# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L Warren

**Respondent:** Arriva UK Bus Limited

**Heard at:** Bristol Employment Tribunal sitting via CVP (Remotely)

**On:** 17th, 18th and 19th June 2024

**Before:** Employment Judge Lambert

**Representation:**

Claimant: Ms Aziz, student

Respondent: Mr Wright, pupil barrister

# JUDGMENT

The complaint of automatic unfair dismissal by reason of making a protected disclosure is not well-founded and is dismissed.

The complaint of unfair dismissal pursuant to section 94 of Employment Rights Act 1996 succeeds.

This matter will be listed for a one day hearing to consider remedies before me within the first open date available. The will take place via CVP. The parties will be expected to make submissions upon the application of Polkey, contributory fault and the application of the ACAS Code of Practice.

# REASONS

**Introduction**

1. The Claimant, Mr Warren, presented a Claim Form on 13th March 2023 complaining of:-

    1.1 unfair dismissal contrary to Section 94 of the Employment Rights Act 1996 ("the **ERA**"); and

1.2 automatic unfair dismissal by reason of making a protected disclosure contrary to Section 103A of the ERA.

**The Hearing**

2. The hearing took place via CVP notionally from Bristol CJC.

3. The parties presented an agreed trial bundle of 253 pages including the pleadings and a separate witness bundle containing 5 statements. All of the witnesses presented a witness statement and gave oral evidence. For the Claimant, he gave evidence himself and also relied upon evidence from Mr Yeeles. The Respondent called 3 witnesses: Mr Cleggett, Director of Financial Shared Services to deal with the investigation; Ms Dana May, Director of Financial Planning and Analysis as she chaired the disciplinary hearing; and Mr Jason Perkin, Finance Director for the Respondent's London subsidiaries, who chaired the appeal hearing.

4. The page numbers referred to in this judgment are references to the pages set out in the trial bundle, unless otherwise stated. Any wording in [square brackets] has been inserted by the Tribunal to aid the reader of this judgment. I read the statements and the documents referred to within those statements and any documents I was directed to in cross examination of the witnesses.

5. The hearing was conducted by CVP, with the witnesses appearing remotely. At the outset of every witness providing evidence, I asked them to confirm that they were in a private room with no one else present; they had access to the trial bundle and witness statements and that they had no other notes or documents available. All confirmed that was the case. The Claimant gave evidence on day 1 and day 2 of the hearing. On the second day, it was apparent that his answers to questions were much more focused and at times, appeared to contradict his evidence on day 1. On investigation, the Claimant confirmed that he was referring to a diary that he had available to him whilst giving evidence and that he had carried out research overnight.

6. The Respondent sought a strike out of the Claimant's case on the basis that a fair trial was no longer possible. I heard submissions from both parties' representatives on this issue and determined that whilst the Claimant's actions were unfortunate, it did not meet the threshold that a fair trial was no longer possible. However, this was a matter that would be considered in relation to the Claimant's credibility in providing his evidence. I provided full reasons at the hearing and do not repeat these here.

**The Issues**

7. The issues were agreed at a Preliminary Hearing before EJ Cadney on 12th December 2023. An order was sent to the parties on 3rd January 2024 (pages 51 – 61). The issues as set out in the Order from that Preliminary Hearing and as discussed and agreed at the outset of this hearing were:

8. **Unfair dismissal**

8.1 Was the Claimant dismissed?

8.2 What was the reason for dismissal? The Respondent asserts that it was for a reason related to conduct, which is a potentially fair reason for dismissal under s.98 (2) of the ERA.

Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances? The burden of proof is neutral here but it helps to know the Claimant's challenges to the fairness of the dismissal in advance and they are identified as follows;

8.2.1 The Respondent was only aware of the content of the WhatsApp messages because he had drawn its attention to them;

8.2.2 That the conclusion that he had also participated in posting sexist and/or racist and/or homophobic content was not a conclusion reasonably open to the Respondent; and/or that they should have concluded that the evidence which purported to show this was fabricated by Mr Williams in revenge for the Claimant's whistleblowing;

8.2.3 There were procedural errors including the failure to disclose to him the material for which he was dismissed prior to the disciplinary hearing.

9. **Protected disclosure ('whistle blowing')**

9.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the ERA? The Tribunal will decide:

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

9.1.1.1 Initially by email on 25th November 2022 to Deutsche Bahn, and subsequently to the respondent on 28th November 2022.

9.1.1.2 He disclosed the posting of racist and/or sexist and/or homophobic messages by Mr Wiliams within a WhatsApp group;

9.1.2 Were the discloses of 'information'?

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

9.1.4 Was that belief reasonable?

9.1.5 Did he believe it tended to show that:

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

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

9.1.6 Was that belief reasonable?

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

9.1.8 Was the reason or principal reason for the Claimant's dismissal the making of the protected disclosure?

**The Law**

Protected Disclosure:

10 Section 47B(1) of the ERA provides:

> *"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."*

11 Section 43A of the ERA provides:

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

12 The relevant sections of 43B of the ERA (as applicable to the Claimant's case), provides:

> *"(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 has been committed, is being committed, or is likely to be committed,*
> *(b) …*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered."*

13 Section 43C of the ERA is satisfied if the worker makes a qualifying disclosure to their employer. In this case, there was no dispute that the disclosure was made to the Respondent. The key issue is whether the disclosure made by the Claimant, in his email of 28th November 2022, is a qualifying disclosure. If so, it will be a

protected disclosure. If not, then the Claimant's complaint of automatic unfair dismissal ends there.

14 In their respective submissions, the Respondent referred to the authorities of **Williams v Michelle Brown AM UKEAT/0044/19/OO** and also **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979** whilst the Claimant referred to the latter.

15 In **Williams** Auerbach HHJ considered the questions that arise in determining whether a qualifying disclosure has been made:

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

16 I refer to these in the consideration section of this judgment below as the five limbs of the test set out in **Williams**.

17 The public interest test was considered in **Chesterton**, where the Court of Appeal held that it is a question of fact for the Tribunal to determine and involves consideration of two stages: first to identify whether the Claimant subjectively believed that the disclosure was made in the public interest, and second, whether that belief was objectively reasonable.

18 **Chesterton** was considered in **Dobbie v Felton (t/a Felton Solicitors) [2021] IRLR 679** where Tayler HHJ set down a summary of the law in relation to the public interest component within protected disclosure cases. This included the following points:

18.1 The essential distinction between private and public interest is between disclosures which serve the private or personal interest of the worker, or wider interests (per **Chesterton** at para 31 and **Dobbie** at para [27](7));

18.2 The intention behind the public interest requirement is that disclosures in the context of a private workplace dispute should not attract the enhanced statutory protection (per **Chesterton** at paras 10 - 13 and **Dobbie** [27](8));

18.3 The test is broad and one to be answered by the tribunal in consideration of all the circumstances, taking into account the factors identified in **Chesterton** at para 34 and ***Dobbie*** [27](9)):

> *"(a) the numbers in the group whose interests the disclosure served…*
>
> *(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed…*
>
> *(c) the nature of the wrongdoing disclosed…*
>
> *(d) the identity of the alleged wrongdoer..."*

18.4 In **Chesterton** it was noted that a self-interested motive will not preclude the public interest requirement from being met, but a self-interested motivation may be relevant, particularly where the disclosure was made with no wish to serve the public: ***Dobbie*** [28](8).

18.5 **Chesterton** also makes clear that even where a disclosure relates to a breach of the worker's own contract or some other matter where the interest in question is personal in character, there may nevertheless be features of the case that make it reasonable to regard the disclosure as being in the public interest as well as in the personal interests of the worker.

19 In (**Babula v Waltham Forest College [2007] IRLR 346 (CA)**) it was held that a worker does not have to prove that the facts or allegations disclosed are true, or that they are capable in law of amounting to one of the categories of wrongdoing listed in the legislation. As long as the worker subjectively believes that the relevant failure has occurred or is likely to occur and their belief is, in the tribunal's view, objectively reasonable, it does not matter that the belief subsequently turns out to be wrong, or that the facts alleged would not amount in law to the relevant failure.

Unfair Dismissal: Ordinary

20 Section 94(1) of ERA confers on employees the right not to be unfairly dismissed if they meet certain conditions. There was no dispute that the Claimant met those conditions, including having over 2 years' service with the Respondent, as required by Section 108 of ERA.

21 Where the Respondent accepts that the Claimant was dismissed and otherwise has the right to pursue a claim under Section 94(1) of ERA, as it does in this case, it has the burden of establishing a potentially fair reason for dismissal, Section 98(2) of ERA. The Respondent relies upon conduct.

22 If the Respondent can establish a potentially fair reason for dismissal, then the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

23 Section 98(4) of ERA deals with fairness generally. It provides that the determination of the question of whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

24 In misconduct dismissals, there is well established guidance on how a Tribunal should consider fairness in this context as set out in the decision of **Burchell v BHS Stores [1978] IRLR 379** and subsequent cases such as **Post Office v Foley**

**[2000] IRLR 827** and **London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220.** The Tribunal must be satisfied that:

24.1 the employer had a genuine belief in the employee's guilt;

24.2 that this belief was held on reasonable grounds; and

24.3 after carrying out a reasonable investigation in all the circumstances.

25 In all aspects of the matter, including investigation, the grounds for belief, the penalty imposed and the procedure followed, the Tribunal must decide whether the Respondent acted within the band of reasonable responses open to an employer faced with those circumstances.

26 It is important to note that it is not for the Tribunal to determine how it would have handled matters or what decision it would have made. The Tribunal must not substitute its view for that of the reasonable employer. This means that one employer might reasonably take one course of action, such as issuing a final written warning, whilst another employer facing the same circumstances might reasonably dismiss. This is the band of reasonable responses. Only when a Tribunal considers that the employer adopted a course of action outside of the band of reasonable responses can it conclude that the action was not that of a reasonable employer: **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23.**

27 Defects at the dismissal stage can be rectified on appeal. See for example: **Byrne v BOC [1992] IRLR 505** and **Taylor v OCS Group Ltd [2006] IRLR 613 CA** in which it was said that the Tribunal must assess the disciplinary process as a whole and where procedural deficiencies occur at an early stage, the Tribunal should examine the subsequent appeal hearing, particularly its procedural fairness and thoroughness, and the open mindedness of the decision maker.

Unfair Dismissal: Automatic S.103A

28 The Claimant disputes that conduct was the reason for dismissal. As well as pursuing a claim for "ordinary" unfair dismissal, he asserts that the real reason was because he made a protected disclosure.

29 Section 103A of the ERA provides that:

> *"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"*

30 For clarity, if the Claimant did not have 2 years' service enabling him to complain of "ordinary" unfair dismissal, then he would have the burden of establishing the reason or principal reason for dismissal. However, because the Claimant had over 2 years' service at the date of dismissal, so he can complain of "ordinary" unfair dismissal, that burden falls upon the Respondent.

31 To succeed in this claim, the Claimant has the burden of establishing that he has made a protected disclosure, the relevant law for which has been set out above. If he can establish this, then I will need to consider whether the reason for dismissal is as the Respondent claims, for conduct, or whether the reason is because the Claimant made a protected disclosure.

**Findings of Fact**

32 I make the following findings of fact based on the balance of probabilities. Where it was necessary to resolve a conflict of evidence, I have set out how I have approached that task below. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in these reasons. I read every document referred to during the hearing, including those referenced in the witness statements and in cross examination, but I have not referred to every document within the findings below.

