THE INDUSTRIAL TRIBUNALS

CASE REF: 10275/18

CLAIMANT: **John Joseph Hurson**

RESPONDENT: **Agro Merchants Lurgan Transport Limited**

JUDGMENT

The unanimous judgment of the tribunal is that it dismisses the claimant's claims for unlawful constructive dismissal and for detriment by reason of having made a public interest disclosure.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Greene**

Members: **Mr A White**
Mr A Barron

APPEARANCES:

The claimant appeared in person, accompanied by his McKenzie friend, Mr Mark Cullen.

The respondent was represented by Mr Barry Mulqueen, of counsel, instructed by Arthur Cox Solicitors.

1. The tribunal heard evidence from the claimant and on his behalf from Mr Tommy McKearney and on behalf of the respondent from David Malcolm, George Lee, Mark McKavanagh, Derek Sawyers and Stephen Campbell. The tribunal received three bundles of documents amounting to some 542 pages approximately, a Schedule of Loss, written submissions from both parties and a number of legal authorities.

THE CLAIM AND COUNTERCLAIM

2. The claimant claimed that he had been constructively unfairly dismissed and that he had suffered a detriment by reason of having made a public interest disclosure. The respondent disputed the claimant's claims in their entirety.

THE ISSUES

3. The agreed issues were as follows:-

Legal Issues

(1) Was the claimant unfairly (constructively) dismissed from employment?

(2) With regard to the claim of unfair (constructive) dismissal:

(a) What was the breach of contract by the respondent?

(b) Was this breach sufficiently important to justify the claimant resigning from employment?

(c) Did the claimant leave in response to the breach of contract?

(d) Did the claimant delay too long in terminating his contract of employment in response to the respondent's breach of contract?

(3) (a) Did the claimant make a protected disclosure?

(b) Is the disclosure a qualifying disclosure?

(c) Did the claimant hold a reasonable belief that the disclosure tended to show a relevant failure [Article 67B(1)(a-f) Employment Rights (Northern Ireland) Order 1996], was substantially true and/or that disclosure was in the public interest?

(d) Was the claimant subjected to detriment? If yes, what was the nature of this detriment?

(e) Was any disclosure made in good faith?

(f) Was any claim made under the protected interest disclosure legislation brought in time? If not, was it reasonably practicable for the claimant to have brought his claim within the required time-limits?

Factual Issues

(1) What were the claimant's contracted working hours between Monday 27 November 2017 and Sunday 3 December 2017?

(2) What work instruction did the claimant receive on 30 November 2017? Did the claimant carry out this work instruction? If not, why not?

(3) What work instructions did the claimant receive on 1 December 2017? Did the claimant carry out these work instructions? If not, why not?

(4) What was the nature of the exchange that took place between the claimant and Mr David Malcolm on 2 December 2017?

(5) What was the nature of the complaint raised by the claimant on 4 December 2017?

(6) Did the respondent carry out a disciplinary investigation and procedure in relation to the complaint made by the complainant on 4 December 2017? If yes, what was the nature and outcome of this disciplinary process?

(7) Did the claimant raise a grievance? If yes, what was the nature of this grievance and outcome of same?

(8) Did the claimant appeal the grievance outcome? If yes, what was the outcome of the same?

(9) Why did the claimant resign from employment on 4 August 2018?

4. At the start of the hearing the claimant clarified that he was making two separate and distinct claims, one of constructive dismissal and a second one of detriment by reason of public interest disclosure. The tribunal also accepted during the hearing that the claimant was alleging that a cover-up had occurred in relation to the incident of 2 December 2017.

FINDINGS OF FACT

5. (1) The claimant worked as a HGV driver with the respondent from 10 August 2012 until he resigned on 4 August 2018. His weekly earnings were £712.60 gross and £574.01 net. He was based at the respondent's Lurgan depot.

(2) The respondent is a global temperature-controlled warehousing and logistics company. In 2015 the group acquired Sawyers Transport Limited which was located in Northern Ireland. Thereafter the business was renamed Agro Merchants Lurgan Transport Limited.

(3) On 30 November 2017 the claimant, in the course of his employment, drove a lorry, from his base in Lurgan to Luton. From 18:31 on 30 November 2017 a series of texts were exchanged between the claimant and Aaron Loughran and between the claimant and David Malcolm, the respondent's Backload Manager for the UK. These texts related to the claimant's duties for the 1 December 2017. These texts form the basis of the claimant's belief that he was being asked to engage in illegal driving.

(4) The texts are as follows:-

Aaron Loughran:

"Well John when you have routine taking off please head to

HIKTON FOODS HUNTINGTON 2-8 THE INTERCHANGE LATHAM ROAD HUNTINGTON UNIT A CAMBRIDGESHIRE PE29 6YE

AND LOAD 2 AMBIENTVFIR HILTON FOOD IRELAND

1 CHILLED FOR LINDEN FOODS

2 FROZEN FOR FOYLE

2 CHILL FOR FOYLE

THEN HEAD TO XPO LOGISTICS

WISBECH ROAD KINGS LYNN NORFOLK PE30 5LQ.

LOADING AT 0930 REF 132181

THEN HEAD TO FRESHCOOK, SLUICE ROAD, HOLBECH, ST MARK'S, SPALDING, LINCOLNSHIRE PE1 2HF

AND 14 PALLETS OF TRAYS AND OALLETS FOR LINDEN.

THEN HEAD TO LONG CLAWSON DAIRY LTD

WEST END LONG, CLAWSON, MEKTON, MOWBRAY, LEICESTSHIRE LE14 4NW AND LIFTB2 PARTS FOR CAPITAL TRANSPORT.

30/11/2017, 18:31"

The claimant:

"That won't work as I need home early.

30/11/2017, 18:35"

Aaron Loughran:

"Flagship be home

HUNTINGTON is open 24 hr andbt-secind collection open at had 7 u can start to suit that.

30/11/2017, 18:36"

The claimant:

"?

30/11/2017, 18:42"

Aaron Loughran:

"Huntington is open 24 and second place is open at 0730 so u can start early and be home early.

30/11/17, 18:43"

(5) At this stage the claimant called Aaron Loughran by telephone at 18:45 and there followed further texts.

Aaron Loughran replied:

"Just LOAD THE HUNTINGTON SPALDING Melton Mowbray.

Dontvworry about THE NORFOLK".

The claimant:

"That still doesn't get me home in one card.

30/11/2017, 18:55"

Aaron Loughran:

"It's been done before.

30/11/2017, 18:56"

The claimant:

"Explain how I can do 3 collections starting in Luton and be back in lurgan inside 15 hours?

30/11/2017, 18:57"

Aaron Loughran:

"Well change u topaz DUBLIN.

30/11/2017, 18:59"

The claimant:

"Still doesn't get me back inside 15 hours.

30/11/2017, 19:00"

Aaron Loughran:

"Okay jhon just sit tight well get loadef to marrow at 1500

30/11/2017, 19:30"

(6) David Malcolm also texted the claimant. He began his texting messages;-

"Please collect the first collection Aaron sent you as soon as you can in the morning:-

30/11/2017, 18:51"

(7) There was a second text:

"3 collections then head for Cairnryan Aaron sending you all the details now.

30/11/2017, 18:53"

The claimant:

"That's impossible come back to me with something sensible.

30/11/2017, 19:14"

David Malcolm:

"I drove lorries a fair length of time and I wouldn't ask you to do anything i couldn't do myself. Speak in the morning but there's nothing early.

30/11/2017, 19:16"

The claimant:

"Explain how I can start from Luton do 3 collections and be back inside 15 hours to Lurgan?

30/11/2017, 19:19"

David Malcolm:

"Ok I'm not arguing, we will find something else for you tomorrow.

30/11/2017, 19:19"

The claimant:

"It's not arguing, just pointing out its impossible.

30/11/2017, 19:20"

David Malcolm:

"*Ok*

30/11/2017, 19:20"

(8) The claimant believed the four collections would take two days and he had only one day left on his shift. The claimant had made it clear that he wanted back to Lurgan on Friday evening (1 December 2017) and the tribunal is satisfied that to have arrived back in Lurgan on Friday evening would have been in accordance with the shift that he was scheduled to work that week.

(9) The standard procedure within the company was that if a job took longer than had been planned an employee would be paid for any extra work he did. In addition if an employee reached the legal driving-limit and had not reached his destination then he was required to stop and take his appropriate rest and seek accommodation for which the respondent would pay. It also appears that the driver had a degree of discretion when returning from Luton to Ireland as to what route he might take, i.e. Cairnryan to Larne or Holyhead or Liverpool to Dublin and the respondent would be responsible for the cost of any variation or change to the route chosen by the driver.

(10) It also appears that a driver who has reached his legal driving limit can be replaced by another driver. The driver should then take his legally required break. Should the driver be transported in another company van during his shift then he should be recorded as being on "other work" and not as being on a "rest period". At base the driver who had travelled as a passenger would be noted as being on a "period of availability".

(11) On 1 December 2017 the claimant was given new instructions to leave Luton to collect a load at Wisbech and then return to Lurgan via Cairnryan. By the time the claimant reached Cairnryan he had reached the legal limit of his driving. He parked the lorry for the night and returned to Lurgan on 2 December 2017 arriving at Lurgan at around 2.00 pm. The claimant had not done any illegal driving.

(12) The claimant went to the respondent's office at Lurgan and had a discussion with David Malcolm during which he said to Mr Malcolm that he could not collect the four loads legally and get back to Lurgan whereas David Malcolm believed it could be done legally. Mr Malcolm also suggested other route permutations that the claimant might have considered.

(13) When the claimant remained adamant that the job could not be done, David Malcolm lost his temper, used strong language and came out of the office to the POD office where the claimant was. He grabbed the claimant by his jacket lapel with his left hand and clenched his right fist and threatened, "to smash his face in". Some other employees intervened at this stage and the incident came to an end. The claimant was badly shaken by the incident and, having considered the matter, he decided to make a complaint.

(14) On 4 December 2017 the claimant made a complaint by email to the respondent's Human Resources department. In his complaint he stated:-

> *"I wish to lodge a complaint against Davy Malcolm who physically assaulted and threatened me last Saturday in the office in Lurgan.*
>
> *In front of several people, I was attacked by Mr Malcolm whenever he grabbed me by my jacket, held me back against the counter and with his right arm pulled back and fist clenched, he held me there for a time threatening to smash my face in. Only other drivers intervened, there is no telling what he would have done considering how crazy and out of control he was.*

When I said I was going to file a complaint against him, he said "File your complaint, and I'll fucking sign it".

It is one thing to be told to break the law regarding my driving hours, but to be physically attacked for challenging this is a step too far.

I do not feel safe to return to work as things currently stand."

(15) At the respondent's request the claimant made a statement, taken by Rebecca Doran, in the HR office on 4 December 2017. He was accompanied at the meeting by George Lee the respondent's Operations Director. His statement was in the following terms:-

"I make this statement in connection with an incident that occurred on …

Thursday night, should have been back Friday but delayed. Got message from Aaron for 4 collections – told Aaron not going to work because that's 2 days work. John explained how that was not going to work in 15 hours. Davy text John about collections but John explained it impossible to do.

John done a print out from Friday and gave to Davy. John said to Davy you said you could do this yourself but how? Davy said John could get middle boat however never no mention of boat. Davy then flipped, slammed his fist on the desk, everyone in office turned to see what happened Davy bust out through side door and came into small office 'pod' door to where John was. Davy pushed John back, held him against counter with fist held back and threatened to 'smash his face in'. Other drivers shouted stop, stop Davy walked away and John shouted I am going to file a complaint and Davy said 'fine, il fucking sign it' Brendan O'Neill came out to calm things down. This incident occurred around 4.00-4.30 pm".

The respondent undertook to investigate the matter further.

(16) Rebecca Doran also took statements from David Malcolm, and from Lewis McCrabbe and Brendan O'Neill who had apparently witnessed the incident.

(17) By letter of 5 December 2017 Laura Casey, the HR manager, invited David Malcolm to a disciplinary hearing on 7 December 2017 chaired by George Lee, Operations Director, to consider whether disciplinary action should be taken against him because it was alleged that he on 2 December 2017 had used unacceptable, abusive or violent behaviour to another member of staff. He was told that was an act of "unacceptable, abusive violent behaviour to members of staff" and was considered to be an act of gross conduct which might result in dismissal without pay in lieu of notice. Mr Malcolm was provided with his own statement and the three other statements (the claimant's and the two eye witnesses).

(18) At the disciplinary hearing on 7 December 2017 George Lee read the claimant's statement of 4 December 2017, set out above, to Mr Malcolm to which Mr Malcolm replied, "yes I agree with the statement." He also acknowledged that his behaviour was unacceptable.

(19) In the course of the disciplinary hearing Mr Malcom alleged that the claimant's behaviour was not acceptable either and he said that he had just lost his temper. He alleged that the claimant had come into the office looking for an argument. Both eye witnesses in their statements also alleged that the claimant was verbally provocative.

(20) Mr Lee, having considered the admission by Mr Malcolm and the witness statements of Brendan O'Neill and Lewis McCrabbe decided the appropriate penalty was a final written warning and a requirement for David Malcolm to attend dignity at work training, having upheld the charge that Mr Malcolm had used unacceptable, abusive and violent behaviour towards a member of staff which was deemed to be an act of gross misconduct. Mr Lee was erroneously of the opinion that the actions of Mr Malcolm did not constitute an assault. He also found that there had been provocation on the part of the claimant and that there had not been any serious physical contact with the claimant by David Malcolm. Mr Malcolm was further told that the warning would remain on his file for a period of 12 months and that the improvement expected was zero re-occurrence. He was also told that the likely consequence of insufficient improvement was further disciplinary action, namely dismissal. He was advised of his right of appeal which he elected not to pursue.

(21) Laura Casey telephoned the claimant on 7 December 2017 to tell him that David Malcolm had been charged with gross misconduct and had received a final written warning. The claimant alleged, which Laura Casey denied, that she told him that David Malcolm had to attend an anger management course and would provide an apology to the claimant. In an email of 7 or 8 February 2018 to Laura Casey the claimant alleged that he had a "detailed record … of that phone call …" but such a record was never produced to the tribunal.

(22) The respondent did not send a written notification to the claimant of the action the respondent intended to take or offer him a right of appeal pursuant to the respondent's grievance procedure. The first written communication of the outcome of his grievance/complaint was in an email of 22 January 2018 from Laura Casey but it did not offer a right of appeal to the claimant.

(23) On 8 December 2017 the claimant provided a sick note from his doctor recording that he was not fit for work and the sick note lasted until 25 December 2017.

(24) On 11 December 2017 the claimant texted his line manager, Chris Corr, to notify him of the sick note and the holidays that he had previously booked and telling him that he would therefore not be back at work until January 2018. He also told Mr Corr that he was still shaken up after the assault. The doctor's sick note was subsequently renewed for the remainder of January 2018.

(25) On 12 December 2017 the claimant reported the assault by Mr Malcolm on him to the PSNI but this did not result in any police action.

(26) On 20 January 2018 the claimant sought confirmation that David Malcolm had been the subject of a disciplinary hearing, a copy of all the documentation, including minutes, and a copy of the decision of the disciplinary hearing against David Malcolm from Laura Casey. Laura Casey, by email, refused to give a copy of all the documentation regarding David Malcolm's disciplinary hearing for data protection reasons. She proposed a meeting between the claimant and David Malcolm and informed the claimant that if he wished to make a grievance he should do so to his line manager.

(27) The respondent has a grievance procedure which enables grievances to be dealt with informally and formally. The informal procedure provides as follows:-

> *"The employee should refer any grievance in the first instance to their immediate Supervisor or to a more Senior Manager, if the grievance relates to the said Supervisor. Everything possible will be done to resolve the problem informally".*

The formal grievance procedure provides:-

> *"If an acceptable solution cannot be found through informal discussions, then the employee must refer the matter in writing to their immediate Supervisor or to a more Senior Manager if the grievance relates to the said Supervisor. The employee must detail the nature of their complaint and submit their grievance within 5 days of any such grievance arising".*

(28) The formal grievance procedure provides that normally a grievance meeting would be held within five days from receipt of the complaint in writing. The employees will be allowed to explain their grievance and how they think it might be resolved. The grievance will be acknowledge in writing within five days of receipt. The HR manager will call the employee to a meeting to discuss their grievance. At the meeting the employee will be given the opportunity to be accompanied by a fellow member of staff or trade union representative. At the meeting the employee will be allowed to explain their grievance and how they think it might be resolved. The meeting will also give the supervisor or senior manager an opportunity to identify whether any investigation is necessary. If it is deemed appropriate to hold an investigation the employee will be informed of this at the meeting. Within five days of the meeting the employee will be advised in writing by the HR Manager what action if any they have decided to take along with a full explanation of how the decision was reached. The employee will also be informed of his right to appeal if they believe the grievance has not been satisfactorily resolved. The appeal must be made in writing to another senior manager within five days of receiving the written decision. An appeal hearing will be scheduled and all efforts will be made to ensure that the appeal hearing takes place within five days of receiving the employee's request for an appeal. At the appeal hearing the employee will be given an opportunity to be accompanied by a fellow member of staff or a trade union

representative. The employee will receive a written decision within five days of the appeal hearing or as soon as is reasonably practicable. The appeal decision is final. Minutes of the appeal hearing will be available on request.

(29) On 23 January 2018 the claimant wrote to Laura Casey in relation to her email of 22 January 2018 in which she set out the outcome of the claimant's complaint/grievance of 4 December 2017 but did not offer him a right of appeal. He suggested that the lack of reply to his complaint/grievance had exacerbated the work related stress from which he was suffering and was a disappointment to him. He also mentioned that the PSNI had told him that David Malcolm was denying threatening or assaulting him.

(30) Laura Casey replied on 25 January 2018 offering to set up a meeting with David Malcolm, "to clear the air/provide an apology". She stated her desire of enabling the claimant to return to work as soon as possible and proposed allowing him to use holiday leave during his sick leave to ease his financial situation.

(31) The claimant replied to Laura Casey on 29 January 2018 again seeking all documentation regarding David Malcolm's disciplinary process and an explanation as to why his grievance had not been treated according to the grievance policy. He also raised a number of other matters.

(32) Laura Casey replied on 1 February 2018 and rehearsed the sequence of events leading to the incident that gave rise to David Malcolm's disciplinary hearing. She described the respondent's actions as an attempt to resolve the grievance informally. She stated that it was only on receipt of the claimant's email of 23 January 2018 that the respondent became aware that the claimant was not happy with the solution provided. Were he unhappy with the outcome of his grievance she invited the claimant to make a formal grievance. She also dealt with the claimant's queries about the CCTV coverage of the incident and a potential SAR (Subject Access Request).

(33) The claimant sent an email to Laura Casey on 8 February 2018. It was a very long email and it rehearsed the history of the incident of 2 December 2017; the communication between the claimant and Laura Casey since that date, verbal and in writing; the dispute between the claimant and Laura Casey as to what she told him in connection with the disciplinary charge brought against David Malcolm; how these matters affected the claimant; the lack of a proper investigation into the incident of 2 December 2017; alleged other incidents of aggressive or violent behaviour by David Malcolm; the statements apparently given by Mr Malcolm to the police in which he had denied assaulting the claimant apparently; and the claimant's stated lack of faith in Laura Casey or George Lee to fully investigate the assault by David Malcolm on him.

(34) On 8 February 2018 the claimant asked Chris Moss, his line manager, to become involved as he did not have confidence in Laura Casey or George Lee. Chris Moss replied on 9 February 2018 to say he would get to the bottom of the matter. Chris Moss followed it up with an email to the claimant of 16 February 2018 to say that Laura Casey would contact him to find out if he was raising a formal grievance.

(35) Another director of the respondent company, Derek Sawyer, contacted the claimant by text on 7 and 14 February 2018 and proposed a private meeting.

(36) On 19 February 2018 Laura Casey wrote to the claimant to propose a grievance meeting on 22 February 2018 with Mark McKavanagh chairing the meeting and Julie Pepper taking notes. The grievance letter stated that the matters to be considered were:-

> Issues surrounding the investigation into an alleged assault on yourself and your concerns of any potential cover up.

According to the letter a summary of the issues included:-

- The location/handling of the investigation meeting.
- Queries over the investigation outcome.
- Questions over the CCTV footage.
- A phone call with Ms Casey.
- Questions over the training conducted with Mr Malcolm.
- Issues regarding communication while off sick.
- Allegations that certain staff may have covered up an assault.

(37) The grievance meeting was re-scheduled to 27 February 2018 and the claimant added a few additional issues, namely; whether there were conflicts of interest including any family ties between Mark McKavanagh, Julie Pepper and any of the others named in the grievance to include but not limited to Mr Malcolm, Laura Casey and George Lee. He also wished to have included:-

> *"Bullying and threatening behaviour by Mr Malcolm.*
>
> *Loss of earnings.*
>
> *Status of initial grievance raised on 4 December.*
>
> *Clarification on policy and appointment of investigating officers and company policy and procedure for conducting investigations in dealing with grievances (including undertaking grievance hearings)."*

(38) At the grievance meeting on 27 February 2018 the claimant rehearsed the events from 30 November 2017 to 2 December 2017 and the telephone call from Laura Casey of 7 December 2017 and subsequent contact with her. The claimant raised queries about the outcome of the investigation; why there was not any CCTV coverage relating to the incident on 2 December 2017; and the training given to David Malcolm. The claimant contended that the complaint was not upheld because of a cover-up. At the meeting the claimant did not raise the issue of him being asked to drive illegally on 1 or 2 December 2017. The respondent accepted that the claimant was owed £70 in relation to work done by him on 2 December 2017 and that he would be paid for that. Following the meeting Mark McKavanagh interviewed David Malcolm, Lewis McCrabbe, Brendan O'Neill, Laura Casey, Lucy Arnold, Patrick McKee, Scott Sawyers, Rebecca Doran; George Lee and Chris Corr.

(39) On 15 March 2018 Mr McKanavagh sent the claimant a copy of his initial investigation report setting out the evidence collected; the persons to whom he had spoken; a summary of the written and physical evidence; and a summary of the witness evidence.

(40) At the request of Mark McKavanagh the claimant attended another investigating meeting on 23 March 2018. Before the meeting Mark McKavanagh had provided the claimant with documentation about the investigation and the claimant had set out his comments and observations on the same. The allegation of illegal driving was raised and the claimant's belief that his opposition to illegal driving was the reason for the assault and threatening behaviour of David Malcolm on 2 December 2017. The claimant particularly raised the alleged practice of drivers who had completed the legal limit of their driving being switched to company vans that would meet the lorries at service stations near ports in Ireland. At the meeting Mark McKavanagh said he had examined the text messages and concluded that the claimant was not being asked to do anything illegal. He also stated that the switching of drivers was a grey area, which is not correct. It is not permitted. The outcome of the investigation was sent to the claimant on 31 March 2018. The report did not upheld any aspect of the claimant's grievance.

(41) The claimant appealed the findings by email of 6 April 2018 without specifying any grounds of his appeal. His appeal hearing was heard on 26 April 2018 and was chaired by David Southwall, an employee of Elas, brought in to hear the appeal. At the meeting the claimant provided information in a 22 page document about alleged illegal driving practices of the respondent; alleged deficiencies in the investigation by the respondent of the incident on 2 December 2017; and the inadequacy of the penalty imposed on David Malcolm following being found to have committed an act of gross misconduct.

(42) Prior to 12 April 2018 the claimant complained to Malcolm Wishart, Traffic Enforcement Manager of the Driver and Vehicle Standards Agency about alleged illegal driving carried out by the respondent.

(43) The appeal outcome record recorded a summary of the grounds of appeal presented by the claimant's representative which were as follows:-

(a) There was a dedicated HR Department involved in the investigation of Mr Malcolm's conduct and your grievance and they should have better directed themselves in undertaking the investigation.

(b) There was a power discrepancy between you and Mr Malcolm and that as a senior manager his actions or views by implication may have been preferred above your own for this reason.

(c) You have been consistent in your describing of the events in that Mr Malcolm exhibited threatening and intimidating behaviour and assaulted you.

(d) The CCTV footage, that could have provided more detail of the circumstances of the incident or identified witnesses was deleted.

(e) If the above were corrected then a senior manager might have dealt with the situation in a different manner.

The claimant believed he had been assaulted by David Malcolm as a result of his refusal to accept a request made to engage in illegal driving.

(44) The claimant's appeal was not upheld. In the course of the outcome report of 8 May 2018 it was revealed that David Malcolm had admitted the allegations made by the claimant in connection with the incident in the Lurgan office on 2 December 2017. The claimant believed David Malcolm should have been dismissed. The allegations of illegal driving were not addressed in the report, the claimant believed, apart from saying that they could be taken up on the claimant's return to work.

(45) On 18 May 2018 the claimant attended the return to work meeting with John Bothwell, head of transport operations at Lurgan. The claimant made his allegations of illegal driving. Mr Bothwell said he would investigate them.

(46) The claimant met with John Bothwell and Chris Corr on 29 June 2018 in relation to the alleged illegal driving. According to the claimant he asked John Bothwell what he had done. John Bothwell said he had investigated it and the compliance manager, Davy Kerr, had told him that it was not going on any more. He also told the claimant that the assault had been fully investigated and that he could not do anything further about it. The claimant alleges John Bothwell offered him six months paid holiday as a concession, which is denied by the respondent, and offered to pay him 28 days holiday pay which is also denied by the respondent.

(47) Subsequently John Bothwell wrote to the claimant seeking his permission to get a medical report from the claimant's doctor about his then condition and future prognosis as by that stage the claimant had been off work for seven months.

(48) The claimant then contacted Expolink, which deals with illegal practices in the supply chain for Tesco UK Ltd. In a conversation with John Steventon of Tesco Primary Distribution the claimant discussed with him the alleged illegal driving practices of the respondent in the UK and Ireland. John Steventon followed this up with the respondent but there were not any further steps taken by him following the answering of his queries by Chris Moss.

(49) On 25 July 2018 the respondent's HR co-ordinator, Rebecca Doran, contacted the claimant to say that his last sick line had expired on 12 July 2018. The letter further stated that his absence without a further sick line implied that he had or intended to resign. It asked him if that was not his intention and that if he was proposing to return to work that he should contact the HR co-ordinator no later than 5.00 pm on 1 August 2018. However, if he were still unable to attend work because he was under medical supervision he should provide an up-to-date sick line from 12 July 2018 to 1 August 2018 by the same date and time.

(50) By letter of 4 August 2018 the claimant resigned. In his letter of resignation to his line manager, Mr Chris Moss, the claimant stated:-

> *"please accept my resignation as a lorry driver of Agro Merchants effective from 4th August 2018.*
>
> *I am resigning due to the lack of a proper and thorough handling of a serious grievance I registered with Agro Merchants of an assault on me by an Agro Merchant manager, David Malcolm on 2nd of Dec 2017 at the Agro Merchants Depot at Lurgan, County Armagh.*
>
> *I feel as I have no choice but to tender my resignation and treat it as a form of constructive dismissal. It is my sincere belief that David Malcolm has very violent tendencies, if I returned to work I could not be guaranteed safety from further assault, I hold this belief in light of the lack of a proper grievance procedure and a defective investigation of the assault."*

(51) On 6 August 2018 the claimant presented his claim to the Industrial Tribunal.

(52) By letter and email of 17 August 2018 Laura Casey asked the claimant to reconsider his resignation and to meet with the respondent to discuss the reasons for his resignation. The claimant replied to confirm his resignation.

6. THE LAW

Constructive Dismissal

(1) A breach of contract arises when the employer breaches any term of the employee's contract of employment whether that term is an express term or an implied term or arises by operation of law.

(2) To establish constructive dismissal that is unfair, the employee must prove that:-

(a) there was a breach of his contract of employment, and

(b) the breach went to the core of the contract, and

(c) the breach was the reason or principle reason for his resignation, and

(d) he did not delay in resigning after the breach occurred, and

(e) in all the circumstances the employer acted unreasonably.

(3) The breach of contact can be a breach of an express term of the contract or a breach of an implied term or both.

(4) Implied terms of the contract include:-

(a) The duty of trust and confidence;

(b) The duty of co-operation and/or support;

(c) The duty promptly to address grievances;

(d) Fairness in disciplinary sanctions; and

(e) The duty to provide a suitable work.

(5) A breach of the implied duty of trust and confidence can be a single act of the employer or a course of conduct by the employer over a period of time.

(6) After a series of cases had gradually moved towards a recognition of this implied duty, the House of Lords finally affirmed its existence in ***Malik v Bank of Credit and Commerce International [1997] IRLR 462, [1997] ICR 606***. The term (often referred to as 'the T + C term') was held to be as follows:-

> *"the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".*

… The view taken by the EAT was that this use of the word 'and' by Lord Stayn in the passage quoted above was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met i.e. it should be 'calculated or likely'. One important result of this is that, as 'likely' is sufficient on its own, it is not necessary in each case to show a subjective *intention on the part of* the employer to destroy or damage the relationship, a point reaffirmed by the EAT in ***Leeds Dental Team Limited v Rose [2014] IRLR 8 EAT***. As Judge Burke put it:-

> *'The test does not require a tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of ….' (Harvey on Industrial Relations and Employment Law D1 [430]).*

(7) Where a course of conduct is relied upon, it is not necessary that any single act itself amounts to a breach of the implied term of trust and confidence but the course of conduct cumulatively must amount to a breach of the implied term.

(8) Where a constructive dismissal claim arises from an alleged breach of the implied term of trust and confidence where the employee leaves in response to conduct carried out over a period of time, the particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against the background of such incidents may be considered sufficient by the court to warrant their treating the resignation as a constructive dismissal. It may be the "last straw" which causes the

employee to terminate a deteriorating relationship (Harvey on Industrial Relations and Employment Law D1 [480]).

(9) One important element of [the last straw doctrine] is that, while that which is alleged to be the last straw must be related to the preceding course of conduct, it need not in itself be fundamental enough to be repudiatory. … (Harvey on Industrial Relations and Employment Law D1 [451]).

(10) The Code of Practice on Disciplinary and Grievance Procedures issued by the Labour Relations Agency deals with keeping records at paragraphs 53-55.

(11) At paragraph 53 it records:-

> *"It is important, and is in the interests of both employers and employees, to keep written records during the disciplinary process for future reference … ."*

(12) In paragraph 54 the Code of Practice states:-

> *"Records should be treated as confidential and be kept no longer than necessary and in accordance with the Data Protection Act 1998. This Act gives individuals the right to request and have access to certain personal data"*

(13) At paragraph 55 of the Code its states:-

> *"Copies of records of meetings should be given to the employee including copies of any formal minutes that may have been taken. In certain circumstances, for example, to protect the witness, the employer may withhold some information".*

(14) Other conduct which might involve a breach of this duty will include serious breaches of the employer's internal disciplinary and grievance procedures, at both original and appeal stages (***Blackburn v Aldi Stores Ltd [2013] IRLR 846 EAT***) … (Harvey on Industrial Relations Employment Law D1 [436]).

(15) In ***W A G Goold (Pearmak) Ltd v McConnell [1995] IRLR 516***, the EAT (Morrison J presiding) accepted that there was an implied term in the contract of employment 'that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have' … as the EAT said, obtaining prompt redress of grievances is of fundamental importance … (Harvey on Industrial Relations and Employment Law D1 [466]).

(16) Although there is an implied duty on the employer to address workplace grievances promptly there are practical limits to this obligation. For example, it will be necessary for the employee to articulate the relevant grievance properly to the employer before any such obligation in relation to redress is triggered (see **Sweetin v Coral Racing [2006] IRLR 252, Scottish EAT)** … (Harvey on Industrial Relations and Employment Law D1 [467]).

(17) The Labour Relations Agency Code of Practice on Disciplinary and Grievance Procedures requires the following steps to be taken by an employer or employee:-

(a) Employers are required to comply with their legal duty to provide a written statement of employment particulars including the procedure for handling employee grievances. (Paragraph 70).

(b) The employee should raise the grievance in writing setting out the nature of the grievance and how it might be resolved. (Paragraph 77).

(c) Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received. (Paragraph 78).

(d) That a worker is given the statutory right to be accompanied in any such grievance meeting. (Paragraph 79).

(e) At the grievance meeting the employee should be permitted to explain their grievance and how they think it should be resolved. (Paragraph 81).

(f) Any further investigation required should be carried out. (Paragraph 81).

(g) The employer will decide on what action if any to take. (Paragraph 82).

(h) The decision and a full explanation of how the decision was reached should be communicated to the employee in writing without unreasonable delay. (Paragraph 82).

(i) The employee must have an opportunity to appeal if they feel that their grievance has not been satisfactory resolved. (Paragraph 83).

(j) The appeal hearing should be convened without unreasonable delay. (Paragraph 84).

(k) The worker has the right to be accompanied at the appeal hearing. (Paragraph 86).

(l) The outcome of the appeal should be communicated to the employee in writing without unreasonable delay. (Paragraph 87).

(18) In ***BBC v Beckett [1983] IRLR 443***, the EAT accepted that it can be a breach of contract for an employer to impose a disciplinary sanction which is out of all proportion to the offence. The employee had been downgraded following disciplinary proceedings having been taken against him. Even though the contract of employment explicitly provided that demotion might be imposed for an act of misconduct, the tribunal held that it was far too harsh for the particular misconduct and that when the employee resigned he was entitled to treat himself as having been constructively dismissed. The EAT refused to interfere with their determination. This decision has been followed

by the EAT in ***Cawley v South Wales Electricity Board [1985] IRLR 89***. (Harvey on Industrial Relations and Employment Law D1 [468]).

(19) A complaint of unfair dismissal must be brought before an industrial tribunal before the end of a period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. (article 145 The Employment Rights (Northern Ireland) Order 1996).

Public Interest Disclosure

(20) A "protected disclosure" means a qualifying disclosure as defined by article 67B of The Employment Rights (Northern Ireland) Order 1996.

(21) A "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the employee 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 of the preceding sub-paragraphs has been, is being, or is likely to be deliberately concealed. (article 67B The Employment Rights (Northern Ireland) Order 1996).

(22) *"… the word 'belief' in section 43B(1) [article 67B(1) The Employment Rights (Northern Ireland) Order 1996] is plainly subjective. It is the particular belief held by the particular worker. Equally, however, the 'belief' must be 'reasonable'. That is an objective test. Furthermore, like the EAT in* ***Darnton****, I find it difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knows or believes that the factual basis for the belief is false. In any event, these are all matters for the Employment Tribunal to determine on the facts". (Lord Justice Wall in the Court of Appeal decision in* ***Babula v Waltham Forest College [2007] IRLR 346 at paragraph 82)****.*

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

has made a protected disclosure. (article 70B(1) The Employment Rights (Northern Ireland) Order 1996).

(24) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act done by another worker of his employer in the course of that other worker's employment, on the ground that the worker has made a protected disclosure. (article 70B(1A) The Employment Rights (Northern Ireland) Order 1996).

(25) Where a worker is subjected to detriment by anything done as mentioned in article 70B(1A) of the 1996 Order that thing is treated as also done by the worker's employer. (article 70B(1B) The Employment Rights (Northern Ireland) Order 1996).

(26) An industrial tribunal shall not consider a complaint under article 70B The Employment Rights (Northern Ireland) Order 1996 unless it is presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where the act or failure is part of a series of similar acts or failures, the last of them, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months and where the act extends over a period the "date of the act" means the last day of that period and a deliberate failure to act shall be treated as done when it was decided on. (article 71(3) and (4) The Employment Rights (Northern Ireland) Order 1996).

APPLICATION OF THE LAW AND FINDINGS OF FACT TO THE ISSUES

Constructive Unfair Dismissal

7. (1) In order to bring a claim successfully for unlawful constructive dismissal the claimant must establish:-

(a) a breach of his contract of employment, and

(b) that the breach went to the core of his contract, and

(c) that the breach was the reason or principal reason for his resignation, and

(d) that he did not delay in resigning after the breach occurred, and

(e) in all the circumstances the employer acted unreasonably.

(2) Allowing for the fact that the claimant is a litigant in person without the benefit of legal training or in presenting claims before an industrial tribunal the claimant's alleged breach of contract appears to embrace a breach of an actual term of his contract of employment, in relation to the respondent's grievance procedure and a breach of the implied terms of breach of trust and confidence and of the duty of promptly addressing grievances.

Grievance Procedure

(3) The claimant appears to rely on alleged failures in the application of the respondent's grievance procedure as a breach of an actual term of the contract and a breach of the implied term of promptly addressing grievances.

(4) In the instant claim the claimant is complaining about the application of the formal grievance procedure.

(5) The respondent's grievance procedure requires a formal grievance to be in writing; the holding of a grievance meeting at which the employee may be accompanied and be given an opportunity to explain his grievance and how it might be resolved; a written explanation of the outcome and how the decision was reached; and given the right of appeal.

(6) The claimant is relying on two grievances, his complaint/grievance to the respondent on 4 December 2017 concerning the assault on him by David Malcolm on 2 December 2017 and his email of 8 February 2018 relating to the same incident, as a formal grievance following the suggestion from the respondent that he consider making a formal grievance.

Complaint/grievance of 4 December 2017

(7) In relation to the claimant's complaint/grievance of 4 December 2017 his concerns appear to be:-

(a) that there was not a proper investigation, and

(b) that he did not receive a written letter of outcome; and

(c) that he did not receive the minutes connected with the grievance, particularly the documents relating to the disciplinary hearing and procedure against David Malcolm; and

(d) that he was not offered a right of appeal.

(8) The respondent is in charge of the investigation and it must decide the scope and breadth of the investigation. It took statements from the claimant, David Malcolm, and two witnesses, Lewis McCrabbe and Brendan O'Neill. It may well be that there were other witnesses who could have been part of the investigation.

(9) It appears that from the outset the respondent treated seriously the claimant's complaint/grievance. The complaint was formally recorded on 4 December 2017 and the respondent charged David Malcolm on 5 December 2017 with gross misconduct, i.e, that he had used, "unacceptable, abusive or violent behaviour to another member of staff" which the respondent characterised as gross misconduct.

(10) At the disciplinary hearing of David Malcolm on 7 December 2017 the statements from four persons were available (the claimant, David Malcolm

and the two eye witnesses Lewis McCrabbe and Brendan O'Neill). The chairman of the disciplinary panel, George Lee, read out the claimant's statement of 4 December 2017 to David Malcolm and he accepted it to be correct. In those circumstances, there cannot be any criticism of the investigation as the claimant's complaint/grievance was accepted in its entirety. There was not any suggestion to the tribunal that the disciplinary hearing lacked any piece of evidence that could add anything to the claimant's statement.

(11) The claimant did not receive a written report on his grievance until he received an email from Laura Casey on 22 January 2018 recording the outcome of his complaint/grievance and informing him that David Malcolm had been disciplined and received a final written warning and retraining. He had been given a verbal report of the same by Laura Casey on 7 December 2017 but in both reports he was not offered a right of appeal. Nor was the claimant provided with a written outcome of this grievance within five days of the meeting, i.e by 9 December 2017.

(12) The claimant did not receive minutes of meetings. The claimant's focus is on all the information and documents relating to the disciplinary hearing of David Malcolm which the respondent had refused to give to him on the grounds of data protection. The claimant's grievance/complaint of 4 December 2017 was recorded in writing. It does not appear that the claimant was provided with a copy of his statement, though he makes no specific criticism of that.

(13) The data protection ground as an explanation for not providing the claimant with a copy of the minutes of David Malcolm's disciplinary hearing, has not been challenged by the claimant and in the absence of any evidence or submissions to the contrary the tribunal accepts the legitimacy of that explanation.

(14) Apart from the data protection ground, the tribunal does not accept that the claimant is entitled to all the documents or the minutes in relation to the disciplinary hearing of David Malcolm. David Malcolm's disciplinary hearing should attract confidentiality in accordance with the LRA Code of Practice. The claimant is entitled to know the outcome but is not entitled to be provided with the minutes and documents relating to the disciplinary hearing of another employee.

(15) The respondent was in breach of its own grievance procedure by not letting the claimant know the outcome of his grievance in writing until 22 January 2018 and not within the five days prescribed by the respondent's grievance policy. Nor did it offer him a right of appeal. However, the claimant had been orally informed of the outcome of his grievance, but without being offered a right of appeal, within five days of his complaint/grievance.

(16) The tribunal is satisfied that the respondent's failure to follow its own procedures is a breach of an actual term of his contract and a breach of the implied term of failure to address a grievance promptly. This may also be relevant to the claimant's claim of a breach of the implied term of trust and confidence.

Grievance of 8 February 2018

(17) By email of 8 February 2018 the claimant made a second grievance. In that grievance the claimant set out a number of issues which all related to the incident of 2 December 2017.

(18) Grievance meetings took place on 27 February and 23 March 2018 and were conducted by Mark McKavanagh. The issues for consideration on the agenda for the meeting were as follows:-

(a) issues surrounding the investigation into an alleged assault on the claimant and his concerns about a potential cover up;

(b) the location/handling of the investigation meeting;

(c) queries over the investigation outcome;

(d) questions over the CCTV footage;

(e) a telephone call with Ms Casey;

(f) questions over the training conducted with Mr Malcolm;

(g) issues regarding communication while off sick;

(h) allegations that certain staff may have covered up an assault;

(i) bullying and threatening behaviour by Mr Malcolm;

(j) loss of earnings;

(k) status of the initial grievance raised on 4 December 2017; and

(l) clarification on policy and appointment of investigating officers and company policy and procedure for conducting investigations and dealing with grievances (including undertaking grievance hearings).

(19) The claimant was provided with a copy of the initial investigation report setting out the evidence collected; the persons interviewed; a summary of the written and physical evidence; and a summary of the witness evidence.

(20) A written outcome to his grievance was provided to the claimant on 31 March 2018 and it did not uphold any of the constituent elements of his grievance. The claimant appealed the findings and an appeal was heard on 26 April 2018 by David Southwall. David Southwall was not an employee of the respondent. He was an employee of Elas. He did not uphold the claimant's appeal and he issued a written outcome of the appeal dated 8 May 2018 which the claimant received on 9 May 2018.

(21) The claimant did not agree with the outcome of the grievance hearing at first instance or on appeal. He believed David Malcolm should have been

dismissed. He remained dissatisfied that he had not been provided with the documents in relation to David Malcolm's disciplinary hearing and he believed the issue of illegal driving had not been addressed. He also believed that Mr Southwall's conclusion that the question concerning the legal position about driving could be discussed on his return to work was not an adequate way to address this matter.

(22) It is clear that the respondent followed the grievance procedure in accordance with the policy so there is no question of a breach of an actual term of the contract arising from or in relation to the second grievance.

(23) The second grievance was obviously treated very seriously by the respondent at first instance and on appeal. The reported outcome of the grievance hearing and the appeal hearings recorded all the constituent elements of the grievance raised by the claimant and arrived at conclusions in relation to them. In that way it can be seen that the grievance was addressed promptly.

(24) The claimant does not accept the outcome of the second grievance and he challenges the conclusions at first instance and on appeal.

(25) The issue arises that if the claimant's criticisms of the second grievance were justified could that be said to constitute a failure to address his grievance promptly, i.e, that his grievance had not been addressed at all or properly.

(26) The tribunal is satisfied that in principle the answer must be yes. However, the tribunal is also satisfied that, to fail to satisfy the "address" element of the implied term, the grievance must have been ignored or the addressing of it must have been unreasonable, for example where an employee was fobbed off by his employer. (See ***W.A.Goold (Permak) Ltd v McConnell***).

(27) The claimant has not asserted that his grievance was ignored. He disagreed with the decision. He contended that the respondent failed to address his grievance in relation to the alleged illegal driving.

(28) Mr Southwall proposed that the allegation of illegal driving would be dealt with on the claimant's return to work. The claimant believes that to amount to effectively ignoring his grievance or constituting an unreasonable manner of addressing that element of his grievance.

(29) The tribunal does not accept the claimant's criticism on this point. In so concluding the tribunal had regard to the following matters:-

(a) There was not any evidence of illegal driving having been done by the respondent before the tribunal.

(b) The claimant did not do any illegal driving between 30 November and 2 December 2017.

(c) The email exchange between Aaron Loughran and the claimant and David Malcolm and the claimant did not instruct nor ask nor propose to the claimant that he should engage in illegal driving.

(d) The only potential evidence that might be consistent with a suggestion of illegal driving was Aaron Loughran's text, "Well change u topaz DUBLIN" which the claimant alleges was a method used to avoid the legal limits imposed on the number of hours that a driver may drive. But it seems to the tribunal that that text could have a perfectly legal or proper construction also, eg you (the claimant) can take your rest at Dublin and another driver will take over the driving to Lurgan and will meet you at the Topaz filling station in Dublin.

(e) The text exchange shows another factor was in issue, i.e, the claimant's desire to be back home early. This was clearly the understanding that Aaron Loughran had (see text of 30/11/2017 at 18:43). The claimant's references to completing his driving schedule within 15 hours (see texts of 30/11/2017 18:57; 30/11/2017 19:00; and 30/11/2017 at 19:19), even if an indirect reference to illegal driving, are also consistent with the claimant's desire to return home early, i.e., by Friday evening 1 December 2017, in keeping with his shift hours for that week.

(f) Indeed in the email exchange between the claimant and Aaron Loughran and the claimant and David Malcolm, the claimant does not raise the question of illegal driving. His complaint is that the work he was being asked to do was "impossible" which he explained somewhat, either that it could not be done within 15 hours or amounted to two days' work. The relevance of this is that the claimant was concerned about not getting back home to Lurgan by Friday night (1 December), a legitimate concern as this was when his shift was scheduled to finish.

(30) The tribunal therefore concludes that the implied term promptly to address grievances in relation to the second grievance has not been breached.

Breach of Trust and Confidence

(31) The test for the implied term of trust and confidence is:-

> "the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee". (**Malik v Bank of Credit and Commerce International**, as amended).

(32) The breach of the duty of trust and confidence by the respondent can be an actual breach of a term of the contract of employment or a course of conduct over a period of time.

(33) The tribunal has found a breach of an actual term in the contract of employment in that the respondent did not follow its own grievance policy in two respects; it did not issue a written decision to the claimant within five days of the grievance, i.e., by 9 December 2017 and the claimant was not offered an appeal.

(34) The claimant was also critical of the investigation and the information supplied to him by the respondent, particularly through Laura Casey.

(35) As the tribunal has concluded that the investigation was sufficient; that the claimant was not entitled to the minutes of the disciplinary hearing of David Malcolm; and that his dissatisfaction with Laura Casey's correspondence, with the exception of not providing details of the outcome of the grievance by 9 December 2017, reflected the opposing views and analysis of these issues rather than any failure on the part of Laura Casey.

(36) The tribunal has found three breaches, a breach of an actual term of the contract of employment and a breach of the implied term to promptly address grievances which may also be considered as a breach of the implied duty of trust and confidence.

(37) Did these breaches go to the core of the contract? In the circumstances of the claim the tribunal concludes they did not. In so concluding the tribunal had regard to the following matters:-

(a) the breach of the actual term has two elements, a failure to give the claimant a written decision by 9 December 2017 and not to offer him the opportunity to appeal.

(b) the formal written decision was provided to the claimant on 22 January 2018, some 44 days late.

(c) the claimant had been given an oral outcome on his complaint/grievance on 7 December 2017, which was in the same terms as the later written outcome of 22 January 2018.

(d) in neither the oral report nor the written report was the claimant offered the opportunity of an appeal.

(e) to be offered an opportunity of appeal is a key element in the respondent's written grievance policy. It is also highlighted in the LRA Code of Practice as an important element in a grievance policy and the tribunal was satisfied that it falls also within the implied duty to promptly address grievances.

(f) to fail to give an employee the opportunity to appeal is normally a serious breach of the grievance policy that would go to the core of the contract of employment.

(g) the crucial factor which causes it not to be a breach of contract that went to the core of the claimant's contract of employment is that the claimant's second grievance, which is essentially an enhanced version of the first grievance/complaint about the same matters as the second grievance was procedurally sound, including offering the claimant an opportunity of an appeal which he took up, although the claimant disagrees with its conclusions and findings. In effect the second grievance cured any defect in the first grievance.

(h) The claimant's disagreement with the conclusions and findings of the second grievance does not mean that it did not satisfy the requirements of applying or carrying out the respondent's grievance policy properly and procedurally correctly.

(38) The claimant's resignation was "due to the lack of a proper and thorough handling of a serious grievance, I registered with Agro Merchants of an assault on me by an Agro Merchant Manager, David Malcolm on 2 December 2017 at the Agro Merchants Depot at Lurgan, County Armagh".

(39) The tribunal accepts that the reason or principal reason for the claimant's resignation was the respondent's alleged failure to properly or thoroughly handle the grievance relating to the incident of 2 December 2017.

(40) The outcome of the grievance (the second grievance) made by the claimant was known to him on 9 May 2018, with which he did not agree. He did not resign until 4 August 2018. The claimant had a number of meetings after 9 May 2018 with John Bothwell but these were about alleged illegal driving. They were not in connection with a lack of a proper or thorough handling of his grievance and it cannot be a justifiable reason for delaying his resignation.

(41) The claimant has not offered any explanation to show why he delayed from 9 May 2018 until 4 August 2018, before resigning. In the circumstances the tribunal concludes that the delay on the claimant's part was excessive and that he has not satisfied that element of the requirements for an unlawful constructive dismissal.

(42) As the claimant has failed to satisfy two of the legal ingredients of an unlawful constructive dismissal it cannot be successful and therefore it is unnecessary for the tribunal to consider whether the respondent has acted unreasonably in all the circumstances.

(43) The claimant did not identify a "last straw" that caused him to resign. The only piece of evidence given by the claimant that related to matters occurring immediately before his resignation was the letter from the respondent's Human Resources Co-Ordinator, Rebecca Doran on 25 July 2015, concerning the claimant's return to work, or provision of an up-to-date sick line or to indicate whether he intended to resign or not. These queries which seem to the tribunal to be reasonable given that the claimant had not been at work since December 2017 and that his most recent sick line had expired 13 days earlier, are not related to the previous course of conduct which the claimant has sought to impugn in his two grievances. The claimant has therefore not established a "last straw" which subsequently resulted in his resignation.

(44) The claimant's claim for unfair constructive dismissal is therefore dismissed.

Public Interest Disclosure

(45) In his final submissions to the tribunal the claimant said that the public interest disclosure was the, "invitation by Aaron Loughran to drive illegally".

He submitted that he made this disclosure on 4 December 2017 to Rebecca Doran; to Mark McKavanagh during the grievance procedure; to David Southall at the grievance appeal; to Expolink who deal with illegal practices in the supply chain for Tesco UK Ltd; and to Michael Wishart in DVSA (Traffic Enforcement Officer).

(46) The allegation of illegal driving clearly falls within the definition of a qualifying disclosure (article 67B(1)(a), (b) and (d) of the 1996 Order), i.e., that a criminal offence has been committed, is being committed or is likely to be committed; or that the person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject; and that the health and safety of any individual has been, is being, or is likely to be endangered.

(47) The claimant mentioned the alleged illegal driving in his email of 4 December 2017 to the respondent's Human Resources Manager although he did not mention it in his statement to Rebecca Doran on 4 December 2017; to Mark McKavanagh on 23 March 2018; to David Southall on 6 April 2018 and to Malcolm Wishart on 30 July 2018. He has therefore satisfied the requirements to make the disclosure to his employer (article 67C The Employment Rights (Northern Ireland) Order 1996).

(48) The tribunal is satisfied that the claimant has made a disclosure, i.e., he has provided information. He not only alleges illegal driving on the part of the respondent but that he was instructed or encouraged or it was suggested to him to engage in illegal driving through the text message from Aaron Loughran on 30 November 2017 when the latter said "WELL change u, topaz DUBLIN".

(49) As the claimant made the allegation of illegal driving to many persons over a period of months and, in the absence of any compelling evidence to the contrary, the tribunal is satisfied that the claimant had the subjective belief that the respondent was involved in illegal driving.

(50) The only evidence in support of the claimant's contention that he was instructed or encouraged or it was suggested to him to engage in illegal driving was the text message from Aaron Loughran of 30 November 2017, set out above.

(51) The tribunal has earlier concluded that that text message does not live up to the claimant's claim or amounting to an instruction, an encouragement or a suggestion that he engage in illegal driving. In fact the tribunal concluded that there were other innocent or appropriate constructions that could be put on the same text message, in the context that the claimant wanted home by Friday night, 1 December 2017, as his shift for that week prescribed.

(52) The claimant's subjective belief that he was being instructed, or encouraged, or it was suggested to him to engage in illegal driving cannot reasonably have been held on the basis of this piece of evidence alone. This is especially so in the context that none of the comments in the text exchange by the claimant raise the issue of illegal driving. It seems to the tribunal that the claimant's preoccupation in the exchange of text messages was to get home by Friday night (1 December 2017).

(53) Therefore the claimant has failed to satisfy a necessary ingredient of a 'qualifying disclosure'. The disclosure therefore does not amount to a protected disclosure.

(54) In the absence of a protected disclosure the claimant's public interest disclosure claim for detriment also fails and is dismissed.

(55) It is unnecessary for the tribunal to consider the element of detriment; or whether the disclosure was bought in good faith or whether the claimant's claim is out of time.

Employment Judge:

Date and place of hearing: **24, 25, 26, 27 and 28 June 2019, 2 and 4 July 2019 and 13 August 2019, Belfast.**

This judgment was entered in the register and issued to the parties on: