EMPLOYMENT TRIBUNALS

Claimant: **Mr M Chiriac**

Respondent: **Serco Limited**

Heard at: **London South Employment Tribunal**

On: **11, 12 and 13 October 2022**

Before: **Employment Judge Dyal, Mr Shanks and Ms Hawkins**

Representation:

Claimant: **in person**

Respondent: **Mr Kirk, Counsel**

RESERVED JUDGMENT

1. The complaint of automatic unfair dismissal within the meaning of s.103A Employment Rights Act 1996 succeeds.
2. All other complaints are dismissed.
3. There shall be a *Polkey* reduction made to any compensatory award: a reduction of 50% applies to losses arising 8 months or more after the date of dismissal.
4. Remedy is otherwise to be determined.

CASE MANAGEMENT ORDERS

1. The parties shall liaise to seek to agree remedy. They shall update the tribunal in that regard within 4 weeks of this judgment being sent to the parties. If they are unable to agree remedy a remedy hearing will be listed.

REASONS

Introduction

1. The matter came before the tribunal for its final hearing.

The issues

2. The issues were agreed by the parties in advance of the hearing. They are appended hereto.

The hearing

3. *Documents before the tribunal*:

    3.1. An agreed bundle, the electronic file for which ran to 499 pages. At the outset of the hearing it became apparent that the Claimant had been working from an earlier version of the bundle (though he had been sent the final version more than a year ago). He confirmed that he had seen all the documents in the final version of the bundle save for p188 which he considered helpful to his case. The Claimant was content to proceed and in the course of the first morning, while the tribunal did its pre-reading, he updated the page references in his witness statement.
    3.2. Witness statements for the witnesses identified below.
    3.3. Respondent's:
        3.3.1. Chronology;
        3.3.2. Cast-list;
        3.3.3. Note on the law.

4. *Witnesses the tribunal heard from*:

    4.1. The Claimant
    4.2. Ms Greta Anne McCarty (written evidence only);
    4.3. Mr Duncan Hadland;
    4.4. Mr Alan Elliot

5. At the close of the evidence the Respondent made detailed oral closing submissions and relied on counsel's note on the law. The Claimant did not make a closing statement. That is not a criticism at all – he is a litigant in person and making a closing speech is entirely optional. For the avoidance of doubt, though, at the outset of the hearing the tribunal had explained to him how the trial would work and that he would have a chance to make a closing statement if he wished.

Findings of fact

6. The tribunal made the following findings of fact on the balance of probabilities.

7. The Respondent is a large employer that provides a range of outsourced services to businesses including in the public sector. It operates the London Cycle Hire Scheme (LCHS) for Transport for London (TfL).

8. The Claimant was employed by the Respondent as a Mobile Operative on the LCHS. He was based at the Clapham depot. His employment commenced in March 2015.

9. One of the Claimant's duties was to attend Waterloo Railway Station in the evening rush hour and continually move bicycles from the limited number of docking stations to a secure hub. This helped ensure that commuters arriving on LCHS bicycles had somewhere to dock.

10. There were a number of challenges that made this job difficult:

    10.1. There was little space at Waterloo Station and there was no easy route between the docking stations and the hub.
    10.2. There was a cycling route on a road but that was shared with buses and was far from ideal.
    10.3. There was a walking route along which bicycles could be pushed (sometimes referred to in the documents as being 'carried' but this actually meant being pushed) but this was narrow.
    10.4. Waterloo station at rush hour was extremely busy, both with vehicles and pedestrians.
    10.5. The job involved working around members of the public - a fraction of whom could be difficult to deal with.
    10.6. There were constant problems with anti-social behaviour that affected the working environment. This included people urinating and occasionally even defecating in the vicinity, including on the walkway between the hub and the docks. It also included people smoking tobacco and smoking drugs in what was a designated non-smoking area.
    10.7. The operation was often under-resourced. This meant that queues built up of sometimes impatient commuters waiting to dock bicycles. This in turn increased stress levels for the workers.

11. The Claimant was deeply affected and troubled by matters of the above sort. He frequently complained about them to managers and co-workers. He was also in the habit of raising his co-workers concerns with management even where the co-workers themselves did not do so.

12. The Claimant accepted in his oral evidence that there was a health and safety representative for his place of work and that there was a health and safety committee. However, his evidence was that having raised concerns through the representative there had been no resolution.

13. Mr Sean Manley was the Operations Manager at Clapham Depot and, initially at least, was someone to whom the Claimant directed his complaints. On a date on which the Claimant can now no longer remember, he raised concerns that some

co-workers had to Mr Manley. Mr Manley said to him to him words to the effect of *'You should not take fights you cannot handle'* and '*do not be their hero'*.

14. On 2 April 2019, the Claimant emailed Mr Manley. He said that he wanted to bring certain matters to his attention "*once again*". The Claimant essentially said that members of the public were regularly urinating around the docking points and in the alley and smoking/vaping cigarettes and drugs in the area. He said that the smell of urine and smoke was unbearable and that they had to step through patches of urine. He asked Mr Manley to do what was necessary for the operatives to go about their work in minimally decent conditions and asked for his email to be forwarded on to the authorities to act (giving the examples 'the Railway Network', BTP and TFL). Mr Manley responded saying that he had forwarded the email to his contact at Network Rail and would raise the matter with TFL but aside from that there was not much he could do.

15. The Claimant's case is that he made disclosures to Ms Castledine orally in June 2019. The Respondent's case is that there is no evidence of that before the tribunal not even from the Claimant. We prefer the Claimant's case:

    15.1. At p417 there is an email from Ms Castledine to the Clamant dated Friday 5 July 2019. It makes plain that she and the Claimant had spoken the previous week (thus in June 2019) and that the Claimant had raised concerns about PPE. Then there is a letter dated 27 August 2019 from Ms Castledine to the Claimant which makes plain that they had spoken in late August 2019 about PPE. Ms Castledine set out her conclusions in relation to that matter in her letter which including some action points to improve the PPE provided, including in relation to waterproofing of clothing. The Claimant did not consider that an adequate resolution.
    15.2. Doing our best, then, we find that the Claimant did, in June 2019, disclose to Ms Castledine that the PPE was inadequate.

16. On 25 July 2019, Ms Castledine, Head of Operations, attended the Waterloo hub. The Claimant wanted to show her what issues the staff faced at the hub. We accept the Claimant's evidence that she responded to the effect that this was not the right time to raise such issues and that the Claimant should be careful how he chose his words.

17. By a letter dated 13 August 2019 from Lihem Ghirmay, Deputy Control Room Manager, the Claimant was given the outcome of a recent investigation. The letter records that he had been interviewed at an investigation meeting on 1 August 2019. It is clear from the letter that the investigation related to something that occurred on 10 July 2019 but it is not clear from the letter, and it is not otherwise in evidence, what. The outcome of the investigation was to remind the Claimant to avoid conflict in on-street work. There was no disciplinary sanction.

18. The letter also records that the Claimant had raised concerns about staffing at the hub and PPE especially during adverse weather conditions. It advised him to make a formal grievance about those matters. In the event, he chose not to.

19. On 29 August 2019, the Claimant was involved in an incident at the Holborn Circus hub. A member of the public tried to take a bicycle that was not docked. The proper way of taking a bicycle was to take one from a dock and that way the system signed it out to the customer. The Claimant held onto the bicycle and would not let the member of the public take it. The Claimant put this incident down to the hub being understaffed and reported the matter, including by email to Sam Jones, Contract Manager. In the email the Claimant made wide ranging complaints about the Respondent failing to take care of the MO's health and safety. This included reference to understaffing and PPE.

20. Mr Jones responded, noting that Ms Castledine was dealing with the PPE aspect and asking to meet the Claimant.

21. On 24 September 2019, Mr Jones emailed the Claimant to feedback following their 'last conversation'. It is therefore plain that they had spoken. He told the Claimant that he agreed there should generally be 4 people at the Waterloo Hub and made some comments on PPE in answer to points the Claimant had made.

22. It is clear, based on the above, that in September 2019, the Claimant had met with Mr Jones and Ms Castledine, complained about PPE being inadequate and complained about understaffing at the Waterloo hub. However, there is no evidence that the Claimant complained about unsanitary working conditions at that point in time.

23. On 25 September 2019, the Claimant was sent a letter of concern in relation to the incident at Holborn Circus hub on 29 August 2019 described above. It recorded that there had been an investigation meeting on 9 September 2019. The outcome was no disciplinary action but recommendations for a one to one conversation with the Claimant's line manager and a review of his Conflict Resolution Training. It reminded the Claimant that he should avoid confrontation with members of the public.

24. On 23 October 2019, the Claimant emailed the Respondent's 'Citizens Services' operations email address. He reported that people urinated on the path in front of mobile operatives. He also reported that members of the public and members of the railway staff smoked and vaped both tobacco and drugs at Waterloo station. He said it caused discomfort and sickness.

25. On 25 October 2018, the Claimant emailed Mr Soames, the CEO of Serco:

    25.1. He made some very generic points about health and safety;
    25.2. However he also made a specific point about health and safety: that they were working with less staff than they should and that it says on paper they should, that it overloaded them and put their health and safety at risks, draining them physically and mentally.

26. Mr Soames replied briefly. The Claimant's complaint was then delegated to Ms Sharman, HRBP. There is an undated email from Ms Sharman asking to speak to the Claimant at 9.30 am on 11 November 2019 asking for particulars of his complaint. At 8.00am on 11 November 2019 the Claimant sent Ms Sharman a

very detailed email outlining the complaint. The Claimant said in his oral evidence that he had spoken to Ms Sharman and that he had been very naïve to do so. We could not follow what the naivety was and we do not know what the ultimate resolution if anything was to the exchange between Ms Sharman and the Claimant.

