



EMPLOYMENT TRIBUNALS

Claimant: Mr Robert Laurence Smith
Respondent: 3663 Transport Limited

Heard at: Watford Employment Tribunal
On: 5,6,7,8,11, and 12 May 2026
Before: Employment Judge Alliott
Mr D Sagar
Mr P Miller

Appearances

For the claimant: Ms Heidi Rao (friend)
For the respondent: Mr Kevin McNerney (counsel)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant was not disabled within the meaning of the Equality Act 2010 at any relevant time.
2. The claimant's claims of discrimination arising from disability, failure to make reasonable adjustments and disability related harassment are dismissed.
3. The claimant was automatically unfairly dismissed for making a protected disclosure (whistleblowing).
4. The claimant's claims for detriment for making a protected disclosure (whistleblowing) are dismissed.
5. The claimant was wrongfully dismissed in breach of contract.

JUDGMENT with oral summary reasons was given at the hearing and written full reasons were requested at the hearing in accordance with Rule 60 of the Employment Tribunal Procedure Rules. The following written full reasons are therefore provided:

FULL REASONS

Introduction

1. The claimant was employed by the respondent on 14 March 2022 as a Food Delivery Driver. He was summarily dismissed on 20 April 2023. By a claim form presented on 12 September 2023, following a period of early conciliation from 4 July until 15 August 2023, the claimant brings complaints of discrimination arising from disability, harassment relating to disability, failure to make reasonable adjustments, detriment and automatically unfair dismissal for making a protected disclosure (whistleblowing) and wrongful dismissal/breach of contract for notice pay. The respondent defends the claims.

The issues

2. The issues were set out in a case management summary following a preliminary hearing heard on 27 August 2024. They are as follows:

“The parties

27. The claimant was employed as a food delivery driver. There was a dispute about whether the claimant was employed by the named respondent, Bidfood BFS Group Limited, or its subsidiary 3663 Transport Limited. After discussion, the claimant accepted that the correct legal identity of his employer was 3663 Transport Limited and I have made an order substituting it as the respondent.
28. The respondent’s business is wholesale food supplies to organisations such as restaurants, canteens, schools, prisons and military facilities. It is common ground that the claimant was employed between 14 March 2022 and 20 April 2023. It is also agreed that the claimant was summarily dismissed for alleged gross misconduct. The misconduct alleged is working during breaks recorded on the claimant’s tachograph (described as a “tachograph offence”).

The claim

29. The claimant presented his claim to the tribunal on 12 September 2023, having gone through early conciliation between 4 July and 15 August 2023.
30. The claimant says that he is disabled within the definition in section 6 of the Equality Act 2010 because of back pain. He also says that he is dyslexic and has been diagnosed with diabetes but these are not relied on as relevant conditions for this claim. The respondent does not accept that the claimant was disabled within the meaning of the Equality Act 2010 at all relevant times.
31. The claimant contends that:
 - 31.1 The respondent’s alleged reason for dismissal was a pretext and the real reason, or part of it, was that it did not wish to make adjustments for his back condition;
 - 31.2 A further reason for his dismissal was that he had complained to managers about a lack of cages for handling goods and unsafe loading practices which increased the risk of injury.
 - 31.3 The respondent failed to make reasonable adjustments for his back condition (although he acknowledges that they made satisfactory temporary changes for a period of two weeks). He says that reasonable adjustments would have been:

- 31.3.1 Providing him with cages for handling goods without having to lift them; and/or
 - 31.3.2 Allocating the claimant to prison and military facility drops which required less manual handling.
 - 31.3.3 Providing a driver's mate.
 - 31.3.4 Providing an electric pump truck.
 - 31.3.5 Not requiring the claimant to work one Saturday per month.
32. The claimant also alleges that he faced the following detrimental treatment:
- 32.1 On 12 April 2023 being told that he had to make a delivery despite the fact that it would have meant missing a physiotherapy appointment;
 - 32.2 Being treated by managers as a hindrance and being made to feel useless,
 - 32.3 Being spoken to disrespectfully by managers in front of colleagues;
 - 32.4 Being kept at work unnecessarily in circumstances where other drivers were permitted to leave.
 - 32.5 Being given harder routes and/or heavier loads than other drivers.
- (The claimant will be required to provide three examples of each of 32.2-32.5)
33. The claimant says that there was no basis for dismissing him summarily and that the failure to pay notice pay was in breach of contract.
34. The respondent denies subjecting the claimant to discrimination on grounds of disability (which is not admitted) or failing to make reasonable adjustments (insofar as the duty to do so arose). It says that it was entitled to dismiss the claimant summarily because his tachograph offence amounted to a repudiatory breach by him of his contract of employment (that is, gross misconduct).

The Complaints

35. The claimant is making the following complaints:
- 35.1 Discrimination arising from disability by dismissal as set out at paragraph 31.1 above (Equality Act 2010, section 15).
 - 35.2 Harassment relating to disability because of the matters set out at paragraph 32 above (Equality Act 2010, section 26).
 - 35.3 Failure to make reasonable adjustments as set out at paragraph 31.3 above (Equality Act 2010, section 20).
 - 35.4 Automatic unfair dismissal for making health and safety and/or protected disclosures as set out at paragraph 31.2 above (Employment Rights Act 1996, sections 100 and 103A).
 - 35.5 Unlawful detriment because of the matters set out at paragraph 32 above (Employment Rights Act 1996, sections 44, 47B and 48).

36. Deliberately vacant

37. Deliberately vacant

“The Issues

38. The provisional issues the Tribunal will decide are set out below. These are subject to further clarification or amendment at the next case management preliminary hearing

1. Disability

1.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

1.1.1 Did he have a physical or mental impairment: a back condition?

1.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

1.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

1.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

1.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

1.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

1.1.5.2 if not, were they likely to recur?

2. Discrimination arising from disability (Equality Act 2010 section 15)

2.1 Did the respondent treat the claimant unfavourably by:

2.1.1 Dismissing him.

2.1.2 On 15 March 2023 stopping his sick pay.

2.2 Did the following things arise in consequence of the claimant’s disability:

2.2.1 The claimant’s requests for adjustments;

2.2.2 The requirement to make adjustments for the claims.

2.2.3 The claimant’s sickness absence.

2.3 Did the respondent dismiss the claimant because of that?

2.4 Was the treatment a proportionate means of achieving a legitimate aim?

The respondent must say what its aim was.

2.5 The Tribunal will decide in particular:

2.5.1 was the treatment an appropriate and reasonably necessary way to achieve that aim;

2.5.2 could something less discriminatory have been done instead;

2.5.3 how should the needs of the claimant and the respondent be balanced?

2.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

3. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

3.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

3.2 A “PCP” is a provision, criterion or practice. Did the respondent have the following PCPs:

3.2.1 A practice of limiting the use of wrap which the claimant alleges caused product to be spilt from pallets in the back of delivery lorries.

3.2.2 Requiring the claimant to work one Saturday per month.

3.2.3 Requiring the claimant to lift and move heavy items when making deliveries.

3.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant’s disability, in that heavy lifting exacerbated his back symptoms/in that picking up spilt product involved the claimant in more frequent lifting and twisting which exacerbated his back symptoms/in that the claimant needed two days a week to recover?

3.4 Did the lack of an auxiliary aid, namely wheeled cages, put the claimant at a substantial disadvantage compared to someone without the claimant’s disability, in that it was harder for the claimant to lift and carry products?

3.5 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

3.6 What steps could have been taken to avoid the disadvantage? The claimant suggests:

3.6.1 Providing the claimant with wheeled cages to move loads without lifting;

3.6.2 Allocating the claimant to deliveries requiring less lifting, such as to prisons or military facilities.

3.6.3 Providing a driver’s mate.

3.6.4 Providing an electric pump truck.

3.6.5 Not requiring the claimant to work one Saturday per month.

3.7 Was it reasonable for the respondent to have to take those steps and when?

3.8 Did the respondent fail to take those steps?

4. Harassment related to disability (Equality Act 2010 section 26)

4.1 Did the respondent do all or any of the things set out at paragraph 32 above.

4.1.1 On 13 April 2023 Mr Bradford Sole distracted the claimant so that he forgot about his tachograph card being on “break”;

4.1.2 Subjecting the claimant to the disciplinary process and dismissing him.

4.2 If so, was that unwanted conduct?

4.3 Did it relate to disability?

4.4 Did the conduct have the purpose of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.5 If not, did it have that effect? The Tribunal will take into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

5. Time limits

5.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

5.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

5.1.2 If not, was there conduct extending over a period?

5.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

5.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

5.1.4.1 Why were the complaints not made to the Tribunal in time?

5.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

6. Remedy for discrimination

6.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

- 6.2 What financial losses has the discrimination caused the claimant?
- 6.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
- 6.4 If not, for what period of loss should the claimant be compensated?
- 6.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
- 6.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
- 6.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
- 6.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 6.9 Did the respondent or the claimant unreasonably fail to comply with it?
- 6.10 If so is it just and equitable to increase or decrease any award payable to the claimant?
- 6.11 By what proportion, up to 25%?
- 6.12 Should interest be awarded? How much?
- 7. **Protected disclosure**
 - 7.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:
 - 7.1.1 What did the claimant say or write? When? To whom?
 - 7.1.2 Did he disclose information?
 - 7.1.3 Did he believe the disclosure of information was made in the public interest?
 - 7.1.4 Was that belief reasonable?
 - 7.1.5 Did he believe it tended to show that:
 - 7.1.5.1 the health or safety of any individual had been, was being or was likely to be endangered;
 - 7.1.6 Was that belief reasonable?
 - 7.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.
 - 7.3 The alleged disclosures the claimant relies on are as follows:-
 - 7.3.1 The claimant stated that transferring goods between lorries during

an official tachograph break was not permitted, as it is classed as “other work” (this regularly occurs when drivers are sent to take deliveries from the original driver when they have insufficient time to deliver the goods on their route).

