Case Number: 1301952/2022

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Carl Guest	v	**VP Plc (1)**
		Brandon Hire Station Limited (2)

Heard at: **Birmingham** **On:** **4, 5, 6 and 7 September 2023**
In chambers 1 & 2 November 2023

Before: **Employment Judge Wedderspoon**
Members **Mr. E. Stanley**
Mr. Faulconbridge

Representation:
Claimant: **In Person**
Respondents: **Mr. P. Smith, Counsel**

JUDGMENT

1. The first named respondent, VP PLC, is dismissed from the proceedings.
2. The claim for unfair dismissal is not well founded and is dismissed.
3. The claim for automatic unfair dismissal by reason of public interest disclosures is not well founded and is dismissed.
4. The claim for unpaid wages (bonus) is not well founded and is dismissed.

REASONS

1. By claim form dated 6 April 2022, the claimant brought complaints of unfair dismissal, automatic unfair dismissal by reason of public interest disclosure and an unlawful deductions of wages claim for non-payment of a bonus.

2. The claimant's case is that by reason of raising a number of protected interest disclosures, the respondent conducted an audit at his depot and then disciplined him for procedural deficiencies including the use of a "dump codes" to hire out equipment which was regularly used (with the respondent's knowledge). His case is that he was following his training and instructions from higher management. The respondent's case is that the claimant was

dismissed for misconduct and he was not dismissed for making any alleged public interest disclosures.

The hearing

3. The Tribunal was provided with an electronic bundle of 700 pages. The claimant called evidence from Alan Paulson, Keith Bradley, Tom Webb and Mark Jones. The respondent called evidence from David Ingleby, Regional Director of Brandon Hire station. The respondent submitted, as a written representation, the witness statement of Phil Jones, Asset Director at Brandon Hire Station, the second named respondent who heard the claimant's appeal from dismissal. The weight attached to his evidence was minimal in the context that he had not attended the Tribunal and had not been cross examined.

4. The case had been listed before a full panel. The case would usually be dealt with by a judge sitting alone. The parties were content that a full panel should hear the case and therefore the tribunal comprised of the Judge and two members.

5. The claimant clarified at the commencement of the hearing that in respect of the ACAS code he relied upon breaches of paragraph 12 namely that he was not given the opportunity to ask questions during the disciplinary hearing; also paragraph 22; he was not informed about the reasons for dismissal. In respect of his grievance, he complained that the hearing should have been postponed because his companion Mark Jones was not available and he should have been given reasonable notice, namely some 5 days.

6. In the course of the hearing the respondent added additional documentation including the respondent's "bonus scheme for branch manager document". It was agreed this document was relevant and it was included at R1.

7. Due to the inadequate listing of the case (the estimated length of hearing was agreed by the parties), it was determined to deal with liability first and further, that two further dates for deliberations would be required. Due to the commitments of the Tribunal to other cases it was not possible for the Tribunal to meet until 1 and 2 of November 2023 to discuss the case. Further time was required to draft the decision and this could only be accommodated when the Judge was not listed to hear another case.

Issues

8. The issues the Tribunal is to determine as set out in Employment Judge Coghlin's order dated 19 October 2022 as follows.

List of issues

9. Unfair dismissal

9.1 what was the reason or principal reason for dismissal?

9.2 Was it that the claimant has made one or more protected disclosures? If so, his dismissal is unfair (section 103A Employment Rights Act 1996)

9.3 If not, was it a potentially fair reason? The respondent says the reason was conduct.

9.4 If the reason was conduct did the response act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The tribunal usually decide in particular whether

9.4.1 the respondent genuinely believed the claimant had committed misconduct;

9.4.2 there were reasonable grounds for that belief;

9.4.3 at the time the belief was formed the response carried out a reasonable investigation;

9.4.4 the respondent otherwise acted in a procedurally fair manner;

9.4.5 dismissal was within the range of reasonable responses.

Protected disclosure

10. Did the claimant make one or more qualifying disclosures as defined in section 43B of the employment rights act 1996? The tribunal will decide

10.1 what did the claimants say or write when to whom the claimant says he made the following disclosures

10.1.1. On 29 July 2019 in an e-mail to Jason Laight (page 129)
10.1.2 on 8 August 2019 in an e-mail to Jason Laight (page 130)
10.1.3 on 9 September 2019 in an e-mail to Jason Laight page 131
10.1.4 on 11 September 2019 in an e-mail to John Whitby and Jason late page 135
10.1.5 on 9 October 2019 in an e-mail to Jason Laight 137
10.1.6 on 16 October 2019 in e-mail to Jason Laight page 138
10.1.7 on 21 October 2019 in an e-mail to Jason Laight page 140
10.1.8 on 7 November 2019 in an e-mail to Jason Laight page 142
10.1.9 on 15 January 2020 in an e-mail to Jason Laight page 144 to 145
10.1..10 5th August 2020 in an e-mail to Jason Laight page 146
10.1..11 on 10 September 2020 in an e-mail to Jason Laight page 148
10.1.12on 13 November 2020 in an e-mail to Jason Laight 149
10.1.13on 2nd December 2020 in an e-mail to Jason Laight page 150
10.1.14on 10 December 2020 in an e-mail to Jason Laight page 151
10.1.15 on 9 January 2021 in an e-mail to Jason Laight page 152
10.1.16 on 5th February 2021 in an e-mail to Jason Laight page 155
10.1.17 on 1 April 2021 in an e-mail to Jason Laight page 156
10.1.18 on 23 April 2021 in an e-mail to Jason Laight 157
10.1.19 on 12 May 2021 in an e-mail to Jason Laight 158
10.1.20 on 13 May 2021 in an e-mail to Jason Laight 159
10.1.21 on 29 May 2021 in an e-mail to Jason Laight160
10.1.22 on 10 June 2021 on in an e-mail to Jason Laight page 161
10.1.23 on 22 June 2021 in an e-mail to Jason Laight page 162
10.1.24 on 23 June 2021 in an e-mail to Jason Laight and HR page 163
10.1.25 on 24 June 2021 in a phone call to HR page 164
10.1.26 on 29 July 2021 in an e-mail to Jason Laight page 165
10.1.27 on 19 August 2021 in an e-mail from Neil Skea to Chris West page 167
10.1.28 on 21 August 2021 in an e-mail from Chris West to Neil Skea page 168
10.1.29on 21 September 2021 in an e-mail to Jason Laight page 169.

11. Did he disclose information?
12. Did he believe the disclosure of information was made in the public interest?
13. Was that belief reasonable?

14. Did he believe it tended to show that :
14.1 a person had failed it was failing or was likely to fail to comply with any legal obligation and/or
14.2 the health or safety of any individual had been was being or was likely to be endangered?
13. Was that belief reasonable?
14. If the claimant made a qualifying disclosure it was a protected disclosure because it was made to the claimants employer or other responsible person.

Unauthorised deductions

15. Was the claimant properly entitled to a bonus in respect of the period July to September 2021?
16. Did the respondent make an unauthorised deduction from the claimant's wages by failing to pay him a bonus in respect of July to September 2021.

Remedy

17. What financial losses has the claimant suffered
18. has the claimant taken reasonable steps to replace lost earnings for example by looking for another job
19. if not for what period of loss should the claimant be compensated
20. is there a chance that the claimant's employment would have ended in any event should their compensation be reduced as a result?
21. Did the claimant contributed to his dismissal by blameworthy conduct in if so should any compensatory award be reduced and by how much?
22. Did the ACAS code of practise on disciplinary and grievance procedures apply?
23. Did the respondent or the claimant unreasonably failed to comply with it
24. if so is it just an extra to increase or decrease any award payable to the claimant?
25. By what proportion up to 25%
26. should the claimant be reinstated or re engaged if these remedies are sought
27. what basic award should be made for unfair dismissal
28. should any reduction be made to the basic ward on the basis of any conduct of the claimant prior to dismissal.

Facts

29. From 2 January 2014 to 31 January 2022 the claimant was employed as a Branch Manager of the Wolverhampton depot of Brandon Hire Station. The contract of employment see page 79 of the bundle sets out that the relevant employer as Brandon Hire which is a subsidiary of VP. The claimant's role as branch manager (see document pages 71-78) included ensuring the depot target was met and the depot was profitable, to ensure all procedures and administration were effectively managed, to increase business development, employee recruitment, staff development; ensuring that the depot was compliant with health and safety legislation and to ensure all customer needs were met. The claimant's branch manager had the ultimate responsibility and accountability on site for handling of the respondent's assets as well as the management of staff.

