EMPLOYMENT TRIBUNALS

Claimant: **Mr W Allard**

Respondent: **Govia Thameslink Railway Limited**

Heard at: **London South (Croydon) via CVP** **On: 4/1/2023 to 9/1/2023**

Before: **Employment Judge Wright**
Mr M Cann
Mr S Sheath

Representation:
Claimant: **In person**

Respondent: **Ms L Bell - counsel**

LIABILITY JUDGMENT

It is the unanimous Judgment of the Tribunal that the claimant's claims of unfair dismissal and automatic unfair dismissal fail and are dismissed.

REASONS

1. Oral reasons were given on 9/1/2023 and in accordance with Rule 62(3)[1] the claimant requested written reasons at the hearing those reasons are accordingly provided.

2. The claimant presented a claim form on 18/9/2018 following a period of early conciliation which started on 21/7/2018 and ended on 21/8/2018. The claimant was employed by the respondent as a Service Engineer Level 1 from 21/10/2013 until his employment terminated on 27/4/2018.

3. It has taken an unfortunately and unreasonably long time for the final hearing of this case. A preliminary hearing took place on 21/5/2019 and listed the case for a final hearing on 7/9/2020. A further preliminary hearing took place on 3/7/2020. At the claimant's request and following the withdrawal of his legal representation, the final hearing on 7/9/2020 was postponed. The final hearing was re-listed for 23/8/2021, that hearing was then postponed, it seems due to lack of judicial resources. On 27/1/2022 this final hearing was listed.

4. The claimant's claims are: unfair dismissal contrary to s. 94 Employment Rights Act 1996 (ERA); automatic unfair dismissal for health and safety reasons contrary to s. 100(1)(c) ERA; detriments contrary to s. 47B ERA; and automatic unfair dismissal contrary to s.103A ERA.

5. The claimant was initially legally represented, including by counsel at the two preliminary hearings, until 5/8/2020 when his representatives withdrew.

6. In view of the fact this claim was first listed for a final hearing to take place on 7/9/2020, there was an unsatisfactory late flurry of paperwork sent to the Tribunal.

7. The respondent accepted at the outset of the hearing that the claimant made three protected disclosures, however, it does not accept he was subjected to any detriments or that the dismissal was unfair (whether automatically or generally).

8. Various applications were made at the outset of the hearing. The claimant applied for documents to be added to the bundle. The respondent had objected on the basis that the documents were duplicates or privileged (eg advice to the claimant from his representatives). At the hearing, the respondent took the sensible approach and notwithstanding its objections, suggest the documents were added to the end of the bundle. That application was allowed; however it is noted that the claimant did not in

[1] The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1.

fact refer to any of those documents either in his evidence or when questioning the respondent's witnesses.

9. The respondent made an application in respect of late disclosure. The respondent had disclosed 57 additional documents at 9:46am on the morning of the first day of the hearing. The respondent's explanation was that it had carried out a further search for documents following a witness' conference with counsel the previous day. That application was refused. It is unreasonable for a party which has been legally represented throughout the process to disclose documents so late. It is unreasonable to expect the claimant to read and absorb these documents, when the hearing was due to start in 14 minutes and when he would be giving evidence later on that day and then (in all likelihood) be under a restriction until his evidence ended.

10. The claimant applied for two transcripts of meetings to be added to the bundle. The respondent objected. The responded had received a transcript of the appeal hearing, but not the sound file. The respondent said it was prepared to accept the transcript, if it could be verified against the sound file. The respondent had asked for the sound file, but it had not been provided (this may have been at the time the claimant was legally represented). It was not clear which other meeting had been recorded. That application was refused. The appeal hearing was not relevant to the matters the Tribunal was to determine. In respect of the other transcript/recording, it was now too late to disclose it to the respondent. The claimant was obliged to disclose all documentation (including sound files) to the respondent. If the recording was of a meeting which took place during his employment, then the document existed at the outset of this litigation and it should have been disclosed to the respondent on the 22/7/2019, not on the first day of the hearing. On the second day, the claimant applied for a reconsideration of this decision. In reality he was re-making his application and as such, there was no prospect of the original decision being varied or revoked. The reconsideration was unsuccessful.