- 7.3.2 During his disciplinary hearing for the infringement (taking insufficient breaks) the claimant was advised to by his manager that he could have a break at this time, but just not do any work. The claimant stated that he could not do that and that it clearly breached tachograph rules (which is a health and safety as well as a public safety rule).
- 7.3.3 The claimant’s request for cages, from managers, to prevent back injury, were not just made for him but also for other drivers.
- 7.3.4 The claimant stated to Claire Harry that if there were more cages everyone should/could have them, at least for a few days a week, as not having any is hurting everyone.
- 7.3.5 The claimant complained that there were insufficient pallet trucks so not everyone got them, which was unsafe for everyone’s back, as without them the amount of manual handling was excessive.
- 7.3.6 The claimant complained about insufficient wrapping around pallets so that they were then unstable and unsafe as stock had to be picked up from the floor and re-stacked unnecessarily, significantly increasing the amount of manual handling required, which was refused, as was being rationed for costs reasons.
- 7.3.7 On some days there was no wrap, which he complained was very unsafe, but Ben Spragg, (manager), replied that the goods had to be delivered any way, (even with no wrapping).
- 7.3.8 The claimant complained that goods loaded in the wrong order, pallets being mixed illogically and inefficiently caused extra/excessive manual handling, but was told by managers, that this was not preventable because the respondent refused to pay the warehouse staff overtime or employ more staff, so they had to rush and could not be too particular about the standard of loading.
- 7.3.9 The claimant complained that it was impossible to follow any safe manual handling procedures (that are recommended in the induction), as the way lorries are loaded makes these methods a joke.
- 7.3.10 The claimant also complained about goods being loaded directly on to the floor, as this sometimes happened when there was no room for more pallets and the last bit of floor space by the door was then stacked up.
- 7.3.11 The claimant was told by Ben Spragg that the goods had to go out.
- 7.3.12 The claimant stated this was unsafe, as risked the boxes falling on drivers, when they then open rear doors, as the stack is then obviously unstable after the lorry has turned a few corners, this had happened several times to other drivers that the claimant knew

about

7.3.13 The claimant also stated to managers (Ben and Jason) that they were not allowed to place boxes of food items directly on the lorry floor for food hygiene reasons.

8. Detriment (Employment Rights Act 1996 section 48)

8.1 Did the respondent do the following things set out at paragraph 32 above:

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

8.3 If so, was it done on the ground that he made a protected disclosure and/or raised a health and safety concern in accordance with sections 47B and/or 44(1)(c),(d) or (1A) of the Employment Rights Act 1996?

9. Unfair dismissal

9.1 Was the reason or principal reason for dismissal that the claimant made a protected disclosure and/or raised a health and safety concern in accordance with sections 103A and/or 100(1)(c),(d) or (e) of the Employment Rights Act 1996?

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

10. Remedy for unfair dismissal

10.1 Does the claimant wish to be reinstated to their previous employment?

10.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

10.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

10.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

10.5 What should the terms of the re-engagement order be?

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

10.6.1 What financial losses has the dismissal caused the claimant?

10.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

10.6.3 If not, for what period of loss should the claimant be compensated?

10.6.4 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?

- 10.6.5 If so, should the claimant's compensation be reduced? By how much?
- 10.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 10.6.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?
- 10.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
- 10.6.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
- 10.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
- 10.6.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?
- 10.7 What basic award is payable to the claimant, if any?
- 10.8 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?
- 11. **Remedy for Protected Disclosure Detriment**
 - 11.1 What financial losses has the detrimental treatment caused the claimant?
 - 11.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - 11.3 If not, for what period of loss should the claimant be compensated?
 - 11.4 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?
 - 11.5 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?
 - 11.6 Is it just and equitable to award the claimant other compensation?
 - 11.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - 11.8 Did the respondent or the claimant unreasonably fail to comply with it?
 - 11.9 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
 - 11.10 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?
 - 11.11 Was the protected disclosure made in good faith?

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

12. Wrongful dismissal / Notice pay

12.1 What was the claimant's notice period?

12.2 Was the claimant paid for that notice period?

12.3 If not, was the claimant guilty of gross misconduct?"

The law

3. Sections 43B and 103A Employment Rights Act 1996 provide:

"43B Disclosures qualifying for protection.

- (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 any individual has been, is being or is likely to be endangered,
 - (da) that sexual harassment has occurred, is occurring or is likely to occur,
 - (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 of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

And

"103A Protected disclosure.

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."

4. As per the IDS Employment Law Handbook "Whistleblowing at Work"

At 3.4:

"In Williams v Brown EAT 0044/19, the EAT helpfully summarised the five elements, derived from section 43B(1) ERA, that cumulatively must be satisfied in order for a claimant to establish that he or she has made a "qualifying disclosure". These are that:

- There was a disclosure of information by the worker in question.
- The worker believed that the disclosure was made in the public interest.

- Any such belief was reasonably held.
- The worker also believed that the disclosure tended to show one or more of the matters listed in section 43B(1)(a) to (f); and
- Any such belief was reasonably held.”

5. And at 3.8:

“Disclosure must convey factual information.

In Kilraine v Wadsworth London Borough Council [2018] ICR 1850, CA, the Court of Appeal held that, in order for a disclosure to be a “qualifying disclosure” within the meaning of section 43B(1) ERA, the disclosure had to have sufficient factual content and specificity. The court went on to stress that the word “information” in section 43B(1) has to be read with the qualifying phrase “tends to show” – i.e. the worker must reasonably believe that the information “tends to show” that one of the relevant failures has occurred, is occurring or is likely to occur. Accordingly, for a statement or disclosure to be a qualifying disclosure, it must have sufficient factual content to be capable of tending to show one of the matters listed in section 43B(1)(a) – (f). Whether an identified statement or disclosure in any particular case meets that standard will be a matter for the evaluative judgment of the tribunal in the light of all the facts of the case.

As the Court of Appeal in Kilraine also made clear, the question of sufficiency of information disclosed is likely to be closely aligned with the issue whether the worker making the disclosure had the reasonable belief that the information disclosed tends to show one of the six relevant failures.

...

6. And at 3.9:

“Based on the decision in Kilraine, the EAT has subsequently clarified that, if a tribunal fails to pay particular attention to the requirement for sufficient factual content and specificity when determining whether a disclosure constitutes a qualifying disclosure, it is likely to err in law – see Lumb v Chief Constable of Greater Manchester Police EAT 0001/21.”

7. And at 3.29:

“Provided that it conveys facts, an oral communication is clearly capable of being a disclosure of information.”

Disability

8. Section 6 of the Equality Act provides as follows:

“6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

- (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.”

9. Schedule 1 to the Equality Act 2010 provides as follows:-

“Long-term effects

2 (1) The effect of an impairment is long-term if—

- (a) it has lasted for at least 12 months,
 - (b) it is likely to last for at least 12 months,
- (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

...”

And

“Effect of medical treatment

5 (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

- (a) measures are being taken to treat or correct it, and
- (b) but for that, it would be likely to have that effect.”

10. As per the guidance on the definition of disability (2011):

“C3...

In these contexts, ‘likely,’ should be interpreted as meaning that it could well happen.

C4. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).”

11. Sections 15, 20, 21 and 26 of the Equality Act 2010 provide:

15 Discrimination arising from disability

- (1) A person (A) discriminates against a disabled person (B) if—
 - (a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

- (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are—
- Disability;”

The evidence

12. We had a main hearing bundle arranged in sections and ending at E-62. In addition, we had a claimant's supplementary bundle of 59 pages and a medical evidence bundle of 103 pages.
13. We had written statements and heard evidence from the following:
- (i) The claimant: a main statement
a rebuttal witness statement
a disability skeleton
an argument/submission
 - (ii) Mr Ben Spragg: Transport Operations Manager
 - (iii) Mr Bradford Sole: Transport Team Manager
 - (iv) Ms Claire Harry: Transport Team Manager
 - (v) Mr Ryan Hunt: Transport Team Manager
 - (vi) In addition, we had a witness statement from Ms Lisa Radford: HR advisor.
14. We had a core chronology

The facts

15. The claimant was employed by the respondent on 14 March 2022 as a Food Delivery Driver. An addendum to the claimant's terms and conditions of employment, dated 15 September 2022, changed his job title to "Multi Drop Driver, Grade 6".
16. The respondent is a large wholesale food distribution business that has distribution hubs and regional depots throughout the United Kingdom. The respondent's customers are within the hospitality, education, and healthcare sectors.
17. The claimant was based at the respondent's Slough depot.
18. The claimant's role required the claimant to drive an LGV vehicle (Large Goods Vehicle – up to 30 tonnes) in order to deliver to Bidfood's customers in accordance with delivery routes allocated on a daily basis.

Disability

19. The respondent does not accept that the claimant was disabled within the

meaning of the Equality Act 2010 at any relevant time.

20. Prior to being employed by the respondent, the claimant worked as an agency driver for the respondent from 22 December 2021.

21. In his disability impact statement, the claimant states:-

“RS’s back problems began in January 2022 soon after starting at Bidford (initially as an agency driver) and by February 2022 it was severe enough for RS to need painkillers every day to be able to manage to go to work.”

22. The claimant puts it as follows:-

“3. By the beginning of March 2022, his back pain became very severe and has been ever since.

...

4. RS had to start to take pain medication when at home as well as when at work from around March 2022 onwards and has been taking pain medication ever since that time, as without them he could not and still cannot sleep or do his normal day to day activities let alone his normal work without them.”

23. In the claimant’s skeleton argument/submission the issue was put as follows:-

“The claimant’s impairment had a substantial adverse effect on his ability to do normal day to day activities from 11/05/2022 until now.”

24. Notwithstanding the claimant’s assertions in his disability impact statement, it is a fact that the claimant was undertaking a difficult and physically challenging job. He was working in excess of 40 hours per week. He was driving to multiple sites and having to unload food produce. We had evidence that on some drops the weight of goods to be delivered could exceed 500kg.

25. The lorries were pre-packed by warehouse staff. The products to be delivered would generally be placed on pallets but could be in wheeled cages. Generally speaking, a pallet pump truck would be carried on the lorry to unload the pallets at the destination. If a pallet pump truck was not available or could not be fitted into the back of the lorry then the produce would have to be delivered by hand, possibly using a sack barrow if one had been taken.

26. The claimant’s impact statement and witness statements have been drafted by Ms Rao on behalf of the claimant. Ms Rao told us she utilised AI for the skeleton argument/submission on disability.

27. In the circumstances, we have examined what medical evidence and other contemporaneous documentation we have.

28. On 11 May 2022, the claimant telephoned in as sick. The log sheet records

“Robert won’t be in due to back pain.”

29. The claimant’s end date of his absence was 16 May 2022. We have a return to work interview form dated 16 May 2022. Although termed an interview, the

claimant gave evidence that he was simply handed the form and instructed to fill it in. The total number of days absent was three and due to this no medical certificate was required.

30. The claimant initially filled in his return to work interview answering the question "Does the employee feel fit to return to normal duties?" "No." However, when it was pointed out to him that he had returned to work and was either fit or unfit, that was changed to "Yes."
31. It appears that the claimant worked on 16 May 2022. However, the claimant went off sick again on 17 May 2022.
32. The claimant consulted his GP on 19 May 2022. The GP notes record the following:-

"Problem: low back pain (first)

History: low back pain worse in the last 2 weeks, ongoing since Dec, since starting job as lorry driver

Heavy lifting, taken time off work

No bladder or bowel sx, no saddle anaesthesia

No focal neurology

Able to WB [weight bear]

No specific injury or fall

...

Examination able to WB

Tender over lumbar area

Reduced ROM [range of movement] of spine

...

Comment: refer physio"

33. The claimant's GP records indicate that he was prescribed 14 days' worth of Naproxen on 27 May 2022.
34. A Med3 fit note was issued. This signed the claimant as not fit for work from 19 May to 2 June 2022. The stated condition was "Back pain."
35. We have the return to work interview form completed on 6 June 2022. To the question "Does the employee believe that they are currently free from any symptoms of their illness?" the claimant has answered "Yes."
36. The respondent had a requirement for all its new employees to complete a Medigold Health Questionnaire to ensure that they were fit for work and that there were no conditions or adjustments needed to be made. The claimant was

required to fill this form in on first being employed but had not done so. By 15 June 2022 it was overdue by 89 days.

37. On 15 June 2022, Edward Preece, HR Assistant, emailed Claire Harry asking her to task the claimant to complete the form as a priority. The email contained the link to the form along with the password.
38. It was Claire Harry's evidence that she verbally chased the claimant to fill in the form.
39. At 13.59.26 on 23 June 2022 the form was submitted. This contained the claimant's personal details including his date of birth, address with postcode, mobile telephone number and email address. We were told that the form would not be pre-populated with that information and it would have to be entered by whoever submitted the form.
40. The claimant disputes that he completed and submitted the form or that it was completed and submitted on his behalf.
41. Every question in the placement questionnaire has been answered "No." This includes the following questions:-
 - "(i) • Do you suffer from any medical condition, that you feel you would need support with in order to carry out functions which are essential to your proposed employment?
 - (ii) • Are you currently receiving any treatment or investigations for any condition?
 - (iii) • Do you require any adjustments to be made to your work or work environment due to a medical condition?
 - (iv) • Are you taking any medication?
 - (v) • Do you have or are you currently being investigated for a learning difficulty (i.e. dyslexia, dyspraxia, ADHD)?
 - (vi) • Were you absent more than 10 days due to a medical condition or conditions over the last 12 months?"
 - (vii) • Within the last 5 years have you suffered from any medical conditions that affect your muscles, ligaments or joints that may impact on your ability to undertake any aspect of your potential role?
 - (viii) • Do you feel that you require any adjustments in relation to a musculoskeletal concern to allow you to undertake your potential role?
 - (ix) • From your knowledge of the job that you will potentially be doing, is there anything that you feel may impact on your medical condition?
42. Answering "No" to questions (iv), (v) and (vi) was incorrect. The claimant had had in excess of 10 days absence due to sickness and had other medical conditions, namely diabetes and dyslexia, that he was taking medication for.
43. Answering "No" to all the other questions (i) – (iii) - and (vii) – (ix) (and (iv) in so

far as it related to pain relief) greatly undermines the claimant's current case as to how significant was his back pain at and before that time if the answers were correct. That in turn would provide a motive to deny he submitted the form.

44. The claimant states that at the time of the submission he was out driving, that he was not able to submit the form via his mobile phone, that he did not have access to a laptop and he points to the inaccurate answers as demonstrating that he could not have filled in the form. He suggests that Claire Harry or someone else in the office had submitted it.
45. Claire Harry denied that she filled in and submitted the form and suggested that she would not have had access to the claimant's details, although we find this unlikely.
46. In our judgment, a highly relevant factor is that the claimant was scheduled to have his probation review meeting the next day on 24 June 2022.
47. Lisa Radford gave evidence that, given the dispute about this issue, she had made enquiries to see if she could obtain any metadata or IP address that would assist in establishing where the form had been completed and submitted from. Unfortunately, Medigold's IT Department was unable to assist due to the passage of time.
48. We make plain that determining this issue has not been easy. However, on the balance of probabilities, we find that either the claimant did submit the form or it was submitted on his behalf by his friend. We find it less probable that Claire Harry or another individual in the office would have filled in the form and done so with such a cavalier approach to creating a probably false document. We find that the claimant was aware that his probation review meeting was scheduled for 24 June and that he had to submit the questionnaire by that time. We find that the claimant was very keen to ensure that he was confirmed in his post and did not want any medical issues potentially to cause him to fail his probation. We find that the claimant probably accessed the form via his mobile and simply answered "No" to every question just to get the form completed and returned. We find that the claimant's dyslexia may have made filling in the form difficult in any event and that may suggest it was filled in for him. However, it does suggest and we find that his back issue was not nearly as significant at that time as he now claims.
49. After the questionnaire had been submitted, Medigold Health Consultancy Nursing Team emailed HR as follows:-

"The candidate has answered no to all questions regarding any health conditions and has therefore been automatically passed as fit for work as there are no health concerns identified that are likely to effect the individual or require any adjustments in the workplace."
50. Around this time the claimant states that he was requesting more cages from management. He says that on 22 June 2022 he complained to Claire Harry about not getting any cage work and that he was struggling with back pain. On 23 June 2022, Steve Hunt, a manager, rang the claimant and offered him physiotherapy. An appointment was booked for 29 June 2022.

51. On 24 June 2022, the claimant had his probation review meeting with Ryan Hunt. The probation review document contains the following:-

“Absence for 2 weeks, hurt back injured at work.

Good multi drop driver.

Attitude sometimes is unacceptable. Bit too direct.

Big issues with not being on cages.”

52. The claimant was passed as satisfactory and successfully completed his probationary period.

53. On 29 June 2022, the claimant attended for his physiotherapy appointment. The consultation notes record as follows:-

“History of present condition: Right hip pain. Had for 26 years. Noticing it more 2/12. Had physio 26 years ago. Pain getting worse for last 2 week. Was off 1 month ago for two weeks sickness. GP gave tablets and NHS physio. Returned to work.”

54. The claimant went off sick the next day on 30 June 2022. The telephone log sheet records as follows:-

“He have back pain.”

55. The claimant was absent for two days and the end of his absence was 4 July 2022. Although the claimant answered the question “Does the employee feel fit to return to normal duties?” with a “Yes,” he also answered the question “Does the employee believe that they are currently free from any symptoms of their illness?” with a “No.”

56. On 6 July 2022, the claimant had an absence review with Claire Harry and the claimant was informed that his absence had reached an unacceptable level and he was warned that, should any further periods of absence occur within the next six months, an investigation would take place and this could result in disciplinary action being taken.

57. On 13 July 2022, the claimant had a second physiotherapy consultation. The following is recorded:-

“Problem: Pain and hip gone, but got discomfort in back. This week has been on cages – products in cages and rolling them as opposed to lifting from pallets. Feeling that bending and twisting is aggravated back.

Examination

OBS – Flattened lumbar spine, increased lumbar lordosis (increasing strain upper lumbar area).

...

Treatment and plan:

1. Given lower back mobilization exercises on sheet – to do daily in evening, during

the day try mobilising back in standing.

2. Abdominal exercises – working to Improve core strength.
3. Mattress – considering a mattress as not support.
4. Discussed how aging process/stiffness in joints and poor abdominal strength can give backache and referral of pain.

R/V in three weeks.”

58. The claimant did not attend the review appointment on 3 August 2022.
59. The claimant’s GP records indicated that he had a number of tests relating to his diabetes in May and June 2022 and had a consultation with his GP on 14 June 2022. The problem was diabetes but the GP record has the following entry:-

“Comment: also complains of cracked feet and pins and needles.”

60. In the claimant’s medical records there is a document dated 16 September 2022 from the Hillingdon Hospitals NHS Foundation Trust Physiotherapy Department which states:-

“The above patient was sent a letter inviting them to attend our back school clinic. Unfortunately they did not attend their appointment, and we have not heard from them regarding this.

As stated in the letter they received regarding this appointment, failure to attend without informing us means they have now been discharged from this episode of care.”

61. The next relevant entry on the claimant’s GP records is on 23 January 2023. The following is recorded:-

“Problem: Malaise.

Has been generally feeling unwell for the last 1-2 weeks.

Felt like he was coming down with flu.

No cough/cold/fever.

This morning, started work early (HGV driver) – Felt dizzy/shaky.

History: Patient also mentioned right sided back pain.

Has been having over the last two weeks.

No radiation.

Had previously.”

62. The claimant had two days off work on 26 and 27 January 2023 with hypoglycaemia.
63. The claimant also took three days off from 23 January to 25 January as holiday as he had exhausted his contractual sick pay entitlement.

64. Notwithstanding the fact that the claimant did not go to his GP for back pain between 2 June 2022 and 23 January 2023, the claimant has suggested that he took holiday rather than being absent sick as he had exhausted his contractual sick pay. The claimant had three periods of absence in late October (five days), early November (four days), and mid-December (three days). Given that the claimant had been warned about his sickness absence levels, we are prepared to accept that he was taking holiday in circumstances where his back pain had flared up and caused him to be off work. The block of holiday between 9 January and 20 January 2023 we find was probably holiday and not sickness absence.

65. On 2 March 2023, the claimant called to say that he would possibly return to work on the next Monday. The telephone log sheet records:-

“Robert was called Tuesday morning because he never showed for work, he said he had to go to the doctors and if he doesn’t call that afternoon he will not be in the following day, he has now called today saying he will not be back until Monday the earliest depending on what the doctor says, this is due to problems following a car accident.”

66. On 2 March 2023, the claimant telephoned his GP practice. The record includes the following:-

“Presenting problem/symptoms problem retaining stools

Nerve damage after car accident 2 weeks ago.

Symptoms started 5 days.”

67. The GP records contain the following:-

“3rd March 2023

Problem: low back pain (New)

History: patient was involved in RTA 2 weeks ago

Since then having lower back pain

Some radiation to left leg

Also some numbness to groin

Last week had episode of faecal incontinence

Examination: antalgic gait

Power 5/5 bilaterally

Sensation reduced left groin, present perineum

Comment: adv cord compression needs to be R/O.”

68. The claimant was provided with a MED3 fit note signing him off as not fit for work from 1 March 2023 to 17 March 2023. The stated condition was “Low back pain.”

69. The claimant was referred to the Emergency Department at West Hertfordshire Hospitals on 3 March 2023. The following is recorded in the discharge summary:-

“Presenting complaints or issues: Injury of lower back

Clinical narrative:

Patient has presented with

1. Lower back pain from the past one week. It started after he had his physiotherapy session. Pain is intermittent, come and goes in waves.
2. Faecal incontinence that started after back pain. He has had 2 episodes in the last one week.

He was involved in RTC 2 weeks ago where a car hit his car from behind. There was no back injury.

O/E

General appearance: Patient lying comfortably in bed, not in distress

...

Power 5/5 in all limbs, sensations intact in all limbs

Patient can straight leg raise

He is walking independently

...

Diagnosis:

03-Mar-2023 No abnormality detected.”

The claimant was prescribed co-codamol.

70. On 13 March 2023, the claimant telephoned his GP practice and the following is recorded:-

“Telephone call from a patient

Back pain

Had for a month

Pain killers given by hospital

Was sent to hospital for MRI – but they didn’t do it

Co-codamol – not helping.”

71. On 14 March 2023, the claimant attended at his GP surgery. The following is recorded:-

“Problem: Low back pain (Review)

History: Patient reviewed

was seen in ED

didn't have MRI

discharged with co-codamol – not keen to use as causes drowsiness

has had physio through insurance

off work, not sleeping well.”

72. The claimant was prescribed naproxen. The claimant was referred to the spinal clinic. A further MED3 fit note was issued signing the claimant as not fit for work from 14 March to 24 March 2023. The stated condition was “low back pain.”

73. On 20 March 2023, the claimant had a welfare meeting with Jason Cartwright and Claire Harry. The notes of the meeting contain the following:-

“Please confirm the reason for your absence?

Back pain, lower.

Have you been off with this type of issue before?

Yes. When I first started ref cages, couple of weeks.

Have you seen a medical professional about this issue. If yes what did they say?

Yes. GP – referred to spinal specialist. Needed ultrasounds at hospital to test bladder. Test OK.

Is this issue caused through work?

No – caused by car accident.

What have the doctors said?

Sent to hospital as cannot pinpoint the issue. Having private physio through car accident people. Waiting spinal appointment.

Are there any adjustments we can make which would enable your return to work?

Yes – on return to work, possibly doing prisons/MODs using electric pump truck to help back.”

74. On 22 March 2023, the claimant telephoned his GP practice. The following is recorded:-

“Patient said he had a welfare meeting at work and they have agreed to reasonable adjustments/no heavy lifting.”

75. On 24 March 2023, the claimant attended his GP practice and the following is recorded:-

“Problem low back pain (Review)

Comment- request reasonable adjustments/no heavy lifting.”

76. On 24 March 2023, a MED3 fit note was issued advising that the claimant may be fit for work taking into account amended duties and workplace adaptations. The comment is “Reasonable adjustments/no heavy lifting.” The fit note covered the period from 24 March to 27 May 2023.
77. Following the welfare meeting, the claimant was referred to Occupational Health.
78. The claimant returned to work on 27 March 2023. He did so on light duties and delivering to MOD/MOJ (prisons).
79. Occupational Health conducted a telephone assessment of the claimant on 23 March 2023.
80. The Occupational Health report is dated 29 March 2023 and contains the following:-

“Occupational history

Mr Smith is employed as a driver. Your referral documentation has cited that Mr Smith has been absent from work since 21 March 2023, however Mr Smith has stated his absence from work was around three weeks ago.

Medical factors

Mr Smith said that he had no prior history of low back issues. He started experiencing lower back symptoms when he started his role 15 months ago where he had a short period of sickness absence of around two weeks due to lower back pain. This was managed with pain relief medication and he did not require any physiotherapy at that time.”

81. The claimant complains that the report may be distorted by virtue of the fact that the referral document does not refer to previous periods of sickness absence. However, it is clear that his previous sickness absence was made clear to Doctor Mameda Deen, the accredited specialist in occupational medicine who undertook the assessment.
82. The Occupational Health report goes on:-

“Mr Smith experienced a further episode of lower back pain symptoms around three weeks ago where he had been prescribed naproxen to help with his lower back pain and has also started physiotherapy sessions. He did have some worrying symptoms at the onset of his lower back pain symptoms which his General Practitioner (GP) had organised some further investigations including an ultrasound scan of his genitourinary systems. However, this did not show any sinister findings from what he told me. He has not had any further worrying symptoms since that time. However, his GP from what he tells me, has referred him to a spinal specialist for further assessment, although an appointment date has not been given.

Mr Smith says that his lower back symptoms are getting better where he has a pain score of 4 with pain relief medication on board. He does not experience any associated lower limb symptoms. He is not restricted in his day to day activities, however is

currently not driving his car. His walking distance is around half a mile and he is able to walk his dogs daily. However, his sitting and standing is restricted to around 15-20 minutes sitting and around 10 minutes standing.

...

Summary and recommendations

Mr Smith has been experiencing lower back pain for which he is currently on appropriate pain relief medication and is pursuing physiotherapy sessions. Although he is able to carry out most of his activities of daily living, his function is still somewhat restricted, although it is the expectation that this would improve in the near future."

83. The report goes on to suggest adjustments. The report then goes on:-

"Is a review or obtaining further medical information required?"

I have not suggested a further Occupational Health review at this time, however if his return to work has been unsuccessful or he is experiencing any difficulties on his return to work, we would be happy to review the situation and provide further advice at managements request. I have not suggested we obtain further medical information at this time.

Is there an underlying health concern?

He has a lower back issue which is likely to be more musculoskeletal in origin rather than any sinister issues.

Is a full recovery expected?

I would expect that this does not result in any long lasting disability and that he should show significant improvement to symptoms with his ongoing physiotherapy and medical management over the next 4-6 weeks."

84. The claimant was dismissed on 20 April 2023.
85. Although it postdates the claimant's termination of employment, we have a letter dated 22 June 2023 from a physiotherapist which states:-

"Thank you for referring this charming gentleman through to the diagnostic clinic. He attends with an eight month history of ongoing lower back and right lateral thigh pain that he recalls occurring really from no specific injury but feels it may be coming from the fact that he is spending a lot of time doing bending and lifting."

86. An eight month history would take the matter back to October/November 2022.

Conclusions

87. We take account of the fact that it will not always be essential for a tribunal to identify a specific "impairment" if the existence of one can be established from the evidence of an adverse effect on the claimant's abilities. Further, Appendix 1 to the EHRC Employment Code states that:

"There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause." – Para 7.