27. Returning to the 25 October 2019, Mr Manley asked Mr Claudio Lisi to investigate the Claimant in relation to three matters:

    27.1. An altercation with a member of the public on 17 September 2019 at Abingdon Villas;
    27.2. An altercation with a member of the public on 20 September 2019 near Waterloo station;
    27.3. An incident in which the Claimant had filmed a member of the public urinating in the grounds of Waterloo Station on 17 October 2019 leading to an altercation.

28. On 11 November 2019, the Claimant was interviewed by Mr Lisi. It is in our view clear from the notes of the interview and the other accounts the Claimant gave that he could have avoided an altercation with members of the public on each occasion:

    28.1. On the first occasion he had challenged a member of the public for sitting on a docking point. The member of the public was not in his way. The Claimant's position was essentially that he wanted to educate the member of the public to teach him that the docks were not for sitting on and he was concerned that over time the dock may be damaged;
    28.2. In the second incident the Claimant was pushing two bicycles at Waterloo Station through a narrow path. He asked a member of the public to take care and give him space. However, the rear wheel of one of the bicycles went over the member of the public's foot. The Claimant was not sure whether the member of the public had stuck his foot out on purpose or not. However, the Claimant simply would not apologise and an altercation followed. He remained of the view that he had been right not to apologise. The Claimant also refused to give the customer his name upon request, told the customer to speak to the station manager and a police officer and that the police officer would charge the Claimant him if he was guilty of assault. This was an odd and unnecessary escalation of the incident by the Claimant.
    28.3. In the third incident the Claimant had used his work mobile phone to film a woman squatting with her trousers down urinating on the floor in his path near Waterloo station. He did this so he could report the incident. It is plain from the footage that the woman was aware she was being filmed and there was an angry altercation. It was obviously inappropriate to film this, and doing so was not necessary in order to report the incident.

29. It is relevant to note that prior to these incidents the Claimant had had Conflict Resolution Awareness training. The Respondent's 'house-style' of dealing with conflict was essentially to avoid it wherever possible even when this meant backing away from situations in which a member of the public was in the wrong,

for instance causing deliberate damage to the Respondent's assets. The MOs were not expected to risk their safety in order to protect property: quite the reverse they were required not to. It is plain to us that this approach did not sit easily with the Claimant. His sense of justice was such that he felt compelled to address wrongdoing where he saw it and/or not 'give in' to it. We think these actions also reflected deep frustration that the Claimant had about his working conditions and the lack of change in relation to them following years of complaints.

30. On 14 November 2019, Mr David Chivers (Head of Health and Safety for Citizens Services) and Ms Andrea Leiter (HSE Manager, Citizens Services), attended the Waterloo Hub. Their visit was prompted by the Claimant's complaints. The Claimant was not there at the time but it was reported to him by three colleagues that Mr Chivers had told Mr Manley that:

    30.1. Henceforth employees should only push one bike at a time, not two, between the docks and hub;
    30.2. There should be four employees working at the hub. If they were short staffed then management staff should make up the numbers.

31. The briefing Mr Chivers gave that day is a matter of controversy in this case and it has essentially been the Respondent's position that the above account is wrong, and certainty that it was simply a matter for the individual employee whether they pushed one or two bicycles at a time.

32. We prefer the Claimant's account and find it accurately summarises what Mr Chivers said:

    32.1. We accept that the Claimant was contemporaneously told by three colleagues who had been present when Mr Chivers attended what he says he was told;
    32.2. One of those employees was Daniel Czaijkowski. He gave evidence to a later disciplinary investigation that is consistent with the Claimant's account.
    32.3. There is an email in the bundle dated 6 January 2020 from Ms Barbieri, a manager at the Clapham depot, that states "*maybe they should review having only 3 MO's when they are not allowed to carry more than one bike at a time…"* in relation to Waterloo.
    32.4. All MOs were required to sign a written briefing following Mr Chivers' visit. Its meaning could/should have been clearer but it does refer to "*walk the bike*" in the singular and in our view is more consistent with the Claimant's case than the Respondent's albeit that it is not on its own definitive either way.

33. On 18 November 2018, the Claimant emailed Ms Leiter. In the email he complained that he and his colleagues were forced to operate the Waterloo Hub with 3 rather than 4 people. He also referred to the problem of there being urine, faeces and smoke from cigarettes and drugs, as well as people being in the way.

34. In the course of the hearing, the tribunal asked whether there was any written risk assessment of the operation at the Waterloo Hub. Mr Hadland was not aware of

any. The tribunal was not otherwise pointed to one during the hearing. In fact there is one that appears twice in the bundle. It is dated 20 November 2019 and is signed by Mr Manley and Ms Leiter. It refers to there being:

34.1. A minimum of three operatives;
34.2. Walking 'the bike' to the cage (in the singular). It does not expressly say that only one bike can be walked at time nor does it say more than one bike can be walked at a time.

35. On 20 November 2019, Mr Claudio Lisi produced an investigation report. He recommended that matters proceed to a disciplinary hearing. On 22 November 2019, Mr Manley, Operations Manager, asked Ms Greta McCarty to conduct a disciplinary hearing with Claimant.

36. On 21 November 2019, Mr Marcos Amaya, Mobile Operative, made a complaint about the Claimant. The essence of it was that:

36.1. The Claimant had picked him up on arriving to work late;
36.2. The Claimant had spoken about him to colleagues saying things like, *"Marcos does not respect us, he respects management more"*.
36.3. The Claimant took charge and if others did not follow his lead there were problems;
36.4. The Claimant had shouted at him about the number of bikes he had stacked and the way he had stacked them.

37. On around 2 December 2019, Mr Manley commissioned Kamal Balgobin to investigate Mr Amaya's complaint.

38. On 3 December 2019, the Claimant attended a disciplinary hearing with Ms McCarty. The Claimant said that Mr Manley was making an example of him. On 13 December 2019, Ms McCarty gave the Claimant a final written warning for failure to follow the Respondent's code of conduct and conflict avoidance training.

39. On 5 December 2019, Mr Amaya was interviewed by Mx Balgobin. Mr Amaya:

39.1. Said the Claimant was critical of his punctuality, the pace at which he worked, his finish times and said that MOs should skip their breaks to arrive on time. He said that the Claimant's expectations of co-workers caused tension. He complained that the Claimant had criticised him for listening to music and making phone calls in working time. He asked for a number of things to be clarified, such as the Claimant's role, the timings of the shift and boundaries between co-workers.
39.2. He did not repeat any suggestion that the Claimant had shouted at him.
39.3. He also said that "*recently MOs have been instructed to move bikes one at a time.*"

40. On 11 December 2019, Mr Aiden Looney was interviewed. Mr Looney reported that the Claimant had made comments about Mr Amaya to colleagues, that he had encouraged Mr Amaya to speak up for himself, that the Claimant had said Mr Amaya was not a team player, and that the Claimant had his way of working and

could be difficult if others did not follow his lead. He said that the Claimant could be rude when giving instructions.

41. Also on 11 December 2019, Mr Daniel Czaijkowski was interviewed. He said:

    41.1. There were problems with Mr Amaya's punctuality and that Mr Amaya did not move as quickly as others,
    41.2. He had not seen any arguments between the Claimant and Mr Amaya,
    41.3. The MOs had been briefed to move bikes one at a time around a month before and this had led to duties taking longer. That the hub had been run by four people then fell to three. Now, however, it had been increased to four or five.

42. On 6 January 2020, the Claimant was working at the Waterloo Hub in the evening rush hour with two colleagues, Mr Mason and Mr Nicholas. The Claimant organised the work as follows. Mr Mason would take a bike from the dock halfway to the cage. The Claimant would then take the bike the rest of the way to the cage and Mr Nicholas would stay in the cage and stack the bicycles. This process would repeat itself one bicycle at a time. They were short handed and a large queue of commuters waiting for an empty dock to built up. One customer tweeted a picture of the queue. In his tweet he was critical of the wait and of the MOs wheeling only one bicycle at a time.

43. On 7 January 2020, the Claimant emailed Ms Leiter in the following terms:

> Hi Andrea,
>
> I'd like to start by wishing you a happy and better new year, 2020!
>
> Secondly, I d like to let you know that the management continues to keep us short at hubs (Belgrove and Waterloo), moreover the management encouraged and continues encouraging people to take 2 bicycles at a time, which put the others, folowing the rules given by taking 1 bicycle at a time, in a bad situation, position in front of the customers and not only.
> Furthermore, for over 1 year Clapham management told and continues to encourage people assigned to Waterloo hub, on early shift, to arrive and start the hub 30 minutes later, which automatically is 30 minutes less from the total of daily working hours, promoting a bad education/mentality, fault of respect towards those arriving on time.
> We see no improvements regarding the issues I (we) have raised.
> As it has happened before when reported the issues within LCHS, it seems having no point in keep raising our issues further to Serco, as no improvements can be seen.
>
> Thank you for your time and understanding.

44. On 8 January 2020, the Claimant and Mr Mason were both working at the Waterloo Hub again as was Mr Witter. Mr Witter and Mr Mason began their shift when the Claimant called Mr Witter and said they should not have started their shift yet. Mr Mason called Remi Jackson, Team Leader, and asked his advice. His advice was to carry on and he said two further members of staff were on their way. In the course of the shift, a dispute arose as to whether or not they were allowed to push two bicycles at a time. Mr Mason telephoned Mr Jackson again and Mr Jackson said that they could push bicycles two at time. A disagreement

arose about this with the Claimant's position being that they were only allowed to push one bicycle. The words used are a matter of dispute.