11. The claimant also stated that the respondent had been Ordered to calculate his pension loss and his loss of travel benefits upon his behalf. The respondent disputed this. The claimant forwarded an email from his solicitor where it was stated:

> *'I am informed that at the Preliminary Hearing of 21 May 2019 your client was directed to calculate the free travel and pension losses for my client, but these do not appear to have been calculated in your Counter Schedule of Loss. Please provide calculations for my client's losses to date and future losses.'*

12. In fact, the Order following the preliminary hearing on 21/5/2019 the Order recorded (page 41):

> *'There will need to be careful calculations regarding any pension loss since the Claimant was in a final salary scheme.'*

13. The Tribunal did not therefore accept the respondent had been ordered to provide any calculations.

14. The claimant had previously applied for Witness Orders in respect of his five witnesses. That application had been refused; however, the claimant was informed he could revisit this at the outset of the hearing. Prior to this it was discussed that the Tribunal did not need to hear from the claimant's witnesses as their evidence did not assist it in the matters which it had to determine. The claimant then applied for Witness Orders for all his witnesses. He said that he had contact details for them, but that he had not been in touch with them for a long time (the statements were dated July 2021). That application was refused. The Tribunal had already indicated that the witnesses' evidence was not of assistance.

15. The format of the hearing was contentious. At the preliminary hearing on 3/7/2020 it was noted that it would be a hybrid hearing, with some witnesses giving evidence remotely. The respondent applied for the entire hearing to be converted to CVP, in particular due to the fact there was a national rail strike due to take place on the first three days of the hearing. The claimant objected to this. The first day of the hearing was converted to CVP and on the first day, the future format was considered. The claimant wished to attend the Tribunal in person and he did so. The hearing was then conducted via CVP. On the fourth day of the hearing, when the panel were deliberating, the claimant agreed that it would be practical for him to attend from home, via CVP while oral judgment was delivered.

16. The Tribunal heard evidence from the claimant. He produced other witness statements for: Anthony Print; Dale Pillar; Malcom Hadlum; Paul Ware; and Phillip Rolt. The application for a witness order for those witnesses was refused.

17. The respondent called eight witnesses. They were: Andrew Bourne; Andy Cordwell; David McDermott; Alan Lucas; Danial Terry; David Robinson; Paul Richardson; and David Poole.

18. There was an electronic and hard copy bundle of 699-pages, plus the claimant's additional 44-pages. Documents were added to the bundle if the application to include them was successful. Some documents in the

bundle were illegible (page 220). The Tribunal only considered the documents to which it was expressly referred.

19. On day three, Ms Bell provided a 10-page closing submission and made a short oral supplementary submission. The claimant made an oral submission. Although not expressly set out in this Judgment, the submissions were considered and applied.

20. A list of issues had been agreed whilst the claimant was legally represented and it was confirmed the list was still accurate. The six detriments relied upon are:

> *(a) being placed on a D exam on the 6th October 2017;*
>
> *(b) being requested by his Shift Leader, Mr Dave Robinson, on the 5th October 2017 to sign off a job he had not done;*
>
> *(c) being the refused the right to be accompanied to a disciplinary investigation meeting on the 3rd January 2018;*
>
> *(d) being harassment and shouted at by Mr Alan Lucas, Team Leader, on the 3rd January 2018;*
>
> *(e) being put through the sickness absence process prior to his dismissal at Stage 4 on the 27th April 2018;*
>
> *(f) failing to properly process his grievance dated the 12th February 2018.*

21. The three protected disclosures were:

> *(1) on or around the 20th September 2017 to Mr Andrew Cordell, the Respondent's Safety Manager, via Mr Tony Print, the Claimant's RMT Representative;*
>
> *(2) on the 1st October 2017 to the Health & Safety Executive; and*
>
> *(3) in or around mid October 2017 to the Office of Road and Rail.*

22. Mr Print the claimant's Trade Union representative provided a witness statement, he did not however, advance any evidence in respect of the disclosure. Notwithstanding that, Mr Cordwell accepted (his witness statement paragraph 14) that Mr Print had spoken to him and made the disclosure on behalf of the claimant.

23. There was no evidence provided of the second and third disclosures, however, there was correspondence to the claimant from the HSE dated 13/10/2017 (informing him that the Office of Rail and Road (ORR) had enforcement responsibility (page 240). The ORR contacted the claimant

on the 6/12/2017 (page 253) and apologised for it taking so long to reach the HM Inspector of Railways.

24. The respondent had provided its running order of its witnesses and the comment was made that irrespective of that, the order was a matter for it and there may be late changes depending upon the individual's circumstances. The claimant's evidence completed at approximately 11:30am on day two. After a break, the Tribunal had heard from three witnesses before the lunch adjournment at 12:50pm. Ms Bell highlighted that one witness was not available the following day as he would be attending a funeral, therefore it was proposed that the Tribunal would hear from him after lunch to ensure his evidence was completed that day[2]. Over the lunch adjournment, Ms Bell informed all parties that there was an error and that Mr Richards[son] was at a funeral that day. He would therefore give his evidence the following day.

