EMPLOYMENT TRIBUNALS

Claimant: Mr A Widdop

Respondent: Keighley & District Travel Ltd

Heard at: Leeds **On: 17,18, 19 and 20 March 2025**

Before: Employment Judge Shepherd

Members: Ms Hiser
Ms Pepper

Appearances
For the claimant: In person
For the respondent: Ms Jones, counsel

WRITTEN REASONS

1. Extempore Judgment having been given orally on 20 March 2025 and the written judgment having been sent to the parties on 20 March 2025. The claimant requested written reasons on 29 March 2025.

2. Unfortunately, due to an administrative failure, the request for written reasons was not referred to the Employment Judge until 24 June 2025 following a request for an update from the claimant. The Employment Judge apologises on behalf of the Tribunal for this failure.

3. These written reasons are provided pursuant to Rule 60 of the Employment Tribunal Procedure Rules 2024.

4. The unanimous judgment of the Tribunal was that:

> 1. The claims of unfair dismissal and automatic unfair dismissal are not well-founded and are dismissed.
>
> 2. The claims of detriment for making a protected disclosure are not well-founded and are dismissed.

5. The claimant represented himself and the respondent was represented by Ms Jones. The Tribunal heard evidence from:

Andrew Widdop, the claimant;
Jim Craven, General Manager;
Joy Devine, Former General Manager;
Steve Ottley, General Manager;
Alan Isherwood, Head of Operations.

6. The Tribunal had sight of a bundle of documents which , together with documents added during the course of the hearing, consisted of 541 pages. The Tribunal considered those documents to which it was referred by the parties.

7. The respondent provided an updated list of issues at the start of the hearing. The claimant indicated that these issues were agreed and that these were the issues to be determined by the Tribunal. They were as follows

1. Time limits

1.1. Was the complaint of detriments because of making a protected disclosure made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

1.1.1. Was the claim made to the Tribunal within three months (plus early Conciliation extension) of the act complained?

1.1.2. If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.1.3. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.1.4. If it was not reasonably practicable for the claim to be made to the Tribunal Within the time limit, was it made within a reasonable period?

2. **Unfair dismissal**

2.1.The claimant was dismissed.

Automatically unfair dismissal

2.2. Was the reason or principal reason for dismissal that the claimant made a protected disclosure?

If so, the claimant will be regarded as unfairly dismissed.

Misconduct dismissal

2.3. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

2.4. If the reason was misconduct, did the respondent act reasonably or

unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular,whether:

2.4.1. there were reasonable grounds for that belief;
2.4.2.at the time the belief was formed the respondent had carried out a reasonable investigation;
2.4.3. the respondent otherwise acted in a procedurally fair manner;
2.4.4. dismissal was within the range of reasonable responses.
2.4.5. The claimant says that particularly:
2.4.5.1. the investigating officer was concentrating on his own version of events rather than listening to the claimant;
2.4.5.2. the dismissing officer relied on her own opinions as to what did or did not amount to self defence rather than following CPS guidelines;
2.4.5.3.even if the protected disclosure was not the reason for dismissing the claimant, it was part of the reason and therefore made the decision unfair.

3. **Remedy for unfair dismissal**

3.1.The claimant does not seek reinstatement or re-engagement to the same or suitable alternative employment with the respondent.

3.2. If there is a compensatory award, how much should it be? The Tribunal will decide:

3.2.1. What financial losses has the dismissal caused the claimant?
3.2.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
3.2,3. If not, for what period of loss should the claimant be compensated?
3.2.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
3.2.5. If so, should the claimant's compensation be reduced? By how much?
3.2.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
3.2.7. Did the respondent or the claimant unreasonably fail to comply with it?
3.2.8. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
3.2.9. If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?
3.2.10. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
3.2.11. Does the statutory cap apply?

3.3. What basic award is payable to the claimant, if any?

3.4. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. **Protected disclosure**

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

4.1.1. What did the claimant say or write? When? To whom?

4.1.2. The Respondent accepts that by way of a letter dated 8 July 2022 (pages 123-124 of the Bundle) the Claimant disclosed information. In particular, he complained that:

4.1.2.1. The parking areas had significant pot holes or raised surfaces which posed a significant trip hazard which could cause injury as the areas were said to be largely unlit making such hazards difficult to see;

4.1.2.2. Employees had to park on West Lane which meant that employees had to walk some distance from their vehicles, potentially in bad weather and in darkness. This was said to have posed both a risk of personal injury resulting from a potential incident crossing Suresnes Road and also when getting into and out of vehicles on West Lane, which was said to be a very busy main road.