45. On 9 January 2020, Mr Mason gave a witness statement in which he recorded the above matters and said that:

    45.1. On 6 January 2020 (he mistakenly refers to 7 January) he had asked the Claimant why he was pushing one bicycle and the Claimant had said "*he wants to take his time and make people (customers) wait"*.
    45.2. The Claimant had said on 8 January 2020, when told that Mr Jackson had said that it was ok to push two bicycles, "*Remi does not know what he's talking about".*

46. On 9 January 2020, the Claimant was suspended in the morning by Mr Manley. In the afternoon he was sent a letter stating that the investigation was into allegations that:

    46.1. Failing to follow reasonable management instructions;
    46.2. Insubordination;
    46.3. Bullying and harassment.

47. On 9 January 2020, Mr Montul was interviewed about the shift on 8 January 2020. On his account the Claimant had told his colleagues that by law they should be moving one bike at a time. He also said that the Claimant had a negative attitude towards him and that the Claimant had not given a customer space when taking a bicycle. He did not say anything about Remi Jackson.

48. On 9 January 2020, the Claimant emailed Ms Leiter stating:

> Hi Andrea,
>
> We all, mostly and persistently myself, have been raised these and other more issues, for years now, gradually up to the Contract Manager and received the same answers and same results, careless, deliberate ignorance, lack of competence, lack of proactiveness.
> These issues and other need to be raised within Serco as higher as possible. We really need help as it is going for years from bad to worse. The issues are deeper that it could be seen.
>
> Thank you once again for your time and understanding.

49. On 10 January 2020, Mr Torrento was interviewed. He said the Claimant conducted himself as if he were a manager and spoke to others in a way that was a bit louder. He said that Claimant had said that "*Remi was wrong*" on 8 January 2020.

50. On 10 January 2020, Mr Witter was interviewed. He said that the Claimant spoke a lot about health and safety. He referred to the fact that Mr Mason had contacted Remi Jackson and had been told that it was okay to push two bicycles but did not report the Claimant saying anything about Mr Jackson. He said that the Claimant took the hub work too seriously and that he could speak to members of the public in a way that was not polite.

51. On 13 January 2020 the Claimant was invited to an investigation meeting. The letter said that the allegations under investigation were:

    51.1. Instructing other members of the team to slow down work to cause disruption at Waterloo hub;
    51.2. Demonstrating insubordinate behaviour by deliberately not following instruction;
    51.3. Bullying and harassing other members of the mobile operative team.

52. On 14 January 2020, the Claimant made a further complaint to Ms Leiter:

> Hi Andrea,
>
> If is possible to pass by to Waterloo in the morning in the next days my colleagues will appreciate very much.
>
> As from today for the rest of the week my colleagues have been informed they will have to undergo the Hub duties in only 3. As told, instructed by LCHS management and demonstrated by Team Leader on street Remi Jacson, on Waterloo Hub, yesterday, 13th January 2020, my colleagues are pushing 2 bicycles at a time through the road.
>
> Thank you for your time and understanding, Andrea.

53. On 16 January 2020 the Claimant attended an investigation meeting chaired by Mr Balgobin.

    53.1. The Claimant said they had been told to only wheel one bike at time due to health and safety;
    53.2. On 8 January he had told colleagues only to wheel one bike, and when they said that Mr Jackson had said it was ok to wheel two, the Claimant told them that Mr Jackson was wrong and it was up to them if they chose to wheel two bicycles. The Claimant said he had been briefed on this by HSE Managers, one was Andreia Leiter and the other her boss Dave [Chivers, head of H&S].
    53.3. The Claimant gave an account of an occasion on which he had spoken to Mr Adaya about his punctuality in his arrival time at the hub. He also said that he was concerned about Mr Adaya using his phone and listening to music on shift. He said Mr Adaya had come up in conversation with others.
    53.4. The Claimant said that the allegations against him were staged and that he was being targeted because he caused a lot of issue to management.

54. On 13 January 2020, Mr Nicholas was interviewed. He referred to a "one bike policy" – plainly a reference to being told only to wheel one bicycle at a time. He reported that he was aware of a "slight altercation" between the Clamant and Mr Anaya.

55. Also on that day, Mr Mason was interviewed. He did not repeat the allegation previously made on 9 January, that the Claimant had said words to the effect that he wanted to work slowly to make people wait. He did say that the Claimant had said "*by a certain time he only wanted about 150 bikes by 6:30, saying they wanted him to go slow and that they could only take one".* We do not follow what

this means. He also did not repeat the allegation, previously made on 9 January, that the Claimant had said Mr Jackson did not know what he was talking about.

56. On 31 January 2020, Mr Balgobin produced an investigation report. He recommended a disciplinary hearing. Having referred to the Claimant's position that the MOs had been told to push only one bike at a time, he says this:

> This process is not the standard operating process for the Waterloo hub. The standard operating process at that time was that each MO takes one or two bikes (at their discretion on what they feel comfortable to to) at a time and delivers them to the storage area. The MO then waits at the storage area until the next MO arrives, so that the storage area is not left unattended,

57. It is unclear where this description of the standard operating process came from. Mr Balgobin had not interviewed anyone at all of a management grade, whether low level management such as Mr Jackson or high level management such as Mr Chivers. The description of the standard operating process adopted as if an objective fact, entirely overlooks what several people interviewed had told him, namely that there had been a rule that only one bicycle could be pushed at a time. The Claimant said this had come from Mr Chivers and Ms Leiter. Others were less specific about the origin of the rule but made plain there was such a rule.

58. The Claimant was invited to a disciplinary hearing on 16 February to take place on 18 February 2020.

61. On 18 February 2020, the Claimant attended a disciplinary hearing accompanied by Austin Walshe. Mr Hadland chaired the hearing.

62. The Claimant repeated his position that Mr Chivers had attended the hub on 14 November 2019 and directed that only one bicycle be pushed. The only action point arising from the hearing was for Mr Hadland to contact Ms Leider and Mr Chivers to verify the Claimant's account.

63. Mr Hadland did not speak to Ms Leider. He could not recall now exactly why not but he thought perhaps she had been on leave. He says that he did speak to Mr Chivers. However, there is no note of him doing so, Mr Elliot was unaware at the appeal stage that he had done so, and there is no reference to this conversation in the Amended Grounds of Resistance which otherwise give a detailed account of the disciplinary process.

64. On balance (and by only a very fine margin) we accept that Mr Hadland did speak to Mr Chivers. However, our finding is that the conversation was nothing more than lip service to the action point from the disciplinary hearing and was wholly inadequate:

    a. Mr Hadland's account of the conversation was extremely vague and the only real point he made about it was that Mr Chivers had told him that it was okay to push two bicycles at the Waterloo hub if the MO felt comfortable.

b. However, Mr Hadland was specifically asked by the tribunal, whether he had asked Mr Chivers what he had briefed staff on 14 November 2019 (because that was a key issue). Mr Hadland said he had not asked Mr Chivers this question.
c. Another indicator that the conversation was wholly inadequate is that it did not reveal the fact that on 20 November 2019 a risk assessment of the Waterloo Hub operation had been carried out. That is quite remarkable.

65. On 25 February 2020, the Claimant was summarily dismissed with pay in lieu of notice. The terms of the email of dismissal are important and so we reproduce the key parts in full:

> Following the final written warning to you dated 13th December 2019 and your subsequent misconduct on, most recently on 8th January 2020, I confirm the decision to terminate your employment. The reasons for your dismissal are that:
>
> - With regards to obstructing the work of others you stated that you had not instructed fellow team members to only carry one bike which was in contradiction to the working instruction but had merely advised them that in your opinion, based on conversations with HSE colleagues, it was safer to only carry one bike. This in your account was a suggestion but in the account of your colleagues (which are numerous) it was a direction as if you were their supervisor which of course you were not. It was also incorrect as it is up to the individual whether they carry one or two bikes and contradicted local management. Serco is very keen that safety issues are called out by anybody at any time but the accounts of the day do not suggest there was an imminent danger to be called out.
> - Your previous statements and what you advised during our meeting arounds the work instruction also contradict your account that you were merely suggesting to your colleagues to carry one bike. If that was the case it does not stand to reason that you would then be at pains to prove the work instruction wrong and demonstrate that carrying one bike was indeed the rule.
> - As for he bullying and harassment claims during our meeting you did not dispute that you had at times spoken to team members through frustration, not least Marcos who's punctuality you were disappointed with (I note your comments from the meeting that he was later than the investigation stated). While your conversations may have been meant with the best of intentions the evidence of Marcos and Marcal amongst others makes it clear that did not come across in that way and as such could be deemed harassment.
> - You were adamant throughout our meeting that you were just trying to get the job done safely. This is of course what we expect from all employees but I do not believe you have ever considered that Serco has assessed the risk, has put measures in to place and that they are fit for purpose. You have consistently fought against this implying a lack of consideration for HSE that does not reflect reality. Your challenge to the HSE guidance now gone beyond what is reasonable and is obstructive.
> - Finally, from the investigation, through to the meeting you have been consistent in your criticism of the local management and especially resourcing. Dealing with the resourcing first it has been a consistent message from you that you are concerned by the resourcing, and as I understand it you have been given the chance to raise those concerns to senior management who have given you their assurance it is being dealt with. Turning to your criticism of the local managers and Serco's processes. As per your formal written warning you have "continued to do what you believe is best rather than what the business has advised you". You have had chance to express your concerns and while a difference of opinion may remain ultimately there should be a point where you accept what your managers say, that you have failed to reach that point despite the formal warning suggest you have no intention of respecting local management or Serco's processes.

