EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr A Hine	**v**	Tesco Stores Limited

Heard at: Reading **On:** 20, 21, 22, 23 and 24 February 2023

Before: Employment Judge Hawksworth
Mr J Appleton
Mr A Kapur

Appearances
For the Claimant: In person
For the Respondent: Ms R Barrett (counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. the claimant's complaints of detriment on the ground of having made a protected disclosure under section 47B of the Employment Rights Act 1996 fail and are dismissed;

2. the claimant was not dismissed by reason of having made a protected disclosure and his claim under section 103A of the Employment Rights Act 1996 also fails and is dismissed;

3. the claimant was unfairly dismissed contrary to section 98 of the Employment Rights Act 1996 and his complaint of 'ordinary' unfair dismissal succeeds;

4. the tribunal does not have the power to consider the claimant's complaint of breach of contract, as it was not outstanding on the termination of the claimant's employment;

5. a hearing will be arranged to decide remedy (for example, compensation) in the complaint of ordinary unfair dismissal, and case management orders for that hearing is being sent separately.

REASONS

Claim and response

1. The claimant was employed by the respondent from 21 May 2018 to 18 August 2020 as a distribution centre HGV driver.

2. In a claim form presented on 27 January 2021 after a period of Acas early conciliation from 15 November 2020 to 29 December 2020, the claimant brought complaints of detriment and dismissal because of whistleblowing, ordinary unfair dismissal, and breach of contract in relation to late payment of banked hours.

3. The response was presented in time; the respondent defends the claim.

Hearing

4. The hearing took place in person.

Identification of the issues

5. At the start of the hearing, we spent some time discussing the issues for the tribunal to determine. It was clear that the claimant was bringing complaints of detriment and dismissal because of whistleblowing, ordinary unfair dismissal, and breach of contract. However the disclosures relied on by the claimant and the detriments which he said were on the ground of those disclosures had not been identified.

6. The tribunal explained to the parties why it is important to identify the issues. We outlined the legal tests which we would be applying in the whistleblowing detriment and dismissal complaints. We then spent some time with the parties identifying the disclosures and detriments. At about 11.30am we began a break to allow us to read the witness statements. We asked the parties to use the break time to make a list of the disclosures and a list of the detriments relied on by the claimant, based on the discussions we had had.

7. After lunch, we considered the lists which the parties had helpfully prepared. The claimant sought to rely on 7 alleged protected disclosures, and 7 alleged detriments.

8. In relation to the alleged disclosures, the respondent accepted that disclosures 1 and 2 were protected disclosures and that the claimant could rely on these. In relation to the alleged detriments, the respondent accepted that detriments 1, 2 and 6 were allegations made in the claim. The respondent said that disclosures 3 to 7 and detriments 3, 4, 5 and 7 had not been included in the claimant's claim form or further information, and so the tribunal's permission would be required to allow the claimant to rely on them.

9. We considered the claimant's application to amend the claim to rely on these five additional disclosures and four additional detriments. We found that these allegations had not been included in the claim, and that permission would be required for the claimant to rely on them. For reasons given at the hearing, we gave permission in respect of disclosures 4, 5 and 6. We did not allow give permission in respect of disclosures 3 or 7, or any of the detriments. In short, the reasons for this were that the factual background for disclosures 4, 5 and 6 had been included in the claimant's further information sent on 16 March 2022. The balance of hardship fell in favour of the claimant on these amendments. On the other hand, the facts relied on as disclosures 3 and 7, and detriments 3, 4, 5 and 7 were not mentioned in the claim form or the further information document. The balance of hardship fell in favour of the respondent on these amendments.

10. We allowed the respondent's application for a supplemental statement to be produced on the issue of causation in relation to the added disclosures. Mrs Jameson's supplementary statement was provided on 22 February 2023, prior to her oral evidence.

11. On the second day of the hearing, the claimant made another application to amend his claim, to add another alleged disclosure. For reasons we explained at the hearing, we did not give permission for another disclosure to be added. In short, the lateness of the application and the likely impact on the timetabling of the hearing if another disclosure was added by amendment meant that the balance of hardship fell in favour of refusing the application.

Audio recordings

12. Also at the start of the hearing, the claimant asked whether he could play audio recordings of meetings he had made. We explained that the tribunal normally considers audio evidence by reading agreed transcripts, and that the person who relies on the audio evidence normally sends a draft written transcript to the other party, for them to consider and comment on. There was a section of transcript in the bundle already. We suggested that if the claimant wanted to rely on any other sections of the audio recordings, he could prepare transcripts for the following day.

13. On the morning of the second day, the claimant produced a transcript of a section of an audio recording of a meeting between the claimant and Mr Futcher. The respondent had no objection to this transcript being included in the evidence and this was added to the claimant's bundle as pages 40 to 43.

14. The claimant said that on the next hearing day he might produce another transcript of part of a meeting with Mr Davies. The judge explained that it was very late to produce transcripts at the hearing itself, they should normally be sent at the time documents were exchanged. She said that the tribunal appreciated that the claimant did not have a lawyer, and had allowed the admission of a late transcript by consent, but the claimant

should be aware that the later in the course of the hearing transcripts were produced, the more likely there would be an objection and the less likely they would be allowed. The judge said that if the claimant did intend to rely on other transcripts, he should produce them as soon as possible and we would consider them then. The claimant did not rely on any other transcripts.

Evidence

15. There was an agreed bundle which had 552 pages. We refer to that bundle by page number. The claimant also provided a separate mini bundle with 43 pages.

16. We heard evidence from the claimant on day two of the hearing. We heard from the respondent's witnesses Ms Downey, Mr Futcher and Mr Davies on day three. Mr Davies' evidence was completed on day four, and we then heard from the respondent's other witnesses, Mr Rhind and Mrs Jameson. All the witnesses had produced and exchanged witness statements.

17. The parties both made helpful written and oral closing comments on the morning of day five.

18. There was insufficient time within the five days for us to make our decision and deliver judgment, and so we reserved judgment. The employment judge apologises for the delay in promulgation of this reserved judgment. The delay was because of the current workload in the employment tribunals.

19. There was also insufficient time for us to hear evidence on remedy and this will be dealt with at a separate hearing.

Issues

20. The respondent's representative produced a list of issues incorporating the points allowed on amendment and this is included below (retaining original numbering).

1. **JURISDICTION**

1.1 Was the Claim Form submitted more than 3 months after the alleged protected disclosure detriment(s) complained of?

1.2 If so, was it reasonably practicable for the claim to have been submitted within the time limit?

1.3 If it was not reasonably practicable for the claim to have been submitted within the time limit, was the further delay beyond the end of the 3 month period reasonable.

2. **QUALIFYING DISCLOSURE**

2.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996?

2.2 The Claimant says he made the following disclosures:

(a) [protected disclosure 1] On 2 August 2020, Claimant wrote a letter of complaint to Claire Jameson, People Partner at Tesco, alleging a misuse of personal data, which the Claimant alleges constituted a breach of the Respondent's obligations under the General Data Protection Regulation 2018

(b) [protected disclosure 2] On 3 August 2020, the Claimant met with Claire Jameson in person to discuss his complaint about the use of his personal mobile phone.

(c) [permission to include protected disclosure 3 was refused]

(d) [protected disclosure 4] Letter of 9 August 2020 to Steven French.

(e) [protected disclosure 5] Email of 13 August 2020 to Claire Jameson and Steven French.

(f) [protected disclosure 6] Submission of document to Protector Line on 1 September 2020, later supplied to appeal manager Christian Davies.

(g) [permission to include protected disclosure 7 was refused]

2.3 Are any of the disclosures listed at above a disclosure of information that the Claimant reasonably believed tended to show that:

2.3.1 there had been or was likely to be a failure to comply with a legal obligation; or

2.3.2 the health and safety of a person had been, was being or was likely to be endangered; or

2.3.3 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.

2.4 Did the Claimant reasonably believe that any or all of the disclosures of information were made in the public interest?

3. **WHISTLEBLOWING DETRIMENT**

3.1 Was the Claimant subjected to any detriment by any act or deliberate failure to act by the Respondent on the grounds that they had made a protected disclosure? The Claimant alleges that he suffered the following detriments:

3.1.1 [detriment 1] Not determining the data protection complaint as part of the disciplinary process.

3.1.2 [detriment 2] Not taking into account the 2 August 2020 letter and/or C's screenshot evidence in the disciplinary process.

3.1.3 [permission to include detriments 3, 4 and 5 was refused]

3.1.4 [detriment 6] Claire Jameson's letter of 28 October 2020 with the outcome to the data protection investigation, failing to address the issues C had raised.

3.1.5 [permission to include detriment 7 was refused]

4. **AUTOMATIC UNFAIR DISMISSAL**

4.1 ***Whistleblowing – section 103A ERA 1996***

4.1.1 Was the reason or principal reason for the Claimant's dismissal the fact that he made a protected disclosure?

5. **UNFAIR DISMISSAL**

5.1 **Fairness**

5.1.1 Did the Respondent conduct a reasonable investigation?

5.1.2 Did the Respondent have reasonable grounds to believe that the Claimant was guilty of the misconduct?

5.1.3 Was dismissal within the range of reasonable responses open to the Respondent?

5.1.4 Did the Respondent and the Claimant comply with the ACAS Code of Practice?

6. **BREACH OF CONTRACT**

6.1 Was the claim brought in time?

6.1.1 Was the claim form submitted more than 3 months after the date that the alleged breach of contract[1]?

6.1.2 If so, was it reasonably practicable for the claim to have been submitted within the time limit?

6.1.3 If it was not reasonably practicable for the claim to have been submitted within the time limit, was the further delay beyond the end of the 3 month period reasonable?

6.1.4 Alternatively did the breach arise or was it outstanding on the termination of employment? (Article 3(c) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994)[2]

6.2 Did the Respondent breach the terms of the Claimant's employment contract? The Claimant relies on the following as amounting to a breach of contract

6.2.1 That the Respondent withheld wages from the Claimant totalling £8,114.38 for the period from 22 May 2018 – 6 March 2019 and failed to apologise for it.

6.3 Did the Respondent breach the Claimant's contract of employment?

6.4 If so, has he suffered any loss?

6.5 What, if any, compensation should be awarded?

7. **REMEDY**

7.1 If the Claimant's claims are upheld:

7.1.1 What remedy does the Claimant seek?

[1] Judge's note – this issue should be 'Was the claim form submitted within the period of three months beginning with the effective date of termination' (article 7(a) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994).

[2] Judge's note - this issue relates to whether the tribunal has jurisdiction, rather than whether the complaint was brought in time. We return to this in our conclusions below.

7.1.2 If the Claimant seeks reinstatement or reengagement, is it practicable for the Respondent to comply with such an Order?

7.1.3 What financial compensation is appropriate in all of the circumstances?

7.1.4 Should any compensation awarded be reduced in terms of *Polkey v AE Dayton Services Ltd* [1987] ICR 142 and, if so, what reduction is appropriate?

7.1.5 Should any compensation awarded be reduced on the grounds that the Claimant's actions caused or contributed to their dismissal and, if so, what reduction is appropriate?

7.1.6 Has the Claimant mitigated their loss?

Findings of fact

21. We make the following findings of fact about what happened. Where there is a dispute about what happened, we decide what we think is most likely to have happened, on the basis of the evidence we have heard and the documents we have read. We have not included everything that we heard about during the hearing. Our findings include those aspects of the evidence which we found most helpful in determining the issues we have to decide.

22. On 21 May 2018 the claimant began employment with the respondent as a late shift HGV distribution driver at the Reading Distribution Centre.

23. On 6 March 2019 the respondent wrote to the claimant to say that, following an audit of payroll reports, it had been discovered that the claimant had been incorrectly set up on the payroll system in relation to banked hours, resulting in him receiving incorrect pay since his start date. The respondent paid the claimant backpay of £8,114.38 on 8 March 2019 and 5 April 2019, and corrected the issue on the payroll system to avoid any future underpayment (page 138-139).

<u>Use of the claimant's personal smartphone on 1 August 2020</u>

24. On 1 August 2020 the claimant received a phone call, voicemail, text message and multimedia message from a manager, Graeme Tallentire, on his personal smartphone. The messages were alerting the claimant to a safety concern with his vehicle tyres. The safety concern had been identified by a new system which the respondent had installed across the exit to the distribution centre. The messages instructed the claimant to vist the respondent's vehicle maintenance yard to have his vehicle checked.

25. Mr Tallentire had the claimant's personal smartphone number because it was on the claimant's personnel file, and because it had been used with the claimant's permission for arrangements earlier in the pandemic, when drivers waited in their cabs to be called forward by phone, rather than waiting together in a waiting room. The claimant had not however given his permission for his personal smartphone to be used to send him messages about tyre safety concerns. He regarded the use of his personal smartphone without his permission as theft.

26. The claimant visited the respondent's vehicle maintenance yard. It was found that the tyre pressures were low. The claimant returned to the transport office to report that he had visited the respondent's vehicle maintenance yard as instructed. The claimant also told Mr Tallentire that he had not given permission for his personal smartphone to be used for safety messages of this type.

27. Later that day, after a second delivery run, the claimant reported to another manager, Alina Miklaseviciute, that he was unhappy about the use of his personal smartphone in this way.

Protected disclosures 1 and 2

28. The next day, 2 August 2020, the claimant wrote a two page letter of complaint to Claire Jameson, the respondent's People Partner for the Reading Distribution Site, about receiving the messages on his personal smartphone on 1 August 2020 (page 148 to 150).

29. The respondent accepts that this letter of complaint is a protected disclosure.

30. On 3 August 2020 the claimant met with Mrs Jameson to discuss his complaint, as set out in his letter dated 2 August 2020. She said she would to speak to the department head, Steven French when he was back from holiday.

31. The respondent accepts that at the meeting with Mrs Jameson the claimant made a verbal disclosure of the same information that was contained in the complaint letter, and that this also amounted to a protected disclosure.

Further use of the claimant's personal smartphone on 3 August 2020

32. After his meeting with Mrs Jameson, the claimant completed his shift. As he returned to Reading Distribution Centre at the end of his shift, the claimant was contacted again by the respondent on his personal smartphone, to alert him of another safety concern. The claimant was very unhappy that his personal smartphone had been used again, after he had made it clear that he did not give his permission.

33. The claimant went to the Transport Office, where he had an interaction with Mr Tallentire, in front of other staff present in the open plan office space. This incident was the subject of an investigation by respondent. The incident led to disciplinary proceedings against the claimant and his dismissal.

34. On 4 August 2020, the claimant raised a complaint via the respondent's Protector Line, about the messages sent to him on his personal smartphone. (This is not said by the claimant to be a protected disclosure.)

Suspension

35. Also on 4 August 2020, the claimant attended a meeting with another manager, Aaron Brennan, who told the claimant that he was suspended on full pay pending investigation into his conduct on 3 August 2020. He was given a notice of suspension which recorded the allegation as 'aggressive behaviour towards a colleague on 3/8/20' (page 162). On the same day, the claimant was given a letter from another manager, Karlie Lynn, inviting him to an investigation meeting (page 157). The invitation letter used the same wording for the allegation against the claimant.

Investigation meeting

36. The claimant attended the investigation meeting on 5 August 2020. The meeting was held by Rebecca Downey.

37. The claimant was asked 'to give his take on 3 August 2020' and he did so. The claimant explained what had led to the incident and this was discussed. The claimant said he believed he was calm in proportion to the offences he had received (the use of his personal smartphone) but he understood that a display of anger was socially inacceptable in itself.

38. Other managers of the respondent had taken witness statements from colleagues present on the day. There were six statements. The claimant was not provided with copies of the witness statements. Ms Downey read some parts of the statements out to the claimant. She did not read all the statements in full. Ms Downey also summarised the statements to the claimant but did not do so accurately:

    38.1. she said that all six of the statements said the same thing, that the claimant had slammed a computer monitor down. In fact only three of the statements said this. The claimant said he hit the table and rested his arm on top of the monitor, causing it to slip down;
    38.2. she said that five of the statements said the claimant 'repeatedly prodded' Mr Tallentire. In fact four used the word 'dig' or 'poke' and one used 'point'.

39. Ms Downey decided that the claimant's behaviour had been unacceptable and that he should be referred for disciplinary action (page 174). No written statement was taken from him but he was asked to review the notes of the meeting and he initialled each page (page 176-181).

40. The claimant waited while Ms Downey prepared a letter inviting him to a disciplinary meeting (page 189). Another letter was sent later when the date for the meeting was rescheduled (page 190). The disciplinary hearing was to be before Jamie Futcher, a manager who had no previous involvement. The invitation letters recorded the allegation in the same terms as the previous letter.

41. Another manager met with the claimant and extended his suspension (page 185-186).

Protected disclosure 4

42. (Alleged protected disclosure 3 was not allowed on amendment).

43. On 9 August 2020 the claimant emailed a letter to Mr French, the department head, copied to Mrs Jameson (page 192-194). The letter set out his version of events in relation to the incident on 3 August 2020.

44. The respondent accepts that this letter is a protected disclosure.

45. Mr French replied to the claimant's email and suggested they arrange a meeting. There was some confusion on the claimant's part about whether this would be the same meeting as the disciplinary hearing. On 11 August 2020 Mr French emailed the claimant to clarify that the meeting with Mr Futcher was going ahead on that day. He said there would be a separate meeting with Mr French and Mrs Jameson on 18 August 2020, to discuss the claimant's email of 9 August 2020 (page 197).

The first part of the disciplinary hearing

46. The disciplinary hearing took place on 11 August 2020. Before the hearing, Mr Futcher spoke to the claimant's colleagues who had made witness statements, and they confirmed they still agreed with what they had said. Mr Futcher did not make any notes of those discussions.

47. Before the hearing, Mr Futcher also looked at CCTV footage taken in the transport office on the day. The incident itself was not visible, but the claimant could be seen going into the room and Mr Futcher formed the view from the CCTV that the claimant's manner was agitated.

48. In the hearing, Mr Futcher began by asking the claimant to 'talk him through' what had happened. He allowed the claimant to give his account. Mr Futcher's questions were not repetitive or badgering. The claimant explained about the use of his personal smartphone, and said he was very angry about this. Mr Futcher asked the claimant whether his behaviour was aggressive, and pressed him to give an answer. The claimant agreed that he acted in a hostile manner. He admitted making contact with Mr Tallentire with his finger.

49. Mr Futcher told the claimant that the CCTV showed him going into the room agitated. We find that the claimant was not shown the CCTV. We make this finding based on the claimant's evidence and the fact that there was no record in the meting notes of the CCTV being shown to him. It is consistent with the claimant's account in his complaint/appeal document (page 301). The notes record that the meeting lasted an hour (page 210), and it seems unlikely there would have been time to show the claimant the CCTV in addition to the discussion as recorded.

50. Mr Futcher told the claimant he had five witness statements. These were not provided to the claimant. Mr Futcher said the witnesses perceived the

claimant's conduct as aggressive behaviour. The claimant replied, 'fair point', and accepted that it was conduct which would trigger gross misconduct. When asked if he would act in the same way again, the claimant said he could not guarantee he would act the same way.

51. Mr Futcher told the claimant that Mr French would speak to Mr Tallentire about the use of the claimant's personal smartphone.

52. Notes of the meeting were initialled on each page by the claimant and Mr Futcher (page 210-213).

53. The meeting was adjourned to allow Mr Futcher time to consider the case further. It was to restart on 18 August 2020 (the same day as the meeting about the claimant's 9 August 2020 grievance).

Protected disclosure 5

54. On 13 August 2020 the claimant sent another email to Mr French and Mrs Jameson about the use of his smartphone (page 227). The email attached some screenshots from the claimant's personal smartphone, evidencing the messages he had received.

55. The respondent accepts that this email was a protected disclosure.

56. Mrs Jameson replied to the claimant and asked whether she could forward the email to Mr Futcher, as the points raised were relevant to the disciplinary hearing (page 233). The claimant replied to confirm that he was content for it to be forwarded. Mrs Jameson forwarded the email and attachments to Mr Futcher (page 227). She suggested that, as it was linked to the disciplinary, Mr Futcher should cover it in the meeting.

57. We find that it is likely that this email and screenshots were included in the appeal packs as well, as those packs included the material available at the disciplinary hearing.

The second part of the disciplinary hearing and the dismissal

58. The disciplinary hearing was reconvened on 18 August 2020 at 11.05am (page 236-250).

59. The claimant agreed that he should not react when angry. He said in his defence that he had worked a lot of overtime and the rota was challenging, and he was unhappy about the unauthorised use of his personal smartphone.

60. Mr Futcher asked the claimant whether he would act in the same way again. The claimant did not give a clear reply about this.

61. After a short adjournment, Mr Futcher told the claimant that he had decided he should be summarily dismissed. He did not think the claimant's behaviour was acceptable. The claimant was given a dismissal letter (page 251).

62. We accept Mr Futcher's evidence that he made the decision to dismiss the claimant on the basis of the claimant's account of the incident, the witness statements of the claimant's colleagues, and the claimant's demeanour as he walked into the room as seen from the CCTV. His decision was not because of the claimant's protected disclosures.

63. The disciplinary hearing went on to 12.43pm, following which the claimant was dismissed. The claimant missed the grievance meeting with Mr French and Mrs Jameson which was due to start at 12.30pm.

64. The claimant submitted an appeal against dismissal by email on 18 August 2020 (page 261-263). Christian Davies, an operations manager from a different distribution centre, was appointed to hear the appeal.

Alleged protected disclosure 6

65. On 1 September 2020 the claimant raised another complaint via the respondent's Protector Line about the messages he had received to his personal smartphone on 1 and 3 August 2020, the handling of the disciplinary process against him and the absence of key materials in the internal hearing bundle, including the failure to provide him with copies of his colleagues' witness statements (page 191 and 296-302).

66. The document was headed, 'The occasion of the abuse of staff and their property by a team manager'. It said there had been 'a complete breakdown in the necessary protocols' and 'wholly unauthorized use of my private property and personal data' (page 296). It explained what had happened on 1 and 3 August 2020.

67. The document went on to refer to the 'denial' by the claimant 'and other staff' of the use of private property 'as a company data output system' (page 300). It said that for GDPR, it is necessary to obtain discrete permission for use of staff data, and it was not correct that the company was permitted to 'use staff's private property without consultation or consent' (page 302).

68. The respondent does not accept that this complaint amounted to a protected disclosure.

69. We find that in making this complaint, the claimant believed that he was disclosing information which tended to show that there had been a breach of a legal obligation to which the respondent is subject, namely the data protection legislation including the GDPR.

70. We also find that the claimant believed that he was disclosing information which was not only in his own interest, but which was in the wider interest of all of the respondent's staff, amounting to a public interest. We make this finding based on the fact that it was submitted to the respondent's Protector Line, and on the wording of the document. Although the focus was on the claimant's case, the title of the document referenced 'staff and

their property', not just the claimant himself, and the claimant referred in the document to the rights of 'other staff'.

71. We return in our conclusions to the questions of whether the claimant's beliefs were reasonable beliefs.

72. The claimant raised another complaint via the Protector Line on 8 September 2020. That is not an alleged protected disclosure.

First stage appeal

73. The claimant's first stage appeal hearing with Mr Davies took place on 11 September 2020 (page 335-342).

74. The respondent has an appeal form template. There is an example on page 347. The claimant had provided Mr Davies with a copy of his complaint document of 1 September 2020 (page 295-302) but did not complete the appeal form. Mr Davies had some difficulty in understanding the claimant's grounds of appeal from his complaint document. Having conducted other appeals, he was familiar with the appeal form and so he went through all the grounds of appeal with the claimant, treating the appeal as if the claimant had ticked all the grounds of appeal boxes.

75. The claimant explained to Mr Davies his concerns about GDRP breaches (page 336).

76. The claimant had still not been provided with copies of the witness statements of his colleagues. He raised this in the appeal hearing (page 339). Mr Davies read out the statements to him (page 341).

77. The outcome letter was sent to the claimant on 11 September 2020 (page 343). Mr Davies upheld the decision to summarily dismiss the claimant. He did not feel that a warning would be effective, as he felt the claimant was not remorseful. The reason he upheld the decision was because of the claimant's behaviour on 3 August 2020. It was not related to the claimant's complaints about the GDPR and smartphone use.

78. The claimant made a second appeal, in accordance with the respondent's two stage appeal process. He filled in the appeal form template (page 346-347).

Second stage appeal hearing

79. The claimant was invited to attend the second stage appeal hearing on 21 October 2020. Matthew Rhind, UK Transport Director, was appointed to hear the second stage appeal.

80. Before the meeting, the claimant requested copies of the witness statements and some other documents (page 391). The documents provided to the claimant for the second appeal contained the witness statements.

81. The second stage appeal hearing took place by video on 21 October 2020 (page 433 to 442). Mr Rhind said that the hearing was to hear the reasons why the claimant had appealed for aggressive behaviour, not about the GDPR (page 434). The claimant explained what had happened on 1 and 3 August 2020 (page 435-436). Mr Rhind asked the claimant how this background impacted his response and behaviour.

82. Mr Rhind decided to adjourn the hearing to allow him to give further consideration to the appeal.

83. After the hearing on 21 October, Mr Rhind interviewed Mr Tallentire (page 452-454). He also interviewed Mr Futcher (page 460-461). Mr Rhind asked Mr Futcher about the CCTV footage. Mr Futcher said he did not think the claimant had viewed the CCTV. He said he would see if there was still a copy of it. He later discovered that it was no longer available as it had been deleted in accordance with the respondent's normal arrangements.

Response to claimant's data protection complaint

84. The claimant had not been able to attend the meeting with Mr French and Mrs Jameson about his data protection complaint. It was due to take place on 18 August 2020 but the claimant was still in his disciplinary hearing and was then dismissed.

85. On 28 October 2020 Mrs Jameson wrote to the claimant with the outcome of his data protection complaint (page 462). She had contacted the respondent's data privacy team and received some advice (page 344, 354). She decided that the use of the claimant's personal smartphone on 1 August 2020 was justified because it was an emergency situation.

86. Mrs Jameson's letter did not address the claimant's complaint about the second use of his personal smartphone number, on 3 August 2020. She was not aware that the claimant had been contacted on his personal smartphone on that day.

87. On 6 November 2020 the claimant and Mrs Jameson exchanged emails about the outcome of the claimant's complaint.

Second stage appeal outcome

88. Mr Rhind wrote to the claimant on 10 November 2020 to invite him to the continued second stage appeal hearing on 26 November 2020, to take place by video (page 465). The claimant did not attend the meeting on 26 November 2020 (page 466).

89. Mr Rhind wrote to the claimant again on 27 November 2020 to invite him to a rescheduled meeting on 10 December 2020 (page 467-468). The claimant replied to say he could not attend (page 471-474). Mr Rhind replied to say that if the claimant did not attend, he would provide the outcome in writing (page 471).

90. The claimant did not attend the rescheduled hearing on 10 December 2020 and Mr Rhind provided his decision in writing (page 476-477). Mr Rhind decided that the dismissal should be upheld. The claimant's behaviour had fell below the required standards, there were no mitigating factors and the claimant had failed to show remorse.

91. Mr Rhind told the claimant there was no further appeal.

The claim

92. The claimant presented his claim on 27 January 2021 after a period of Acas early conciliation from 15 November 2020 to 29 December 2020.

The law

93. This section is a summary of the legal principles which apply in cases of protected disclosure detriment, automatic and 'ordinary' unfair dismissal and breach of contract.

Protected disclosure

94. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure is:

    94.1. a 'qualifying disclosure' as defined by section 43B;

    94.2. which is made in accordance with one of six specified methods of disclosure set out in sections 43C to 43H.

95. Section 43B sets out what a qualifying disclosure is. Sub-sections 43B(1) and (5) say:

> *"(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,*
>
> *(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.*
>
> *…*
>
> *(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)."*

96. In summary, a qualifying disclosure is i) a disclosure of information that ii) in the reasonable belief of the worker making it, is made in the public interest and iii) (again, in the reasonable belief of the worker making it) tends to show that one or more of six 'relevant failures' has occurred, is occurring or is likely to occur. Relevant failures include failing to comply with a legal obligation.

97. Points ii) and iii) both have two elements: that the claimant has the required belief (as a matter of fact and on a subjective basis) and, if they do, that their belief is a reasonable belief to hold (on an objective basis).

98. In *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979 the Court of Appeal considered the public interest element of the definition. It held that:

> *"where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker."*

99. The court said that the question of whether a disclosure about a personal interest is also made in the public interest is one to be decided by considering all the circumstances of the case, but these might include:

> *"(a) the numbers in the group whose interests the disclosure served;*
>
> *(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;*
>
> *(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;*

> *(d) the identity of the alleged wrongdoer…the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest."*

100. A disclosure of information includes a disclosure of information of which the person receiving the information is already aware (section 43L(3)).

101. If a qualifying disclosure has been made, consideration needs to be given as to whether the method of disclosure makes it a protected disclosure. Section 43C says:

> *"(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure -*
>
> *(a) to his employer, or*
>
> *(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—*
>
> *(i) the conduct of a person other than his employer, or*
>
> *(ii) any other matter for which a person other than his employer has legal responsibility,*
>
> *to that other person."*

Protected disclosure detriment

102. Section 47B of the Employment Rights Act says:

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

103. 'Detriment' is given a wide interpretation. It means putting a worker under a disadvantage, or doing something that a reasonable worker would consider to be to their detriment (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11).

104. The test for whether a detriment was done 'on the ground that' the worker has made a protected disclosure is set out in *Fecitt and others v NHS Manchester* [2012] IRLR 64, CA. What needs to be considered is whether the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the worker.

Burden of proof in protected disclosure detriment

105. In a complaint of detriment, section 48(2) provides that it is for the employer to show the ground on which any act, or deliberate failure to act, was done. This means that the burden shifts to the employer where the other elements of a complaint of detriment are shown by the claimant.

106. Unlike the operation of the burden of proof under the Equality Act 2010, a failure by the employer to show positively the reason for an act or failure to act does not mean that the complaint of whistleblowing detriment succeeds by default. It is a question of fact for the tribunal as to whether or not the act was done 'on the ground' that the claimant made a protected disclosure (*Ibekwe v Sussex Partnership NHS Trust* UKEAT/0072/14/MC).

Automatic unfair dismissal

107. Section 103A of the Employment Rights Act says:

> *"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."*

108. A dismissal which is contrary to section 103A is 'automatically' unfair. The tribunal does not need to consider whether the dismissal was reasonable in the circumstances.

109. The causation question for the tribunal in the complaint of automatic unfair dismissal is different to that in relation to the complaint of detriment. In the automatic unfair dismissal complaint, the tribunal must consider whether the sole or principal reason for dismissal is that the employee made a protected disclosure (*Kuzel v Roche Products Ltd* [2008] ICR 799 and *Fecitt and others v NHS Manchester*).

'Ordinary' unfair dismissal

110. An employee with two or more years' service has the right not to be unfairly dismissed (section 94 of the Employment Rights Act). This is sometimes called 'ordinary' unfair dismissal, to distinguish it from automatic unfair dismissal, such as dismissal because of making a protected disclosure.

111. Section 98 of the Employment Rights Act sets out the tests for determining whether there has been an 'ordinary' unfair dismissal. Subsection 1 provides:

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."*

112. A reason which relates to the conduct of the employee is a reason falling within subsection (2).

113. In a complaint of unfair dismissal which the employer says is for conduct reasons, the role of the tribunal is not to examine whether the employee is guilty of the alleged misconduct. Instead, in line with guidance set out in the case of British Home Stores v Burchell, the tribunal must consider the following issues:

    113.1. whether, at the time of dismissal, the employer genuinely believed the employee to be guilty of misconduct;
    113.2. whether, at the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
    113.3. whether, at the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

114. Where there is a potentially fair reason for dismissal, the tribunal has to consider (under section 98(4) of the Employment Rights Act 1996):

> "*whether in the circumstances (taking into account the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a fair reason for dismissal."*

115. This is determined in accordance with equity and the substantial merits of the case, including whether the respondent acted in a procedurally fair manner and whether dismissal was within the range of reasonable responses open to the employer. The test recognises that there may be more than one reasonable approach for an employer to take in the circumstances of the case; the tribunal must not substitute its own view for that of the employer.

Acas Code of Practice

116. The Acas Code of Practice on Disciplinary and Grievance Procedures provides statutory guidance to employers and employees on the principles for handling disciplinary and grievance situations in the workplace.

117. In relation to disciplinary issues, the code says that, after the facts of the case have been established, the employer should inform the employee of the problem:

> *"9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."*

Breach of contract

118. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 gives the employment tribunal the power to hear complaints of breach of contract in some circumstances, as explained in article 3:

> *"3. Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—*
>
> *(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*
> *(b) the claim is not one to which article 5 applies; and*
> *(c) the claim arises or is outstanding on the termination of the employee's employment."*

Conclusions

119. This section explains how we have applied these legal principles to the facts in the claimant's case, to reach our decisions on the issues we have to decide. We have considered the issues in the following order: whether the claimant made protected disclosures, complaints of detriment, complaints of dismissal and complaint of breach of contract.

Protected disclosures

120. The respondent has accepted that the claimant made protected disclosures on:

    120.1. 2 August 2020 in a letter to Mrs Jameson;
    120.2. 3 August 2020 in a conversation with Mrs Jameson;
    120.3. 9 August 2020 in a letter to Mr French;
    120.4. 13 August 2020 in an email to Mrs Jameson.

121. The respondent did not accept that that the claimant's document which was submitted to Protector Line on 1 September 2020 it amounted to a protected disclosure. We have considered the requirements of section 43B of the Employment Rights Act.

122. First, we have found that there was a disclosure of information by the claimant. We have found that the claimant disclosed information about the unauthorised use of his private property and personal data on 1 and 3 August 2020 (a qualifying disclosure can be a disclosure of information of which the person receiving the disclosure is already aware).

123. We have found that the claimant himself believed that the information he disclosed tended to show that the respondent was failing or was likely to fail to comply with a legal obligation to which the respondent is subject, namely the data protection legislation including the GDPR. That is information which tends to show a relevant failure under section 43B(1)(b).

124. We find that the claimant's belief about that was a reasonable belief. It was reasonable for him to believe that the use of his personal smartphone number without his permission was a breach of data protection legislation, such as the GDPR, to which he specifically referred in the document.

125. We have also found that the claimant himself had a subjective belief that his disclosure of information about a breach of the GDPR was a disclosure which was made not just in his own interest, but in the wider interest of the respondent's staff, amounting to a public interest.

126. We have gone on to consider whether the claimant's subjective belief was a reasonable one, considered objectively. Considering the factors set out in *Chesterton* and the particular circumstances of the claimant's case, there are features which make it reasonable to regard the document of 1 September 2020 as being sent in the public interest as well as the personal interest of the claimant. It was about something which impacted other employees of the respondent, as well as him. Data protection rights are an important protection for employees. Given the size of the respondent, a very large group of people was potentially affected. For these reasons, we have decided that the claimant's belief that his disclosure was made in the public interest was objectively reasonable.

127. Therefore we have decided that the claimant's document of 1 September 2020 was a qualifying disclosure under section 43B.

128. As the claimant's document of 1 September 2020 was sent to his employer (via the Protector Line, and by being given to Mr Davies), it was a protected disclosure under section 43C.

Protected disclosure detriments

129. We have therefore found that the claimant made five protected disclosures between 2 August 2020 and 1 September 2020. Next, we consider, in relation to each of the complaints of protected disclosure detriment,:

    129.1. whether the act (or omission) occurred as alleged (that is, what the respondent did or failed to do);
    129.2. whether it was a detriment; and
    129.3. if it was, whether it was done by the respondent on the ground that the claimant had made a protected disclosure.

130. In relation to the third point, as we have found that the claimant has made protected disclosures, where the claimant shows that he was subject to a detriment by the respondent, section 48(2) provides that the burden is on the employer to show the ground on which the act was done. The test for whether any detriment was 'on the ground of' a protected disclosure is whether a protected disclosure materially influenced the respondent's treatment of the claimant.

131. We have considered each of the three alleged detriments.

132. The first alleged detriment is 'not determining the data protection complaint as part of the disciplinary process'.

133. We have found that the respondent dealt with the claimant's data protection complaint separately from the disciplinary process, as alleged. The data protection complaint was determined by Mrs Jameson and the outcome sent to the claimant on 28 October 2020. It was not determined as part of the disciplinary process.

134. We have also found that the decision makers at all stages of the disciplinary process were aware of and considered the claimant's data protection complaint in the sense that the claimant relied on it as the background to the events of 3 August 2020 and as a mitigating factor.

135. Dealing with the claimant's data protection complaint separately was not a detriment to the claimant. The disciplinary process was considering the claimant's conduct, and the data protection issue was not an issue about the claimant's conduct. The separation of the two procedures did not disadvantage the claimant, because he was able to talk about the data protection issues in all the disciplinary meetings and hearings. The data protection issues were taken into account in the disciplinary process as a mitigating factor relied on by the claimant, although they were not determined as part of that process. The claimant received a separate response to his data protection complaint. In the circumstances, a reasonable worker would not consider the fact that the complaint and disciplinary processes were not decided together to be to their detriment.

136. Even if we had found the separation of the complaint and disciplinary process to have been a detriment, we would not have found this to have been done 'on the ground' of one or more of the claimant's protected disclosures. This allegation is to some extent circular: the claimant is saying that not determining his data protection complaint (a protected disclosure) in the disciplinary process was done on the ground that he had made a protected disclosure. In any event, we are satisfied that the respondent's treatment of the claimant's data protection complaint (and of the disciplinary process) was not materially influenced by the fact that the complaint itself was a protected disclosure, or by the fact that the claimant had made one or more protected disclosures. It was approached in that way because the two matters were different. That was an entirely reasonable approach to take and does not suggest any unlawful motive.

137. The second alleged detriment is quite similar: 'not taking into account the 2 August 2020 letter and/or the claimant's screenshot evidence in the disciplinary process'.

138. We have found that the decision makers at all stages took into account the claimant's data protection concerns, as set out in his 2 August 2020 letter. We have found that the claimant sent the screenshots to the respondent in an email of 13 August 2020 and that they were passed to Mr Futcher for

the disciplinary hearing and were likely to have been in the appeal packs as well.

139. Therefore, this allegation fails on the facts. The decision makers in the disciplinary process did take into account the claimant's data protection concerns and the screenshot evidence. They did not consider the claimant's data protection concerns to be sufficient mitigation for his conduct on 3 August 2020.

140. The third alleged detriment is Mrs 'Jameson's letter of 28 October 2020 with the outcome to the data protection investigation, failing to address the issues C had raised.'

141. We have found that Mrs Jameson replied to the claimant's data protection complaint on 28 October 2020 and that she did not address all the issues the claimant had raised, because she was not aware that he had been contacted again on his personal smartphone on 3 August 2020. She was only aware of the contact on 1 August 2020.

142. It was a detriment to the claimant that the response to his data protection complaint failed to address his additional concerns about being contacted on 3 August 2020. The points he raised were not fully answered. It was reasonable for him to regard that as a detriment.

143. However, the letter of 28 October 2020 and the failure to address the contact on 3 August 2020 were not done on the ground that the claimant had made one or more protected disclosure. We are satisfied that the respondent's treatment of the claimant's data protection complaint was not materially influenced by the fact that the complaint itself was a protected disclosure, or by the fact that the claimant had made one or more protected disclosures.

144. As with the first allegation, this allegation is circular: the claimant is saying that he received an inadequate response to the data protection complaint he made in a protected disclosure, because it was a protected disclosure. Our findings of fact show that the respondent took the claimant's data protection complaint seriously. He was due to have a meeting with Mr French and Mrs Jameson. This did not take place, because of his dismissal, but the respondent replied to the claimant's complaint after his dismissal. Mrs Jameson sought relevant advice from the respondent's data privacy team, reached a conclusion and informed the claimant of the outcome of his complaint. The claimant was not happy with the outcome of the complaint, but the outcome was not caused by one or more of his protected disclosures.

145. For these reasons, all three of the claimant's complaints of protected disclosure detriment fail and are dismissed.

<u>Protected disclosure dismissal</u>

146. Section 103A requires us to identify the sole or principle reason for the dismissal. If that reason is one or more protected disclosure, the dismissal is automatically unfair.

147. We have found that the reason for the respondent's decision to dismiss the claimant was not one or more of the claimant's protected disclosures. The reason the claimant was dismissed was the claimant's conduct on 3 August 2020. Mr Futcher decided that this conduct was not acceptable behaviour in the workplace.

148. Mr Futcher did consider the claimant's protected disclosures as part of his consideration of the claimant's conduct. He was invited to do so by the claimant, because the claimant regarded the use of his personal smartphone on 1 and 3 August 2020 and his raising of data protection concerns as the explanation for his conduct. Mr Futcher treated the data protection concerns raised by the claimant as a mitigating factor, but decided that they were not sufficiently mitigating to lead him to impose a sanction other than dismissal. The circumstances surrounding the protected disclosures made by the claimant were factors in the claimant's favour, because they were treated as mitigating factors, not as a reason for dismissal.

149. Mr Davies and Mr Rhind took the same approach at the appeal stages. The data protection concerns raised in the claimant's protected disclosures were considered as mitigating factors but ultimately both appeal managers concluded that they were not sufficiently mitigating to overturn the dismissal.

150. As we have found that the reason for the claimant's dismissal was not a protected disclosure, the complaint of automatic unfair dismissal because of making a protected disclosure cannot succeed. That complaint fails and is dismissed.

<u>'Ordinary' unfair dismissal</u>

151. We next consider whether the dismissal was unfair contrary to section 98 of the Employment Rights Act ('ordinary' unfair dismissal).

152. We have found that the reason for the dismissal was the claimant's conduct on 3 August 2020. That is a reason related to the employee's conduct, which is a potentially fair reason for dismissal under section 98(2) of the Employment Rights Act.

153. In a complaint of unfair dismissal which the employer says is for a reason relating to conduct, our role is not to examine whether the employee is guilty of the misconduct, or to consider whether we would have dismissed the employee in the same circumstances. Our role is more limited. Guidance on the scope of that role is set out in the case *of British Home Stores v Burchell* and that requires us to consider three questions:

153.1. first, whether at the time of dismissal the employer genuinely believed the employee to be guilty of misconduct;
153.2. secondly, whether at the time of dismissal the employer had reasonable grounds for that belief; and
153.3. thirdly, whether at the time the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

154. As explained in the summary of legal principles, we also consider the fairness in the circumstances of the case, including whether the procedure adopted by the respondent was otherwise fair, and whether the decision to dismiss was within the range of reasonable responses.

155. The first question in the *Burchell* test is whether the respondent genuinely believed the claimants to be guilty of misconduct.

156. We accept that at the time of dismissal Mr Futcher genuinely believed that the claimant was guilty of misconduct on 3 August 2020. He had reasonable grounds for that belief. He had seen the witness statements of the claimant's colleagues and the CCTV of the moments before the incident. The claimant had agreed that he was angry, had acted in a hostile manner and had made contact with Mr Tallentire.

157. The third question for us when considering cases where the employer relies on a conduct reason for dismissal is whether the respondent's belief on those grounds was reached after carrying out as much investigation as was reasonable in the circumstances. We have concluded that the respondent did carry out as much investigation as was reasonable in respect of the incident on 3 August 2020. The respondent had taken statements, looked at the relevant CCTV footage and held an investigatory meeting with the claimant.

158. Therefore, the respondent has met the three elements of the test set out in *Burchell*.

159. We go on to consider the fairness in the circumstances of the case, including whether the respondent otherwise acted in a procedurally fair manner and whether the dismissal was in the range of reasonable responses. We have concluded that the respondent failed to act in a procedurally fair manner because:

159.1. The claimant was not provided with copies of the witness statements of his colleagues at the investigatory, disciplinary or first appeal stages;
159.2. This was contrary to paragraph 9 of the Acas Code of Practice which says that 'it would normally be appropriate to prove copies of any written evidence, which may include any witness statements, with the notification' of the disciplinary hearing. The respondent did not put forward any reason why it would not have been appropriate to provide the claimant with witness statements in this case;

159.3. The claimant was also not shown the CCTV footage of the moments before the incident;

159.4. Parts of the statements were read out at some meetings, and they were read in full at the first appeal meeting. However, reading the statements out is not the same as providing copies, as it was more difficult for the claimant to take in, and he did not have a copy in advance to enable him to prepare to answer the case at the disciplinary hearing as required by the Acas Code of Practice;

159.5. The claimant was given an inaccurate summary of the witness statements at the investigatory meeting and this was not expressly corrected at any time;

159.6. When making his decision to dismiss, Mr Futcher specifically relied on the witness statements and the CCTV footage (from which he perceived that the claimant looked agitated) neither of which had been shown to the claimant;

159.7. Although the statements were read by Mr Davies at the first appeal hearing and provided by Mr Rhind at the second appeal hearing, given the importance of the statements to the process and to the respondent's decision, this was too late to correct the procedural failure of the earlier stages;

159.8. The CCTV had been deleted by the time of the second appeal hearing, so the claimant never had the opportunity to view it;

159.9. If the claimant had been provided with copies of the statements and seen the CCTV footage at an early stage in the process, he might have taken a different approach to the questions he was asked about whether he would act in a different way in future, which was something to which the respondent attached some weight.

160. The range of reasonable responses test applies to the procedure as well as to the dismissal itself. We remind ourselves that we are not looking to see if the respondent carried out '<u>the</u> perfect procedure', rather whether the procedure was in the range of reasonable procedures of a reasonable employer in these circumstances. We bear in mind that the claimant had admitted some elements of his conduct and had accepted some criticism of it, including that it amounted to gross misconduct. However, we have decided that the failings in the procedure were such that they took the response adopted by the respondent outside the range of reasonable responses of a reasonable employer in these circumstances. In short, statements which were not provided to the claimant and CCTV footage which he had not seen played a significant part in the decision to dismiss the claimant.

161. For these reasons, the claim for 'ordinary' unfair dismissal succeeds.

162. Because of time constraints at the hearing, we did not consider remedy (for example, compensation) or any related issues including:

162.1. whether there is a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some

other reason. If so, should the claimant's compensation be reduced? By how much?

162.2. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent or the claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

162.3. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

163. A separate document is being sent to the parties to arrange for another hearing to decide remedy (for example, compensation). The document includes details of the steps the parties must take so that a hearing date can be arranged, and of the steps the parties need to take to prepare for the hearing.

Breach of contract

164. The claimant's final complaint was for breach of contract in respect of delays to payment for his banked hours. Hours owing to the claimant from 21 May 2018 were paid to the claimant on 8 March 2019 and 5 April 2019 and the system was corrected 'going forward'.

165. As explained in the legal summary above, the employment tribunal has the power to hear complaints of breach of contract if they meet the conditions set out in article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. One of the conditions is that the claim must arise or be outstanding on the termination of the employee's employment.

166. In the claimant's case, a complaint about the failure to properly pay banked hours was not outstanding on the termination of the claimant's employment. The respondent had paid the claimant's outstanding pay on 8 March and 5 April 2019. By 18 August 2020 when the claimant was dismissed, there was no longer any outstanding complaint about non-payment of pay.

167. The tribunal therefore does not have the power to hear a breach of contract claim in this case. Even if it did, the claimant has been paid the sums due. The tribunal would have no power to order an apology in a breach of contract case.

Employment Judge Hawksworth

Date: 4 May 2023

Sent to the parties on: 10th May 2023

GDJ
For the Tribunals Office

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