25. When the hearing resumed after lunch, this was discussed, the result was that the respondent was not diverting from its proposed running order of witnesses. The claimant then stated that he had spent the lunch break preparing his questions for Mr Richardson as he understood he would be the respondent's next witness. He said that he was not prepared to question the next witness. The claimant said he had been ill for years and had only recovered to some extent in the last three months.

26. It was observed that the claimant had been legally represented until August 2020. The witness statements which were signed were dated July 2021. There was no medical evidence and the claimant had not applied for a postponement due to any lack of preparation. The respondent's eight witness statements in total comprised of 41-pages. There was no reason for the claimant to have left his preparation until the lunchbreak.

27. After the evidence and submissions had concluded, the claimant sent an email attaching medical records of other employees which the respondent had been ordered to disclose. Despite the fact these documents had been disclosed to his solicitors on the 8/7/2020, they were not referred to in his witness statement. The claimant did not refer to them in his questions and only briefly mentioned then in his closing submissions. The records did not assist the Tribunal as it did not know the circumstances of the employees, nor the reasons for the absences. Finally, the claimant did not raise any comparators or differences in treatment in either the dismissal or appeal meetings.

[2] In any event, there was confusion over which witness it was. There was a Mr Robinson (this was the witness the Tribunal under the impression was attending a funeral) and a Mr Richardson. Mr Richardson was on the list of witnesses as Mr Richards. It was Mr Ricardson who was attending a funeral.

28. There were other matters which the claimant was clearly aggrieved about. They were not matters over which this Tribunal had jurisdiction and therefore, they were not relevant and were not considered. One matter, was the claimant's dispute with his Trade Union (including a ballot which the Trade Union held) and the Trade Union's solicitors who were instructed to represent him. Although the claimant referenced those matters, they were not considered as they were not relevant.

Findings of fact

29. The background to the claimant's absences from work started with the first absence which triggered Stage 1 of the respondent's Managing For Attendance (MFA) procedure (page 87) on 15/11/2015. The reason for his absence was a foot problem - plantar fasciitis. Between then and his dismissal on 27/4/2018 the claimant was absent from work for 123 days (excluding rest days). Applying an annual working pattern of 260 working days per year (which does not necessarily apply to the claimant due to his shift work), he was absent for at least approximately 14% of working time.

30. This resulted in the respondent commencing the MFA in respect of the claimant and it held a meeting on 20/1/2016. It was decided that no further action would be taken (page 123).

31. On the 29/3/2016 the claimant was placed on Stage 1 of the MFA due to his attendance causing concern (page 147). Again the reason for his absence was the foot problem.

32. The claimant had two more periods of absence from work between 17/6/2016 to 20/6/2016 and 12/10/2016 to 16/10/2016, however no further action was taken by the respondent.

33. The claimant was absent with a chest infection between 12/12/2016 to 22/12/2016. When this was put to him in cross-examination, the claimant said he had flu for which he took Amoxicillin. He resiled from fact he had a chest infection in December 2016 and he stated that the the GP's Statement of Fitness for Work had been 'doctored'. If he were making that allegation he was invited to provide a further copy of the certificate to highlight the difference. The respondent was directed to provide a copy of the bundle to the claimant by the 17/7/2020 and a further hard copy had more recently been provided. The claimant said that he had not read the bundle. That was surprising in view of the fact this is his claim and he is expected to actively pursue it. If the claimant chooses not to read the documentation, he is at risk of not being able to properly represent himself. There is nothing the respondent or the Tribunal can do about that.

34. In fact the claimant's own evidence (his witness statement paragraph 6) said that he was absent with a chest infection. His self-certification form said 'flu that developed into a chest infection' (page 170). The GP certificates stated the cause of absence was on 16/12/2016 'Chest Infection' (page 166) and on 30/12/2016 as 'Left flank pain' (page 179). Whatever the claimant now says, the Tribunal finds that he did have a chest infection in December 2016.

35. The end result of that was that following an interview on 22/12/2016 the claimant was placed on Stage 2 of the MFA procedure (page 177).

36. The claimant returned to work, but was then again absent from work, being taken home during his shift on the 3/1/2017 to 4/1/2017.

37. The background to the claimant's disclosures is that on his account, on the night of the 3/1/2017 to 4/1/2017 as part of his work, he used a chemical which contained Dichloromethane Methanol (DCM), rather than Nitromors paint stripper. The claimant made various allegations in respect of this, however ultimately the ORR took no further action. The ORR report made recommendations and concluded that the actual risk to the health of the employees in the circumstances in which the product was used was low (page 461). The respondent commissioned a report from SOCOTEC (page 344) which concluded:

> 'Monitoring revealed that airborne exposure to dichloromethane was significantly below the workplace exposure limit (350 mg/m3 8-hr TWA) for the individual undertaking the task, based on 1 hour of exposure in a working day (at 6.17% of the WEL). However, exposure approached 50% of the WEL based on 8 hours of exposure in a working day. Based on the results from this exposure assessment, personnel applying this DCM containing product in line with the GTR maintenance procedure (which was carried out during this assessment) are unlikely to be exposed to any significant levels of DCM via inhalation during a typical application time of approx. 1 hour.'