66. On 2 March 2020, the Claimant appealed against his dismissal. Ultimately, one of the points of appeal was that Mr Czaijkowski's statement had not been included in the disciplinary pack, though it was clear from the investigation report that it existed.

67. The appeal coincided with the start of the pandemic. The Claimant was insistent upon having a face to face appeal hearing and there was a lot of correspondence

about this. The Respondent offered to hold the hearing by telephone and/or by Skype video call. The Claimant ultimately did not accept either of these means because he thought the hearing should take place face to face with social distancing.

68. On 22 April 2020, the appeal hearing proceeded in the Claimant's absence. On 27 April 2020, Mr Elliot dismissed the Claimant's appeal. With the appeal outcome letter he sent the Claimant a copy of Mr Czaijkowski's statement for the first time.

Law

Public interest disclosures

59. A protected disclosure is a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H. A qualifying disclosure is defined by section 43B, as follows:

> *(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—*
> *[…]*
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> *[…]*
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*

60. In ***Williams v Michelle Brown AM***, UKEAT/0044/19/OO at [9], HHJ Auerbach identified five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

> *'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.'*

61. As for what might constitute a disclosure of information for the purposes of s.43B ERA, in ***Kilraine v London Borough of Wandsworth*** [2018] ICR 1850 CA, Sales LJ provided the following guidance:

> *'30. the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the Judgment below at*

[30], set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other […]
31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.
[…]
35. In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).
[…]
36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a Tribunal in the light of all the facts of the case.
[…]
41. It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in in the Cavendish Munro case [at paragraph 24], the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "You are not complying with health and safety requirements", the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim under the protected disclosures regime in Part IVA of the ERA, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the Claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner.'

62. The issues arising in relation to the Claimant's beliefs about the information disclosed were reviewed by Linden J in ***Twist DX Ltd***, from which the following principles emerge.

    62.1. Whether the Claimant held the belief that the disclosed information tended to show one or more of the matters specified in s.43B(1)(a)-(f) ('the specified matters') and, if so, which of those matters, is a subjective question to be decided on the evidence as to the Claimant's beliefs (at [64]).
    62.2. It is important for the ET to identify which of the specified matters are relevant, as this will affect the reasonableness question (at [65]).

62.3. The belief must be as to what the information 'tends to show', which is a lower hurdle than having to believe that it 'does show' one of more of the specified matters. The fact that the whistleblower may be wrong is not relevant, provided his belief is reasonable (at [66]).

62.4. There is no rule that there must be a reference to a specific legal obligation and/or a statement of the relevant obligations or, alternatively, that the implied reference to legal obligations must be obvious, if the disclosure is to be capable of falling within section 43B(1)(b). Indeed, the cases establish that such a belief may be reasonable despite the fact that it falls so far short of being obvious as to be wrong (at [95]).

63. The Court of Appeal considered the 'public interest' test in ***Chesterton Global Ltd v Nurmohamed*** [2018] ICR 731. There is lengthy discussion of that leading case in ***Dobbie v Felton (t/a Feltons Solicitors)* - [2021] IRLR 679**, in which HHJ Tayler said this:

> *There are a number of key points I consider it is worth extracting from Underhill LJ's reasoning, and re-emphasising:*
>
> *(1) the necessary belief is that the disclosure is made in the public interest. The particular reasons why the worker believes that to be so are not of the essence*
> *(2) while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it – Underhill LJ doubted whether it need be any part of the worker's motivation*
> *(3) the exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest*
> *(4) a disclosure which was made in the reasonable belief that it was in the public interest might nevertheless be made in bad faith*
> *(5) there is not much value in trying to provide any general gloss on the phrase 'in the public interest'. Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression*
> *(6) the statutory criterion of what is 'in the public interest' does not lend itself to absolute rules*
> *(7) the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest*
> *(8) the broad statutory intention of introducing the public interest requirement was that 'workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers'*
> *(9) Mr Laddie's fourfold classification of relevant factors may be a useful tool to assist in the analysis:*
> *i. the numbers in the group whose interests the disclosure served*
> *ii. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed*

iii. the nature of the wrongdoing disclosed
iv. the identity of the alleged wrongdoer
(10) where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest.

64. HHJ Tayler went on to say this:

There are a few general observations I consider it worth adding:

(1) a matter that is of 'public interest' is not necessarily the same as one that interests the public. As members of the public we are interested in many things, such as music or sport; information about which often raises no issue of public interest
(2) while 'the public' will generally be interested in disclosures that are made in the 'public interest', that does not necessarily follow. There may be subjects that most people would rather not know about, that are, nonetheless, matters of public interest
(3) a disclosure could be made in the public interest although the public will never know that the disclosure was made. Most disclosures are made initially to the employer, as the statute encourages. Hopefully, they will be acted on. So, for example, were a nurse to disclose a failure in the proper administration of drugs to a patient, and that disclosure is immediately acted on, with the consequence that he does not feel the need to take the matter any further, that would not prevent the disclosure from having been made in the public interest – the proper care of patients is a matter of obvious public interest
(4) a disclosure could be made in the public interest even if it is about a specific incident without any likelihood of repetition. If the nurse in the example above disclosed a one off error in administration of a drug to a specific patient, the fact that the mistake was unlikely to recur would not necessarily stop the disclosure being made in the public interest because proper patient care will generally be a matter of public interest
(5) while it is correct that as Underhill LJ held there is 'not much value in trying to provide any general gloss on the phrase 'in the public interest' – noting that 'Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression' – that does not mean that it is not to be determined by a principled analysis. This requires consideration of what it is about the particular information disclosed that does, or does not, make the disclosing of it, in the reasonable belief of the worker so doing, 'in the public interest'. The factors suggested by Mr Laddie in Chesterton may often be of assistance. While it certainly will not be an error of law not to refer to those factors specifically, where they have been referred to it will be easier to ascertain how the analysis was conducted. It will always be important that written reasons set out what factors were of importance in the analysis; which may

include factors that were not suggested by Mr Laddie in Chesterton. As Underhill LJ held 'The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case'. It follows that if no account is taken of factors that are relevant; or relevant factors are ignored, there may be an error of law
(6) for the disclosure to be a qualifying disclosure it must in the reasonable belief of the employee making the disclosure tend to show one or more of the types of 'wrongdoing' set out in s 43B(a)–(f) ERA. Parliament must have considered that disclosures about these types of 'wrongdoing' will often be about matters of public interest. The importance of understanding the legislative history of the introduction of the requirement for the worker to hold a reasonable belief that the disclosure is 'made in the public interest' is that it explains that the purpose was to exclude only those disclosures about 'wrong doing' in circumstance such as where the making of the disclosure serves 'the private or personal interest of the worker making the disclosure' as opposed to those that 'serve a wider interest'
(7) while the specific legislative intent was to exclude disclosures made that serve the private or personal interest of the worker making the disclosure, that is not the only possible example of disclosures that do not serve a wider interest, and so are not 'made in the public interest'. There might be a disclosure about a matter that is only of private or personal interest to the person to whom the disclosure is made and does not raise anything of 'public interest'
(8) while motivation is not the issue; so that a disclosure that is made with no wish to serve the public can still be a qualifying disclosure; the person making the disclosure must hold the reasonable belief that the disclosure is 'made' in the public interest. If the aim of making the disclosure is to damage the public interest, it is hard to see how it could be protected. Were a worker to disclose information to his employer, that demonstrates that it is discharging waste that is damaging the environment, with the aim of assisting in a coverup, or to recommend ways in which more waste could be discharged without being found out; while the disclosure would otherwise be a qualifying disclosure, it is hard to see how the disclosure could be 'made' in the public interest. The fact that a disclosure can be made in 'bad faith' does not alter this analysis. A worker might make public the fact that the employer is discharging waste because he dislikes the MD, and so is acting in bad faith, but nonetheless hold the reasonable belief that making the disclosure is in the public interest because the discharge of waste is likely to be halted. Generally, workers blow the whistle to draw attention to wrongdoing. That is often an important component of why in making the disclosure they are acting in the public interest.

65. S.47B(1) 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.

66. Care must be taken to establish the 'reason why' the employer acted as it did. The 'reason why' is the set of facts operating on the mind of the relevant decision-maker, it is not a 'but for' test. The correct test is whether 'the protected disclosure materially influences (in the sense of being more than a trivial influence on) the employer's treatment of the whistleblower (***Fecitt v NHS Manchester*** [2012] IRLR 64 at [45]).

67. S.48 ERA provides:

> *(1A) A worker may present a complaint to an employment Tribunal that he has been subjected to a detriment in contravention of section 47B.*
> *[…]*
> *(2) On a complaint under subsection […](1A)[…] it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*

Health and safety cases

68. Section 44 ERA provides:

> *(1)An employee 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—*
>
> *(a)having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,*
>
> *(b)being a representative of workers on matters of health and safety at work or member of a safety committee—*
>
> *(i)in accordance with arrangements established under or by virtue of any enactment, or*
>
> *(ii)by reason of being acknowledged as such by the employer,*
>
> *the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,*
>
> *(ba)the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise),*
>
> *(c)being an employee at a place where—*
>
> *(i)there was no such representative or safety committee, or*
>
> *(ii)there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,*

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(1A) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that—

(a)in circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work, or

(b)in circumstances of danger which the worker reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger.

