EMPLOYMENT TRIBUNALS

Claimant: Mr C Moulding

Respondent: Hippo Vehicle Solutions Limited

Heard at: Manchester **On:** 6-8 December 2023

Before: Employment Judge Phil Allen
Ms M Plimley
Ms D Kelly

REPRESENTATION:

Claimant: In person
Respondent: Mr B Uduje, counsel

JUDGMENT having been sent to the parties on 12 December 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following written reasons are provided:

REASONS

Introduction

1. The claimant was engaged by the respondent as a vehicle delivery driver. There was no dispute that he was a worker at the relevant time (the respondent denied he was an employee). The claimant alleged that he made protected disclosures and as a result he was treated detrimentally. The respondent denied that he was.

Claims and Issues

2. A preliminary hearing (case management) was previously conducted in this case, on 24 March 2023. In the case management order prepared following that hearing, Employment Judge Oldroyd set out the issues in the claim. At the start of this hearing, the parties confirmed that those remained a correct statement of the issues which we needed to decide.

3. In this Judgment we have determined the liability issues only as it was confirmed at the start of the hearing that the liability issues would be determined first. The remedy issues were left to be determined later, only if the claimant succeeded in

his claim. Two matters were identified which were under the heading remedy but which it was agreed we would decide alongside the liability issues (and those issues only are reproduced below).

4. The issues identified for us to determine were as follows:

1. Protected disclosure ('whistle blowing')

1.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

1.1.1 What did the Claimant say or write? When? To whom? The Claimant says he made disclosures on these occasions:

1.1.1.1 On or about 3 August 2022, he advised Craig Robinson of the Respondent that vehicles that were purchased by the Respondent at auction were being driven to new destinations even though those vehicles did not have a valid MOT certificate and that this was in breach of health and safety legislation and/or a criminal offence.

1.1.1.2 On 22 September 2022 the Claimant says that he was instructed to drive a vehicle by the Respondent which was unsafe (as its wheels had not been properly secured). The Claimant says that he raised a health and safety concern about this with Colin Shaw of the Respondent at a meeting on 29 September 2022.

1.1.1.3 On 2 October 2022, the Claimant says that he was asked by Gary Westenholme of the Respondent to deliver a vehicle in circumstances where he had had inadequate sleep and rest and that he said that this instruction was unsafe and in breach of health and safety legislation.

1.1.2 Were the disclosures of 'information'?

1.1.3 Did he believe the disclosure of information was made in the public interest?

1.1.4 Was that belief reasonable?

1.1.5 Did he believe it tended to show that:

1.1.5.1 a criminal offence had been, was being or was likely to be committed;

1.1.5.2 the health or safety of any individual had been, was being or was likely to be endangered;

1.1.6 Was that belief reasonable?

1.2 If the Claimant made a qualifying disclosure, was a protected disclosure made because it was made to the Claimant's employer?

2. Detriment (Employment Rights Act 1996 section 47B)

2.1 Did the Respondent reduce the amount of work offered to the Claimant compared to other workers or employees?

2.2 By doing so, did it subject the Claimant to detriment (save to the extent that the Claimant was an employee and the detriment in question amounts to dismissal)?

2.3 If so, was it done on the ground that he had made the protected disclosures set out above?

3. Remedy

Detriment (s. 47B)

3.1 Did the Claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

3.2 Was the protected disclosure made in good faith? If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

5. During his cross-examination, the claimant stated that issue 1.1.1.1 was wrong, as he said he advised Colin Shaw and not Craig Robinson. The respondent did not object to the issue being amended in that way, although it was highlighted that the respondent had prepared the case on the basis that the alleged disclosure had been made to Craig Robinson. In submissions the respondent's representative submitted that it was immaterial to whom the disclosure was made and therefore we considered the issue as it applied whether the disclosure was made to Mr Shaw or Mr Robinson.

Procedure

6. The claimant represented himself at the hearing. Mr Uduje (counsel) represented the respondent.

7. The hearing was conducted entirely by CVP remote video technology with both parties and all witnesses attending by CVP.

8. A bundle of documents was prepared in advance of the hearing. That bundle ran to 211 pages. At the start of the hearing the claimant did not have the entire bundle, but the additional pages at the end of the bundle were provided to him during the time the Tribunal took to read the statements and relevant documents. Where a number is referred to in brackets in this Judgment, that is a reference to the page number in the bundle.

9. We were provided with a witness statement prepared by the claimant. We were also provided with the witness statements of three witnesses called by the respondent. On the first morning, after the introduction and initial discussion, we read the witness statements and the documents in the bundle which were referred to in those statements.

10. We heard evidence from the claimant, who was cross examined by the respondent's representative. The claimant's evidence was heard from 12.30pm on the first day until 10.35am on the second day.

11. Between 10.45am and 2.35pm on the second day of the hearing, we heard evidence from the respondent's witnesses, each of whom was cross examined by the claimant and (where required) we also asked questions. The respondent's witnesses were:

a. Mr Craig Robinson, after sales director;

b. Mr Colin Shaw, after sales manager; and

c. Mr Gary Wolstenholme, logistics planner.

12. After the evidence was heard, on the afternoon of the second day, each of the parties made verbal submissions. We then considered and reached our decision, which we delivered orally late morning on the third day.

13. As the claimant has requested written reasons, we have provided these written reasons.

Facts

14. The claimant has considerable experience of health and safety matters, having previously run and owned a health and safety business. The claimant was engaged by the respondent from 1 February 2022. He was a worker. We were provided with a contract dated 1 February 2022 which stated that the claimant was a zero-hours worker (59). In summary, that said that the claimant's first assignment would commence on 1 February 2022 and that there were no normal hours of work, and the claimant would be required to work on an as required basis.

15. On 10 February 2022 the claimant had an accident at the respondent's workshop. We were shown the entry in the report book and a report form completed by Mr Shaw. That incident did not assist us in reaching our decision in the claim brought.

16. At the time relevant to the issues in this claim, the claimant was engaged as a vehicle delivery driver. In summary, his duties involved collecting vehicles for the

respondent from other locations such as car auction houses or sellers and delivering vehicles to the respondent's other sites or to customers of the respondent. When working, the claimant undertook significant mileage and could be asked to collect or deliver vehicles from a significant distance away. The claimant worked out of the respondent's site at Blackburn.

17. The respondent used a WhatsApp group to allocate work to the drivers it engaged and to inform those drivers about the work to be undertaken. The group was called Hippo drivers – general. The claimant was a member of that group at the relevant time. It was the claimant's evidence that drivers used that system to communicate issues which arose with the work that they undertook. We accepted that evidence, and noted messages in the bundle which supported that evidence. It was also the claimant's evidence that he had two telephones, one which he used for the respondent's work and one he did not. It appeared that the claimant's membership of the relevant WhatsApp group used the number of the phone he used for work (albeit the claimant confirmed that the respondent had been provided with both numbers).

18. The respondent's Blackburn site was also an MOT testing centre and the respondent employed MOT testers. The respondent also, on occasion, out-sourced MOT tests. An issue of concern arose amongst some of the drivers, as, on occasion, the vehicles which the drivers were asked to collect would not have a current MOT. It was the respondent's evidence that typically the vehicles stocked were under six years old and many would be around three years old.

19. On 2 August 2022 Mr Robinson placed a series of messages on the drivers general WhatsApp group. He quoted from the Government's own website with the advice about MOT tests and exceptions. What he said in the messages was (71 and 74):

> "*Hi All*
>
> *Just wanted to clear up our take on driving cars with no MOT as there still seems to be some confusion. Its a bit of a grey area I know but I have just spoke to somebody police force and they have spoke to Traffic and advised the following which is from the government website.*
>
> *You cannot drive or park your vehicle on the road if the MOT has run out. You can be prosecuted if caught. The only exceptions are to drive it: to or from somewhere to be repaired; to a pre-arranged MOT test*
>
> *So for me provided you have checked the MOT stays of the vehicle and made sure it's booked here with a service, are displaying both trade plates correctly and driving back here then we are ok* [thumbs up emoji]
>
> **status*
>
> *It's your responsibility to make sure the vehicle is visually roadworthy, tyres lights and any obvious issues need to be considered before driving ..*