4.1.3. Did the claimant believe the disclosure of information was made in the public interest?

4.1.4. Was that belief reasonable?

4.1.5. Did the claimant believe it tended to show that:

4.1.5.1the health or safety of any individual had been, was being or was likely to be endangered;

4.1.6. Was that belief reasonable?

4.2. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

5. Detriment (Employment Rights Act 1996 section 48)

5.1. Did the Respondent do the following things:

5.1.1. On 10 November 2022 inform the Claimant of a change to his working pattern, namely, from 4 days per week to 5 days per week. The Claimant avers that he was given a 3 month time frame for changing back to his 4 day working pattern but that Mr Craven and Mr Isherwood had no intention of it being a short term arrangement;

5.1.2. Fail to provide an update to the Claimant on his working pattern despite the claimant making a request for an update in March 2023. Further, the claimant asked Mr Craven on numerous occasions, and was simply told he was on a waiting list. The claimant believes that he was fobbed off and the respondent had no intention of putting him back on his previous working pattern.

5.1.3. The claimant remained on a five day shift pattern until the end of his employment.

5.2. By doing so, did it subject the claimant to detriment?

5.3. If so, was it done on the ground that the claimant made a protected disclosure?

6. Remedy for Protected Disclosure Detriment

6.1. What financial losses has the detrimental treatment caused the claimant?

6.2. What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

6.3. Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

6.4. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.5. Did the respondent or the claimant unreasonably fail to comply with it?

6.6. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

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

6.8. Was the protected disclosure made in good faith?

6.9. If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

Findings of fact

8. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions.

9. Where the Tribunal heard evidence on matters for which it makes no finding or does not make a finding to the same level of detail as the evidence presented, that reflects the extent to which the Tribunal considers that the particular matter assists in determining the issues. Some of the Tribunal's findings are also set out in its conclusions, to avoid unnecessary repetition and some of the conclusions are set out within the findings of fact.

10. The claimant was employed by the respondent as a PCV bus driver from 28 June 2021.

11. On 8 July 2022 the claimant raised a grievance in respect of drivers not being able to park at the Keighley depot. He complained that there was "no official published notices or signage denoting staff parking." Within the grievance it was stated:

> "I would also like to raise the question as to whether a risk assessment has been carried out as required by health and safety law. The current parking areas have significant potholes or raised surfaces posing a significant trip hazard which could reasonably cause injury or property damage: as these areas are largely unlit making such hazards difficult to see.
>
> In addition to this, we have been told to park on West Lane, however this means walking some distance from our vehicles, potentially in bad weather and in darkness. This poses both the risk of personal injury resulting from a potential incident crossing

> Surenese Road which can be quite busy, but also in getting into and out of our vehicles on West Lane…
>
> … In light of these points and the threats of damage or false imprisonment being made, it is my opinion that this should be investigated as a matter of urgency in accordance with our contract and Keighley Bus' Duty of Care towards its employees."

12. On 6 September 2022 the respondent wrote to the claimant providing the outcome of the grievance. It was indicated to the claimant that the respondent did not provide car parking and was not obliged to do so for employees. It had been discussed with the claimant and his trade union representative. Signage was put in place in accordance with the claimant's original request and the matter was closed.

13. In November 2022 the respondent lost the tender for the Otley route and it was transferred to another operator from February 2023. The employees working on the Otley route opted not to transfer to the other operator and remained employed by the respondent. There was a waiting list for a 4 day rota in Keighley. The claimant requested to join the waiting list in January 2023 and remained on the waiting list until his employment terminated.

14. On 11 October 2023 the claimant was involved in an altercation with another employee after his car had been locked in the compound at the depot as it had remained parked there beyond the permitted time. Both employees involved in the altercation were suspended. The other employee resigned prior to disciplinary hearing.