(2)For the purposes of subsection (1A)(b) whether steps which a worker took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) A worker is not to be regarded as having been subjected to any detriment on the ground specified in subsection (1A)(b) if the employer shows that it was (or would have been) so negligent for the worker to take the steps which he took (or proposed to take) that a reasonable employer might have treated him as the employer did.

(4). . . This section does not apply where the [worker is an employee and the] detriment in question amounts to dismissal (within the meaning of Part X).

Unfair dismissal

69. There is a statutory right not to be unfairly dismissed. There is a limited range of potentially fair reasons for dismissal (s.98 Employment Rights Act 1996).

70. Section 100 ERA provides

100 Health and safety cases.

(1)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—

(a)having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b)being a representative of workers on matters of health and safety at work or member of a safety committee—

(i)in accordance with arrangements established under or by virtue of any enactment, or

(ii)by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(c)being an employee at a place where—

(i)there was no such representative or safety committee, or

(ii)there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d)in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e)in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2)For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3)Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

71. S.103A ERA provides:

> *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.*

72. There is an important distinction between detriment cases, where it is sufficient that the disclosure is a material factor in the treatment, and dismissal cases, where it must be the sole or principal reason (***Fecitt v NHS Manchester*** [2012] ICR 372 CA).

73. The approach to the burden of proof in section 103A claims was summarised by Mummery LJ in ***Kuzel v Roche Products*** [2008] ICR 799 as follows:

> '[…]
> [52] Thirdly, the unfair dismissal provisions, including the protected disclosure provisions, pre-suppose that, in order to establish unfair dismissal, it is necessary for the ET to identify only one reason or one principal reason for the dismissal.
> [53] Fourthly, the reason or principal reason for a dismissal is a question of fact for the ET. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.
> […]
> [57] I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.
> [58] Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.
> [59] The ET must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, it is not necessarily so.
> [60] As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the Tribunal to find that, on a consideration of all the evidence, in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.'

74. However, as Mummery LJ said

> *[55]* ". . . the burden of proof issue must be kept in proper perspective. As was observed in *Maund* . . . when laying down the general approach to the burden of proof in the case of rival reasons for unfair dismissal, only a small number of cases will in practice turn on the burden of proof."

75. This case does not turn on the burden of proof. As set out below, we have been able to make a positive finding of fact about the reason for the dismissal.

76. The 'reason' for dismissal is the factor operating on the decision-maker's mind which causes him/her to take the dismissal decision (**Croydon Health Services NHS Trust v Beatt** [2017] ICR 1420). The net could be case wider if the facts known to, or beliefs held by, the decision-maker had been manipulated by another person involved in the disciplinary process with an inadmissible motivation, where they held some responsibility for the investigation. That person could also have constructed an invented reason for dismissal to conceal a hidden reason (***Royal Mail Ltd v Jhuti*** [2020] All ER 257.)

Fairness

77. If there is a potential fair reason for a dismissal, the fairness of the dismissal is assessed by applying the test at s.98 (4) ERA.

78. In ***BHS v Burchell*** [1980] ICR 303, the EAT gave well known guidance as to the principal considerations when assessing the fairness of a dismissal purportedly by reason of conduct. There must be a genuine belief that the employee did the alleged misconduct, that must be the reason or principal reason for the dismissal, the belief must be a reasonable one, and one based upon a reasonable investigation.

79. However, the ***Burchell*** guidance is not comprehensive, and there are wider considerations to have regard to in many cases. For instance, wider procedural fairness, the severity of the sanction in light of the offence and mitigation are important considerations.

80. In ***Iceland Frozen Foods v Jones*** [1982] IRLR 439, the EAT held that the tribunal must not simply consider whether it personally thinks that a dismissal was fair and must not substitute its decision as to the right course to adopt for that of the employer. The tribunal's proper function is to consider whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

81. The range of reasonable responses test applies to all aspects of dismissal. In ***Sainsbury's v Hitt*** [2003] IRLR 23, the Court of Appeal emphasised the importance of that test and that it applies to all aspects of dismissal, including the procedure adopted.

82. Live final warnings can be taken into account by the employer even where they relate to a different type of conduct to the matter currently under investigation: ***August Noel Ltd v Curtis*** [1990] IRLR 326.

83. In the ordinary course of events, an employer considering dismissal is not required to re-open the circumstances in which a live final written warning was given. The essential principle is that it is legitimate for an employer to rely on a final warning provided that (***Davies v Sandwell Metropolitan Borough Council*** [2013] EWCA Civ 135 (at paragraphs 20 and 21) and ***Wincanton Group Plc v Stone & Anor*** [2013] IRLR 178 as per Langstaff P):

    83.1. It was issued in good faith;
    83.2. There were at least prima facie grounds for imposing it; and
    83.3. It was not manifestly inappropriate to have issued it.

Discussion and conclusions

Protected disclosures

84. It is convenient to first address the question of whether the Claimant made any protected disclosures. By reference to the List of Issues we find as follows:

85. Disclosure (i): the Respondent amits that this was a PID and we so find.

86. Disclosure (ii): this PID is made out:

    86.1. The Claimant disclosed information orally to Ms Castledine. The information was that the MOs' PPE was inadequate and the Claimant gave details of the inadequacy relating to waterproofing;
    86.2. The Claimant did believe that this tended to show that health and safety was at risk. The very subject matter of his disclosure related to PPE. He believed it was inadequate to keep MOs dry. They worked outside all or most of the day. That was a reasonable belief since of its nature PPE is something that is there to protect people and if it is inadequate then in probability there is a risk to safety. Protection from the elements is a basic health and safety matter. It is also clear from the resolution of this issue that the Respondent agreed to improve the wet-weather PPE and that lends weight to our view that the Claimant's belief was reasonable.
    86.3. The Claimant also had a belief, which was reasonable, that it was in the public interest to disclose the information that he did. We are satisfied that the Claimant was concerned not only for himself but always also for his colleagues. We do not know how many MOs there were but it is plain from the size of the operation that there must have been at the least 10s of them. The interests affected were the health and wellbeing of the Claimant and others. The employer was a private one but one that was providing essential services directly to the public pursuant to an agreement with a public sector body (TfL).

87. Disclosure (iii): this PID is made out:

    87.1. The Claimant orally disclosed information to Ms Castledine. The information was that the PPE was inadequate and that the Waterloo hub was understaffed;

87.2. The Claimant did believe that this tended to show that health and safety was at risk because the PPE was inadequate to keep MOs, who worked outside all or most of the day, dry. Our analysis of this is as above for PID (II). The Claimant also believed that the short staffing was harmful to health. He believed that it tended to lead to people being overworked, drained physically and mentally. In our view that was a reasonable belief. The Claimant had direct experience of the staffing levels and the impact on staff. That combines with common sense: working in an understaffed can be draining physically and mentally to the point of being harmful to wellbeing.

87.3. The Claimant also had a belief, which was reasonable, that it was in the public interest to disclose the information that he did. We are satisfied that the Claimant was concerned not only for himself but always also for his colleagues. We do not know how many MOs there were but it is plain from the size of the operation that there must have been at the least 10s of them. The interests affected were the health and wellbeing of the Claimant and others. The employer was a private one but one that was providing essential services directly to the public pursuant to an agreement with a public sector body (TfL).

88. Disclosure (iv): the Respondent admits that this was a PID and we so find.

89. Disclosure (v): this PID is made out:

89.1. The Claimant disclosed information to Mr Soames. Not everything he said in his email would amount to a disclosure of *information* but some of what he said did. In particular, that they were working with less staff than they should be and that it said on paper they should be, that it overloaded them and put their health and safety at risk, draining them physically and mentally.

89.2. The remaining tests were satisfied. We repeat the reasoning from disclosure (iii).

90. Disclosure (vi): the Respondent admits that this was a PID and we so find.

91. Disclosure (vii): this PID is made out:

91.1. The Claimant disclosed information: that the management continued to short staff the hubs and that management were encouraging an internal safety rule, to push one bicycle at a time, to be broken.

91.2. The Claimant subjectively believed that this tended to show that health and safety was at risk. That was a reasonable belief. We repeat the analysis above in relation to staffing levels. In relation to pushing bikes, the Claimant's belief, was that Mr Chivers had determined that only one bicycle could safely be pushed if the hub was to operated in a safe way and that that it was not safe to push more than one bicycle. There was a reasonable basis for this belief. Firstly, three colleagues reported to the Claimant that

this is what Mr Chivers had said. Secondly, since Mr Chivers was a senior health and safety manager and since he had conducted a site based assessment, it was reasonable to believe the contradicting his safety advice on the method of work tended to risk safety.

91.3. The Claimant believed, and reasonably so, that this disclosure was in the public interest. We repeat the analysis above which also applies here. The Claimant was concerned not only for himself but always also for his colleagues. We do not know how many MOs there were but it is plain from the size of the operation that there must have been at the least 10s of them. The interests affected were the health and wellbeing of the Claimant and others. The employer was a private one but one that was providing essential services directly to the public pursuant to an agreement with a public sector body (TfL).

92. Disclosure (viii): this PID is made out:

92.1. In our view, this disclosure was essentially a reference back and repetition of disclosure VII. The Claimant was saying that the issues he had disclosed were still happening. He believed this and reasonably so. He had direct experience of what was going on, on the ground.

92.2. The remaining tests are met: the analysis of disclosure VII is repeated.

93. Disclosure (ix): this PID is made out:

93.1. The Claimant disclosed information, namely that the hub was going to be understaffed for the rest of the week and that Mr Jackson was wrongly instructing the Claimant's colleagues to push two bicycles instead of one.

93.2. The analysis of this disclosure is essentially the same as that of Disclosure VII which we repeat.

PID detriment complaints

Detriment (i)

94. Ms Castledine did say to the Claimant words to the effect *of 'careful how you chose your words'* in the context of him trying to get her to deal with concerns he had about health and safety on 25 July 2019.

95. In our view, that was a detriment. The Claimant interpreted what Ms Castledine said as a threat and that was a reasonable interpretation. It implied there could be some sort of adverse repercussion if he did not choose his words with care. He could reasonably regard that as detrimental.

96. By this stage the Claimant had made disclosures (i) and (ii). Although we have not heard from Ms Castledine, on balance, we think it is unlikely that this exchange was on the grounds or partly on the grounds of those disclosures. We think it is more likely that the ground of the treatment was the conversation the

Claimant had with Ms Castledine on that day itself (25 July 2019). The Claimant wanted to show Ms Castledine some H&S issues there and then whereas she considered it was not the right time. It is the Claimant's way to be very persistent and we think it was approach he took on this day that precipitated the comment and not disclosures (i) and/or (ii).

Detriment (ii)

97. A number of distinct matters in fact fall under this heading.

98. *Initiating the investigation that led to the letter of concern in August 2019.* We do not know who initiated that investigation (the Claimant said in closing submissions – not evidence - it was Mr Manley). We also do not know the subject matter of the investigation. However, we know the outcome was simply to remind the Claimant of his conflict avoidance training. There is very little to go on in respect of this matter, but the outcome is so wholly benign that it seems implausible to us that any part of this was because of the Claimant's PIDs. It would just be so pointless to go through this exercise and end with this outcome that we think, on balance, the initiation of the investigation was not on grounds of any PID.

99. *Initiating the investigation the letter of concern 2 in September 2019.* We do not know who initiated that investigation (the Claimant said in closing submissions – not evidence - it was Mr Manley). The subject matter was an incident in which the Claimant had some level of altercation with a member of the public who tried to take a bicycle from him rather than from a dock. The outcome was again very benign. Again there is very little to go on but, again, we think the outcome is so wholly benign that it seems implausible that any part of reason for the treatment was the Claimant's PIDs. It would just be so pointless to go through this exercise and end with this outcome that it is implausible there was any ulterior reason for it. We are also satisfied that there were some indeed shortcomings in the Claimant's ability to deal with members of the public that meant disputes arose from time to time and this is likely to be the true reason for this episode.

100. *The disciplinary process that led to the final written warning*. This was instigated by Mr Manley. It was investigated by Mr Lisi who recommended a disciplinary hearing. The disciplinary hearing was conducted by Ms McCarty and she imposed the final written warning. In our view there was no ulterior reason at work here. Three significant incidents with members of the public *had* occurred. The nature of the incidents and the Claimant's account of them meant it was not at all surprising that it was dealt with in the way it was. We have given our view of the Claimant's conduct in these incidents in our findings of fact. Instigating and pursuing a disciplinary process through to a significant sanction is all in keeping with, and proportionate to, the underlying conduct. The PIDs were no part of the ground of this treatment.

Detriment (iii)

101. The Claimant was suspended and Mr Manley was the decision maker. It is true that this suspension was temporally proximate to some of the PIDs. However, the reality is that the claimant raised complaints so frequently that if any adverse event had happened at almost any time it would have been temporarily proximate to a complaint.

102. We do not think there was an ulterior reason for the suspension. It is clear that the queue at Waterloo on 6 January 2020 had caused significant concern and embarrassment to the Respondent. It was sensitive about the matter. Mr Mason gave a statement on 9 January 2020 in which he alleged, in effect, that the Claimant had sabotaged the operation at Waterloo, deliberately going slowly in order to make customers wait.

103. In those circumstances, suspension for an investigation to take place, was essentially inevitable or at the least entirely unsurprising. We do not think any PID was any part of the grounds for the treatment.

Detriment (iv)

104. We do not think that the instigating/pursuing disciplinary proceedings was on the grounds of a PID(s). We repeat the analysis of detriment (iv). Allegations had been made against the Claimant and they needed to be investigated since at their height they suggested significant misconduct. The PIDs were not the ground or part of the ground for instigating/pursuing a disciplinary investigation.

105. However, as we will now see, the PIDs did indeed influence the outcome of those disciplinary proceedings.

Unfair dismissal

106. The Respondent's case is that the decision makers were not aware of the Claimant's PIDs and did not make their decision in any part because of them. The dismissal was, it says, solely because of conduct. Further, the Respondent's position is that since the Claimant was on a final written warning, severe misconduct was not required in order to justify dismissal and that makes the Claimant's dismissal all the more unsurprising.

107. We reject the Respondent's case. We infer that the decision makers were aware of the PIDs and find that the reason for the Claimant's dismissal was because of the PIDs or at least the more recent ones that he had made. As a result of the PIDs the Claimant was seen as an insubordinate troublemaker and the disciplinary proceedings were used as an occasion to dismiss him. We do not reach this conclusion lightly, however, we are driven to it for the following reasons that, in our view, cumulatively make the PIDs the most likely reason for the Claimant's dismissal.

108. The disciplinary investigation report was very slanted and in a suspicious way. It stated as if it were an objective fact that the standard operating procedure at

the Waterloo Hub was to wheel two bicycles if the MO felt comfortable. However, there was copious express evidence in the interviews conducted during the investigation to the contrary. Several employees indicated that there was a 'one bicycle' policy. In summarising the evidence in the investigation report this evidence was simply omitted in favour of reporting the purported standard operating procedure as if it were an objective fact. The evidence which was ignored was of central importance to allegation 1. As drawn that was a really serious allegation: effectively that the Claimant had been pushing one bike at a time as sort of deliberate sabotage of the Respondent's operation.

109. This was all the more suspicious in light of the fact that, it seems, not a single manager was interviewed in order to ascertain how things were supposed to work at Waterloo. It is hard to see how the investigator could have arrived at the definitive view expressed in the report with the evidence actually gathered..

110. There was an almost complete failure to properly investigate the Claimant's case that - far from being on a frolic of his own in relation to the number of bicycles that could be pushed - there had been a briefing from Mr Chivers, a very senior health and safety manager, just a month or so previously to precisely that effect. The Claimant's case was very obviously that it was Mr Chivers' briefing rather than simply the Claimant's personal opinion about how many bicycles should be pushed that was behind his actions. This account was of central importance both to the allegation of sabotage and the allegation of insubordination/failure to follow a reasonable management instruction. It was of first importance to properly investigate the Claimant's case that Mr Jackson, a very junior manager, was disobeying recent and specific instructions of Mr Chivers, a senior manager.

111. As noted, no-one from management was spoken to at all at the investigation stage. At the disciplinary stage, Mr Hadland spoke to Mr Chivers. However, the conversation was completely and utterly inadequate in a way that we think shows it was lipservice and not a genuine attempt to investigate the Claimant's defence to the allegations. The conversation was so inadequate it did not even reveal there had been a recent risk assessment of the work at Waterloo. This risk assessment was done by Mr Manley and Ms Lieder (who reported to Mr Chivers). It was a couple of days after Mr Chivers and Ms Lieder's visit to the waterloo hub on 14 November. We think it is vanishingly unlikely that Mr Chivers was unaware of this risk assessment which followed hot on the heals of his own assessment at the hub. Further, and most importantly, Mr Hadland did not ask the most important and obvious question of Mr Chivers: '*what did you brief staff on 14 November 2019?'*

112. The investigation report, though it referred to the fact of Mr Czaijkowski being interviewed, failed to append the record of his interview to the investigation report and failed to give a fair summary of the exculpatory evidence he had given. Mr Czaijkowski's statement was highly supportive of the Claimant's case. It was not

put before Mr Hadland as it did not make it into the disciplinary pack. It was put before Mr Elliot because the Claimant raised the point at the appeal stage. However, Mr Elliot purported in his outcome letter that this statement made no material difference and took matters no further. That is implausible and self-serving. It did make a material difference and did take matters materially further because it supported the Claimant's case and cast doubt on the inculpatory evidence.

113. The Claimant was not shown of Mr Czaijkowski's statement until he received the appeal outcome. Regardless of whether he attended the appeal hearing or not, the obvious course was just to send him a copy of the statement prior to the appeal hearing. That would give him a chance to make any representations about it. That was particularly important as it became clear that the Claimant would not attend the appeal hearing. Mr Elliot could not explain why he did not do this, simply stating that he would have discussed the statement with the Claimant had he attended the appeal hearing. Again this tends to imply not only unfairness but also, in our view, an agenda against the Claimant.

114. The email of dismissal was somewhat irrational in that it said:

> *"You were adamant throughout our meeting that you were just trying to get the job done safely. This is of course what we expect from all employees but I do not believe you have ever considered that Serco has assessed the risk, has put measures in to place and that they are fit for purpose. You have consistently fought against this implying a lack of consideration for HSE that does not reflect reality. Your challenge to the HSE guidance now gone beyond what is reasonable and is obstructive."*

115. The Claimant's very case was that the *Respondent's* senior health and safety manager, Mr Chivers, had assessed the risk at the Waterloo hub and had told everyone present that only one bicycle should be pushed. The investigation, again, had revealed significant corroborative evidence of this. It simply did not make sense to say that the Claimant had had no regard to Serco's assessment of safety, when the Claimant was saying that this was exactly what he was trying to implement. There was a peculiar failure to engage with his case; but there is a very palpable sense that the Claimant's concerns about health and safety were unwelcome.

