EMPLOYMENT TRIBUNALS

Claimant: **Mr BRIAN WEBSTER**

Respondent: **DIAMOND BUS (NORTH WEST) LIMITED**

Heard at: Manchester **On: 13 November 2023**

Before: Tribunal Judge Holt
Ms Sheard
Ms Pennie

REPRESENTATION:

Claimant: In person
Respondent: Ms Rebecca Jones (Counsel)

WRITTEN REASONS

Introduction

1. These are the written reasons of the judgment regarding the Claimant's claim for remedies against the Respondent in this claim. Our decision was given orally at the conclusion of the hearing on 13 November 2023. The oral decision included the detailed reasons for our decision. The oral decision was followed by a written judgment prepared by me on 13 November 2023.

2. The (written) short judgement was sent by the Tribunal staff to the parties shortly thereafter. The judgment of the Tribunal was that:

    a. The Claimant's claim for unlawful deductions from pay pursuant to Part II of the Employment Rights Act 1996 for unpaid wages and holiday pay is struck out pursuant to Rule 37(1)(c) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
    b. The Claimant should be awarded the sum of £4,335.28 as compensation as follows:

i. Basic award: none payable in light of the Claimant's length of service;
ii. £4,335.28 compensatory award broken down as: £3,672.68 past loss of earnings; £120.20 employer pension contributions; and £542.40 additional compensation for travel passes.

3. For completeness, and to help understand the chronology of this case and our decision on remedy, I record that the substantive evidence in the case was heard between 12 and 16 June 2023. Our decision had to be reserved due to lack of time allocated to the case, but we were able to produce a written reserved judgment on 3 July 2023 (promulgated 5 July 2023) when we found that the protected disclosure and whistleblowing claims to be unfounded. However, we also found that the Claimant had been unfairly dismissed pursuant to section 104 ERA 1996.

4. Thereafter, a first remedy hearing was listed as soon as 14 July 2023 to deal with the discrete issue of interim relief. Interim relief applications are of course normally heard at the very outset of proceedings, but in this case there had been an appeal and a remission of the interim relief application to the Tribunal. (This was because there was a significant degree of urgency due to the fact that the Respondent was then in the throes of a complex process of working out redeployment and TUPE transfers for their workforce, connected to a massive re-organisation and franchising operation applying to the provision of bus services in the Greater Manchester area). On 14 July 2023 the Claimant was seeking remedies including reinstatement to his position with the Respondent pursuant to sections 112 and 113 of the Employment Rights Act 1996. In relation to reinstatement, we found that the relationship of trust and confidence between the Claimant and the Respondent had broken down irretrievably and refused the Claimant's application for reinstatement. Having dealt with and refused reinstatement we ran out of time to deal with the other remedies claimed by the Claimant but set further directions for the future progress of the claim.

The parties to the litigation procedural background

5. On 13 November 2023, the Claimant appeared as a litigant in person (as he had done at the June and July hearings), and the Respondent was represented by Ms Jones (Counsel).

6. The respondent provided a bundle which the Claimant did not take issue with and so appeared to be an agreed bundle. The bundle included the Claimant's document headed "itemised days" document [38-65] and a document headed schedule of loss [195-197] as well as the Respondent's counter schedule [225-226]. Ms Jones also provided a document headed "Respondent's written submissions as to remedy". Both parties supplemented the paperwork that they had submitted with oral arguments.

7. The respondent's case on 13 November was that part of the Claimant's quantum claims, namely the unauthorised deductions from pay element, should

be struck out due to lack of clear pleading of the case in any document including the schedule of loss and lack of clear evidence to support the Claimant's claim.