I am more than happy to chat about this one on one if anybody has any other info or issues, just come and find me next time you are on site. The last thing I want is to put you [or] *ourselves at risk"*

20. On 3 August the claimant responded to Mr Robinson on the WhatsApp chat. What he said was the following (and only the following) (75):

"*Craig can you phone me please re the above. Craig"*

21. Mr Robinson responded on the same chat and said:

"*Just pop in Craig when you are here next?"*

22. The claimant did not have any further conversation with Mr Robinson about the issue following that exchange.

23. It was the respondent's evidence, that from August 2022 until October 2022 4.1% of vehicles which it purchased did not have a valid MOT certificate. Around two third of those vehicles were transported by trailer. One third were driven by drivers. Whenever a driver was asked to do so, they would use trade plates and a test would be booked at the Blackburn site for that vehicle before it was driven. The respondent did not appear to apply any restriction to the distance for which this exemption could and would be relied upon. Drivers were able to refuse to undertake driving vehicles without an MOT, and the claimant did so.

24. On 22 September 2022 the claimant was engaged to drive a vehicle to a customer in Glasgow. It was the claimant's evidence, that the weather was atrocious that day and, due to flooding on the motorway, he was restricted to a maximum speed of fifty miles per hour. After approximately two hours of travel, he was contacted by Mr Shaw. Mr Shaw had been informed that when the wheel had been placed back on the vehicle the previous day, although the wheel nuts had been tightened, they had not been torqued using the torque wrench and so that had not been to the manufacturer's specifications. Mr Shaw informed the claimant about this.

25. The claimant slowed his vehicle down and found a suitable place to pull over. It was the claimant's evidence that the nuts were finger loose and therefore dangerous. He subsequently spoke to Mr Shaw again. Mr Shaw had identified a garage ten miles from the claimant's location and he suggested the claimant drove to the garage so that the nuts could be tightened. It was the claimant's evidence that the equipment required in the car, which had been recorded as being present on a quality check sheet which he found in the car (160), was not in fact in the vehicle. With the aid of some local people, the claimant managed to tighten the nuts himself and proceed on his journey.

26. There was no dispute that the incident which occurred on 22 September had been dangerous. In his witness statement prepared for this Tribunal hearing, Mr Shaw said "*I agreed with* [the claimant's] *concerns that the error could have resulted in a serious car accident*". It was Mr Shaw's evidence that he investigated the causes of the incident and implemented a new procedure for technicians to record each time a wheel nut was removed or replaced. It was also his evidence that the new procedure was audited.

27. On 23 September the claimant sent a text message in which he raised concerns about the events of the previous day (157):

> "*Craig/Colin. With regard to the incident yesterday with the delivery of the above vehicle. Id appreciate if you will let me know at you're earliest convenience, what precautions will now be implemented to stop a further potential left threatening situation occur due to basic neglect and severe lack of diligence. This was a serious breach of Health and Safety Regulations and a situation that could have possibly ended in death."*

28. What the claimant said in that message reflected what he also said in the Tribunal hearing about the incident. Mr Shaw's evidence was that he had a brief telephone call with the claimant and asked him to come and see him to discuss it.