33 The Respondent is a transport provider operating a network of local bus services, through several subsidiary businesses, across various areas of England.

34 The Claimant was employed by the Respondent from 25th November 2019 as a Commercial Real Estate Manager. He reported into Mr Williams, the Respondent's Property and Estates Development Director. Except for matters set out below, until 10th January 2023, the Claimant had a clean disciplinary record.

35 In or around April 2020, the Claimant agreed to be furloughed by the Respondent in accordance with the Coronavirus Job Retention Scheme in place at that time. No doubt to ensure that there was effective communication between various individuals, Mr Williams set up a WhatsApp group called "Property Moguls" ("the **Group**"). Membership of the Group was limited to Mr Williams; Mr Harman, the Respondent's Property Manager; Mr Yeeles, who was employed by the Respondent as its Commercial Real Estate Manager North but who left its employment on 30th April 2024; and the Claimant. Whilst the Group was private, it was accepted by both parties that it was used to primarily discuss business issues affecting the Respondent. All of the members of the Group reported into Mr Williams.

36 In addition to being used to send business related communications, Mr Williams, Mr Yeeles and the Claimant forwarded messages which were non-business related. Examples were provided within the bundle of messages that appeared within the Group. It was accepted by both parties that some of the messages being shared were racist and/or sexist and/or homophobic and/or otherwise offensive. For ease of reference, I will refer to these messages in this judgment as "the **Offensive Messages**").

37 Whilst the Claimant denied that he had sent any of the Offensive Messages that were relied upon by the Respondent to justify his dismissal, the Claimant accepted that someone found to have sent any of the Offensive Messages could reasonably be considered to be committing an act or acts of gross misconduct.

38 Both parties contended that Mr Williams shared most of the Offending Messages. For clarity, Mr Williams did not give evidence before me and I make no finding on this point.

39 On 20th October 2022, the Claimant attended an Equality, Diversity and Inclusion awareness course provided by the Respondent ("the **EDI Course**"). The Claimant's evidence was that this provided confirmation to him that the Offensive Messages being shared by Mr Williams were unacceptable. He says that he had already made Mr Williams aware of his concerns about the nature of the contents of the messages being shared by Mr Williams within the Group but, after attendance at this course, he redoubled his efforts. The Claimant says that he told Mr Williams to stop sending such messages. In response, the Claimant says that Mr Williams told him in no uncertain terms that the Claimant should go away and also called him a *"snowflake"*.

40 On 27th October 2022, the Claimant was invited to a meeting by Mr Williams at the Respondent's London office. Mr Williams informed the Claimant that his role was under review because the Claimant had achieved all that he had been hired to do and that the Respondent may wish to enter into agreed terms to end his employment with it. The Claimant gave evidence that he was happy to consider this because his wife had recently given birth and he could spend considerable time with his new son, before looking for new employment. The Claimant's evidence was that he welcomed this approach from Mr Williams. I accept this evidence.

41 The Claimant was absent from work from 31st October 2022 until 21st November 2022 due to a medical operation. The Claimant suggested in his witness statement that on 4th November 2022 he received an email from Mr Williams advising him that the Respondent had made the decision to make him redundant.

42 Acting in response to this email, the Claimant says that he instructed a solicitor to draw up a settlement agreement reflecting a proposal of 12 months' gross salary. He shared this with Mr Williams on 17th November 2022. Whilst the settlement agreement was not included within the trial bundle, this evidence was not contested by the Respondent and I accept the Claimant's evidence in relation to the settlement agreement.

43 The email of 4th November 2022 from Mr Williams appeared within the bundle (page 118) and it stated:

> *"…I informed you that regrettably, this had led to your role being identified as 'at risk'.*
>
> *…I confirmed that* ***no decision had been made*** *and that you will be invited to a consultation meeting on your return to work."*
>
> *[My emphasis]*

44 The content of this email contradicts the Claimant's evidence on what it contained. The Claimant stated that the decision had been made to make him redundant, whereas this email states that no decision had been made.

45 The Claimant clearly wanted the Respondent to agree a termination package with him, but the email of 4th November 2022 is couched in terms that no decision has been made. In my view, the Claimant was not satisfied with the Respondent's response and sought to encourage the Respondent to enter into a settlement with him by paying for a settlement agreement to be drafted and making his proposal to the Respondent on 17th November 2022.

46 The Claimant returned to work on 21st November 2022. The first email he sent was to Mr Williams which contained the following points (pages 116 – 118):

- *"That you have no issue with my performance to date;*
- *That you agree that I have delivered every transactional instruction you've given me to date;*
- *That there are no disciplinary matters in hand, pending or planned;*
- *You told me that "my role is no longer required"; You then told me that "my role is at risk";*
- *You also told me that "the property team is being looked at by DB", but gave no reason for the changes;*
- *You subsequently told me that "the next steps would be a meeting when I returned to work" from heart surgery – I've invited you to a 1:1 meeting with me 10:30hrs this Friday at Lacon House as a direct result of this point;*
- *And then you told me that "the company will reach a settlement with me" – as a result of this specific point, I have taken advice and will use VWV to represent me in this matter, I propose that the employer pays the first £2.5k+VAT of my legal costs, I will pay the rest from the resulting settlement agreement. It is a condition of a binding settlement agreement that the employee takes independent legal advice."*

47 The email ended with the following request:

> *"Would you please make sure that the first email you send me subsequent to this email is in response to this email, and confirm receipt, and accept the meeting I've just popped into a void space in your diary for this Friday 10:30hrs in person at Lacon House to collaboratively discuss 117 the next steps."*

48 This email reinforces the view that the Claimant was seeking to press ahead with discussions around a termination package by arranging a meeting with Mr Williams to discuss this very issue.

49 On 24th November 2022, the Claimant sent an email to Mr Williams (page 116) which stated:

> *Dear [Mr Williams],*
>
> *You told me when we met at Lacon House on the 27th October that we would meet the first week I returned to work from heart surgery to discuss the next steps but you didn't invite me to any such meeting; I note that you have decided to not accept my own invite to a collaborative meeting with me at Lacon House 10:30hrs tomorrow morning, in response I will not waste company funds on booking rail travel for myself as it's now past lunchtime on the day before, and I'm sorry that we won't get to meet in person this week, I had been looking forward to it."*

50 The Claimant rejected the suggestion put to him in cross examination that this was quite a sharp reply to Mr Williams, or that it suggested that Mr Williams was being uncollaborative. He also rejected the assertion that the Respondent's decision to retain the Claimant's role was a disappointment to him because he wanted to leave the Respondent's employment with an agreed termination. He answered that he was aware that Mr Williams was a busy man and he was fine with the lack of response. I refer to this as "the **Agreed Termination Discussion**".

51 Looking at the contemporaneous emails, I do not accept the Claimant's evidence on this point. I have concluded that the Claimant was encouraged by the Respondent's firm indication at the meeting on 27th October 2022 that his role may be redundant and he was keen to advance discussions. This is evidenced by the significant costs he incurred in the production of a draft settlement agreement to present to Mr Williams on 17th November 2022. He also confirmed within this email that it was the first email he sent on his return to work. I considered this was because of the importance he placed on this very issue. It is not credible for the Claimant to suggest that he was fine with the lack of response from Mr Williams. It seems to me that he was anything but fine with this, contrary to the evidence he provided.

52 On 25th November 2022, the Claimant raised a complaint with the Respondent's parent company, Deutsche Bahn. He was advised to raise it with the Respondent itself, which he did so on 28th November 2022 (pages 122 – 130) ("the **Disclosure Email**").

53 The Disclosure Email's subject was *"Report an Arriva Director who is racist, homophobic and sexist, who demonstrates questionable judgement, morals, values and ethics."* Within the body of this email, the Claimant stated:

> *"After a great deal of thought, and with some trepidation, I write to advise you about a Director who holds racist, homophobic and sexist views that he shares with the Arriva team that report to him. Reason for taking this action now is that this Director talks to us about Arriva's values (my work is aligned with them), and the problem is that he does not believe in them, promote them or even care about them. I've also recently completed a diversity and inclusion course which confirmed my fears about his behaviour, I want to work within a collaborative, diverse and inclusive*

*team of people, one that inspires and empowers us to provide a quality service that we are all proud of and where everyone has a voice and the opportunity to contribute, but I currently work in a team led by a Director who demonstrates poor judgement, and who has questionable morals, values and ethics.*

*I care about the work I do, and try to do the right thing, but how are we to embrace inclusivity and diversity when our team leader is known to have views that are in direct contradiction of what the organisation aims to achieve? How can we work to the highest standards unless we hold him to account for his abhorrent personal views? I believe that our values and behaviour underpin our way of working, so can wait no longer to call-out this unacceptable behaviour, because if I do, it may harm the cultural change Arriva is working to achieve."*

54 Embedded within the Disclosure Email was the Offensive Messages which the Claimant alleged were sent by Mr Williams to the Group and which the Claimant stated was unacceptable behaviour.

55 In response to receipt of the Disclosure Email, the Respondent commenced an investigation into matters, which included interviewing all members of the Group. They were all asked to produce messages from the Group but none were able to do so, except for Mr Williams. He was suspended on 16th December 2022 but tendered his resignation with immediate effect on 21st December 2022.

Investigation

56 In early January 2023, Mr Williams contacted the Respondent and made a similar complaint about the Claimant, suggesting that he had also sent Offensive Messages to the Group.

57 On 10th January 2023, Mr Adam Cleggett, Finance Director Shared Services for the Respondent, held a discussion over Teams with the Claimant to inform him that he was suspended pending an investigation into the allegations raised by Mr Williams. Mr Cleggett's uncontested evidence was that the Claimant left this discussion abruptly before it was completed.

58 Very quickly after that discussion, the Claimant sent an email to Mr Cleggett appealing the decision to suspend him on the basis that he had raised a public interest disclosure and taking action against him for doing so would be unlawful (pages 145 - 146).

59 Mr Cleggett responded in a letter sent by email to the Claimant later that day (pages 139 – 140) confirming the suspension pending investigation into allegations of inappropriate discriminatory behaviour for a Senior Manager; suspected breaches of a number of the Respondent's policies including its Disciplinary Policy; Equality, Diversity and Inclusion Policy; and its IT Usage and Electronic Communications and Acceptable usage policies. It invited the Claimant to attend an investigation meeting on 12th January 2023. Within this letter, the Respondent set out its position that it accepted that a *"…whistleblower can't be subjected to a*

*detriment for making a protected disclosure. However, this does not prevent disciplinary action in the event of wrongdoing."* This was the Respondent's position before the Employment Tribunal that it did not dismiss the Claimant because he made a protected disclosure, but because he committed acts of gross misconduct.

60 An investigation meeting took place on 12th January 2023 before Mr Cleggett, via Teams. During the investigation meeting, it was accepted by the Claimant that Mr Cleggett shared his screen and put up images from the Group. Mr Cleggett's evidence was that he put up some of the Offensive Messages that the Claimant was alleged to have sent to the Group by Mr Williams (pages 158 – 178) and the Claimant did not raise the point that he had not sent these messages. The Claimant accepted that some images were shown via Teams by Mr Cleggett at the meeting, but not the Offensive Messages that he was alleged to have sent.

61 It seems inconceivable to me that the images shown by Mr Cleggett to the Claimant at the investigation meeting were not the Offensive Messages that the Claimant was alleged to have sent to the Group. This was the reason for the discussion. If the messages shown were not easily identifiable as offensive in nature, I consider that the Claimant would have challenged them on that basis at that meeting. He did not.