38. The report also recommended at 9.1 (page 384):

> 'Although the monitoring results indicated that exposure to dichloromethane arising from the task was insignificant based on typical 1 hour of exposure in a working day, the employer should still continue to apply the eight principles of good practice for the control of substances hazardous to health (see 5.2.1) if dichloromethane containing products continue to be used. To maintain low exposures the procedure should remain the same with the product being applied in small quantities by brush (i.e. avoid spraying) and over a short period of time with appropriate PPE in use.'

39. The Tribunal makes no findings about the use of this chemical (and on other occasions which the claimant said preceded it and post-dated it). It is only relevant to the extent that it led to the protected disclosures.

40. The claimant said that his frustration with the lack of response by the respondent to this situation led to him making a disclosure on the 20/9/2017. That in turn, he said led to the detriments he was subjected to.

41. The claimant claims he went to hospital after he arrived home on the 4/1/2017, however he did not provide any evidence in respect of this visit. There is a GP certificate dated 4/1/2017 which certified the claimant as unfit for work on 4/1/2017 to 18/1/2017 due to 'chest wall pain' (page 185).

42. The claimant was referred to OH on 11/1/2017 (page 186). That report referred to his foot problem, which stated the symptoms were 'manageable'. The report went onto say:

> 'Additionally he has recently had a chest infection and he presented today in our consultation with persistent rib pain for the past few weeks. Has been signed off by his GP till 18th January and I would advise till that date to remain off. I anticipate that afterwards he will be able to return to work but he should refrain from heavy tasks and be helped when difficulties are met for four weeks.'

43. OH deemed the claimant to be 'F2 Fit with Limitations Temp'.

44. Following this the claimant's GP certified him as unfit for work on 18/1/2017 to 25/1/2017 due to 'Cough, wheezing and shortness of breathe' (page 187). On the 24/1/2017 his GP certified him as unfit for work until the 7/2/2017 due to 'lower respiratory tract infection' (page 188).

45. The claimant was re-referred to OH on 7/2/2017 (page 189). OH again deemed the claimant to be 'F2 Fit with Limitations Temp'. Apart from flexibility to attend appointments in respect of investigations into his condition, OH said he can return to full contractual hours and roster, with short breaks. OH wanted an update in three weeks time to decide whether to see the claimant again.

46. The claimant self-certified on 8/2/2017 stating that his condition was chest pain and fever, flu symptoms (page 190).

47. On 9/2/2017 Mr McDermott invited the claimant to a meeting under Stage 3 of the MFA procedure (page 193). The meeting took place on 21/2/2017 and Mr McDermott decided no further action was needed. Mr McDermott was of the view that the absence was linked to the previous sickness absence and that the claimant had returned to work too soon. The

claimant refused to sign the note of the outcome (page 199). The outcome was confirmed in writing on 23/2/2017 (page 205).

48. There was a referral to OH on 31/5/2017 (page 206), but no further absence until July 2017.

49. The claimant reported as unfit for work on 8/7/2017 due to 'cough – suspected allergic asthma' (page 208). He saw his GP on the 14/7/2017 and he was certified as unfit for work from 8/7/2017 to 4/8/2017 due to 'cough – suspected allergic asthma' (page 209).

50. A return to work interview was conducted on 7/8/2017 (page 211) and as a result of this absence, the claimant was invited to a Stage 3 meeting under the MFA (page 214). As the claimant's desired TU representative was not available, the meeting was rearranged and it took place on 18/9/2017 (page 225). The outcome of that meeting was that the claimant was placed on Stage 3 of the MFA. That outcome was confirmed in writing on 19/9/2017 (page 238).

51. Prior to that meeting the claimant was referred to OH on the 8/9/2017 (page 219). He was again certified as 'F2 Fit with Limitations Temp' (page 218). He was also referred to OH on 2/10/2017 for a physiotherapy appointment in respect of his foot issue. That assessment recorded him as 'F1 Fit for Normal Duty' (page 239). The claimant was not able to see OH on the 19/10/2017 as he was late for his appointment (page 241).

52. On the 20/9/2017 the respondent accepted the claimant's Trade Union (TU) representative made a protected disclosure Mr Cordwell in respect of the product containing DCM being on site. The respondent also accepted the claimant made a protected disclosure to the HSE on 1/10/2017 and to the ORR at some point in October 2017.

53. It is the claimant's case that this led to him suffering from six detriments.

54. The first was on the 5/10/2017[3], that he was asked to sign off a report, for an inspection which he had not carried out (called a '620') by Mr Robinson.

55. The claimant's case was that Mr Robinson's request was bullying him to find something to dismiss him for. What that fails to acknowledge is that when Mr Robinson asked the claimant to sign the report and he refused, there were no consequences. There was no disciplinary action taken and there was not even an investigation.

[3] 8b on the list of issues.

56. The respondent's position was that the claimant had carried out a far more extensive investigation and that as a result of that, it was permissible to ask him to sign the 620 report.

57. The Tribunal finds the claimant was asked to sign the 620 report and he refused to do so. That is the extent of the matter. There is no link to the protected disclosure made on the 20/9/2017.

58. The second allegation was that he was asked to carry out a type of inspection (a 'D exam') on a train on 6/10/2017[4] by Mr Lucas. He said this isolated him and prevented him from talking about his concerns to his colleagues.

59. The Tribunal finds the claimant was qualified to carry out the D exam and that there was nothing untoward in Mr Lucas asking him to do so. It may well have been that it was an examination which he needed to carry out on his own, but that does not necessarily result in him being isolated. There was no evidence from the claimant that he was prevented from talking to his colleagues. Certainly, as will be seen with the following incident on the 3/1/2018, the claimant was assertive and if he wished to do so, he would call his TU representative or indeed, contact another manager such as Mr McDermott.

60. When the claimant made the second disclosure to the HSE on the 1/10/2017, it contacted him on the 13/10/2017 and informed him the ORR had enforcement responsibility (page 240). It is not clear when the claimant contacted the ORR (his third disclosure). Presumably it must have been after he received the email from the HSE. The claimant has not suggested how Mr Lucas or Mr Robinson knew of the disclosure made on 20/9/2017. He referred in his questioning to all the Managers knowing about the allegation in respect of DCM, he did not however substantiate his assertion. For example, the Tribunal was told that Mr Poole did not move into the area until late February/early March 2018 and he said he was not aware of the allegation at the time it was raised.

61. The claimant saw OH again on the 1/12/2017 (page 249). In the report, OH noted that the claimant informed the Consultant Occupational Physician that he had been exposed to Dichloromethane Methanol (DCM) and not a Nitromors paint stripper. OH noted that the claimant was being investigated by chest and liver specialists at the Royal London Hospital and was awaiting the outcome of that referral (page 250).

62. In December 2017 an incident came to Mr Lucas' attention. A train carriage had the Brake Isolation Cock left isolated when put back into

[4] 8a on the list of issues.

service. This mean that the train did not have any brakes working on that carriage whilst in use. The claimant and other engineers were the last people to work on that train and Mr Lucas was asked to investigate.

63. On the 3/1/2018 Mr Lucas spoke to the claimant and asked him to attend an initial investigation meeting during his shift. This was the third alleged detriment[5]. The claimant wanted to be accompanied by a TU representative. Mr Lucas wished to check whether this would be permitted and contacted Mr McDermott. Mr McDermott informed Mr Lucas that as it was not a disciplinary hearing and was a fact finding interview, there was no right to be accompanied.

64. Mr Lucas explained the respondent's position to the claimant with the result that he became agitated. Mr Lucas decided not to interview him at this stage and asked the claimant to return to work. The respondent did not on this occasion allow the claimant to be accompanied, however, the meeting did not take place. In fact it did not take place until 22/2/2018 when the claimant was accompanied by his TU representative (page 285). The end result was that there was no case to answer by the claimant and the matter ended there. Clearly, had the respondent wanted to be difficult, it could have pursued this matter; however it did not.

65. It should be noted that this was against a backdrop of an on-going dispute between the respondent and the TU as to whether an employee can be represented at an investigation meeting (page 315).

66. If there was any detriment to the claimant, it was extremely minimal and transitory. In any event, Mr Lucas' decision was not linked to any protected disclosure, it was due to the on-going dispute.

67. During that shift, Mr Lucas was aware the claimant had called his TU representative. As Mr Lucas had decided not to meet with the claimant at that time, he asked him to return to his duties. Mr Lucas became frustrated that the claimant would not do so, particularly as he had informed the claimant that the meeting would not now go ahead. Mr Lucas accepts he raised his voice at the claimant and that the claimant had done the same. This was the fourth[6] detriment claimed.

68. The Tribunal finds that there were raised voices, which may have amounted to shouting. The reason for that however, was Mr Lucas' frustration with the claimant in continuing to speak to his TU representative, when he had made it clear the meeting was no longer

[5] 8c on the list of issues.

[6] 8d on the list of issues.

going to take place and when he had asked the claimant to return to his duties.

69. The claimant was certified as unfit for work on 4/1/2018 to 18/1/2018 due to 'stress at work' (page 259). He was referred to OH and had a consultation on 1/2/2018 (page 278). The outcome was that he was fit to attend the investigation meeting (with the recommendation that he be accompanied), that an independent manager be appointed to discuss the claimant's work issues which were causing him stress and that he continue to work on restricted duties (no safety critical duties and to be accompanied). OH wanted to have a further review once the specialist report was received (as referred to on the 1/12/2017 (page 277)).

70. The claimant raised a grievance in February 2018[7] (page 291-296). On 12/3/2018 he was invited to an investigation meeting on 23/3/2018 and informed of his right to be accompanied (page 297).

71. In respect of his sickness absence, the claimant was invited to a Stage 4 meeting under the MFA on 19/3/2018 (page 300). The meeting was originally scheduled for the 9/4/2018, however, due to the claimant informing Mr Richardson that his TU representative was unavailable, it was rescheduled to the 27/4/2018 (page 321).

72. In the meantime, Mr Watts met with the claimant to discuss his grievance on 23/3/2018 (page 301). The meeting lasted from 9:49am until 12:01pm. The notes of the meeting were sent to the claimant on the 13/4/2018 (page 326). Mr Watts also met with Mr Terry on 11/6/2018 (page 395). Mr Watts did not uphold the grievance and his seven-page letter is dated 16/7/2018 (page 416).

73. On the 27/4/2018 Mr Richardson wrote to the claimant with the outcome of the Stage 4 MFA meeting (page 338). Mr Richardson confirmed the decision to terminate the claimant's employment with effect from 27/4/2018 due to unacceptable levels of attendance.

74. The claimant appealed that decision on 30/4/2018 (page 339). On 4/6/2018 the respondent confirmed to the claimant the appeal hearing would take place on 19/6/2018 and that it would arrange for the claimant's TU representative to be released for the meeting (page 394). Mr Poole's appeal outcome was sent to the claimant on the 20/6/2018 and he upheld the decision to terminate the claimant's employment (page 413).

The Law

[7] There is no date in February given.

75. Ms Bell set out the law on dismissal under sections 98, 100 and 103A ERA 1996 and firstly dealt with the reason for dismissal.

76. The Tribunal must determine what the real reason for the claimant's dismissal was. Although the respondent has characterised the reason for dismissal as capability in its Grounds of Resistance (page 36), where an employee is dismissed for failing to meet attendance targets following warnings to that effect, or failing to comply with an attendance procedure that has been clearly communicated to the employee, the legal characterisation may be 'some other substantial reason' (section 98(1)(b)) (Wilson v Post Office [2000] IRLR 834, and Ridge v HM Land Registry [2014] UKEAT/0485/12). What is key is what was at the forefront of the employer's mind. It is not fatal that a respondent attaches the wrong legal label, as the Tribunal can substitute another potentially fair reason and still go on to find the dismissal fair.

77. Was the dismissal fair in all the circumstances of the case (s. 98(4) ERA 1996)?

78. Section 98(4) of the ERA 1996 provides that:

> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer:
>
> > (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
> >
> > (b) shall be determined in accordance with the equity and the substantial merits of the case.

79. In Lynock v Cereal Packaging Ltd [1988] IRLR 510, the EAT (Wood J presiding) described the appropriate response of an employer faced with a series of intermittent absences as follows:

> "The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment—sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own fact, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following—the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need

> of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching. These, we emphasise, are not cases for disciplinary approaches; these are for approaches of understanding."

80. In Lyncock, the Tribunal relied upon International Sports Co Ltd v Thompson [1980] IRLR 340, in which the Court of Appeal held that the proper approach in such cases is to:

    a. Review the pattern of absences and the reason for them.

    b. Warn the employee of the required improvement in attendance, giving them the chance to make representations.

    c. Consider whether there is the required improvement in attendance; if there is not, dismissal is likely to be reasonable.

81. A dismissal in line with a clear and well notified policy will not normally be unfair (Kelly v Royal Mail Group Ltd UKEAT/0262/18 (11 June 2019, unreported).

82. Where it is found that an employee's ill health is caused by the employer's treatment, it might justify a tribunal requiring the employer to demonstrate extra concern before implementing a dismissal, but this remains a question of fact (McAdie v Royal Bank of Scotland [2007] IRLR 895). This McAdie principle applies not just to cases where the employer's conduct has caused the illness, but also where that conduct has exacerbated it. This does not mean however that a culpable employer can never dismiss a missing employee. A balance must be struck. Where an employee has received a final written warning, it is not uncommon for them to try and argue that the earlier warning had been unfairly given and that the employer should have ignored it and therefore not dismissed the employee. However, there are limits to the extent to which an employer can be expected to revisit what has taken place at an earlier stage in the process. In the context of misconduct dismissals, the Court of Appeal has held that the test is whether it is reasonable for the employer to treat the misconduct, taken with all the circumstances including the final written warning, as sufficient reason to dismiss. In answering that question it is not the tribunal's function to re-open the final warning; it is merely to determine whether the warning is a circumstance which a reasonable employer could reasonably take into account. Relevant factors will be whether the warning was issued in good faith, whether there were prima

facie grounds for giving it, and whether it was manifestly inappropriate (Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374). The EAT has held that the same reasoning should also apply to warnings given in other types of case, including capability (General Dynamics Information Technology Ltd v Carranza UKEAT/0107/14). That case involved a dismissal for repeated sickness absence following a final written warning.

83. The Tribunal should be careful to fall into the substitution mindset. As with misconduct cases, an employer is to be judged by whether it acted within the range of reasonable responses.

84. In respect of the detriments, Ms Bell set out the law as follows by reference to s. 47B ERA 1996.

85. The correct approach is to ask first whether the respondent in fact treated the claimant differently from an actual or hypothetical comparator. Second, whether the reason for that different treatment (by act or omission) was the claimant's protected disclosures. Third, whether that different treatment did in fact result in a detriment to the claimant (consciously or otherwise).

86. The reason for an act or omission is a set of facts known to the employer or it may be the beliefs held by him, which cause him to act or refrain from acting (Abernethy v Mott Hay and Anderson [1974] IRLR 213, per Cairns LJ). It is necessary to consider the mental processes both conscious and unconscious of the employer.

87. The burden of proof is on the employer to prove on the balance of probabilities that the act, or deliberate failure, complained of was not on the grounds that the employee had done the protected act; meaning that the protected act did not materially influence (in the sense of being more than a trivial influence) the employer's treatment of the employee (Fecitt v NHS Manchester [2012] IRLR 64, CA). Therefore, if the employer fails to prove that the act, or deliberate failure, complained of was not on the prohibited grounds, the question or issue must be determined in favour of the employee.

88. The word detriment is to be given a wide interpretation. The Court of Appeal in Jesudason v Alder Hay Children's NHS Foundation Trust [2020] IRLR 374, held that (paras 27-28):

> "In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well

established in discrimination law and it has the same meaning in whistle-blowing cases. In Derbyshire v St. Helens MBC [2007] UKHL 16; [2007] ICR 841, paras. 67-68 Lord Neuberger described the position thus:

""…. In that connection, Brightman LJ said in Ministry of Defence v Jeremiah [1980] ICR 13 at 31A that 'a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment'.

That observation was cited with apparent approval by Lord Hoffmann in Khan [2001] ICR 1065, para 53. More recently it has been cited with approved [sic] in your Lordships' House in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of 'materiality', also said that an 'unjustified sense of grievance cannot amount to "detriment"'. In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: 'If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice'.""

Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective."

Conclusions

89. It is noted that the claimant had the benefit of representation from his TU throughout. He was also represented by the TU's solicitors until 5/8/2020.

90. The claimant has advanced a breach of s.100 (1)(c) ERA, the health and safety claim. He did not advance any particular evidence in respect of this claim. It is also difficult to see how the case could be made out in view of the fact that there was a health and safety representative and the claimant's own TU representative was also a health and safety representative. Furthermore, the claimant did bring his concerns to his TU representative who passed them onto Mr Cordwell. The facts simply do not come within either s. 100 (1)(c) in respect of either (i) or (ii).

91. When considering the fairness or otherwise of the dismissal, the Tribunal has to consider the reason for the dismissal, which it found to be some other substantial reason. The respondent therefore had a potentially fair reason for dismissal.

92. The Tribunal must not substitute its view as to what sanction is appropriate in these circumstances. There is sympathy for the claimant in being dismissed due to his unacceptable levels of attendance. The claimant suggested managment should have exercised discretion and not dismissed him because of his poor attendance record. He said the poor attendance arose because of an industrial accident or injury while working for the respondent. The respondent could not identify any proven link between the claimant using paintstripper containing DCM and his absence, or that his foot probem arose from a failure to provide appropriate footwear. Nor could the Tirbual identify such a link. The claimant provided no medical evidence to show his absence arose from an accident or injury.

93. The Tribunal finds the decision to dismiss did fall within the range of reasonable responses open to this respondent, taking into account its size and the administrative resources available. Although not obliged to, the respondent did canvass altherative roles with the claimant, however, he did not wish to pursue any alternative. The Tribunal is satisfied in all the circumstances, the respondent was justified in dismissing for that reason.