116. Mr Hadland ironically did not find out whether or not there was a written risk assessment nor obtain the one that there in fact was.

117. Crucially, the email of dismissal said this:

> *Finally, from the investigation, through to the meeting you have been consistent in your criticism of the local management and especially resourcing. Dealing with the resourcing first it has been a consistent message from you that you are concerned by the resourcing, and as I understand it you*

have been given the chance to raise those concerns to senior management who have given you their assurance it is being dealt with.

118. Firstly there is obviously a criticism here of the Claimant for his criticism of management including/especially in respect of resourcing. Secondly, there is reference to the Claimant raising those concerns to senior management. Thirdly, this was, precisely the subject matter of several of the Claimant's protected disclosures and notably the most recent ones.

119. It must be remembered that the passage we have quoted immediately above is part of the contemporaneous explanation the Claimant was given for his dismissal. What is said here is not quite an admission of the Claimant's case that he was dismissed for making protected disclosures, but it in reality it is not that far off.

120. Also crucially, the dismissal email went on to say:

Turning to your criticism of the local managers and Serco's processes. As per your formal written warning you have "continued to do what you believe is best rather than what the business has advised you". You have had a chance to express your concerns and while a difference of opinion may remain ultimately there should be a point where you accept what your managers say, that you have failed to reach that point despite the formal warning suggest you have no intention of respecting local management or Serco's processes.

121. This passage is, as its opening words suggest, about the Claimant's criticism of local managers and the Respondent's processes. It is very close to saying in terms that part of the reason for the Claimant's dismissal is that he kept on making complaints about local managers. He did: and they were protected disclosures.

122. Mr Hadland's evidence was that he was referring here simply to the Claimant's approach to Mr Jackson's instruction on 8 January 2020, that two bicycles could be pushed. Mr Hadland's position was that the Claimant should have telephoned Mr Jackson for clarification and should not have said that Mr Jackson did not know what he was talking about. We do not accept that is all that this passage in the dismissal email is about. But in any event the analysis is a self-serving distortion of the Claimant's position. The Claimant's case was that a *much* more senior manager who was expert in health and safety had said on 14 November 2019, in a specific site based assessment that came about because of complaints the Claimant had made, 'only push one bicycle at a time'. One point already noted is that there was a failure to investigate the Claimant's case. Another, point is that there is a complete failure here to analyse the situation the Claimant found himself in, which was a very junior manager contradicting a very senior one and thus repeating what the Claimant had been complaining about all along, of local management not following the rules. It is grossly simplistic to describe the Claimant's position as insubordinate or disobeying reasonable management instructions. In fact, if the Claimant's account of the 14 November

2019 briefing was right, he was placed in an invidious position by local management contradicting senior management's directions. Mr Jackson's instruction could not be described as reasonable if without more it was in contradiction to Mr Chivers' instructions. It was not insubordinate to follow the senior management advice not the junior management advice.

123. Again, the strong impression here is of the Claimant being viewed as a troublemaker rather of Mr Hadland taking an even-handed look at the disciplinary allegations.

124. The email of dismissal also said this:

> *As for he bullying and harassment claims during our meeting you did not dispute that you had at times spoken to team members through frustration, not least Marcos who's punctuality you were disappointed with (I note your comments from the meeting that he was later than the investigation stated). While your conversations may have been meant with the best of intentions the evidence of Marcos and Marcal amongst others makes it clear that did not come across in that way and as such could be deemed harassment.*

125. This assessment is curious in that it does not say whether or not the Claimant's conduct did amount to harassment just that it "*could be deemed harassment*" without actually taking a view. Looking carefully at what the Claimant's colleagues reported in interview, it is very hard to see how the Claimant's conduct could properly be described as bullying or harassment and it cheapens those words to deploy them here.

126. There was evidence that the Claimant could be difficult to work with, that he liked to take the lead, do things his way and that he could get frustrated with colleagues if they did not do their jobs well. It was also plain from the employee interviews in the investigation that there was an issue with Mr Anaya's punctuality and inevitably that affected the people he worked with. The Claimant did take this up with him, perhaps that was unwise, but it was hardly harassment.

127. Stepping back and looking at matters in the round, in our view in truth the reason or principal reason for the Claimant's dismissal is that he made PIDs, they were unwelcome and he was regarded accordingly as a troublemaker.

128. The dismissal was thus automatically unfair by s.103A ERA.

129. We note for completeness that the Respondent did not run an argument, nor do we think one would have been tenable that there was some properly separable feature of the PIDs that were the true reason for dismissal, e.g. the way they were made or the persistence with which they were made.

Contributory conduct

130. In closing submissions the tribunal checked what matters the Respondent relied upon for the purposes of seeking a reduction to any compensation on account of contributory conduct. Mr Kirk said the Respondent relied upon the Claimant's conduct in the matters charged in the final disciplinary proceedings.

131. It is for us to make our own findings in respect of these matters.

132. In relation to the events at the Waterloo Hub on 6 and 8 January 2020 we accept the Claimant's evidence that the reason that he pushed just one bicycle and told colleagues that was the rule was because he understood that to be Mr Chivers' instruction. That was not blameworthy. We reject any suggestion that the Claimant was pushing one bicycle at a time in order to make customers wait. There is a line to that effect in Mr Mason's statement but we prefer the Claimant's evidence that this allegation is false. We have heard from the Claimant, his evidence was tested and it prevailed in that test.

133. At trial the Respondent put the emphasis on the Claimant undermining Mr Jackson by saying words to the effect of '*he does not know what he is talking about'* and failing to telephone him for clarity. We accept the Claimant's evidence that he did not say this and his words were more to the effect that Mr Jackson was wrong, that his peers could push two bicycles but if so that would be management's fault. It is true he did not telephone Mr Jackson. However, none of that was blameworthy conduct in the circumstances. There was a long history of the Claimant making formal complaints about local management and its failure to implement company policy. In light of what Mr Chivers had said and decided on 14 November 2019 the Claimant's approach was not blameworthy. He simply got on and followed Mr Chivers' instructions and explained why to his co-workers. Given all the history it is simply unrealistic to expect the Claimant to take Mr Jackson's instructions at face value and follow them given that they contradicted senior management instructions; and unrealistic to expect or require him to speak to local management in the course of a busy shift in these circumstances. It was not blameworthy conduct at any rate.

134. We do not accept that the Claimant was insubordinate in any blameworthy sense. It is true that he did not do what a junior manager said and at least implicitly encouraged others not to, but the circumstances are as we described. That was not blameworthy. He was following the instructions of a much more senior manager. Likewise we do not accept that he failed to follow a reasonable management instruction. Firstly, Mr Jackson did not actually give the Claimant an instruction. Secondly, in any event it was not a reasonable instruction since it, on ad hoc basis, suddenly contradicted Mr Chivers' recent instructions. Mr Chivers was much more senior. The Claimant was not blameworthy.

135. We do not accept that the Claimant bullied or harassed his co-workers. The height of these allegations as they were presented to us at trial were taking Mr Amaya up on his attendance, speaking about him to colleagues and shouting at

him. We reject the suggestion that the Claimant shouted at Mr Amaya. There is almost no evidence of that and we prefer the Claimant's account. The Claimant did complain to Mr Amaya about his punctuality but the context of it was the difficulties his lateness had on the Claimant's work and working environment. The Claimant also did speak about Mr Amaya to other colleagues – he did so in a normal way. Almost everyone speaks about particular work colleagues who are perceived not to be pulling their weight to others. What the Claimant did, fell within the normal non-blameworthy range. We can accept that there were shortcomings in the Claimant's interpersonal skills and that he could be brusque. However, all of this in our view fell within the ordinary range of work-place relations and short of blameworthy conduct.

136. We make no reduction for contributory conduct because there was no blameworthy conduct in the matters the Respondent relied upon.

Polkey

137. As will be clear from our analysis above, there were legitimate concerns about the way in which the Claimant interacted with members of the public and these had, properly, lead to a final written warning.

138. Our view is that as time went on the Claimant had become increasingly frustrated with his job and this, combined with the aspects of his personality that we have characterised above (e.g. his sense of justice, desire to challenge bad behaviour by members of the public and desire not to 'give in' to it by walking away), meant that further avoidable altercations were likely.

139. If the Claimant had not been dismissed when he was, we think that within a period of around 6 months or so there is a significant chance that he would have had further altercations with members of the public during the course of his work in which he would not have followed his conflict avoidance training.

140. In the event of such further altercation(s) there would inevitably have been further disciplinary proceedings and action. This would have taken some time – about two months - to reach a conclusion but ultimately there is a high chance, particularly given the final written warning, that it could and would have resulted in the Claimant's (fair) dismissal.

141. Although there is a reasonably cogent basis for anticipating the above hypothetical events (our findings of fact and the application of common sense / industrial experience to them), there can, of course, be no certainty that this is how the future would have played out. In all the circumstances, our view is that it is appropriate to make a 50% *Polkey* reduction to any compensatory award but with the reduction applying only to losses commencing 8 months or more from the date of dismissal.

Sections 44 & 100 Employment Rights Act 1996

142. The claims under these sections are bound to fail. The Claimant relies upon s.44(1)(c)/s.100(1)(c) Employment Rights Act 1996.

143. This is a case in which there was a representative of workers on matters of health and safety and in which there was a safety committee.

144. There is no evidence that it was not reasonably practicable for the Claimant to raise the concerns about health and safety with the health and safety representative and/or with the committee. The Claimant's evidence was that he tried this and it was not effective in resolving matters. However, that did not render it not reasonably practicable to raise the issues with the representative or committee.

