EMPLOYMENT TRIBUNALS

Claimant: Mr W Hynes

Respondent: Simply Bearings Limited

HELD AT: Manchester **ON:** 25,26 & 27 September 2018
7 November 2018 (In Chambers)

BEFORE: Employment Judge Holmes
Ms R Hodkinson
Mrs J Rathbone

REPRESENTATION:

Claimant: In person
Respondent: Ms L Halsall, Consultant

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The claimant was unfairly dismissed.

2. Whilst the claimant would be entitled to a remedy, the Tribunal finds that his conduct prior to the dismissal was such that it would be just and equitable to reduce the amount of the basic award by 100%, in accordance with s.122(2) of the Employment Rights Act 1006, and it does so.

3. Further, the Tribunal finds that the material unfairness in the claimant's dismissal made no difference, and, had it been rectified, he would still have been dismissed in any event, so as to entitle the Tribunal to reduce any compensatory award by 100% , pursuant to the principles in ***Polkey v A E Dayton Services Ltd [1988] ICR 142*** , and it does so.

4. Further , the claimant's conduct contributed to his dismissal to the extent of 100%, and pursuant to s.123(6) of the Employment Rights Act 1996, it would be just and equitable to reduce the compensatory award by 100%, and does so.

5. The claimant was not dismissed and was not subjected to any detriment, by reason of having made any protected disclosure.

6. The claimant was not dismissed in breach of contract , and is not entitled to any notice pay.

REASONS

1. In this claim the claimant complains of unfair dismissal arising out of his dismissal as Operations Manager with the respondent effected by letter dated 12 September 2017. His dismissal was a summary dismissal , without notice, on the grounds of conduct which , it is alleged ,destroyed the relationship of trust and confidence between the parties. Having been dismissed without notice, the claimant seeks notice pay. Further, he alleges that he had made protected disclosures, and that his suspension on 15 August 2017 was a detriment for having made such protected disclosures, and/or he claims his dismissal was by reason of having made the said disclosures.

2. The issues to be determined by the Tribunal were identified in a Preliminary Hearing held on 27 March 2018. The claimant has appeared in person, and the respondent has been represented by Ms L Halsall, a Consultant. The respondents called Steve Makin, Dan Makin and Ally Breen. The claimant gave evidence himself, but called no witnesses. There was an agreed bundle before the Tribunal. The evidence was concluded on 27 September 2018, but submissions could not be heard that day. Accordingly, the parties agreed to provide written submissions, which they duly did, the Tribunal reserving its decision and considering the same in Chambers on 9 November 2018. Having so deliberated the Tribunal now promulgates this, its reserved unanimous judgment.

3. Having heard the witnesses, read the documents, and considered the submissions of each party, the Tribunal unanimously finds the following relevant facts.

3.1 The respondent is a small family company which supplies bearings to trade and retail customers, operating from Halton House, Green Fold Way, Leigh Business Park, Leigh, Lancashire. The business was started by two brothers Daniel, and Steve Makin, and they are both directors of the business. Alison Breen (also known as Ally) is the Company Secretary, and it was through her friendship with the claimant that he started working for the respondents on 27 August 2012. There are two other Directors, the wives of the Makin brothers, but they have no operational involvement in the business.

3.2 The claimant and Ms Breen were peers in the business, she dealing with finance, HR, and similar matters, and he dealing with all other operational aspects of the business. The business grew, and at the time of the claimant's dismissal employed some 38 employees. The Makin brothers were grooming the claimant and Alison Breen to take over from them , as they intended to "row back" in their involvement in the business as they got older. There was a good relationship between the claimant and Mrs Breen, and indeed the

claimant and the Makins, with Dan Makin in particular. There were no disciplinary or other issues with the claimant prior to August 2017.

3.3 When the claimant was first employed he was given the use of a company van, a Citroen Berlingo, which he could take home with him, and use for himself on a private basis. In June 2015, however, that changed, when the claimant (see page 366 of the bundle) was given a monthly car allowance, which was then used to lease a vehicle, referred to as a truck, but in fact a 4 x 4 pickup style vehicle, a Mitsubishi L200.The respondent, however, retained the company van, but the claimant was no longer to use it for personal use, and did not do so.

3.4 On 3 July 2017 the claimant approached Steve Makin, and asked if he could take the Citroen van home. This request was refused. The claimant told Steve Makin that he wished to take it home in order to fill it up. In refusing this request Steve Makin did make reference to the potential VAT liability in respect of private use of vehicles, but, we find, the claimant did not inform Steve Makin that he wished to borrow the van in order that he could bring his mountain bike in the following day.

3.5 Later that same day Steve Makin received a text or email alert in relation to use of the company AMEX card. A number of employees were permitted to use this card, and had their own cards, including the claimant. The respondent would receive alerts of this nature when spending limits had been reached or approached and Steve Makin got such a text to that effect on this occasion. He noted from the account that on 27 June 2017 the claimant had used the company AMEX card for fuel (see pages 127 and 128 of the3 bundle). On 3 July 2017 the claimant had also purchased fuel in the sum of £51.76, although this would not be apparent to Steve Makin at this time. Steve Makin therefore checked the fuel gauge in the company van after the claimant had gone home and took a photograph of it (see page 58 of the bundle) which showed that it was almost full. Steve Makin therefore was curious as to why it would be the claimant would want to take the van home again to refuel it when it was already quite full.

