EMPLOYMENT TRIBUNALS

Claimant: **Mr E Smith**

Respondent: **Seaward Travel Ltd**

Heard at: **Watford** **On: 7,8,9 June 2023**
(25 July 2023 in Chambers)

Before: **Employment Judge Bansal**
Members – Mr A Scott & Mr I Murphy

Appearances:

For the Claimant: **Miss J Raw (Legal Representative FRU)**

For the Respondent: **Mr S Hirst (Counsel)**

RESERVED JUDGMENT

The unanimous decision off the Tribunal is that;

1. The Claimant's claim of constructive unfair dismissal is well founded and succeeds.

2. The Claimant's claim of automatic constructive unfair dismissal for making a protected disclosure is not well founded and is dismissed.

3. The Claimant's claim automatic unfair dismissal for a health and safety reason is not well founded and is dismissed.

REASONS

Background

1. The claimant was employed by the respondent as a Coach Driver from 2 October 2017 to 6 October 2020.

2. The claimant contacted ACAS on 13 October 2020. The Conciliation Certificate was issued on the same day.

3. The claimant presented a claim form (ET1) on 4 January 2021, and made claims for ordinary unfair constructive dismissal (s95 & 98 Employment Rights Act 1996 ("ERA"); automatic unfair dismissal for making a protected

disclosure (s103a ERA); automatic unfair dismissal for health and safety reasons. The respondent submitted a response (ET3) on 8 February 2021 contesting the claims.

4. At this hearing the claimant was represented by Miss Raw (Legal Representative) and the respondent by Mr Hirst of Counsel.

List of issues

5. The List of Issues were agreed by the parties at a Preliminary Case Management Hearing held on 1 December 2021, before Employment Judge Wyeth. These were as set out below;

6. Constructive unfair dismissal

6.1 Did the respondent breach the implied term of mutual trust and confidence, i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant?

6.2 The claimant asserts that the following conduct individually or collectively amounted to a breach of the implied term:

6.2.1 The respondent's alleged failure to act on the disclosures made by the claimant, in particular its failure to address the claimant's safety concerns by changing the vehicle driven by the claimant;

6.2.2 The respondent's alleged failure to investigate the allegations made against the claimant by the respondent's client on 13 September 2020; and/or

6.2.3 The unprofessional manner in which the respondent is alleged to have handled the investigation meeting of 28 September 2020.

6.3 If the respondent was in breach of the implied term, did the claimant affirm the contract of employment before resigning?

6.4 If the claimant did not affirm the contract, did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation – it need not be the reason for the resignation)?

7. Public interest disclosure

7.1 The claimant relies upon the following as purported qualifying protected disclosures:

7.1.1 On 22 January 2020 the claimant told Mr Cassell that diesel and carbon monoxide fumes were escaping in to the cabin of the coach he was required to drive; this was followed up with an email from the claimant to Mr Seward of the same date;

7.1.2 On 14 September 2020 the claimant told Mr Cassell that the same

vehicle was making him unwell because of the fumes and also that the heating was not working properly.

7.2 In any or all of these, was information disclosed which in the claimant's reasonable belief tended to show that the health or safety of any individual (namely the claimant himself) had been put at risk?

7.3 If so, did the claimant reasonably believe that the disclosure was made in the public interest?

8. Automatic constructive unfair dismissal for making a protected disclosure

8.1 Did the respondent conduct itself in a way that breach the implied term of mutual trust and confidence (as identified in paragraphs 6.2.1 to 6.2.3 above)?

8.2 If so, was reason or principal reason for that conduct because the claimant made any proven protected disclosures?

8.3 If so:

8.3.1 Did the claimant resign because of the respondent's breach of contract?

8.3.2 Did the claimant acquiesce to the breach or affirm the contract following any breach by the respondent?

9. Automatic constructive unfair dismissal for a health and safety reason

9.1 Did the respondent conduct itself in a way that breach the implied term of mutual trust and confidence (as identified in paragraphs 6.2.1 to 6.2.3 above)?

9.2 Was the reason or principal reason for that conduct because:

9.2.1 There were no health and safety representatives or safety committee at the claimant's place of work or if there were, it was not reasonably practicable for the claimant to raise the matter by those means; and

9.2.2 The claimant brought to the respondent's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety? Or

9.2.3 In circumstances of danger which the claimant reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert:

9.2.3.1. while the danger persisted he refused to return to his place of work or any dangerous part of his place of work? Or

9.2.3.2. he took steps to protect himself from the danger?

9.3 With regard to "circumstances connected to his work" believed to be harmful to health and safety and "circumstances of danger" the claimant relies on the matters he raised as outlined in paragraphs 6.2.1-6.2.3

9.4 With regard to 9.2.3, the claimant says he was absent on sick leave as a result of the alleged danger.

9.5 The respondent denies that there were circumstances of danger and maintains that there were no problems with the vehicle cabin as asserted by the claimant even after the vehicle was professionally inspected for any such problems.

9.6 Furthermore, the respondent denies that the claimant was treated in the way alleged at all or, if he was, that such treatment was not for the reasons alleged in paragraphs 9.2.2 or 9.2.3 above.