30. Brandon Hire Station Limited was a national provider of small tools, climate, lifting, safety, survey and press fitting equipment to industry, construction and

homeowners throughout the UK. The second named respondent is a subsidiary of V.P. PLC, an established specialist equipment rental group.

31. Each itemised asset in the depot is given a unique asset number which is recorded in the respondent's stock control system known as G42. This system allows the respondent to track the service and maintenance history as well as all transactions relating to any given itemised asset. This process safeguards the respondent's customers and employees to ensure that the correct safety checks have been conducted in accordance with legal requirements. Items which were damaged or unidentified are quarantined and placed in a separate area in the depot.

32. All the witnesses who gave evidence at the Tribunal including the claimant's witnesses (save for the claimant) agreed that items should not be removed from the "quarantine area" or items provided with another code due to lack of traceability of the item and also because of health and safety. The claimant's evidence which contradicted this, was rejected by Tribunal.

33. By the nature of the amount of hiring of items from different branches, assets can be wrongly returned to another depot in error. As the depot manager it was the claimant's responsibility to ensure that he had only the correct items in his depot.

34. The claimant relied upon a number of emails he sent to the respondent as "public interest disclosures" stating that they either/both raised concerns about a failure of a legal obligation and/tended to show the health and safety of any individual has been/was being or was likely to be endangered. The claimant conceded that three alleged disclosures dated 24 June 2021 (page 164); 19 August and 21 August 2021 (pages 167 and 168) concerned emails from others and therefore could not amount to disclosures made by him. At the Tribunal the claimant did not directly put to the dismissing officer that he had been dismissed by reason of making any alleged disclosures. However, the Tribunal did ask the dismissing officer, Mr. Ingleby about his knowledge of the alleged disclosures; he stated he was unaware that the claimant had made public interest disclosures. The Tribunal accepted this evidence.

35. In respect of the remaining 26 alleged disclosures these were as follows. On 29 July 2019, page 129, the claimant emailed Mr. Laight complaining about inadequate staffing and requesting recruitment of staff at his depot and seeking more equipment for his depot. He also complained about Paul Reed's attitude towards him. He was concerned about staff. On 8 August 2019 page 130 he raised the need for more staff and highlighted the need for more kit. On 9 September 2019 page 131 the claimant raised the fact he was working long hours and could not keep going and he wanted an answer as to whether he could have another staff member. On 11 September 2019, page 135, the claimant was requesting more staff and more staff to deal with compliance. On 9 October 2019 page 137 the claimant raised the need for more people to repair kit and requested a manual so that a fitter knows how many tests and what a piece of kit actually needs. On 16 October 2019 page 138 the claimant was raising concerns about more staff and the need to replace a vehicle. On 21 October 2019 page 140 the claimant raised he required more cat equipment; the lack of knowledge of the G42 system and a lack of people and training and the right people in the right

place. On 7 November 2019 page 142 the claimant requested when a van was going to be replaced he hadn't got enough; he wanted some winter heaters and lights. On 15 January 2020 page 144 the claimant required a large gas cage. On 5 August 2020 page 146 the claimant required assistance with repair of roller shutters a man hole cover at the front which was now sticking up causing a trip hazard; the lack of drainage at the yard; the water heater in canteen stopped working; re yard with potholes and a toilet which was a flushing. On 10 September 2020 page 148 the claimant raised there was a lack of financial recognition for how much work his team had put in. On 13th November 2020 page 149 the claimant stated the yard was the biggest problem he'd had two members of staff trip over in the last six weeks. He alleged 6 inches of water building up. He stated it is only a matter of time before someone puts a claim in. On 2nd December 2020 (page 150) the claimant was making an inquiry as to whether the landlord had come back about the drainage in the yard alleging that Mr. Stone had fallen over today when he was opening up. On 10 December 2020 page 151 the claimant raised that he hoped his team would be getting a financial reward for all their hard work and should receive a further bonus. On 9 January 2021 page 152 the claimant stated there was a burst water pipe where two members of staff had slipped in the yard because it had iced over and requesting a second mega tester for curl and testing kits for COVID. On 5 February 2021 page 155 the claimant raised that two members of staff had slipped in the yard this week and the duty of care and that a neighbouring business was blocking his depot's entrance alleging it was costing him time and represented a health and safety issue with cars and waggons trying to squeeze past. On 1 April 2021 page 156 he stated another person who had slipped in the yard today loading panels; the yard had turned into a mud bath and broken kit which was taking up too much room and wished to move it elsewhere. On 23 April 2021 page 157 the claimant raised it was unfair for staff not to receive the bonus. On 12 May 2021 page 158 he raised the fact he thought it was a poor show if no one got a bonus. On 13 May 2021 page 159 the claimant raised that another individual had slipped in the yard. He said there was an issue with the drains and pools of water and mud he requested whether the yard would be resurfaced further the kit was getting worse further a colleagues broken kit was getting worse and wanted to get rid of it. On 29 May 2021 page 160 the claimant raised his disappointment that he was the only person in the depot to get a bonus. On 10 June 2021 page 161 the claimant requested an agency driver in June because what happened to Steve stone. On 22 June 2021 page 162 he complained he had not received a letter to give to Steve Stone. On 23 June 2021 page 163 he asked if and when Steve Stone was going to get any kind of written letter regarding what happened between him and Stuart Atton. On 29 July 2021 page 165 the claimant raised another problem in the yard when it rained and asked about whether the drainage could be sorted. He also stated there were 100 items of NI kits that need writing off and getting out of the yard stating that in effect the place was too small. On 21 September 2021 page 169 the claimant set out a list of items of lost and stolen equipment charged to customers but when found returned to the Brandon hire station he raised the issue of custom and practise for the respondent to overcharge customers for loss or stolen items at a price higher than the replacement cost and the custom and practise of without consultation with the customer to charge damage waiver on all new accounts and cash hires. He also referred to health and safety issues at the Wolverhampton depot stating that over three years he had sent numerous emails and made many phone calls due to the lack of

drainage and short staff shortages at Wolverhampton depot none of which had been actioned.

36. There was an expectation that a depot would be audited twice per year by the compliance department. An audit conducted in February 2020 at page 195 flagged up problems with the use of dump codes as being non-compliant; the claimant was provided with the audit at the time.

37. There was an assertion by the claimant and Mr. Jones his witness that other depots used the dump code. Mr. Jones limited this to 5 depots were actually using the dump codes but accepted in cross examination that the company did not condone this practice. Dump codes were used for the hire of equipment. The dump code for hire of an item meant that another code was given to an item and put on hire without identifying it in the absence of its correct G42 code. This provided a depot with the ability of releasing an item which was not meant to be in branch and obtain a sale.

38. All of the claimant's witnesses agreed with paragraph 27 of Mr Ingleby's statement that each item was given a unique asset number which was recorded on the respondent stock control system G42. On this system the respondent is able to track the service and maintenance history as well as all transactions relating to any given itemised asset. This process safeguards the respondent's customers and employees to ensure that the correct safety checks have been conducted in accordance with the legal requirements. Further, all the witnesses agreed the latter part of Mr. Ingleby's statement paragraph 28 namely the consequences of such actions that is hiring out an asset without the correct service maintenance history could leave the respondent liable for any accidents as a result of not having evidence of full service maintenance history as well as an exposure to significant stock loss due to the lack of controls within the branch.

39. The respondent discovered that the claimant had lent out (without any paperwork trail) two Genie lifts in July 2021. Mr. Laight asked the claimant by e-mail dated 26 of July 2021 to locate where the genie lifts were. The claimant responded on 26 July 2021 (page 221) stating they were stuck inside a house. Mr. Laight further enquired why the items had gone out because they were showing on the system as in stock at 619. The claimant responded that he was doing a favour as the individual wanted them for a day but obviously it then ended up a bit longer on hire. The claimant also explained that they had no contract because they had overcharged the client on the last occasion. Mr. Laight asked why the genie lifts had been hired out with no paperwork and chased the claimant for details of the "overcharged contract and name and address". The claimant failed to reply to these enquiries.

40. On 2 August 2021 a full itemised stock count took place by the compliance team at the claimant's depot over a 3 day period and identified 171 missing assets (see pages 227-232).

41. On 9 August 2021 the claimant raised a grievance in response to the stock count process and disputed the accuracy of the stock count (see pages 233 to 234). The claimant was concerned that the stock count audit was part of an agenda and not routine, he alleged the term "noise" was used as the reason for the audit

and the audit team discussed the Wolverhampton audit process missing items with persons outside of the branch resulting in reputational damage to the claimant. He alleged no support was sought from him during the audit process, there had been seven audits conducted at Wolverhampton within the past three years which was many more than others. The claimant did not believe the audit was thorough; the team was incapable and items had been missed and he requested that Spencer, the auditor be removed from the process.

42. The Tribunal found the audit/stocktake to be an appropriate management activity. The respondent was entitled to do a stock count at any stage. The claimant expected an audit twice per year. In respect of the timing of the claimant's grievance (see page 233) the Tribunal found on the balance of probabilities that this was raised as a diversion technique by the claimant in the hope that he would not be subject to any disciplinary investigation (if he lodged a complaint). The Tribunal noted in his grievance the claimant did not link the audit or disciplinary investigation with the previous public interest concerns he had raised.

43. By reason of the claimant's concerns contained in his grievance, on 19 and 20 August 2021 a follow up stock count was carried out by the respondent's compliance team. This audit revealed less missing items than the first audit (see pages 242-247).

44. On 24 August 2021 Jason Laight attended the Wolverhampton depot and gave verbal instructions to the staff, including the claimant (see the interviews page 370 and 372) not to process any item equipment that had not been subjected to a thorough inspection to ensure that the item was correctly numbered prior to completing all transactions.

45. On 27 August 2021 Mark Ball, Regional Sales manager held a grievance meeting with the claimant. Mr Ball rejected the claimant's grievance and found as set out in his outcome letter (pages 312 to 314) that the audit of the Wolverhampton branch followed various issues being raised at the Telford branch. The Telford branch manager raised concerns that he had experienced problems with equipment which had been transferred from the claimant's branch. At the claimant's depot it was identified that equipment which had been prevented from hire due to a product recall, had actually been hired out despite the block which had been placed on G42 to prevent the items from being hired out. Mr Ball also concluded there was no evidence that word "noise" was used to determine the reason for the audit nor was there any evidence that the audit team discussed the branch audit with persons outside the branch to result in reputational damage to the claimant. Support had been sought from the claimant during the audit process but he and the rest of the branch had been uncooperative. There were four audits of the Wolverhampton branch since 2019 and this was not inconsistent with other branches. In respect of the details of items missed, this is where the branch support would have assisted and shortened the processes for the audit team.

46. On 31 August 2021 an investigation report prepared by Amanda Knowles was prepared (see pages 268-305). The report concluded at page 281 that the asset control at the claimant's branch was poor, that the claimant had admitted renumbering assets to bypass system controls and that the practise followed at

the branch posed significant health and safety risks and an opportunity for fraudulent activity to take place. This report was not a made available to either the claimant or the dismissing officer, Mr. Ingleby prior to or at the time of the disciplinary decision.

47. On 9 September 2021 Neil Skea completed a report highlighting stock management in the claimant's branch asset availability and disposal (see page 350-357). The report highlighted a number of examples of assets with multiple asset numbers recorded on them and evidence that a manual process had been implemented in the claimant's branch to circumnavigate the system. In respect of the turntable truck p.356 it was recorded that the claimant admitted in front of Neil Skea and his business support manager, Mark Jones that he intentionally removed the truck from the segregated Do Not Touch area and put it out on hire. The claimant did not ring for any advice or ask permission from a senior manager to hire out the truck.

48. From September 2021, Jason Laight undertook an investigation into the claimants conduct and interviewed the following individuals; the claimant on 13 September 2021 see pages 361 to 364 and on 4 October 2021 (pages 399-403); Lisa Vincze on 13 September 2021 page 372-375; Alan Poulsen September 2021 page 365-367; John Cole on 14 September 2021 page 368-371; Steven Stone 29 September 2021 pages 376 to 377; Tom Webb 29 September 2021 page 378 to 379; Stuart Atton on 29 September 2021 page 380 to 382. On Saturday 11th of September 2021 (page 373) the claimant asked John Cole to alter the identification code on an item of equipment and he refused to do so. The claimant disputed this in cross examination contending that Mr Cole had it in for him however this evidence was actually corroborated by Lisa Vincze who the claimant accepted he had no issue with. The Tribunal found the evidence of Ms. Vincze to be cogent when taken together with the evidence of Mr. Cole in the investigation at age 366 when he alleged the claimant had instructed him to deliberately to alter the identity on an e code item of equipment.

49. John Coles evidence at page 369-370 was that the claimant requested him to change the numbers of petrol saws, two podiums and turntable truck. Mr. Poulson also stated at page 366 that he had received instructions from the claimant to alter the identification e code on items. Steve Stone (page 376) said that 9/10 times he had been instructed by the claimant to deliver an item of equipment displaying an incorrect duplicated or tampered e code. Mr. Webb disputed that he had ever seen an item with an incorrect, duplicated or tampered e code. Mr. Atton described the claimant as instructing him to deliver an item of equipment displaying an incorrect, duplicated or tampered with e code; he stated *"he gets people to do his dirty work so he hasn't got blood on his hands".* He further stated that the claimant instructed him to alter, tamper or renumber the e-code asset identification number.

50. On 13 September 2021 the claimant appealed the grievance appeal outcome page 315-7. The claimant disputed that the audit was not routine but alleged it was part of an agenda; he maintained that noise was used to determine the reason for the audit; he contended that Michael Young and Brian Sherlock have both been questioned about the claimant's honesty with colleagues outside of the Wolverhampton branch. He contended that the audit was not thorough, and the

auditors were not competent to carry out their role and failed to locate a number of different items. He alleged that there had been seven audits in seven years; more than any other branch; he complained that Spencer being left at the depot and had checked whether plant numbers matched equipment items and issued bar codes and serial numbers matched which the claimant stated was outside Spencer's normal audit process.

51. By letter dated 18 September 2021 (page 320) the claimant was suspended in order for the respondent to conduct an investigation into the issue of duplicate E codes identified, renumbered assets and removing a turntable truck from a segregated do not touch area, renumbering it and putting it out on hire. The respondent reserved its right to change or add to the allegations in the light of the investigation and further stated that the suspension did not constitute disciplinary action nor imply any assumption of guilt of misconduct. The claimant was suspended on full pay was provided with a copy of the disciplinary procedure.

52. At the claimant's initial interview on 13 September 2021 (page 362) the claimant denied giving anyone an instruction to change e-codes. However, at the meeting on 4 October 2021 at page 403 the claimant admitted he had implemented his own manual booking system by creating a system generated header containing customer details and a handwritten manual entry for the fleet number E code.

53. By letter dated 21 September 2021 (169-171) the claimant raised concerns about the following matters; loss and stolen equipment charged to customers but when found returned to Brandon Hire Station; invoicing of loss and stolen equipment; the addition of damage waiver on new accounts and cash hires; health and safety issues at Wolverhampton depot. He referred to emails dating from 29 July 2019 to 29 July 2021 his alleged whistleblowing disclosures when he says he raised health and safety concerns.

54. On 22nd September 2021 the grievance appeal hearing took place and was chaired by James Gabbott (see pages 332 to 336). The claimant had an opportunity to state his case. He was accompanied by Scott Cooper. By letter dated 29 September 2021 the claimant's grievance appeal was rejected (see page 338). Mr Gabbott determined that the claimant had not provided any new supporting evidence. He reviewed the original investigations that had been conducted and was satisfied that it was an exhaustive process. He accepted that the original outcome letter regarding noise could have been expanded upon. He did not associate the use of noise as being linked to other investigations that may have taken place and less ambiguous language could have been used. He dismissed allegations of bullying and victimisation. The claimant had now exhausted the grievance process.

55. By letter dated 3 October 2021 (page 340-1) the claimant wrote to Mr Gabbott stating he was still not satisfied that Mr. Gabbott had provided adequate responses to the issues he had raised in his original grievance letter and his grievance appeal letter.

56. By letter dated 6 October 2021 (p347) James Gabbott, Divisional Sales director informed the claimant that he was satisfied that all areas of the claimant's

grievance and grievance appeal had been investigated thoroughly and responded to. He confirmed that the claimant had exhausted the process.

57. By letter dated 11 October 2021 (page 348) the claimant was invited to attend a disciplinary meeting scheduled for 15 October 2021. The allegations to be considered were for (1)gross mismanagement and misappropriation of company assets; (2)serious breach of company rules in relation to health and safety and (3) breakdown of trust and confidence in regards to creating a booking system against company policy.

58. The claimant was provided with the following documents; e-mail and photographic evidence from Neil Skea from 7 September regarding the turntable truck asset; compliance audit report dated 9 September 2021; investigation meeting notes for himself on 13 September 2021 and 4 October 2021; investigation meeting notes from Alan Paulson, John Cole and Lisa Vinze from 13 September 2021; investigation meeting notes from Steve Stone, Tom Webb and Stuart Atton on 29 September 2021; example invoices showing the alleged incorrect booking system; supporting evidence detailing the hire of the turntable truck asset on 1 September 2021 and the disciplinary procedure extract from the company handbook. The claimant was informed of his right of accompaniment at the meeting and further advised that given the seriousness of the matter the outcome could be disciplinary action up to and including dismissal.

59. On 12 October 2021 the claimant was signed off sick due to stress and anxiety.

60. By letter dated 12 October 2021, (page 407 -9) John Martin, HR Manager responded to the claimant's whistleblowing allegations dated 21 September. In respect of the issues of lost and stolen equipment charged to customers when found and returned to Brandon Hire station and invoicing of lost and stolen equipment, Mr. Martin concluded that *the current policy outlines that equipment identified by the customer as being lost will trigger the items to be transferred to an appropriate loss status via members of the branch team. The central last team will process these from the system and then charge accordingly for the items replacement. The customer is notified in writing and is provided 10 days to make contact with the business to raise any concerns or disputes. The price charge is generally at a replacement value in order to maintain optimum fleet levels all lost equipment is processed through the procurement team.* He further stated it was apparent that the responsibility in the main resides with the locating branch; so if items are located then the details of credit requirements should be forwarded accordingly and the appropriate persons notified. *On the evidence provided a volume of the equipment referred to had been located at the Wolverhampton branch. There is no detail to suggest these located items had been forwarded to the appropriate persons or respective credits raised. Equipment located adopts wood branch had been credited accordingly. The investigation highlighted numerous examples of credits raised to support lost charges, settlement negotiations and reinstatements across the business, therefore challenging the claim that there is a culture of refusal. The business does recognise that this matter requires greater compliance engagement which will form part of the recommendations.*

61. In respect of the issue of the addition of damage waiver on new accounts and cash hires it was stated that *clients are advised to go through the terms and conditions with all new accounts being informed as part of their introduction a new account welcome pack. Where a client refuses the product there is evidence to validate its removal.* In respect of health and safety issues at Wolverhampton depot it was acknowledged that proposed actions have been identified to remedy the defective area. The investigation only found one completed and one pending investigation both concerning slip hazards. Given the procedures that exist for the reporting of injuries all matters of this nature should be reported in order to fully investigate. In respect of lack of support and lack of resource the business regretted and acknowledged these have been present in a number of industries as markets and businesses recover from the pandemic. The respondent rejected any concerns that the branch was forced to work through the pandemic and that all that these decisions were based on NWR and NHS contracts. The respondent stated that inevitably customers and supporting geography that lead with all decisions being based on the collective customers' needs. He further stated regarding the COVID period of working the business firmly defend that all actions were taken to eliminate the spread of the virus in accordance with government guidelines and all appropriate steps were taken. There is evidence to show that thorough briefings a curd operating procedures were amended and that a significant investment in PPE was made to protect our employees. The business also conducted an external audit to ensure that all requirements were in place.

62. By letter dated 8 November 2021 page 411 Mr. Laight regional director stated he had tried to reach the claimant by phone but had been unsuccessful. The respondent wished to obtain a medical report from occupational health to enable them to consider a number of options and adjustments that can be considered that will not hinder the claimant's recovery. He attached the long term sickness absence policy and a guidance document relating to the occupational health referral process for the claimant's information. The claimant was invited to contact Mr Laight to give consent. The claimant responded on 9 November 2021 at page 414 stating that the letter of Mr Laight contained incorrect dates and he invited the respondent to resend the letter with the correct dates.

63. By letter dated 13 November 2021 (page 424) the claimant emailed Mr. Laight thanking the respondent for his wages for November. He stated *"I was expecting a bonus payment from profit made in July August September.* Please could you inform me why this hasn't been paid". Mr. Laight responded on 14 December 2021 stating *the bonus scheme is an at the absolute discretion of directors and may be amended or withdrawn at any time without notice including retrospectively. Your bonus is therefore deferred at this time and will be considered for payment at such a time the business deems appropriate when your formal process has concluded.*

64. On 7 December 2021 a welfare meeting (page 427) took place between the claimant and Jason Laight. The claimant stated he had work related stress which started in July when he was unfairly treated and it had continue to escalate.

65. On 29 December 2021 the claimant provided a fit note stating he was fit for work on amended duties.

66. The report from Occupational Health dated January 2022 page 433 stated that the claimant would be fit to return to work once there has been a resolution to the issues that Mr. Guest raised with his manager prior to him becoming absent along with the disciplinary process. It refers to any meeting being held at a mutually agreed location or by zoom.

67. At a welfare meeting between the claimant and Mr. Laight on 14 January 2022 page 438 the claimant stated he was not fit to attend a hearing but when he was so fit he was happy to meet at Birmingham. On 14 January 2022 (page 441) the claimant was invited to attend a disciplinary hearing scheduled for 18 January 2022. The claimant completed a SSP statement of sickness dated 17 January 2022 that he was unwell by reason of stress and anxiety. A fit note dated 20 January 2022 stated that the claimant was unfit for work by reason of stress at work.

68. On 24 January 2022 David Ingleby invited the claimant to a disciplinary hearing for 26 January 2022. The claimant requested for this meeting to be rescheduled in order for his witnesses to attend. Mr. Ingleby agreed to re-schedule the disciplinary hearing to 31 January 2022 (page 453).

69. Initially the claimant raised that Mr. Jones or Mr. Cooper were unable to attend the meeting on 31 January 2022 because it was too short notice. However, Mr. Ingleby made arrangements to ensure that Scott Cooper could attend and accompany the claimant (see page 456).

70. At the disciplinary hearing on 31 January 2022 (page 498-507) the claimant was accompanied by Scott Cooper. The claimant read out a detailed pre-prepared witness statement see pages 460-486 and addressed the allegations and commented upon the witness evidence collated as part of the investigation. He was critical of the audit conducted at his depot; he described using the dump code as part of his induction training on G42; he accepted he removed the turntable truck from the segregated do not touch area but alleged it was picked and booked by Lisa. He was also critical that some meeting notes had inaccurate dates. The claimant alleged that Neil Skea had told him to deliberately alter the identification e codes of items. The claimant contended that he had done what the company told him and used this method for 3 years through 6 audits and it was not an issue. He alleged that Spencer, the auditor, knew and took photos. In respect of the turntable truck being hired out when it was in the do not touch area he alleged that the respondent had picked the wrong one. He was instructed by Neil to take the truck out of the do not touch area; he changed the codes on the turntable truck because he had been told to. He accepted he had used dump codes to book out an item. He said he had been told by the company to use this system. He also admitted using the header system to short cut the booking system to hire out the equipment.

71. The claimant called three witnesses Mr Poulson, Mr Webb and Kevin Bradley. The claimant stated that Graham had asked him to use the dump code (page 500) which contrary to company policy. The claimant was asked why Mr. Poulson in his statement would have said that the claimant asked him deliberately to alter the identification codes. The claimant said Neil Skea asked him to do it.

72. Following hearing the evidence, Mr. Ingleby adjourned the meeting for 2.5 hours. Mr. Ingleby made some inquiries with Spencer Courtnell an internal auditor who confirmed in a previous audit dated February 2020 he had noted the use of generic dump codes which actually stated on the system when entered, “do not use MEP only” and it was listed as a non conformance (see page 509). No photographs were taken due to the format of the audits at the time. A copy of the minutes of Mr. Ingleby’s conversation with Mr Courtnell was set out at page 509. He also spoke with Mr. Skea who confirmed no conversations had taken place post audit with the claimant giving him permission to change asset numbers. The training delivered at the time of the changeover to the G42 system was checked confirming there was no references for using generic dump codes in the training.

73. Mr. Ingleby determined to dismiss the claimant. He concluded that the claimant was guilty of gross mismanagement and misappropriation of company assets namely his actions had enabled the hiring out of assets of equipment with multiple E codes and thereby circumnavigating fail safes in the G42 system. This allowed assets to be available to hire out with duplicate codes. He concluded that the claimant 's evidence was inconsistent. During the investigation the claimant had initially said he had only changed E codes on one occasion (page 361). He then later admitted to changing E codes on a number of occasions. The claimant did not respond to whether he had asked others to change the numbers. He dismissed the suggestion that Mr. Skea or Mr. Hughes had requested numbers to be changed. In respect of Mr. Skea’s observations at page 7 of the report at page 356 about the turntable truck; it would have gone against what Mr. Skea was trying to resolve at the claimant’s branch if he allowed numbers to be changed. The claimant denied ever asking anyone to change any code (page 362) but a number of the claimant's colleagues disputed this; the claimant then admitted he had only told Mr Poulson to change a code (Page 498 -507).

74. By letter dated 1 February 2022 the claimant was sent the disciplinary decision in writing (page 521-3). Mr. Ingelby stated in respect of “gross mismanagement and misappropriation of company assets”-*“the results of your actions enabled the hiring out of equipment with multiple E codes and circumnavigating fail safes in the G42 to allow these assets to be available to hire our assets with duplicate codes. The evidence including your admittance in the hearing, investigation statements and photographs supplied to me and supplied to yourself in evidence led me to this result. There were high levels of assets with double E codes in the evidence of when this has happened as well as your example of the diesel welder asset hired out that does not exist on G42 leads me to believe that this was not a one off mistake but a deliberate gross mismanagement and misappropriation of company assets. The explanation you gave was that you were told to do so by Neil Skea is unfounded with evidence.”* In respect of serious breach of company rules in relation to health and safety Mr. Ingleby concluded *“our company system G42 enables us to safely log all company assets and detailed service history from the mega tester (with the exception of non-mechanical and non-electrical equipment. It also allows us to see the history of which customers have hired the asset enabling us to know the amount of usage it has had so we know it is safe to use. By using a dump code of 99999 this makes the history of the asset incorrect and gives us no information under the dump code. To ensure this*

doesn't happen training is given on the system of how to use the system correctly which you confirmed in the hearing that you have undertaken. An additional fail safe to ensure that this code is not used appears on G42 when dump code 99999 is entered which says do not use MEP use only. Following information given in the hearing regarding an audit from Spencer Courtnell in February 2020 where you confirmed your use of this dump code was established by him I adjourned the meeting to look into this further. This resulted in my discovering the content of that audit where Spencer has marked the report in red with non compliant for using the dump code. This report was supplied to you at the time and you confirmed in the meeting you had it with you when I delivered the outcome. However I have enclosed again for your reference. I feel your actions grossly breached company rules in relation to health and safety."

75. In respect of breakdown of trust and confidence in regards to creating a booking system against company policy Mr Ingleby stated *"following your admittance to creating a booking system where you have a header system in place in your branch and instructing others in the branch to follow this system demonstrates to me the breakdown of trust and confidence with yourself and the company. By instructing others to use it and using it yourself puts the business in jeopardy if there was an accident. By not demonstrating an understanding of this and attempting to justify your actions, I believe this action would continue and unavailable assets would go on higher to our customers."*

76. The claimant was sent meeting notes and informed that he was dismissed summarily. He would be paid up to the 31 January 2022 and he was not entitled to any pay in lieu of notice and he was given a right of appeal.

77. By letter dated 3 February 2022 the claimant appealed his dismissal (page 524-5). In his notice of appeal, the claimant stated that he was dismissed despite being off work sick; during the meeting Dave was unable to answer any of his questions regarding the disciplinary. The claimant alleged that Mr. Ingleby made a decision regarding his dismissal when he did not know enough about the claimant's case. The claimant stated that he did not consider the evidence showed any wrongdoing on his part and he had been accused of doing things he had nothing to do; incorrect dates were included on some documentation. Further the claimant alleged there was a lack of evidence to support accusations against him; no explanation as to how he had fallen short of his requirements. Further, the claimant contended that a new accusation of using a dump code was raised; he was not asked allowed to ask questions of the witnesses. He did not understand and Mr. Ingleby had failed to explain as to how he was found guilty. He was using procedures which had been taught to him during his G42 training by his fellow depot managers who followed the same policies and procedures. There was no explanation of how similar situations have been addressed in management upper depots.

78. By letter dated 14 February 2022 (page 530-1) the claimant was invited to an appeal hearing chaired by Phil Jones. He was given a right of accompaniment.

79. At the appeal hearing on 17 February 2022 (see pages 545-550), the claimant read a witness statement and was given an opportunity to put his case. The

claimant conceded at the appeal hearing that as a branch manager the buck stopped with him.

80. By letter dated 18 March 2022 the claimant's appeal was rejected by Mr. Phil Jones (see page 551-564). The appeal letter considered all of the claimant's points of appeal. The allegation and finding of misappropriation of assets was removed (see p.562) because there was no evidence of personal gain. In respect of the claimant's suggestion that he should not have been asked to come to a disciplinary hearing while suffering from a sickness it was noted that occupational health advice had been sought by the respondent and that the claimant in the course of the disciplinary process was able to put forward his case; respond to questions and was permitted to call witnesses to attend the meeting. He noted that the claimant had admitted to Mr Skea in the presence of Mark Jones that he had removed a turntable truck from a segregated do not touch area and the claimant had not sought advice or permission from a senior manager to hire out the asset. Further it was noted that the claimant was given a clear instruction from his line manager not to remove items from the segregated area but he did so and placed it on hire. He also found that the claimant by use of a header system circumnavigated the system. The claimant admitted in the course of the disciplinary hearing if a hire came in he would use a dump code to sort the customer. Mr. Jones referred to the witness evidence obtained in the investigation which indicated that the claimant had instructed employees to change numbers on items for hire. He concluded on the balance of probabilities that at the claimant's Wolverhampton branch, assets were being booked out using a header system which the claimant admitted to instructing the team to do, assets were hired out with more than one asset number on them, the removal of an asset by yourself from a segregated area and put on hire when advised by your line manager not to do so when the process was being undertaken to sort out stock issues in the branch, assets hired out under different asset numbers, circumnavigating the system to allow customers who were on stop to hire out equipment, hiring out an asset where there was not a G42, not completing the correct safety checks through G42 and not having control of the assets in the branch, not having control of assets that were out on hire with potential exposure.
81. Mr. Jones concluded therefore that the evidence upheld the decision to terminate the claimant's contract by reason of gross mismanagement of company assets, serious breach of company rules in relation to health and safety and breakdown of trust and confidence. The mismanagement of assets allegation holds up from the evidence he had reviewed. He determined that the correct decision to summary dismissed the claimant had been made.

82. The Bonus scheme (page R1) refers to the bonus being paid to the branch manager quarterly on the branch achieving its PBITHO budget and will be self funding in that the branch and company Brandon hire station will need to remain in positive PBITHO and above the threshold level once the bonus for employees and managers have been calculated. The quarters in the year started in April. Eligibility based on disciplinary/absence record and performance of each employee. It further states any employee who has valid disciplinary warnings on record at the time of the bonus payments being made may have their entitlement to bonus withdrawn. The schemes are at the absolute discretion of directors and may be amended or withdrawn at any time without notice including retrospectively. The respondent determined not to pay the claimant the bonus at

page 424. The bonus scheme was a discretionary scheme. In the circumstances that the claimant was facing the possibility of a disciplinary sanction, Mr. Laight determined not to pay a bonus.

Submissions

83. The respondent submitted there was overwhelming evidence that Hire Station Limited was the correct employer relying upon the contract of employment. It was submitted that VP Plc should be dismissed as a respondent in the proceedings.

84. In respect of the unfair dismissal claim the respondent had established that the reason for the claimant's dismissal was misconduct which was a potentially fair reason taking account of the credible evidence of Mr. Ingleby.

85. Alternatively, the dismissal had nothing to do with making alleged public interest disclosures. Although the respondent has not gone through each and every alleged public interest disclosure with a fine tooth comb in evidence, the principal reason was misconduct. In respect of three alleged disclosures relied upon by the claimant these could not be public interest disclosures as the claimant did not disclose anything (they were emails authored by others). The claimant's suggestion that Mr. Young instructed Mr. Ingleby to dismiss him was unfounded and Mr. Ingleby was not so easily manipulated. Mr. Ingleby made a decision on evidence. Any alleged public interest disclosures were not communicated by Mr. Young to Mr. Ingleby. The decision maker has to know of the public interest disclosure and the detail of the information must be provided to him. There was no evidence these details were communicated to him either and the automatic unfair dismissal claim was hopeless.

86. This was a fair dismissal taking account of the case BHS v Burchell. The Tribunal should not substitute its view for the respondent. It genuinely believed the claimant committed misconduct. The respondent sent relevant information to the claimant; it undertook an investigation with the claimant's colleagues which to solidly implicated the claimant in wrongdoing. The respondent held a reasonable belief in misconduct on strong evidence.

87. The respondent submitted that the investigation was comprehensive. The respondent considered two audits; the report of Mr. Skea; the claimant was interviewed on two occasions. No stone was left unturned. In respect of the report of Ms. Knowles, the report was not provided to either the claimant or the decision maker Mr. Ingleby; the requirement of a reasonable investigation and procedures does not require perfection. Mr. Skea's report showed a shocking state of affairs whereby the claimant was giving express instructions to others to change e codes on items of equipment. The statement of Mark Jones in the investigation notes namely "he'll never learn" showed how the claimant was not following management instructions.

88. There was no breach of the ACAS code. In respect of paragraph 12 there was an opportunity to ask questions; the handwritten notes of Mr. Cooper shows this. In respect of paragraph 18 of the code reasons to dismissal; Mr. Ingleby was

clear the claimant was guilty of all charges; Mr. Ingleby's reasons were expressed in accordance with notes at the end of the disciplinary hearing and added his full reasons in writing. This is a mere minor procedural flaw which does not make the dismissal unfair.

89. In respect of the claimant's concerns about having a companion, at p.357 when Mr. Jones could not attend. The claimant had put forward Mr. Cooper as an alternative. He did actually attend and accompany the claimant. The claimant's statutory right was not infringed.

90. In all the circumstances the respondent submitted that the dismissal fell within the band of reasonable responses. On the findings made by Mr. Ingleby it was reasonable for the employer to dismiss; see page 521 allegations. It was clear to all concerned the state of Wolverhampton depot was so mismanaged to justify dismissal based on misconduct.

91. In respect of Polkey there was overwhelming guilt of the claimant. The basic award takes account of conduct prior to dismissal which is culpable and blameworthy. The respondent submitted there should be a deduction of 100%. In respect of the compensatory award, conduct which is blameworthy and has contributed to the dismissal should, be considered. The claimant is to blame; in particular consider S. Atton's statement that the claimant gets others to do his dirty work. He blamed everybody but himself. The compensatory award should be reduced to nil.

92. In respect of the claimant's wages claim namely the unpaid bonus, it is for the claimant to establish that he has a legal entitlement to the bonus and that it was a properly payable sum. The claimant's contract of employment does not confer a legal entitlement of the payment of bonus. See the rules of the scheme at R1. The respondent determined not to pay the claimant the bonus at page 424. The bonus scheme was a discretionary scheme. In the circumstances that the claimant was facing the possibility of a disciplinary sanction, Mr. Laight determined not to pay a bonus. The claimant can not show a legal entitlement or say when the bonus should be paid. The rules of the bonus scheme establish it is a discretionary scheme.

93. The Tribunal was invited to prefer the evidence of Mr. Ingleby. His version should be preferred where there is a dispute.

94. The claimant submitted that VP was a massive company. He had been victimised, harassed and bullied. The claimant submitted that he raised concerns about price fixing; and that customers were paying more for equipment page 269. As a result, the CMA got involved. Further the claimant submitted that from July 2019 to Oct 2021 loss of stolen equipment was not credited to customers; there were inflated prices; damage waiver; VP has no objections to the use of dump code which he submitted was common in depots. Further the use of dump codes was not mentioned in my disciplinary pack. It was a new allegation used in my dismissal letter; see Ladbrooke Racing case;

95. The claimant submitted he was merely following the procedures he was trained in. He noted that the allegation of misappropriation was dropped at his appeal. VP had broken the policy. Mr. Jones was not allowed to attend as a companion at his disciplinary and appeal hearing. He did not know the outcome of his disciplinary. The claimant submitted that the respondent dismissed him and failed to take account of his inadequate training. He stated he followed the written guidance in the branch manger's profile. He submitted that the VP procedures or his training needs were not reviewed. He submitted that header systems used by G. Rutter who was responsible for his induction and training. There was no issue with it until 2021. The use of the dump code, was mentioned by bMr. Rutter who responsible for training; The claimant submitted that this was picked up in a previous audit as minor non-conformance but there was no issue he thought not to use it again. He submitted that there was no evidence to show equipment was out on multiple e codes or double e codes. In respect of the turntable truck he said it had nothing to do with me; it was managed by Lisa.
96. The claimant submitted that his disciplinary action was pre-determined; Mr. Ingleby was told to dismiss him by senior management, Mr. Young. There was no evidence of misappropriation. The final audit identified only 14 assets of 2500 items were wrong which is very. low He said meeting notes had incorrect dates and some were not signed. He alleged that treatment of himself was inconsistent and less favourable to other depots in identical situations. He referred to page 344 and 227-8 concerning a lighting tower hire. The claimant submitted that Shrewsbury transferred the wrong number. Further the stock error rate 50% at Telford was worse than his. The manager at Warrington not as good as my depot but no action was taken against them.

The Law

Public Interest Disclosure dismissal

97. Pursuant to section 103A of the Employment Rights Act 1996 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.

98. The starting point is section 43A of the Employment Rights Act 1996 that states a protected disclosure means a qualifying disclosure as defined by section 43B which is made by a worker in accordance with any of the sections 43C to 43G. The statute makes it clear that whomever the disclosure is made, first it must consider whether there is a qualifying disclosure. The additional requirements for disclosures for certain persons only need to be considered once it has been established that there has been a qualifying disclosure. Qualifying disclosure is defined by section 43B of the Employment Rights Act 1996 which states that 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 namely a person had failed or was failing or was likely to fail to comply with any legal obligation and all the health or safety of any individual had been was being or was likely to be endangered. Once the qualifying disclosure is established the next stage is to consider whether it is a protected disclosure. Pursuant to section 43C of the ERA disclosure to an employer is a protected disclosure.

99. In the case of **Kealy v Westfield Community Development Association EA-2022-000157** HHJ Tayler stated there are two essential terms to consider in deciding whether there has been a protected disclosure. There must be a qualifying disclosure. The term qualifying disclosure concerns the nature of disclosure that is made. The qualifying disclosure must become a protected disclosure. The term protected disclosure concerns the person to whom the disclosure is made. But it is not quite as simple as that because there are additional requirements about the disclosure itself if the disclosure is made to certain persons. In every case it is necessary to analyse first whether there is a qualifying disclosure and then ask whether it has become a protected disclosure. The answer to the second question is usually straightforward because the paradigm example is they are protected disclosures if made to an employer by a worker in which case there is no additional requirement in respect of the nature of the disclosure.

100. In order to be protected there must be a disclosure of information. In the case of **Kilrane v London Borough of Wandsworth (2018) ICR 1850** the Court of Appeal noted that an allegation could amount to disclosures of information depending on their content and on surrounding context.

101. In terms of reasonable belief of the disclosure tending to show a relevant failure there are two requirements; (a) a genuine belief that the disclosure tended to show a relevant failure in one of the five respects or deliberate concealment of the wrongdoing and (b)that belief must be reasonable belief. Reasonableness involves applying an objective standard to the personal circumstances of the disclosure so that the reasonableness test might differ depending on whether the disclosure was a lay person or an expert. A lay observer may reasonably believe the same disclosed information indicated wrongdoing without first making such cheques see **Korashi V Abertawe Bro Morgannwg University London Health Board 2012 IRLR 4**. The definition is concerned with what the worker believed at the time when they made the disclosure not what they may have come to believe later on following **Dodd v United Kingdom Direct Solutions Limited 2022 EAT 4.**

102. In respect of endangerment of health and safety pursuant to section 43B(1)(d) of the ERA the nature of the health and safety danger needs to be specified but can be done in general terms; see the case of **Fincham v the HM Prison Service EAT/0925/01**.

103. Whether a disclosure was made in the public interest requires analysis following **Chesterton Global Limited and others and Nurmohamed 2017 EWCA Civ 979.** The Court of Appeal stated that the Tribunal should consider all relevant factors in the circumstances which could include numbers in the group whose interests the disclosure served; the nature of the interest affected; the nature of the wrongdoing and the identity of the wrongdoer.

104. The next question for the Tribunal is whether the information in the claimant's reasonable belief for example shows that the health and safety of an individual was endangered or there had been a breach of legal obligation.

105. In terms of burden of proof in an automatically unfair dismissal claim, when an employee positively asserts a different reason such as whistleblowing the burden of proof does not pass to him; whilst the employee must produce some evidence supporting the positive case, the employee does not bear the burden of proving that the dismissal was for that reason. It is sufficient for the employee to challenge the evidence produced by the employer to show that the reason

advanced by him for the dismissal and to produce some evidence of a different reason; see **Kuzel v Roche (2008) EWCA Civ 380**.

"Ordinary Unfair dismissal"

106. The right not to be unfairly dismissed is provided by section 94 of the Employment Rights Act 1996. The test to be applied in determining a claim of unfair dismissal is set out in section 98 of the ERA where it is stated that it is for the employer to show the reason or if more than one, the principle reason for the dismissal and that it is either a reason falling within 98 (2) or was for some other substantial reason of a kind such to justify the dismissal of an employee holding the position which the employee held.

107. Pursuant to section 98 (4) of the ERA, it states where the employer has fulfilled the requirements of section 98(1), the determination of the question of whether the dismissal is fair or unfair having regards the reason shown by the employer a depends on whether in the circumstances including the size administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and be shall be determined in accordance with equity and the substantial merits of the case.

108. In a claim for unfair dismissal, it is not for the Employment Tribunal to substitute its decision for that of the employer; that would be to usurp the role of the employer. A harsh dismissal decision may still be a fair one. The role of the employment tribunal includes considering whether the employer acted within the band of reasonable responses to dismiss the employee. The band is not so wide as to leave no room for the Employment Tribunal to conclude that the dismissal was unfair.

109. The fairness of a conduct dismissal is to be determined in accordance with the well-established principles set out in **BHS and Burchell 1978 IRLR 379**. The tribunal should ask one whether there were reasonable grounds upon which the employer could believe that the employee had committed the misconduct in question two whether the employer completed a reasonable investigation prior to dismissal and three whether the decision to dismiss for the misconduct in question fell within the band of reasonable responses **London Ambulance Service NHS Trust v Small 2009 IRLR 563**. Fairness of a dismissal procedure must be considered as a whole following **Taylor and OCS Group Limited 2006 EWCA Civ 702**. Consideration of whether a dismissal is fair or unfair involves an evaluation of the facts and circumstances of the dismissal, against the relevant legal principles best left to the good sense of the Tribunal which heard the evidence in the case of **Tayeh v Barchester Healthcare Limited 2013 EWCA Civ 29.**

Unlawful deductions

110. Pursuant to section 13 of the Employment Rights Act 1996 employers should not make deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of the statutory provision or a relevant provision of the workers contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. Pursuant to 13 (3) where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker and on that occasion after deductions the

amount of the deficiency shall be treated for the purposes of this part as a deduction made by the employer from the workers wages on that occasion.

111. The provisions require the tribunal to make findings as to what is properly payable pursuant to the contract of employment.

Credibility

112. The Tribunal found Mr. Guest to be an intelligent person whose actions were not motivated by personal gain. However, he was motivated by an operational incentive to ensure his depot was very successful. Under cross examination he tended to be combative, and the Tribunal found some areas of his evidence unsatisfactory. For example, where one colleague, Ms. Vincze who the claimant agreed had no ill-motive towards him, put the claimant solidly in the frame for changing e codes, the claimant was unwilling to accept any blame. Witnesses called by the claimant contradicted the claimant's evidence about the removal of items from the quarantine area and in fact agreeing with the respondent (and not the claimant) there were health and safety risks by doing so. There was no corroborative evidence from any of the witnesses as to the claimant's contention that Jason Laight had any intention or agenda to get rid of the claimant at any time. The Tribunal expressly rejected the claimant's assertion.

113. The Tribunal found the claimant's witnesses wished to be supportive of their former depot manager but did not want to implicate themselves either. The witnesses gave consistent evidence that there were health and safety risks without paperwork about testing of items and items should not be removed from quarantine items.

114. Mr. Webb was a driver. He was unaware of the detail of the process. He was dismissed from his employment by the respondent due to a physical assault on Stuart Atton. He said he did not take equipment out with the incorrect numbers. He was interviewed on 29 of September 2021 (see page 378) and said he had seen a few incorrect numbers on items. When he was cross examined about this, he said he could not remember saying that. He accepted that he attended the disciplinary hearing on 26 January 2022 at page 453 with the claimant. At page 500 he did not challenge what he had told Mr Jason Laight namely that he had seen different numbers on items but instead he continued to maintain that he could not recall saying that. The Tribunal did not find his evidence reliable.

115. Mr. Jones gave evidence that he was unaware that the claimant was a whistleblower. He stated in evidence that a number of depots used a dump code to get around the system and he did not tell Mr Guest about this because he said he already knew. Along with the Wolverhampton depot he was aware of five other depots who were doing it. It was infrequent but it was used. He said there was no general company practise or policy to use dump codes to work around the system and there was no knowledge of the company that the dump codes were used. He accepted that Jason Laight at page 372,363 and 366 had given an instruction to staff not to change codes. When Lisa raised with him that the claimant had changed a code, he said "he'll never fucking learn" (page 374).

116. The Tribunal found Mr. Ingleby, dismissing officer a credible witness who determined the case on the evidence before him and was not influenced by any third party in terms of his dismissal decision.

Conclusions

The correct respondent

117. The claimant's contract of employment was between himself and the second named respondent Hire Station Limited. There was no evidence that the claimant was employed by VP PLC so that the first named respondent is dismissed from these proceedings. The correct respondent for the claimant's complaints is Hire Station Limited.

The claimant's conduct

118. The claimant as branch manager had the ultimate responsibility and accountability on site for handling of the respondent's assets. The claimant conceded the buck stops with him.

119. At the time of the audit in February 2020, the claimant was aware that the use of dump codes for hired goods was not compliant. This had been identified by Spencer the audit which indicated "do not use." Despite this the claimant continued to use dump codes which is supported by the investigation and in particular the evidence of Lisa Vincze. Further despite being given an instruction not to use e codes by Mr. Laight the claimant continued to do so; Mr. Jones had stated that the claimant "never learned".

E-Codes/G42 system

120. It was important that the correct codes were attached to an item. Each itemised asset is given a unique asset number which is recorded in the respondent's stock control system known as G42. By way of this system the respondent is able to track the service and maintenance history as well as all transactions relating to any given itemised asset. The process safeguards the respondent's customers and employees to ensure that the correct safety checks have been conducted in accordance with legal requirements. Items which were damaged or unidentified are quarantined and placed in a separate area in the depot.

Public Interest Disclosure

121. In cross examination the claimant did not explore with the respondent's witness, Mr. Ingleby his contention that he was dismissed by reason of making public interest disclosures. The Tribunal is mindful that the claimant is a litigant in person with no legal experience and following the authority of **NHS Trust Development Authority (NHS TDA) v Saiger North Cumbria University Hospital Trust and IRG t/a Odgers UKEAT/0167/15 & 0276/15** determined that it would consider this part of the case despite it not having been formally put by the claimant to the respondent.

122. Three of the alleged disclosures (dated 24 June; 10 August and 21 August 2021) could be discounted because they were emails from others and not from the claimant; these could not be disclosures by the claimant. From the remaining list of 26 alleged disclosures made by the claimant he made a number of complaints about depot issues he classified as 'public interest disclosures'. The Tribunal noted that the respondent had conceded in submissions that some of these complaints may potentially be disclosures within the meaning of the Act.

123. There was a paucity of information provided by the claimant as to the number of individuals with access to the depot and how any health and safety issues highlighted might affect "the public interest" and the legal obligation relied

upon. On the limited information available the Tribunal determined that the claimant had potentially raised health and safety disclosures dated 13 November 2020; 2 December 2020; 9 January 2021; 5 February 2021;13 May 2021 and 29 July 2021.

124. However, fundamentally the Tribunal was satisfied that Mr. Ingleby was unaware of the alleged public interest disclosures at the time he determined to dismiss the claimant and reached a decision to dismiss the claimant on the available material before him. The Tribunal expressly rejected the claimant's contention that Mr. Ingleby was influenced by Mr. Laight (who the claimant had directed his complaints to) or Mr. Young.

Pre-determination

125. The claimant's case is that there was a pre-determination to dismiss him as shown by the decision to audit his depot. The Tribunal found that the respondent did regularly conduct audits of its depots. The Tribunal found that in reality the trigger for the audit in August 2021 was the discovery that the claimant had released two genie lifts to a customer in the absence of any paperwork as "a favour" in the context that Telford branch had raised an issue with the claimant's depot.

Reason for dismissal

126. The Tribunal found that the respondent had established on the evidence that the reason for dismissal was misconduct. The respondent undertook an investigation into the claimant's conduct as branch manager of the Wolverhampton depot consisting of the consideration of relevant documentation and witness evidence and took these matters into account when determining to terminate the claimant's conduct.

BHS v Burchell

127. The Tribunal having considered all the available evidence before the dismissing officer Mr. Ingleby found that he held a genuine belief in the claimant's misconduct based on reasonable grounds following a reasonable investigation in the circumstances.

128. The outcome of the audit by the compliance team was that a number of items were missing. Following the claimant raising concern about the accuracy of the audit; the audit was re-done finding less items missing than at first. However, the audit did indicate that the claimant did not have a tight control over his depot equipment.

129. Furthermore, the witness evidence indicated that the claimant was mismanaging his assets by creating headers and e codes for different items. This was supported by witnesses interviewed for the purposes of the investigation including Ms. Vincze. Her evidence (the claimant said he had no issue with her) was that the claimant asked Jon but he would not do it so he got one of the other lads to do it. She had raised with Mark Jones that the claimant following being given an express instruction not to change item numbers had done so. Mr. Stone's evidence was that 9/10 times he had been told by the claimant to deliver an item of equipment with the incorrect, duplicated or tampered e code. Mr. Atton also said he had been told by the claimant to deliver an item of equipment displaying an incorrect, duplicated or tampered with e code; the claimant "gets people to his dirty works so he hadn't got blood on his hands". Jon Cole has

altered the number of the item on instructions from the claimant. There was sufficient evidence for the employer to reasonably conclude that the claimant had adopted a process of a header system with dump codes in order to circumvent the G42 system. This was contrary to process condoned by the respondent. The Tribunal rejected the claimant's assertion that lots of depots were adopting this methodology. The audit in February 2020 alerted the claimant that the use of dump codes was non- compliant; he continued to use the code.

130. The claimant challenged that he was to blame and he blamed higher management. The decision maker, Mr. Ingleby noted the claimant's comments but Mr. Ingleby genuinely believed on the basis of the witness evidence available during the investigation that the claimant had committed misconduct; he had sent items out with a correct code.

131. The respondent conducted a reasonable investigation in the circumstances. The claimant did not identify any other witnesses. The claimant had all the relevant documents and was able to articulate a very detailed statement dealing with the allegations which he read at the disciplinary hearing. Mr. Ingleby took further evidence from the auditor Spencer who had identified in 2020 the non-compliance of the use of the dump code. The documentation showed items had gone out of the depot on the dump codes and header had been used to circumnavigate the system.

132. Although the claimant did not see the final audit document by Amanda Knowles, this was not something seen or taken into account by the decision maker Mr. Ingleby.

133. There was no evidence to establish that the claimant was trained to use dump codes or in fact to circumnavigate the G42 system. Use of dump codes and the header system was not a condoned practice of the respondent.

134. Furthermore from the evidence the claimant had taken it upon himself to sort the customer and instruct others to change codes of items. The claimant appeared to blame everybody but himself.

135. The Tribunal determined that Mr. Ingleby on the available material held a genuine belief in misconduct based on reasonable grounds following a reasonable investigation.

Reasonable responses

136. The Tribunal determined that the claimant's dismissal fell within the range of reasonable responses. The claimant accepted that as branch manager the buck stopped with him. The respondent had a reasonable belief that the claimant had mismanaged the branch based on its investigation. The lack of correct codes on items circumnavigated the G42 process which meant that items could be hired by customers with a lack of health and safety checks. By the use of 999 dump codes also makes the history of the item incorrect. The claimant had confirmed he was using this code in February 2020 at the time of the audit. The report was provided to the claimant at the time indicating it was non-compliant but the claimant continued to use it. Further the claimant admitted he created a booking system using a header system in branch. He used it and requested others to do so; the respondent reached the reasonable conclusion on reasonable grounds that the claimant was guilty of misconduct and there was a breakdown of trust and confidence in him.

137. The claimant complained that he was off work with stress and should not have been invited to a disciplinary hearing. The respondent obtained OH advice

which recommended that the claimant would recover once the issues raised had been determined. The claimant was able to fully participate in the disciplinary hearing and appeal hearing and prepare a very detailed statement which dealt with the allegations and available evidence. The claimant was not disadvantaged.

138. The claimant was also able to ask witnesses questions at the disciplinary hearing as shown in the disciplinary notes. Although the claimant would have preferred Mr. Jones to accompany him; he did suggest Mr. Cooper who the respondent ensured was available and attended to accompany the claimant. The claimant was not disadvantaged. The Tribunal do not find that these issues breach the ACAS code of conduct.

139. The claimant received reasons on the day of the dismissal and far more detailed written response via letter dated 1 February 2022. These reasons clearly identify the findings of Mr. Ingleby and the reasons for the claimant's dismissal. There is no breach of the ACAS code.

140. The claimant as branch manager had responsibility for all that went on in his branch. He was in a senior position and circumvented processes and instructed others to so do. The Tribunal determined that on the basis of the findings of the respondent it was entitled to dismiss the claimant summarily for misconduct. The dismissal fell within the band of reasonable responses. The claimant was given a right to appeal. Again he was given the opportunity to put his case; reading from a detailed pre-prepared statement. The dismissal of the claimant was a fair dismissal in all the circumstances.

141. In respect of inconsistent treatment, the Tribunal reminds itself of the decision in **MBNA Limited v Jones**. The EAT stated that where an employee seeks to argue that their dismissal was unfair because another employee was treated more leniently; the cases of the two employees must be truly parallel. It will be rare for the facts to be sufficiently similar to justify this. The Tribunal do not have sufficient material before it to determine whether the claimant's situation and other depot managers were in truly parallel situations. The Tribunal dismisses this point.

Bonus

142. The claimant was not entitled to a bonus. He is unable to establish that the bonus was properly payable to him within the meaning of section 13 (3) of the ERA. The document R2 shows that the bonus scheme was discretionary and not contractual. The respondent determined that the claimant was facing disciplinary investigation and therefore he should not receive a bonus for July to September 2021 (see page 424).

143. By reason of the non-discretionary scheme the respondent was entitled to reach that view and the claimant cannot establish that he is entitled to a bonus. The claim for unpaid wages is dismissed.

Employment Judge Wedderspoon

28 November 2023

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