88. It is clear to us and we find that the claimant experienced some pain from his back from 22 December 2021. The claimant had time off work and attended his GP between 16 May and 2 June 2022. The cause was low back pain. It is the claimant's case that the back pain had a substantial adverse effect on his ability to undertake day to day activities from 11 May 2022. We have no doubt that the claimant's ability to undertake normal day to day activities was compromised during the period that he was off work. However, the claimant returned to work and then had three further days off at the end of June. The claimant then returned to work and had three periods of sickness absence taken as holiday in October, November, and December 2022.
89. We have not had a diagnosis of what was causing the claimant's low back pain. Consequently, we have considered whether we can infer that he had a physical impairment from such limitation to his normal day to day activities as we find.
90. We do not accept the claimant's evidence as to the effect on his ability to undertake normal day to day activities at this time, i.e. between May and October 2022. This is because the claimant has asserted in his impact statement that even with a lot of over the counter painkillers everything that involves moving caused pain. The claimant complains about being continuously in severe pain sitting down, standing up, going up and down stairs, walking, getting dressed, undressed, lifting, carrying, pulling, or pushing anything, driving a car, gardening, doing basic DIY and walking the dogs. The reason we do not accept the claimant's evidence is that such limitations are incompatible with the claimant doing his 40 hours a week job even with over the counter analgesics. The claimant was driving a large goods vehicle for a good proportion of the working day and, as such, was sitting down for long periods. At destinations, the claimant was pulling or pushing pallets or cages loaded with goods. The claimant was manually handling goods, climbing stairs and delivering produce.
91. The claimant seeks to advance that he was taking a lot of over the counter pain killers and that when assessing his ability to undertake day to day activities we must proceed on the basis of making the assessment assuming he was not on over the counter painkillers. However, we have placed significant reliance of the fact that the claimant did not return to his GP between 2 June 2022 and 23 January 2023 to seek prescription drugs for his alleged pain.
92. The claimant went to his GP during this time and, had he been in pain to the extent he now claims, could have easily mentioned it. (For example, in June 2022 he mentioned his cracked feet.) That he did not suggests to us that the effect on his day to day activities in his impact statement has been grossly exaggerated. No evidence of the purchase of over the counter painkillers has been placed before us.
93. The medical evidence is that on each of the times he went to his GP in May 2022, January 2023 and March 2023 the onset of the back pain is put at two weeks prior to the consultation.
94. A further factor is that the 3 March 2023 absence was attributed to a road traffic accident. Whilst the claimant told us that that was a white lie and the purpose was to get him a GP appointment sooner rather than later, we reject that evidence. The GP notes demonstrate that he generally got an appointment within

a day or two after telephoning. The claimant stated in the welfare meeting that the RTA was the cause of him going off sick.

95. We find that the claimant did have a physical impairment causing low back pain between 11 May and 2 June 2022. Thereafter we find that the claimant did not have a physical impairment until early January 2023. We find that the claimant did not have a physical impairment following his return to work after the hypoglycaemia episode in January 2023. We find that the claimant did have a physical impairment, said to have been caused by a road traffic accident, after mid-February 2023.
96. We find that we have insufficient evidence to draw any conclusions from the brief periods of sickness absence taken as holiday in October, November, and December 2022.
97. We find that the claimant's physical impairment did not have a substantial adverse effect on his ability to undertake day to day activities until his absence from work on 1 March 2023. That is despite the Occupational Health report stating that the claimant was not restricted in his day to day activities as we find that the claimant was keen to get back to work for economic reasons.
98. Even if we took a start date of 11 May 2022 as the start date for the claimant having a physical impairment that had a substantial adverse effect on his ability to undertake day to day activities, the fact is that by 20 April 2023 it had not lasted 12 months. We find that the adverse effect on his day-to-day activities ceased on 2 June 2022. Thereafter we find that it was not likely to recur. As such, we need to consider whether it was likely that his physical impairment would last 12 months, i.e., that it could well happen.
99. The medical evidence is that any problems with his back were episodic and temporary. The Occupational Health report does not recommend a follow up consultation and gives a prognosis of significant improvement to symptoms over the next four to six weeks.
100. Given the history and the Occupational Health report, we find that at no time prior to 20 April 2023 could it be said that the claimant's physical impairment was likely to last more than 12 months. Further, we find that the effect was not likely to recur.
101. Consequently, we find that the claimant was not disabled within the meaning of the Equality Act 2010 at any relevant time between 14 March 2022 and 20 April 2023.
102. Consequently, the claimant's disability related claims are dismissed.

Detriment and/or automatically unfair dismissal for making a protected disclosure (whistleblowing)

103. The protected disclosures relied upon are set out in paragraphs 7.3 of the list of issues.
104. Alleged protected disclosure 7.3.1 is:

“The claimant stated that transferring goods between lorries during an official tachograph break was not permitted, as it is classed as “other work” (this regularly occurs when drivers are sent to take deliveries from the original driver when they have insufficient time to deliver the goods on their route).”

105. Alleged protected disclosure 7.3.2 is:

“During his disciplinary hearing for the infringement (taking insufficient breaks) the claimant was advised [to] by his manager that he could have a break at this time, but just not do any work. The claimant stated that he could not do that and that it clearly breached tachograph rules (which is a health and safety as well as a public safety rule).”

106. These alleged disclosures relate to a disciplinary hearing held on 19 July 2022 by Ben Spragg and Ryan Hunt. The claimant was being dealt with for alleged tachograph infringements.

107. The respondent had special status with DVSA (Driving and Vehicle Standards Agency) under the Earned Recognition Scheme. The respondent was required to provide evidence of compliance with transport law in general which included tachograph compliance. Earned Recognition meant that the respondent's lorries did not get spot checked by DVSA .

108. It is clear to us and we find that the respondent took compliance with tachograph regulations seriously.

109. As part of his induction as an agency driver, the claimant signed a number of documents including “Falsification of tachograph records.” This was signed on 20 December 2021. This states as follows:-

“It has been brought to our attention that some Bidfood drivers have allegedly been falsifying records by proceeding to deliver goods to customers, whilst their tachograph has been set to rest mode:

Breaks from driving are your refreshment and recuperation and are therefore in the interests of road safety. WHEN YOUR TACHOGRAPH IS SET TO BREAK – YOU MUST BE TAKING A BREAK!

It has been made clear to all Bidfood drivers via company inductions and CPC courses that the falsification of tachograph records will not be tolerated and will be considered as gross misconduct. Drivers who are identified as having falsified records, by delivering goods to customers whilst their tachograph is set to rest mode, or by some other means, will be subject to the company's disciplinary process – with dismissal being the potential outcome. Please also be reminded, that falsification of records is a criminal offence and as such the maximum penalty upon conviction is up to two years imprisonment.

...

Line managers – if you are aware that drivers are breaking these rules, you are equally liable for the falsification of records. If you have any concern that your drivers may be in breach of the tachograph legislation, you **MUST** report this to Fleet Support immediately.”

110. The respondent ran a points system for tachograph infringements. The claimant was disciplined as he had reached the threshold of eight points.

111. As drafted, disclosure 7.3.1 is a statement of the law. A driver could not transfer goods between lorries during an official tachograph break as this was classified as other work. Further, alleged disclosure 7.3.2 is a statement of the law. The claimant could have a break at any time but just not do any other work.

112. In fact, the disclosure that the claimant appears to have intended is as follows. He alleges that Ryan Hunt stated to the claimant that he could have taken a break whilst transferring goods from his lorry to other lorries to avoid getting the infringement. The claimant states that he responded:-

“It’s breaking the law, and just because other drivers do it I’m not going to.”

113. Ryan Hunt denies saying any such thing. Given the seriousness of tachograph infringements, we find that Ryan Hunt probably did not suggest the claimant work whilst on a break during the disciplinary hearing. The disciplinary hearing was to deal with tachograph infringements, not to encourage them.

114. The notes of the hearing on 19 July 2022 contain the following:-

“Ryan Hunt: Confirms to complete the break before people help with your drops.

Claimant: OK we will do that. Shut vehicle & have a break.”

115. We find that both as drafted and as understood, allegations 7.3.1 and 7.3.2 do involve the communication of information by the claimant as to what the law required. That information does not tend to show that a legal obligation had been or was likely to be not complied with or that the health and safety of an individual was or was likely to be endangered. At best, it was a disagreement as to what the tachograph regulations would allow, with it being confirmed to the claimant that he could not work whilst on a break and that that would include supervising other drivers removing produce from his lorry. Further, we find that the claimant did not reasonably believe that the conversation was in the public interest. It was a discussion in the course of the claimant’s disciplinary meeting.

116. Accordingly, we find that disclosures 7.3.1 and 7.3.2 were not protected disclosures.

117. Alleged protected disclosure 7.3.3 is:

“The claimant’s request for cages, from managers, to prevent back injury, were not just made for him but also for other drivers.”

118. We have corroborating evidence that at his probation review meeting the claimant did raise a big issue about not being on cages. Ryan Hunt gives evidence that the claimant told him that he had issues with not being on cages. Further, Ryan Hunt gave evidence that the claimant told him he had issues with not being on cages.

119. We find that the claimant was regularly complaining to management about a lack of cages and having to work with pallets. Further, Ben Spragg gave evidence that cages were always an issue and all drivers wanted them. We find that this was not the communication of information. It was a request by the claimant for cages which he preferred. We find that the claimant was not motivated to make

the request on behalf of other drivers. As such, we find that the claimant did not reasonably believe that this was in the public interest.

120. Accordingly, we find that disclosure 7.3.3 was not a protected disclosure.

121. Alleged protected disclosure 7.3.4 is:

“The claimant stated to Claire Harry that if there were more cages everyone should/could have them, at least for a few days a week, as not having any is hurting everyone.”

122. From further information supplied by the claimant this probably relates to an incident on 22 June 2022. The claimant states that he complained to Claire Harry about not having cages and Steve Hunt overheard. We find that the context of the claimant stating that there were insufficient cages available was that he had back pain.

123. We find that that was the disclosure of information. Further, we find that the claimant believed that it tended to show that the health and safety of the claimant and/or other staff was likely to be endangered and that that belief was objectively reasonable. We find that the claimant believed it was in the public interest and that that belief was objectively reasonable. As such, given that it related to health and safety in the workplace, we find that the claimant reasonably believed that it was in the public interest. Consequently, we find the disclosure in issue 7.3.4 is proved and is a protected disclosure.

124. Alleged protected disclosure 7.3.5 is:

“The claimant complained that there were insufficient pallet trucks so not everyone got them, which was unsafe for everyone’s back, as without them the amount of manual handling was excessive.”

125. In his further information the claimant puts it as follows:-

“From February to May 2022 the claimant complained about this to the Transport Coordinators Tomasz Wojziac and Piotr Januuchowski, on most mornings when he got to work, especially when he couldn’t get a pallet truck, which was about twice a week/three times a fortnight.”

126. We find that the claimant did regularly complain that there were insufficient pallet trucks. We find that the context of the claimant’s complaint was that without a pallet truck it would involve the driver with a lot more manual handling which in turn could endanger their health and safety.

127. We find that that was the disclosure of information. Further, we find that the claimant believed that it tended to show that the health and safety of the claimant and/or other staff was likely to be endangered and that that belief was objectively reasonable. We find that the claimant believed it was in the public interest and that that belief was objectively reasonable. As such, given that it related to health and safety in the workplace, we find that the claimant reasonably believed that it was in the public interest. Consequently, we find the disclosure in issue 7.3.5 is proved and is a protected disclosure.

128. Alleged protected disclosure 7.3.6 is:

“The claimant complained about insufficient wrapping around pallets so that they were then unstable and unsafe as stock had to be picked up from the floor and re-stacked unnecessarily, significantly increasing the amount of manual handling required, which was refused, as was being rationed for costs reasons.”

129. On 1 April 2022, a new Plastic Usage tax was introduced. Thereafter, there was an obvious economic and environmental impetus to reduce plastic usage. An extract from a sustainability report produced before us contains the following:-

“Since 2021 we’ve been working on four-sided cages, which would not only generate zero plastic waste but also help reduce accidents, stock damage and makes life easier for warehouse teams and drivers.”

A summary indicates that between 2019 and 2022/23, the total pallet wrap (kg) had reduced from 214,493 to 122,094.

130. The respondent’s witnesses gave evidence that there was no rationing on plastic wrap but it is clear that there was a significant decrease in the usage of plastic wrap by 2022/2023.

131. The claimant’s repeated request for cages, which we have already found, indicates to us that the expected replacement of pallets shrink wrapped with cages had not been rolled out to the extent that perhaps the respondent was expecting.

132. The claimant has produced 24 still photographs and two videos that he sent to management illustrating the problems he was experiencing. Three of the photographs show boxes of food product scattered around the back of the lorry with shrink-wrap that appears to have failed. Although evidence was given to us that, if different drops were on the same pallet, the claimant would need to cut the shrink-wrap, we accept that, on occasions, the shrink-wrap was inadequate to hold the stock in place as the lorry went about its deliveries.

133. In his further particulars, the claimant asserts that he complained to managers Ben Spragg, Bradford Sole, Claire Harry, and Jason Cartwright when in the office or counter area on the days that he sent the photos in. We accept the claimant’s evidence and find that the claimant did complain about insufficient wrapping around pallets which could cause them to be unstable and unsafe.

134. We find that was the disclosure of information. Further, we find that the claimant believed that it tended to show that the health and safety of the claimant and/or other staff was likely to be endangered and that that belief was objectively reasonable. We find that the claimant believed it was in the public interest and that that belief was objectively reasonable. As such, given that it related to health and safety in the workplace, we find that the claimant reasonably believed that it was in the public interest. Consequently, we find the disclosure in issue 7.3.6 is proved and is a protected disclosure.

135. Alleged protected disclosure 7.3.7 is:-

“On some days there was no wrap, which he complained was very unsafe, but Ben

Spragg, (manager), replied that the goods had to be delivered any way, (even with no wrapping).”

136. Ben Spragg gave evidence that, on occasions, produce would be placed on the floor of the lorry rather than in a cage or on a pallet. That may be due to issues concerning space and fitting in a pallet pump truck. Be that as it may, we find that this practice could result in the produce moving around in the back of the lorry and spilling out when the door was opened.
137. We find that that was the disclosure of information. Further, we find that the claimant believed that it tended to show that the health and safety of the claimant and/or other staff was likely to be endangered and that that belief was objectively reasonable. We find that the claimant believed it was in the public interest and that that belief was objectively reasonable. As such, given that it related to health and safety in the workplace, we find that the claimant reasonably believed that it was in the public interest. Consequently, we find the disclosure in issue 7.3.7 is proved and is a protected disclosure.
138. Alleged protected disclosure 7.3.8 is:-
- “The claimant complained that goods loaded in the wrong order, pallets being mixed illogically and inefficiently caused extra/excessive manual handling, but was told by managers, that this was not preventable because the respondent refused to pay the warehouse staff overtime or employ more staff, so they had to rush and could not be too particular about the standard of loading.”
139. The claimant’s further particulars state that the claimant complained about the problem of goods loaded in the wrong order to Claire Harry on 6 July 2022 during the attendance review meeting he had with her. Claire Harry’s evidence was that she did not recollect this. We have no doubt that the claimant did complain about this and find that he did so. It is the claimant’s case that in order to retrieve stock he had to lean over, climb over, and retrieve items from further back in the lorry which imposed extra manual handling.
140. We find that that was the disclosure of information. Further, we find that the claimant believed that it tended to show that the health and safety of the claimant and/or other staff was likely to be endangered and that that belief was objectively reasonable. We find that the claimant believed it was in the public interest and that that belief was objectively reasonable. As such, given that it related to health and safety in the workplace, we find that the claimant reasonably believed that it was in the public interest. Consequently, we find the disclosure in issue 7.3.8 is proved and is a protected disclosure.
141. The second part of this alleged protected disclosure involving communication by managers to the claimant and not the disclosure of information by the claimant. As such, we find it was not a protected disclosure. Consequently, the first part of this protected disclosure is proved.
142. Alleged protected disclosure 7.3.9 is:-

“The claimant complained that it was impossible to follow any safe manual handling procedures (that are recommended in the induction), as the way lorries are loaded makes these methods a joke.”

143. This is a very general allegation and, in our judgment, effectively reflects the numerous complaints that we have found the claimant made as above. We find that in actual fact it was not impossible to follow any safe manual handling procedures. However, we have had no evidence that the claimant made such a disclosure in a specific sense. Consequently, we find that the claimant failed to prove he disclosed this information to anyone and that this alleged protected disclosure is not proved.

144. Alleged protected disclosure 7.3.10 is:-

“The claimant also complained about goods being loaded directly on to the floor, as this sometimes happened when there was no room for more pallets and the last bit of floor space by the door was then stacked up.”

145. We find that this protected disclosure is, in essence, the same as 7.3.7. We have no doubt that the claimant did complain about this.

146. We find that that was the disclosure of information. Further, we find that the claimant believed that it tended to show that the health and safety of the claimant and/or other staff was likely to be endangered and that that belief was objectively reasonable. We find that the claimant believed it was in the public interest and that that belief was objectively reasonable. As such, given that it related to health and safety in the workplace, we find that the claimant reasonably believed that it was in the public interest. Consequently, we find the disclosure in issue 7.3.10 is proved and is a protected disclosure.

147. Alleged protected disclosure 7.3.11 is:-

“The claimant was told by Ben Spragg that the goods had to go out.”

148. We find that this is not the disclosure of information by the claimant. Consequently, alleged protected disclosure 7.3.11 is not proved.

149. Alleged protected disclosure 7.3.12 is:-

“The claimant stated this was unsafe, as risked the boxes falling on the drivers, when they then open rear doors, as the stack is then obviously unstable after the lorry has turned a few corners, this had happened several times to other drivers that the claimant knew about.”

150. This protected disclosure, is, in essence, the second half of the protected disclosure 7.3.10 which we have found proved. For the same reasons we find this is proved.

151. Alleged protected disclosure 7.3.13 is:-

“The claimant also stated to managers (Ben and Jason) that they were not allowed to place boxes of food items directly on the lorry floor for food hygiene reasons.”

152. In his further information the claimant asserts that he made this complaint to Ben Spragg. We find that this was the disclosure of information. We find that the claimant believed it tended to show that the health and safety of members of the

public was likely to be endangered. However, we find that the claimant did not have reasonable grounds for believing that it tended to show that the health and safety of an individual was likely to be endangered. This is because we had no evidence that placing boxes of food items directly on the lorry floor compromised food hygiene. Ben Spragg gave evidence that it was not unhygienic. Further, we find that the claimant did not have reasonable grounds for believing that a person was likely to fail to comply with any legal obligation concerning food hygiene. Accordingly, this alleged protected disclosure is not proved.

153. In conclusion, we find that the claimant was a regular and forceful complainer to many of his managers about many aspects of his job and we have found that many of these complaints constituted protected disclosures. The claimant has produced numerous WhatsApp pictures and 2 videos of 'access issues' sent to management. We find that the claimant was probably perceived by management as being something of a problem due to his repeated complaints. We find this due to an email that was sent on 24 March 2023 by Jason Cartwright to Claire Harry. The email is as follows:-

“If he is returning on Monday we need to make sure his return to work is completed correctly and Jamie/Richard need to be aware of him only being able to do MOD/MOJ deliveries for two weeks then we will review, I believe Brad is in on Monday to cover Heathrow so he could do the return to work due to who it is and making sure all the details are on the paperwork.” (our underlining)

155. We find the words “due to who it is” are significant and demonstrate to us that management regarded the claimant as an individual who was potentially troublesome and difficult to manage.
156. The detriments alleged by the claimant are set out in paragraph 32 of the list of issues. Detriments 32.2, 32.3, 32.4 and 32.5 are in very general terms and, consequently, the claimant was ordered to provide three examples of each.
157. Detriment 32.3 is:-

“Being spoken to disrespectfully by managers in front of colleagues;”

158. Example 3 is the incident when the claimant went to the office in May 2022 having returned to work and had filled in the return to work form stating that he was not fit for work. In our judgment, Steve Hunt saying to the claimant “You are either fit for work or not” does not constitute being spoken to disrespectfully. In our judgment, it is stating the obvious. Consequently, we find example 3 not proved.
159. Example 2 was when the claimant was requesting cages in the office. It is the claimant's case that Steve Hunt overheard his request and came out saying words to the effect “I'm not spending another £30,000 on buying any more cages as I am not the person losing them.” We heard evidence that quite often cages were damaged by being dropped from tail lifts or left at customer's premises. Cages were an expensive asset. We find that the claimant was not spoken to disrespectfully by Steve Hunt. We find that this was just a workplace conversation about cages, with a reason for their scarcity being given. Consequently, we find example 2 not proved.

160. Detriment 32.5 is:-

“Being given harder routes and/or heavier loads than other drivers.”

161. The three examples given by the claimant relate to specific deliveries that he had to do on his round. However, we have had no real evidence as to how the claimant's rounds compared with other drivers. We are not prepared to accept the claimant's generalised assertions without some corroborative evidence. We have no doubt that the claimant's job entailed a lot of manual handling but we do not find that the claimant's jobs were harder or heavier than others. Consequently, we find the detriments in the three examples of 32.5 are not proved.

162. The remaining detriments will be dealt with as they arose in the context of the claimant's sickness absence in March 2023 and thereafter.

163. On 19 July 2022, the claimant received a verbal warning for breach of tachograph offences having reached nine points.

164. On 29 December 2022, the claimant was invited to a disciplinary hearing as he had accumulated a further nine points under the tachograph infringement policy. The disciplinary hearing was heard on 5 January 2023 by Bradford Sole with Claire Harry in attendance. The outcome was that the claimant was re-issued with a second verbal warning for a further six months.

165. On 9 February 2023, there was an incident between the claimant and Jason Cartwright.

166. On 9 February 2023, the claimant returned to the depot and drove in too fast. In his witness statement the claimant admits that he should not have done that. He attributes it to being stressed, frustrated, and upset because he felt that Paul Tovey, a Transport Co-ordinator, had not informed him that access issues to the depot were finished and consequently he had made an unnecessary detour to get back to the depot.

167. Whilst talking to Paul Tovey, Marcus (a driver who did yard work) informed the claimant that he had to do an extra job because he had driven into the yard too fast. The claimant refused, claiming it was unfair as he could not get away home like other drivers. It is clear from the claimant's witness statement that he became very angry and shouted at Paul Tovey.

168. It is the claimant's case that Jason Cartwright then came over to him and shouted at him “You're a cunt.” However, in his handwritten notes for the disciplinary hearing, the claimant puts it as follows:-

“Jason “You're a cunt for speeding in the yard.”

169. In his statement, Jason Cartwright puts it as follows:-

“I then stepped in and said “as you drove into the depot like a cunt (which I apologised straight away for my terminology) you can do this,” he replied and said “no” and started shouting at me and then saying “You called me a cunt” (at no point did I call him a cunt).”

170. It is common ground that the claimant was told that he had to take a lorry to Reading. The claimant's account is that he refused because he never got home early like other drivers. The claimant's account is that Jason Cartwright then warned him that if he did not go to Reading he would be suspended. The claimant responded: "I said suspend me then."

171. The claimant was then suspended.

172. On 9 February 2023, the claimant was invited to an investigatory meeting with the reason given:-

"Alleged gross misconduct namely failure to follow a reasonable management request."

173. The notification went on:-

"These are extremely serious allegations and, if proven, may result in disciplinary sanctions being taken against you, up to and including, summary dismissal for gross misconduct"

174. The investigatory interview took place on 14 February 2023. It was conducted by Bradford Sole. Although the interview concerned the incident on 9 February 2023, it is noticeable and relevant in our judgment that various other issues were raised by Bradford Sole concerning the claimant's conduct. The following matters were raised:

- (i) Driving at speed and potentially dangerously into the yard.
- (ii) Shunting in the yard with door insecure.
- (iii) Throwing a cage which could have hit a member of staff.
- (iv) Previous run-ins with customers.
- (v) Damaging the truck wash previously.
- (vi) Two tachograph infringements.
- (vii) The claimant being considered the 'overtime king'.
- (viii) And, in particular: "Paul was looking at something before in regard to your working hour directives. You don't work in your breaks do you?"

Claimant: Is Paul involved in this feeding you irrelevant information .

Brad Sole: Management being asked to check information and data as it is quiet."

175. The range of issues raised outside the stated remit for the interview suggests to us and we find that management was casting about to find misconduct issues to raise against the claimant.

176. At the end of the interview the claimant stated as follows:-

"Claimant: I will be putting a grievance against Jason, just so you're aware and I

would like copies of the notes of investigation.”

177. Bradford Sole then, presumably, requested a statement from Jason Cartwright who was actually Bradford Sole's line manager. A statement was obtained from the claimant and on 15 February 2023 the claimant was requested to attend a disciplinary hearing with the reason given as:-

“Alleged gross misconduct namely failure to follow a reasonable management request.”

178. It would appear that on 15 February 2023 Bradford Sole communicated to the claimant that the charge was no longer gross misconduct and Bradford Sole did not deny this.
179. However, when the disciplinary hearing was held on 16 February 2023 the notes make clear that the suspension had been lifted and the accusation reduced from gross misconduct to serious misconduct. Bradford Sole was the presenting manager. The outcome of the disciplinary hearing was a final written warning.
180. On 20 February 2023, the claimant appealed his final written warning. The appeal is an email five pages long wherein the claimant makes a number of complaints. In particular, he complains about the conduct of Bradford Sole and Jason Cartwright.
181. On 1 March 2023, the claimant went off sick.
182. It is not disputed that the claimant's contractual sick pay was stopped on 15 March 2023. Claire Harry gave evidence that this was down to payroll. The claimant's contractual sick pay entitlement would appear to have risen from two weeks to five weeks once he had completed his first year of employment. Given that the claimant was employed on 14 March 2022, so 15 March 2023 was on the anniversary of his employment. We find that this was simply an error by payroll and was not a detriment done on the grounds that the claimant had made a protected disclosure. As such, example 2 of detriment 32.2 is not proved.
183. On 20 March 2023, there was a welfare meeting between the claimant, Jason Cartwright and Claire Harry.
184. Example 1 of detriment 32.2 is that the claimant was made to feel useless and incapable of work and not deserving of support in that meeting. That is denied by Claire Harry. We have the notes of the meeting which is a form with a series of pre-prepared questions. We find that the claimant has not proved that he was treated as being a hindrance and made to feel useless. The claimant's health was considered, adjustments were recorded and consent forms were filled in for a referral to Occupational Health. We find that this was not a detriment. Accordingly, Detriment 32.2 Example 1 is not proved.
185. It is against the background of the claimant returning to work and needing a phased return to work that the email cited above at paragraph 153 dated 24 March 2023 was sent.
186. On 27 March 2023, Bradford Sole conducted a return to work interview with the claimant. In accordance with the previous email, Bradford Sole had replaced

another manager, presumably because of who the claimant was. The claimant was given adjusted deliveries for MOD/MOJ for two weeks.

187. Also on 27 March 2023, the claimant was given a Stage 1 warning for absence levels.

188. It would appear that on 3 April 2023 the claimant experienced a problem with his tachograph. An email dated 12 April 2023 from Claire Harry records:-

“Robert has advised he went to eject his card but pulled the key out of the ignition too quick. When put back in, it popped the card out saying “unauthorised ejection.”

189. Claire Harry was seeking an explanation which was provided on 12 April by Hannah Russell.

190. On 12 April 2023, the claimant had been given a shorter route because he had a physiotherapy appointment later that day.

191. After the claimant finished his delivery he went to the office and overheard Bradford Sole and Claire Harry talking about an extra delivery that had to be made to Hoddesdon. As the claimant walked towards the door to leave, Bradford Sole told the claimant to do another delivery. Neither Bradford Sole nor Claire Harry had any real recollection of this event.

192. The claimant complained that he could not make the delivery because he had a physiotherapy appointment. In due course, another driver was told to make the delivery. The claimant was told he had to wait in case another job came in. The claimant waited for about an hour and then went to the office to get permission to go. The claimant told us and we find that he was being really quite careful given that he had been given a final written warning for failing to comply with a reasonable management request. Eventually, the claimant was released.

193. It is the claimant's evidence that during the course of that incident, he said to Bradford Sole that:-

“If you make me do it and I miss my physiotherapy appointment, I will be doing a grievance against you.”

194. Detriments 32.1 and 32.4 Example 1 are:-

“On 12 April 2023 being told that he had to make a delivery despite the fact that it would have meant missing a physiotherapy appointment”

And

“Being kept at work unnecessarily in circumstances where other drivers were permitted to leave.”

195. It is clear to us and we find that drivers were routinely requested to wait around in case other jobs came up. As such, we find that this was not a detriment but just part of the job. We find he was not deliberately kept waiting around. We find that the claimant has not proved that this treatment was because of the protected disclosures. We find that it was because of the normal working practice of the

respondent. Accordingly, alleged detriments 32.1 and 32.4 Example 1 are not proved.

196. On 13 April 2023, the claimant returned to the yard at about 9.50 am (from the tachograph day view chart we have).
197. It is common ground that on arrival he placed his tachograph onto break mode.
198. There is a significant dispute between the claimant and Bradford Sole/Claire Harry as to what happened thereafter. It would appear that the whole event was covered by CCTV. The claimant requested the CCTV be preserved within a month or two of the incident but, for whatever reason, it has not been preserved.
199. The claimant's account is that having placed his tachograph on break mode he went to the toilet. On his way he met Bartozs Gogol who told him that he had to take a lorry to METTS (A tachograph calibration garage). The claimant accepts that he told Bartozs Gogol that he had put the tachograph card on a break.
200. It is the respondent's case that Bartozs Gogol went up to the office and reported to Bradford Sole and Claire Harry that the claimant said he would go to METTS (Uxbridge) after he had finished his break. The respondent's evidence is that both Claire Harry and Bradford Sole looked out of the window and witnessed the claimant off-loading pallets from his vehicle tail lift. It is the respondent's case that thereafter Bradford Sole went down to the yard, had a brief conversation with the claimant and went into the lorry cab to verify that the tachograph was in break mode. Bradford Sole accepted that having seen the tachograph on break mode he did not say anything to the claimant and left.
201. It is the claimant's case that on his return from the toilet, Bradford Sole came down to the yard and they had quite a long conversation about any potential problems with the tachograph. The claimant's witness statement says he replied "No" (although we note that the 12 April email exchange in paragraphs 188 and 189 above concerned a potential tachograph problem of the claimant's). Be that as it may, the claimant then says that Bradford Sole got into the lorry cab, shut the door and stayed there for some time. The claimant then states that he forgot that his tachograph card was on break mode and it was at that point that he unloaded four empty pallets on a pump truck.
202. Of course, if we had the CCTV coverage, there would be no difficulty in ascertaining who was correct. To an extent we do not have to decide between the two versions since it is accepted by the claimant that he did work whilst his tachograph was on break mode. If we had to choose between the two accounts, we find that the claimant's account is probably accurate. The problems with the tachograph on 12 April provide a reason for Bradford Sole to have gone down to talk to the claimant about his tachograph and get into the cab to check it. We find that Claire Harry probably did witness the claimant working whilst Bradford Sole was in the cab. It transpired during the course of oral evidence that Jason Cartwright was also in the office at the time.
203. It was accepted by Bradford Sole that not saying anything at the time was probably poor management. He put this down to inexperience. However, Bradford Sole had previously been a driver and, in our judgment, it must have

been obvious to him that a clear breach of tachograph regulations had been committed by the claimant.

204. The claimant was allowed to complete his duties on 13 April 2023.

205. Detriment 32.4 Example 2 is:

“On 13/4/23

The claimant was not permitted to go home after returning to the depot after finishing his scheduled delivery, which is what other drivers were permitted to do, this has also been described in previous submissions.”

206. In his witness statement the claimant states:

“When I returned from the Metz job later that afternoon, before I booked off, ...I asked Bradford and Claire if they still needed me, in case they planned to keep me at work for longer like the previous day. Claire said no, they didn’t need me, and yes, I could go home.”

207. Based on the claimant’s own evidence, detriment 32.4 Example 2 is not proved.

208. We find that, having caught the claimant working whilst his tachograph was on break, it was seized upon as a pretext to get rid of the claimant due to him being perceived as being a difficult employee who complained all the time and who had threatened grievances against Jason Cartwright and Bradford Sole. It is noticeable that Bradford Sole had administered the claimant’s second verbal warning, had presented the case against the claimant which resulted in him getting a final written warning, had allegedly witnessed the claimant working whilst his tachograph was on break and who was charged with investigating the same incident before presenting the evidence in the disciplinary hearing on 20 April 2023. Jason Cartwright was Bradford Sole’s line manager. Further, the flawed nature of the investigation and disciplinary process thereafter supports our conclusions.

209. On 14 April 2023, the claimant was interviewed by Bradford Sole. Notwithstanding that Bradford Sole had been a witness to the incident, he told us that Jason Cartwright had asked him to investigate it as well. We note that that is not best practice.

210. The following is recorded in the interview:-

“Because of this, I have looked into previous records and even thought it is not one hundred per cent conclusive there are still some questionable OPTAC and QDrop records (showing records)”

211. The two records referred to relate to tachograph printouts from 4 January and 2 February 2023, said to have been selected at random. Those are the OPTAC records. The QDrop records (also referred to as PAD) are from the handheld electronic device which records when the claimant arrived at a delivery site and left a delivery site.

212. Initially, the claimant’s appeal against his final written warning and the disciplinary hearing were scheduled to be heard on 19 April 2023. However, at

the claimant's behest, the disciplinary hearing was moved to 20 April 2023. The disciplinary hearing Chairperson was changed to Ben Spragg.

213. An unsigned and undated investigation report has been produced by the respondent. Initially it was said to have been created by Claire Harry but that is clearly inaccurate and Bradford Sole says he created it. The claimant questions when it was actually produced. It was not sent to the claimant in advance of his disciplinary hearing. However, it does reference two random days and comparisons of OPTAC versus QDrop records which is compatible with the entry on the investigation meeting on 14 April 2023. However, the QDrop records have not been produced to us and were not sent to the claimant in advance of the disciplinary hearing. We find the analysis in the investigation report to be troubling. Manuscript entries have been placed on the tachograph printout setting out the QDrop timings of when the claimant was at delivery sites. However, for 4 January 2023, the claimant accepted that he had pressed the wrong customer and that he first went to Frithwood and then Gables which was an error he made. In addition, the assumption that the QDrop data was accurate ignores periods of driving whilst he is said to be at one address. In our judgment, the data produced does not provide clear evidence of or even suspicion that the claimant had been working whilst on a break and we so find.
214. The claimant was only sent the tachograph printout for 2 February 2023 in advance of the disciplinary hearing. He was not sent the 4 January 2023 one.
215. It is clear to us and we find that the claimant was not sent all relevant material in advance of the disciplinary hearing.
216. It is the claimant's evidence that just before going into the hearing Steve Hunt said to the claimant "Oh, back so soon." We find that that was a remark in the context where the claimant had only relatively recently been at a disciplinary hearing at which he had been given a final written warning and had had the grievance appeal hearing the day before. We find that that was disrespectful and a detriment. We find that it was because of the claimant coming back for a disciplinary hearing quite soon after his previous one and not because of the protected disclosures. Accordingly, detriment 32.3 Example 1 is not proved.
217. The disciplinary hearing was held on 20 April 2023. The Chair was Ben Spragg and the presenting manager was Bradford Sole. Ben Spragg was not sure if his introductory comments included going through the investigation report.
218. The following is recorded in the brief notes of the disciplinary hearing:-
- "Ben Spragg: Other investigations show this isn't the first time (evidence attached).
- Claimant: Arrive at drop, but have a break before doing the drop.
- Ben Spragg : 4 instances over 2 different dates – plus this occasions."
219. Whilst Ben Spagg denied that he took into account the previous alleged occasions when the claimant might be said to have been working through a break, the notes of the meeting do not read like that.
220. At the conclusion of the meeting the claimant was dismissed for gross

misconduct.

221. The claimant did not appeal against his dismissal.

Conclusion

222. We have to determine what the principal reason for the claimant's dismissal was. In our judgment, the proximate reason for the claimant's dismissal was gross misconduct for working whilst on a tachograph break. However, we find that that was a pretext. We find that but for the claimant's whistleblowing the action on 13 April 2023 would probably have been dealt with informally by Bradford Sole there and then having a chat and reminding him that he shouldn't work on a break or recording a tachograph infringement. We find that the claimant's complaints about work equipment and working practice, which we have found to be protected disclosures, had caused management to perceive the claimant as being a difficult employee to deal with. Further, we find that as a result of that perception, relationships with the claimant's managers, notably Bradford Sole and Jason Cartwright, and, to an extent, Claire Harry, deteriorated to the point where the claimant was threatening grievances against the first two. We find that as a result of the protected disclosures, management wanted to get rid of the claimant and the events of 13 April 2023 presented management with an opportunity to do so. We find that the principal effective cause of and reason for the dismissal was the protected disclosures. Consequently, we find that the claimant was automatically unfairly dismissed.

223. Alleged detriment 32.2 example 3 is the speedy and unfair manner in which the claimant was dismissed. Whilst we find that the claimant was dismissed in an unfair manner, we do not find that that constituted treatment that the claimant was a hindrance and made to feel useless. Accordingly, this detriment is not proved.

224. In the circumstances, the claimant's claim for wrongful dismissal must succeed.

225. The claimant has failed to prove any of the detriments for making a protected disclosure claim and the same are dismissed.

226. By virtue of our findings of fact, we do not deal with the time issue as the automatically unfair dismissal claim is in time.

Approved by:

Employment Judge Alliott

Date 21 September 2026

JUDGMENT SENT TO THE PARTIES ON

21 September 2026

FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at <https://www.gov.uk/employment-tribunal-decisions> shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/