9.7 If the reason or principal reason for any proven conduct found to be a breach of the implied term was for the matters proscribed as set out in paragraphs 9.2.2 and 9.2.3 above:

9.7.1 Did the claimant resign because of the respondent's breach of contract?

9.7.2 Did the claimant acquiesce to the breach or affirm the contract following any breach by the respondent?

10. Remedies

10.1 If the claimant succeeds, in whole or part, the tribunal will be concerned with issues of remedy.

10.2 In the event that the claimant is found to have been unfairly dismissed, does the respondent prove that irrespective of any unfairness the claimant's employment was likely to terminate in any event? And/or to what extent and when?

The Hearing

11. The claimant provided two statements, a main statement and a supplementary statement. The respondent provided written statements for Mr Richard Cassell (General Manager) and Mr Jeremy Caulfield (Coach Driver.)

12. The tribunal was provided with an agreed bundle of documents of 203 pages. In addition, a copy of the claimant's statement of terms and conditions of employment was added to the bundle.

13. This hearing was listed for a remote hearing by CVP. On the morning of the first day, the claimant encountered considerable technical issues and was unable to join the hearing remotely, which caused the hearing to be delayed to 2pm. At the start of the hearing in the afternoon, although the claimant

was able to join remotely, however, his connection was intermittent and he also had difficulty in accessing the bundle electronically, which made it difficult to continue with the hearing. Following discussion with the parties representatives, it was agreed that the hearing be converted to a hybrid hearing, with the claimant and his representative attending at the tribunal in person, and the respondent representative and witnesses to join remotely. The hearing was postponed to the following day.

14. On the second day, the claimant completed his examination in chief and was cross examined. The tribunal also heard evidence from Mr Richard Cassell and Mr Jeremy Caulfield for the respondent. The respondent witness evidence was completed in the afternoon on the third day. All witnesses were also questioned by the tribunal.

15. At the conclusion of the parties' evidence, both representatives provided written submissions which they expanded on orally. Due to lack of time, the decision was reserved to allow the tribunal panel to meet for their deliberation and to provide a written judgment.

Findings of fact

16. Having considered all of the evidence, on the balance of probabilities, the tribunal made the following findings of fact. Any reference to a page number is to the relevant page number in the bundle.

17. The respondent is a transport company providing a variety of travel services to clients including schools. It operates its services from a depot in London. The respondent was formed in 2003 by its sole director and shareholder Mr Phil Seaward, who resides in Weymouth. The respondent currently employees 10 full time staff and five part time staff. As of 6 October 2020 the respondent employed 8 full time staff which included the claimant and five part time. It has a fleet of 15 coaches ranging from 16 to 61 seat capacity.

18. The claimant was a full time employee and was assigned to cover Route 5 for the South Bank International Hampstead School, each school day during the school term. The claimant drove a white Mercedes Cheetah minibus for this service. The daily school run was from 7:30 am to 8:20 am and 15.20pm to 4,00pm. In between the school run times, unless there was any additional driving for the claimant, he would go home.

19. The tribunal was provided with a copy of the claimant's statement of terms and conditions of employment issued on 31 January 2019. This statement was signed by Mr Cassell but not the claimant. Mr Cassell explained this had been prepared by the respondent's HR advisers Moorepay Compliance Ltd and was unable to confirm when it was sent to the claimant. The claimant acknowledged that he had received it and was not asked to sign it. Although a copy of the Employee Handbook was disclosed in the hearing bundle, the tribunal was told that the Employee Handbook was issued some seven years ago; that the employees were not provided with their own copy, but a copy was retained in the office for inspection by the employee.

20. The claimant reported to Mr Richard Cassel and to Miss Nikki Goolab (Business Development Manager) for day-to-day issues.

21. Mr Cassell held the position of General Manager. He joined the respondent in December 2006, and is responsible for the running and management of the business, including dealing with the drivers. Mr Cassell also confirmed he deals with all employee and health and safety issues involving the business. He himself reports to the owner/sole director Mr Seaward.

22. Miss Nikki Goolab is the Business Development Manager and reported to Mr Cassell. She assisted Mr Cassell with the day to day operations of the business.

Health and safety

23. The Employee Handbook dated April 2021, contained a health and safety policy.(p144) In evidence, the claimant confirmed he had never been provided with the Employee Handbook and did not know there was one. He first became aware of its existence from the copy contained in the hearing bundle. The tribunal was not provided with an earlier version to this Employee Handbook. No explanation was provided for this and neither was an earlier version produced during the hearing.

24. In particular, the Health & Safety Policy states,

" …. We attach great importance to providing employees with a healthy and safe working environment. We accept our legal responsibilities to provide a safe place and systems of work. We provide suitable equipment for employees to do their jobs safely… " (p145)

25. The respondent does not have a health & safety committee or an appointed health and safety representative.

Complaints

26. Mr Cassell acknowledged that during the period January 2018 to January 2020, the claimant had raised several concerns about the Cheetah minibus he was driving. The concerns were about mechanical issues and how he felt ill on occasions after driving the minibus. In evidence, the claimant confirmed that due to his concerns about the minibus in 2018 he started to wear a face mask when driving during the school run. This was not challenged by the respondent in cross examination.