3.6 At this time Dan Makin was on holiday, and consequently Steve Makin waited until he returned on 5 July to discuss this incident with him and Mrs Breen. He asked Dan Makin to carry out a fact-finding enquiry into fuel usage, and in particular how frequently diesel was being purchased , and how often the van was being used. Steve Makin himself then went on leave on 21 July 2017.

3.7 On 4 July 2017 the claimant saw Steve Makin, and there was a conversation between them in which the claimant mentioned items which had been purchased but which were not on site, and asked what he should do if there was a VAT inspection and the directors were not on site. Steve Makin told him there would not be such a surprise VAT inspection, this was nothing to do with the claimant, as not his responsibility.

3.8 The claimant contends that it was following this discussion, which the claimant contends was a protected disclosure, that Steve Makin decided to investigate the fuel usage position. The Tribunal does not so find and indeed finds that his suspicions had been aroused the night before , when he took the photograph of the fuel gauge as described above. Further, whilst the claimant alleges that the same day he saw Ally Breen , and had a conversation with her about his conversation with Steve Makin, the Tribunal does not so find.

3.9 There was , the Tribunal finds, as Ally Breen testified, a conversation between her and the claimant on 25 July 2017, but not on the 4 July 2017. In this conversation with Ally Breen the claimant did refer to the fact that he had viewed the Fixed Asset register, and expressed concern as to what would happen if a VAT inspection occurred. Ally Breen told him that finance was not his area and he would not be expected to deal with a VAT inspection.

3.10 The meeting on 25 July 2017 had been for Ally Breen to clear the air with the claimant after a distancing of the claimant , following comments made about his behaviour by Mrs Breen. That behaviour related to use of his mobile phone during a staff appraisal. The Tribunal is satisfied that no protected disclosure had taken place before 25 July 2017, and further, that this conversation that occurred on 25 July 2017 did not amount to a protected disclosure.

3.11 Dan and Steve Makin did not wish to put the allegations against the claimant to him without being sure there was some foundation for them. He was in a position of trust, and they did not want to rush into making what may turn out to be false allegations against him, and for that reason they waited to obtain further information before raising the matter with him.

3.12 Around this time Ally Breen was due to go on leave, and as she lives in Chorley where the claimant had made his fuel purchases, she agreed to make enquiries. She did so, which led her to the Police as the supermarket where the fuel was purchased would not release the CCTV footage to her without the involvement of the Police. Consequently, she contacted the Police, on 6 July 2017 at Leigh, but thereafter was told to contact the Chorley Police Station which she duly did. She requested copies of the CCTV footage at the supermarket for 14 March, 17 April, 1 May, 23 May and 27 June 2017, taking those dates from the company's credit card statements.

3.13 On 1 August 2017 she attended the Police Station and viewed CCTV footage , which was only available for 1 May, 23 May and 27 June 2017. The footage showed the claimant at the petrol station on all three occasions fuelling the van and two fuel containers. Ally Breen made no witness statement or note of what she had seen.

3.14 In the meantime, Dan Makin had been making his enquiries as part of the investigation. He waited for Ally Breen to return from holiday, and was told by her what she had seen in the CCTV footage on 1 August 2017. Ally Breen returned to work on 15 August 2017. On this day Dan Makin invited the claimant to a meeting with Ally Breen present. During this meeting he suspended the claimant , and provided him with a letter of suspension (see

page 55 of the bundle). The claimant was suspended on full pay and was told that he could still use the company vehicle and phone whilst on suspension. He was asked to leave his keys to the premises, his key fob and both credit cards with the company. In the suspension meeting the claimant was informed that CCTV footage from Morrisons Petrol Station in Chorley had been viewed where he could be clearly seen refuelling the van and putting fuel into cans.

3.15 In the course of his investigation Dan Makin asked Steve Makin to make a statement , which he did on 21 August 2017 about the events of 3 July 2017. That statement is at page 57 of the bundle.

3.16 The claimant in fact did not return the company credit cards at the time of his suspension, and consequently on 17 August Dan Makin rang him. In the course of that conversation the claimant told Dan Makin that he had put fuel in the van , and had stored it in the warehouse. He said that he was devastated at being suspended . Dan Makin, however, stopped him saying anything further, and instead asked him to return the credit cards. The transcript of that conversation is at pages 59 to 60 of the bundle. Dan Makin and the claimant agreed to meet, which they did but nothing further was said by the claimant about the allegations.

3.17 On 24 August 2017 an investigation meeting was held with the claimant by Dan Makin, with Ally Breen taking notes, the excerpts of which are at pages 61 to 76 of the bundle. In the course of this meeting the claimant stated that he had been storing diesel in the warehouse, but he was not supposed to do that, and had not told anyone else in the warehouse about it. He also said that he would check the van in the morning , and no one else would see him. He told Dan Makin that he would take the vehicle to his home town to refuel it, and that the containers that he used were his own. In this meeting the claimant maintained that his conversation with Steve Makin on 3 July 2017 had been about bringing his bike into work. Dan Makin put to him in this meeting that , based on the calculations that he had carried out , the van had travelled some 4,950 miles between May 2016 and August 2017, but the amount of diesel which had been purchased was such that the vehicle would have to have travelled almost 9,000 miles , so that there was a considerable short fall. On this basis the van would have been doing 26 miles per gallon when it should have been achieving at least 50 miles to the gallon.

3.18 The claimant was asked if he could explain this and he said that he had “not got a clue”. The claimant did say in this meeting that he thought it was normal practice to keep back up fuel on the premises. He alleged that Dan Makin kept containers of fuel on the premises for the lawnmower. The claimant had prepared a document for this meeting, a copy of which is at pages 77 and 78 of the bundle. It is headed “24 August questions” and has a number of bullet points. In this document he referred to using his own fuel and truck to go to various suppliers for the company, and had been told that he would be able to fill his truck with fuel using the company credit card as he had used his own fuel for the company’s benefit. He also went on to say that it was normal practice he considered to fill containers of fuel as he had seen the directors do this on several occasions. He questioned why he was not

suspended until 15 August 2017, and queried how the alleged inconsistency in the mileage of the company van had been monitored and documented.

3.19 Dan Makin continued his investigation after this meeting with the claimant, and looked into, in particular, his contention that he had discussed with Steve Makin on 3 July 2017 the need to bring his bike into the warehouse for the following day, suggesting as he did that it was to be used for training purposes. He took photographs of two bikes that were left in the warehouse and also of an area in the warehouse where the claimant stated that the diesel containers had been hidden (pages 84 to 89 of the bundle). His enquiries also revealed that the training in relation to cycle bearings was not due to be carried out until 3 August 2017, and had not been added to the training calendar until 28 July 2017 (see page 141 to 142 of the bundle).

3.20 Dan Makin interviewed Steve Makin on 24 August, to clarify the conversation that took place on 3 July 2017. A note of that interview is at pages 145 to 146 of the bundle, and in it Steve Makin confirmed that he had no recollection of the claimant making any mention of using his bike for training. He confirmed that the claimant asked if he could take the van as it needed diesel. Dan Makin carried out further enquiries with Neil Dunne (pages 147 to 148 of the bundle), Phil Winrow (pages 149 to 150 of the bundle), Danny James (pages 151 to 153 of the bundle), and Ian Jeffries (pages 154 to 155 of the bundle). None of these employees was aware of the claimant storing containers of diesel in the warehouse, and had not seen him with such containers at any time.

3.21 Dan Makin interviewed Christian Clarke on 24 and 25 August 2017 as he was the person who organised any training for the company. He confirmed that he had previously asked the claimant to bring his bike in to work for training but could not remember the dates. He confirmed that the cycle training had taken place on 3 August 2017 and that he had not asked the claimant to bring his bike in for 4 July 2017. Subsequently Dan Makin was provided with copies of an email exchange between Ian Jeffries, the Goods In Team Leader and Christian Clarke, in which reference was made to bikes being left in the warehouse propped up against the door, and indeed a photograph had been taken of them. This email exchange confirmed that the relevant training took place on 3 August 2017 and not in July 2017 (see page 161 of the bundle). Dan Makin also made enquiries into the risk assessments that the company was required to carry out to see if the storage of the diesel in containers had been recorded, and it had not. Similarly, the claimant had completed a fire risk assessment on 19 July 2017, but there was no mention therein of the storage of diesel on the premises (see pages 163 to 178 of the bundle).

3.22 Given that Dan Makin had conducted the investigation, and that Steve Makin had been involved in it as a potential witness, the decision was taken that Ally Breen should conduct the disciplinary, notwithstanding that she was of the equivalent rank in the company to the claimant. Accordingly, by letter of 31 August 2017 (page 195 of the bundle) she invited him to a disciplinary hearing on 7 September 2017 to discuss “allegations of theft and fraudulent

use of a company credit card for your own personal use whilst purchasing fuel for the company van". She enclosed some nine items with this letter, comprising of the copy documents assembled by Dan Makin during the investigation, and in this letter, she also said this:-

"CCTV footage is also available but can only be viewed at the Police Station".

She informed the claimant that she would be conducting the hearing and that Julie Hamlett would also be in attendance as a note taker. The claimant was advised of his entitlement to be accompanied by a fellow employee.

3.23 On 6 September 2017 at 14.17 the claimant sent an email to Ally Breen saying that he had not yet received information relating to the CCTV footage at the Police Station that he had requested. He said that as he needed to see this footage as it was part of the investigation and disciplinary information, he would like the disciplinary hearing to be postponed until he had had the information and viewed the footage at the required Police Station. Ally Breen replied later that same day at 3.49 pm, by e-mail (page 196 of the bundle) as follows:

"Thank you for your email. Peninsula have confirmed that the CCTV footage evidence is an additional piece of information that is not being relied upon during the hearing, therefore it is not relevant that you view it. The evidence that will be relied upon was sent to you on Friday 1 September and is clearly stated in the disciplinary hearing invite letter, points one to nine".

She advised that the hearing could then proceed the following day as planned.

3.24 The claimant duly attended the disciplinary hearing, during the course of which Ally Breen did not inform the claimant that she had herself viewed the CCTV footage , or what it showed. The notes of the hearing are at pages 198 to 223 of the bundle. At the outset the claimant asked if he could be represented by a trade union official but as the respondent did not recognise the trade union and this was not in the employee handbook, this request was denied.