29. Mr Shaw met with the claimant on 29 September 2022. No notes were taken of the meeting, so we did not have the ability to refer to those notes to identify exactly what was said. The claimant's witness statement was somewhat limited in the account which it provided of that meeting. Mr Shaw's witness statement was fuller, albeit it still did not provide a full account of exactly what the claimant said and how Mr Shaw responded. It was not contentious that two things were discussed: the incident on 22 September; and the issue of driving cars without MOTs. Mr Shaw explained in his witness statement that they spent approximately ten minutes discussing the incident on 22 September. On MOTs, it was the claimant's position that the law required someone to drive to the nearest MOT test centre for the exception to apply, and Mr Shaw disagreed with that position. The claimant was told that there was no obligation on him to drive vehicles which did not have a valid MOT certificate if he did not wish to do so. Mr Wolstenholme was subsequently told not to offer the claimant work which involved driving cars without a valid MOT certificate. At the meeting Mr Shaw informed the claimant that naturally the claimant would lose out on the hours which would involve driving cars without MOTs, if he did not wish to do that work. The claimant perceived that statement to be a threat. It appeared to be a statement of fact about something which naturally followed from the claimant's decision.

30. On 2 October the claimant was included in a WhatsApp group chat in which he and three other drivers were asked to undertake a job with a 4am start, to be undertaken on the following Friday (which would have been 7 October). On the general group chat the claimant responded and said the following (84):

> "*I am really sorry but slavery ended years ago. Getting up at 3-00am and not getting home until 7/8/9/10 at night for £9-50 an hour. Someone is taking the Proverbial. Last week I could have been killed due to negligence. Now I'm being asked to work unsocial hours, for the very bare minimum wage. I'll work from 6-00am. And even that should include a shift allowance or sustenance allowance. After all they get it on site!"*

31. Mr Wolstenholme responded to the claimant's message by saying the following (amongst other things) (85-86):

> "*That's fine I'll replace you on that Friday job.*

It's your choice at the end of the day if you dont like the sound of the job you can refuse, that's the point of a zero hours contract it works both ways.

That Friday I agree is a long one, unusually so, but sometimes the need is there. We are short staffed currently at luton so lock drivers doing a few more longer London area jobs where needed.

What I would say generally is this is what the job involves – minimum wage and occasional long hours. The vast majority of our drivers are happy with it and have been for a long time, in fact two have already come forward having seen your message and said they are happy to do it instead.

I will make a note not to send you on anything pre 6am going forward, or anything that is overly long, however by the same token I can't guarantee you will get 5 days work a week with the limitations in place"

32. The claimant replied simply with a brief message which said, "*No problem*".

33. We noted that in the exchange of messages the claimant did not make any reference to working hour restrictions or the need for breaks. In his message he explained his objection to the work offered and the time of the work by reference only to the rate of pay and the lack of subsistence payments. We entirely understood why the claimant would object to working at 3am for the rate offered and we also accepted the evidence which we heard from him about the fact that without any subsistence payments and with the need to stop at motorway service stations, he would effectively work for two hours without pay. In his witness statement, the claimant did not expressly address what he believed when he provided the information contained in that message.

34. Mr Wolstenholme understood that the messages exchanged meant that the claimant no longer wished to be offered jobs which began before 6am or jobs which involved longer-hours. The claimant had intended to object to starting before 6am, it was not clear that he had intended to object to the longer hours, albeit that was how Mr Wolstenholme understood the claimant's response. There was a difference of view between the claimant and the respondent about whether there was a proportion of jobs which needed to commence before 6am or whether there was a clique of drivers who preferred to do so, but nonetheless there appeared to be no dispute that a proportion of the jobs on offer did in fact start before 6am (whether or not they needed to do so).

35. When Mr Wolstenholme was asked about the arrangements he had in place regarding drivers hours and working time, it appeared that he had little or no understanding of the law as it applies. He referred to endeavouring to ensure that, where a driver had undertaken a longer working day, he would try to allocate a shorter day the following day. He appeared to have no system in place to ensure that the requisite breaks were taken. He appeared to have received no training on the breaks required. The Tribunal was shown a document (196) which appeared to show a single driver working the following hours over five days: 9.25; 16; 12; 15; and 13. Mr Wolstenholme explained that not all those hours would have been driving, but nonetheless we shared the concerns expressed by the claimant about the

respondent's approach to working time and breaks for those whose work appeared to predominantly involve driving.