62 Nowhere within his email of 10th January 2023 challenging his suspension does he deny sending Offensive Messages. He stated: *"…my immediate line manager instructed me to join [the Group], encouraged me to participate, robustly coercing me to contribute and never, at any point, scolded me or advised me that anything I added was unacceptable or offensive…"* [My emphasis]. This is not the language of denial. This is the language of attempting to explain a misbehaviour. Therefore, for these reasons and for those set out below at paragraph 75 below, I prefer the evidence of Mr Cleggett on this issue.

63 An investigation report was prepared (pages 141 – 144) concluding that *"On [the] basis of [the] volume and severity of evidence then there is a case for [the Claimant] to receive gross misconduct with summary dismissal."*

64 The Respondent's Disciplinary Procedure, at page 68, requires the investigating officer to make a recommendation: either there is a case to answer and the matter should proceed to a disciplinary hearing or there is no case to answer. Whilst it is common for an investigator to indicate the level of sanction that may be engaged, in the light of the investigation, this wording appears to me to be more definitive and could be viewed as the investigating officer dictating a sanction. This was not consistent with the Disciplinary Procedure and, in my view, is a procedural flaw.

Disciplinary Hearing

65 By letter dated 18th January 2023, which was emailed to the Claimant (pages 148 – 149), he was required to attend a disciplinary hearing on 20th January 2023.

66 He was informed that he could be represented at this hearing by a work colleague or trade union representative. The allegations contained within this letter were the same as those set out in Mr Cleggett's letter of suspension and the Claimant was informed that sanctions may include a written warning, a final written warning or dismissal. The letter confirmed that Ms Dana May, the Respondent's Director of Financial Planning & Analysis, would chair the hearing.

67 The disciplinary hearing took place on 20th January 2023 at 3pm. The Claimant, Ms May and Helena Griffin, HRBP attended to take notes. It was accepted by Ms May and also Mr Perkin for the Respondent that the Claimant was, at no point prior to or during the disciplinary hearing itself, provided with a copy of the investigation report or of the Offensive Messages it relied upon to justify initiating disciplinary action. (However, as explained in paragraph 61 above, I accept that Mr Cleggett shared the Offensive Messages with the Claimant at the investigation). This failure to provide the information was a clear breach of the Respondent's Disciplinary Procedure (page 68) which required the Respondent to provide a copy of the full investigation report, including witness statements as appropriate. The Respondent accepted that this was a breach of its Disciplinary Procedure.

68 During the disciplinary hearing, it was accepted by the Claimant and Ms May that the Claimant read out a statement. After the conclusion of the hearing, the Claimant provided the statement to the Respondent for inclusion within the notes via an email he sent to Ms May later that day (pages 152 – 153). Ms May gave evidence that when this was read out by the Claimant early on in the disciplinary hearing, she concluded that the Claimant had accepted that he had sent the Offensive Messages but did so at the behest of Mr Williams. This position was consistent with the Claimant's position in his email to Mr Cleggett of 10th January 2023 and I find that this decision was open to Ms May.

69 The Claimant's statement included the following excerpts:

> *"The messages you've seen in relation to this matter are not representative of the content I shared with the WhatsApp group, they're the worst-of-the-worst and are only a very small part of the messages I've sent over the last three years. The vast majority of my contributions was based on politics, sports and driving.*
>
> *I did not create the group, I joined it on the specific instruction of my line manager, [Mr] Williams, and was robustly encouraged by him to contribute these kind of messages to his group.*
>
> *[Mr Williams] encouraged me to send jokes, specifically offensive ones, as those were the ones he found funny. These messages are in no way representative of who I am, my values or what I believe.*
>
> *All of the messages in question were sent a very long time ago, and before I (of my own volition) undertook an Arriva ED&I course last year. I did not find the messages funny, I sent them as encouraged to by my line-manager, in order to fit-in with his team, as the newest member of his team.*

*I was the only one in the group who took action to end this behaviour by blowing the whistle and potentially preventing damage to the company should these messages have emerged outside of the Organisation.*

*Every time I tried to speak to [Mr Williams] in relation to the group content he laughed at me, often calling me a 'snowflake', so I became reluctant to insist as I felt that continuing to do so would jeopardise my job.*

*[Mr Williams]'s messages became more and more offensive as time went on, I did not feel comfortable with this content and I knew that I had to do something about it - this was further reinforced in my mind after I attended the ED&I course last year.*

*In the previous disciplinary meeting it was suggested that revenge was my motivation for blowing the whistle, and I want to stress that it was not. Last year Mr Williams told me that the business no longer required my transactional commercial real estate advice post Wood Green and that the company would like to enter into an agreement with me to end my contract early 2023, I subsequently took advice and delivered a reasonable proposal to end my contract on good, mutually-beneficial terms, but [Mr Williams] then told me that the business had changed its mind and that my role was no longer in question. The Arriva solicitor that I whistleblew to asked me if I still wanted to pursue the matter after my role was confirmed for 2023 and said that I did because it was the right thing to do.*

*I feel that I am being punished for blowing the whistle. I'm absolutely mortified that anyone from outside the Property Moguls WhatsApp group has seen the messages and been offended by them, and I'm more than willing to personally apologise to anyone that I've offended by sending the messages I did.*

*I am sorry for the part I played in this. I have tried to put it right by taking the ED&I course, by blowing the whistle to end this kind of behaviour, and by joining the Global Arriva Inclusion Network in order to continue to learn about EDI, and I am determined to make this a life-long learning opportunity."*

70 In cross examination, the Claimant denied that the notes of the disciplinary hearing were accurate. Further he initially denied that the statement he provided had been recorded accurately within those notes. It was only when he was taken to his email setting the words above (pages 152 – 153), that he conceded this was his explanation. The Claimant eventually accepted that upon any fair reading of his email, it was reasonable to conclude that he had accepted that he had sent Offensive Messages within the Group. I accept that the evidence which the Claimant provided in his emails of 10th January 2023 and from the above email of 20th January 2023, that this could reasonably be accepted as an admission from the Claimant that he sent the Offensive Messages.

71 The Claimant was informed by letter from Ms May, dated 27 January 2023 (pages 155 – 156), that she had considered all of the evidence and had decided to

dismiss him on the grounds of gross misconduct. She provided three reasons for doing so: (i) the messages were inappropriate, sexist and discriminatory in nature and were shared amongst the Group; (ii) as a senior manager with years of experience, the Claimant should have realised this was not acceptable behaviour; and (iii) the Claimant's initial response in denying his involvement was honest. He was informed of his right to appeal to this decision, which he exercised.

Appeal Hearing

72 By letter dated 17th April 2023, Ms Maguire, Senior ER Partner wrote to the Claimant confirming that his appeal hearing would be heard on 21st April 2023 and chaired by Mr Jason Perkin, the Respondent's Regional Finance Director. This letter confirmed that the *"appeal hearing will be completed as a re-hearing of the initial disciplinary held. The evidence that will be used at the hearing has been attached to the email for you. The allegations for the hearing remain the same."*

73 The appeal hearing proceeded by way of a full rehearing on 21st April 2023. Mr Perkin explained that this decision was taken because the Claimant had complained that he had not been provided with the Offensive Messages or the investigation report prior to, or at the Disciplinary Hearing.

74 Notes were taken of the hearing and appeared in the bundle at pages 183 – 189. During the hearing, the Claimant stated that he had not received any dismissal letter from the Respondent. It was put to him in cross examination that this was not accurate because he must have received the letter from Ms May dismissing him, to understand that he could appeal. The Claimant eventually accepted this point. The Claimant also asserted in evidence that he was denied the opportunity to be accompanied at the hearing. The Claimant was taken to various documents within the bundle (pages 179 and 183) where he was reminded of this right, including at the disciplinary hearing itself. The Claimant eventually accepted that he had not been denied the right to be accompanied.

75 These issues affected the credibility of the Claimant's evidence. It appeared that he was more interested in putting forward evidence that he felt supported his case at that moment, rather than providing evidence which was accurate. Mr Cleggett, Ms May and Mr Perkins gave evidence which was consistent with the contemporaneous documentation and accepted points which were not favourable to their case. For example, Ms May and Mr Perkin readily accepted that the Claimant had not been provided with the investigation report or copies of the Offensive Messages prior to the disciplinary hearing and that this was a breach of the Respondent's own Disciplinary Procedure (see paragraph 67 above). I have also commented upon the Claimant's actions in paragraphs 5 and 6 above. Therefore, where there was a conflict of evidence put forward by the Claimant and the Respondent's witnesses, I preferred the evidence of the Respondent's witnesses.

76 Mr Perkin's evidence before the Tribunal was that the Claimant advanced two main issues at the appeal hearing. The first was that the Claimant had denied sending the Offensive Messages to the Group during the investigation meeting

with Mr Cleggett, but this denial had been ignored. Secondly, that the allegations raised by Mr Williams against him were false and that Mr Williams was motivated by revenge because the Claimant had reported him. To support this argument, the Claimant demonstrated that changing the name of a contact in his phone would automatically update within WhatsApp, so that messages could be manipulated to suggest that someone else had sent the message. He asserted that Mr Williams had manipulated the Offensive Messages in order to incriminate the Claimant.

77 Mr Perkin adjourned the appeal to investigate matters further. He subsequently interviewed Mr Cleggett and Mr Yeeles and considered the point that the Claimant raised about altering the names on WhatsApp messages.

78 In respect of the denial point, Mr Perkin concluded that the Claimant had not made such a denial. This was based on his interview with Mr Cleggett (page 204 – 208) and a review of the Claimant's email of 10th January 2023 challenging the decision to suspend him (pages 145 -146). Nowhere within this email does the Claimant deny sending Offensive Messages.

79 Mr Perkins's evidence around the WhatsApp manipulation was that he and Ms Maguire made further inquiries by opening up WhatsApp on her phone. She already had the Claimant's number stored on her phone and it showed a profile picture that the Claimant was using on WhatsApp at that time (page 213). They noted that this profile picture matched the profile picture of the sender of the Offensive Messages that Mr Williams alleged the Claimant had sent to the Group. Mr Perkin then changed the name of someone in his contacts and this changed the name of the sender within WhatsApp, exactly as the Claimant alleged. However, the profile picture of the sender did not change, even though the name did.

80 From this, Mr Perkin concluded that whilst it was possible to partially manipulate the sender's name within WhatsApp as the Claimant had indicated, it was not possible to do so where the contact number had a linked profile picture through WhatsApp. He concluded that because the profile picture which the Claimant was using in April 2023, as evidenced by Ms Maguire's contact list, was the same profile picture as the sender of the Offensive Messages as alleged by Mr Williams, that the Claimant had sent the Offensive Messages to the Group.

81 In cross examination, the Claimant was taken to the screenshots of the Offensive Messages and it was put to him that messages received from someone had a white surround and appeared to the left; whilst messages the user of the phone had sent appeared with a green surround on the right hand side. Looking at the WhatsApp messages that the Claimant had supplied to the Respondent, it was notable that the Claimant had appeared to edit the images by either deleting his messages or providing screenshots which did not disclose the full message he had sent. In contrast, the images provided by Mr Williams contained the full messages received from the Claimant. These were offensive, as accepted by the Claimant.

82 Mr Perkins reviewed the evidence and concluded that the Claimant had sent the Offensive Messages and did not accept the Claimant's explanations that Mr

Williams had sought to incriminate him. Mr Perkin concluded that this amounted to gross misconduct and immediate dismissal was the appropriate sanction. He therefore upheld the decision to dismiss the Claimant, which he confirmed in a letter to the Claimant dated 19th May 2023 (page 218). This letter stated that the Claimant had a right to appeal this decision.