145. In any event, these complaints add nothing at all of substance to the complaints of public interest disclosure detriment/unfair dismissal.

_____

Employment Judge Dyal

_____

Date 07.11.2022

SENT TO THE PARTIES ON

09.11.2022

.....

.....

FOR EMPLOYMENT TRIBUNALS

Appendix: agreed list of issues

THE CLAIMS

1. The Claimant brings the following claims:

A. detriments for making health and safety disclosures under section 44 of Employment Rights Act 1996 ("ERA 1996");

B. detriments for making protected disclosures under section 47B ERA 1996;

C. automatically unfair dismissal for raising health and safety concerns contrary to section 100 of ERA 1996;

D. automatically unfair dismissal for making protected disclosures contrary to section 103A of ERA 1996; and

E. ordinary unfair dismissal contrary to section 98 of ERA 1996.[1]

ISSUES ON LIABILITY

A. Health and Safety Detriments

Jurisdiction

2. Did the act(s) relied upon by the Claimant as detriments take place less than three months before the date on which the Claimant submitted his claim to the Employment Tribunal (as extended by ACAS conciliation), in accordance with section 48(3) ERA 1996?

3. If not, were the detriments were 'a series of similar acts or failures', the last of which was brought within time?

4. If not, was it not reasonably practicable for the Claimant to have presented his claim before the end of the limitation period; and was the claim presented within such further period as the Tribunal considers reasonable?

Health and Safety Concerns

5. Has the Claimant established, on the balance of probabilities, that:

   i. on 2 April 2019 (following earlier verbal complaints to the Respondent about issues of health and safety which had not been addressed), the Claimant made a written disclosure of information by email to Mr Sean Manley (Depot Manager) about health and safety breaches including unsafe and unsanitary working conditions at the Waterloo Station Hub;

   ii. in June 2019, during a meeting between Ms Annabel Castledine (Head of Services) and the Claimant at the Clapham Depot, the Claimant made an oral disclosure of information to Ms Castledine about the Respondent breaching health and safety rules, including having unsafe and unsanitary working conditions, employees having to work understaffed and the inadequate provision of PPE;

   iii. at the beginning of September 2019, during a meeting between Mr Sam Jones (Contract Manager) and the Claimant at the Clapham Depot, the Claimant made an oral disclosure of information to Ms Castledine about the Respondent breaching health and safety rules, including unsafe and unsanitary working conditions, employees having to work understaffed and the inadequate provision of PPE.

   iv. on 23 October 2019, following the Respondent's failure to address his concerns above and having taken advice from a Trade Union representative, the Claimant sent an email to the Respondent (sent to cs_operations@serco.com) repeating the above concerns and making further disclosures of information about the Respondent failing to address his concerns around breaches of health and safety rules, unsafe and unsanitary working conditions, employees having to working understaffed and the inadequate provision of PPE;

v. on 25 October 2019, in an email to the Respondent's CEO, Rupert Soames, the Claimant made a further disclosure of information about what he described as "management wrongdoings" and requested an independent investigation into the same;

vi. on 18 November 2019, in an email to Ms Andrea Leiter Piema (HSE Manager, Citizen Services) the Claimant made a further disclosure of information in relation to health and safety breaches by the Respondent;

vii. on 7 January 2020, in an email to Ms Andrea Leiter Piema (HSE Manager) the Claimant made further disclosures about health and safety, including reporting failures by the Respondent's management to follow health and safety rules and procedures;

viii. on 9 January 2020, in an email to Ms Andrea Leiter Piema (HSE Manager), the Claimant made further disclosures of information about failures by the Respondent's management to follow health and safety procedures;

ix. on 14 January 2020, in an email to Ms Andrea Leiter Piema (HSE Manager), the Claimant made further disclosures of information about the continuing management failures in respect of health and safety, including understaffing at Waterloo Hub and failures by staff members to follow health and safety instructions.

6. If so, did the Claimant bring the above matters to the Respondent's attention by reasonable means?

7. If so, did the Claimant reasonably believe that the above information amounted to a circumstance

connected with his work which was harmful or potentially harmful to health or safety?

8. If so, was the Claimant employed at a place where:

i. there was no health and safety representative or safety committee; or

ii. if there was such a representative or safety committee, that it was not reasonably

practicable for him to have raised the above matters by those means?

Detriments

9. Did the following alleged acts/omissions take place on the balance of probabilities:

i. on 25 July 2019 (only weeks after the Claimant's disclosure to Annabel Castledine in June 2019), Ms Castledine (Head of Operations) telling the Claimant not to raise issues with her in relation to health and safety at that time and to "be careful" how he chose his words.

The Claimant perceived this to be a threat by Ms Castledine, which cause him concern and which he believed was detrimental to him;

ii. between July and December 2019, the Respondent instigating disciplinary proceedings against the Claimant for alleged misconduct, namely an alleged failure to follow the Code of Conduct and conflict avoidance training, and then issuing the Claimant with a Final Written Warning for the same;

iii. on 9 January 2020 (only two days after the Claimant's first email disclosure to Ms Leiter on 7 January and only three hours after his email disclosure to Ms Leiter on 9 January 2020), the Respondent suspending the Claimant without giving him any reason for the same until later that day, at which point he was accused of alleged misconduct;

iv. between 9 January 2020 and 25 February 2020, the Respondent instigating and pursuing disciplinary proceedings against the Claimant, alleging that he had committed three separate acts of misconduct relating to his alleged interactions with other colleagues and response to management instructions.

10. If so, did any such acts amounted to detriments within the meaning of section 44(1) ERA 1996?

Reason for Detriments

11. If the Claimant was subjected to any detriments as alleged above, were any such detriments done

on the ground that he made a health and safety related disclosure?

B. Whistleblowing Detriments

Jurisdiction

12. Did the act(s) relied upon by the Claimant as detriments take place less than three months before the date on which the Claimant submitted his claim to the Employment Tribunal (as extended by ACAS conciliation), in accordance with section 48(3) ERA 1996?

13. If not, were the detriments 'a series of similar acts or failures', the last of which was brought within

time?

14. If not, was it not reasonably practicable for the Claimant to have presented his claim before the end of the limitation period; and was the claim was presented within such further period as the Tribunal considers reasonable?

Qualifying Disclosures

15. Did the Claimant make disclosures of information, as set out at paragraph 5 above?

16. If so, did any of those disclosures of information amount to protected disclosures within the meaning of section 43B of ERA 1996? This issue involves consideration of the questions set out at paragraphs 17 to 20 below.

Alleged disclosures under s 43B(1)(b)

17. Did the disclosures at paragraph 5 above tend to show, in the Claimant's reasonable belief, that the Respondent had failed, was failing and/or was likely

to fail to comply with a legal obligation to which it was subject, in particular under:

i. the Health and Safety at Work Act 1974; and/or

ii. the Management of Health and Safety at Work Regulations 1999 (the Management Regulations)?

Alleged disclosures under s 43B(1)(d)

18. Did the disclosures at paragraph 5 above tend to show, in the Claimant's reasonable belief, that the health or safety of any individual had been, was being or was likely to be endangered?

Reasonable belief in public interest

19. Were the disclosures at paragraph 5 above made, in the Claimant's reasonable belief, in the public interest?

Detriments

20. Did the alleged acts/omissions at paragraph 9 above take place on the balance of probabilities?

21. If so, did any such acts amount to detriments within the meaning of section 47B ERA 1996?

Reason for Detriments

22. If the Claimant was subjected to any of the alleged detriments above, were any such detriments done on the ground that he had made a protected disclosure?

C. Automatically Unfair Dismissal for Health and Safety

Qualifying Health and Safety Concerns

23. Did the Claimant raise concerns in relation to health and safety falling within section 100(1) of

ERA 1996? The questions to be considered on this issue are those at paragraphs 5 to 8 above.

Reason for Dismissal

24. Was the reason (or, if more than one, the principal reason) for the Claimant's dismissal the fact

that he raised health and safety concerns?

D. Automatically Unfair Dismissal for Protected Disclosures

Qualifying Disclosures

25. Did the Claimant make a protected disclosure(s) within the meaning of section 43B ERA 1996?

The questions to be considered on this issue are those at paragraphs 15 to 19 above.

Reason for Dismissal

26. Was the reason (or, if more than one, the principal reason) for the Claimant's dismissal the fact

that he made a protected disclosure?

E. Ordinary Unfair Dismissal

27. What was the reason (or, if more than one, the principal reason) for the Claimant's dismissal and was it a fair reason falling within section 98(2) of ERA 1996? The Claimant contends that the reason or principal reason for his dismissal was the fact that he raised health and safety concerns and/or protected disclosures, which is not a fair reason under section 98. The Respondent

contends that the reason for dismissal was conduct which is a fair reason under section 98(2)(b).

28. Was the Claimant's dismissal fair in all the circumstances pursuant to section 98(4) ERA 1996?

ISSUES ON REMEDY

29. If the Claimant succeeds on any of his claims above, should the Employment Tribunal make any declarations and, if so, what declarations should be made?

30. If the Claimant succeeds on any of his detriment claims above, what remedy, if any, is he entitled to under section 49 ERA 1996?

31. If the Claimant succeeds on either of his unfair dismissal claims above, what remedy, if any, is he entitled to under sections 118-124 ERA 1996?

32. Should any award be decreased by virtue of a 'Polkey' reduction and, if so, by what amount?

33. Did the Claimant cause or contribute to his own dismissal such that any compensatory damages should be reduced and, if so, by what amount?