Strike – out: the relevant legal framework

8. At the hearing before us on 13 November 2023 we had regard to Rule 37(1)(c) of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Rule 37 provides:

> ***Striking out***
>
> ***37.****—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
> *…..*
> *(c) for non-compliance with any of these Rules or with an order of the Tribunal;*
>
> *(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*

9. In reaching our decision on the strike application we also had regard to of ***B v A [2008] 7 WLUK 67***. In that case the factual background was slightly different but the same principles applied to the case of this Claimant under review. In B v A the judge had made an order requiring the claimant to identify, out of a large number of documents disclosed, which were relevant and which were not. The claimant had responded by saying that none were irrelevant. The judge found that the claimant had not complied with the earlier order and struck the claim out.

Decision in relation to unlawful deduction from wages

10. In our reserved judgment dated 3 July 2023 relating to the substantive claim, we had found [§85] that there were unauthorised deductions from the Claimant's pay on occasions. However, in our findings we went on to say that "*we cannot pinpoint precisely when they happened. All we can find is that there were some unauthorised payments….*" *We* emphasised that "*we have not seen the pay records and it is for the Claimant to substantiate his losses and to identify which journeys*..." Inter alia, this was a reminder to the Claimant that he has the legal burden of proving his losses for the particular shifts/dates claimed.

11. We note that his claim for holiday pay was linked, in principle, to his claim for unauthorised deduction from his wages.

12. I our 3 July 2023 decision we also found that, from the time when the Respondent did start paying the Claimant the inconvenience payments (which the Claimant reasonably believed were travel time payments), then it seemed that this issue of uncompensated travel time had been covered ie that he had

received remuneration which covered the travel-related element. Therefore, in relation to those shifts where the Claimant was paid for travel time (by way of the inconvenience payment), there has been no unauthorised deductions from his pay. On the issue of the travel time (inconvenience) payments and the particular shifts that they related to, we emphasised that we could not pinpoint the relevant shifts/dates. Consequently, we could not identify the shifts/dates preceding whenever the travel inconvenience started for which he had not received any pay.

13. Following the reserved 3 July 2023 judgment we gave the Claimant until 10 July to prove an up-dated schedule of loss. The time for compliance was short because the case was listed to deal with remedies, including reinstatement, on 14 July 2023, bearing in mind that the respondent was dealing with a TUPE transfer exercise affecting their (large) workforce in this period.

14. The Claimant failed to provide a schedule of loss but provided a document which we have called "*the itemised days doc*" [38-65 remedies bundle] on 11 July 2023 in advance of the remedies hearing listed on 14 July 2023.

15. As summarised above, following a hearing all day on 14 July 2023, we decided that the Claimant should not be reinstated. We ran out of time to deal with other remedies. An oral decision was given at the end of the hearing (although the Claimant had left by then) and my written note of that decision was forwarded to him on 19 July 2023.

16. It is important to note that, at the 14 July 2023, hearing the Respondent had complained that the Claimant had provided a claim that was unintelligible and the "*the itemised days doc*" was objected to because it was difficult to follow.

17. Following the 14 July 2023 hearing, Directions were given for the further progress of the case and were appended to the 19 July note of reasons, which included, for the Respondent's counsel to provide draft proposed directions with the opportunity for the Claimant to respond. The Claimant was told: "*Claimant will be asked to prove further evidence/clarification by 18 September 2023. It is anticipated that the Claimant will provide a final up-to-date schedule of loss and also a witness statement setting out his claims and the reasons for his claims*." (For completeness, it had not been possible to deal with Directions in the Claimant's presence at the end of the 14 July 2023 because he had been compelled to leave early before we were ready to announce our decision). Nonetheless, the practical effect of not having dealt with all the outstanding remedies issues on 14 July 2023 and the need for a further hearing to deal with the outstanding remedies, meant that the Claimant was given yet another opportunity to provide a comprehensive schedule of loss and to put his remedies claim "house" in order.

18. There was also a formal Case Management Order [157-9] dated 14 August 2023 (sent to the parties on 17 August 2023) which listed that, by 18 September, the Claimant needed to break down exactly what compensation he was seeking under each head of loss [§3 a. to g] and that a witness statement was required and what the witness statement needed to cover [§4 a to g]. In

drafting the Case Management Order I was acutely aware that the Claimant was acting as a litigant in person and that the matters in issue were complicated and subtle and so provided comprehensive pointers as to what was required of him.