83 The Claimant emailed the Respondent on 22 May 2023 (page 220) setting out various challenges to Mr Perkin's decision and requesting an appeal hearing. This was acknowledged by Ms Maguire on 26th May 2023.

Second Right of Appeal

84 It was common ground that the Respondent did not provide the Claimant with a second right of appeal. At paragraph 7 of his statement, Mr Perkin conceded that:

> *"… [T]he Company's HR support agreed that this was a fundamental procedural error and that, as a result, the appeal process that [he] was hearing should be a full re-hearing and reinvestigation of the whole situation."*

85 Mr Perkin went on to explain at paragraph 8 of his statement that the Claimant *"… was being offered a two stage appeal process."* For completeness, in relation to the second stage appeal, Mr Perkin stated at paragraphs 32 and 33 *"…Mr Eggerton decided not to continue with the second level of appeal…. Despite this extended right of appeal having been withdrawn…"* So despite Mr Perkin's understanding of the Respondent's approach to this matter the Claimant was not provided with a second level of appeal.

86 In cross examination, Mr Perkin accepted that the applicable disciplinary procedure (page 108) provided the Claimant with a final right of appeal if the decision at the first appeal hearing was not upheld or not varied sufficiently to satisfy the employee. This was a breach of the Respondent's disciplinary procedure.

## Consideration

Did the Claimant raise a protected disclosure?

87 The Disclosure Email of 28th November 2022 (pages 122 – 130) is clear in providing information about Mr Williams. I have no hesitation in concluding that the first limb of the test set out in **Williams** has been met. It is the remaining limbs of the Williams test that I have some difficulties with.

Public Interest (2nd and 3rd limbs of Williams)

88 The evidence put forward by the Claimant in the Disclosure Email was that he became more concerned over the content of messages being shared by Mr Williams within the Group and that Mr Williams did not believe, promote or even care about the Respondent's values. He considered that Mr Williams

demonstrated poor judgement, had questionable morals, values and ethics and was concerned about the impact this may have upon the team in sending the Offensive Messages (page 122).

89 "The team" in this context must mean members of the Group, which was limited to the Claimant; Mr Williams; Mr Yeeles and Mr Harman. There is no reference to the public at large or any expressions that could reasonably be considered as being of public interest. On the basis of the test identified in **Chesterton** (see para 18 above), I cannot see that the information that Mr Williams was sending Offensive Messages to the Group, which affected 4 individuals including the Claimant meets the test of public interest. Whilst the Claimant asserted that if the information became public, it could affect the mental health of the general public and the Respondent's employees, this is not a submission I accept.

90 It follows that I do not consider that the Claimant believed that this disclosure was in the public interest at the time he made it. The evidence before me, which I accept, was that the Claimant was an active participant in sending offensive messages. His assertion, that his position changed after he attended an EDI course, seems contrived in the light of the more recent developments around discussions to end his employment on agreed terms.

91 The EDI course took place on 20th October 2022. If, as the Claimant suggests, this confirmed his views of the offensive nature of the messages being sent by Mr Williams within the Group, it is surprising that he did not raise the disclosure earlier than 25th November 2022.

92 To my mind, the events relating to the Agreed Termination Discussion are more likely than not to be the effective cause of the Claimant sending the Disclosure Email. From the meeting on 27th October 2022 and the subsequent emails passing between Mr Williams and the Claimant on 4th November 2022; the production of a settlement agreement at his own cost; 21st November 2022 and 24th November 2024, I have concluded that the Claimant was keen to pursue this discussion. On 24th November 2022, as evidenced by his email to Mr Williams, the Claimant was clearly extremely disappointed, more likely frustrated with Mr Williams over the apparent *volte face* over the discussion to move forward with the Agreed Termination Discussion.

93 Mr Williams did not accept the Claimant's proposal for a meeting on 25th November 2022, nor did he respond to the Claimant's settlement agreement proposal. From these facts, I consider that the Claimant concluded that the Respondent was no longer open to a discussion about an agreed termination and the Claimant was aggrieved by Mr Williams's position in this matter. He sought to cause difficulties for Mr Williams and did so by sending the Disclosure Email.

94 Therefore I have concluded that the reason the Claimant raised the Disclosure Email at this time was in response to this apparent refusal of the Respondent to discuss his proposal for termination. This was to do with the Claimant's private interests and not wider interests: **Chesterton**.

95 In any event, even if the Claimant did subjectively hold the view that his disclosure was in the public interest, it was not objectively reasonable for him to hold this view, based on these facts. It seems clear from the evidence that the Claimant was responding to Mr Williams's actions and to protect the Claimant's own position rather than out of concern for the public interest.

96 This finding disposes of the Claimant's claim that he raised a protected disclosure. However, for completeness I will consider the remaining elements.

Tending to show breaches (Fourth and Fifth Limbs of Williams)

97 The Claimant advanced his case on the basis that the disclosures tended to show one of the breaches set out in paragraph 9.1.5 above. The Claimant asserted that the messages sent by Mr Wiliams met the threshold of a hate crime, a criminal offence under the Criminal Justice Act. However, the difficulty I had with this submission was that the Claimant himself would not accept that the messages which the Respondent concluded he had sent could also be considered to meet the threshold of a hate crime, despite the obvious fact that the messages were of a similar character. If the messages sent by Mr Williams were capable of meeting the threshold of a hate crime, it cannot be said that the messages the Respondent attributed to being sent by the Claimant did not also pass that threshold.

98 Therefore, I am not satisfied that the Claimant genuinely held the view at the time of making this disclosure that the information tended to show that a criminal offence had been, is being, or is likely to be committed. I consider that he formulated these grounds afterwards to justify the definition of a protected disclosure. It was not in his mind at the relevant time.

99 In relation to the health and safety ground, the Claimant suggested that if the information had become public, that a senior person within the Respondent was sharing such messages, it may affect the general public's, as well as the wider employees of the Respondent's, mental health. This seemed fanciful to me and I did not accept the Claimant's evidence on this point. It again pointed to the Claimant seeking to justify what was essentially a private dispute between him and the Respondent and/or Mr Williams into a public interest disclosure.

100 Therefore, I am not satisfied that the Claimant believed that the information he was disclosing tended to show either of these matters. The Claimant did not advance his case on the basis that the Respondent was failing to comply with a legal obligation imposed upon it. Whilst this may have led to a different conclusion on this particular point, it would not assist the Claimant due to my earlier finding that this was essentially a private issue and not a public interest matter capable of receiving the enhanced protection from raising a protected disclosure.

Unfair Dismissal: Automatic Due To Making Protected Disclosure (Section 103A of ERA)

101 Setting aside my findings upon the disclosure itself, I consider that the reason for the dismissal was because of the Claimant's own acts of gross misconduct in sending the Offensive Messages to the Group. The Claimant accepted himself

that these messages were offensive, inappropriate and amounted to acts of gross misconduct.

102 I have accepted the evidence of Mr Perkin. He set out his rationale for concluding that the Claimant had sent the Offensive Messages to the Group and I agree entirely with this conclusion. The investigation interviews, the disciplinary hearing and the first appeal hearing are all clear in dealing with the allegations that the Claimant sent the Offensive Messages to the Group.

103 There was no evidence before me that Mr Williams was acting in concert with the Respondent. The evidence showed that the first time the Respondent became aware of the nature of the messages sent by the Claimant, upon receipt of the complaint from Mr Williams, was the first time it took steps to investigate. This was the reason for the Claimant's dismissal and not because of making any disclosure, whether protected or otherwise. The reason was because of his own misconduct.

104 The Claimant's complaint of automatic unfair dismissal in accordance with Section 103A of the ERA is not well-founded and fails.

Unfair Dismissal: Ordinary

Substantive

105 From the findings I have made above, I am satisfied that the Respondent dismissed the Claimant due to conduct, which is a potentially fair reason for dismissal. In accordance with **Burchell**, the Respondent had a genuine belief in the Claimant's misconduct and that a reasonable investigation had been carried out in all of the circumstances to justify that belief. The Claimant's dismissal was substantively fair.

Procedural

106 However, I do have concerns about the procedural fairness of the decision to dismiss the Claimant. The Respondent accepted that it did not provide the Claimant with the Investigation Report, nor the Offensive Messages prior to the first appeal hearing. This was in breach of its own disciplinary procedures (p.68). I have also raised my concern over the conclusion set out in the Investigation Report and whilst this would not have been sufficient for me to find that the dismissal was procedurally unfair of itself, when reviewed in the light of the other failings, it is a factor I have taken into account.

107 Moreover, it did not provide the Claimant with copies of notes of the investigation hearing, nor of the disciplinary hearing until after commencement of these proceedings. Further, the Claimant was provided with the reasonable expectation that the Respondent would comply with its own agreed Disciplinary Procedure to provide the Claimant with a second right of appeal. This was the understanding of Mr Perkin, as he candidly set out in his statement, and is consistent with the Respondent's disciplinary procedure. The Respondent is part of a multi-billion pound turnover group of companies and this Tribunal is expressly encouraged by Section 98(4) of ERA to take into the account administrative resources of the

Respondent when assessing fairness. It is incomprehensible why the Respondent, having agreed a disciplinary procedure, presumably on the basis of setting out what it considers to be a fair process, failed to follow it. Whilst not complying with it does not necessarily mean a dismissal is unfair, in this case I consider that these failings made the process unfair to the Claimant.

108 Whilst I acknowledge that **Byrne** means that a full rehearing may correct any deficiencies with a flawed disciplinary hearing, the Respondent expressly informed the Claimant that he would have a second appeal, in accordance with its own disciplinary procedure. Failing to do so, in my view, leads to the conclusion that the Claimant's dismissal was procedurally unfair.

109 By making this finding, I am required to consider what is likely to have happened if a fair process had been adopted. I have little hesitation in concluding that the Claimant would have been dismissed. Whatever procedural failings there may have been, the evidence is more than enough to establish that the Claimant sent Offensive Messages to the Group and that this was an act of gross misconduct.

Polkey

110 I have made findings above that the Respondent was justifiably satisfied that the Claimant had committed the acts of gross misconduct it alleged against him, but the decision to dismiss was procedurally unfair.

111 Due to issues of timing, I did not hear any submission from the parties about Polkey. To assist the parties, and without prejudging the matter, it seems to me that if I was minded to apply a Polkey reduction, I would probably be persuaded look at a date (rather than a percentage reduction of any compensation awarded) and that date may be within a period between the date of the disciplinary hearing (27th January 2023) and the date when the Claimant was informed that his appeal was not successful (19th May 2023).

Contributory Fault

112 I did not hear any submissions in relation to contributory fault and I would need to do so before making a final judgment on remedies. It should be borne in mind that, unlike Polkey reductions, contributory fault can apply to both the basic award and any compensatory award.

ACAS Code of Practice

113 I did not hear full submissions on the application or otherwise of the ACAS Code of Practice and would need to do so before finalising judgment. In particular, I would like to hear on whether there was any breaches and if so, whether such breaches were unreasonable.

Disposal

114 This matter will be listed for a one day hearing (via CVP) on the first available date

before me to consider remedies.

Employment Judge Lambert

Date: 14th July 2024

JUDGMENT SENT TO THE PARTIES ON
14 August 2024
FOR THE TRIBUNAL OFFICE