36. A grievance was raised by the claimant. It was heard and determined. The Tribunal was provided with the documents from the grievance process. We did not hear from the person who heard the grievance.

37. We were provided with an email sent from Mr Wolstenholme to Hannah Bentley on 7 December 2022 (145) which provided details of the hours which the claimant worked for the respondent each week. As Mr Wolstenholme himself summarised in that email, the summary showed that the claimant's hours dropped from averaging approximately forty or fifty hours per week, down to twenty or thirty hours per week. Mr Wolstenholme explained in that email that it had occurred "*around the time he refused early work/long jobs*". In the week commencing 19 September the claimant worked 56 hours and he worked 63 hours and 43 hours in the following two weeks. In October his hours per week were: 24; 25.5; 22.5 and 29.5. He ceased to work any hours at all from the week commencing 21 November 2022.

38. It was Mr Wolstenholme's evidence that the claimant took 11.5 hours to complete a job which involved driving to Luton and back on 16 November 2022 and which Mr Wolstenholme believed should have taken eight or nine. On 17 November the claimant took 14.5 hours to drive to Norfolk and back, a journey which Mr Wolstenholme believed should have taken approximately ten hours. Mr Wolstenholme suspected the claimant was time-wasting and said that he had lost trust in the claimant and decided not to offer the claimant any more work. The claimant in his evidence before us vehemently denied that he wasted time on the two journeys and explained the circumstances on each occasion which had resulted in the time taken. We had no reason to doubt the claimant's explanation. Nonetheless, we also had no reason to disbelieve Mr Wolstenholme's explanation that the view he took of those days resulted in him ceasing to give the claimant work. We would add that there was no genuine investigation undertaken, nor was the claimant informed about the reason; the decision appeared to reflect Mr Wolstenholme's general approach to allocating work to those on zero-hours contracts.

39. It was also Mr Wolstenholme's evidence that he took the deliberate approach to work allocation, of allocating those who undertook long days and unsocial hours, a shorter day the following day. That approach meant that the claimant would have received even less work after he stopped being allocated early starts and long days, because the drivers undertaking that work were also given priority for the shorter jobs.

40. On 28 November 2022 the usual message was sent asking for driver availability over December. The claimant did not respond on the WhatsApp group as usual and required (although he did respond by email). The claimant was not offered any work. Over Christmas and new year there was also some work available, but the claimant did not respond as he was not using the mobile phone upon which he received the respondent's WhatsApp messages and, for a period, he was away on holiday. The respondent also invited its drivers to training in December 2022, but the claimant did not respond or attend the training.

41. We were also provided with an email from Mr Wolstenholme to Ms Bentley of 2 December 2022 in which he explained the reasons why he had reduced the work which he had offered to the claimant (133).

The Law

42. Section 43A of the Employment Rights Act says:

> "*In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.*"

43. Section 43B says:

> *"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –*
>
> *(a) that a criminal offence had been committed, is being committed or is likely to be committed,*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered"*

44. Section 43C provides that a disclosure to a worker's employer is a qualifying disclosure.

45. The word "*likely*" in section 43B requires more than a possibility or a risk that a person might fail to comply with a legal obligation or that health and safety is endangered, the information had to show that it was probable or more probable than not, that there would be a breach.

46. The necessary components of a qualifying disclosure are:

a. First, there must be a disclosure of information.

b. Second, the worker must believe that the disclosure is made in the public interest.

c. Third, if the worker does hold such a belief, it must be reasonably held.

d. Fourth, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f) of section 43B.

e. Fifth, if the worker does hold such a belief, it must be reasonably held.

47. Unless all five conditions are satisfied there will not be a qualifying disclosure. Those steps are clear from the statute but were very clearly and helpfully summarised by HHJ Auerbach in **Williams v Michelle Brown AM** EAT/0044/19.

48. The first stage involves a consideration of whether there has been a disclosure of information. The correct approach to the disclosure of information was

set out in the decision of the Court of Appeal in **Kilraine v London Borough of Wandsworth** [2018] ICR 1850**.** In that decision they highlighted that, on occasion, an allegation could be so general and devoid of specific factual content that it would not be a disclosure of information. However, there is not a rigid dichotomy between an allegation and information. In applying the statutory provision, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]". In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in section 43B(1).

49. It is necessary to consider whether the employee holds the belief that the disclosure tends to show one of the relevant forms of wrongdoing and whether that belief is reasonable. This involves subjective and objective elements. The test of what the claimant believed is a subjective one. Whether or not the employee's belief was reasonably held is an objective test and a matter for the Tribunal to determine.

50. In **Chesterton Global Ltd v Nurmohamed** [2018] ICR 731 Underhill LJ held that the same approach, involving both the objective and subjective elements, applies to the requirement that in the reasonable belief of the worker making the disclosure, it is made in the public interest. What is "in the public interest" does not lend itself to absolute rules. The broad intent behind the amendment to section 43B(1) to require a worker to believe that the disclosure was made in the public interest, was that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to a whistleblower. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

51. The mental element required imposes a two stage test: (i) did the clamant have a genuine belief at the time that the disclosure was in the public interest; if so (ii) did he have reasonable grounds for so believing? The belief does not have to be the predominant motivation in making it (as motivation is different from belief).

52. Section 47B of the Employment Rights Act 1996 provides that 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. Under section 48(2) it is for the employer to show the ground on which any act, or deliberate failure to act, was done (where it is asserted that it was on the ground of having made a public interest disclosure). The employer must prove on the balance of probabilities that the act, or deliberate failure, was not on the grounds that the employee had done the protected act.

53. In determining whether a claimant has suffered a detriment as a result of having made a public interest disclosure, the Tribunal must focus on whether the disclosure had a material influence, that is more than a trivial influence, on the treatment - **NHS Manchester v Fecitt** [2012] IRLR 64.

54. The correct approach is to place the burden of proof on the claimant in the first instance to show that a ground or reason (that is more than trivial) for detrimental treatment is a protected disclosure; then by virtue of 48(2) Employment Rights Act 1996 the respondent must be prepared to show why the detrimental

treatment was done and if they do not do so adverse inferences may be drawn against them. Determining whether a detriment is on the ground that the worker has made a protected disclosure, requires an analysis of the mental processes (conscious or unconscious) of the employer acting as it did. It is, of course, not sufficient to demonstrate that 'but for' the disclosure, the employer's act or omission would not have taken place. The protected disclosure must have materially influenced the employer's treatment of the worker.

55. A worker is subject to a detriment if he is put at a disadvantage. The concept of detriment is very broad and must be judged from the viewpoint of the worker. There is a detriment if a reasonable worker might consider the relevant treatment to constitute a detriment.

56. It is also important to highlight that, in deciding whether or not a protected disclosure was made or a worker was subjected to a detriment as a result, we do not need to decide whether the worker was correct when making the disclosure. It is not part of our role to determine whether or not the matter about which the worker blew the whistle was made out, so (in this case) whether a criminal offence had been committed etc, or whether the health and safety of an individual had in fact been endangered. However, when considering remedy, section 49(6A) of the Employment Rights Act 1996 provides for the remedy to be reduced if the public interest disclosure was not made in good faith.

57. Neither party referred to any case law or specific legal matters during their submissions. They focused on the facts of the case.

Conclusions – applying the Law to the Facts

58. The relevant provisions of the Employment Rights Act 1996 apply to protected disclosures. The protection from detriment in section 47B applies only where the reason (or part of the reason) for the detriment is a protected disclosure. The first thing which we needed to decide, therefore, was whether the claimant had made a protected a disclosure. The list of issues clearly set out the three alleged protected disclosures relied upon, and we therefore needed to consider whether or not each of those alleged disclosures was a protected disclosure. We would also highlight that the issues we were to decide were limited to determining whether those were protected disclosure, that is the three set out in the list of issues.

