EMPLOYMENT TRIBUNALS

Claimants: **Mr C Thompson**

Respondent: **Govia Thameslink Railway Limited**

Heard at: London South **On:** 11,12,13 and 16 October 2023

Before: Employment Judge Self
Mr H Smith
Mr M Cronin

Appearances

For the Claimants: In Person

For the Respondent: Mr I Maccabe – Counsel

JUDGMENT

1. The Claim of protected disclosure detriment is not well founded and is dismissed.

2. The Claim of automatically unfair dismissal is not well-founded and is dismissed.

3. The Claim of ordinary unfair dismissal is not well-founded and is dismissed.

WRITTEN REASONS

(As Requested by the Claimant)

1. By a Claim Form lodged at the Employment Tribunal on 9 November 2022 the Claimant brought claims asserting he had been unfairly dismissed. It was subsequently found at later hearings that he also considered had been automatically unfairly dismissed pursuant to section 103A of the Employment

Rights Act 1996 and that he had been subjected to detriments on account of protected disclosures he had made.

2. ACAS Early Conciliation took place between 26 September 2022 and 20 October 2022. Time limits have not been an issue at this hearing because it appears that previous Judges have taken the view that there were no issues. It has not been raised by the parties in relation to the detriment claim. We proceed on the basis that we have jurisdiction to consider all claims.

3. There were two Case Management Hearings which brought us to this final hearing. On the first day of this hearing, all the parties were at the Tribunal and all the Tribunal were remote. We spent the first day reading and decided that the hearing would be best conducted with the Employment Judge attending at the Tribunal. The lay members were both at some distance to the hearing centre, having been brought in proximate to the hearing, and in fairness the final hybrid nature of the hearing worked well. The evidence and closing submissions were completed in two days, deliberations took place on Day 3 and an oral Judgment was delivered orally on the afternoon of Day 4. The Claimant subsequently requested these written reasons, which largely replicates that which was delivered orally. In the event of any material difference these written reasons take precedence.

4. We have heard oral evidence from:

   a) The Claimant
   b) Mr Ben Warrington – Infrastructure Compliance and Projects Manager
   c) Mr David Poole - Head of Fleet Production
   d) Mr Andy Leister – Head of Onboard and Rail Enforcement
   e) Mrs Wendy Robertson – Head of Fleet Infrastructure
   f) Miss Marianne Martin – Coastal Depots Infrastructure Manager.

   There was a substantial bundle of documents and we have considered such documents as we have been referred to in the statements and during the evidence. We also considered the parties closing submissions. Counsel for the Respondent gave his orally and the Claimant did his in writing, with oral supplement, as was his preference. We would like to thank the advocates and witnesses for the focussed manner in which they approached this hearing.

The Facts

5. The Claimant was employed as a Depot Infrastructure Technician on 25 July 2011. He had previously served in the Royal Navy as a Marine Engineer and had also worked for the New Zealand Navy and the RNLI.

6. On 28 January 2020, the Claimant was given Advice relating to three pieces of work over a one-month period which had not been conducted properly and

with due care. The Claimant was warned that if he did not improve then formal disciplinary action might be taken against him (251).

7. On 29 April 2020, the Claimant was given a written warning for failing to exercise due care and attention whilst undertaking remedial infrastructure work. The warning was to remain on the file for 12 months and there was a right of appeal given (250). The Claimant did not exercise his right to appeal.

8. On 9 February 2022, the Claimant emailed Mr Jackson and Ms Martin in relation to a contractor working in a room at Bognor Station stating:

   "From the age of the room internals it would be fair to say that some of these may contain asbestos which would need identifying and including in the register".

   He included some pictures (188). **PD1**

9. Mr Jackson replied indicating that there was no asbestos in the room and that responsibility for the room lay with station facilities who should have alerted the contractor to any dangers prior to work starting. He later stated that there should be records of any asbestos at station facilities, but if the Claimant had made the engineers aware then it would be for the contractors to assess the risks and act appropriately. Ms Martin thanked the Claimant for bringing it to her attention and indicated that she had raised it with Mr Jordan. The exchanges are courteous and professional and no irritation is apparent in the responses received.

10. On 4 March, Mr Jackson contacted Ms Martin and Mr Jordan to say that he had been told that the Claimant had been operating the wash at Littlehampton when a train was approaching and had not informed or checked with the shunter prior to this. Mr Jackson asked for a report to be raised. A Zero Harm report was raised by Ms Martin on 11 March 2022

11. On 7 March 2022, the Claimant raised his concern with Mr Jordan that his safety concerns re the asbestos had been ignored / dismissed. He asserts that Mr Jordan was in turn dismissive. At that same meeting the Claimant asserts that Mr Jordan brought up an incident that had taken place at the Littlehampton Train Wash on 2 March 2022 (see previous paragraph).

12. On 11 March, the Claimant contacted Louise Sharp an Employment Relations Advisor to advise that he was concerned that communications within his department had broken down so that he felt unable to raise serious safety concerns. We have not been shown anything that would support that view. He was advised that his options were to either raise a grievance or to convene a meeting with Mr Jordan and Ms Robertson. That seems sound enough advice.

13. On 15 March, Ms Martin asked the Claimant to provide a version of events of the Littlehampton Wash incident, which he did.

14. On 21 March, the Claimant produced a document entitled ***"Concerns raised as to stability of clifftop boundary wall bordering Highcroft Villas BN1 5PS and Railway Carriage Wash Machine Below"***. He explained that he had safety concerns about the structural stability of the underlying foundations of this wall. His primary concern was of a strike from a stray vehicle on Highcroft Villas leading to a wall collapse. He accepted that he was not an expert in the geological make-up of the cliff or the rendering system applied to it but considered there to be a vulnerability if there was a vehicle strike. (199)

15. On 23 March, the Claimant had a meeting with Mrs Robertson (Head of Fleet Infrastructure) and Mr Jordan about what he described as ***"safety and communication issues"***. Whilst the Claimant considered that it may be an opportunity for him to continue with the matters, he had recently raised with HR he was aware before the meeting via Miss Martin that he was also being called into discuss the Littlehampton Wash incident, the CET Pumps at Bognor and one other matter. These issues were discussed and at the end of that meeting the Claimant was suspended pending a formal investigation on full pay and he was sent a letter of suspension dated 24 March 2022, but which was received on 29 March 2022. Mrs Robertson explained that the decision to suspend was made because a number of matters had come to her attention in short order (those the subject of the investigation) and she considered that there was risk if the Claimant remained at work. The Claimant contends that Mrs Robertson was raising the Littlehampton Wash issues as counter allegations and his suspension were detriments caused by his disclosure. **(D1 and D2)**.

16. In addition, Ms Martin had raised two further Zero Harm reports on 25 March involving CET pumps at Bognor Regis and the lack of gas and hot water at Brighton.

17. All three of these matters were escalated to Peter Jordan for him to undertake an Investigation Report into each of those separate incidents involving the Claimant detailed above. The report is at pages 207 – 222.

18. The Claimant was interviewed as part of that process and the report takes that interview into account and details the rest of the evidence gathered. The conclusion for each one was as follows:

    a) **CET Pumps Bognor Regis** – The Claimant had failed to complete his tasks on these pumps as he was distracted which led to a lack of capability to remove waste effluent from trains and toilets locked out of

action on active carriages. The Claimant stated the distraction was caused by the possible asbestos issue.

b) **Littlehampton Wash** – The Claimant failed to inform the shunter that he was on site and failed to put any other safety measures in place. This was deemed to be potentially gross misconduct on safety grounds.

c) **Loss of heating and hot water at Brighton depot** – An error by the Claimant resulted in the depot being without hot water and heating as the gas supply was isolated.

The conclusion was that it appeared that the Claimant was easily distracted and there was a concern that this was a pattern of behaviour. It was concluded that ***"Adhering to safety procedures and carrying out tasks using the prescribed processes are a key element of the role and these incidents indicate to me that Craig does not always do this. This could put his own and others' lives at risk and also result in additional cost and inconvenience to the business***". (221). We do not consider that to be an unreasonable conclusion considering the information provided. Of course, other conclusions could have been reached but that does seem to be a reasonable one.

19. It was recommended by Mr Jordan that formal disciplinary action be taken and, due to the combined seriousness, gross misconduct should be considered. Again, that does not appear to be unreasonable.

20. On 13 April 2022, the Claimant wrote a supplementary response to interview where he expressed, inter alia, that he had previously raised safety concerns at Brighton which he did not feel had been taken seriously and which had led to a fractured working relationship. He also stated how much he had welcomed Ms Martin coming to Brighton and his appreciation that she had allowed him to channel his long running concerns about the cliff into drafting a report. (260)

21. Over 9 and 10 May 2022 the Claimant lodged three Zero Harm Reports detailing:

a) The incident on 9 February 2022 when he suspected contractors were working near asbestos at Brighton.
b) The wall at Highcroft Villas
c) Failures in notifying staff in relation to changes in documented procedures relating to the gas and heating loss in Brighton.

22. On 18 May 2022, the Claimant was invited to a disciplinary meeting on 25 May 2022 to be conducted by David Hickson who was the Head of Engineering. The Claimant submitted a substantial document in advance of the meeting (268-280).

23. The disciplinary hearing took place on 25 May 2022 and the Claimant was accompanied by his Trade Union representative. Mr Hickson concluded:

    a) That the Claimant's actions in delivering his daily duties did not reflect a safety focussed person and lapses may lead to undesirable outcomes.
    b) As far as the Littlehampton wash incident Mr Hickson considered this to be unsafe and led to a completely unacceptable situation.
    c) Some mitigations were accepted and rather than dismiss a final written warning was to be placed on the Claimant's file with no tolerance for future safety or other errors. The warning would last 24 months.
    d) There was an opportunity to appeal given within 7 days.

    A letter confirming the outcome was sent on 26 May 2022 (296-298).

24. We are satisfied that the disciplinary process was a fair one in the sense that the Claimant's position was heard and considered. The outcome seems to the Tribunal to be a reasonable one, considering the allegations against the Claimant. As with most disciplinaries other sanctions could have been applied but we consider that this decision fell within what was a reasonable band of responses.

25. At the end of the meeting the Claimant was told what the outcome was and that it would be communicated in writing. He was also told he had the right to appeal. The Claimant asserts that he never saw the letter which is at 296-298 of the bundle. The Claimant at this hearing took no point over this issue and indicated that he accepted that he was on a final warning which had not been challenged on appeal. It is highly material that the Claimant went into the final phase of his employment on a final warning.

26. Upon the Claimant's return it appears to the Tribunal that the Claimant was seeking to act upon that which he was told by Mr Hickson, i.e., that he needed to concentrate upon his day job and try and be proportionate. There is correspondence about the correct washers relating to lighting columns and he issued a very precise email to Ms Martin re which washers and what methods to employ and later on the same day he wrote to her with a concern about what appeared to him to be a disparity, re whether or not he was required to be reinducted. Those emails are detailed and precise as was the Claimant's style.

27. On 1 June Mrs Robertson wrote to the Claimant asking him to desist from overwhelming his team with correspondence. The exception was in relation to any health and safety defects which she indicated ought to be raised immediately. (313) The correspondence we have seen does not seem to merit that response and we have not been shown a plethora of correspondence from the Claimant and indeed Mrs Robertson accepted in

evidence that the subject matter of the emails and the requests made were quite reasonable.

28. Again, we see this as an example of the Respondent not really understanding the Claimant and his personality. We accept that on the evidence we have, this does show a certain irritation towards the Claimant from Mrs Robertson and others within his management team. We consider however that the irritation is aimed at the Claimant's style and method of communication as opposed to the subject matter of it. We note that the request for restraint expressly excludes matters that would be deemed a health and safety risk i.e., expressly excludes the Claimant holding back on making health and safety protected disclosures.

29. The Claimant responded indicating that he understood the message.

30. On 21 June 2022, the Claimant reversed his work van into a tree and the vehicle sustained a dent to the rear door. At the time of the incident neither the Claimant nor Mr Hearn inspected it although they knew there had been an impact. The following day the Claimant was appraised of the fact that there was damage by Mr Hearn and he accepts that he undertook about 10-15 minutes of work trying to push the dent out himself. He then sought to take the vehicle to a repair shop but did not proceed when the quote exceeded what he considered was reasonable. He then told Mr Jackson his Team leader about the incident.

31. In the "Managing the Risk from the Use of Road Motor Vehicles for Business Purposes" policy (99) at 5.1.3 (h) it states that an employee is responsible for reporting a road traffic accident on company business and they will be responsible for reporting it and at 5.1.3.(i) damage was to be reported immediately to Brighton and Hove to allow repairs to be carried out.

32. On 23 June, Mrs Martin called the Claimant who then sent her some photographs of the vehicle as it was post the repairs he had undertaken. Later that day Ms Martin submitted a Zero Harm report. We accept that this was not unusual despite the minor nature of the incident and accept that a number of other road vehicle issues were also reported from time to time.

33. On 24 June, the Claimant was suspended by Mr Jordan. The decision to suspend appears to the Tribunal to have been unnecessary considering what was known at the time, or indeed at all. Looking at the disciplinary policy at (73) we have not been told of any basis as to why the Claimant would need to be suspended so as to protect the investigation nor could it properly be described as potential gross misconduct nor were there any risks to the employee, business or third parties.

34. Mr Warrington was asked to undertake the investigation and we accept that he did so in good faith and without any hostility towards the Claimant. He interviewed staff who could possibly assist with the enquiry and made his conclusions and certain other matters came out such as the visit to the farm to get milk which took place during the working day and the attendance at the Claimant's home. In his Conclusions (326) Mr Warrington remarked on the following:

    a) That the accident had taken place after a detour of some ten miles had taken place to visit the farm and the Claimant's home address. The Claimant believed that this was permissible because he believed that his Team Leader had undertaken similar trips with Mr Hearn.
    b) ***"Damage to the van was not reported in a timely manner and the sequence of events does not match the statement originally given by Mr. Thompson this leads me to believe that there was an attempt to conceal damage as Mr. Thompson is on a final written warning for a safety related incident."***
    c) ***"The damage to the rear door is relatively minor and Mr Thompson's efforts to cover up the damage seemed disproportionate to the effort and potential personal cost if a) he did believe the incident would be non- reportable and b) was not worried about his final written warning"***. However, it was not the extent of the damage, but the fact that correct reporting procedures were not followed that was the issue.
    d) That the Final Written Warning had stated that there was no tolerance for safety or other issues.
    e) On the balance of probability, it appeared that the Claimant had intended to conceal the damage to the van because he was currently on a final written warning on his file for a safety incident. It was believed that the Claimant had displayed behaviours which had caused a breach of trust between employer and employee.

35. Whilst Mr Warrington's full conclusion is not one that this Tribunal would necessarily have come to, we accept that on the information he had available it was one to which he was able to come to. We accept that his investigation was adequate and that his decision to push the matter towards a disciplinary hearing was one that fell within a band of reasonable responses. The Claimant himself whilst disagreeing with the conclusions accepted that one interpretation of his actions could have been that he was acting to conceal the damage.

36. On 15 July 2022, the Claimant was sent a notice of the investigation outcome stating that the Claimant was to attend a disciplinary hearing on 3 August 2022. The allegations were as follows:

a) On 21 June 2022 used the company vehicle in company time to visit Hook Farm to purchase goods for personal use. This was done without permission or authorization.
b) On 22nd of June 2022 on discovering damage attributed to the collision with the tree he did not report the incident immediately or take photographs of the damage
c) He undertook repairs to the vehicle in an attempt to conceal the damage.
d) He made efforts to engage professional vehicle repair service to complete repairs to the vehicle at his own cost
e) He did not report the incident to your line manager as instructed
f) He did not truthfully record his actions in the statement provided on the 24 June 2022
g) He indicated through interviews that he would continue to make personal judgments about what should or should not be reported without seeking advice from his Team Leader or manager.

37. The claimant submitted a Response to the allegations (382-385) which Mr Poole considered. Mr Poole did not know the Claimant, nor was there any evidence that outside of the matters raised in the meeting that he was aware of any of the protected disclosures. The Claimant was accompanied by his Trade Union representative. The Claimant spent time detailing issues around the H2S leak and other safety related issues.

38. We have carefully considered the notes of that meeting. We consider that the issues were fully explored therein and the Claimant was given every opportunity to contribute. We accept that Mr Poole was entitled to try and keep the meeting on track and we consider that he was entitled to consider that the other safety issues in themselves were tangential to the matters he had to consider.

39. The Claimant was informed that he had been dismissed on 3 August and the reason for the dismissal was that:

"You failed to report a road traffic incident immediately after… You attempted to repair the vehicle in company time with a possible view of not declaring it, before eventually reporting the incident the following day toward the end of your shift when the damage could not be removed without further professional intervention."

40. Mr Poole went onto explain that whilst those matters of themselves would not be reasons in themselves for dismissal they did ***"form a broader context when considering your recent final warning which you received only a matter of weeks before this event. The final warning centred around failing to take appropriate due care and attention and failing to make correct decisions in certain situations. This presents a significant safety risk whereby it could put yourself and other parties in danger or***

damage company assets. In addition, it shows a pattern of reckless and or thoughtless behaviour and breach of trust that must exist between the employer and employee and as discussed after the adjournment, this does constitute gross misconduct".

41. The Claimant was summarily dismissed and he was notified of his right of appeal.

42. The Claimant appealed the following day indicating that he did not believe that Mr Poole had all the facts available and that the punishment was too severe. The Claimant did not indicate in this letter that he had been dismissed for whistleblowing reasons but he did supplement this brief letter on 28 August 2022 when he produced a lengthy letter in which he set out his full response to his dismissal. There was a delay caused when the Claimant asked for a different person to hear his appeal. That was permitted and a change made.

43. The appeal was heard by Mr Leister who again had had no dealings with the Claimant or anybody else within the matter and indeed did not have any link with the engineering section at all. The Claimant's TU rep expressed concerns during the course of the meeting in relation to the Claimant's continued reference to the Zero Harm reports (whistleblowing) stating that discussing them was ***"going down rabbit holes."*** It would appear that the Claimant's representative was mindful of the Claimant's apparent failure to keep on topic.

44. At one point the Claimant stated, ***"they are trying to get rid of me as they have made a serious error in not dealing with a deadly gas leak."*** That is not the foundation of a whistleblowing claim as the Claimant would have to believe that they were "getting rid of him for making the allegation about the deadly gas leak" and not their alleged subsequent lack of action on the complaint.

45. Mr Leister does consider the Claimant's allegation that ***"managers involved in the process have been influenced by safety concerns you have raised which were disregarded"*** and concludes that the Claimant has not provided any evidence to substantiate the claim. He reflected that the factual basis of the safety claims i.e., were they justified or not was not within the scope of the meeting. We agree with that assessment.

46. Mr Leister concluded that in the course of the appeal the Claimant had used alleged comparable situations to justify his actions which caused Mr Leister to appreciate the seriousness of the situation. Whilst Mr Leister was not too concerned at the Claimant taking lunch at his home address, he was concerned that the vehicle log did not show this and the line manager was not appraised of the same.

47. He concluded that there was a general disregard for compliance with safety procedures which was evidenced through previous incidents for which the Claimant had received a final written warning. On account of those incidents Mr Leister considered it placed into question the relationship between employee and employer i.e., the necessary trust that is required and he concluded that he was not satisfied that despite being warned that the claimant would follow procedures in the future. He concluded that whilst the matter was not gross misconduct, it was misconduct which allied with the written final warning meant that the Claimant should still be dismissed but the Claimant would be paid his notice pay. The Claimant's appeal was partially successful in removing the summary element of the matter.

The Law

48. Section 103A of the Employment Rights Act 1996 states:

"**An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure**.

Section 47B of the Employment Rights Act 1996 states:

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
(a) by another worker of W's employer in the course of that other worker's employment, or
(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.
(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

49. Section 43A ERA states ***that "a protected disclosure mean a qualifying disclosure (as defined by Section 43B) which is made in accordance with any of sections 43C to 43H***". There is no need to consider protected disclosures in any more detail on the basis that it has been conceded that the seven matters raised by the Claimant are protected disclosures.

50. By referring to 'the reason (or, if more than one, the principal reason) for the dismissal', s.103A indicates that there may be more than one reason for a dismissal. An employee will only succeed in a claim of unfair dismissal if the

tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure. 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***). If the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under S.103A will not be made out.

51. Furthermore, as Lord Justice Elias confirmed in ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372***, the causation test for unfair dismissal is stricter than that for unlawful detriment under section 47B ERA as the latter claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker, whereas s.103A ERA requires the disclosure to be the primary motivation for a dismissal.

52. When faced with a case in which the Claimant alleges that he or she has made multiple protected disclosures, a tribunal should ask itself whether each individual, any combination or when taken as a whole, the disclosures were the principal reason for the dismissal.

53. So far as unfair dismissal is concerned, the position under S.103A is the same as that which applies to other automatically unfair reasons for dismissal. Technically, the burden is on the employer to show the reason for dismissal. In most cases, the employer seeks to discharge this by showing that, where dismissal is admitted, the reason for it was one of the potentially fair reasons under S.98(1) and (2) ERA. It will therefore normally be the employee who argues that the real reason for dismissal was an automatically unfair reason. In these circumstances, the employee acquires an evidential burden to show — without having to prove — that there is an issue which warrants investigation and which is capable of establishing the automatically unfair reason advanced. However, once the employee satisfies the tribunal that there is such an issue, the burden reverts to the employer, which must prove, on the balance of probabilities, which of the competing reasons was the principal reason for dismissal — **Maund v Penwith District Council 1984 ICR 143,** (a case of automatically unfair dismissal for trade union reasons).

54. There is one important qualification to the above. Where the employee lacks the requisite two years' continuous service to claim ordinary unfair dismissal, he or she will acquire the burden of showing, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason. That is not the case here.

55. The burden of proof under S.103A was considered by the Court of Appeal in **Kuzel v Roche Products Ltd 2008 ICR 799**, CA, where K, who had the requisite period of continuous service to claim ordinary unfair dismissal, brought a claim under S.103A, arguing that she had been dismissed because she had made protected disclosures regarding various regulatory issues.

56. On appeal to the Court of Appeal, Lord Justice Mummery, giving the only reasoned judgment, reiterated that the principles in **Maund** apply to S.103A claims and emphatically rejected the contention that the burden of proof was on K to prove that her making of protected disclosures was the reason for her dismissal. However, Mummery LJ was in agreement with the EAT that, once a tribunal has rejected the reason for dismissal advanced by the employer, it is not bound to accept the reason put forward by the claimant. Mummery LJ set out essentially a three-stage approach to S.103A claims:

    a) first, the employee must produce some evidence to suggest that his or her dismissal was for the principal reason that he or she had made a protected disclosure, rather than the potentially fair reason advanced by the employer. This is not a question of placing the burden of proof on the employee, merely requiring the employee to challenge the evidence produced by the employer and to produce some evidence of a different reason
    b) having heard the evidence of both sides, it will then be for the employment tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or reasonable inferences,
    c) Finally, the tribunal must decide what was the reason or principal reason for the dismissal on the basis that it was for the employer to show what the reason was. If the employer does not show to the tribunal's satisfaction that it was its asserted reason, then it is open to the tribunal to find that the reason was as asserted by the employee. However, this is not to say that the tribunal must accept the employee's reason. That may often be the outcome in practice, but it is not necessarily so.
    d) Mummery LJ went on to caution that, as it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may therefore be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not one advanced by either side. Accordingly, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case of automatically unfair dismissal advanced by the employee.

57. Often there will be a dearth of direct evidence as to an employer's motives in deciding to dismiss an employee. Given the importance of establishing a sufficient causal link between the making of the protected disclosure and the dismissal complained of, it may be appropriate for a tribunal in these circumstances to draw inferences as to the real reason for the employer's action on the basis of its principal findings of fact. In **Kuzel** Mummery LJ endorsed this approach, stating that a tribunal assessing the reason for dismissal can draw ***'reasonable inferences from primary facts established by the evidence or not contested in the evidence'.***

58. In **London Borough of Harrow v Knight 2003 IRLR 140**, the Employment Appeal Tribunal set out the requirements for a successful claim under S.47B(1) (adapted to take account of S.47B(1A)):

a) The claimant must have made a protected disclosure.
b) he or she must have suffered some identifiable detriment
c) the employer, worker or agent must have subjected the claimant to that detriment by some act, or deliberate failure to act and
d) the act or deliberate failure to act must have been done on the ground that the claimant made a protected disclosure.

59. The term 'detriment' is not defined in the ERA, but it clearly has a broad ambit. Its meaning has been given extensive consideration in case law, much of which has examined the term in the similar context of the anti-discrimination legislation. In **Ministry of Defence v Jeremiah 1980 ICR 13**, Lord Justice Brandon said that 'detriment' meant simply ***'putting under a disadvantage'***, while Lord Justice Brightman stated that a ***detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'***. Brightman LJ's words, and the caveat that detriment should be assessed from the viewpoint of the worker, was adopted by the House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337**.

60. It is important to stress that S.47B provides protection from any detriment: there is no test of seriousness or severity and the provision could well be breached by detrimental action that seems very minor to an objective observer (although the severity of the detriment will be relevant to the question of compensation). In **Shamoon v Chief Constable of the Royal Ulster Constabulary** (above) their Lordships emphasised that it is not necessary for there to be physical or economic consequences to the employer's act or inaction for it to amount to a detriment. What matters is that, compared with other workers (hypothetical or real), the complainant is shown to have suffered a disadvantage of some kind.

61. Ordinarily, a claimant in civil proceedings will bear the burden of proving his or her claim on the balance of probabilities. That position has been altered by statute in respect of S.47B ERA. In any detriment claim under that provision, it is for the employer to show the ground on which any act, or deliberate failure to act, was done (S.48(2)). Where a claim is brought against a fellow worker or agent of the employer under S.47B(1A), then that fellow worker or agent is treated as the employer for the purposes of the enforcement provisions in Ss.48 and 49, and accordingly bears the same burden of proof as the employer (S.48(5)(b)).

62. Section 48(2) is easily misunderstood. It does not mean that, once a Claimant asserts that he or she has been subjected to a detriment, the Respondent (whether employer, worker, or agent) must disprove the claim. Rather, it means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e., that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.

63. If an employment tribunal can find no evidence to indicate the ground on which a respondent subjected a claimant to a detriment, it does not follow that the claim succeeds by default (**Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14**). There, the EAT adopted the same approach as that taken by the Court of Appeal in **Kuzel**. While **Kuzel** was an unfair dismissal claim brought under S.103A ERA, which covers dismissals for making a protected disclosure, a similar burden of proof applies. The Court of Appeal in Kuzel held that, having rejected the reason for dismissal advanced by the employer, a tribunal is not then bound to accept the reason advanced by the employee: it can conclude that the true reason for dismissal was one that was not advanced by either party.

64. The Claimant in this case also contends that he was dismissed unfairly under section 98 ERA which reads so far as is material to this case as follows:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it—
(b) relates to the conduct of the employee,

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

65. The potentially fair reason put forward by the Respondent in this claim is conduct. In such cases the Tribunal will consider whether the Respondent had a genuine belief that the Claimant had committed misconduct based on reasonable grounds after a reasonable investigation. The Tribunal will need to consider the process adopted in considering the disciplinary matters to consider if they were fair and reasonable. It is not for the Tribunal to substitute their own decision for that of the employer but rather the Tribunal must ask whether the decision the Respondent came to fell within a band of reasonable responses taking into account all relevant circumstances of the case.

66. Attention was given to **Wincanton Group PLC v Stone (2013) IRLR 178**. That case states that if earlier warnings were issued in good faith and prima facie grounds for making them then the earlier warning will be deemed valid. Where there is a final warning the usual approach will be that further misconduct will normally result in dismissal, though not inevitably so.

Conclusions

67. The Respondent has accepted that the seven matters put forward in the list of issues as protected disclosures were protected disclosures. That means that they have accepted that the Claimant had a reasonable belief that his disclosures of information tended to show that the health or safety of individuals had, was, or would be likely to be endangered. We consider that to be an appropriate and correct concession for the Respondent to make. We consider that the Claimant did hold a genuine and focussed concern for health and safety matters and those that he raised were ones in which he held a genuine belief in. We also accept the Claimant had a reasonable belief that his disclosures were in the public interest. Those disclosures which were made between 9 February 2022 and 30 June 2022 are set out between pages 48 and 52 of the bundle. The alleged detriments were identified by EJ Fowell at the Case Management Meeting dated 4 October 2023

68. Detriments 1 and 2 – At the meeting on 23 March 2022 counter allegations were made against the Claimant and he was suspended.

It is agreed that in the course of that meeting Mrs Robertson raised the three issues of which one was the Littlehampton wash. There were three matters which were relatively close in time and they had caused some inconvenience to passengers via the toilets being out of action, some discomfort in the depot when there was no heating and a safety / process issue in relation to not notifying the shunter. It is also agreed that the Claimant was suspended. Factually therefore the actions alleged did take place.

69. The Tribunal accepts that both of these acts were detriments to the Claimant. The issue is the extent to which they were caused by any protected disclosures. At the time when these matters took place the only alleged protected disclosures that had taken place was the asbestos disclosure in emails around February and with Mr Jordan on 7 March. The Claimant did raise the issue with Mrs Robertson at the meeting on 23 March. In addition, there was the cliff wall issue which the Claimant had been asked to raise a report about to pass onto Network Rail by Ms Martin.

70. We note that the Claimant had been previously disciplined before he made any protected disclosures and that his issues with his line manager also went back some time before the disclosures.

71. We have considered the evidence and are unable to ascertain any irritation or upset in the correspondence with the Claimant over the asbestos issue. The correspondence we have seen is professional and seems, in our view to deal with the issue appropriately. Any frustration seems to flow from the Claimant in relation to his belief that the issue needed to be escalated but the suggestions made by his managers seem to be proportionate and reasonable. The Claimant accepted that whilst he had a belief that it was linked he could produce no evidence to support that. The Claimant had been actively encouraged to raise issues about the cliff wall by Miss Martin who he appears to have liked and trusted. The Respondents denied that there was any causal link between the disclosures and the actions.

72. The Tribunal can understand why the Respondent wished to raise these matters with the Claimant and why it was that the Claimant, with previous disciplinaries against him and, taking into account the acts which were alleged, why it was he considered them to be ***"counter allegations"***, although the Tribunal would not deem them as such and would prefer to speak of them as ***"incidents requiring an explanation"***. We do not consider that there is any sufficient evidence to suggest that that decision was taken because of the Public Interest Disclosures that had been made at that time There is ample evidence to support that the Claimant was treated in the way he complains about for no protected disclosure reasons. Those

two detriment claims are rejected. We accept the Respondent's account of why they were raised i.e., matters of substance to be enquired about. Those allegations are dismissed.

73. We move on next to the alleged detriment which was the decision of Mr Poole to give the Claimant a final written warning following the disciplinary. The allegations were given to Mr Warrington to investigate and then give to Mr Poole to adjudicate. The Claimant told us that he had a good relationship with Mr Warrington who had been his manager for some time and that they had also shared a room successfully for some time. Mr Poole had not met the Claimant prior to undertaking his disciplinary. On the evidence we have before us there is nothing in the relationships between the Claimant and these two gentlemen which would provide any motive at all for either of them to bear the Claimant any ill will generally, or at all.

74. The Claimant identifies what he perceives as flaws in the investigation but the Tribunal considers that taken roundly the investigation is reasonable and proportionate and one into which the Claimant was permitted to have considerable input. The Claimant was very keen to bring up and develop his concerns in relation to safety. The Tribunal are satisfied that the Claimant's interest in safety related matters was genuine and heartfelt. It was suggested that the Claimant raised safety issues in order to dissemble and / or deflect. We do not agree. The Claimant brought them up because he thought they were relevant. We do agree however that as far as the specific investigations were concerned, they were not as relevant as the Claimant perceived and arguably not relevant at all. The Claimant's inability to understand this drove him forward on his belief that nobody was listening to him and that he was being treated unfairly. We do not agree. The managers had a job to do. Investigations such as this are effectively over and above the day job. A manager is entitled for proportionality reasons to try and keep issues on point.

75. The asbestos issue was at most a reason put forward for why the Claimant was not focussed as he should have been and made an error at Bognor station. Whether there was asbestos, what should be done about it and whether the Claimant's managers acted appropriately was not an issue for determination or even discussion. Rather than acting to the Claimant's detriment it seems to us that those involved in the discipline deliberately did not get involved in the matter. It was for the Claimant to raise a Zero Harm notice or to raise a grievance if he considered there were issues in the workplace.

76. We have not been taken to any evidence that such disclosures as were known about by Mr Hickson had any influence upon his decision making at all. We have no doubt that the Claimant genuinely believes it but despite opportunities he was unable to point is to anything which would directly point

us or indeed from which we could draw an inference that there was any such influence. We consider he came to a genuine decision based on the information before him which had been fairly and genuinely gathered by Mr Warrington. We have no evidence of a shadowy puppeteer malignly controlling matters from the shadows.

77. It is not for us to substitute our own view for that of Mr Hickson but we are of the view that he called the sanction correctly. We do not consider that there was sufficient there for a dismissal but we do consider that considering the fact that there had been a consistent drip of concerns over a substantial period which had led to Advice and a warning that it was by no means unreasonable for the seriousness of the allegations to be in a final warning. Our role is to consider whether it fell within the band of reasonable responses and from the above we clearly do. In fact, we note that the Claimant himself seemed to accept some of the suggestions made and we find that Mr Hickson did make efforts to try and help the Claimant in the way he approached matters.

78. We reject the allegation that the final warning was in any way a detriment materially influenced in any way to the protected disclosures. That claim is dismissed

79. We pause here to make a general observation. At the outset of this hearing the Claimant made representations that he had certain autistic traits and indicated that he might struggle to fit into a pattern that was not his. We were pleased that he spoke up and it was that disclosure which primarily led the employment Judge to consider that a judicial presence in person was required. We should say that the Claimant listened to suggestions from the Judge throughout the case as to relevance and how he could present things and that is very much to his credit. We are satisfied that the Claimant does see the world and the issues in this case in a certain way. He appears to become fixed on certain matters and at times is slower than others may be to move away from those matters. We have seen examples in the case of an approach from the highly intelligent Claimant that we consider to be a likely reflection of autism.

80. We do not consider that the Respondent at any time really picked up that traits the Claimant showed may be linked to a medical condition. We consider it a shame as had it been picked up or flagged up by the Claimant more forcefully, assistance could probably have been gained as to the best way to deal with the Claimant and possibly adjustments made. Having said that the only claim before we have before us is a whistleblowing claim but we consider that there may be a learning point for the Respondent and those who managed the Claimant to consider that if there are similar issues in the future with another member of staff an OH referral may shed light to everybody's benefit. This is not meant as a criticism of the Respondent

because we accept that they have not had a chance to comment upon it but we believe that learning can always be drawn from these cases for the parties' benefit.

81. The final detriment claim is the suspension on 24 June 2022. Being suspended is undoubtedly a detriment and we have already found above that we do not consider that the suspension was necessary. We conclude however that it was an error of judgment and we reject the Claimant's assertion that it was materially influenced in any way by any combination of his protected disclosures. We have already noted that Mrs Robertson did not have any proper cause to write to the Claimant about ceasing communications and we consider that that letter betrays minor irritation with the Claimant but we are quite satisfied that was linked to the manner the Claimant was communicating as opposed to the content of what he was communicating. There is also no evidence to suggest that Mrs Robertson was a moving hand in the decision to suspend or influenced Mr Jordan to do so. The specific allegation of whistleblowing detriment is not made out and is rejected.

82. It follows from our conclusions above that the detriment claims are not well founded and are dismissed.

83. We move to the dismissal both in terms of section 103A ERA 1996 and in respect of being an ordinary unfair dismissal.

84. We remind ourselves that it is not our role to substitute our view for the view of the Respondent. We have to ask ourselves in such a case whether or not the decision to dismiss fell within a band of reasonable responses. We need to consider whether the dismissing officer had a genuine belief on reasonable grounds after a reasonable investigation that the Claimant was guilty of misconduct.

85. As stated above the Respondent asked the Tribunal to consider Wincanton Group PLC. Adopting the rationale of that case we are satisfied that the final warning was issued in good faith and with prima facie grounds for making it and so the final warning was valid and material. That being the case we are obliged to consider the fact of that warning and that the Claimant accepted it without appeal, notwithstanding his concerns over it. When on a final warning other misconduct will normally but not inevitably result in a dismissal. We are entitled to consider the Respondent's action against others and note that both Mr Hearn and the Claimant's line manager were given warnings for their conduct in the final misconduct issue. That is relevant in the sense that it suggests that it is the conduct that is the issue for the Respondent as opposed to anything personal about the Claimant such as the fact he was a whistle blower.

86. The Claimant asked the Tribunal to consider the case of **Jhuti v Royal Mail**. In that case it was held that in searching for the reason for a dismissal, courts need generally look only at the reason given by the decision-maker. But where the real reason is hidden from the decision-maker behind an invented reason, the court must penetrate through the invention. So, if a person in the hierarchy of responsibility above the employee determines that he should be dismissed for one reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.

87. We have already indicated that we do not consider that this was the case here or certainly on the evidence we have had produced to us cannot find it to be so on the balance of probabilities. We consider that those involved in investigating the matter, hearing the disciplinary and hearing the appeal all exercised independent thought and judgment. We are quite satisfied that none were influenced by the Claimant's protected disclosures let alone that the protected disclosures were the principal reason for the dismissal.

88. The reason for the Claimant's dismissal was his conduct which had followed on quick succession from his final warning where a zero-tolerance approach had been indicated. We are satisfied that the investigation was adequate and reasonable in the circumstances. One can pick holes in any process but we are satisfied that this investigation was of a reasonable standard. We accept that Mr Poole had a genuine belief in the Claimant's guilt and that was on genuine grounds after the investigation. He arrived at that view after a fair hearing and a process that in our view did meet the ACAS standards. The Claimant made broad allegation that it did not but was not specific about what any breaches were.

89. Mr Poole clearly erred in dismissing summarily and that was corrected on appeal. We consider that was an error but not one from which he can accept that there was any hostile animus towards the Claimant. Sometimes people just get things wrong.

90. We consider that the decision to dismiss fell within a reasonable band of responses taking into account the facts of the recent final warning, the nature of the past conduct, the nature of this conduct and we can understand why when considering sanction, it was considered by the Respondent, looking at matters as a whole, the requisite trust had disappeared on account of the Claimant's conduct and so why dismissal was the outcome.

91. Whilst that was an outcome that we consider the Respondent were entitled to come to and effectively renders the dismissal a fair one and so disposes of the Claimant's case the Claimant may take some solace from the fact that this Tribunal would probably not have dismissed the Claimant in relation to the same matter.

92. This tribunal would have considered that the Claimant's length of service, the fact that he wanted to transfer away from the line management issues and that may well have been facilitated and would have carefully considered how to get the best from the Claimant taking into account the way he approached things and how to manage him best. Those are the factors that the Tribunal would have relied upon to retain the Claimant. WE are satisfied that another person considering all of the issues including those we have highlighted could have come to a different decision. For the avoidance of doubt, we are satisfied that all maters were considered by the Respondent Sometimes a reasonable response can be to dismiss or to retain and we consider that had the Respondent done either, they could not be criticised. Crucially however utilising the way that the law works on unfair dismissal we must rule that the dismissal was fair pursuant to the case law and statutory provisions.

93. We understand why the Claimant has brought this claim and take the view that it is for precisely claims like this that this tribunal exists. We have no doubt at all that the Claimant holds a full and genuine belief in his case. We have tried to give hm the fullest possible opportunity to present his claim and to listen carefully to it. The Claimant has conducted himself creditably throughout. We have little doubt that the Claimant has the intellect and the capability to be an excellent and useful employee or to run his own small business successfully. He will, no doubt, be disappointed by this decision but we hope that he will now be able to draw a line under these matters and move forward personally and professionally. We wish the Claimant and the Respondent and their witnesses well for the future and record our thanks to Mr Maccabe for his professionalism and expertise during the course of this hearing.

94. All Claims are dismissed.

Employment Judge Self
21 December 2023