94. In respect of the equity and the substantial merits of the case, the Tribunal was satisfied that the respondent had exercised its discretion when applying the MFA process. The process was extended and the respondent did not simply move on through each stage. It supported the claimant, referred him to OH and gave him every opportunity to provide an acceptable level of attendance.

95. The claimant said the dismissal was unfair due to a lack of medical prognosis. The respondent did not refer the claimant to OH at the time of the dismissal, however, the claimant was not absent at that time. Ms Bell referred to the authority of International Sports Co Ltd v Thomson 1980 IRLR 340. Dismissal for persistent absentism is potentailly within the range of reasonable responses open to a respondent. There comes a point when a respondent is entitled to say ‘enough is enough’ as long as warnings have been given. The respondent should: carry out a fair review of the attendance record and the reasons for the absence; give the employee the opportunity to make representations; and give appropriate warnings of dismissal if things do not improve. It would place too heavy a burden on the respondent to require it to carry out a formal medical invesitgation and given the transiant nuture of the symptoms and complaints, it would rarely be fruitful.

96. The claimant’s dismissal was therefore fair and his claim that it was unfair contrary to s. 94 ERA is dismissed.

97. Turing to the protected disclosure detriments. Mr Robinson asked the claimant to sign off a job and he refused to do so. The Tribunal finds this is nothing more than a normal request in the ordinary course of events. It was not detrimental and even if it was, there was no link to the protected disclosure.

98. There was nothing to link being asked to do a D exam by Mr Lucas to a disclosure which had been made. The Tribunal finds that this was simply a legitimate request made by Mr Lucas of the claimant. There was no detriment on the ground the claimant had made a protected disclosure.

99. The claimant was initially refused to be accompanied to an investigation meeting and there is no right to be accompanied. The meeting did not take place and therefore, there was no detriment to the claimant in suggesting that he could not be accompanied, when the meeting did not then go ahead. When the meeting did take place, he was accompanied. There was no link to the protected disclosure and the initial refusal to allow the claimant to be accompanied was not on the ground the claimant had made a protected disclosure. The reason for the refusal was the dispute between the respondent and the TU.

100. Mr Lucas did raise his voice to the claimant and the claimant did the same. The situation may have escalated to shouting. This was nothing more than a disagreement between Mr Lucas and the claimant. Mr Lucas was frustrated with the claimant's refusal to return to work, once he knew the meeting was not going to take place. In this environment (a train maintenance depot), the Tribunal can understand that shouting took place and that it did so on both sides. It was not however done on the grounds that the claimant had made a protected disclosure. The reason for Mr Lucas speaking to the claimant in this manner was due to his frustration with the claimant.

101. The Tribunal concludes that the claimant was dismissed due to his unacceptable levels of attendance. The respondent did exercise its discretion when applying the MFA and it is noted that for example, the final Stage 4 meeting was delayed in order for the claimant to secure his choice of TU representative. In respect of the January/February 2017 absence the respondent chose not to move onto the next Stage and the claimant remained on Stage 2. Furthermore, the MFA procedure pre-dated any protected disclosures made by the claimant and the process had started in January 2016.

102. The Tribunal concludes that applying the MFA resulting in dismissal on 27/4/2018, whilst clearly a detriment, was not on the ground that the claimant had made protected disclosures. It was due to the claimant's numerous and lengthy absences.

103. The final allegation of a detriment is that the respondent did not properly process the claimant's grievance. It is not clear what criticism the claimant makes here. Clearly, the claimant is dissatisfied with the grievance outcome. It is noted that the grievance process continued after the claimant's employment had terminated. Mr Watts met the claimant and he also met Mr Terry. Mr Watts produced a detail seven-page outcome letter (page 416). The claimant did not appeal the grievance outcome.

104. In respect of the sixth allegation of a detriment, the Tribunal concludes that factually, it is not made out. Notwithstanding the claimant disagrees with the outcome, there was no failure as alleged and no detriment.

105. Having concluded the reason for the dismissal of the claimant was his unacceptable level of attendance, he was not dismissed for making a protected disclosure.

106. The respondent was certainly not trying to cover up any wrongdoing. Mr Cordwell was concerned when the allegation about DCM was put to him and took appropriate action. The respondent cooperated the ORR and commissioned its own investigation. Other than the claimant's allegations, there does not appear to have been any concern raised in respect of the incident. There was no evidence of any other complaint, for example, by the TU.

107. For those reasons, the claimant's claims fail and are dismissed.

9/1/2023

Employment Judge Wright

JUDGMENT SENT TO THE PARTIES ON

16 January 2023

……..
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS