



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr Pir Raju Ahmed**

**v**

**G4S Secure Solutions (UK) Ltd**

**Heard at:** London Central

**On:** 19-24 January 2023

**Before:** Employment Judge G Hodgson

**Representation**

**For the Claimant:** in person

**For the Respondent:** Mr K Ali, counsel

## JUDGMENT

1. The claim of unfair dismissal fails and is dismissed.
2. The claim of automatic dismissal brought under section 103A Employment Rights Act 1996 fails and is dismissed.

## REASONS

### Introduction

- 1.1 By claim form dated 16 June 2021 the claimant brought claims of unfair dismissal and automatic unfair dismissal for whistleblowing.

### The Issues

- 2.1 The claimant alleges he was unfairly dismissed. He alleges the dismissal was outside the band of reasonable responses and IT was procedurally unfair.

- 2.2 In addition, the claimant alleges that the dismissal was automatically unfair as the sole or principal reason for dismissal was his making the protected disclosures. He brings a section 103A Employment Rights Act 1996 claim.
- 2.3 He alleges he made protected disclosures by a written grievance of 3 April 2021.
- 2.4 Following a case management hearing before EJ Khan, the claimant alleged further protected disclosures in 2017 and 2020, which were detailed in further and better particulars. The respondent has not objected to those further and better particulars being treated as part of the claim, without formal amendment.
- 2.5 I will give further details of the alleged protected disclosures in due course.

### **Evidence**

- 3.1 The claimant gave evidence. He called no further witnesses.
- 3.2 The respondent relied on evidence from the following: Mr Afra Khan, Mr Lee Jones; Mr Peter Taylor-Smith; and Mr Muzayed Hussain
- 3.3 I received a bundle of documents. Both parties disclose further documents during the course of the hearing.
- 3.4 The respondent provided written submissions.
- 3.5 The claimant relied on oral submissions, but he was invited to provide written submissions, should he wish.

### **Concessions/Applications**

- 4.1 On day two the respondent filed further evidence in accordance with its continuing duty of disclosure. I admitted the evidence for the reasons given. In summary, it was relevant and there was proper reason for it being late. On day three, I also allowed the claimant to submit further evidence, being better copies of a number of documents already served.
- 4.2 I noted that the claimant had filed further and better particulars, on the face of the documentation, the particulars introduced new matters which required amendment. The respondent chose not to object to the further and better particulars, and they have been treated as part of the claim form, but there has been no formal amendment.
- 4.3 On day three, Mr Hussain was recalled, having already given his evidence. The claimant made further allegations during his own oral

evidence, and it was appropriate that Mr Hussain should be able to answer those points.

## **The Facts**

### **Background**

- 5.1 The respondent employed the claimant as a mobile patrol officer from 25 May 2015 until his dismissal on 6 April 2021. He held keys for various locations for which the respondent had responsibility. He undertook patrols and responded to alerts and callouts. The claimant was required to drive vehicles.
- 5.2 The respondent supplied two electronic devices to the claimant. He received instructions primarily through a PDA device.<sup>1</sup> This had a hands-free cradle in each vehicle. In addition, he had a mobile device known as a POP phone. This was a proof of presence device and recorded, by radio-frequency identification when placed near a patrol point, location. It could act as a phone and instructions could be diverted to it, but it was primarily used to register attendance at sites. He was permitted to carry his own mobile phone and to use it when it was safe and legal to do so.
- 5.3 On 10 February 2021, the claimant signed a form confirming he understood the directions in that document including the following: the need to complete relevant attendance forms (RBS forms); the need to wear a seatbelt; the need to avoid speeding; the need to drive in accordance with the law; and the need to clean the vehicle. Individuals who broke the rules could be subject to disciplinary proceedings. However, as an alternative, there was discretion to give 'counselling' to provide further guidance.
- 5.4 In or around 2019, the respondent introduced the use of dash cams. Vehicles were fixed with a camera facing forward and a camera in the cab, which would record the actions of the driver. On 10 January 2019, the claimant signed a form to acknowledge the introduction of the dash cams and to acknowledge the instructions given. The cameras did not allow real-time monitoring, albeit I understand they were always active. Video footage would be obtained, if there was a triggering event, including harsh braking, collision, or harsh cornering. It also appears that failure to wear a seatbelt may trigger a report. In addition, the employee could activate the camera, if the employee felt threatened.
- 5.5 The claimant's evidence is that he signed the dash cam form, and then immediately orally retracted his consent. He did not record any retraction of consent in writing. I have not found the claimant to be a credible

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<sup>1</sup> Also referred to as an EDA device.

witness and I will consider this further below. I find on the balance of probability, that he did not retract any consent. First, his evidence is unreliable. Second, there were a number of occasions when he did not wear a seatbelt, but he did not raise his lack of consent to being filmed during any these counselling sessions. Had he not consented, on the balanced of probability, there would have been some evidence in writing, and there is none. The only relevant documentary evidence confirms consent.

- 5.6 In August 2020, the claimant received counselling for not wearing a seatbelt whilst driving. Counselling, rather than disciplinary sanction, may be given at the discretion of the manager. The claimant was told he had failed to comply with company policy and the law. He was told he would be monitored.

Events leading up to dismissal

- 5.7 On 25 February 2021, the claimant was involved in a collision. The vehicle the claimant was driving drove into the back of a stationary car which was queueing at traffic lights. This collision generated an alert which led to the relevant CCTV footage being obtained. In addition, the claimant completed an incident report. The relevant part of the incident report read:

**I was on a standstill position behind [member of public's] vehicle .... waiting on a red light signal. The traffic light went to green lights and [member of public] was slow to move forward and that moment, my foot slipped off the brake pedal and bumped the vehicle in front about 0 – 1 mph, my vehicle .... rolled forward due to my foot slipping off the brake pedal and bumping the vehicle in front.**

- 5.8 The claimant's report failed to confirm that he was not wearing his seatbelt or that he was looking at a mobile device when the collision occurred.
- 5.9 On 26 February 2021, Mr Andrew Wintle, who was an individual who had responsibility for obtaining and monitoring relevant CCTV of triggering events, informed Mr Khan, an operations manager for the respondent, that the video footage showed the claimant using a hand-held phone whilst driving, and at the time he was not wearing a seatbelt. As for not wearing a seatbelt, he said this was the fourth time the claimant had been "picked up for this."
- 5.10 Mr Khan received the video footage. He suspended the claimant, as confirmed by letter of 1 March 2021. The letter sent out the matters for which the claimant would be investigated, including driving without due care and attention, holding a hand-held device whilst driving, and providing an inaccurate statement of events. In a separate letter of 1 March 2021, Mr Khan invited the claimant to attend an investigation meeting on 4 March 2021, to be held by video. It referred to the collision on 25 February 2021 and identified three matters to be investigated:

- **Driving without due care and attention (using a handheld device whilst driving) which resulted in a collision with a stationary vehicle**
- **Provided an inaccurate statement of events to the National Control Centre**
- **Not correctly wearing a seatbelt whilst driving a G4S company vehicle**

- 5.11 The letter confirmed his right to request documentation and to be accompanied by a colleague or trade union official.
- 5.12 The investigation meeting went ahead on 4 March 2021. The claimant declined to elaborate on the circumstances of the collision, saying he relied on his written report. The claimant declined to add any further details. Mr Khan explained he had obtained the CCTV footage. He showed the claimant the footage. He indicated the footage appeared to show the claimant's account was inaccurate. It is apparent the footage showed the following: the claimant looking at what appeared to be messages on a mobile phone - he is scrolling through multiple messages; the lights change to green for vehicles turning left; the lights remained red in the claimant's lane; the third party's vehicle was stationary; the claimant drove his vehicle forward whilst the claimant remained looking down; the claimant's vehicle drove into the back of the third party's vehicle; the claimant had the seatbelt plugged in, but was wearing it behind him; immediately after the accident, he pulled the seatbelt forward and put it over as head, so that he appeared to be wearing the upper part correctly.
- 5.13 At the investigation meeting the claimant did not initially deny that the phone he was using was his. Instead, he asked whether Mr Khan knew whether it was a personal or company mobile phone. When Mr Khan indicated he did not know, the claimant stated it was a G4S phone which he used to carry out his duties. He stated he was using that company phone because the EDA device constantly malfunctioned. He stated he was checking any messages or calls from "Belfast" being the central control room. Mr Khan noted that there was no report of faulty equipment.
- 5.14 As for not wearing a seatbelt, he stated that he believed it had human faeces on it, and that he had tested positive for Covid and was scared that he may contract some illness. For that reason, he did not wear the seatbelt.
- 5.15 He was asked why his account differed to what appeared to be the evidence in the CCTV footage. The claimant indicated his foot slipped off the brake. A report was completed.
- 5.16 Mr Lee Jones sent an invitation to a disciplinary hearing on 19 March 2021. He repeated the allegations. He confirmed that he may be dismissed. The claimant was not sent the CCTV footage, but he did receive all other documents.
- 5.17 Following the claimant's request to delay the meeting, the disciplinary hearing was conducted by Mr Lee Jones, business manager, on 26 March 2021.

- 5.18 Mr Jones reviewed the investigation meeting minutes, the investigation report, the claimant's incident report, the two videos, and a CCTV transcript, which summarised the relevant footage.
- 5.19 The claimant was accompanied by Mr Tony Smith, a trade union representative. At the hearing, the claimant acknowledged that driving whilst using a mobile phone is illegal and that he was required to wear a seatbelt. Mr Jones went through the circumstances of the incident. I do not need to record the full conversation. Mr Taylor-Smith went through the incident in detail and allowed the claimant to give any explanation he wished to. Mr Jones concluded that the video showed that the claimant's vehicle accelerated, which was inconsistent with a simple slip. The CCTV transcript reports the claimant's vehicle stopped, and he started to look at a mobile phone; while still looking at the mobile phone, he then accelerated for approximately three seconds, before colliding with the vehicle in front at approximately 3.8 mph. The claimant maintained his explanation which involved three key elements; first, that there had been faeces on the seatbelt which made him reluctant to wear it; second, his foot had slipped off the brake which led to this collision; third, he had been looking at the company's mobile device, as the EDA was faulty.
- 5.20 After the disciplinary hearing, Mr Jones undertook further investigations. He wanted to understand several things: the purpose of the company POP phone; and whether the claimant had been the only person who had been assigned to the vehicle - it was unclear how faeces could have got onto the seatbelt - Mr Jones wished to check whether anyone else could have driven it. He reviewed the documents again.
- 5.21 Mr Jones reached a number of conclusions.
- 5.22 The POP phone is a proof of presence device and records by radio-frequency identification when placed near a patrol point. If the PDA was not working correctly, the claimant should have reported it. He believed on the balance of probability the claimant was looking at his own phone and this was clearly careless driving and a contravention of the law. In any event, there was no good reason for him to be looking at the PDA, as he had only just started his shift and was not far from his first job.
- 5.23 He concluded the claimant's account recorded on the incident report was materially inaccurate. In particular, it failed to refer to the fact claimant was looking at a mobile device when the accident occurred. He concluded the claimant's account was intentionally inaccurate and it was a dishonest distortion and it was an attempt to lessen the seriousness of his actions. This called into question the claimant's integrity.
- 5.24 Finally, he concluded the claimant had not been wearing the seatbelt in contravention of the law and the respondent's instructions. He concluded that the claimant had invented an excuse for not wearing a seatbelt by alleging that there was faeces on it. There was no reason why the claimant could not have cleaned it. It appeared only the claimant had

used the vehicle. In any event, the claimant's alleged concern did not explain why he was content to wear the seatbelt behind him or why, when moving the seatbelt from behind him to the front, he had run his hand along the length of the seatbelt. He concluded there was a dishonest invention.

- 5.25 Mr Jones took into account the claimant had been employed for five years and had received two awards for improved driving.
- 5.26 Given the seriousness of the incident, and the claimant's dishonest and invented accounts, he considered dismissal to be the appropriate sanction.
- 5.27 The claimant was dismissed by letter on 6 April 2021 with immediate effect. The letter set out, in detail, the reasons for dismissal.
- 5.28 The claimant appealed the dismissal by letter of 7 April 2021. He alleged the outcome was too harsh and that other colleagues, who had committed serious breaches and gross misconduct, had received lesser sanctions. He complained he should have been given the CCTV footage at the investigation stage, before the meeting, and before he was questioned on it. He said the footage was unclear and he requested a copy of it.
- 5.29 By letter 29 April 2021, Mr Taylor-Smith invited the claimant to an appeal hearing on 25 May 2021. He stated that the hearing would be a full rehearing.
- 5.30 On 4 May 2021, the claimant requested further documentation, including the CCTV footage. Mr Taylor-Smith complied with the majority of the request, but refused to provide a copy of the CCTV footage. However, it is clear from the correspondence that he offered the claimant an opportunity to see the CCTV footage before the hearing, and at the hearing. The claimant would be entitled to view it as many times as he wished prior to the hearing. However, he was not prepared to release a copy to the claimant.
- 5.31 The hearing was rearranged, but on 9 June 2021 claimant declined to attend, as he considered it unfair that he could not have a copy of the CCTV footage.
- 5.32 Mr Taylor-Smith proceeded to hold the appeal without the claimant being present. He reviewed all relevance statements, documents, and the CCTV footage. He concluded that the claimant had failed to wear his seatbelt. In addition, he had been using a mobile device whilst driving. His attention had been distracted when the vehicle was moving and that had led to the collision. He found it was clear the claimant was driving without due care and attention, and he was committing an offence by using a mobile device. He found no evidence in support of his claim that the PDA had not been working. He was satisfied the claimant had received proper training. He was not satisfied by the claimant's account.

- 5.33 As to the severity of the penalty, Mr Taylor-Smith concluded that there were numerous aspects which could be viewed as gross misconduct. Given the cumulative effect, the only appropriate sanction was dismissal. He did not accept that there was evidence that others had been treated more leniently in similar circumstances. He did not accept the disciplinary process had been flawed. He did not accept that Mr Jones had been prejudiced in any manner. He did not accept there was evidence that the claimant's foot slipped from the brake. Instead, he concluded that the claimant appeared to deliberately apply the accelerator pedal whilst looking down at the mobile device. He concluded the claimant became confused by the traffic lights, believing his traffic light had turned to green, when he was distracted by the mobile device. He concluded that the claimant's account had demonstrated deliberate obfuscation and omission.
- 5.34 As for not supplying the CCTV footage, he concluded there was an obligation to the third party and the need to protect his identity. In his statement he also says, "I believe that such footage could have brought the company into disrepute if the footage had been shared in an uncontrolled way." He was concerned that the footage would be published generally, for example on YouTube. He concluded this justified not sending the footage to the claimant.
- 5.35 Mr Taylor-Smith concluded dismissal was the right sanction. He sent the claimant a detailed letter on 2 July 2021, setting out his reasons. The claimant did not exercise his further right of appeal.
- 5.36 On 3 April 2021, the claimant raised a grievance in writing. Mr Taylor-Smith was aware of the grievance because he had initially been sent it. However, when he was nominated as the appeal manager, he returned the grievance, confirming that it would be inappropriate for him to consider it. It is the claimant's case that the grievance contained protected disclosures. I accept that, potentially, Mr Taylor-Smith was aware of those alleged disclosures from the letter itself.
- 5.37 I am satisfied Mr Jones made an independent decision to dismiss the claimant. Of the alleged disclosures of information the claimant now alleges to be protected, Mr Jones knew nothing.
- 5.38 I do not need to consider the grievance in detail. It is necessary to consider the alleged protected disclosures. However, to the extent findings of fact are needed, I can consider those in my conclusions.

### **The law**

- 6.1 Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the



reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

- 6.2 In **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 the Court of Appeal held -

**A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.**

- 6.3 In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in **British Home Stores v Burchell** [1980] ICR 303, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the EAT in **Sheffield Health and Social Care NHS Foundation Trust v Crabtree** EAT/0331/09.

- 6.4 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones** [1982] IRLR 439 and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal consider the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

- 6.5 The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (see **Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23.)

- 6.6 In considering the question of contribution, the tribunal must make findings of fact as to the claimant's conduct. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the award by such proportion as it consider just and equitable having regard to that finding.
- 6.7 Under section 43A Employment Rights Act 1996, a worker makes a protected disclosure in certain circumstances. To be a protected disclosure, it must be a qualifying disclosure. Qualifying disclosures are identified in section 43B Employment Rights Act 1996.

**Section 43B - Disclosures qualifying for protection -**

- (1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
  - (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
  - (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
  - (d) that the health or safety of any individual has been, is being or is likely to be endangered,
  - (e) that the environment has been, is being or is likely to be damaged, or
  - (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
- (2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.
- (3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.
- ...
- (5) In this Part 'the relevant failure', in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

- 6.8 The following questions must be addressed: first, is there a disclosure of information; second, did the claimant believe the information tended to show one of the relevant failures identified in section 43B(1)(a)-(e); third, was the belief of the employer that the disclosure tended to show a relevant failure reasonably held; and fourth, was the belief that there was a public interest reasonably held. In deciding the latter point it is important to recognise that there are two key questions: first, whether the worker believed, at the time he made the disclosure it was in the public interest; and second whether that belief was reasonable. All of these elements must be satisfied if the claim is to succeed.

6.9 Disclosure of information should be given its ordinary meaning, which revolves around conveying facts. Mere allegations may not be a 'disclosure' for these purposes (see **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38. It should be recognised that the distinction between allegation and information may not be clear-cut. Any argument based on this alleged distinction should be viewed with caution. It is possible an allegation may contain information, whether expressly or impliedly. (see **Kilraine v Wandsworth LBC** [2018] EWCA Civ1 1436). Each case will turn on its own facts. It will be necessary to consider the full context. Sales LJ in **Kilraine v LB Wandsworth** [2018] EWCA Civ 1436 held that "Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other...." Further, he stated at para 35 -

**"35... In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) ...**

**36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case..."**

6.10 Sales LJ observed in **Kilraine** at paragraph 33 that statements which were "devoid of any or any sufficiently specific factual content" would not qualify for protection.

6.11 In **Simpson v Cantor Fitzgerald Europe** [2020] ICR 236 (EAT), Choudhury P considered whether a question can amount to the provision of information for the purpose of making a qualifying disclosure:

**Whether or not something is merely a query, or amounts to the provision of information albeit framed as a query, is for the tribunal to determine. If an employee sets out sufficiently detailed information that, in the employee's reasonable belief, tends to show that there has been a breach of a legal obligation, then the fact that such information is contained within a communication that can be described as a query will not prevent it from amounting to a qualifying disclosure.<sup>2</sup>**

6.12 It may be possible to aggregate disclosures, but the scope is not unlimited and is a question of fact for the tribunal.

6.13 It may be necessary to indicate the legal obligation on which the claimant is relying, but there may be cases when the legal obligation is obvious to all and need not be spelled-out (see **Bolton School v Evans** [2006] IRLR 500 EAT). However, where the breach is not obvious, the claimant may be called upon to identify the breach of obligation that was contemplated when the disclosure was made. It may be necessary to identify a legal obligation (even if mistaken), as opposed to a moral or lesser obligation (see **Eiger Securities LLP v Korshunova** [2017] IRLR 115, EAT.)

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<sup>2</sup> At para. 42.

- 6.14 The reasonable belief of the worker must be considered. The test is whether the claimant reasonably believed that the information 'tended to show' that one of (a) to (f) existed; the truth of disclosure may reflect on the reasonableness of the belief.
- 6.15 'Reasonable belief' is to be considered by reference to the personal circumstances of the individual. It may be that an individual with specialist or professional knowledge of the matters being disclosed may not have a reasonable to belief whereas a less informed but mistaken individual might. Each case must be considered on its facts.
- 6.16 The public interest element was added in 2013 in order to reverse the decision in **Parkins v Sodexho Ltd** [2002] IRLR 109, EAT. This has been considered by the CA in **Chesterton Global Ltd v Nurmohamed** [2017] EWCA Civ979.
- 6.17 Underhill LJ gave the lead judgment in the Court of Appeal and addressed whether a disclosure made in the private interest of the worker may also be in the public interest, because it serves the interests of other workers as well (see Underhill LJ, paragraph 32).
- 6.18 'Likely' requires more than a possibility or risk that an employer may fail to comply with a relevant legal obligation – see **Kraus v Penna plc**. 2004 IRLR 260
- 6.19 It is not necessary for the information to be actually true (see **Darlington v University of Surrey 2003** IRLR133, EAT).
- 6.20 In **Ibrahim v HCA International** 2019 EWCA civ 207 the Court of Appeal suggested the mental element imposes a two stage test: (i) did the claimant have a genuine belief at the time that the disclosure was in the public interest, then (ii) if so, did he or she have reasonable grounds for so believing. It is necessary to consider the individual circumstances of that individual, including any expertise or knowledge.
- 6.21 When considering the ground on which any act, or deliberate failure to act was done, it is necessary to consider the mental processes (conscious or unconscious) of the decision maker (see **Harrow London Borough v Knight** 2003 IRLR 140, EAT).
- 6.22 It is for the employer to show the ground on which any act or deliberate failure to act was done (section 48(2) Employment Rights Act 1996). The employer must prove, on the balance of probability, that it was not on the grounds of the protected act (or disclosure) meaning that the disclosure did not materially influence, in the sense of it being more than trivial, the employer's treatment of the whistleblower (see **Fecitt v NHS Manchester** 2011 EWCA civ 1190).

## **Conclusions**

- 7.1 The claimant alleges that he was unfairly dismissed and also that the dismissal was automatically unfair because the sole or principal reason for dismissal was a protected disclosure.
- 7.2 The respondent alleges the reason for dismissal was the claimant's conduct.
- 7.3 It is convenient to first consider the claim of ordinary unfair dismissal.
- 7.4 It is for the respondent to establish the reason for dismissal. The reason for dismissal is a set of facts known by the employer, or it may be beliefs held by the employer, which causes the employer to dismiss.
- 7.5 I am satisfied that the person who dismissed the claimant was Mr Jones, and that it was his decision alone.
- 7.6 The first question is whether he believed there was misconduct. Mr Jones concluded that the claimant had driven his vehicle into the rear of third party's vehicle. This had occurred because the claimant was looking at his mobile phone, and he was not paying attention. He was distracted. He started to move his vehicle forward against a red light. Mr Jones believed the claimant was looking at his own mobile phone. Thereafter, the claimant, when reporting the matter, had materially misled by failing to refer to the fact he was looking at a mobile phone. He considered the claimant's account was misleading, particularly in relation to the reason for the accident, the use of the seatbelt, and the device that he was viewing. I am satisfied that Mr Jones believed all that. Mr Jones believed the claimant was guilty of misconduct.
- 7.7 The next question is whether the respondent had reasonable grounds on which to sustain the belief. There was clear evidence. The collision had occurred. The claimant had produced a report. The report was materially inaccurate, and that was revealed by the CCTV footage. The claimant had been given an opportunity to produce an account. He then had an opportunity to change the account when he reviewed the CCTV footage, but chose not to. There was ample evidence to show that the claimant had driven carelessly by driving into the rear of another vehicle whilst being distracted by a mobile phone, which he should not have been viewing. The claimant had not been wearing a seatbelt. A simple comparison of the claimant's account, as viewed against the CCTV, demonstrated that the claimant had materially misled the respondent in his incident report. It follows there was ample evidence on which to sustain the belief.

- 7.8 The next question is whether at the time the belief was formed had there been an investigation which was open to a reasonable employer. The respondent had sought an initial report from the claimant. The respondent identified and obtained any relevant CCTV and documentary evidence. The claimant had an opportunity to give his account at the investigation stage. The claimant had a further opportunity to give his account at the disciplinary stage. To the extent the claimant raised any matters, Mr Jones undertook further investigation as described above.
- 7.9 The claimant's main criticism of this whole procedure is that the CCTV footage should not have been obtained or viewed because he had withdrawn any consent. For the reasons I have given, I find he gave consent and did not withdraw it. Even if he had withdrawn that consent, this was not a matter he raised with Mr Jones. Even if consent had been withdrawn, that would not necessarily prevent the respondent from reviewing the CCTV. The reality is that the claimant had used vehicles since 2019, knowing that video was being taken, without his ever raising any specific protest. His continuing conduct is inconsistent with his statement that he removed consent. If he had concerns, he would have raised them.
- 7.10 The tribunal does not have jurisdiction in relation to data protection. The respondent had good grounds for installing CCTV. CCTV will help reveal the circumstances of an accident and it may prevent fraudulent claims against the company. Moreover, where the driver is at fault, it may assist in identifying that fault and ensuring blame is placed where it belongs.
- 7.11 The respondent takes a responsible attitude to processing data. The respondent does not use the CCTV to routinely monitor individuals. The CCTV footage is obtained when there is a particular reason or there is a triggering event. Moreover, the CCTV is limited. The claimant has criticised the respondent for producing limited clips. His rationale is unclear. The CCTV obtained covers the relevant events and demonstrates the cause of the collision. It shows the claimant's vehicle stopping. It reveals the lights governing the lanes and the fact that the light governing the claimant's lane remained red. It demonstrates the claimant's vehicle started to move and accelerate whilst the claimant paid no attention to the road and was looking at a mobile device. For these purposes, it matters not whether the device was his own or the respondent's. It was illegal to look at it. The respondent, rightly, took the view that the claimant was driving carelessly.
- 7.12 I have no doubt that the respondent was reasonable in looking at the CCTV. Should it have shown the CCTV to the claimant before the investigation started? The overall test is reasonableness. The claimant had been involved in an accident. He had an opportunity to say he was looking at a mobile device when he produced his report. It was reasonable for the respondent to take the view that the claimant lied in his written account. The purpose of an investigation is to gather all the information and to give the employee an opportunity to give an initial

explanation. There is no principle of natural justice which says that during an investigation all evidence must be disclosed before any questions is asked. I have no doubt that in this case it was reasonable to ask the claimant whether his account was accurate and thereafter to disclose the information which had been obtained, in this case the CCTV footage. The claimant had a full opportunity to respond to it. I do not accept that at the time he believed the footage to be unclear, such that he could not see what was happening.

- 7.13 The CCTV footage provided clear evidence of key points. First, the length of time the claimant's vehicle accelerated before the collision. Second, there was no braking of the claimant's vehicle before the collision. Third, the claimant was looking at a mobile device at the point when his vehicle started, and he remained distracted up to the collision. Fourth, he was not wearing a seatbelt – it was behind him - he put the seatbelt over his chest after the accident.
- 7.14 The claimant now has the videos. He has been able to view the clips on numerous occasions. The claimant was asked what further material defence he would have advanced at the disciplinary, had he had the video. The claimant could identify no defence to which he had been denied. The reality is in no sense whatsoever was the claimant prejudiced by the failure to send him a copy of the video or by the way in which it was introduced in the investigation. The claimant's defence was undermined because he materially misled the respondent in his original incident report, and the respondent was reasonable in concluding that the claimant had deliberately misled.
- 7.15 I conclude that at the time the belief was formed, there were reasonable grounds for the belief and those grounds were supported by a reasonable investigation.
- 7.16 Did the respondent act fairly by dismissing? I must apply the band of reasonable responses. It is the claimant's case that the dismissal was too harsh. He has pointed to two comparators. I considered the comparators the claimant purports to rely on. They do not support the claimant's case. The claimant had received counselling in relation to breaches, particularly with regards not wearing seat belts. One of the comparators receive counselling for driving over the legal speed limit. There is no indication that he sought to mislead. I do not accept the claimant's contention that speeding is a more serious offence than viewing a mobile phone whilst driving. The claimant also relies on a further comparator who is said to have driven recklessly and who held a mobile phone in his hand. I am not satisfied that that person was treated differently. He was on probation. He resigned before the probation meeting, and it is not clear that he would have remained employed. In any event it is far from clear that he actively misled, unlike the claimant.
- 7.17 The claimant suggests that he should receive more lenient treatment because of the seniority. I do not find that argument convincing. The

claimant had received ample training. As a senior employee, who should have understood the importance of complying with the respondent's rules and the importance of not breaking the law, and who had already received counselling, his culpability may be seen as greater. Moreover, he had been given counselling as well as training. However, the claimant's culpability in causing the accident was not his only misconduct, he also deliberately misled the respondent by filing a misleading incident report. Mr Jones took all of that into account. I have no doubt dismissal was within the band of reasonable responses.

- 7.18 I have considered whether there was any procedural failure which would lead to a finding of unfair dismissal. The claimant's main argument revolves around use of the CCTV footage. For the reasons I have given, I reject that submission. It was appropriate for the respondent to rely on the CCTV footage.
- 7.19 I have considered whether the failure to give the claimant a copy of the CCTV footage should lead to a finding of unfairness. For the reasons I have already given, I take the view that the claimant suffered no prejudice at all. He was shown the CCTV footage at the proper time during the investigation. He had opportunity to view it again in the disciplinary. He had opportunity to view it at the appeal and before the appeal. The claimant could advance no argument for why having the CCTV would have advantaged him in any way, or would have led to any further line of enquiry, or line of defence. I find that there is no unreasonableness in failing to give the claimant a copy of the CCTV.
- 7.20 That said, I have considered the respondent's position on this. The respondent advances two broad reasons for why it should not send a copy of the CCTV. The first is the protection of a third party's identity. The second is to protect the reputation of the respondent. As to the first, there may be more proportionate ways of dealing with the protection of third party's identity. No doubt there is software which would obscure the number plate and the face of the third party. The cab footage does not show the third party and therefore there was no third party identity to protect. Further, it is clear from Mr Taylor-Smith's evidence that the respondent had in mind the protection of its own reputation. Put simply, it did not want published on the Internet, whether on YouTube or otherwise, the video which showed one of its employees breaking the law by causing a collision whilst viewing a handheld mobile device. I can understand that such videos may damage the reputation of the respondent. That is not in itself a good reason to withhold the footage. Whilst the respondent's motivation for withholding the CCTV footage is questionable, it does not, in this case render the procedure unfair.
- 7.21 In all the circumstances I find that the dismissal was not unfair.
- 7.22 Lest I be wrong in that conclusion, I will consider both the Polkey deduction and contribution.



- 7.23 As for contribution, I must make findings of fact. I have viewed the CCTV footage and I have had the benefit of hearing from the claimant. I make the following findings. The claimant says that he did not have his mobile phone with him. I reject that evidence.
- 7.24 I am satisfied that the claimant deliberately and knowingly gave misleading information amounting to an untrue account when he reported the collision to the respondent. The claimant's case is that his foot slipped off the brake. I find that account unconvincing and, on the balance of probability, deliberately untrue. His evidence was that he did not realise his foot had slipped off the brake; he alleges he neither feel his foot move nor the brake pedal slip away. His evidence is then that the vehicle moved because it was an automatic, but he did not immediately realise the vehicle was moving, albeit it was moving for approximately three seconds. At some point he says he did realise the vehicle was moving, he is not clear why he realised. It is possible that he was alerted by peripheral vision, as he was looking at his phone, or he felt the vehicle move. Whatever the position, he says he did not realise in time to apply the brake. This means, on his account, that his foot slipped from the brake and the vehicle moved for three seconds before he realised it was in motion.
- 7.25 The claimant's account is entirely inconsistent with the CCTV which shows a vehicle accelerating. The acceleration is consistent with the claimant using the accelerator. His account of his foot slipping off the brake is difficult to reconcile with his account that he observed a change to a green light and the third party was slow to move. Reference to a green light is consistent with the claimant starting to drive forward because he believed his light was green. Further, when viewed carefully it is possible to see on the CCTV footage the claimant move his leg or foot to the right, in what appears to be a deliberate way, to move from the brake to the accelerator.
- 7.26 His reference to seeing the green light and the slow movement of the third party suggests he was looking up. It is inconsistent with an individual who is looking down, and who allows a vehicle to inadvertently move because his foot slips. The CCTV shows he did not look up as the vehicle started to move and contradicts his account. I have no doubt, having heard the claimant's evidence, and having viewed the CCTV footage, that the claimant observed a change of lights from red to green in the left turning lane to his left, but his attention was so distracted he failed to realise that the light governing straight on traffic, his lane, remained red. He then started to drive, by pressing the accelerator. He did not look up because he continued to look at his mobile device. He became aware there was a problem when he collided with the vehicle in front. He was simply not paying attention. He then sought to cover up his culpability by first putting his mobile phone away and then, second, by transferring the seatbelt from behind him to in front of him. I have no doubt he did that because the third party got out of his car and the claimant did not wish to be observed not wearing a seatbelt. Thereafter, the claimant produced a

report which is demonstrably untrue and the omitted the crucial fact that he was using a mobile device. This was a deliberate lie by omission designed to obscure or reduce the blameworthiness of his conduct.

- 7.27 Finally, I have concluded that he was using his own mobile phone. He alleges that he would always leave his own mobile phone in his own vehicle when he had driven to the depot. I find that inherently unlikely. Moreover, there was no good reason for him to look at the company's device. He had just left the depot and was on his way to a job. There was no pressing need for him to check any messages. At the investigation he was careful to ascertain whether the mobile device could be clearly identified before alleging it was not his own phone. I take into account the claimant's untruthful account of the accident before the respondent and the fact he has persisted with an untruthful account before me. I have concluded that the claimant was checking his own mobile phone, and I find he has been untruthful in saying that he did not have his mobile phone with him.
- 7.28 In the circumstances, I have found that the claimant's behaviour was culpable. The accident was caused by the claimant's inattention. His inattention was caused by being distracted by viewing his own mobile phone. He then deliberately and dishonestly misled the respondent about the circumstances. The law forbids the use of handheld mobile phones while driving for good reason. There are well documented examples of tragic accidents caused by individuals behaving in a similar way. The claimant's behaviour is culpable and blameworthy. He contributed to his dismissal in my view 100%.
- 7.29 I take the view that the respondent's procedure was impeccable. At each stage – investigation, disciplinary, and appeal – each of the individuals was conscientious, thorough, and fair. If there is any unfairness in the procedure, such that there should be a technical finding of unfair dismissal, I can see no basis on which such unfair procedure would have either led to a delay in the dismissal, or would have resulted in anything other than a dismissal. I therefore take the view there is 100% chance that the claimant would have been dismissed at the same time.

### Whistleblowing

- 7.30 In order for the claimant to succeed on the section 103A claim, I would need to find that the protected disclosure was the sole or principal reason for dismissal. I would have to find that Mr Jones did not dismiss because of claimant's misconduct which started with the events of 25 February 2021, but instead he dismissed because of his knowledge of a protected disclosure, or possibly a belief that there would be a protected disclosure.
- 7.31 First, I need to consider what matters are said to be protected disclosures. On 20 October 2021, EJ Khan considered the issues in this case. He identified the protected disclosures as follows:

**(1) Protected disclosures (sections 43A – C ERA)**

**1.1 Did the claimant make a protected disclosure? The claimant says he disclosed the following information in a grievance dated 3 April 2021:**

- a. The respondent committed fraud when it applied for multi-parking permits from Tower Hamlet Council using his personal address (and using Hitachi capital fleet documents without their knowledge and consent).**
- b. The respondent made false representations to the Council when challenging penalty charge notices i.e. giving false police names and numbers.**
- c. The respondent falsified company records i.e. it altered Kvr response times in relation to the DWP contract to avoid incurring financial penalties.**

7.32 In addition, at that hearing, the claimant said there were disclosures on the same matters in August 2017 and 2020. Those were to be specified. The claimant then gave further details in further and better particulars. The respondent has accepted that those further and better particulars may be treated as an amendment to the claim.

7.33 I have considered the further better particulars. As for the events of 3 August 2017 and in 2020 the claimant states -

**5. The date of each alleged disclosures were made to Mr S Chowdhury on the 3rd of August 2017 who at the time was also managing the supervisor post as well as administrating. I had reported to Mr Chowdhury in relation to the multi vehicle parking permit which I was made to obtain fraudulently by supplying my personal information to Mr Muzayed Hussain who in return made application with supporting lease holder Hitachi capital documents and of V5 to apply for the multi parking permits with the Tower Hamlets Council when eligibility are not met, as I do not park these 4 G4S lease vehicles at my residential address. Mr Chowdhury had told me he would speak to HR for advice and get back to me with instructions and with time this matter had faded away without receiving a response regarding matter.**

**6. In August 2020 I had raised the matter of PCN Appeal letters which is a falsification of documents to avoid paying parking charges. I had reported to the shift supervisor Mr Abdul Alim who in return assured me that he will speak to a member of the management team and get back to me. Only later I found out that he had spoken to Mr Chowdhury in regards to the matter of PCN Appeal letter and Mr Chowdhury only then had directly approach me, regarding the PCN Appeal letter by telling me, everyone does it, and i should too appeal any parking charge notices and if it gets rejected than I would be provided with company credit card to pay for the charge. And I was given the company credit card as I refuse to use such falsified document.**

**7. These are the two dates I can recall which are the 3rd August 2017 and August 2020 and at both occasions I had verbally spoken to report the above matter.**

7.34 The claimant's evidence on these matters has been inadequate and unconvincing. To the extent there is a conflict on the evidence, I preferred the evidence of the respondent's witnesses. It is necessary to consider, broadly, the facts.

- 7.35 First, the respondent never applied for multi-vehicle parking permits. The claimant's account of this has varied and developed during the course of the evidence. However, he has not sought to change his pleaded case. It is clear the claimant applied for and paid for multi-vehicle parking permits, and he did so for several years after 2017. Mr Hussain accepts that he gave the claimant a letter confirming that the claimant was employed and that he used multiple vehicles. In support, he gave the claimant copies of V5s which show the vehicles owned by Hitachi, who was a leasing company.
- 7.36 Mr Hussain states that the claimant lived in Tower Hamlets and wished to take comfort breaks in his own home, rather than return to the depot in Victoria. To do so he would wish to park the company vehicle, and therefore, needed a parking permit. The claimant accepts that he applied for the parking permits, not the respondent. He first applied in 2017. The claimant paid for all parking permits. He renewed the parking permits yearly. The respondent did not pay for the permits. The respondent did not reimburse him. After concluding his cross-examination of Mr Hussain, and during his own evidence, the claimant made an accusation which had not hitherto been made, namely that he obtained the parking permit for Mr Hussain, who then used it for his own purposes. I allowed the claimant to recall Mr Hussain to put the accusation to him, which he denied. I find this is another example of the claimant inventing allegations in order to bolster an unconvincing argument.
- 7.37 I have seen a number of text messages which the claimant says supports his view that the permits were obtained for Mr Hussain. In my view they do not.
- 7.38 The claimant has indicated that he did not need a parking permit because he is a carer for his mother and she had a disabled parking permit. However, it was clear, even on the claimant's own evidence, that such a permit would only be used for the benefit of his mother. It could not be used in a work context.
- 7.39 I have no doubt the claimant obtained a multi vehicle parking permit for his own use. In no sense whatsoever was the respondent acting fraudulently by confirming the claimant was employed and drove multi vehicles.
- 7.40 The claimant also alleges that the respondent acted fraudulently in relation to the receipt of PCNs (parking charge notices). I received little detail of the PCNs in this case. PCNs are generally requests for damages for breach of contract when an individual parks on private property, or penalties for breach of parking restrictions in restricted public areas. There is an appeal process. It is the driver of the vehicle that is primarily responsible. I have seen a number of pro forma letters, which the respondent has written, in relation to several PCNs. The letters explain the circumstances whereby vehicles may be responding to emergency calls. There is no reason why the respondent should not write such letters. There is no evidence of to suggest any letter was anything other

than truthful. They may or may not have led to the PCNs being overturned. There is no evidence whatsoever that false police names and numbers were given at any time.

- 7.41 The claimant makes a general allegation that the respondent altered KVR response times. The respondent has contracts with third parties, including the DWP. Some contracts provide for response time within a certain period. The claimant has produced no evidence demonstrating any falsification, or when that occurred. I cannot rule out the possibility that it did occur. However, the claimant has not established, on the balance of probability, any single occurrence, and that is a matter I can have regard to when considering whether any information was disclosed or any disclosure was made in the public interest or whether the claimant could reasonably believe it tended to show a relevant failure.
- 7.42 Did the claimant disclose information? It is unclear what the claimant asserts he disclosed in 2017. I do not accept on the balance of probability that he gave information to Mr Chowdhury. His case is that he disclosed information concerning the fraudulent activity of the respondent in relation to multi-vehicle permits. However, there was no fraudulent activity. It followed there is no underlying information to be disclosed. What the claimant says is the information remains unclear.
- 7.43 What is said to be the information in 2020 is entirely obscure. Viewed one way, there may have been information, in the sense that there were a number of letters which appealed, or supported appeals, against PCNs. However, the information relied on by the claimant is not the fact of letters, but the falsification. The basis for that is not set out in his evidence.
- 7.44 On 3 April 2021, the claimant filed a grievance. I considered whether there is information on that. The claimant failed to set out in his claim form, or in his further particulars, or in his evidence, what he alleges to be the information. I considered the letter carefully. I particularly considered the areas of alleged disclosures outlined above. There are a number of assertions of fraudulent practices. However, an assertion of fraud is not a disclosure of information. I can see no disclosure of information which could amount to a protected disclosure.
- 7.45 In any event, even if there was a disclose information, it is still necessary to consider whether any disclosure is protected. The information must tend to show one of the relevant failures and it does not support a finding that the claimant reasonably believed it showed a relevant failure. The claimant generally asserts fraud or breach of contract. If I am wrong and there is information, it is difficult to see how that information tends to show any of the relevant failures. In any event, the information must in the reasonable belief of the worker making the disclosure be made in the public interest and must tend to show one of the failures.
- 7.46 As regards the disclosures in 2017 and 2020, the evidence is very poor. The claimant alleges fraud by Mr Hussain. However, the evidence is the

claimant obtained the multiple vehicle parking permit for his own use. He had no basis for believing there was a failure on the part of Mr Hussain, and therefore he could not reasonably believe that any disclosure demonstrated the likelihood of Mr Hussain breaching contract or committing fraud. Further, in 2020, the mere allegation of fraudulent appeals is not based on information which he he could reasonably believe demonstrated any form of failure. The letters produced clearly show proper supporting information produced in support of appeals.

- 7.47 As to the 3 April 2021 alleged disclosure, I note there is a failure to give information on the nature of the allegation that would demonstrate he reasonably believed there was information which tended to show a relevant failure.
- 7.48 It is also necessary to consider whether it was made in the public interest. It is necessary to consider both the timing of the alleged disclosures, and also the timing of the allegations before this tribunal. I am satisfied that the claimant filed his grievance on 3 April to bolster his position in relation to a disciplinary process when he knew that his behaviour was culpable and likely to lead to his dismissal. This was a transparent attempt to distract from his own blameworthy conduct by raising a false allegation. In these circumstances the raising of a false allegation was a deliberate ploy to draw attention away from his own misconduct. It was not made in the public interest at all. As regards the previous alleged disclosures, it is instructive to consider when they been raised during these proceedings. It seems to me they have been added to bolster a very weak claim. On the balance of probability, whatever he did at the time, it was not in the public interest.
- 7.49 I therefore find that there are no protected disclosures.
- 7.50 Even if I were wrong in that, it would still be necessary to find that one of the alleged protected disclosure was the sole or principal reason for dismissal. I am satisfied that Mr Jones knew nothing of the alleged disclosures in 2017, 2020, or 2021. He did not know the claimant had filed a grievance. He had not read it. He had no reason to believe the claimant had made, or would make, any protected disclosure. So, the principal reason for the claimant's dismissal was the claimant's misconduct on 25 February 2021 and then his culpable behaviour in misleading the respondent thereafter.
- 7.51 I note that Mr Taylor-Smith did know about the grievance. I am satisfied that any disclosure played no part in his decision. In any event, the claimant had already been dismissed by the time Mr Taylor-Smith considered the appeal. He dismissed the appeal because he came to the same conclusions as Mr Jones, based on the same reasons. I am therefore satisfied that any protected disclosure played no part in his decision. However, even if it had, as the dismissal already occurred, I doubt the Mr Taylor-Smith can be said to dismiss for the purpose of

section 103A. I do not need to decide that point in any event, as the reason for dismissal is clearly established by the respondent.

- 7.52 For all the reasons I have given the claims of unfair dismissal automatic and for dismissal are dismissed.

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Employment Judge Hodgson

Dated: 7 March 2023

Sent to the parties on:

.07/03/2023

For the Tribunal Office