15. The claimant was suspended on full pay on 12 October 2023.

16. The claimant attended an investigation meeting with Jim Craven, General Manager, on 19 October 2023. The CCTV footage was shown to the claimant and he accepted that he had hitt the other employee twice in the face and that he may have overreacted towards the other employee by hitting him twice in the eye. He confirmed that he was aware that violence the workplace was unacceptable but claimed that he had acted in self-defence.

17. On 24 October 2023 the claimant attended a disciplinary hearing which was chaired by Joy Devine, General Manager. The claimant was accompanied by his Trade Union representative.

18. On 24 October 2023 Joy Devine wrote to the claimant confirming his summary dismissal in which it was stated:

> "… I cannot condone your actions during this incident, you have admitted pushing the other person away from you, this action caused an altercation between you both, where you admitted you punched your colleague in the face twice, when you were on top of him. This was not defending yourself, at this point you were the aggressor.
>
> I can confirm my decision due to your admission of gross misconduct, is to summary dismiss you from the Company in line with the formal stage of the Company Disciplinary procedure, section 3.3 Gross Misconduct is a serious breach of the code of conduct to the extent that the relationship of trust and confidence between the Company and the individual has broken down…"

19. The claimant wrote to the respondent on 24 October 2023 indicating that he wished to exercise his right of appeal on the grounds of "compassion and leniency".

20. The claimant attended an appeal hearing on 2 November 2020 which was chaired by Steve Ottley, General Manager. The claimant was accompanied by a Trade Union representative.

21. Steve Ottley wrote to the claimant on 2 November 2023 upholding the decision to dismiss. In the letter it was stated:

> "… The moment you placed your hand on this person by pushing him away you had crossed the line as being the aggressor, physical assault. Now the cleaner felt threatened and he wanted to defend himself.
>
> We expect our staff to come to work and conduct themselves in a professional manner and to feel safe in their place of work.
>
> Not to be subjected to any kind of physical assault when it does happen this sort of behaviour will not be condoned.
>
> The fact remains you put another employee way from you which resulted into a physical altercation, which I deem as unreasonable reaction from you, all because of the parking spaces, your vehicle blocking and you requested the cleaner's name…"

22. On 2 November 2023 the claimant submitted an appeal on the grounds of "compassion leniency".

23. On 21 November 2023 the claimant attended a final stage appeal hearing before Alan Isherwood, Head of Operations, the claimant was accompanied by a Trade Union representative. The claimant's dismissal was upheld. In his letter of 21 November 2023 Alan Isherwood stated:

> "During the meeting it was confirmed that your reasons for appeal were compassion and leniency, you do not dispute and admitted that on 11 October 2020 you struck your colleague, but that you regretted your actions which resulted in your summary dismissal from the Company.
>
> Although you stated you were acting in self-defence you accepted that you had struck the other employee twice whilst you were on top of him and regretted this.…
>
> I informed you that the Company has a duty of care and responsibility to all its employees and cannot condone violence of any nature within the workplace. The Company has an obligation that any aggressive incidents are investigated and dealt with appropriately and in this case, I believe this incident could have, and should have been avoided.…"

The law

Unfair dismissal

24. Where an employee brings an unfair dismissal claim before an Employment tribunal, it is for the employer to demonstrate that its reason for dismissing the employee was one of the potentially fair reasons in section 98(1) and (2) of the Employment Rights Act 1996. If the employer establishes such a reason the Tribunal must then determine the fairness or otherwise of the dismissal by deciding in accordance with section 98(4) of the Employment Rights Act 1996 whether the employer acted reasonably in dismissing the employee. Conduct is a potentially fair reason for dismissal under section 98(2).

25. In determining the reasonableness of the dismissal with regard to section 98(4) a Tribunal should have regard to the three-part test set out by the Employment Appeals Tribunal in **British Home Stores Limited v Burchell [1978] IRLR379**. That provides that an employer, before dismissing an employee, by reason of misconduct, should hold a genuine belief in the employee's guilt, held on reasonable grounds after a reasonable investigation. Further, the Tribunal should take heed of the Employment Appeal Tribunal's guidance in **Iceland Foods Limited v Jones [1982] IRLR439**. In that case the EAT stated that a Tribunal should not substitute its own views as to what should have been done for

that of the employer, but should rather consider whether the dismissal had been within "the band of reasonable responses" available to the employer. In the case of **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR23** the Court of Appeal confirmed that the "band of reasonable responses" approach applies to the conduct of investigations as much as to other procedural and substantive decisions to dismiss. Providing an employer carries out an appropriate investigation and gives the employee a fair opportunity to explain his conduct, it would be wrong for the Employment Tribunal to suggest that further investigation should have been carried out. For, by doing so, they are substituting their own standards as to what was an adequate investigation for the standard that could be objectively expected from a reasonable employer. In **Ucatt v Brain [1981] IRLR225** Sir John Donaldson stated:

> "Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, 'Would a reasonable employer in those circumstances dismiss', seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question 'Would we dismiss', because you sometimes have a situation in which one reasonable employer would and one would not. In those circumstances, the employer is entitled to say to the Tribunal, 'Well, you should be satisfied that a reasonable employer would regard these circumstances as a sufficient reason for dismissing', because the statute does not require the employer to satisfy the Tribunal of the rather more difficult consideration that all reasonable employers would dismiss in those circumstances".

Stephenson L J stated in **Weddel v Tepper [1980] IRLR 96**:

> "Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, per Burchell, 'carried out as much investigation into the matter as was reasonable in all the circumstances of the case'. That means that they must act reasonably in all the circumstances, and must make reasonable enquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate enquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are not acting reasonably".

26. In the employment context the term "gross misconduct" is used as convenient shorthand for conduct which amounts to a repudiatory breach of the contract of employment entitling the employer to terminate it without notice. In the unfair dismissal context, a finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Exactly what type of conduct amounts to gross misconduct will depend on the facts of the individual case. Generally, to be gross misconduct, the misconduct should so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment. Thus, in the context of section 98(4) of the 1996 Act it is for the Tribunal to consider:

> (a) Was the employer acting within the band of reasonable responses in choosing to

categorise the misconduct as gross misconduct and

(b) Was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, the employee's length of service and disciplinary record are relevant as is his attitude towards his conduct.

Protected Disclosure Claim

27. Section 43B(1) of the Employment Rights Act 1996 states:

"(1) In this part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

(a) that a criminal offence has been committed, is being committed or is likely to be committed;

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) that the health or safety of an individual has been, is being or is likely to be endangered;

(e) that the environment has been, is being or is likely to be damaged; or

(f) that information tending to show any matter falling within any one the preceding paragraphs has been or is likely to be deliberately concealed".

28. Section 47B(1)

"A worker has the right not to be subjected to any detriment by an act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

29. Section 103A

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

30. The definition of a qualifying disclosure breaks down into several elements which the Tribunal must consider in turn.

Disclosure

31. In **Cavendish Munro Professional Risks Management Limited v Geduld 2010 IRLR 37** Slade J stated:

"That the Employment Rights Act 1996 recognises a distinction between "information" and an "allegation" is illustrated by the reference to both of these terms in S43F……It is instructive that those two terms are treated differently and can therefore be regarded as having been intended to have different meanings……the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before

us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that "you are not complying with Health and Safety requirements". In our view this would be an allegation not information. In the employment context, an employee may be dissatisfied, as here, with the way he is being treated. He or his solicitor may complain to the employer that if they are not going to be treated better, they will resign and claim constructive dismissal. Assume that the employer, having received that outline of the employee's position from him or from his solicitor, then dismisses the employee. In our judgment, that dismissal does not follow from any disclosure of information. It follows a statement of the employee's position. In our judgment, that situation would not fall within the scope of the Employment Rights Act section 43 … The natural meaning of the word "disclose" is to reveal something to someone who does not know it already. However, s43L (3) provides that" disclosure" for the purpose of s 43 has the effect so that "bringing information to a person's attention" albeit that he is aware of it already is a disclosure of that information. There would be no need for the extended definition of "disclosure" if it were intended by the legislature that "disclosure" should mean no more than "communication".

32. Simply voicing a concern, raising an issue or setting out an objection is not the same as disclosing information. The Tribunal notes that a communication which conveys facts and makes an allegation can amount to a qualifying disclosure.

33. In **Kilraine –v- London Borough of Wandsworth UKEAT/0260/15** Langstaff J stated:

> "I would caution some care in the application of the principle arising out of **Cavendish Munro**. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the Claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point".

Public interest

34. In **Chesterton Global Ltd -v- Nurmohamed [2015] IRLR** Supperstone J stated:

> "I accept Ms Mayhew's submission that applying the **Babula** approach to section 43B (1) as amended, the public interest test can be satisfied where the basis of the public interest disclosure is wrong and/or there was no public interest in the disclosure being made provided that the worker's belief that the disclosure was made in the public interest was objectively reasonable. In my view the Tribunal properly asked itself the question whether the Respondent made the disclosures in the reasonable belief that they were in the public interest…… The objective of the protected disclosure provisions is to protect employees from unfair treatment for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace (see **ALM Medical Services Ltd v Bladon** at paragraph 16 above). It is clear from the parliamentary materials to which referen**ce can be made pursuant to Pepper**

(Inspector of Taxes) v Hart [1993] AC 593 that the sole purpose of the amendment to section 43B(1) of the 1996 Act by section 17 of the 2013 Act was to reverse the effect of **Parkins v Sodexho Ltd.** The words "in the public interest" were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. As the Minister observed: "the clause in no way takes away rights from those who seek to blow the whistle on matters of genuine public interest" (see paragraph 19 above) …… I reject Mr Palmer's submission that the fact that a group of affected workers, in this case the 100 senior managers, may have a common characteristic of mutuality of obligations is relevant when considering the public interest test under section 43B (1). The words of the section provide no support for this contention……. In the present case the protected disclosures made by the Respondent concerned manipulation of the accounts by the First Appellant's management which potentially adversely affected the bonuses of 100 senior managers. Whilst recognising that the person the Respondent was most concerned about was himself, the tribunal was satisfied that he did have the other office managers in mind. He referred to the central London area and suggested to Ms Farley that she should be looking at other central London office accounts (paragraph 151). He believed that the First Appellant, a well-known firm of estate agents, was deliberately miss-stating £2-3million of actual costs and liabilities throughout the entire office and department network. All this led the Tribunal to conclude that a section of the public would be affected and the public interest test was satisfied".

Reasonable Belief

35. In the case of **Darnton v University of Surrey** and **Babula v Waltham Forest College 2007 ICR 1026** it was confirmed that the worker making the disclosure does not have to be correct in the assertion he makes. His belief must be reasonable. In **Babula** Wall LJ said:

> "… I agree with the EAT in **Darnton** that a belief may be reasonably held and yet be wrong… if a whistle blower reasonably believes that a criminal offence has been committed, is being committed or is likely to be committed. Provided that his belief (which is inevitably subjective) is held by the Tribunal to be objectively reasonable neither (i) the fact that the belief turns out to be wrong – nor (ii) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence – is in my judgment sufficient of itself to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute… An employment Tribunal hearing a claim for automatic unfair dismissal has to make three key findings. The first is whether or not the employee believes that the information he is disclosing meets the criteria set out in one or more of the subsections in the 1996 Act section 43B(1)(a) to (f). The second is to decide objectively whether or not that belief is reasonable. The third is to decide whether or not the disclosure is made in good faith".

Legal Obligation

36. A disclosure which in the reasonable belief of the employee making it tends to show that a breach of legal obligation has occurred (or is occurring or is likely to occur) amounts to a qualifying disclosure. It is necessary for the employee to identify the particular legal obligation which is alleged to have been breached. In **Fincham v HM Prison Service EAT0925/01 and 0991/01** Elias J observed: "There must in our view be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the worker is relying." In this regard the EAT was clearly referring to the provisions of section 43B (1) b of the 1996 Act.

37. The Tribunal has noted the criticism by the EAT in **Fincham** of the decision of the Employment Tribunal in that case that a statement made by the claimant to the effect "*I am under pressure and stress"* did not amount to a statement that the claimant's health and safety was being or at least was likely to be endangered.

38. In the case of **Eiger Securities LLP v Korshunova** UKEAT/0149/16/DM Slade J stated:

> "The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. However, in my judgement the ET failed to decide whether and if so what legal obligation the claimant believed to have been breached."

39. In **Goode –v- Marks and Spencer plc UKEAT/0042/09** Wilkie J stated the judgment of the EAT at paragraph 38 to be:

> "…the Tribunal was entitled to conclude that an expression of opinion about that proposal could not amount to the conveying of information which, even if contextualised by reference to the document of 11 July, could form the basis of any reasonable belief such as would make it a qualifying disclosure."

Claim for Automatic Unfair Dismissal Section 103A 1996 Act

40. Section 103A

> "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".

41. The burden of proof lies with the respondent to establish the reason for dismissal. If the reason is established it will normally be for the employee who argues that the real reason for dismissal was an automatically unfair reason to establish some evidence to require that matter to be investigated. Once that has been done the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal.

42. In the case of **Eiger Securities LLP v Korshunova UKEAT/0149/16/DM** Slade J referred to the distinction between automatically unfair dismissal by reason of making a protected disclosure and detriment on the ground of making a protected disclosure as follows

> "The Claimant's claim for "ordinary" unfair dismissal under ERA section 98 had been struck out as she did not have the necessary qualifying period of employment to bring such a claim. A claim for unfair dismissal for making a protected disclosure requires no qualifying period of employment and is brought under ERA section 103A. Section 103A 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 claim."

43. The tribunal was referred to the Court of Appeal decision **in Royal Mail v Jhuti [2018] IRLR 251** in which Underhill LJ stated:

> "… For the purpose of determining 'the reason for the dismissal' under s98(1)

the Tribunal is obliged to consider only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss (that may be subject to possible qualifications discussed below; but they are marginal and not relevant to the present case). Section 103A falls under Pat X of the 1996 Act and it must be interpreted consistently with the other provisions governing liability for unfair dismissals."

Detriment

44. Section 103A, automatic unfair dismissal by reason of making a protected disclosure, and section 47B (1), a right not to be subjected to a detriment on the ground of making a protected disclosure, are in different Parts of the ERA, Part IX and IV respectively and use different language. The consequences of these differences for the tests in establishing claims for unfair dismissal under ERA section 103A and being subjected to detriment under ERA section 47B (1) were authoritatively determined by the Court of Appeal in **Fecitt v NHS Manchester [2012] IRLR 64**, a claim under ERA section 47B (1). These differences were explained by Elias LJ in paragraph 44 in which he held:

> "I accept, as Mr Linden argues, that this creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair. However, it seems to me that it is simply the result of placing dismissal for this particular reason into the general run of unfair dismissal law. As Mummery LJ cautioned in **Kuzel v Roche Products Ltd [2008] ICR 799**, para 48, in the context of a protected disclosure.
>
> Unfair dismissal and discrimination on specific prohibited grounds are, however, different causes of action. The statutory structure of the unfair dismissal legislation is so different from that of the discrimination legislation that an attempt at cross fertilisation or legal transplants runs a risk of complicating rather than clarifying the legal concepts**."**

45. Different tests are to be applied to claims under ERA sections 103A and 47B (1). Thus, for a claim under ERA section 103A to succeed the ET must be satisfied that the reason or the principal reason for the dismissal is the protected disclosure whereas for a claim under ERA section 47B (1) to be made out the ET must be satisfied that the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's detrimental treatment of the Claimant."

46. The Tribunal had the benefit of oral submissions provided by the claimant and Ms Jones on behalf of the respondent. These were helpful. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

Automatically unfair dismissal

47. The Tribunal is satisfied that the reason for the dismissal was gross misconduct. There was no credible evidence that the reason or principal reason was that the claimant had made a protected disclosure. The evidence from the respondent, both oral and documentary, was clear, credible and consistent. The disclosure by the claimant had no material influence in the decision to dismiss which was the result of the respondent's finding that the claimant was guilty of misconduct.

Misconduct dismissal.

48. The claimant was dismissed for misconduct. The respondent genuinely believed the claimant was guilty of misconduct. There was CCTV evidence of the altercation with the other employee. There was an investigation. A disciplinary procedure and stage I and stage I appeals.

49. Both employees involved in the fight were suspended. The other employee resigned before he could be disciplined.

50. The claimant said that he was acting in self-defence. The he said that the other employee pushed his forehead into the claimant's mouth. The claimant then pushed the other employee. They both fell to the ground. The claimant was clearly shown to be on top of the other employee and punching him in the face. The claimant admitted this part said that it was to prevent the other employee from attacking him further.

51. The dismissal was in accordance with the respondent's disciplinary policy. The claimant was accompanied by a trade union representative throughout the disciplinary and appeals procedure There were no substantive procedural defects

52. The claimant admitted that he had hit the other employee twice in the eye. He said he only reacted in what he believed to be self-defence. He had agreed that he overstepped the mark in the heat of the moment.

53. The Tribunal is satisfied that the respondent held a genuine belief that the claimant had committed misconduct. At that belief was held on reasonable grounds following a reasonable investigation. The respondent took the view that the statement of the other employee involved in the altercation was not relevant to the claimant's disciplinary hearing. Ms Devine made it clear that the evidence of the other employee who had been involved and that of his son did not form part of her decision.

54. The Tribunal is satisfied that the information before the respondent during the investigation and disciplinary procedure was sufficient for the respondent to have conducted a reasonable investigation and to reach a decision on reasonable grounds and within the band of reasonable responses.

55. It may have been helpful to the claimant for the respondent to inform the claimant that the respondent had taken a statement from the other employee and provided the evidence that they have invited him to a disciplinary hearing prior to his resignation.

56. Where a reasonable investigation leaves it uncertain as to who started the fight, employers may sack all the participants fairly, unless there are circumstances that make this unreasonable.

57. In the case of **British Aerospace v Mafe EAT 565/80** the EAT it was held that, insofar as spontaneous violence is concerned, "fighting is frequently regarded as justification for the dismissal of the participants without the employer being required to draw fine distinctions between the relative guilt of those involved."

58. There may be situations where one employer acting reasonably might dismiss the employee for misconduct but another employer might not dismiss in the same circumstances. The Tribunal must consider the issue by the objective standards of the

hypothetical reasonable employer rather than by reference to the Tribunal's own subjective views. The Tribunal must not simply consider whether they are of the opinion that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that employer.

59. The claimant was involved in a violent altercation with another employee. Both the employees involved were treated in a similar way. The other employee resigned before he had to attend a disciplinary hearing.

60. The Tribunal has been careful not to substitute its own view for that of the employer but the unanimous decision of the Tribunal is that a reasonable employer acting reasonably could dismiss in these circumstances and the dismissal was clearly within the band of reasonable responses available to the employer.

Time limits

61. The issues in respect of time are related to the allegations of detriment for making a protected disclosure. It was accepted by the respondent that the claimant had made a disclosure on 8 July 2022 in respect of the parking areas.

62. There was no credible evidence that it was not reasonably practicable for the claims to be issued within time and the Tribunal had no jurisdiction to hear the claims of detriment. However, the Tribunal has gone on to give consideration as to the merits of the claim as if it had jurisdiction.

Public Interest Disclosure

63. It was submitted, on behalf of the respondent, that this was a workplace dispute and the disclosure was of issues of private concern to the claimant. He had accepted that he held a subjective belief that it was in the public interest. His concern was an expression of opinion with regard to potholes and crossing a road which was not a major risk. The claimant had not established that he had a reasonable belief that the disclosure was in the public interest.

64. The Tribunal has given careful consideration to this point. The Tribunal accepts that the disclosure was made in the public interest, it raised a health and safety issue involving potentially 200 drivers of passenger carrying vehicles. It did involve a reasonable belief that the health and safety of an individual was being or was likely to be endangered. The Tribunal accepts that it was a protected disclosure.

65.The claimant's work patterns changed as a result of the respondent losing the Otley bus route contract on which the claimant had worked and which provided the claimant with a rota that was four days a week and the claimant and other bus drivers changed to five days a week. The claimant was offered the opportunity for his employment to transfer to the new operator but opted to stay with the respondent. As a result, he was moved to a route which the respondent operated on a five day per week rota.

66. The claimant and other drivers were placed on a waiting list to move to a four day per week working pattern.

67. There was no credible evidence that the claimant's change in working patterns was done on the ground that, or materially influenced by, the fact that the claimant made a disclosure

whether protected or not. He was merely placed on a waiting list together with a number of other colleagues.

68. There was also no credible evidence that the claimant was subjected to the detriment of being ‘fobbed off’ and that the respondent had no intention to return him to a five day working pattern. Alan Isherwood gave clear evidence that he told the claimant that he was on the waiting list and that he would be moved back as soon as possible.

69. In the circumstances the unanimous decision of the Tribunal is that claimant’s claims are not well-founded and are dismissed in their entirety.

Employment Judge Shepherd
4 July 2025