27. On 22 January 2020 the claimant raised a complaint to Mr Cassel about fumes escaping into the cabin of the minibus which was causing him to lose concentration and fall asleep when driving. He reported this caused him to suffer with a dry cough, sore throat and irritated eyes. The claimant did not find that Mr Cassell took his complaint seriously which prompted him to directly e-mail Mr Seaward on 22nd January 2020. In that e-mail the claimant stated,
"Good evening Philip I sending this e-mail in regards to GCZ This evening I spoke with Richard informing him of some of my concerns about the fumes that are coming into the cab. I often feel as though I'm getting exposed to fumes in this vehicle. Today this evening I asked both Jerry and Yomi to see if they could smell anything to which they replied. I know that I am being

exposed to gases and fumes while in GCZ and I have the typical sore throat irritated eyes cough etc.
The point I'm making is I'm sure Richard is hearing my point though it's hard to tell with Richard, after speaking about my concerns Richard asked if I was saying I wasn't going to drive GCX my reply to this was I did not say I wasn't going to drive the vehicle but I'm that worried so therefore I will wrap a scarf around my mouth and nose all use a safety mask similar to that of the cyclist. I am worried about the effects on my health and don't want to be misunderstood which is why I am informing yourself. If I were to fall ill at the wheel due to the exposure is also fear for me as the air con doesn't provide much air ventilation up in the front where the engine is located once hot under temperature. " (p178) The claimant relies on this complaint as a qualifying disclosure made to Mr Cassell and Mr Seaward.

28. Upon receiving this e-mail, Mr Seaward on 23 January 2020 emailed a company called RinxTech Ltd to inspect the minibus. Mr Seaward in his email, copied the claimant's complaint, and added, *"my colleague Nicky boarded the coach today and has verified this. We have a window during the day on Wednesday next week where we could bring the coach to you. Do you have an engineer available to ride with Esmond/Investigate? "* (p51) This email was copied to the claimant.

29. On 25 January 2020 the respondent engaged PSV Services Limited ("PSV") based in London to inspect the minibus. PSV is a business which provides experienced mobile mechanics for public service vehicles. The respondent regularly used PSV. The description of the work stated in the invoice dated 25 January 2020 confirm, *"Call out to you for check on cheetah emissions inside cab. Remove engine cover and check under bonnet no obvious fault. Reconnect intake for demister as possible fault and reconnect Adblu overflow pipe"* (p91) The description does not confirm if the minibus was actually driven to check if fumes were leaking into the cabin.

30. On 31 January 2020 the minibus was subject to further work. This time the dash was stripped and cleaned and checks made for any leaks. There is no information to confirm if the minibus was driven to check the leakage of fumes as complained by the claimant. Despite these checks the claimant continued to drive the minibus which still made him feel unwell.

31. On 20 March 2020 due to the Covid 19 pandemic, the respondent closed its business and placed its employees on furlough, including the claimant.

<u>September 2020</u>

32. Following the Covid pandemic, the respondent resumed its business on 7 September 2020. A week before, the claimant with other colleague drivers returned to the depot to prepare the coaches for service and receive guidance on the Covid regulations. Each driver had a meeting individually with either Mr Cassell or Miss Goolab. The drivers were informed that all vehicles would be equipped with hand sanitizers, face masks, antibacterial wipes, disposable gloves, and given instructions on how to keep the vehicles clean. It was also agreed that all drivers would do a Covid test in the week before schools opened and then would do a lateral flow test twice a week.

33. According to Mr Cassel the claimant refused to do any Covid test and made it known that he was not going to follow these rules. Mr Cassell had another meeting with him to make it clear that these safety rules were not optional, and that he had to comply. Eventually, the claimant agreed to comply. In evidence, the claimant disagreed with Mr Cassell that he had refused to comply.

34. The claimant returned to work on 7 September 2020. His chaperone had been changed to a new employee, Ms Anita Brosnan. The claimant had not been given notice of this change.

35. The claimant found the problems with the minibus were still present. He also found an issue with the heating system, which had not been switched off since it was last used in the winter months. The switch to control the heating system was located inside the bonnet, the claimant had to turn on the air conditioning to try to control the temperature. Within three days of returning to working, the claimant developed symptoms of head cold, a dry cough, sore throat and irritated eyes.

36. The claimant explained that given his symptoms Ms Brosnan became concerned that he may be suffering from Covid19.

37. The claimant explained that on a particular day around this first week, when he returned to the depot, he met with Mr Cassel and told him about his symptoms, the state of the minibus; also that the hearing system required attending too, and that the minibus needed to be replaced. According to the claimant Mr Cassel acknowledged the heating system had to be looked into and told him that he would look into replacing the minibus. Mr Cassell disputed he said he would look into replacing the minibus.

38. On Saturday 12 September2020 the claimant in a text exchange with Miss Goolab in the evening at 7.29pm wrote *"Evening nikki you know this is definitely a head cold I have now I'm gonna stay indoors so will let you know what time if at all I go to the yard tomorrow now they gonna be really suspicious of my cough so I'm trying to recover for Monday"* (p54) On Sunday 13 September, the claimant in another text message to Nikki, stated, *"I'm still blocked up nicky I haven't' gotten rid of this head cold at all yet"*

39. On Sunday 13 September 2020, by email sent at 11:59 am, Mr Kevin Green Director of Finance & Operations of South Bank International School, made a complaint about the claimant. He reported that there was no sanitising gel made available on the bus route and that the claimant's explanation was that the respondent did not provide gel for buses; that the chaperone had suggested the driver gave strong indications that he didn't take the threat of Covid seriously and this was causing her anxiety as she had a long respiratory illness during lockdown, and that she felt that the welfare of the students was being compromised. The e-mail also stated that over the weekend they had received similar feedback from a family of a child about the claimant making claims to the children that he didn't believe in coronavirus and that is why he did not wear a face covering at certain times. Mr Green requested this matter be investigated. (p61)

40. On 14 September 2020 the claimant attended at work for his morning shift. He said he attended early that morning with his tools in order to swich off the heating system in the minibus. He explained Miss Goolab was on site, and he spoke to her about changing his minibus and expressed his displeasure that the respondent had not changed his minibus despite having purchased a new 50 seater coach. The claimant accepted in evidence he was unhappy about this.

41. The claimant also had a conversation with Mr Cassell that morning as he was about to leave for the school run about his concerns with the heating system to the minibus was affecting his health. The claimant found that Mr Cassell dismissed his concerns which made him feel upset and tearful. The claimant said he considered resigning as he felt he was risking his health at work, but did not want to let down Ms Brosnan and the children on the school run. He therefore continued to do his school run.

42. After doing his morning run, the claimant went home sick feeling unwell. In a text message with Nikki, the claimant wrote, *" Gone home sick I'm not feeling well, you can inform that supervisor he is no doctor I will visit a real doctor "* (p52)

43. In a text message to Nikki, that day, the claimant wrote *" How can I turn up to work coughing out my lungs in CGZ before this pandemic I've had symptoms like a cough, nicky suggesting to the PA my beliefs about covid is like you suggesting that you don't believe CGZ has an effect on my respiratory or lungs you're not a doctor you're a supervisor. I'm not an actor I'm concerned about my health what's wrong with that doctor"* (p53)

44. Due to feeling unwell, the claimant was absent from work from 14 September 2020 for a period of two weeks.

45. On 14 September 2020 at 6.15pm, Nikki Goolab replied to Mr Green's email, stating, *" I am sorry to hear about your concerns about the driver on Route 5 and fully sympathise. We have taken your observations on board and the driver has now been taken off this route and suspended until we discussed these matters with him. A replacement driver (whom I will accompany tomorrow morning) has been installed on the route*. (p58)

46. Mr Cassell, in evidence explained that on 21 September 2020, the respondent received a telephone call from Cognito, a transport management company who managed the school runs for South Bank International Hampstead School insisting that the claimant be removed from the school run. Mr Cassell confirmed this was a verbal instruction. He was unable to confirm the identity of the caller and to whom this call was made. The respondent did not produce any contemporaneous note or any written evidence to verify this call. Mr Cassel explained because this instruction had the potential to affect the claimant's future employment as this was the sole route he worked on, he decided to call him to a meeting to discuss his future employment.

47. On 22 September 2020 at 7.55am the claimant sent a text message to Miss Goolab saying, "*Morning. After contacting my doctors and given treatment I have got over my cough and feel better. Due to the safety of others have stayed at home for the two weeks. When will you be at the office next I need to meet with you please and thanks."* (p55) Miss Goolab replied *" Hi Esmond, can you attend a SOSR meeting on Thursday 24th September 2020 please can you confirm that you will be attending thank you."* The claimant replied, *" What is a SOSR does this mean I need to attend with some representation kindly let me know."* Miss Goolab replied, *"Please check your e-mail as Richard has sent you one explaining about the meeting."* (p56)

48. On 22 September 2020 by e-mail at 14.10 pm, Mr Cassels sent the claimant a letter inviting him to a meeting on Thursday 24 September 2020 at 11am. The letter confirmed the purpose of the hearing as *" to discuss the clients request to remove you from their school run and the impact this has on your ongoing employment. I must advise you that in the event no suitable alternative work can be found it may result in your dismissal from the company. You may be accompanied at the hearing by either a work colleague or Trade Union representative. …."* (p57)

49. The claim replied to this letter by e-mail on 24 September 2020 at 10.39am, requesting details of the third party allegations, and stating that on receipt of the requested information he would be able to attend Monday week and also will let him know who will accompany him.(p60) The scheduled meeting did not go ahead and was re-arranged for 28 September 2020. The respondent did not respond to this email or provide the requested information or any documentation.

50. The re-scheduled meeting was held on 28 September 2020 at 12 noon at its premises, The meeting was conducted by Mr Cassel. Also present was Miss Goolab. The claimant attended with his mother. The claimant observed that Miss Goolab was wearing a hoodie with the hood over her head and was sat on a swing chair with her feet up, which he found inappropriate. In evidence, Mr Cassell disputed the claimant's observations although he admitted that Miss Goolab is known to wear hoodies.

51. The respondent produced typed notes of the meeting, signed by Mr Cassell and Miss Goolab, "as true minutes of the meeting". In evidence, the claimant was adamant that neither Mr Cassell or Miss Ghoolab were taking notes of the meeting. He first saw these notes in the hearing bundle and disputes the contents of the notes.

52. The tribunal questioned Mr Cassell about these meeting notes. The notes are written in the past tense and summarises the discussion held. Mr Cassell confirmed that he took hand written notes at the meeting, and then typed these on his old laptop which has now been disposed of. He said he disposed of the handwritten notes too. The tribunal did not find Mr Cassell's evidence credible particularly knowing the importance of this meeting. We find these meetings notes were produced sometime after the meeting, and were not sent to the claimant at all. Had these been sent to the claimant, it is

highly likely the claimant would have made his observations.

53. In summary, the notes of the meeting start by making reference to " this meeting will go along the lines of a SOSR meeting (Some other significant reason (sic)). They then record the claimant's verbal abuse of Miss Goolab on the morning of 14 September 2020, and further verbal abuse towards Mr Cassell that same morning after learning that another driver had been allocated a new coach and not the claimant. The notes also record, the claimant complaining about damage to his health due to fumes from the engine coming into the vehicle, and a response by Mr Cassell confirming that "*the vehicle has been checked professionally – no fumes/leaks were found, the only issues reported was that the vehicle was in disgusting filthy condition looked like it had never had a proper clean."*

54. The notes also record Miss Goolab informing the claimant about the complaint from the School/Cogita about their being no sanitising gel on the minibus; he had stated to the children that he did not take Covid seriously; and that Ms Brosnan had also reported her concerns about the claimant not taking Covid seriously and was placing the welfare of the children at risk. The claimant disputed these claims, and is stated to have said, "this is rubbish, all lies." Due to the claimant's attitude and temper, which Mr Cassell found to be aggressive, he decided to end the meeting. In doing so, Mr Cassell informed the claimant that the allegations had to be taken seriously and would be investigated, and that he was suspended on full pay pending investigation. (p63-66)

55. In evidence, the claimant stated that the claims made by Ms Brosnan were untrue. In the hearing bundle there is an email from Ms Brosnan to the claimant dated 29 September 2020. The was obtained by the claimant in response to the claims made to him by Mr Cassell. The email states it is a statement by Ms Brosnan, in which it states she has never witnessed the claimant communicating with the parents or children about Covid 19. Also she has never said she does not want to work with the claimant, and also denied that she has had any discussion with Mr Cassell about this. In evidence, Mr Cassell stated that had the claimant disclosed this statement he would have contacted Ms Brosnan about it. This was a surprising comment bearing in mind that Mr Cassell claimed that Ms Brosnan had raised her concerns about the same point to him previously, yet no statement was obtained from her for the meeting of 28 September 2020. (p179)

56. On 2 October 2020,at 2.44pm, the Transport Manager at Cognita wrote to the the respondent Director, Mr Phil Seaward in the following terms, *" I write to confirm my request at the above school to remove the driver operating this service with immediate effect. This is due to the continued refusal to comply with the requirements to wear a face covering as set out in our guidelines for home to school services and his repeated comments that he did not believe in Covid being a threat, which has been made repeatedly to the students. We have received complaints from the on board chaperone and from parents of students who travel on this service who are concerned about his actions*. " (p67)

57. On 5 October 2020 at 13.19pm, Mr Cassell emailed the claimant inviting him

to attend a hearing on Wednesday 7 October 2020 at 12noon at the Depot. It stated the meeting was a follow up meeting of 24 September 2020 during which he was told of the client's request to remove him from their school service. The claimant was told that he had the right to be accompanied by either a work colleague or trade union representative. (p68)

58. On 5 October 2020 by letter the claimant made a Subject Access Request (SAR)

59. By letter dated 6 October 2020 the claimant gave notice of his resignation with immediate effect. The letter was addressed To Whom it may concern, and headed CONSTRUCTIVE DISMISSAL. It read, " *I am writing this letter to inform you that I'm resigning from my position as coach driver with Seaward Travel Ltd with immediate effect due to relationship breakdown of mutual trust and confidence in my employer. I write as I am left with no alternative to remove myself from a bullying environment where I am being willfully persecuted and victimised unfairly….. The grounds for my constructive dismissal is connected with the past and present treatment of bullying and assumptions made by Richard Cassell and Nick Goolab in regards to alleged allegations which they claim have been made against me. The disciplinary meeting held on the 28th September 2020 was disingenuous and a collusion of hearsay which has been fabricated. Richard (line manager) has failed to conduct proper procedures in line with legal employment practises hence he attempted avoiding my ability to bring forth a grievance against issues I wished to raise and has denied me access to documents which I have requested on several occasions for which I have a legal right to request. Fundamentally, as I mentioned above the loss of trust and confidence in both Richard Cassell and Nick Goolab, their behaviour towards me has had the detrimental effect on my health and well-being and has made the job intenable, also in the knowledge that their allegations are unfounded. I have on several occasions tried to resolve previous issues to no avail of successfully being heard. The last straw that has brought me to this decision has derived from wilful unfounded allegations, aimed at damaging my reputation and assassinating my character which has also financially detrimental and caused me stress. I consider all the above to breach my contract with Seaward Travel Ltd and would appreciate your your acknowledgement of this notification.* (p71)

60. In evidence, the claimant also stated that despite being suspended on full pay, he did not receive any monies for his suspension period and therefore he could not afford to travel to the scheduled meeting.

The Legal Framework

Constructive unfair dismissal

61. Section 94 of the Employment Rights Act 1996 ("ERA 1996") sets out the right of an employee not being unfairly dismissed by his or her employer.

62. An unfair dismissal claim can be pursued only if an employee has been dismissed as defined by Section 95 of the Employment Rights Act 1996.

63. Section 95(1)(c) provides that an employee is dismissed by his employer

if: “the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

64. The case of ***Western Excavating (ECC) Ltd v Sharpe 1978 IRLR 27***, established that in order for the circumstances to entitle the employee to terminate the contract without notice, there must be a breach of contract by the employer, secondly that the breach must be sufficiently important to justify the employee resigning: the employee must leave in response to the breach not some under connected reason, and that the employee must not delay such as to affirm the contract. The breach relied upon can be a breach of an express or implied term.

65. In ***Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606*** it was confirmed that every contract of employment contains an implied term that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is implicit in this that any breach of the implied term will be sufficiently important to entitle the employee to treat himself as dismissed and the reason for that it is necessary do serious damage to the employment relationship. That position was expressly confirmed in ***Morrow v Safeway Stores Limited 2002 IRLR 9***.

66. The test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in Malik recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust.

67. Where the breach alleged arises from a number of incidents culminating in a final event, tribunal may, indeed look at entire conduct of the employer and the final act relied on need not itself be repudiatory or it even unreasonable, but must contribute something even if relatively insignificant to the breach of contract. ***Lewis and Motor World Garages Ltd1985 IRLR 465 and Omilaju v Waltham Forest London Borough Council 2005 IRLR 35***.

68. In ***Kaur-v-Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978***, the Court of Appeal reviewed cases on the 'last straw' doctrine and Underhill LJ formulated the following approach in relation to the Malik test;
"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
(2) Has he or she affirmed the contract since that act?
(3) If not, was that act (or omission) by itself a repudiatory breach of contract?
(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of

a possible previous affirmation, for the reason given at the end of 45 above)

(5) Did the employee resign in response (or partly in response) to that breach?"

69. If the dismissal is established subsection 98(1) ERA 1996 requires the employer to demonstrate that the principal reason or if more than one, for the dismissal was for one of the potentially fair reasons listed in sub-section 98 (2) ERA 1996 or for some other substantial reason. If it cannot do so then the dismissal will be unfair.

70. If the employer is able to establish that the reason for dismissal was for a potentially fair reason, then the tribunal must go on to consider whether the dismissal was actually fair applying the test set out in section 98(4) ERA 1996.

Public Interest Disclosure

71. A qualifying disclosure is a disclosure that falls within section 43B of the Employment Rights Act 1996.

In order for the disclosure to be protected it has been made in the public interest and the claimant has to reasonably believe that it tended to show one or more of the following:
(i) a breach of legal obligation;
(ii) that a criminal offence has been committed;
(iii) there has been a miscarriage of justice;
(iv) there is a health and safety danger;
(v) environmental damage
or that any of the above is occurring or is likely to occur.

72. Qualifying disclosures can only be made to certain classes of person; these include a person's employer. (s43C ERA 1996)

73. In ***Williams v Michelle Brown AM UKEAT/0044/19/00, HHJ Auerbach*** identified five issues which a tribunal is required to decide in relation to whether something amounts to a qualifying disclosure.

" *It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a believe it must be reasonably".*

74. The word disclosure must be given its ordinary meaning which involves a disclosure of information, that is conveying facts which means that making of mere allegations will not be a "disclosure" for these purposes. In ***Cavendish Munro Professional Risks Management Ltd v Geduld (2010) IRLR 38)*** Slade J said,

"…the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be, " The wards have not been clean for the past two weeks. Yesterday sharps were left lying around" Contrasted with that would be a statement that, "You are not complying with Health and Safety requirements" In our view this will be an allegation not information."

75. Thus care must be taken not to draw false distinctions between allegations and information when often a disclosure maybe both.

76. In ***Kilraine v London Borough of Wandsworth (2018) ICR CA Sales LJ*** provided the following guidance;

(i) s43B (1) should not be glossed to introduce into it a rigid dichotomy between information on the one hand and allegations on the other…

(ii) On the other hand although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.

(iii) In order for a statement or disclosure to be a qualifying disclosure according to this language it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)

(iv) Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgement by a tribunal in the light of all of the facts of the case.

77. The disclosure will only be a qualifying disclosure if the worker believes that the disclosure is in the public interest. This requirement was considered by the Court of Appeal In ***Chesterton Global Ltd v Nurmohamed (2017) EWCA Civ 979,*** in which it was held that they may not be a white line between personal and public interest, with any element of the former ruling out the statutory protection; where they are mixed interests it will be for the employment tribunal to rule, as a matter of fact, as to whether there was sufficient public interest to qualify under the legislation.

78. It was stated that the Tribunal has to determine, (a) whether the worker subjectively believed at the time that the disclosure was in the public interest and (b) if so whether that belief was objectively reasonable.

79. The legislation does not define what the "public interest" means in the context of qualifying disclosure although the Employment Tribunals must be intended to apply it "as a matter of educated impression" looking at all the following factors; (i) the numbers in the group whose interests the disclosure served; (ii) the nature of interests affected and the extent in which they are affected by the wrong being disclosed;(iii) the nature of the alleged wrongdoing disclosed; and (iv) for the identity of the alleged wrong doer.

s103A Employment Rights Act 1996 ("ERA")

80. S103 A, provides,

" 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 principle reason) for the dismissal is that the employee made a protected disclosure.

81. The principal reason is the reason that operated on the employer's mind at the time of the dismissal. (***Abernethy v Mott, Hay and Anderson (1974) ICR 323, CA).***

82 s103A ERA requires the protected disclosure to be the primary motivation for a dismissal. ***Fecitt and others v NHS Manchester (Public Concern at Work Intervening (2012) ICR 372 CA***.

Health & Safety – s100 Employment Rights Act 1996

83. Section 100 Employment Rights Act 1996, "ERA 1996", provides,

(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—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer, the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(c) being an employee at a place where—

(i) there was no such representative or safety committee,

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work,

84. An employee is automatically unfairly dismissed if the reason or principal reason for dismissal is one of the health and safety reasons as set out above.

Conclusion

Constructive unfair dismissal

85. The tribunal first examined the alleged 3 breaches as set out in the List of Issues (Para 6.2.1 6.2.3). We deal with each breach.

(a) Failure to act on the disclosures in particular its failure to address the claimant's concerns by changing the vehicle driven by the client.

86. The respondent did fail to properly address the safety concerns as complained of by the claimant. In our view given the ongoing concerns expressed by the claimant, a reasonable employer would have ensured a detailed inspection and examination of the minibus was undertaken and a discussion held with the claimed to allay his fears. The respondent has a duty to provide a safe system of work. It failed to do so. Further given the claimant's ongoing complaints about his ill health caused by his having to drive the minibus it would have been a reasonable step for the respondent to have replaced the mini-bus than to insist the claimant continued to drive the same mini-bus in the circumstances. We also find Mr Cassell's response to the claimant on 14 September 2020, when he arrived at the depot, that as far as he was concerned the matter was closed despite knowing the claimant's concerns, to be unreasonable conduct which further damaged the trust and confidence between himself and the claimant.

(b) Failed to investigate the allegations made against the claimant by the respondent client (i.e the School) on 13 September 2020

87. On the facts, the tribunal find the respondent did not carry out any investigation to the complaint made by Mr Green (Director). Mr Green was not interviewed to obtain further details about the concerns expressed to him by Ms Brosnan, and the family member who had also complained about the claimant. Ms Brosnan, the chaperone, was not interviewed either. Instead, upon receipt of the complaint, the respondent on 22 September 2020, invited the claimant to a SOSR meeting without explaining the meaning of a SOSR meeting, or giving him any details about the complaint received or the purpose of this meeting.

88. Mr Cassell by letter dated 22 September 2020, invited the claimant to attend a meeting, on 24 September 2020, in which it mentioned the purpose of the meeting was to "discuss the client's request to remove him from the school run, and the impact this has on your employment". It further stated, in the event there was no other suitable employment found he may be dismissed. This letter provided no details of the complaint received or any evidence of investigation undertaken. Even at the meeting on 24 September 2020, no evidence of the complaint or investigations undertaken was provided. This was in breach of the ACAS Code of Practice. This conduct was a breach of the implied term of trust and confidence.

(c) The unprofessional manner in which the respondent is alleged to have handled the investigation meeting of 28th September 2020.

89. The meeting of 28 September 2020, was the disciplinary meeting, (not the investigation meeting as stated in the invitation letter of 24 September) conducted by Mr Cassell, at which Miss Nikki Goolab was also present. The tribunal does not accept that contemporaneous notes were taken at this meeting by the respondent. The tribunal has in Para 52 above, set out its findings about the accuracy of their content. Accordingly, the tribunal has considered the evidence of the claimant and Mr Cassell, in reaching its conclusion. We prefer the evidence of the claimant as to what happened at this meeting.

90. The tribunal finds the respondent did not provide the claimant, in advance of the meeting, any details about the complaint, any information about the investigation undertaken to this complaint. Mr Cassell claimed to the claimant that he had spoken to Ms Brosnan, when in fact this was untrue as confirmed by the statement from Ms Brosnan provided in the hearing bundle.

91. In particular, the claimant's complaint about the meeting was the unprofessional manner of Miss Goolab, who he recalled, during the meeting was sitting on a swing chair with her feet up. She was wearing a hoodie with the hood over her head. He did not think this was appropriate in a meeting of this kind when his job was at stake. In evidence, Mr Cassell did not recall Miss Goolab sitting as described and could not recall, if she was wearing a hoodie that day. He did accept that Miss Goolab was known to wear a hoodie on occasions.

92. The tribunal notes this was a formal meeting. It should have been conducted in a professional manner. Miss Goolab held a managerial position and should have acted responsibly and professionally. She did not.

93. The tribunal has noted the contents of the claimant's resignation letter repeated at Para 59 above in which he refers to the conduct of Mr Cassell and Miss Goolab and the fact that unfounded allegations and lies were now being made about him. In evidence the claimant repeated this was the reason for the loss of trust and confidence.

94. On the basis of the above findings the tribunal asked if these matters, individually or cumulatively are sufficient to amount to a breach of the implied term of trust and confidence? Are they of a sufficiently serious nature to seriously damage the relationship of trust and confidence. The tribunal found by their conduct the respondent acted in such a way as to destroy the relationship of trust and confidence between the parties. Further, the claimant did not delay from resigning and neither did he affirm the said breaches.

95. Accordingly, the tribunal finds the claimant was dismissed.

96. In evidence, the respondent has argued the reason for the claimant's dismissal was for a SOSR reason, which is a potentially fair reason. On the facts, the tribunal does not find this reason has been made out. The respondent has failed to establish facts from which a potentially fair reason may be found. The constructive dismissal was therefore unfair.

Automatically Unfair Dismissal s103A ERA 1996

97. The claimant asserts he made two qualifying disclosures, namely on the 22 January 2020 and 14 September 2020. The tribunal considered these individually.

98. The disclosure of 22 January 2020, is as set out in the claimant's email of 22 January 2020 at Para 27 above. In applying the legal test, the tribunal finds as follows.
(i) The concern that the claimant was being exposed to gases and fumes in the cabin of the minibus when driving was a disclosure of information. It was not a mere allegation.
(ii) The information tended to show that the claimant's health or safety and that of others, if having to drive the vehicle at all, was at risk or was likely to be endangered particularly as he felt it caused him to lose concentration and fall asleep. The claimant had a reasonable belief in this.
(iii) This disclosure was made in the public interest. He was not only concerned about his safety and welfare but also any other colleagues who would have to drive the vehicle, and further the safety and welfare of the passengers as well as the public and other road users.
(iv) It was raised with Mr Cassell, the General Manager, as well as Mr Seaward, the Managing Director.

99. Accordingly, this was a protected disclosure in accordance with s43B (1) ERA 1996.

100. With regard to the disclosure of 14 September 2020, made verbally to Mr Cassell, in the absence of any written record of what was actually said, the tribunal prefers the claimant's evidence that he repeated the state of the minibus leaking fumes and how it was making him feel ill. On this basis, of the analysis made above, the tribunal find this also was a protected disclosure.

101. The tribunal then considered the reason for the claimant's dismissal. This was carefully considered in view of the claimant's letter of resignation and his oral evidence to the tribunal. In evidence, the claimant showed his upset and anger about how he had been treated by Mr Cassell and Miss Goolab, in the past. However the central reason which caused him to resign was being called to a disciplinary meeting by Mr Cassell, for what he described as unfounded allegations which he maintained were "false and lies", and that these allegations had been made to damage his reputation and assassinate his character. The claimant did not mention in his resignation letter or in oral evidence that the failure to deal with or take his concerns about his minibus seriously was a consideration in his decision to resign.

102. The tribunal therefore finds the claimant's resignation was not linked to his qualifying disclosures. This claim, therefore is not made out and fails.

Automatic Unfair Dismissal related to Health & Safety – s100(c) & (d) ERA 1996

103. There was no appointed Health & Safety representative or a Health & Safety Committee at the respondent. The Health & Safety Policy disclosed in the bundle made no reference to a Health & Safety representative or Safety Committee. Neither was any information provided to employees to whom such concerns should be raised with.

104. The tribunal find that, in the absence of a Health and Safety representative or a Health & Safety Committee, the claimant had no alternative but to report his health and safety concerns to Mr Cassell being the General Manager of the respondent.

105. The tribunal is satisfied that the claimant did bring to the attention of Mr Cassel by reasonable means, circumstances connected with his work which he reasonably believed was harmful to his health and safety namely, the leakage of the fumes into the minibus cabin, and the heating ventilation issues. The tribunal is therefore satisfied that the claimant has met the qualifying requirements of s100(1)(c) ERA 1996.

106. Having considered the overall position the tribunal is not satisfied the claimant has established on a balance of probabilities that his health and safety concerns as raised was the reason for his dismissal. In this regard the tribunal has given careful consideration to the claimant's resignation letter. The said letter does not state the reason is related to his health and safety concerns. In the main, the claimant states his position has become untenable because of the loss of trust and confidence caused by the conduct of Mr Cassell and Miss Goolab; the holding of the disciplinary hearing which he considered was disingenuous; his being bullied, victimised and unfairly treated; with the last straw being the unfounded allegations made against him about his conduct, which he considered was fabricated and lies. This claim therefore is not made out and fails.

107. In regard to the claim made under s100(1)(d) ERA 1996 the tribunal finds that the claimant did bring to the respondent's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety. The tribunal does not find that there were circumstances of danger, and that the breach of the implied term of trust and confidence was caused by the reasons as stated above in Para 108. Accordingly this claim also fails.

108. The claimant therefore succeeds in his claim for constructive unfair dismissal and wrongful dismissal. Accordingly, the listed hearing on 22 September 2023 will proceed to deal with the issue of remedy.

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Employment Judge Bansal
Date: 12 September 2023

Judgment sent to the parties on
13 September 2023

For the Tribunal office