59. The first alleged disclosure was said to be that on or about 3 August 2022 the claimant advised Craig Robinson of the respondent that vehicles that were purchased by the respondent at auction were being driven to new destinations even though those vehicles did not have a valid MOT certificate and that this was in breach of health and safety legislation and/or a criminal offence. As explained, during his evidence the claimant said the disclosure was in fact made to Colin Shaw.

60. We heard no evidence of any disclosure made to Colin Shaw on that date. What appeared to be relied upon was the WhatsApp message sent on 3 August 2022 to Craig Robinson to which we have referred. When considering whether there has been a protected disclosure, we need to decide whether there has been a disclosure of information. What is said must have some factual content (and cannot be so devoid of specific factual content, that there is not information being disclosed). The message (75) sent by the claimant asked simply that Craig Robinson

phone the claimant. There was no information provided whatsoever. We did not find that it contained any disclosure of information and, as a result, we did not find that the claimant made a protected disclosure on 3 August 2022 as he contended.

61. The second alleged disclosure was described in the list of issues as being that on 22 September 2022 the claimant said that he was instructed to drive a vehicle by the respondent which was unsafe (as its wheels had not been properly secured). The claimant said that he raised a health and safety concern about this with Colin Shaw of the respondent at a meeting on 29 September 2022. We read that issue as relating to an alleged disclosure on 29 September (which was the date of the meeting which the claimant had with Mr Shaw) and not an allegation that the disclosure had been made on 22 September. We understood the earlier date to have been included in the list of issues because it was the date of the incident about which the claimant said he made disclosures, not the date of the disclosure itself.

62. It was clear from the evidence that there was a discussion about the events of 22 September in the meeting between the claimant and Mr Shaw on 29 September. Mr Shaw told us that there was a ten-minute discussion of the incident. Whilst neither of the attendees detailed exactly what was said, we have had the benefit of hearing the claimant explain the incident, and his concerns about it, to us in this hearing. He has told us that he believed he could have died and it could have caused an accident. He has relayed information about what occurred and what it could have meant. We accordingly found that in that discussion the claimant would have relayed information about the events of 22 September to Mr Shaw.

63. The second question which we were required to ask is whether the claimant believed that the disclosure was made in the public interest? We found that he did. If an accident had resulted on the motorway, others could have been injured as a result. The claimant believed that what he told the respondent about the loose nuts and the risks arising from them, was in the public interest. We also found that such a belief was reasonably held, as clearly averting such an accident would be or could be in the public interest.

64. The fourth question is whether the claimant believed that the disclosure tended to show one of the matters listed in section 43B of the Employment Rights Act 1996? For this disclosure, that is whether the claimant believed that the disclosure of information tended to show that the health or safety of any individual had been endangered? The claimant clearly believed that he had been put at risk by the untightened wheel nuts. He believed other motorway users also had been put at risk. The fifth question is whether that belief was reasonably held? Mr Shaw told us that he agreed that the error could have resulted in a serious car accident (albeit it did not in fact, and the parties differed in their views about the level of the risk). We found that the claimant's belief was reasonably held.

65. Issue 1.2 asked whether the disclosure was made to the claimant's employer? It was, as it was made to Mr Shaw. Accordingly, we found that the second alleged protected disclosure, was a protected disclosure.

66. In his submissions, the respondent's representative accepted that there was a disclosure of information in the meeting on 29 September by the claimant about MOTs. However, he submitted that was not what was described in the issue we

needed to determine as having been the protected disclosure relied upon. We agreed that what was described in the list of issues at 1.1.1.2 was not anything about MOTs, it was limited to concerns about driving an unsafe vehicle as a result of the wheels not properly being secured.

67. The third alleged protected disclosure was that, on 2 October 2022, the claimant said that he was asked by Gary Wolstenholme of the respondent to deliver a vehicle in circumstances where he had had inadequate sleep and rest and that he said that this instruction was unsafe and in breach of health and safety legislation. What was relied upon as being that disclosure was the WhatsApp message sent by the claimant on 2 October 2022 (84).

68. We have considered carefully what the claimant said in that WhatsApp message, and we have decided that the claimant did not disclose any information in it. He explained what he was unhappy about and why he was unhappy about the shift he was being asked to work, the level of pay for the hours/times, and the absence of sustenance allowances. He did not provide any information in the message.

69. Having decided that the claimant did not disclose information, the message of 2 October could not have been found to be a protected disclosure in any event, but we did also consider the other legal questions for that potential disclosure. We did not find that the claimant reasonably believed that the disclosure made tended to show that the health or safety of any individual had been, was being, or was likely to be endangered. The focus of the message was on money. The message did not refer to health and safety or working hours at all. There was no genuine evidence before us that the claimant believed that what he said was about health and safety being endangered. We would also not have found it to have been a protected disclosure for that reason.

70. Having concluded that the claimant made a protected disclosure on 29 September 2022 in his meeting with Mr Shaw, we then went on to decide the three questions set out in the list of issues (at issue 2) regarding detriment, as they related to that disclosure found.

71. Issue 2.1 asked whether the Respondent reduced the amount of work offered to the claimant compared to other workers or employees? The claimant's hours of work clearly reduced from their previous very high-level from the week commencing 10 October 2022, as Mr Wolstenholme in effect acknowledged in his email to Ms Bentley of 7 December 2022. From the week commencing 21 November 2022, the claimant's hours ceased altogether.

72. Issue 2.2 asked whether, by doing so, the respondent subjected the claimant to a detriment? A zero-hours worker being allocated fewer hours is clearly and obviously a detriment.

73. That left just the issue at 2.3 to be determined, albeit we appreciated that was an important issue. The question to be determined was whether the detriment (the reduction in hours) was done on the ground that the claimant had made the protected disclosure? We understood that, legally, the issue was whether the

protected disclosure found had a material influence, that is more than a trivial influence, on the treatment. We found that it did not.

74. There were a number of reasons why the claimant was allocated fewer hours and, later, no hours at all. It was not for us to determine whether the reasons were fair or reasonable or represented a fair procedure. The sole question was why were the hours reduced, and did the protected disclosure have an influence on that decision. We found that the reasons were:

a. Mr Wolstenholme understood that the claimant did not want to work before 6 am and did not want to work long-hours (based on the messages exchanged (85) and (86));

b. Those undertaking early starts and working long hours were also more likely to be allocated the shorter jobs on subsequent days;

c. The claimant had chosen not to undertake journeys in cars without MOTs (albeit that would only have been a small percentage of the journeys);

d. Mr Wolstenholme's view of the trustworthiness of the claimant after the journeys on the 16 and 17 November (irrespective of whether that view was valid); and

e. The claimant's lack of response(s) on the WhatsApp system used, in part due to him not regularly using the phone with the number used on that system.

75. We found that Mr Wolstenholme did not reduce the claimant's hours because of the information the claimant had disclosed to Mr Shaw on 29 September about the incident on 22 September.

76. At the start of the hearing, we identified two remedy issues which we would also address at the same time as the liability issues. Neither party made any submissions on those issues. In the absence of any submission on it, we would not have found that the claimant caused or contributed to any detrimental treatment. The final issue was a contention that the claimant did not make the protected disclosure in good faith. We found that the claimant did make the disclosure which he made in good faith. We found that he was passionate about the matters he raised and, based in part on his own health and safety experience, he was committed to ensuring that health and safety obligations were adhered to and steps taken to address risk. We found that the disclosures were genuinely made in good faith.

Summary

77. For the reasons explained above, we did not find for the claimant in his claim. Of the three alleged protected disclosures relied upon, we found one was made and was a protected disclosure. We found that the claimant suffered a detriment when his hours were reduced. We did not find that the protected disclosure made had any influence on that detriment (the reduced hours).

Employment Judge Phil Allen
20 December 2023

REASONS SENT TO THE PARTIES ON
2 January 2024

FOR THE TRIBUNAL OFFICE

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