. There is a dispute about whether, during the meeting the claimant behaved in a rude and insulting manner. We prefer the claimant's evidence in relation to this dispute. The claimant did not say anything in a manner that was rude or insulting. Her words were not offensive. Had the claimant behaved in that way, we would have expected the respondent to have called Mr Swift to give evidence to say so.

67. On 27 August 2020, the claimant wrote a letter of claim to Mr Thomas. In a series of 17 bullet points, the claimant listed the legal complaints she was thinking of bringing against Vedamain. About half of them were recognisable as some form of complaint that an employment tribunal could consider. One of these was "automatic unfair dismissal", which was expressed to be based, in part, on "the Public Interest Disclosure I made [to CWCC]." Another was a complaint of automatic unfair dismissal for asserting a statutory right.

68. On 4 September 2020, Mr Ben Thomas, a manager at Vedamain, wrote to Patrick Dooley at CWCC. His e-mail notified CWCC that Vedamain would be returning CRF payments to CWCC in respect of the claimant. Mr Thomas explained the rationale in this way:

> "We would like to return this money to you as we cannot pay Helen Hughes for it, as she has disputed her employment classification, having worked without a query for the past 8/9 years as a self-employed driver for Abbey Taxis prior to our purchase of it. We arranged a business to business meeting where the situation couldn't be resolved and we ended our business relationship with her, and we want to return the money."

Relevant law

<u>Disclosures qualifying for protection</u>

69. By section 43A of ERA, a qualifying disclosure is protected if it is made in accordance with one of a list of sections, including 43C.

70. Section 43B of ERA provides, so far as is relevant:

"

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:

(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,

…

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)."

71. Section 43C provides, relevantly:

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure

…(b) where the worker reasonably believes that the relevant failure relates solely or mainly to…

(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

72. A worker may have a reasonable belief that information tends to show that a criminal offence has been committed, even if the worker cannot point to an actual criminal offence that could have been committed on the basis of that information. A worker may form a mistakenly-held, but reasonable, belief about what the criminal law says. Likewise, a worker may have a reasonable belief that information tends to show breach of a legal obligation, without the need for the worker to point to an actual legal obligation that could have been breached: *Babula v. Waltham Forest College* [2007] EWCA Civ 174.

73. When evaluating the reasonableness of a worker's belief in what disclosed information tends to show, the tribunal should have regard to the worker's expertise in the subject, or lack of such expertise: *Korashi v. Abertawe Bro Morgannwg University Local Health Board* UKEAT 0424/09.

74. What amounts to a reasonable belief that disclosure was in the public interest was considered by the Court of Appeal in *Chesterton Global Limited v Nurmohamed* [2018] ICR 731. The Court of Appeal considered that a disclosure could be in the public interest even if the motivation for the disclosure was to advance the worker's own interests. Motive was irrelevant. What was required was that the worker reasonably believed disclosure was in the public interest in additional to his own personal interest. Underhill LJ, giving the leading judgment, refused to define "public interest" in a mechanistic way, based merely on whether it impacted anyone other than the claimant or whether it impacted those beyond the workforce. Rather a Tribunal would need to consider all the circumstances, although the following fourfold classification of relevant factors was potentially a "useful tool":

(a) The **numbers in the group whose interests the disclosure served** – although numbers by themselves would often be an insufficient basis for establishing public interest;
(b) The **nature and the extent of the interests affected** – the more important the interest and the more serious the effect, the more likely that public interest is engaged;
(c) The **nature of the wrongdoing** – disclosure about deliberate wrongdoing is more likely to be regarded as in the public interest than inadvertent wrongdoing;
(d) The **identity of the wrongdoer** – the larger or more prominent the wrongdoer, the more likely that disclosure would be in the public interest.

75. Tribunals should be cautious about concluding that the public interest requirement is satisfied in the context of a private workplace dispute merely from the numbers of others who share the same interest. In practice, the larger the number of individuals affected by a breach of the contract of employment, the more likely it is that other features of the situation will engage the public interest.

Protection from detriment

76. Section 47B(1) of ERA provides:

> "(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."

77. The concept of "detriment" should be construed widely. A detriment is something that could reasonably understood by the worker to put them at a disadvantage: *Jesudason v. Alder Hey Children's NHS Foundation Trust* [2020] EWCA Civ 73.

78. An employer's act, or failure, is done "on the ground that" the worker made a protected disclosure if that disclosure influenced the employer's motivation to an extent that was more than trivial: *NHS Manchester v. Fecitt* [2011] EWCA Civ 1190.

Burden of proof - detriment

79. Section 48 of ERA provides, relevantly:

> (1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.
>
> …

80. On a complaint under subsection (1A), it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

Direct sex discrimination

81. Section 13(1) of EqA provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

82. Sex is a protected characteristic.

83. Section 23(1) of EqA provides, relevantly,

> "(1) On a comparison of cases for the purposes of section 13… there must be no material difference between the circumstances relating to each case."

84. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

85. Less favourable treatment is "because" of the protected characteristic if either it is inherently discriminatory (the classic example being the facts of *James v. Eastleigh Borough Council,* where free swimming was offered for women over the age of 60) or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind: *Nagarajan v London Regional Transport* [1999] IRLR 572.

Burden of proof

86. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person ("A") contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

87. The initial burden of proof is on the claimant: *Royal Mail Group Ltd v. Efobi* [2021] UKSC 33.

88. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

> (1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
>
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

> (5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
>
> (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
>
> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].
>
> (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
>
> (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
>
> (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
>
> (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
>
> (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

89. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Conclusions – protected disclosures

Disclosures qualifying for protection

PD1 and PD2

90. We take PD1 and PD2 together. This is because, for both alleged disclosures, the information was allegedly disclosed to the same person in the same series of

telephone conversations. We also consider these two disclosures alongside some information that she additionally disclosed to Mr Harrison, namely that Vedamain was charging VAT twice to account customers on the same fare.

91. In the claimant's favour, we consider what she thought this information cumulatively tended to show.

92. The e-mail of 2 July 2020 did not disclose the information in PD1 or PD2.

93. The claimant orally disclosed information to Mr Harrison at CWCC.

94. The gist of the information was that Vedamain was collecting settle from drivers without issuing invoices or receipts, and that there had been "maladministration" which included the lack of a paper trail.

95. She did not say, expressly, that Vedamain was not keeping VAT records.

96. The claimant did not believe that this information tended to show that Vedamain had committed a criminal offence or that Vedamain had breached a legal obligation. See our finding at paragraph 44.2.

97. In any case, we would find that, if the claimant did believe that this is what the information tended to show, such a belief would not have been reasonable. Context is important here. So is the claimant's knowledge of the industry. She knew that she was not registered for VAT. Nor were most taxi drivers, and the claimant must have known that, too. She knew that it was not compulsory for her or other drivers to obtain a written receipt for her settle payments to Vedamain. She knew, of course, that Vedamain would be required to keep their own records of how much settle they had collected, otherwise Vedamain would not know how much VAT to pay on that settle when they submitted their VAT return to HMRC. But that is all Vedamain was required to do. Vedamain did not need to give anything to the drivers. Any reasonable person in the claimant's position would have known that.

98. We have considered whether the claimant also believed that the information tended to show a breach of legal obligation when combined with the information that Vedamain was charging VAT twice. We did not make a finding either way. This is because, if the claimant did believe that she was disclosing a breach of a legal obligation, that belief would not have been reasonable. What she was saying did not make sense. The only account work that the claimant did was for CWCC. Vedamain's invoices to CWCC were for the contract price (£55.00 in her case) plus VAT. The contract price did not already include VAT, and the claimant did not have any reason to think that it did.

99. PD1 and PD2 therefore did not qualify for protection.

PD3

100. The e-mail of 2 July disclosed information that Vedamain was keeping CRF money for itself instead of allowing it to "filter down" to the drivers for whom it was intended. As a generalisation, the e-mail described this practice as "fraudulent". It specifically informed the reader that one of the ways in which Vedamain was retaining CRF money was by means of a deduction of commission for a weekly payment facility that it was not providing. According to the e-mail, another means by which Vedamain were allegedly keeping CRF money was by making a deduction of settle and an opaque COVID charge without the drivers' agreement.

101. We have found at paragraph 40 that the claimant believed that this information tended to show that Vedamain was breaching its legal obligations by making unauthorised deductions from wages and/or breaching its contract with drivers and/or committing the criminal offence of fraud.

102. In our view, it was reasonable for the claimant to believe that this is what the information tended to show. Viewed objectively, her e-mail provided enough detail to explain to CWCC what was wrong with Vedamain's making of deductions, and how that was fraudulent or unlawful.

103. The claimant also disclosed substantially the same information orally to Mr Harrison. At paragraphs 45.2 and 45.3 we recorded our finding that the claimant believed this information also tended to show that Vedamain was breaching its legal obligations and/or had committed a fraud.

104. For the same reasons as we have given in relation to the 2 July e-mail, we consider that the claimant's belief was reasonable.

105. Our finding at paragraph 46 is that the claimant believed that she was making these disclosures in the public interest.

106. In our view, it was reasonable for the claimant to hold this belief. This is because:

106.1. Vedamain was an organisation of substantial size – although it had relatively few employees, Vedamain had approximately 600 drivers working for the company;

106.2. the claimant correctly believed she was speaking up on behalf of other drivers and passenger assistants, and demonstrated that she was doing so by providing information to assist other drivers in their disputes;

106.3. she reasonably believed that her disclosure involved the misuse of public funds; and

106.4. she reasonably believed that the failures that she was exposing could have an impact on the ability of CWCC to ensure that children were taken to and from school.

107. PD3 therefore qualified for protection.

PD4

108. The claimant orally disclosed information to Mr Harrison that Vedamain were wrongly classifying drivers as being self-employed.

109. We have found at paragraph 45.1 that the claimant believed that this information tended to show a breach of a legal obligation to pay tax and national insurance at source.

110. We did not make a finding either way about whether the claimant spelled this tax irregularity out to Mr Harrison. Nevertheless, we have concluded that it was reasonable for the claimant to believe that the information she disclosed tended to show a breach of tax obligations. Even if she thought she was merely implying it (rather than expressly saying so), it would be reasonable for her to think that such an implication was obvious from what she was saying. Everyone concerned with the industry, including the claimant and Mr Harrison, must have known that employers were required to pay tax and national insurance at source on their

employees' wages. They would also know that one of the main consequences of wrongly calling someone self-employed would be an unlawful failure to pay national insurance.

111. Just as a reminder, the reader is referred paragraph 46 for the claimant's subjective belief that she made her disclosures in the public interest. Her belief was reasonable. This is partly for the reasons we have already given. It is also for a further reason that is specific to PD4. Non-payment of tax and national insurance affects the public, as well as the employer and employee concerned.

112. PD4 was therefore a qualifying disclosure.

In accordance with section 43C

113. Not all qualifying disclosures are protected. The claimant must also show that PD3 and PD4 were made in accordance with section 43C(1)(b)(ii) of ERA.

114. The starting point is the "matter" to which the claimant believed the relevant failures (that is, the perceived fraud and breaches of legal obligation disclosed in PD3 and PD4) related. We have found (at paragraph 47) that there were two such matters in her mind:

114.1. Risk to the service of transporting children to and from school; and

114.2. The non-payment of tax on the wages of disguised employees doing work on CWCC's behalf

115. We found in that paragraph that the claimant believed that CWCC was legally responsible for those two matters.

116. In our view, that belief was reasonable. It does not have to be correct. Regardless of the strict legal position, most people would think that an education authority has some legal responsibility for ensuring that school-aged children can get to and from school, particularly so when the students are wheelchair users. As for the legal responsibility of CWCC to avoid disguised off-payroll employees, the claimant's view was consistent with published guidance and was supported by legal advice that she had received.

117. Also at paragraph 47 is our finding about how, in the claimant's mind, those two matters were related to the relevant failures. Now we must examine her belief objectively and ask whether it was reasonable or not. Again, it does not matter whether or not the relevant failures and the matters actually were related.

118. In our view, the claimant's belief was reasonable. She made a logical connection between underpaying workers (on the one hand) and the lack of availability to provide the service (on the other). She also connected, reasonably, Vedamain's breaches of tax obligations caused by misclassification of employment status (on the one hand) and CWCC's own perceived reliance on the work of disguised employees.

119. PD3 and PD4 were therefore protected disclosures.

Conclusions - detriments

Detriment 1 - Termination of contract

120. Having found that the claimant made two protected disclosures, we must now decide whether either of those disclosures motivated Mr Thomas to terminate the

claimant's contract on 29 July 2020. It is for Vedamain to prove that the disclosures did not influence his decision in any significant way.

121. Our finding is that PD3 and PD4 did not in any way motivate Mr Thomas' decision. Here are our reasons:

121.1. We were able to make a positive finding about Mr Thomas' reason for dispensing with the claimant's services. It was because the claimant had raised a grievance asserting her status as an employee, asserting her right to be paid holiday pay and claiming entitlement to the National Living Wage.

121.2. Our finding about Mr Thomas' true reason is based partly on the undeniable importance to him that drivers should be acknowledged to be self-employed. By claiming to be an employee, the claimant had made a direct challenge to Vedamain's fundamental business model. Mr Thomas could not tolerate the notion of having drivers as employees. If he continued to allow the claimant to work for Vedamain whilst openly describing herself as an employee, other drivers might assert their status, too.

121.3. Our finding is also based on Vedamain's e-mail of 4 September 2020. We found it to be revealing and truthful as to the reason why the claimant's contract was terminated. We have considered the possibility that Ben Thomas may have deliberately misled CWCC about Vedamain's reason for termination. We came to the conclusion that this possibility was unlikely. The purpose of the e-mail was not to defend a whistleblowing claim. The explanation of the reason for termination was incidental to the main purpose of the e-mail, which was to explain to CWCC why Vedamain was returning some of the CRF money. In reaching this view, we have not forgotten that, by 4 September 2020, Vedamain had received a letter of claim, indicating that the claimant was considering bringing a whistleblowing complaint. But we do not think Ben Thomas' e-mail was prompted by the letter of claim. Significantly, in our view, the letter of claim also included a proposed complaint of unfair dismissal for asserting a statutory right. Here, in his 4 September 2020 e-mail, was Ben Thomas confessing that the claimant's contract had been terminated for asserting that she was an employee. If Vedamain had intended the e-mail to be used as misleading evidence to defend a future claim, I would not have expected it to contain an admission like that.

121.4. At the time of the meeting on 29 July 2020, Mr Thomas did not know that the claimant had made any complaint to CWCC, whether about the failings disclosed in PD3 or PD4 or anything else. As it happens, Mr Thomas told us that he had been unaware of the complaint. We did not take that denial at face value; he had a powerful incentive to deny all knowledge. The real difficulty for the claimant, though, is that there is no evidence from which we could reach the opposite conclusion.

121.5. The claimant says that we can conclude that Mr Thomas knew about her complaint to CWCC from the following:

(a) Her oral evidence about conversations she had with Mr Ward in April 2020;

(b) Her assertion that Mr Harrison told her in July 2020 that he had had a conversation with Mr Thomas;

(c) Mr Ward's oral evidence at the preliminary hearing in December 2019 that the claimant had made a complaint; and

(d) Her assertion that it was "well known that I had made a complaint".

121.6. The evidence summarised at paragraph (a) above gets the claimant nowhere. Nothing the claimant said in April 2020 could have caused Mr Thomas to know that the claimant had made a complaint at the beginning of July 2020. The claimant cannot rely on her assertion at paragraph (b) because of our finding at paragraph 44.1. We checked our employment judge's notes of the December 2019 preliminary hearing. This was to check whether the claimant's point at paragraph (c) had any force. We were looking to see if Mr Ward gave any oral evidence that he (or anyone else) knew that the claimant had complained to CWCC, or that the claimant had complained to anyone about misuse of the CRF or about tax arrangements. There is no note of him having given any such evidence. To clarify the claimant's generalised assertion at (d), our employment judge asked the claimant who knew and when. The claimant was unable to answer, except to remind us that she had complained about the plight of the drivers in April 2020.

122. For these reasons we find that Vedamain did not contravene section 47B of ERA when it terminated the claimant's contract. As a complaint, Detriment 1 fails.

Detriment 2 – refusal to discuss employment status

123. Mr Thomas subjected the claimant to a detriment at the 29 July 2020 meeting by refusing to discuss her employment status. She reasonably understood the refusal to be detrimental to her: as far as she was aware, she was at a meeting to discuss her grievance, which was based on the central premise that she was an employee.

124. Her complaint nonetheless fails. The claimant cannot get around our finding at paragraph 61. Mr Thomas' decision to curtail further discussion of employment status was not in any way influenced by the fact that the claimant had made a protected disclosure. Vedamain proved to us that the overwhelming reason was the importance of self-employed status to its business model.

125. Having also reached a conclusion on Detriment 1, we should add that the Detriment 2 complaint would also fail on the ground that Mr Thomas did not know that the claimant had made any complaint to CWCC.

Conclusions – direct sex discrimination

126. The central question in this complaint of sex discrimination, as we identified at the start, is, "What is the reason why the claimant's contract was terminated on 29 July 2020. Was it because she is a woman?"

127. Before engaging directly with that question, we first address another element of the statutory test. Did Vedamain treat the claimant less favourably than it treated others? For the purposes of this comparison, we must ensure that the circumstances of the "others" were not materially different from those of the claimant.

128. The claimant says that she was treated less favourably than the school contract driver who posted an "unpleasant" social media comment in the course of the dispute with Mr Fairclough. Her contract was terminated and his was not. In our view, that driver's circumstances were materially different from the claimant's

circumstances. One difference, from what we know, is that he was not alone in posting negative comments about KingKabs. If Mr Thomas had terminated that driver's contract, he risked escalating his dispute with the other drivers, too. There is another important difference in circumstances. What the male driver did was quite different from what the claimant had done. The claimant had directly challenged Vedamain's business model in a way that Mr Thomas could not tolerate. That was more serious than posting an unpleasant comment on Facebook.

129. This brings us to the reason why the claimant's contract was terminated. The claimant has not proved any facts from which we could conclude (even in the absence of an adequate explanation) that Mr Thomas' decision was motivated by her sex. She was in a male-dominated industry, but that does not shift the burden. It ignores an important fact which strongly suggests that she was dismissed for a different reason, namely the fact that she had asserted that she was an employee and was not prepared to accept Vedamain's position that she was self-employed.

130. In case we are wrong about that, we find that Vedamain has proved that the decision to terminate her contract was nothing to do with the fact that she was a woman. As we have found, Mr Thomas made his decision because the claimant was asserting that she was an employee.

131. Vedamain did not, therefore, discriminate against the claimant because of her sex.

Employment Judge Horne
30 August 2023

SENT TO THE PARTIES ON
11 September 2023

FOR THE TRIBUNAL OFFICE