EMPLOYMENT TRIBUNALS

Claimant:	**Mr T Rajtmar**	
Respondent:	**Uneek Clothing Company Limited**	
Heard at:	**Cardiff via CVP**	**On: 14 January 2021 and 5 November 2021**
Before:	**Employment Judge**	**R Havard**
	Members:	**Ms L Owen**
		Ms K Smith

Representation:
Claimant: Mr G Airey, Counsel
Respondent: Dr K P Tshibangu, Director of Personnel/HR

RESERVED JUDGMENT

1. The judgment of the Tribunal is that the Claimant's claims for:

   (i) automatic unfair dismissal (section 103A Employment Rights Act 1996);

   (ii) public interest disclosure detriment (sections 44 and 47B Employment Rights Act 1996);

   (iii) unlawful deduction from wages and breach of contract

   are well founded and are upheld.

2. The case will be listed for a remedy hearing with a time estimate of one day.

REASONS

Introduction

1. By a claim form dated 17 April 2020, the Claimant indicated that he wished to pursue a claim for unfair dismissal. In the grounds of complaint, the Claimant stated he brought claims of, "whistleblowing, automatically unfair dismissal, unpaid wages and wrongful dismissal".

2. On 11 May 2020, the Respondent filed its response in which it disputed the claims pursued by the Claimant.

3. On 2 June 2020, the Claimant lodged an application to amend his claim together with a draft amended grounds of claim dated 1 June 2020. On 11 June 2020, the Respondent wrote to the Tribunal objecting to the Claimant's application.

4. At a case management hearing on 17 June 2020, the Claimant's application to amend his claim in accordance with the draft was granted and, on 29 June 2020, the Respondent filed an amended response to the claim.

5. At the case management hearing, it was directed that the case would be decided at a final hearing lasting one day, to be heard on 14 January 2021. It was noted that the Claimant would require the assistance of an interpreter of the Hungarian language.

Preliminary issues relating to disclosure

6. At the commencement of the hearing on 14 January 2021, Dr Tshibangu raised two preliminary matters.

7. The first related to the employee handbook (pages 64 - 74). The version of the handbook included within the bundle was dated 1 March 2014 but Dr Tshibangu indicated that this had been updated in March 2019 and issued to the staff in July 2019. Therefore, it was maintained that the handbook in the bundle was the old version. Dr Tshibangu wished to rely on the updated version but this was resisted by Mr Airey on the basis that the Respondent had been in possession of the bundle since 24 August 2020 and this was the first time that this issue had been raised despite the content of the bundle having been agreed.

8. Dr Tshibangu stated that, when the documents were sent to him by email, he worked on the assumption that everything was up-to-date and it was only when he was preparing the case that he saw that the handbook included in the bundle was the old version. Therefore, on 13 January 2021, he sent the new document to the Claimant's representative.

9. The second issue was that there was one email dated 17 January 2020 which did not appear in the bundle even though it had been sent to Mr Airey.

10. Dr Tshibangu accepted that he had not looked at the bundle carefully when it had arrived.

11. Mr Airey said that it was not his job to ensure that the Respondent had checked the bundle carefully; furthermore, the witness statements had been exchanged in December 2020 so that would have ordinarily put Dr Tshibangu on notice of the issue. There were also various issues with regard to a request for a reference in December 2020 and there were also concerns with regard to the non-disclosure by the Respondent of CCTV footage which should have taken place.

12. With regard to the handbook, the one paragraph on which Dr Tshibangu would wish to rely in the updated version is referred to in the letter to the Newport CAB of 24 February 2020 and also in the amended grounds of response.

13. It was resolved on the basis that Dr Tshibangu will accept that the updated handbook would not be admitted on the understanding that he is able to refer to the relevant paragraph set out in the letter to the CAB and as stated in the grounds of response. On this basis, Mr Airey did not pursue his objection.

14. The following documents were added to the bundle:

    a. Bank statement (pages 189 to 194);

    b. HSE document (pages 195 to 199), and

    c. Stills from CCTV (pages 200 to 201).

List of issues

15. At the outset of the hearing on 14 January 2021, it was confirmed that a list of issues had not been agreed.

16. At the conclusion of the first day of the hearing on 14 January 2021, when the matter was adjourned part-heard, the parties were required by the Tribunal to endeavour to agree a list of issues for the Tribunal to determine when the hearing resumed.

17. On 19 January 2021, the Claimant's Counsel sent to the Tribunal, and copied to the Respondent, a document which illustrated where there was disagreement between the parties and restating the Claimant's proposals with regard to the list of issues.

18. Mr Airey had provided two documents: the first was the list of issues that included the additional content which had been added by Dr Tshibangu and to which Mr Airey took exception. The second document was a clean copy of what the Claimant maintained should stand as the list of issues and which therefore did not include the additions made by Dr Tshibangu. At the start of the resumed hearing on 5 November 2021, the Tribunal had also been provided with email exchanges between Counsel and Dr Tshibangu with regard to this matter.

19. On considering the additions made by Dr Tshibangu, the Tribunal concluded that such additions did not amount to issues that the Tribunal would be expected to consider when reading its decision, but rather a series of assertions.

20. Dr Tshibangu was reminded by the Tribunal that he would be given every opportunity to make any assertions he wished when he came to make his closing submissions but that it was unnecessary and not appropriate for such assertions to be included in the list of issues.

21. On the understanding that he would be able to make such assertions in the course of his closing submissions, Dr Tshibangu was content for such assertions to be removed from the list of issues and he then agreed the list of issues which are set out below.

22. The agreed issues are:

    Sections 13, 23 and 24 Employment Rights Act 1996:

    1) Was the Claimant paid for the period of his suspension?

2) If not, is the Claimant entitled to be paid for the period of his suspension?

Breach of contract:

3) Was the Claimant's dismissal in breach of contract?

The Respondent will assert that it was the Claimant who had breached the terms of his contract by being in possession of a mobile phone contrary to Section 7.5.1. of his Employee Handbook.

4) If it was, is he entitled to 4 weeks' notice pay in accordance with the terms of his contract of employment?

Sections 44(1)(e), 48 and 49, and 100(1)(e) and 111 Employment Rights Act 1996 – (if amendment application granted):

5) What was the principal reason for the Claimant's suspension?

The Claimant asserts that in circumstances of danger, which he believed to be serious and imminent, he took photos to make a disclosure to protect himself and others from the danger. The Claimant asserts this was the appropriate step to take.

The Claimant also asserts that if the principal reason for suspension is the use of the mobile phone, the reason for suspension must be due to health and safety.

The Respondent asserts that the reason for suspension was the use of the mobile phone at work which is not permitted and not due to health and safety reporting.

6) What was the principal reason for the Claimant's dismissal?

The Claimant and Respondent rely on the same positions on suspension in relation to dismissal.

7) If the reason was raising health and safety issues, what is the Claimant's remedy?

Sections 47B, 48 and 49 Employment Rights Act 1996 (if amendment application granted) and Sections 103A and 111 Employment Rights Act 1996;

8) Did the Claimant make a qualifying disclosure?

The Claimant asserts he made 3 qualifying disclosures, on 10, 16 and 17 January 2020, the latter being the taking of the photograph.

The Respondent disputes that there was any disclosure on 10 and 16 January 2020. The Respondent would have accepted that the photos taken on the 17th January 2020 amounted to a qualifying disclosure if a) the photos showed an imminent danger; b) if the photos were sent off site, such as to the head office or elsewhere because the supervisors were not taking action.

9) What was the principal reason for the Claimant's suspension?

The Claimant asserts that his suspension is for making protected disclosures relating to health and safety.

He also asserts that if the principal reason for suspension is the use of the mobile phone, the reason for suspension must be due to making a protected disclosure.

The Respondent asserts that the reason for suspension was the use of the mobile phone at work which is not permitted and not due to the protected disclosure.

10) What was the principal reason for the Claimant's dismissal?

The Claimant and Respondent rely on the same positions on suspension in relation to dismissal.

11) If the reason was making a protected disclosure, what is the Claimant's remedy?

Sections 207 and 207A Trade Union and Labour Relations (Consolidation) Act 1992:

12) Has the Respondent failed to comply with the ACAS Code of Practice by not holding any form of disciplinary process with the Claimant?

13) If the answer is yes, should the Claimant be awarded an increase in compensation, and if so, what percentage should be applied?

Evidence

23. The Claimant gave evidence on his own behalf. Mr Andrew Minas also gave evidence on behalf of the Claimant.

24. At the time of the exchange of witness statements, the Respondent had provided a witness statement of Mr Terry Lehaj.

25. As stated, it had not been possible to conclude the hearing of the case on 14 January 2021 and therefore the hearing was adjourned part-heard. It had been anticipated that Mr Lehaj would provide his evidence when the hearing resumed. The case was due to resume on 12 May 2021 but, as a result of Dr Tshibangu suffering from illness, the case had to be re-listed on 5 November 2021.

26. By the time of the resumption of the hearing, it transpired that Mr Lehaj had been dismissed by the Respondent although the Tribunal was not made aware of the circumstances surrounding that dismissal.

27. In the period leading up to the resumption of the hearing, Dr Tshibangu had corresponded with the Tribunal and the Claimant's representative informing them of the position. The correspondence had been referred to Employment Judge Jenkins who wrote to the parties. He confirmed that, whilst ultimately a matter for this Tribunal, the Respondent could continue to rely on the statement of Terry Lehaj, but that, "*The witness statement of a witness who does not attend to be cross-examined, whilst admissible, is likely to be given very little weight by the Tribunal."*

28. All those who gave oral evidence had provided written witness statements.

29. A bundle had been prepared by the Claimant and submitted together with an index. The bundle, to include the additional documents, ran to 201 pages.

30. Unless otherwise stated, any page references in this Judgment refer to pages in the bundle.

Submissions

31. On 5 November 2021, Mr Airey sent to the Tribunal and to Dr Tshibangu a document entitled "The Claimant's Skeleton Argument" together with extracts from IDS Volume 14 Chapters 5 and 6 and also two decisions: *Smith v Hale Town Council [1978] I.C.R.996* and *Virgo Fidelis Senior School v Boyle 2004 WL62152*.

32. Dr Tshibangu had also provided the Tribunal and Mr Airey with written submissions.

33. Both Mr Airey and Dr Tshibangu then provided oral submissions.

Findings of Fact

34. The Respondent operates a warehouse facility and distribution centre.

35. On 26 November 2018, the Claimant commenced employment with the Respondent as a Warehouse Operative and his job involved driving a forklift truck.

36. The Claimant signed a contract of employment (pages 84 – 89). At section 7 of the contract, it stated that the Respondent can terminate the Claimant's employment if he committed a serious or repeated breach of any of his obligations under the agreement. The staff was also issued with an Employee Handbook. The version contained within the Hearing Bundle was dated 1 March 2014 (pages 64 – 74). At paragraph 8.5.1 it stated:

> *"the use of personal mobile phones is not permitted during working hours. They may only be used during authorised breaks or in the case of an emergency."*

37. At paragraph 10.1 of the amended Grounds of Response (pages 55 to 60), and in a letter to the CAB of 24 February 2020 (pages 106 to 107), the Respondent made reference to the circumstances in which mobile phones can and cannot be used and it included the following:

> *"anyone caught using a mobile phone (whether to speak or text) will be summarily dismissed." (Page 58)*

38. The Health and Safety Policy of the Respondent (pages 75 – 83) set out the expected standard to be met by all members of staff, contractors and visitors to the site, although it does not include a specific prohibition on the use of mobile phones when working in the warehouse. However, in the Health and Safety Policy document, there is reference to the requirement of staff to immediately report any unsafe conditions or defects found.

39. The Tribunal had listened carefully to the evidence of the Claimant and also Mr Minas. The Tribunal found both to be credible witnesses. Whilst Dr Tshibangu quite properly challenged their evidence, and that of the Claimant in particular, who gave evidence

through an interpreter, the Claimant's evidence was consistent with that of Mr Minas and he gave his evidence in a measured way without endeavouring to exaggerate or embellish his account of events. Whilst there were certain inconsistencies in the Claimant's evidence, the Tribunal was satisfied that such inconsistencies were not material to the central issues to be determined.

40. The Tribunal also took into consideration the fact that the Claimant's witness statement contained information that was not included in his original, or amended, grounds of claim. Nevertheless, as stated, the Tribunal found the Claimant to be credible and his witness statement contained a detailed account of the events that had led to his claim. Furthermore, the Respondent had relied on the witness statement of Mr Terry Lehaj even though he only comments on the incident on 17 January 2020 which led to the Claimant's dismissal and subsequent events. It then transpired that Mr Lehaj did not attend the hearing to give evidence and for his account to be challenged. Further, the Respondent had not produced any witness evidence from any other member of the supervisory staff to whom the Claimant reported the incidents on 10, 16 and 17 January 2020. Indeed, the Respondent had not called anyone to give evidence.

41. It was not in dispute that the Claimant was an experienced and well-regarded forklift truck driver of some 16 years' experience. When he joined the Respondent, he did not receive an induction but he underwent a test to ensure that he was competent in driving a forklift truck. The lack of induction was also confirmed by Mr Minas when he started at the company. Mr Minas started work at the Respondent in or about August 2018 as an agency worker but he then became a permanent member of staff. He left on good terms in December 2019 and had been a Forklift Truck Driver for some 33 years.

42. On 9 August 2019, Mr Lehaj had written to the Claimant (page 90) requiring him to attend a disciplinary meeting on 12 August 2019 relating to an incident when the Claimant had been talking on his mobile phone outside of his designated break time.

43. At the disciplinary hearing on 12 August 2019 (pages 91 to 92), the Claimant readily admitted that he had used his phone but that it was for less than a minute as he had to phone his son. The Claimant maintained that he had been given verbal permission to use his phone on that occasion. The Claimant accepted that he understood the company policy with regard to the use of mobile phones. Reference was made to the relevant extracts from the Company Handbook and that this incident had happened not long after he had finished his break, but the Claimant indicated that he had to phone his son at a specific time. The Claimant was reminded that it was necessary for him to ask permission in such circumstances and was then informed that he was being given a written verbal warning which would be kept on his record for a period of three months and this followed an informal discussion which had taken place some months beforehand.

44. On Friday 10 January 2020, at some time between 5 p.m. and 6 p.m., the Claimant was moving a pallet which fell from a height of some 9 metres. The Claimant had noted that the pallet looked overloaded and packages were overhanging the pallet which was kept together with the use of cellophane. The boxes of product loaded onto pallets can weigh over 500 kilogrammes and the Claimant was concerned that such a pallet, falling from 9 metres, would present a serious risk to the safety of others.

45. In his witness statement, the Claimant stated that it was the pallet that he was moving which fell from a height of some 9 metres. In his oral evidence, he suggested that the pallet that he had raised and was manoeuvring had pushed another pallet off a shelf which then fell 9 metres. Whilst the Tribunal acknowledged that inconsistency, it nevertheless was satisfied, and found, that a pallet had fallen 9 metres and that the Claimant reported this incident immediately to one of the supervisors, Thomas, who instructed the Claimant to stack the boxes back onto the pallet and put it back in its place. The Tribunal found that, despite the matter being reported to a supervisor, no further action was taken nor was the fall of the pallet documented.

46. The Respondent having failed to react sufficiently in relation to this incident, the Claimant continued to be concerned that pallets were being overloaded.

47. On 16 January 2020, the Claimant saw another overloaded pallet and reported this to his Supervisor, Terry Lehaj, who happened to be with the Supervisor involved in the incident on 10 January 2020, namely Thomas. In his witness statement, Mr Lehaj does not make any reference to this conversation on 16 January 2020. However, the Tribunal accepted the Claimant's evidence and found that such a conversation did take place and that Mr Lehaj instructed the Claimant to continue working as all of the pallets were loaded in the same way. It was suggested that the Claimant could report this concern to the Health and Safety Officer, Mr Khalid Amer.

48. On the following day, 17 January 2020, the Claimant observed another overloaded pallet that he was required to move in the forklift. This is the pallet illustrated in the photographs taken by the Claimant (pages 94 – 97 and 100). The Claimant went to his locker to get his phone and then returned to take the photographs. This occurred at about 10.30 a.m. and the Claimant did not use his phone either to speak to anyone or send a text but purely to take the photographs. Further, he indicated that, at that time, he was unable to locate the Health and Safety Officer, Mr Amer. When he had taken the photographs, he returned his phone to his locker.

49. A short while later, at approximately 11 a.m., the Claimant spoke with Mr Amer and raised his concerns with regard to overloaded pallets. He asked Mr Amer if he could show him the photographs he had taken. Mr Amer agreed and so the Claimant went to his locker to get his mobile and then showed the photographs to Mr Amer who thanked the Claimant for showing him. The Claimant then returned his mobile to his locker.

50. Later that afternoon, a meeting took place when the forklift drivers were told to move the pallets with more care.

51. Following the meeting, and without any prior warning or concern having been expressed by Mr Amer or anyone else, Mr Lehaj spoke with the Claimant and informed him that he had been suspended because he had used his mobile phone. Mr Lehaj said that he would call the Claimant later to explain. The Claimant heard nothing further on that day or the following day. The Tribunal rejected the evidence of Mr Lehaj that he had tried to contact the Claimant and rejected his evidence that he had left a message. The Tribunal rejected his statement that he had asked the Claimant to come in to the office and that it was at that stage that he dismissed the Claimant.

52. On 22 January 2020, it was the Claimant who took the initiative and called Mr Lehaj. He recorded this conversation and a transcript had been prepared (pages 101 to 102). It was of considerable significance that Mr Lehaj made no mention of this conversation in his statement.