19. Nonetheless, in terms of the chronology of the proceedings, the Claimant then sought reconsideration of the reinstatement decision on 21 August 2023. His reconsideration was rejected in a decision dated 6 September 2023 and promulgated on 19 September 2023.

20. At the same time as dealing with the reconsideration, I considered email correspondence from the Claimant, as a result of which the Tribunal wrote to the parties by letter dated 20 September 2023 saying that the parties should be preparing for the remedies hearing. This included reminding the Claimant that he had the burden of proof and that "*the main document that needs to be prepared is the Claimant's schedule of loss which sets out the sums claimed and the working out relating to how the amounts are calculated*". This included the comment "*because the Claimant has the burden of proof he needs to think carefully about what he can and cannot prove*".

21. On 23 October 2023, Mr Lomax (the Respondent's Solicitor) wrote to the Tribunal. The Respondent was supposed to have provided their counter-schedule by that date, but the Respondent said that they could not do so because the Claimant had still not provided a schedule of loss which complied with the 14 August 2023 Court Order, nor a witness statement (both which were due by 18 September 2023). The Respondent asked for an Unless Order giving the Claimant until 30 October 2023 to provide the missing schedule of loss and witness statement.

22. On 25 September 2023 the Claimant had sent two documents to the Respondent's solicitor which was were (1) the "itemised days doc"; the same document which had been provided in July and which had, in part, prompted my very detailed directions. Additionally (2) the Claimant provided his schedule of loss documents [195]. He did not provide a witness statement [202].

23. On 2 November 2023 the Tribunal issued a letter to the parties stating that Regional Employment Judge Franey had decided that there was insufficient time before the hearing for an Unless Order to be issued but that "*The consequences of failure to comply with case management orders will be considered*" at the remedies hearing on 13 November 2023.

24. On 8 November 2023 Mr Lomax wrote to the Tribunal again stating that the Claimant had failed to provide a sufficiently detailed and comprehensible (my shorthand) schedule of loss, and that his witness statement did not provide the evidence required by the Court Order.

25. At the hearing on 13 November 2023 Ms Jones (Respondent Counsel) applied to have the unpaid wages element of the claim to be struck out pursuant to rule 37(1)(c) of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

26. Having considered rule 37 and the documentation provided by the Claimant we decided that the Claim for unpaid wages and holiday pay should be struck out. This is because the Claimant has been given ample time to comply. The time has been extended several times and the directions that I made were very clear telling him what he needed to do. We made our decision on the basis that:

    a. whilst we can see which dates the Claimant claims he was rostered for, and we understand fully that he cannot provide the pay made and any shortfall on a *day-by-day basis*, and was limited to making claims on a weekly basis, nonetheless:
        i. He failed to take account of the 90 mins unpaid "non-driving time" element for each shift [Contract of employment 175 main bundle] over and above his meal breaks. His contract of employment states "*non-driving time of up to 90 minutes per duty, including meal break, will be unpaid*".
        ii. The Claimant failed to provide the details of the shifts where he was in fact provided with a voluntary payment referred to an inconvenience payment and which covered his travel (referred to the travel time payment at the hearing and above on occasions). To be clear, we found that he cannot be entitled to unpaid wages on the days when he received the voluntary payment because otherwise he would receive a windfall "double recovery".
        iii. The Claimant failed to provide evidence of where he parked his car on each relevant shift. This was relevant to the issue of where he actually travelled to at the end of each shift, in circumstances whereby his evidence had been in June 2023 that *usually* he parked at the Bolton Bus Depot, but sometimes he would park his car elsewhere (including occasionally close to Bury interchange) depending upon where he started his shift. In turn this was relevant to what happened after his shift and where he travelled back to.
        iv. The Claimant failed to specify how long it took to travel between Bolton Bus depot and Bury/Bolton interchanges. Whilst I have some local knowledge and had a rough idea of how long it takes to drive from Bury town centre and Bolton Town Centre, the Claimant has to provide evidence of the time he says that the journeys took, including to Bolton Bus Depot (which is separate from Bolton Interchange) and which presumably varies at different times of the day. The burden is on the Claimant to specify what his case is and he cannot ask the Court to fill the evidential gaps.
        v. The Claimant failed to provide a full breakdown of his claims taking all the relevant detail into account.

27. Despite the very incomplete and unintelligible schedule of loss, the Claimant did provide a witness statement, but it did not deal with the requirements of paragraph 4 of the Order of 14 July 2023 and did not provide sufficient detail to help us understand his claims or figures and did not provide sufficient exhibits to enable us to understand his claim.

28. Whilst the Claimant was unclear on the point, throughout the conduct of his case, his approach had been that, at the heart of his case, the Respondent had failed to account for the times when he had been required to travel back to his car at the bus depot after the driving element of his shift had ended. These were on the occasions before the Respondent revealed to him that there was in place an agreement between the drivers' trade union and the Respondent resulting in the travel time inconvenience payment. Linked to this the Claimant was critical of the respondent's record-keeping. His argument translated to an assertion that, because they were not paying him an inconvenience payment for certain shifts, then they should have paid him for the time that he spent travelling once the driving element of his shift was over and he still had to get back to where his car was parked. This was why he succeeded at the substantive hearing on the principle that he had suffered unlawful deduction of wages.

29. Nonetheless, we found that the Claimant knew and should have been able to identify when the travel time inconvenience payments started, ie when was treated like the other bus drivers who had benefitted from the inconvenience payments.

30. I record that, at the 13 November 2023 hearing the Claimant resisted the strike out submission and said that it was possible to work the sums out and referred to a complicated method which involved cross-referencing several pages of the bundle in relation to each shift to come to a revised figure per shift which could be totalled for each week to work out the overall weekly sum claimed. However, he failed to do this exercise and failed to summarise it. This is what the Claimant should have done in his schedule of loss supported by an explanation in his witness statement. He has failed to do so and we could not follow his oral explanations. The Claimant's approach at the remedies hearing translated to him saying to us that we should work out his claims for ourselves.

31. At the hearing on 13 November 2023 there was no good explanation as to why the Claimant had failed to confront the detail of his claims. It seemed that he thought that the Respondent had this information and that they should provide him with the precise dates and times of his shifts and where he had travelled to/from at the end of his shifts. However, the Claimant had suspected from within a few weeks, if not days, of stating his bus driver role with the respondent and as early as the end of December 2019 or the beginning of January 2020 that he was being underpaid for his work. The Claimant raised issues regarding his pay with the Respondent's Mr Butler by 24 January 2020. Therefore, the expectation of the Tribunal is that, because the Claimant was querying the details of what he was being paid for particular shifts, then he would have created and provided his own log or record of what he was paid, what he believed the short-fall to be and why he believed that there was a short-fall in his wages. Given the Claimant's inability to corroborate his generalised claims of a short-fall, we can only presumed that he failed to keep such a log/records. Crucially, he has not been able to re-construct his shortfalls months later for the consideration of the Tribunal (and the Respondent) but it is not the role of the Tribunal or the respondent to do it for him.

32. On 13 November 2023 we were faced with the Claimant's "*the itemised days doc*" [38-65 remedies bundle] which is 27 pages long and which requires re-calculating. It was/is not the Tribunal's role to do this. To embark on this exercise would be a wholly disproportionate use of the Tribunal's time and contrary to the overriding objective for a relatively modest sum of currently claimed at a maximum of £2,974.58 (subject to the potential deductions alluded to above). Our decision was therefore to dismiss the unpaid wages claim in its entirety.

33. Therefore, we found that his claims for unauthorised deductions from wages and holiday pay were to be stuck out for failure to provide the documents required by the various directions Orders to properly quantify and corroborate his claims. In making our decision, we had regard to the authority of *B v A [2008] 7 WLUK 67* where an employment judge was found to be entitled to find that failure to identify (in that case) relevant documents did not amount to compliance with an order. This will be considered within the structure of the remedies claimed and explained further below.

Decision in relation to basic award

34. Turning to deal with the other heads of loss, the Claimant was not entitled to a basic award because he had worked for the Respondent for less than 12 months. (His employment was from 9 December 2019 to 8 July 2020).

Compensatory Award – loss of earnings and decision in relation to unfair dismissal – relevant legal Principles

35. As set out in our judgment on the substantive matters (dated 3 July 2023) [from §18 onwards], the unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. The relevant sections in this case are contained within sections 94 to 110.

36. The primary provision is section 98 which, so far as relevant, provides 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 sub-section (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 sub-section if it … relates to the conduct of the employee …**
>
> **(3) …**

> **(4) Where the employer has fulfilled the requirements of sub-section (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 reasonable 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".**

37. If the employer fails to show a potentially fair reason for dismissal (in this case, conduct), dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

38. I remind that we as a panel considered the legal framework when we made our substantive decision as was recorded at §18 to §24 of the 3 July 2023 substantive decision.

39. ***In principle***, as per our 3 July 2023 decision the Claimant was entitled to an award for unfair dismissal flowing from our findings at §84 and §85 of our substantive decision. We found that "*All we can say is that there were <u>some</u> unauthorised payments*". We also found "…*that there were unauthorised decisions of pay although we cannot pinpoint precisely when they happened.*"

40. There were three potential remedy issues which arose: a <u>Polkey</u> reduction, the ACAS Code of practice, and contributory fault.

41. The first arose because of the nature of a compensatory award for unfair dismissal under section 123(1) of the 1996 Act:

> **"(1) Subject to the provisions of this section and sections 124 and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."**

42. However, whilst considering section 123 ERA 1996, is should be noted that, pursuant to section 123(4) claimants are required to mitigate their loss and (lack of) attempts of mitigating loss will be considered when assessing quantum:

> **"(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales…"**

43. It has been established since <u>Polkey v A E Dayton Services Limited</u> [1988] ICR 142 that in considering whether an employee would still have been dismissed even if a fair procedure had been followed, there is no need for an all or nothing decision. If the Tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment. Although this inherently involves a degree of speculation, Tribunals should not shy away from that

exercise. A similar exercise was also required by what was then section 98A(2) (part of the now repealed statutory dispute resolution procedures), and the guidance given by the Employment Appeal Tribunal in paragraph 54 of Software 2000 Limited v Andrews [2007] IRLR 568 remains of assistance, although the burden expressly placed on the employer by section 98A(2) is not to be found in section 123(1):

> "(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
>
> (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).
>
> (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
>
> (4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
>
> (5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.
>
> (6) The s.98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.
>
> (7) Having considered the evidence, the Tribunal may determine
>
> (a) That if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).
>
> (b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.

> (c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.
>
> (d) Employment would have continued indefinitely.
>
> However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

44. In relation to the breach of the ACAS Code of Conduct, [at §100 of our judgment of 3 July 2023] we were critical of the Respondent's failure to find an independent person when Mr Butler dealt with the Claimant's disciplinary hearing on 6 July 2020. At §100 we found that "*Overall….the Respondent had no intention of making the final disciplinary hearing fair and that they set out at the disciplinary hearing specifically to dismiss the Claimant with no intention of doing anything else*".

45. In relation to contributory fault, a reduction because of contributory fault by the employee can apply both to the basic award and to the compensatory award by virtue of differently worded provisions in sections 122 and 123 respectively:

> "Section 122 (2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly….
>
> Section 123 (6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

46. As to what conduct may fall within these provisions, assistance may be derived from the decision of the Court of Appeal in Nelson v BBC (No 2) [1980] ICR 110 to the effect that the statutory wording means that some reduction is only just and equitable if the conduct of the claimant was culpable or blameworthy. The Court went on to say (*per* Brandon LJ at page 121F):

> "It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."

Loss of earnings and decision in relation to unfair dismissal

47. The Claimant claimed a compensatory award for lost earnings between 8 July 2020 and 15 September 2023 in the sum of £49,731.23 based on a claim of £477.23 a week. However, we were not entirely clear what work the Claimant had been doing in this period, although he certainly did some driving work. It was not clear why he was not working, in terms of hours and intensity, to an extent comparable with his working for the Respondent in December 2019 and the spring and summer of 2020.

48. In this regard we noted the evidence of the Respondent's witness Mr Dave Leonard [§7 of his witness statement at 69 remedies bundle onwards] which was not significantly challenged by the Claimant. This evidence was to the effect that there was a shortage of drivers within the "passenger carrying industry" in the relevant period between July and September 2020. In the summer of 2020 COVID-19 restrictions were still in place, but significant elements were eased. Essential bus services ran throughout the pandemic and by the summer of 2020 the lockdowns were easing and there was a great deal more lawful interaction in work and social settings (including, for example, the "eat out to help out" scheme instituted by the government in August 2020). Mr Leonard's evidence was that bus companies were taking drivers on in this period and that qualified drivers were particularly attractive candidates because bus companies were not able to train up new drivers in the period immediately before as a result of the COVID-19 restrictions. Mr Leaonard relied on job advertisements for qualified drivers in this period to corroborate his assdertions.

49. In contrast, we noted that the Claimant did not satisfy us that that he had had failed to mitigate his loss pursuant to s123(4) of the ERA. We would expect him to have provided pay slips, evidence of job applications and other evidence of his attempts to find alternative work. We also found him to cagey in oral evidence on this topic.

50. Against this background, the Respondent argued that the Claimant's lost earnings was limited to 12 weeks' loss of earnings (between 15 July 2020 and 7 October 2020, less one week because the Claimant started a new job on 28 September 2020). The Respondent conceded, and the Claimant did not take issue with at the hearing, an average weekly loss of earnings at £333.88 net. We therefore awarded the Claimant £3,672.68 past loss of earnings[1].

51. In relation to the pension loss claim, we further noted that the Respondent conceded £120.20[2] lost pension contributions (based on a 3% contribution by the Respondent) contingent on the 12 minus 1 week earnings representing 15 July to 7 October 2020.

52. Finally, the Claimant had lost the benefit of travel passes due to his dismissal. The Respondent conceded and the Claimant did not take serious issue with the fact that an adult travel pass would have been £70 a month for adults (ie £140

[1] 11 x 333.88 = 3,672.68
[2] [12 x 333.88 =] 4,006.56 x 0.03 = 120.20

a month for the Claimant and his wife) and £10.20 a week for children. This led to calculation of (3 x £140 + 12 x £10.20 =) £662.60 for the Claimant's family.

Compensatory Award – Injury to feelings

51 The Claimant continued to pursue an award pursuant to the Vento Guidelines relating to his claimed injury to feelings. However, the Claimant is not entitled to do so. Compensation for an unfair dismissal (even if caused by a protected disclosure which of course the Claimant failed to establish in this case) cannot include compensation for non-economic losses such as injury to feelings as per the Dunnachie v Kingston upon Hull City Council [2004] UKHL 36 where it was held that compensation for unfair dismissal under the section 123(1) of the ERA could not include awards for non-economic loss such as injury to feelings.

Summary

53. The award is broken down:

a. The monetary award is £4,335.28; of which

b. The prescribed element is £3,672.68;

c. The period to which the prescribed element relates is 15 July 2020 to 28 September 2020; and

d. The amount by which the monetary award exceeds the prescribed element is £662.20.

Tribunal Judge Abigail Holt

8 March 2023

DECISION AND REASONS
SENT TO THE PARTIES ON

20 March 2024

FOR THE TRIBUNAL OFFICE