3.25 In the meeting Ally Breen put to the claimant a number of pre-prepared questions which appear in the notes. The notes themselves are a mixture of pre-prepared questions and the claimant's responses, and are slightly unsatisfactory in that various questions are deleted because they were presumably not asked , and the claimant's comments are fitted in around the pre- populated questions. In addition to those notes, the claimant made further comments which are documented at pages 224 to 226 of the bundle, pages 225 to 226 being a statement that the claimant read out at the end of the meeting. In the course of this hearing the claimant and Ally Breen discussed a number of points that the claimant had raised in his defence, such as asking Steve Makin for permission to take the van home so that he could bring his bike in the following day.

3.26 The hearing also explored where the claimant said he had stored the containers of fuel in the warehouse of which all other employees were unaware. The claimant also made reference to the fact that other fuel for other machinery , such as the lawnmower , was stored in the warehouse. The claimant in his closing statement did make reference to his five-year unblemished record , and the proactive nature of his role in keeping the operation running smoothly. He said he had never been told what he could and could not do with his company credit cards or given any instructions as to what to do with the van as he had been solely responsible for it since the day of its purchase. He believed it was in the best interests of the company to keep fuel to one side as they did for other machinery in the warehouse. This was to ensure that employees could get in the van without breaking down , as it had no phone which could have created a problem. He accepted that he should have shared the information about the fuel being stored in the warehouse with others, but did not think to tell anyone as he had always been in control of the van. He did his best in everything he did , which he did for the good of the company during his employment , and had always been given a free rein. He had never used the containers for his own personal use and it had always been his intention to use them for emergency fuel for the van.

3.27 Ally Breen considered the evidence and what the claimant had to say. She considered the relevant discrepancies between the information the claimant had provided during the investigation and what he was saying during the disciplinary hearing. She concluded the claimant had indeed been purchasing fuel at the company's expense, for his personal use, and consequently that he was guilty of gross misconduct, for which the sanction to be applied was summary dismissal. She set out her reasoning in a letter of dismissal dated 12 September 2017, pages 227 to 229 of the bundle, and in particular set out the inconsistencies that she had noted between what the claimant said in the investigation meeting , and the disciplinary hearing.

3.28 The claimant was advised of his right to appeal against the decision which he exercised by email of 18 September 2017 to Steve Makin (page 230 of the bundle) attaching to that email his grounds of appeal which are at pages 231 to 234 of the bundle. In these grounds the claimant in particular complained that Ally Breen was not impartial , as she had been present during his suspension on 15 August 2017. He also complained that he was not allowed to record the disciplinary hearing. He raised the issue as to why he was not allowed a trade union representative, and also made reference to the CCTV footage. He pointed out that he had been given no reference numbers or contact details to enable him to view this footage, and referred to the response that he had received from Alison Breen to the effect that this was additional evidence which was not being relied upon during the hearing.

3.29 He then went through the points made in the dismissal letter of 12 September, seeking to explain the apparent discrepancies and his failure to alert the employers to the fact that he was storing fuel on the premises. He did say in this document that he would fill the van between 6.30 and 6.50 am, and queried if anyone had checked the CCTV footage at the warehouse to see if he had filled the van with fuel from the containers. In conclusion, he did

express his regret that he had not mentioned the storage of diesel at the time, but was just completing his role as he had done for many years to keep the operational side of the business running smoothly. He asked that Steve Makin take into account his five years of unblemished service when looking into his appeal.

3.30 Steve Makin acknowledged his appeal letter in a letter dated 22 September 2017 (pages 256 to 259 of the bundle) in which he confirmed arrangements of the appeal to be heard on 5 October 2017 by himself, with Ally Breen present to take minutes. Steve Makin explained how he had reviewed the contents of the claimant's appeal letter and his grounds of appeal , and set out what he understood them to be in some 21 bullet points. Further, in the meantime, further statements had been obtained in relation to a metal cabinet which the claimant had referred to in the disciplinary meeting in relation to the storage of flammable liquids. Further, a picture had been taken of it and a statement had been obtained also from Dan Makin. These documents were referred to in Steve Makin's letter, and were enclosed with the letter convening the appeal.

3.31 The appeal could not actually be heard on 5 October 2017, and was subsequently heard on 12 April 2017 by Steve Makin with Ally Breen present as the note taker. The notes of this appeal (again comprising of pre-populated set questions provided to the respondents presumably by Peninsula, their employment advisers) together with notes of the claimant's responses and statements are at pages 263 to 272, and pages 273 to 293, and pages 294 to 303 of the bundle. All these documents have been signed and dated 12 October 2017 by the claimant, Ally Breen, and Steve Makin.

3.32 In the appeal Steve Makin went through the various points made by the claimant and his explanations for any apparent discrepancies and inconsistencies that had been noted by Ally Breen in her dismissal decision letter. In particular there was discussion of the point the claimant made as to whether there was any company CCTV footage of the claimant refuelling the van at the respondent's premises , which he claimed he would do between 6.30 and 6.50 am. Steve Makin explained that there would not be, as the respondent's CCTV did not operate before 7 am. Steve Makin also made the point during the course of the appeal that there was no need for the claimant to refuel the van when the respondent's premises are located some 600 yards away from a petrol station.

3.33 Steve Makin adjourned and considered his decision. He wrote to the claimant on 17 October 2017 (see pages 304 to 307 of the bundle). The first three and a half pages of this letter are a re-iteration of Steve Makin's previous letter acknowledging the claimant's grounds of appeal. On page 307 he records his decision as being that the original decision taken by Mrs Breen stood for the reasons which he then went on to set out in five bullet points. In particular he focussed on four questions which the claimant's appeal appeared to raise , and which were answered during the appeal hearing.

3.34 These are those set out at pages 274, 275, 278 and 280 of the bundle. These are pre-prepared as indeed would appear to be the respondent's answers , as they had been typed in. Question one was in relation to the absence of any recording of the disciplinary and investigation meetings. Question two was in relation to the mpg recorded for the van , and a discussion of the mileage discrepancies with the amount of fuel consumed. Question three related to the storage of fuel at the warehouse for other equipment such as the lawnmower/strimmer , and leaf blower , and the claimant's suggestion that he was storing fuel as good practice in case of an emergency. Question four related to the claimant's assertion that he carried out checks on the van between 6.30 and 6.50 am which should have shown him fuelling the van on the company CCTV. Steve Makin considered all those points had been addressed in the appeal as set out in the respondent's responses and the further discussions in the appeal notes, and that these did not affect the validity of the decision made. Further, he went on to deal with the inconsistencies that had been identified by Ally Breen and himself and how the claimant had simply referred back to his previous answers in the disciplinary hearing. The appeal was by way of a review not a re-hearing as was stated in the letter convening it, and Steve Makin's view was that the decision taken by Ally Breen was indeed correct and was upheld.

3.35 Subsequently, although not before the respondents in terms of their disciplinary and appeal process, a statement has been obtained from a Police Constable 8744 Brown, at page 636 of the bundle, in which he confirmed that he obtained CCTV footage from Morrisons petrol station on 29 July 2017 (although he has erroneously stated 2018 in this document). He confirms in this statement that he observed the claimant putting fuel into petrol cans after filling the company van up, this was witnessed on a few occasions namely 1 May, 23 May and 27 June 2017. He goes on in that statement to confirm how Alison Breen attended Chorley Police Station on 1 August 2017 to watch the CCTV footage in his presence.

3.36 Following the discussion on 3 July 2017, and the claimant's suspension, the respondent monitored the mpg of the Citroen van, and found that it had been achieving 52.8 mpg (see page 140 of the bundle).

3.37 The claimant has submitted as part of the bundle for this hearing, but did not produce for the disciplinary or the appeal literature relating to the accuracy of claimed mpg figures at pages 309 to 311 of the bundle.

4. Those then are the relevant facts as found by the Tribunal. In terms of credibility, there has inevitably to have been some assessment of the claimant's reliability in terms of his account, and his responses to the matters which are alleged against him. As between the respondent's witnesses and the claimant himself, the Tribunal has preferred the evidence of the respondent's witnesses which has been more coherent and consistent throughout the proceedings, both internally and before the Tribunal. The Tribunal was particularly struck by the good relationship between the claimant and the Makin brothers, and indeed Ally Breen prior to these issues arising, and the fact that he was being considered and prepared for a more senior role when the Makin brothers planned to wind down their involvement in the

business. Far from having any ill – will against the claimant, the Tribunal noted the sentiment expressed in hearing that the respondent did not want the allegations against the claimant to be true.

Submissions

5. The parties made their written submissions as directed by the Tribunal. As these are available in written form, they will not be repeated here. Suffice it to say that the claimant submitted largely what he had stated throughout the disciplinary and appeal processes, maintaining his innocence of any wrongdoing, and contending that he had been picked on because he had whistleblown .

6. The respondent's submissions largely denied any protected disclosure had been made, and in any event that it had any bearing on the disciplinary action that was taken. The disciplinary process had been thorough and fair, and any minor discrepancies did not make the dismissal unfair. Alternatively, the Tribunal could be satisfied that the claimant had been guilty of gross misconduct , or that applying ***Polkey*** a fair dismissal would have occurred in any event, thereby justifying a reduction in the compensation payable of 100%.

Discussion and Findings

The protected disclosure claims

7. In order for the claimant to succeed in alleging that his dismissal was by reason of having made a protected disclosure, or that any detriment such as being suspended was so motivated, the Tribunal has to be satisfied that the claimant in fact made (or alternatively was believed to have made) a protected disclosure. Protected disclosures are defined in Section 43B of the Employment Rights Act 1996 as set out in the Annex to this judgment. In essence the claimant alleges that the disclosures that he made in this case were verbal ones made initially to Steve Makin, and subsequently to Ally Breen. He alleges that they tended to show that the respondents were guilty of breach of some legal obligation or possibly even some form of criminal offence in relation to their compliance with VAT legislation. The first issue for the Tribunal is whether the claimant made any such disclosure. The Tribunal's unanimous conclusion is that he did not. Firstly, on a purely factual basis, the Tribunal accepts the evidence of Steve Makin , and indeed Ally Breen , to the effect that no discussion between the claimant and Steve Makin about anything relating to VAT occurred until the 4th July 2017. This is so in terms of disclosure , for it is accepted by the Tribunal that Steve Makin himself mentioned VAT on 3 July 2017 when declining the claimant's request to be allowed to take the van home, but that was him referring to VAT issues , and not the claimant. That therefore cannot have been a protected disclosure by the claimant. What was said the following day, however, potentially may have been, but on the claimant's own case it was no more than an enquiry from the claimant as to what he should do if there was a VAT inspection. This was way short , in our view, of any form of disclosure to the respondent in the person of Steve Makin that the respondents were actually guilty of any form of breach of VAT legislation. It was , at its highest , an enquiry by the claimant as to what he should do in certain circumstances , and not any form of protected disclosure which requires the imparting of information. The claimant did

not even , on his own evidence , impart information , and we are quite satisfied that this was not a protected disclosure. Similarly, we accept Ally Breen's evidence that no further discussion of what was discussed with Steve Makin on 3 or 4 July 2017 ever took place until 25 July 2017. Even then, the terms of it we are satisfied do not qualify it as a protected disclosure. Again, it was not the claimant imparting any form of information to Ally Breen, it was, at most, the claimant raising a question as to what he should do on a VAT inspection. Thus, we are not satisfied that there was any protected disclosure so as to entitle the claimant even to raise the possibility of his dismissal or indeed, his suspension before it as being any form of consequence of any protected disclosure.

8. If, however, we were wrong on that , and the claimant had made any protected disclosures, the issue then becomes one of causation. We are quite satisfied that the claimant falls this hurdle. We do not consider for one moment that Steve Makin's decision to commence investigations was in any way influenced by any alleged disclosure in relation to the company's VAT practices. The crucial point we consider is that Steve Makin's suspicions were first aroused on the evening of 3 July 2017. It was at that time when he took the photograph of the fuel gauge on the Citroen van , because he was suspicious as to why the claimant should be asking to take the van home for refuelling when he had apparently refuelled it only some days previously. This clearly was the genesis of his suspicions , and his decision to make investigations. We do not consider that anything that was said about VAT at that time , or indeed subsequently , played any part in his decision to instigate the investigation , or subsequently to suspend and indeed, ultimately to dismiss the claimant. In any event, in terms of the dismissal, that was carried out, not by either of the Makin brothers but by Ally Breen. The alleged disclosure to her was even more remote in terms of any allegation being made about the respondent's VAT practices, and we are perfectly satisfied that she was in no way motivated by any protected disclosure that the claimant may in fact have made. That would certainly be true of the dismissal, and we come to the same view in relation to the appeal decision taken by Steve Makin. In short, we consider that protected disclosures have nothing to do with this case. We note , in particular , that the claimant did not in either his disciplinary meeting , or indeed in his extensive letter of appeal , make any suggestion that his dismissal had in fact been motivated by the respondent's reaction to any allege disclosure about VAT practices. This contention has all the appearance of an afterthought. We consequently dismiss all protected disclosure elements of these claims.

"Ordinary" unfair dismissal.

9. We now turn to the merits of the dismissal itself from the point of view of an ordinary unfair dismissal claim. The burden is upon the respondents initially to establish a potentially fair reason for dismissal, and that is fairly and squarely put as the claimant's conduct. For these purposes the respondents do not to have to establish that the claimant was actually guilty of the conduct which led to his dismissal, merely that they entertained a reasonable belief, after a reasonable investigation, on reasonable grounds that the claimant was guilty of the conduct alleged against him, applying the classic test laid down in ***British Home Stores v Burchell [1980] ICR 303*** . In doing so, the Tribunal does not substitute its own views for that of the respondent , but considers whether or not the actions of the

respondent, both in terms of the procedure followed and the substantive decision fell within the band of reasonable responses.

10. Having discounted any ulterior motive for the dismissal as set out above, the Tribunal is quite satisfied that the reason for the dismissal was indeed the respondent's belief that the claimant had indeed been guilty of serious misconduct. That belief the Tribunal accepts was a genuine one, and was arrived at after a reasonable investigation. In fact, the investigation was , the Tribunal considers , extremely thorough. Dan Makin made extensive enquiries and interviewed a number of witnesses , including his brother, and then handed the matter over to Ally Breen. Whilst the claimant complains that he was not suspended until 15 August 2017, that is something of a double-edged sword for him, as had the respondents started this process sooner, his dismissal was likely to have been effected sooner as well. He was thus therefore kept in employment for longer than he otherwise would have been. The claimant's point appears to be that this somehow undermines the genuineness or validity of the respondent's belief in his misconduct. The Tribunal does not accept that point. The Tribunal does accept the evidence of the respondents that , rather than rush to judgment and to suspend the claimant , with the potentially damaging effect that would have upon him in a small business where the reason for his suspension may well have got out, it would not have been fair to suspend him without having carried out a proper investigation , and having obtained the necessary evidence on which to base such a decision. This was perfectly proper and understandable course to take , and in the view of the Tribunal in no way undermines the validity of what the respondent subsequently did.

11. The Tribunal appreciates the claimant's concern that his dismissal was not carried out by either of the two directors, but by a fellow employee Ally Breen who was not his superior. This was unusual it is accepted, but the Tribunal again considers that this fell within the band of reasonable responses. Dan Makin had carried out the investigation, and , of course , it can equally be complained of in terms of unfair procedure if the same person investigates as then carries out the disciplinary process. The respondents understandably sought to separate the two parts of the process , but unfortunately this meant that the superior employee having carried out the investigation it then fell to the more junior employee albeit a peer of the claimant , to carry out the disciplinary hearing. The Tribunal sees nothing unfair in that , in all the circumstances which, s.98(4)(a) reminds us , include the size and administrative resources of the respondent's business , which is , at the end of the day , a small family business. The suggestion that the directors' wives who played no operational role in the respondent's business at all, should have been charged with the task of carrying out the disciplinary procedure is , with respect to the claimant , a somewhat fanciful suggestion. Had they been involved their independence would have been questioned for obvious reasons. In any event, it is not the Tribunal's task to decide whether something could have been done better, it is its task to decide whether or not the way in which the respondent went about this process fell within the band of reasonable responses which, clearly, the Tribunal considers this did.

12. Consequently, in terms of the investigation and the process as a whole the Tribunal sees no basis on which to hold that the respondent's action fell outside the band of reasonable responses. There is, however, one aspect where the Tribunal does consider that the respondent's actions did fall outside the band of reasonable

responses , and it is this. Ally Breen had viewed the CCTV footage at the Police Station and had clearly seen what she described to the Tribunal and is corroborated by the evidence of PC Brown. She clearly was then in possession of that evidence. She , however , then held the disciplinary hearing and did so without any witness statement having been taken from her , or the claimant being informed in advance that she had actually seen the CCTV footage. This we consider was unfair, as it placed the claimant at a disadvantage. He was not to know that the very person who was carrying out his disciplinary hearing was also a highly relevant witness because she had witnessed the CCTV footage. This fact was never disclosed to him at the time , or indeed during the appeal, and was an issue that the claimant was raising expressly in terms of the disciplinary hearing , and indeed the subsequent appeal , when he was complaining of the fact that he himself had not been able to see the CCTV footage. He was never aware until these proceedings that Ally Breen had done so , whereas it was her that carried out the disciplinary hearing.

13. The Tribunal cannot agree with the response (apparently on advice) by Ally Breen to the claimant's request for a postponement of the disciplinary hearing that the CCTV footage was somehow not being relied upon. That is, with respect, a preposterous contention , when the very person carrying out the disciplinary hearing had herself viewed it. Ally Breen could not un-view the CCTV footage , and the mere fact the respondents chose not to "rely" upon it, in the sense of disclosing it to the claimant , does not mean that it was not a highly relevant period of evidence to which the claimant was entitled to have sight , or at least the opportunity of doing so. This, however, was denied to him , in the sense that he was denied a postponement and he was also denied the knowledge that Ally Breen had actually seen it. In that regard, albeit in that regard alone, the Tribunal does consider that the respondent did act outside the band of reasonable responses , as no reasonable employer would have behaved in that way in relation to this evidence. On that basis and that basis alone, the Tribunal finds that the dismissal was unfair.

Remedy

14. That, however, does not dispose of the matter , because the Tribunal has to then go on to consider what remedy to award, and although issues relating to remedy have not been ventilated fully before the Tribunal in terms of amounts, the Tribunal is , at the determination of the liability stage , entitled to take into account the respondent's alternative pleas raised in the preliminary hearing issues , at Annex B, if not in the response, firstly that had a fair procedure been followed the outcome would have been the same (a reduction based on the case of ***Polkey v A E Dayton Services Ltd [1988] ICR 14*** , and hence known as a ***Polkey*** reduction) , or further in the alternative, whether the claimant contributed to his own dismissal by reason of blameworthy or culpable conduct.

15. In relation to the former, in terms of the ***Polkey*** reduction the Tribunal has to carry out an exercise as to what would have happened had the respondent not committed the unfairness identified above in relation to Ally Breen's involvement and viewing of the CCTV footage without the claimant having had the opportunity to do so himself , and without him having been warned that she had herself seen it. There is a range of possibilities for a ***Polkey*** reduction pursuant to the guide lines set out in the case of ***Software 2000 v Andrews [2007] IRLR 568*** by Elias LJ as he then was.

One possibility is that the Tribunal comes to the conclusion that the defect would have made no difference at all, in which case a 100% reduction should be made. Alternatively the Tribunal may conclude that the position is not as clear cut , and consequently a percentage reduction somewhere between 0 and 100% is appropriate. In this instance the Tribunal is satisfied that had either someone else dealt with the disciplinary hearing, or the claimant been told that Ally Breen had viewed the CCTV footage , or had even been afforded the opportunity to see it himself, none of this would have made any difference to the outcome. There was , as it turns out , no dispute on the CCTV footage, the claimant has not challenged that it shows what Ally Breen, and indeed PC Brown's evidence, says it shows. He accepted that he had in fact on the three occasions identified filled up both the Citroen van and two fuel containers. That is the essence of what the CCTV footage shows and there was no dispute about that. Once that had been established everything else it seems to the Tribunal would follow, and consequently it would have made no difference to the outcome had this defect in the procedure not occurred , and the Tribunal would make a 100% reduction to any (compensatory) award on that basis.

16. Further, in any event, the Tribunal is also entitled and invited to consider whether the claimant contributed to his own dismissal. Although not put in terms by the respondent, there are two ways in which this can be approached, the first is in relation to the compensatory award, pursuant to Section 123(6) of the Employment Rights Act 1996 which provides that the Tribunal may make a reduction in a compensatory award , if satisfied that the claimant has been guilty of action which contributed to his own dismissal to the extent that it would be just and equitable to do so. The Tribunal is so satisfied in this case, the Tribunal is satisfied as will be seen below when the question of notice is considered , that the claimant , on a balance of probabilities , had indeed misused the company credit card and had purchased on it fuel which was not for the benefit of the company, and was potentially for his own private use , or the use of another. In making such finding the Tribunal concludes therefore that the claimant was indeed guilty of blameworthy and culpable conduct , and , as that was the reason for his dismissal , it contributed to that dismissal to the extent of 100% . A reduction will be made to any compensatory award on that basis as well. Whilst in practice the order of reductions is probably academic , on the authority of ***Rao v Civil Aviation Authority [1994] ICR 495*** the Tribunal makes the ***Polkey*** reduction first. If it is in fact wrong to do so, or to do so to the maximum extent of 100%, then the ensuing 100% reduction for contribution would in any event reduce any compensatory award that might otherwise have been made to nil.

17. Further, a reduction to the basic award to which the claimant would otherwise have been entitled is also permissible under Section 122(2) of the Employment Rights Act 1996 if the Tribunal is satisfied that prior to the dismissal the claimant had behaved in a manner that would make it just and equitable to make a reduction in the basic award. This section is slightly different to the compensatory award section, as there is no requirement for there to be a link between the conduct and the dismissal. As has been observed in several authorities (see ***RSPCA v Cruden [1986] ICR 205***) , however, it will be rare when the Tribunal makes a finding of contributory fault for the purposes of Section 123(6) that it will not also do so for the purposes of Section 122(2). That is the position here, we consider that our finding that the claimant did indeed conduct himself in a way that amounted to that gross

misconduct makes it just and equitable to reduce his basic award by 100% as well , and consequently no basic award will be made.

Notice Pay

18. This brings the Tribunal to a discussion of the claimant's claim for notice pay, he having been dismissed without notice. The issue here is slightly different, as it is not what the respondent reasonably believed that matters , as it is in the test in relation to unfair dismissal , rather the Tribunal must form its own view as to whether the claimant was or was not , on the balance of probabilities , guilty of conduct which entitled the respondent to dismiss him without notice. The Tribunal therefore has to form its own view, and is not bound by the view of the respondent, and does not have to consider the range of reasonable responses test.

19. The Tribunal has reluctantly come to the conclusion that it is satisfied on the balance of probabilities (for that is the test , and not the criminal test of beyond reasonable doubt) that the claimant did indeed conduct himself in the manner alleged. Once it is established and indeed accepted by the claimant , that on at least three occasions he used the company credit card to fuel the company van and two additional containers, the use of which his employer was wholly unaware , whilst the burden of proving gross misconduct rests on the respondent , in effect that burden in practical terms rather shifted then to the claimant to explain how those purchases were then utilised for the benefit of the respondent company. The claimant has signally failed to do so. In all his explanations and dealings in the internal procedures and , indeed, before the Tribunal he has simply failed to persuade his employers initially , and indeed this Tribunal now , that the fuel that he purchased on these occasions with the company's credit card was ever utilised , or indeed intended to be utilised , for its benefit. He has no corroboration whatsoever for his account that this was "emergency" fuel, or that it ever went into the Citroen Berlingo van to prevent it running out of fuel. Steve Makin's suspicions aroused on 3 July 2017 were indeed correct , we find and whilst appreciating the various arguments that have been ranged by the claimant in relation to matters relating for example, to mpg fluctuations and the accuracy of manufacturers' claims, ,at the end of the day the Tribunal rejects these as fanciful. Whilst before a criminal jury they may have some traction , and could possibly raise the matters of doubt, on a balance of probabilities the Tribunal is quite satisfied that on the basis of the mileage discrepancy alone the claimant cannot explain how the fuel that he purchased in this manner on some three occasions was being utilised for the benefit of the respondent. There is ample support for such a finding in the mileage calculations carried out by the respondent, and the evidence of the mpg improvement noted after 5 July 2017, when the claimant's allegedly additional purchases ceased. The proximity of a petrol station, the relatively low mileage that the van covered in the use that the respondent made of it, the complete unawareness of any other employee of this stock of allegedly "emergency" fuel and the fact that the claimant felt it necessary to have not only one, but two, containers for this purpose verges on the bizarre, and his account is ultimately , the Tribunal is compelled to conclude , literally incredible. Why the claimant should indulge in such a foolish enterprise is unclear, but not really relevant. It may have had some connection with his dissatisfaction with his own lease vehicle, which he complained to Ally Breen, was heavy on fuel, or it may , in part , have been justified in the claimant's own mind by

the contribution he (rightly, doubtless) felt he made to the respondent's business, which may have lead to a slightly distorted sense of entitlement.

20. Whatever the position, the Tribunal is satisfied that the respondent has established that the claimant did , on a balance of probabilities behave in a manner which entitled it to dismiss him without notice , and that it did so for that reason. Consequently, his claim for notice pay is dismissed , and all his claims before the Tribunal must fail.

Employment Judge Holmes

Date : 23 November 018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

.29 November 2018

.

.....
FOR THE TRIBUNAL OFFICE

[JE]

ANNEX

THE RELEVANT STATUTORY PROVISIONS

EMPLOYMENT RIGHTS ACT 1996

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.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(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).

47B Protected disclosures

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

(1A) A worker ('W') has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) – (1E) N/A

(2) … this section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, 'worker', 'worker's contract', 'employment' and 'employer' have the extended meaning given by section 43K.

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) N/A

(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 equity and the substantial merits of the case.

(5) – (6) N/A

103A Protected disclosure

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

122 Basic award: reductions

(1) N/A

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

(3) N/A

123 Compensatory award

(1) Subject to the provisions of this section and sections 124 [, 124A and 126] the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—

(a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or

(b) any expectation of such a payment,

only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(5) N/A

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

(6A) - (8) N/A