53. It was in the course of that telephone conversation that the Claimant was dismissed. The Tribunal found that Mr Lehaj had been instructed to dismiss the Claimant. As stated in the letter to the CAB of 24 February 2021 (page 106), it transpired that such an instruction emanated from Dr Tshibangu who represented the Respondent at this hearing. Dr Tshibangu had not provided a witness statement nor given evidence with regard to his involvement in the circumstances leading to the Claimant's dismissal. In that recorded telephone conversation on 22 January 2021, Mr Lehaj stated:

> *"Well basically I would like you to come down to the fac, come to the warehouse and see me but erm, that's up to you. I, I will tell you that you've been dismissed, right"*
>
> *"So like I said, to me I want to explain to em the purpose why you've done it, but erm like I said you know what a fucking like, but that's, like Khalid, shouldn't have done what he fucking, I give him a row as well, basically as soon as you pulled your phone out he should've either done something then, not wait till later on, so, he's in the wrong, . . ."*

54. The Tribunal had considered the written statement of Mr Lehaj but, as he had not attended to give evidence, the Tribunal placed very little weight on its content. In addition, and in any event, the Tribunal did not find his written account of events to be credible or reliable.

55. Mr Lehaj stated that, on 17 January 2020, the Claimant called him over to show him a pallet which the Claimant considered to be unsafe. Mr Lehaj suggested that it was safely stacked although the photographs clearly contradict his assessment. It was then suggested that Mr Lehaj told the Claimant that, if the Claimant considered it necessary, he could restack the pallet. Mr Lehaj alleged that, when he left the Claimant, he said that he would speak to Khalid and Thomas about the situation. Mr Lehaj suggested that when he spoke later to Thomas and Khalid, he explained what had happened and arranged a meeting with the forklift drivers at the end of the shift in order to stress the importance of health and safety.

56. Mr Lehaj says in his written statement that, later in the shift, Thomas approached him and said that the Claimant had his mobile phone with him and had been taking photos. Mr Lehaj then said that Khalid Amer had also told him the same. Further, it was alleged that Thomas had shown CCTV footage to Mr Lehaj illustrating the Claimant talking to Mr Amer and getting his phone out of his pocket and showing Mr Amer, "*something on his phone*".

57. The Tribunal rejected Mr Lehaj's account. It clearly conflicted with the account provided by the Claimant which the Tribunal preferred. The Claimant had been challenged in respect of his evidence and had remained consistent in his account. Furthermore, other than two images purporting to have been taken from the CCTV footage at 15:38 and 15:40 on 20 January 2020, no other CCTV footage had been disclosed by the Respondent showing the Claimant taking his phone out of his pocket in order to show

something on his phone to Khalid. The CCTV footage was clearly disclosable but the Respondent had declined to disclose it. As stated, the Tribunal found that Khalid Amer had been asked by the Claimant if he could show him the photographs and Mr Amer had agreed for him to do so, at which point the Claimant went back to his locker to obtain his phone.

58. Furthermore, Mr Lehaj stated that the Claimant could see Mr Amer at his workstation. However, the Claimant stated, and the Tribunal found, that Mr Amer was not at his workstation at the material time.

59. Reference had also been made to an email which had been sent by Mr Lehaj containing a summary of what he said had happened. It was again of significance that, if such an email existed, it had not been disclosed.

60. Subsequently, the Claimant went to the Respondent's premises to obtain his possessions from his locker and, whilst there, maintained to Mr Lehaj that he had been treated unfairly. Mr Lehaj said *"you know Tamas, how Khalid is . . . and my hands are tied".*

61. The Claimant sought advice from the Citizens Advice Bureau who, on 19 February 2020, wrote to the Respondent on the Claimant's behalf in order to raise a grievance (pages 103 – 104).

62. In the Respondent's response on 24 February 2020 (pages 106 to 107), Dr Tshibangu confirmed that it was his decision that the Claimant should be dismissed, stating that the reason for dismissal was the improper use of the mobile phone, that no one is allowed a mobile phone on the shop floor and that at a meeting some two weeks prior to the accident, *"I reiterated the fact that anyone found with a mobile phone for any reason whatsoever would be summarily dismissed."*

63. The grievance was dismissed and Dr Tshibangu maintained that the dismissal was justified.

64. The Claimant's concerns with regard to health and safety were supported by Mr Minas who stated that pallets would frequently fall down. He confirmed that he would report his concerns and that he had not been disciplined for doing so. Having been shown the photographs (pages 94 – 97 and 100), he had seen pallets stacked in this way on a number of occasions and that they had nearly caused accidents at the Respondent's site at which people could have been hurt. He had seen pallets fall into other aisles. He himself had experienced accidents due to overloading of pallets, remembering one occasion when a pallet fell from a height of 9 metres, *"and very narrowly missed a woman walking by the next isle. If the pallet would have hit her then it would have killed her."*

65. Mr Minas stated in his evidence, and, in the absence of challenge, the Tribunal found, that, whilst it was understood that staff should not bring their phones onto the shopfloor, this was, *"not always abided to by staff"*. Dr Tshibangu referred to other staff being dismissed for doing so but produced no evidence in support and therefore the Tribunal took no account of it.

The Law

66. The relevant section of the Employment Rights Act (ERA) 1996 is section 43 which defines the meaning of protected disclosure. Section 43A says as follows:

"In this Act a "Protected Disclosure" means a qualifying disclosure (as defined by section 43(b)) which is made by a worker in accordance with any of sections 43(c) – 43(h)."

67. S.43(b) – Disclosure qualifying for protection:

"(i) 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 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 and 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 proceeding paragraphs has been, is being or is likely to be deliberately concealed."

68. S.43(c) – Disclosure to Employer or other responsible person:

"(i) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure …

(a) to his employer ..

69. Section 103A ERA - 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 employer made a protective disclosure."

70. The basic issues for the Tribunal were: -

1. Was there a protective disclosure or disclosures?

2. Was that protected disclosure/were those protected disclosures the reason or principal reason for the Claimant's dismissal.

71. Any such disclosure must be:-

1. "Disclosure of information"

2. Must be a “qualifying disclosure i.e. one that in the reasonable belief of the worker making it is made in the public interest and

3. Tends to show that one or more of six “relevant failures” has occurred or is likely to occur.

4. Must be made in accordance with one of the specified methods of disclosure.

72. A disclosure may concern new information, in the sense of telling any person something of which they were previously unaware, or it can simply involve drawing a person’s attention to a matter of which they are already aware (Section 43(l)(3), ERA 1996). The worker making a disclosure must actually “convey facts”, even if those facts are already known to the recipient (Cavendish Munroe Professional Risks Management Limited v Geduld (2010) IRLR38EAT at Paragraph 24 and 25).

73. In Kilraine the London Borough of Wandsworth 2018 EWCA Civ 1436, the Court of Appeal held that “information” in the context of Section 43(b) is capable of covering statements which might also be characterised as allegations. The word “information” in Section 43(b)(i) has to be read with the qualifying phrase “tends to show”.

74. For a statement or disclosure to be a qualifying disclosure, it has to have sufficient actual content and be sufficiently specific as to be capable of tending to show one of the matters listed in Section 43B(i)(a) – (f).

75. As for what might constitute a disclosure of information for the purposes of section 43b ERA, in Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436 CA, Sales LJ (as he then was) provided the following guidance:

“…30. the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the Judgment below at [30], set out above, and I would respectfully endorse what he says there.

76. Whether an identified statement or disclosure in any particular case does meet the standard required to amount to information will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief.”

77. The reference to the amendment in 2013 (paragraph 35 of Kilraine) is to the inclusion of a requirement that the disclosure be one that, in the reasonable belief of the worker in question, “is made in the public interest.” This requirement was considered by the Court of Appeal in the case of Chesterton Global Limited (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979, in which it was held that there may not be a white line between personal and public interest, with any element of the former ruling out the statutory

protection: where there are mixed interests, it will be for the ET to rule, as a matter of fact, as to whether there was sufficient public interest to qualify under the legislation.

78. Public Interest Component

79. The disclosure will only be a qualifying disclosure if the worker also reasonably believes that the disclosure is in the public interest. The ambit of this requirement has been recently considered by the Court of Appeal in Chesterton Global Limited (t/a Chestertons) v Nurmohamed (2017) EWCA Civ 979. The Tribunal has to determine (a) whether the worker subjectively believed at the time that the disclosure was in the public interest and (b) if so, whether that belief was objectively reasonable. The legislation does not define what "the public interest" means in the context of qualifying disclosure although Employment Tribunals must be intended to apply it "as a matter of educated impression' looking at the following factors:

    1. The numbers in the group whose interests the disclosure served;

    2. The nature of interests affected and the extent in which they are affected by the wrong being disclosed;

    3. The nature of the alleged wrongdoing disclosed;

    4. The identity of the alleged wrong doer.

80. In respect of health and safety cases, section 44(1)(e) ERA provides that an employee has the right not to be subjected to any detriment by his employer on the ground that in circumstances of danger which an employee reasonably believed to be serious and imminent, he took appropriate steps to protect himself and other persons from the danger.

81. Section 47B(1) provides that 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.

82. Pursuant to section 48(2) ERA, it is for the Respondent to show the ground on which any act, or deliberate failure to act, was done.

83. As for the Claimant's claim for automatic unfair dismissal, an employee who lacks the requisite continuous service to claim ordinary unfair dismissal has the burden of showing, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason (Smith v Hayle Town Council 1978 ICR 996). The EAT in Ross v Eddy Stobbart Limited EAT0068/30 confirmed that the same approach applied to whistle blowing cases. The Claimant must show that his alleged protected disclosures were the principal reason for his dismissal and/or any other detriments that he asserted he suffered during his period of employment.

84. Once he has done that, the burden of proof is on the employer: under the statute, it is for the employer to show the ground on which any act or omission was done.

Analysis and Conclusions

85. Addressing each issue in turn, the Tribunal has carried out an analysis of the facts and, applying the legal framework, has reached the following conclusions.

Sections 13, 23 and 24 Employment Rights Act 1996

86. The Claimant was suspended by Mr Lehaj at 5.30 p.m. on Friday 17 January 2020. In other words, he was allowed to finish his shift even though his alleged misuse of his phone was discovered at 11 a.m. when he volunteered the information that he had taken some photographs of an unsafe pallet that he wished to show Mr Amer. He was dismissed on Wednesday 22 January 2020. He only discovered that he was to be dismissed when he made contact with Mr Lehaj on 22 January 2020. He was therefore suspended from Friday 17 January 2020 to Wednesday 22 January 2020.

87. The Claimant has stated, and the Tribunal found, that he was not paid for the time during which he was suspended. In accordance with paragraph 15.2 of the Employee Handbook (page 72), suspension will be on full pay. Consequently, the Claimant is entitled to be paid for the period of his suspension and the failure of the Respondent to pay the Claimant during that time represented an unlawful deduction from his wages.

Breach of contract

88. The Tribunal has found that the Claimant's dismissal amounted to a breach of contract. The Respondent's submission that it was the Claimant who was in breach as a result of being in possession of a mobile phone was rejected. The Tribunal relied on its analysis and conclusions set out below. The Claimant had gone to his locker to obtain his mobile phone in order to take photographs of the pallet which he considered to be in a dangerous condition and he had then returned his mobile phone to his locker. At no stage during that time had he either spoken to anyone on his mobile or sent a text.

89. In the circumstances, the Tribunal found that he was entitled to four weeks' notice pay in accordance with paragraph 8.2 of his contract (page 87).

Sections 44(1)(e), 48 and 49, and 100(1)(e) and 111 Employment Rights Act 1996

90. The burden of proving the ground on which it suspended the Claimant rests with the Respondent. The Tribunal rejected the Respondent's submission that the principal reason for the Claimant's suspension and subsequent dismissal was as a result of the use of his mobile phone.

91. The Tribunal had found that the Claimant had brought his concerns with regard to the danger presented by badly loaded pallets to the attention of his supervisors on three occasions, namely 10, 16 and 17 January 2020. Indeed, on 17 January 2020, he had brought his concerns to the attention of the person responsible for health and safety within the warehouse. The Tribunal was satisfied that such information amounted to qualifying disclosures. They were made by the Claimant in the reasonable belief that the content of such disclosures amounted to information that the health and safety of members of the Respondent's workforce were endangered. The Tribunal was also satisfied that the disclosures had been made in the public interest and, in making them

to his supervisors, to include the person responsible for health and safety, he had notified his employer.

92. Indeed, whilst the Claimant did not pursue a claim under section 100(1)(c), the Tribunal concluded that it had some relevance in that it related to an employee bringing his concerns to an employer's attention "by reasonable means". The Tribunal was satisfied that taking photographs of the defectively-loaded pallets on 17 January 2020 fell within that definition.

93. The Tribunal had found that the information provided by the Claimant related to the risk of unsafe pallets weighing in excess of 500 kilograms falling from heights of up to 9 metres. Indeed, it was not merely a risk. Both the Claimant and Mr Minas had witnessed pallets falling from such a height and this information had been reported to the Respondent. The Claimant's evidence was consistent with that of Mr Minas.

94. The circumstances were such that it was reasonable for the Claimant to believe that they represented a danger which was serious and imminent. In taking the photographs to evidence the risk, and presenting them to his employer, having already brought his concerns to their attention previously, the Tribunal was satisfied that such steps were appropriate to protect both himself and other workers. It was done in an effort to ensure that measures would be taken to deal with such a risk.

95. The Tribunal took into consideration the fact that, in August 2019, the Claimant readily accepted that he had used his mobile in breach of the terms of the Handbook, and he had been given a written verbal warning which remained in force for three months.

96. First, that three month period had expired and secondly, there was no suggestion by the Respondent that, on 17 January 2021, the Claimant was using his mobile phone whilst in the warehouse in order to speak to anyone or to send anyone a text. It was simply to take a series of photographs to lend weight to the information he was providing to his supervisors to raise awareness of issues regarding health and safety, previous concerns having been met with an inadequate response.

97. The Tribunal also took into consideration that a formal procedure was followed in August 2019, which led to the Claimant receiving a written verbal warning. No procedure at all was followed in relation to the events which took place on 17 January 2020 and which led subsequently to the Claimant's suspension and summary dismissal.

98. It was also relevant that, despite it being suggested that being in possession of a mobile phone would lead to summary dismissal, when a more formal procedure was followed in August 2019, relating to the Claimant's use of the phone to speak to someone, he was neither suspended nor summarily dismissed.

99. By contrast, in January 2020, when the Claimant used his phone to take photographs to highlight a concern with regard to health and safety, no formal disciplinary procedure was followed. On 17 January 2020, he was allowed to complete his shift and, rather than being summarily dismissed, he was only suspended. His dismissal only took place three days later and only when the Claimant had made contact with the Respondent.

100. The Tribunal was satisfied that the Respondent had failed to establish, on the balance of probabilities, that it suspended, and subsequently dismissed, the Claimant for being

in possession of a mobile phone in the warehouse. The Tribunal was satisfied that the real reason for dismissal related to the Claimant making qualifying disclosures with regard to his concerns relating to health and safety.

101. The Tribunal was satisfied that the act of the Respondent in suspending the Claimant amounted to a detriment.

Sections 47B, 48 and 49 Employment Rights Act 1996

Sections 103A and 111 Employment Rights Act 1996

102. The Tribunal relied on its conclusions in relation to the Claimant's claim under sections 44(1)(e) above.

103. For the same reasons, and in respect of section 47B, the Tribunal was satisfied that the disclosures made to the Respondent on 10, 16 and 17 January 2020 were protected disclosures in accordance with sections 43A and 43B(d).

104. For the reasons outlined above, the Tribunal was satisfied that the Respondent had failed to establish, on the balance of probabilities, that it suspended, and subsequently dismissed, the Claimant for being in possession of a mobile phone in the warehouse. The real reason for dismissal related to the Claimant making qualifying disclosures with regard to his concerns relating to health and safety.

105. The Tribunal was satisfied that the act of the Respondent in suspending the Claimant amounted to a detriment.

106. With regard to the Claimant's claim of automatic unfair dismissal, and taking account of the fact that the Claimant did not have two years' qualifying employment, the burden of proof rested with the Claimant to satisfy the Tribunal that the reason for dismissal was an automatically unfair reason.

107. The Tribunal had found that the Claimant made three qualifying disclosures to the Respondent. These disclosures related to the provision of information by the Claimant to the Respondent of issues relating to health and safety, namely: the near miss on 10 January 2020; the information relating to the overloaded pallet on 16 January 2020, and the further information about the dangerously loaded pallet on 17 January 2020 which was evidenced by the series of photographs.

108. The Tribunal was satisfied that, in making these disclosures, the Claimant had a reasonable belief that this information tended to show that the health or safety of the Claimant and other workers had been endangered and that this situation was likely to continue. The Tribunal was satisfied that such disclosures were made by the Claimant in the public interest; it must be in the public interest if the aim of the disclosure was ensure the health and safety of the workforce. Furthermore, the Tribunal was satisfied that, in providing this information to his supervisors, and in particular the supervisor with specific responsibility for health and safety, he had notified his employer.

109. They related to circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety. This followed his concerns being relayed verbally to his supervisor, Thomas, and then his supervisor, Mr Lehaj, but

who took no further action. Therefore, the Tribunal found it was reasonable for the Claimant to conclude that he needed further evidence to persuade the Respondent that action needed to be taken. He therefore took the photographs which he then showed to a third supervisor, Mr Amer, who was also responsible for health and safety at the warehouse.

110. In the circumstances, and recognising that the burden of proof rested with the Claimant, the Tribunal was satisfied that he had established on the balance of probabilities that the principal reason for his dismissal was as a consequence of him making protected disclosures as outlined above.

111. The Respondent had then failed to establish that the reason for dismissal was a potentially fair one.

112. In reaching this decision, the Tribunal had taken into a consideration the evidence that had been produced by the Respondent with regard to the timings of phone calls made by the Claimant over a period of time which suggested that he may have been using his mobile during working hours. However, first, such evidence was not known to the Respondent at the time that the Claimant was dismissed on 22 January 2020. Secondly, there was no evidence to suggest that the suspension, and dismissal, of the Claimant was related to the Claimant's improper use of the mobile in order to speak to someone or to send a text. The only use being made of the mobile which led to the Claimant's suspension and dismissal was the taking of photographs of pallets which the Claimant reasonably believed presented a danger to health and safety.

113. For these reasons, and as stated, the Tribunal was satisfied that the Claimant had established, on the balance of probabilities, that the principal reason for his dismissal was as a result of him making protected disclosures. Therefore, he was automatically unfairly dismissed.

Employment Judge R Havard
Dated: 3 December 2021

JUDGMENT SENT TO THE PARTIES ON 6 December 2021

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche