RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Suleyman**

Respondent: **Star Catering Supplies Ltd**

Heard at: **East London Hearing Centre**

On: **10, 11 and 12 March (hearing)**
and 11 May 2021(in chambers)

Before: **Employment Judge Jones**
Members: **Ms J Isherwood**
Mr R Blanco

Representation
Claimant: Mr J Sykes (representative)
assisted by Mr Cem Ozgan, Turkish Interpreter

Respondent: Mr G Hines (representative)

JUDGMENT

1. **The claimant was fairly dismissed.**

2. **The claimant made a protected public interest disclosure on 10 July 2019.**

3. **The claimant did not suffer any detriment on the grounds that he made that disclosure.**

4. **The respondent did not unlawfully deduct the claimant's wages in contravention of section 13 of the Employment Rights Act 1996.**

5. **The complaint of breach of contract fails.**

6. **All claims fail and are dismissed.**

REASONS

1. The Claimant brought complaint of unfair dismissal, detriment and dismissal for making protected disclosures, wrongful dismissal and unlawful deduction of wages.

2. The Respondent disputed that the Claimant had made protected disclosures. It contended that the Claimant had been dismissed for gross misconduct and that there were no wages outstanding.

3. There was an agreed list of issues. Those are set out in the decision part of these reasons.

Evidence

4. The Tribunal had an agreed bundle of documents. On the first day of the hearing, the Claimant sought leave to submit video evidence taken by Mr Balcik, the Claimant's son, who also worked at the Respondent, as evidence of the state of the warehouse on the evening of 7 July 2019. This was extremely late disclosure. The Claimant submitted that it was relevant to the issues. The Respondent opposed the application but after viewing it, stated that it could address it in evidence.

5. The Tribunal decided to allow the Claimant to submit one of the videos taken on the evening of 10 July 2019. The Claimant had apparently disclosed some 40 snippets of video evidence. After submissions we decided that it was unlikely that they were all relevant since it was the Claimant's case that the disclosures on which he relied were made either verbally or in writing to Mr Muezzin and it was not his case that any of those were captured on these videos.

6. At the start of the hearing we also heard an application from the claimant for disclosure of emails from the respondent's system which the claimant and Mr Balcik contended contained protected disclosures. The claimant was unable to provide any dates of when the emails were sent, to assist the respondent in retrieving them. Mr Hines informed the tribunal that he would find out from the respondent during the course of the hearing whether it was possible to retrieve emails from a closed email account. He stated that there were technical difficulties in getting emails from the inbox operated by former staff. Mr Balcik left the respondent's employment in September 2019. Mr Hines stated that he would endeavor to provide a witness statement from whoever at the respondent conducted the search for any emails sent to the respondent by the claimant or Mr Balcik on the claimant's behalf, between 29 May and 11 July 2019. However, the respondent failed to produce any further disclosure and we were not provided with any witness statement dealing with this search. It was the respondent's case that there were no other relevant emails apart from those in the bundle and that it was not possible to retrieve emails from former staff, from its email system.

7. We had witness statements from the Claimant and from his son, Orcun Balcik who was also an assistant night warehouse manager for the Respondent and who resigned in September 2019. The Claimant also submitted a signed witness statement from Metin Muezzin, the Respondent's former Warehouse

Manager who usually managed the day shift, on his behalf. He was senior to the claimant. At the time of the hearing, Mr Muezzin was no longer employed by the respondent and lived abroad. The Tribunal was told by the claimant's representative that Mr Muezzin was reluctant to attend the Tribunal to give evidence. Both parties had the opportunity to make submissions on the weight to be given to the witness statement.

8. For the Respondent, the Tribunal had witness statements from Mr Ali Soner Guvemli, who at the time was Managing Director at the Respondent and Richard Talty, who had been the Respondent's Transport Manager since April 2019.

9. All witnesses, apart from Metin Muezzin, gave live evidence to the Tribunal.

10. The Tribunal apologises to the parties for the delay in the promulgation of these reasons and the judgment. This was due to delays in the Tribunal being able to meet and to pressure of work in the judge.

Findings of Fact

11. The Tribunal made the following findings of fact from the evidence at the hearing. We have only made findings on those matters in dispute that relate to the issues that we have to determine.

12. The Claimant began working for the Respondent in 2004 as a night warehouse manager at the Respondent's premises in Walthamstow, London and knew his job well. The Claimant speaks limited English. He also has difficulty reading and writing English. Turkish is his first language. The Claimant's son has assisted him with reading documents and writing emails to management as he has limited writing and no electronic capabilities.

13. The Respondent runs a cash and carry retailer operating from a trading estate in London. The Claimant was responsible for overseeing deliveries of frozen and other food to the respondent's customers during the night shift. The warehouse was stocked with food products for the respondent's wholesale fast food supplier business.

14. There was a copy of the claimant's contract of employment in the bundle of documents. There was also a copy of the respondent's company Handbook from 2019 and a copy of another company handbook, which was undated.

Disclosures

15. We spent considerable time in the hearing going through a number of photographs, the video and emails in the bundle to assess whether they contained disclosures to the respondent about various health and safety matters. Our findings on those are as follows:

16. The claimant's reading and writing ability in English was limited. He relied on his son, Mr Balcik to complete his paperwork. Mr Balcik was also the assistant warehouse manager and therefore had his own responsibilities to the respondent. All emails in the bundle was sent by Mr Balcik to the respondent. The claimant's evidence was that Mr Guvemli and Mr Muezzin told him that if there is ever a

problem in the warehouse during the nightshift, he should take a photo of the problem and send it to them. The claimant confirmed that the photos in the hearing bundle, attached to emails were all taken by Mr Balcik as were the videos, one of which was disclosed at this hearing.

17. We find it likely that the claimant spoke to Mr Muezzin on a number of occasions during their employment as they worked opposite shifts at the warehouse and there would be a need for them to communicate about various operational matters. Although a signed witness statement was produced to the tribunal at the hearing, purportedly from Mr Muezzin, that statement did not deal with the apparent contradictions between it and the statement he gave to the respondent on 10 July 2019.

18. In the hearing we were taken to the following documents produced in the bundle: At page 102, there are 4 photographs of boxes that contained baked goods. 2 boxes contained what looked like chocolate eclairs in plastic bags and the other 2 contained round goods which had the appearance of donuts or tarts. The email was sent by Mr Balcik. It was sent on 2 June 2019 and the message simply stated that one eclair was missing. The claimant's evidence was that he knew nothing about this email.

19. At page 103, the message from Mr Balcik was that the items photographed were all on the top shelf and that they could not be reached easily. He asked *'could someone please put them down for us thanks'*. He then listed items such as brioche buns, chicken nuggets, Americana glazed buns and cod fillets. The photographs attached to that email were of boxes stacked on top of each other, wrapped in plastic. The boxes were on pallets. The claimant's live evidence was that he did not know about this email until it appeared in the case. But he was adamant in the hearing that he had lived it and seen it.

20. Page 105 is a copy of an email sent to Mr Muezzin by Mr Balcik, which attached 6 photographs of bags of rotten onions. In the email he stated that the reason he was sending the email was to let Mr Muezzin know why they had not sent out any fresh large Spanish onions that night.

21. At page 106, Mr Balcik asked someone called Mr Levent Mertler to look at the issue of the '*picking list'* and '*pallet jobs'* for them. At page 107 Mr Balcik attached photos of a box of jars and stated that this was the state in which they had been found.

22. Over the next few pages, Mr Balcik addressed complaints from customers through the respondent that the nightshift had made various errors with orders and with invoices. At 113, Mr Muezzin listed three accounts the respondent had either lost or were about to lose because of loading mistakes and cancellation of products. There was an email from Mr Balcik to Mr Muezzin dated 15 July and which he asked whether the respondent could arrange for two agency staff. There were two emails between Mr Balcik and Deniz in the HR office about staff and their written contracts.

23. On page 119, on 3 July 2019, Mr Balcik emailed Deniz to ask whether the respondent could advertise and recruit more members of staff because the nightshift was losing experienced staff and this was a big issue for *'us'*. We take

that to mean Mr Balcik and the claimant, as the two managers on the nightshift. He stated that this was because the staff talked among themselves and if someone left and started working elsewhere, they would call their friends and encourage them to go and work with them there. He stated that as there was a shortage of 7 members of staff, *'everyone is working under pressure'*. He apologised for giving Deniz a headache but stated that this was a problem which had worsened since his last email about advertising for new staff.

24. At page 120 there was photograph taken sideways showing a pallet leaning over to one side. The wording of the email was *'we have 1 pallet of buns leaning over'*. On page 121, Mr Balcik notified the respondent that there was a member of staff leaving. He asked for a list of the holidays of each person on the nightshift. He also attached photographs of various completed forms which were not attached and we were not told what they were.

25. On page 122 there are 2 photographs of stacked pallets. The wording on that email was from Mr Balcik. He stated that he just wanted to let Mr Muezzin know that there was not enough space in the freezer to put any pallet down. The sentence was unfinished and we did not have the full photograph of the email in the bundle so that we could see how the sentence ended. The claimant agreed that he had not sent this or any of the other emails. However, he stated in the hearing that this was the respondent overstocking the freezer and that this was not good for health and safety as it could fall on someone.

26. Mr Talty's evidence was that the respondent was aware that there were storage issues at the warehouse and that when they took over the business, they brought shipping containers and placed them in the yard to be used as additional storage.

Events leading to the claimant's dismissal

27. On 10 July 2019, on his arrival to start his shift, the claimant telephoned Mr Muezzin. There is a dispute between the parties as to whether he shouted at Mr Muezzin. It is agreed that he informed him that the state of the freezer was unacceptable and that his staff were not going to work the shift but were going on strike. Mr Balcik's evidence was that the warehouse was a busy environment with forklifts making noise so that the claimant had to raise his voice to be heard. We find it likely that the claimant was agitated and expressed his feelings loudly to his manager. This would not have been the first time the claimant spoke to Mr Muezzin on the telephone while at work, but it is the only time that we were told that there was an allegation that he been shouting at him.

28. Although it was difficult to find out what was happening, we find it likely that he told Mr Muezzin that he was unhappy that pallets had been left on the floor and about the way that goods had been stacked in the freezer. He stated that Mr Muezzin's day shift had packed pallets of food in the freezer in rows with inadequate spacing which made it difficult for the pallets to be taken out easily. He said to Mr Muezzin and to Mr Guvemli, when he spoke to him, that the day staff had left boxes on the floor behind the rows of pallets, which were also on the floor. He stated that it was dangerous to work in the freezer in that state.

29. The respondent became concerned about what was happening at the

warehouse, especially because the claimant stated that the staff were refusing to work and because he was so agitated during the call. Mr Muezzin found it difficult to ascertain exactly what was happening at the warehouse as the claimant was so worked up during the conversation. At the time, he described the claimant as shouting at him and being abusive. It was for those reasons that Mr Muezzin telephoned Mr Guvemli and Mr Talty, who lived close to the warehouse. Mr Talty was asked to go to the warehouse to see what was happening.

30. Mr Talty went to the warehouse and found the claimant shouting and still in an agitated state. The claimant was so agitated, that it was not clear to Mr Talty what he was saying. Mr Balcik had to explain the situation on his father's behalf. He informed Mr Talty that the problem was that the day shift had left too many pallets lying around which made it impossible for the nightshift to access the freezer. Mr Talty confirmed that he noticed that there were pallets lying around on the floor in the freezer. He considered that this was not unusual and was something that occurred from time to time as when the day shift is busy, they do not always have time to stack pallets neatly before finishing the shift. He agreed in the hearing that it would have been awkward to move the pallets and that it would also have been time-consuming to rearrange the things on the floor. Mr Muezzin had been in charge of the day shift. Mr Talty concluded that this was likely to be a matter between the claimant and Mr Muezzin and that the claimant had tried to include other people in the dispute. He noticed that the team was not as exercised about the state of the freezer as the claimant was. When Mr Talty spoke to the nightshift, they did not report any issue to him or express reluctance to work. They were working in the freezer when he arrived.

31. Before he left, Mr Talty took the claimant and Mr Balcik to a different part of the warehouse where staff would normally make a hot drink, in order to give the claimant an opportunity to regain his composure, before the management came inside.

32. Mr Guvemli and Mr Muezzin arrived at the warehouse soon after. Mr Muezzin also spoke to staff to enquire whether they intended to go on strike but they confirmed that they had no intention of doing so. The respondent's HR consultant, Deniz Akkaya attended the warehouse that night. He spoke to the claimant in the office and told him to go home to calm down. Although no one used the word '*suspension'*, we find that the claimant was effectively suspended from work as he was told to go home and not to return until he was asked to. He was told that he was being sent home because of the way he spoke to Mr Muezzin on the telephone. The claimant confirmed that the nightshift went back to work before he left the warehouse. In his witness statement he stated that once the management arrived with new staff and moved the goods, that resolved the problem. It was Mr Talty's evidence that once the claimant left the site, the other members of staff on the nightshift were happy to work and the issue was resolved that night.

33. Mr Talty confirmed that 4 men from the day shift turned up that night but they did not work. We find it likely that the workers who completed the work that night were members of the nightshift. Mr Talty recalled that Mr Balcik took over after the claimant was sent home and that all the good were picked and loaded on time that night and all the vehicles went out on time.

34. Because of the way the claimant spoke to him on the telephone that night, Mr Muezzin made a written complaint about him to the respondent. In the statement, Mr Muezzin outlined the telephone call and stated that it had been abusive and that the claimant had shouted at him. He also added the following matters that he wanted to bring to the respondent's attention. He stated that he had been told by some of the respondent's staff, that the claimant was renting rooms in properties to members of staff and that he used this to control their behavior, threatening them with eviction if they did not follow his instructions. He added that he had been told that on some occasions, the claimant would ask members of staff to stop doing work for the respondent and instead, to load a wholesaler's vehicle and he would then take a bribe of £300 cash per week. He reported that he had received complaints from staff that the claimant's management style was very threatening and aggressive and that he managed staff by fear. He had been informed that the claimant had been signing the attendance sheet for members of staff who do not attend work but were still being paid and that the claimant sometimes left work early and claimed that he left work at a later time. He complained that the claimants behaviour, professionalism and integrity were in question and that the safety of staff was in immediate danger.

35. The respondent considered that these were all serious allegations. The respondent decided to conduct an investigation. Firstly, the respondent's HR invited anyone who had anything to report, to come forward to speak to management. Piotr Lezuch, quality assurance, conducted the investigation into the allegations that Mr Muezzin made against the claimant. He first met with anyone who came forward and interviewed them. We had copies of their signed statements in the hearing bundle. Mr Muezzin was present in the room for two of the interviews. All those who were interviewed confirmed that they rented rooms from the claimant. One individual confirmed that the room he rented from the claimant was overpriced and that when he stated that he wanted to move out, the claimant told him that if he changed his home, that he would no longer have a job at the respondent. Another confirmed that he rented a room in one of the claimant's houses and that the claimant sometimes took people from work to do work on his house and sometimes he would not let them return to work at the warehouse because they had to do work on his house. They all confirmed that they witnessed the claimant shouting at members of staff and that some people, such as Romanians were too scared to refuse to work on the claimant's house as he would dismiss them. Lastly, another member of staff complained that when it was busy, the claimant did not allow them to take their tea or lunch breaks and that this happened a few times a week.

36. We find it likely that while the claimant was on suspension; Mr Balcik, who was also the respondent's assistant night manager; spoke to a few of the staff on the nightshift and got them to sign statements in support of the claimant. These are on pages 129 – 134 of the hearing bundle. We came to that conclusion because: we found it unlikely that these 6 individual members of the nightshift, who did not speak English as a first language, would voluntarily write witness statements in almost identical wording and present them to Mr Balcik, to give to the respondent; without any assistance and prompting from him. It is highly likely that Mr Balcik either wrote these statements for the named individuals and asked them to sign them or suggested to them what words should be in the statements. As they were typewritten, it is more likely that he did the statements. Mr Balcik's evidence about the statements was confusing and contradictory. At the start of his

cross examination, Mr Balcik denied knowing anything about these statements but when he was questioned further, he stated that that he had nothing to do with their preparation but that he had been given them by Rafik to send to management. Rafik was one of the respondent's employees who's name is on one of the statements. As his cross-examination progressed, he stated that the original copies were put in an envelope and left under Mr Muezzin's door and that he did not know how they came to exist. Towards the end of his cross-examination, he stated that all 6 members of staff came to see him at the same time, in his office and that was how the statements came to be. His evidence was that he could not recall when this was done.

37. On 23 July, the respondent wrote to the claimant to invite him to an investigation meeting to be held on 25 July. The claimant was informed that the subject matters to be discussed at the investigation meeting where as follows:

> -Allegations that the claimant had been renting his property, in exchange for a position on the nightshift;
> -Allegations of bullying and aggressive behavior
> -Allegations of not providing contracts to employees
> -Allegations of not allowing them to have a lunch break
> -Allegations of using company vehicles for your own personal work;
> -Allegations of missing damaged goods; and
> -Allegations of falsification of clock in/out sheets.

38. The claimant was informed that the meeting would be conducted by Piotr and that a possible outcome of the meeting could be a referral for disciplinary process. It was also possible that the respondent could decide not to proceed any further.

39. The investigation meeting happened on 25 July 2019 and the respondent arranged for an interpreter to attend to assist the claimant. The meeting was conducted by Mr Talty with Piotr taking minutes. Mr Talty confirmed that he read the statements taken by Piotr from the nightshift staff before conducting this investigation meeting with the claimant.

40. The claimant confirmed that he rented rooms to various members of staff. He stated that this had not been a problem for the previous owners of business. He stated that he only rented rooms to staff when they were in need. He confirmed that they paid rent in cash for those rooms. He denied that he had told anyone that if they left one of his rooms, they could no longer work for the respondent. He stated that if renting rooms to staff was a problem for the respondent, he was willing to stop doing so. He disagreed with the suggestion that renting rooms to staff could cause a conflict of interest for him. That was also his case in the hearing.

41. The claimant denied using the members of staff to work on his property. He denied paying staff who had not attended work. He denied paying staff to work on his private property. The claimant denied the allegation that he was bullying and aggressive to members of staff and stated that he only wanted to do his job to perfection and did not want anyone to make any mistakes. He stated that when they were under pressure, he would tell them to catch up because they were not working efficiently. He stated that when staff would not listen to him, he would complain to HR, who would deal with them. He denied shouting at staff.

42. The last issue taken up with the claimant in the investigation meeting was the allegation that he was withholding contracts from employees. The claimant stated that whenever he was given a written contract from HR, he would usually hand those over to the employee. He confirmed that the usual process was that when he decided to employ someone, Mr Balcik would complete the paperwork, interview them and offer them the job on his behalf. Whenever a written request comes from HR, Mr Balcik would complete the paperwork and send it back to HR. Mr Talty confirmed that the claimant kept the written contracts in the break room/locker room downstairs and that the only people who had keys to the locker were the claimant and security. HR had issued contracts but they have never been given to the employees. The claimant stated that some people did not want their contract. The claimant confirmed that he had never conducted a disciplinary meeting in the 15 years that he had been employed by respondent.

43. He confirmed that he sometimes did not give breaks to staff, if the shift was busy but that they would make up the break on another occasion, such as the following shift. He confirmed that he was aware that the staff were entitled to a tea break of 15 minutes and a separate hour's lunch break at 2 AM. He denied bullying anyone or giving them shorter breaks. He also denied using the company vehicles for personal use.

44. The claimant denied paying someone when they had not attended work. Lastly, the claimant confirmed that the previous owners had given him authorisation to give damaged goods to employees. He confirmed that he did give damaged goods to employees on the nightshift.

45. All the allegations in the invitation letter were put to the claimant in this meeting and he was given an opportunity to comment on them.

46. After the investigation meeting with the claimant, Mr Talty checked the respondent's records and noticed that several of the employees' addresses were the same address. He also noticed that some employee's wages were paid into the claimant's bank account, which he considered to be odd. Mr Talty also checked HM Land Registry to see who the property they lived at was registered to. However, he did not obtain any Land Registry documents. He also looked at the tracker on the company vehicle that the claimant used.

47. We find that Mr Talty noted that the claimant had never asked for permission to use the company vehicles and that he was not an authorised user of the company vehicles. The claimant had never offered to pay for fuel and oil for the company vehicles. As the Transport Manager, Mr Talty would have been aware if the claimant had that permission as he would have had to have a copy of the claimant's driving license and to have signed him off as authorized to drive the vehicle. By contrast, Mr Balcik and Rafik were licensed to drive the respondent's vehicles and were registered to do so. Mr Talty had their driving licenses on file.

48. By letter dated 30 July, the claimant was invited to a disciplinary hearing on 8 August. The letter stated that it was to be conducted by Mr Talty. The charges that were going to be considered at the disciplinary meeting were:

"Renting your property in return to offering a position on the nightshift;

-bullying and aggressive behavior - specifically on 10 July 2019 when you were being extremely abusive towards a colleague over the telephone;
-not providing a contract of employment to employees;
-not allowing team members to have a lunch break;
-using company vehicles for your own personal use;
-missing damaged goods; and
-falsification of clock in/out sheets, specifically, that on 9 July you falsely stated your start time as 5 pm when in reality, you arrived at work at 18.40."

49. The letter informed the claimant that if the allegations were substantiated, the respondent would regard them as serious misconduct. Attached to the letter were copies of the clocking in and out sheets, copies of CCTV footage, copies of statements from the nightshift staff relating to the first 6 allegations, and copies of a couple of text messages relating to the shift on 10 July.

50. The claimant was advised that the possible outcomes of the disciplinary hearing could be warnings or that his employment could be terminated. He was also advised of his right to be accompanied to the hearing by a fellow employee. Lastly, he was told that if he failed to attend the meeting without good reason, the respondent would treat his non-attendance as a separate act of misconduct.

51. Mr Talty's evidence was that this was meant to be a further investigation meeting as there were things which arose from his investigation that he wished to put to the claimant. The letter stated clearly that it was a disciplinary hearing but at various points in the minutes, it is recorded as both a disciplinary and an investigation meeting. Mr Talty told us that most of the respondent's employees had English as a second language (including those in the office) and that there may have been some confusion over the correct title for the meeting but that he considered it a further investigation meeting.

52. The meeting occurred on 13 August. The claimant attended the meeting unaccompanied and the respondent provided the same interpreter who had attended the earlier meeting. Mr Talty chaired the meeting and Piotr wrote minutes. We did not hear from the respondent's HR representative, Deniz Akkaya. We find it likely that the HR evidence was not qualified and that the respondent had not had any legal advice at this point in the proceedings.

53. The claimant was asked further questions about renting rooms in his property to members of staff. As he had stated in the earlier meeting that the previous owners of the business had given him permission to do so, Mr Talty asked whether he had proof of that permission or whether he had approached the previous directors for a statement confirming this which he could produce. The claimant had not done so. He had nothing to confirm that he had been given such permission. The claimant was advised that as a landlord, he would have to deal with issues regarding rent and other complaints from tenants and that this could conflict with his role as their manager at Star Catering where he would be the person with the power to take disciplinary action against the same individuals, if necessary. The claimant confirmed that he understood the conflict and that he would not do so again. He did not deny renting rooms to the employees so Mr

Talty did not print off and show him any documents from HM Land Registry.

54. The claimant disputed that he had behaved in a bullying and aggressive manner to Mr Muezzin on the telephone on 10 July. He denied holding onto people's contracts but stated that sometimes members of the nightshift would leave their contracts in the changing room and that when that happened, Mr Balcik would store them in a cupboard in the changing room.

55. Mr Talty confirmed that following their last discussion, he had checked the records to see whether there was any record of break/lunchtimes during the nightshift. There were no breaks recorded. The claimant stated that he had been working in this way for many years and that there had never been any queries of how he ran the shift. He confirmed that he understood that it was important to have a structure to the shift. The claimant stated that no one else apart from his son and occasionally, Rafik used the company vehicles. He also stated that the previous owners had given him permission to use the vehicles and that whenever he wanted, he would ask and they would give him use of a company vehicle. He denied using the company vehicles himself but when Mr Talty offered to show him information from the tracking device that showed that the vehicle had frequently been to his home, he accepted that he had used it to drive home. Later he stated that he had used it to collect pitta bread. The claimant confirmed that he understood that he was responsible for the use of company vehicles during the course of the nightshift.

56. In relation to taking damaged goods home, the claimant confirmed that he had not taken damaged goods to his own home but that he had been given permission for staff on his shift to take damaged goods home and that the respondent had agreed to this. He stated that although this did not happen every day, the directors had given him permission to distribute damaged goods to employees. He confirmed that he did not have any documents to show the previous management giving him permission to do so.

57. The claimant stated that the issue of the falsification of the timesheet was an error.

58. The respondent’s management board considered the findings from Mr Talty’s meetings with the claimant and the statements collected by Piotr in the investigation. The board decided that the claimant should be invited to a disciplinary hearing and that they were going to engage an external consultant to conduct it.

59. By letter dated 23 August, the respondent wrote to the claimant to invite him to a disciplinary hearing to be conducted by a Face2Face consultant from Peninsula. This was to take place on 29 August at the respondent’s premises. The claimant was advised of his right to be accompanied by a colleague or trade union representative. He was informed that if he could not provide a satisfactory explanation for the matters discussed, he could be given either a warning, a final warning or his employment could be terminated in accordance with the respondent's disciplinary procedure. Once again, he was informed that if he failed to attend a meeting without good reason, his non-attendance will be considered as a separate issue of misconduct.

60. Before the meeting, the claimant wrote to the respondent to indicate that he had not been able to find a trade union or other representative but had asked a friend to accompany him and to act as an interpreter. The respondent agreed to this and the claimant attended with his friend on the morning of 29 August. The meeting was conducted by Paul Baker, consultant from Face2Face. There was a minute taker and the meeting was recorded. Mr Baker provided a written report of the hearing on 2 September, which was in the hearing bundle. In the report, Mr Baker confirmed that his role was to provide an impartial service, conduct the hearing and make recommendations to the respondent employer. It would then be up to the respondent to decide whether to follow his recommendations.

61. The report confirmed that before conducting the hearing, Mr Baker considered the relevant documents, including the investigation report, the invitation to the disciplinary hearing which set out all the allegations to be considered, the respondent employee handbook and the related correspondence between the respondent and the claimant. In the hearing, the claimant had opportunity to respond to all the allegations set out in the invitation letter. He denied renting rooms to members of staff in return for a job on the nightshift and stated that all members of staff who said so were lying about him. However, he did confirm that all 4 members of staff who were renting rooms for him at that time, were also working for the respondent on the nightshift. The claimant confirmed that rooms were rented to people who were friends of those already living at the property and others who wanted to come to the UK. He described the process of getting employment on the nightshift, which was that once in the room, they would be brought to the business, complete paperwork which we would be passed to HR and they would then start working. Mr Baker pointed out to him that this was not really an interview process as he was not conducting a suitability check. The reality of the situation was, *'if you rent my room, I will give you a job'.*

62. They discussed the allegation that the claimant had behaved in a bullying and aggressive manner to staff and to Mr Muezzin. The claimant denied this. The claimant asserted that the respondent was only investigating this allegation because he had made complaints to the respondent on 10 July about the state of the freezer.

63. They discussed the allegation that the claimant failed to give written contracts to employees and failed to give them their lunch breaks. When they discussed the claimant's use of the company vehicles and whether he used them to go home, the claimant denied that he did so but when Mr Baker stated that he intended to look at the tracking data, the claimant stated that he did use the vehicle to go home but that he only did so once or twice a month. He stated that he was never told that he could not do this. When they discussed the issue of the claimant giving damaged goods to staff, Mr Baker found that there was no record of the claimant being told that he could not do so or any record from the previous management to say that he could do so.

64. Mr Baker noted that the system of using clocking in/out sheets had only recently been introduced into the respondent and that prior to their introduction, the respondent used a system whether people signed in with a thumbprint. The claimant stated that he made a mistake and put the wrong signing in time. Mr Baker noted that he was on salary and so therefore there was no benefit to him in the

signing in earlier than he had arrived at work. The claimant denied that he had ever signed in and out for staff.

65. In his written report, Mr Baker confirmed that having considered all the evidence and including the claimant's representations at the disciplinary meeting, he did not find sufficient evidence to uphold the allegations that the claimant had given staff damaged goods in breach of being told not to do so, failed to allow staff to have a lunch break or to give them their written contracts. However, he found the allegation that the claimant had rented out rooms in his property to members of staff upheld and he also upheld the allegations that the claimant had used the company vehicle for his personal use and that he had been guilty of falsification of timesheets for others. Mr Baker decided that the allegations that he upheld were serious and that they showed that the claimant was guilty of serious misconduct and incompetence. He recommended that the claimant be summarily dismissed.

66. Mr Guvemli confirmed that the management board considered Mr Baker's report and noted that some of the allegations against the claimant had been upheld. They discussed the findings in the report and concluded that the conduct described amounted to serious misconduct and incompetence. They noted Mr Baker's recommendation that the claimant's employment should be terminated with immediate effect by summary dismissal. They also considered the minutes of the hearing. We find that after discussion, the management board decided that sufficient evidence had emerged in the disciplinary hearing that gave rise to a genuine belief that the claimant was guilty of the matters alleged and that he had been given sufficient opportunity to answer the allegations. The respondent decided that they would adopt Mr Baker's recommendation and they decided to summarily dismiss the claimant for gross misconduct.

67. There was a draft dismissal letter in the bundle but the letter that was sent to the claimant, was on page 184 and was dated 9 September 2019. It was signed by Mr Guvemli and had been written on his instructions. The letter informed the claimant that the allegation that he had rented rooms to staff on the nightshift in return for offering them a job, acted in a bullying and aggressive manner, used the company van for his personal use, and falsified clocking in and out records; were all upheld.

68. The claimant was informed that his actions, when considered as a whole, had irrevocably destroyed the trust and confidence necessary to continue the employment relationship and therefore, his employment was terminated with immediate effect by summary dismissal. The respondent also stated that its standard disciplinary procedure, did not permit recourse to a lesser disciplinary sanction. The claimant was informed that he had the right to appeal against the decision and that if he wished to exercise that right he needed to write to HR, within 2 weeks of receiving the letter giving the full reasons why he believed that his dismissal was inappropriate or too severe.

69. An appeal letter on the claimant's behalf, written by his solicitors was sent to the respondent on 25 September 2019. In relation to the first allegation, the claimant denied that he had rented rooms to staff in return for getting them employment at the respondent. He stated that the previous owners knew that he rented rooms to staff and had no problem with it and also, that the present owners of the business were aware that he frequently faced shortages of staff and that this

was his way of dealing with that problem. He stated that he believed that the respondent had decided to dismiss him based on assumptions and hearsay without any reliable evidence. In relation to the second allegation he stated that he believed that he had been a victim of the respondent's failure to recruit adequate loading workers and provide a safe working environment. He complained that he was under pressure to complete the work on the shift by 5 AM and that it was an unhealthy working environment to work with many pallets blocking the area in which he and his staff had to work. He felt that the management findings in relation to this matter were unfair to him and that as he is the manager on shift, the staff would frequently blame him for the conditions in which they worked but that he had not bullied or been aggressive to anyone. The claimant denied using the vehicle for his personal use but then stated that he used it to go home or to collect pitta bread order or pickup medication and that it would be unreasonable to dismiss him for doing so. He considered that the change in policy regarding using the company vehicles for personal use had not been communicated to him. He disputed that it was fair to dismiss him for the variation between the signature of one particular employee on the clocking in and out sheets. He contended that this was used to dismiss him because he raised health and safety concerns and that there was no evidence to substantiate those allegations.

70. The claimant's appeal was held on 18 October 2019 before another consultant from Face2Face called Barnaby Rudston. The claimant attended with his friend and interpreter who had been with him at all the other previous meetings. Mr Rudston was accompanied by notetaker. Mr Rudston confirmed that he had read all the previous documents. He also spoke to Mr Guvemli as part of conducting the appeal.

71. During the appeal Mr Rudston went through all the points that the claimant wanted to make against each of the allegations that had been founded proved against him. Mr Rudston gave the claimant the opportunity to produce any new evidence that he had that related to the allegations. The claimant and his companion also had the opportunity to comment on each of the allegations and to say why they should not have been upheld and why he should overturn the decision. Mr Rudston conducted the appeal by going over the allegations, giving the claimant the opportunity to show where Mr Baker went wrong in arriving at his conclusions and the opportunity to bring new evidence that would show that he made the wrong decision.

72. In his report, Mr Rudston went through each of the allegations. He stated that he did not accept the claimant's explanation for offering workers accommodation. The claimant did not give him an explanation that required further investigation. Mr Rudston simply did not accept that Mr Baker had come to the wrong conclusion. The claimant submitted in the appeal hearing that he had to push the staff who work for the nightshift hard so that they would finish loading the trucks by 5 AM and that this was the reason why they complained about an unhealthy working environment. Even if the claimant had been performance managing the staff, Mr Rudston did not accept that this was a reason to appeal against the dismissal. The claimant had been dismissed because of his conduct and not because of the conduct of the staff. Although the claimant stated that he had permission from the previous owners to use the vehicles for his personal use, he also submitted that he had not used vehicles for personal use and later submitted that he had but that it had been infrequent. Mr Rudston checked with

Mr Guvemli about this. Mr Rudston concluded that the claimant knew that he was not allowed to use the vehicle for his personal use without permission from his employers, which is why he initially stated that he had not done so. This point of appeal failed.

73. They also discussed the claimant's last point of appeal which related to the alleged forgery/falsification of the clocking in and out times of one of the workers on the nightshift. The claimant denied doing this and stated that he would not have been able to sign another person signature even if he tried as he could not follow signatures. He stated that it would have been pointless for him to sign or not to sign for himself as it would make no difference to his pay as he did not get paid by the hour. Mr Rudston spoke to Mr Guvemli about this. He also noted in the disciplinary hearing outcome report, that Mr Baker confirmed that there was evidence that the claimant had paid staff when they had not attended work.

74. In his report, Mr Rudston stated that after considering all the documents and after listening to the claimant's points, he found no reason to overturn the respondent's decision. He recommended that the claimant's appeal should be dismissed in its entirety and that the original sanction of summary dismissal should be upheld.

75. On 15 November, the respondent's HR department, which we believe to be Mr Deniz Akkaya, wrote to the claimant to confirm that the respondent was going to accept the recommendation of the appeal officer and reject the claimant's appeal against his dismissal. The claimant's dismissal was confirmed.

The respondent's disciplinary policy and procedures

76. The respondent had written disciplinary procedures outlined in both the July 2019 copy of the handbook and the undated handbook in the hearing bundle. The July 2019 copy of the handbook stated that an employee would only be disciplined after careful investigation of the facts and after being given the opportunity to present their side of the story. The policy allowed the respondent to temporarily suspend an employee on contractual pay, if necessary, to enable an uninterrupted investigation to take place. The policy outlined the rules covering unsatisfactory conduct and misconduct and gave a list of examples for which disciplinary action could be taken. It also outlined serious misconduct which was defined as misconduct due to extreme carelessness or where the misconduct had a serious or substantial effect on the respondent operation or reputation. In that circumstance, the policy stated that the employee may be issued with a final written warning in the first instance. A final written warning could also be imposed as the first course of action if, in an alleged gross misconduct disciplinary matter, upon investigation, there was shown to be some level of mitigation resulting in it being treated as an offence just short of dismissal.

77. Gross misconduct was described as conduct warranting the penalty of dismissal without notice and without any previous warnings being issued. The policy stated that such misconduct was any behaviour or negligence resulting in a fundamental breach of contractual terms that irreversibly destroys the trust and confidence necessary to continue the employment relationship. A list of examples was provided in the policy, which also stated that the list was not exhaustive.

78. The older, undated handbook also contained a disciplinary procedure. The right to suspend an employee on full pay while investigations take place was stated to be up to 5 working days, or longer in an exceptional case. If on investigation it is considered that the matter should be taken further, a disciplinary hearing would be convened of which the employee would be given prior notice. The respondent reserved the right to implement any of the stages of the disciplinary procedure if the employee's alleged misconduct warranted such action. The policy stated that the disciplinary hearing would be conducted by a director and the person who conducted the investigation will be asked to present the supporting facts or materials. The employee would be given the right to be accompanied to the hearing by a colleague who would be able to present the case or act as a witness and could also ask questions. In a straightforward case, the employee would be notified of the decision of the hearing at the end of it; otherwise they would be notified following an adjournment of usually not more than 7 days. The policy also set out a right of appeal.

79. This policy also stated that if an employee committed an act of gross misconduct they would be summarily dismissed without notice, pay in lieu of notice or accrued holiday pay. Breach of trust, corrupt or improper practice, receiving benefit or advantage from any individual or body with which the company has dealings, failure to notify the company of a pecuniary interest with any customers, or using confidential information for personal ends; were all listed as matters that would be considered to be acts of gross misconduct. The list was not exhaustive.

80. The more modern handbook stated that an appeal against a formal warning or dismissal should give details of why the penalty imposed is too severe, inappropriate or unfair in the circumstances. The appeal procedure will normally be conducted by member of staff not previously connected with the process so that an independent decision can be made. If the employee is appealing on the grounds that they have not committed the offence then the appeal may take the form of a complete re-hearing and reappraisal of all matters so that the person who conducts the appeal can make an independent decision before deciding whether to grant or refuse it. The older contract made no mention of the right to rehearing.

81. The claimant began early conciliation with ACAS on 10 October 2019 and the ACAS certificate was issued on 10 November 2019. The claimant's complaint of automatic and ordinary unfair dismissal and detriment for making public interest disclosures was issued at the Employment Tribunal on 16 November 2019.

Law

82. The claimant made complaints of unfair dismissal, automatic unfair dismissal on the grounds of making a public interest disclosure; detriment for the same reason, wrongful dismissal (a claim for non-payment of notice pay), and unlawful deductions from wages.

Protected Disclosures

83. The Claimant complains that the reason for his detrimental treatment and his dismissal was that he made protected disclosures. The Respondent resisted this and submitted that he was dismissed for gross misconduct and not subjected to detriment.

84. In order for disclosures to be considered as protected in accordance with the Employment Rights Act 1996 (ERA), three requirements need to be satisfied. A 'qualifying disclosure' needs to contain a disclosure of information, which is made in the public interest and is made by the worker in a manner which accords with the scheme set out in the ERA sections 43C-43H.

85. Whether or not the disclosure qualifies depends on the nature of the information being revealed. The worker making the disclosure must have a reasonable belief that it tends to show one of the statutory categories of failure. It is not necessary for the information to be true. However, determining whether they are true can assist the tribunal in their assessment of whether the worker held a reasonable belief that the disclosure in question tended to show the relevant failure. (*Darnton v University of Surrey* [2003] IRLR 133).

86. The ERA sets out six categories to which the information must relate if the disclosure is to be one qualifying for protection. Out of those six, the claimant relied on (d) that the health and safety of any individual has been, is being or is likely to be endangered. The claimant submitted that he made oral and written disclosures to Mr Muezzin and to the respondent.

87. The Tribunal considered the case of *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436 in which Sales LJ stated that he agreed with the submission that the concept of "information" in section 43B(1) is capable of covering statements which might also be characterised as allegations. He also stated that section 43B(1) should not be glossed to introduce into it a rigid dichotomy between '*information'* on the one hand and '*allegations'* on the other hand. Although sometimes a statement which can be categorised as an allegation will also constitute information and amount to a qualifying disclosure under section 43B(1), not every statement involved in an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.

Detriments for making protected disclosures

88. Under section 47B of the Employment Rights Act 1996, it states that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. This means that the disclosure must have been a material factor.

89. The claimant submitted that he suffered detriments as a direct consequence of making protected disclosures. In considering whether he had been subject to a detriment on this ground the tribunal needs to analyse the mental processes (conscious or unconscious) of the respondent (*London Borough of Harrow v Knight* [2003] IRLR 140).

90. The Tribunal must identify the causal nexus between the act of making a protected disclosure (if there was one) and the decision of the employer to subject the claimant to any of the alleged detriments. The Tribunal also considered the case of *Fecitt v NHS Manchester* [2012] ICR 372 in which the Court of Appeal stated that it is not necessary that the protected disclosure is the sole or principal

reason for the treatment. Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.

91. The Tribunal will also need to assess whether the claimant actually had suffered detriments as the respondent contended that he had not.

Automatic unfair dismissal

92. The tribunal considered the case of *Kuzel v Roche Products Ltd 2008 ICR 799* in which there was a complaint of dismissal on the grounds of making a protected disclosure and a discussion on the issue of the burden of proof. The court decided that although it is for the employer to prove that he dismissed the employee for a fair and admissible reason, it does not follow, as a matter of law, that if he fails to establish this the tribunal must accept the alternative reason advanced by the employee. If the employee's puts forward a positive case that he was dismissed for a different reason, he would need to produce some evidence supporting that case. There is, however, no burden on him either to disprove the reason for the employer, or to prove the reason asserted by himself, even where this is an inadmissible reason, such as making a protected disclosure. *'It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and produce some evidence of a different reason'* Mummery LJ.

93. Whereas in the case of detriment, the test is whether detriment was done 'on the ground' that the employee had made protected disclosure, i.e. that it had been a material factor; in a dismissal case, the test is more stringent and is, whether the whistleblowing was *'the reason (or, if more than one, the principal reason) for the dismissal'* (*Fecitt*). In the case of *Eiger Securities LLP v Korshunova* [2017] IRLR 115, EAT, the tribunal had found the claimant's dismissal to be automatically unfair under section 103A because it was satisfied that the whistleblowing had been *'on the respondent's mind'* at the time of dismissal. The EAT held that the tribunal had applied the wrong test. It has to be the *reason* for dismissal or in more than one, the principal reason. (see also *Mid-Essex Hospital Services NHS Trust v Smith* UKEAT/0239/17 (5 March 2018, unreported).

94. The Tribunal also considered the general law on unfair dismissal.

Unfair dismissal

95. It is respondent's submission that the claimant was dismissed because of serious misconduct.

96. Where the Tribunal is concerned with the question of determining the reason for the Claimant's dismissal and whether it is one of the reasons set out in section 98(2) of the Employment Rights Act 1996 (ERA); the burden is on the Respondent to show the reason for the dismissal and that it is a potentially fair reason i.e. that it relates to the Claimant's conduct or capability.

97. A dismissal that falls within that category can be fair. In order to decide whether it is fair or unfair, the Tribunal needs to look at the processes employed by the Respondent leading up to and including the decision to dismiss. In cases

concerning the employee's conduct, a three-stage test must be applied by the Respondent in reaching a decision that the employee has committed the alleged act/s of misconduct. This was most clearly stated in the case of *British Homes Stores Ltd v Burchell [1980] ICR 303*, as follows. The employer must show that: -

(a) he believed the employee was guilty of misconduct;

(b) at that time, he had in his mind reasonable grounds which could sustain that belief, and

(c) at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

98. The means that the employer does not need to have conclusive, direct proof of the employee's misconduct but a genuine and reasonable belief of it which has been reasonably tested through an investigation.

99. What constitutes a reasonable investigation? In the case of *Sainsbury's Supermarkets Ltd v Hitt* [2002] EWCA Civ 1588, the Court of Appeal held that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for conduct reason. The objective standards of a reasonable employer must be applied to all aspects of the question of whether an employee was fairly and reasonably dismissed. The Court of Appeal held that on the facts of that case, the purpose of the investigation was not to establish whether not the applicant was guilty of the alleged theft but whether there were reasonable grounds for the employers' belief that there had been misconduct on his part to which a reasonable response was a decision to dismiss. The employer is required to carry out an investigation that is reasonable in all the circumstances.

100. If the Tribunal concludes from all the evidence that the employee has committed misconduct; then the next step for the Tribunal is to decide whether, taking into account all the relevant circumstances, including the size of the employer's undertaking and the substantial merits of the case, the employer has acted reasonably in treating it as a sufficient reason to dismiss the employee. In determining this, the Tribunal has to be mindful not to substitute its own views for that of the employer. Whereas the onus is on the employer to establish that there is a fair reason, the burden in this second stage is a neutral one. The *Burchell* test applies here again and the Tribunal must ask itself whether what occurred fell within "the range of reasonable responses" of a reasonable employer. The tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair. In judging the reasonableness of the employer's conduct (a) tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In the case of *Iceland Frozen Foods v Jones [1982] IRLR 439* Mr Justice Browne-Wilkinson stated that: -

"in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another; and *the function of the ….*

Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable response which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

101. It was also the respondent's submission that it was entitled to dismiss the claimant summarily because he committed gross misconduct. As the claimant had been employed since 2004, his rights to notice as set out under section 86 of the Employment Rights Act 1996, was to one week's notice for every year that he was employed, up to a total of 12 years. The claimant was therefore entitled to 12 weeks' notice pay, unless we decide that he committed gross misconduct (section 86(6)), which would entitle the respondent to treat his contract as terminable without notice.

Unlawful deduction of wages

102. Section 13 of the employment rights act 1996 states that an employer should not make deductions from wages of a worker employed by him unless the deductions are required or authorised by virtue of a statutory provision or a provision of the workers contract or, the worker has previously signified in writing his agreement or consent to the making of the deduction. Employers are entitled to deduct for tax, National Insurance and for overpayments of wages or expenses.

103. The tribunal heard no evidence from the claimant on this issue.

Applying law to facts

104. The Tribunal will refer to the issues set out in the list of issues contained in the minutes of the preliminary hearing conducted by EJ Moor on 22 May 2020.

Protected disclosures

105. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996?

Allegation: Between 1 May and 11 July 2019, the claimant advised Mr Muezzin by telephone on about 3 occasions week of inadequate supply of nightshift staff resulting in workplace stress and shorter breaks;

106. It is our judgment that the claimant and Mr Muezzin spoke frequently during the claimant's employment as they worked opposite shifts and needed to cooperate with each other. However, it was our judgment that the claimant did not complain of inadequate supply of nightshift staff between 1 May and 11 July 2019.

107. It is our judgment that between 1 May and 11 July 2019, the claimant did not disclose any information to Mr Muezzin, that tended to show that the health and safety of any individual has been endangered.

Allegation: In an email from the claimant's son, (Mr Orcun Balcik) to the respondent, undated, stating that there was a need for the respondent to employ more night staff and that night staffing was inadequate resulting in shorter breaks;

108. It is our judgment that Mr Balcik sent many emails to the respondent in his own right as assistant warehouse manager and he may well have discussed the contents of those emails with the claimant before sending them. The evidence did not support the claimant's case that he was doing so under the claimant's direction/instruction. In the hearing, the claimant did not recall the contents of the emails and knew nothing of them.

109. There were 2 emails to the respondent, on 3 and 15 July in which Mr Balcik asked the respondent to recruit more agency staff. He suggested that there was increased pressure on staff who were working because members of staff had left the nightshift, after being encouraged to do so by friends who had moved on to work elsewhere. He stated that this left the respondent '*shorthanded'*, which meant that everyone was working under pressure. There was no reference to health and safety or any breach of any legal obligation by the respondent. It could have been that they were under pressure to complete deliveries on time or to meet targets. There was insufficient information to say what '*pressure'* was being referred to. It is our judgment that the statements made by Mr Balcik in those two emails, even if they were sent on the claimant's behalf, did not provide information which tended to show that the health and safety of any individual had been, was being or was likely to be endangered.

Allegations (3)and (4): On 10 July 2019 the claimant disclosed on the telephone to the Day Warehouse Manager, Mr Muezzin, health and safety risks, which were that the day shift staff under his supervision had packed pallets of food in the freezer room in piles of 3 pallets aligned in rows in inadequate space in which precluded the pallets being taken easily or at all.

110. It is our judgment that the claimant telephoned Mr Muezzin on 10 July to complain about the state of the warehouse that night and to inform him that he was unhappy with the way the packed pallets of food had been left in the freezer, with inadequate space which precluded the pallets being taken out easily or at all and that this was dangerous. We find it likely that these points were made among the things that he said to Mr Muezzin that night.

111. It is therefore our judgment that in his conversations with Mr Muezzin on 10 July, the claimant provided information that the respondent had breached or was likely to breach the health and safety of himself and the nightshift staff because of the state in which the day shift had left the freezer.

112. It is our judgment that the claimant disclosed to the information set out at paragraphs 21.4 and 21.5 of the list of issues; during the conversations he had with management on 10 July 2019.

113. In our judgment, the claimant believed that the disclosure of information made that night was in his interest and in the interests of members of staff on the nightshift and therefore, in the public interest. It was not solely about him.

114. He believed that it tended to show that the health or safety of an individual had been, was being or was likely to be endangered.

115. It is our judgment, that the claimant's belief was reasonable. The claimant was concerned that the nightshift would bear the responsibility for moving pallets and reorganising the warehouse in order to be able to fulfil deliveries that night and that someone could get hurt and that this was unfair. It is likely that he believed that their health and safety was likely to be endangered by the amount of work they had to do that night and because of the need to shift heavy boxes and move packed pallets, in order to fulfil the orders.

116. It is therefore our judgment, that the claimant made a qualifying disclosure and that it was protected because it was made to the claimant employer on 10 July 2019.

117. Although the claimant alleged that he told the respondent that the day shift staff had left food packages from the freezer room in the warehouse where they got warm and potentially and actually spoiled and were later returned to the freezer room; (as alleged in .21.6 of the list of issues); we did not have evidence that he said that to the respondent on 10 July and we did not have evidence of him saying it on any other day. The emails in the bundle did not contain any such statements. Although there were photographs in the hearing bundle showing pallets with a dark red liquid running from the bottom but we did not have reliable evidence that those photographs were given or sent to anyone or that the issue was raised with management during the claimant's employment.

118. The video that we looked at during the hearing was taken during the shift of 10 July and tended to show the disorganisation in the warehouse with pallets and boxes on the floor and some stacked high. It therefore supports the claimant's case that he made the disclosure on the night of 10 July 2019.

119. It is therefore our judgment that the claimant's only protected disclosure was in relation to the state of the warehouse regarding the placing of pallets and boxes, and that he made that disclosure on the telephone to Mr Muezzin when the claimant attended work on 10 July.

Time limits

120. The claimant's claim form in the employment tribunal was issued on 16 November 2019. The ACAS certificate was dated 10 November 2019. It was determined at the preliminary hearing that any complaint about something that happened before 9 July 2019 may not been brought in time. As this disclosure was made on 10 July, it is our judgment that the claimant's complaints about it were brought in time.

<u>Detriments (Employment Rights Act 1996 section 48)</u>

121. Did the respondent do the following things: (the following were set out in the list of issues)

failed to address understaffing on the nightshift;

122. in our judgment, the staffing of the nightshift changed on a regular basis. We had copies of emails between Deniz and Mr Balcik in which they discussed staff leaving and other staff joining the shift. The respondent did what it could to

address the issue by engaging more staff. Sometimes those members of staff left quite quickly after being engaged, as referred to in one of Mr Balcik's emails.

123. Even if the respondent failed to engage more staff, it is not our judgment that this was a detriment to the claimant or a detriment for making the disclosure that he made on 10 July. The claimant was suspended on 10 July and never returned to work. Therefore, the respondent did not fail to engage more staff, following the claimant making the disclosure.

124. Also, if the respondent failed to engage staff when there was a shortage that would be a detriment to the business and to all the other members of staff on the nightshift as they would potentially have to do more work or they might fail to complete the work that they had to do which could have caused the respondent to lose clients. It would not have been in the respondent's business interests to fail to engage the right amount of staff for the job.

125. Our primary judgment on this issue is that whenever it was aware of a shortage, the respondent engaged more staff or allowed the claimant to engage staff, as he confirmed that he had done through word of mouth from those who rented rooms from him in his house.

126. The claimant did not suffer this detriment.

Mr Muezzin shouted at the claimant on the telephone on or around 10 July 2019.

127. It is our judgment, that at the time that he had the conversation with Mr Muezzin on 10 July 2019, the claimant was angry at him and with the respondent. It is our judgment that the claimant shouted at Mr Muezzin and that it is highly likely that he was frustrated by what he considered to be disorganisation from the day shift because they had left the freezer in disarray, which meant more work for him and the staff on the nightshift. Mr Talty was immediately asked to go to the warehouse to sort out what was happening and all the other managers attended the warehouse that night, in response to the strength of feeling that the claimant demonstrated when he shouted at Mr Muezzin on the telephone. Also, on arrival at the warehouse, Mr Talty took both the claimant and Mr Balcik to another part of the warehouse because they were both trying to talk to him at the same time and to calm down before the senior managers arrived. This again demonstrated that the claimant had not been calm when Mr Talty arrived but had been shouting and was agitated. The claimant was suspended because of the way he spoke to management that night. At the time, he did not protest his suspension. Taking all those factors into consideration, it is our judgment that the claimant raised his voice and shouted at Mr Muezzin during their conversation.

128. In our judgment, it is also likely that Mr Muezzin shouted back at the claimant when they spoke on 10 July 2019. The claimant shouted at him and Mr Muezzin shouted back.

129. It is our judgment that Mr Muezzin did not shout at the claimant because he made a disclosure. The claimant and Mr Muezzin were having a row. This was a heated argument between two members of staff who had worked together for a while and who sometimes clashed.

130. It is our judgment that Mr Muezzin did not shout at the claimant because he had made a disclosure.

131. There was no detriment to the claimant.

Suspended the claimant on 11 July 2019

132. Although no one used the word suspension, it is our judgment that the claimant was effectively suspended during the nightshift of 10 July 2019 when he was sent home to calm down and not return to work. A suspension is a detriment as it was an unwanted act which was not to the claimant's benefit.

133. Why was the claimant suspended? It is our judgment that he was suspended because Mr Muezzin reported to the respondent that the claimant had shouted at and been abusive towards him during their telephone conversation that evening.

134. The claimant made a disclosure during that telephone conversation. However, he was speaking to a senior manager and even though he was raising a matter of concern, it was not appropriate for him to do so by shouting and being abusive. He was not required to be rude or abusive to a senior manager in order to make a disclosure. At the time, Mr Muezzin was the Day Warehouse Manager and we were told that he was senior to the claimant. It was not appropriate for him to shout at Mr Muezzin.

135. It is our judgment that the reason for the claimant's suspension during the nightshift of 10/11 July 2019 was the manner in which he spoke to Mr Muezzin rather the contents of the conversation.

Failed, on receipt of the appeal to investigate the complaint that led to the internal investigation;

136. It was not clear to the Tribunal what this complains referred to. We were not helped in our understanding by the claimant's written submission. The respondent investigated all the allegations against the claimant before he was invited to a disciplinary hearing. Mr Talty conducted the investigation into the allegations against the claimant and produced a report to management. The claimant did not produce any new evidence to the appeal hearing or raise any matter that required further investigation.

137. The claimant was given the opportunity at the appeal hearing to show why he considered that the dismissal was unfair or because he had raised health and safety matters and that the sanction of dismissal was unfair. In his report, Mr Rudston responded to and addressed each of the claimant's grounds of appeal. It was his conclusion after doing so that the dismissal should be confirmed.

138. If this is a reference the contents of Mr Muezzin's statement to the respondent in which he referred to issues with conduct, it is our judgment that the respondent took those allegations seriously and investigated them through its disciplinary procedure. Those were the complaints that led to the investigation. In his statement, Mr Muezzin referred to a number of matters that had occurred during the previous months and which had been reported to him by staff members. He

made serious allegations against the claimant. It is likely that Mr Muezzin was upset that the claimant shouted at him. We judge that it is likely that he would have raised these matters with the respondent in any event. He had recently been told about them by staff. In our judgment, the wording on his statement made on 10 July shows that he was upset by the claimant shouting at him rather than the contents of what he stated.

139. Once he raised those issues with the respondent, they could not ignore them and in our judgment, it was appropriate that they should be investigated. The claimant had the opportunity during the investigation to respond to the allegations and to show that Mr Muezzin had ulterior or other motives for making those serious allegations against him.

140. Staff had complained to Mr Muezzin before 10 July about the claimant's bullying and aggressive behavior, about not being given their written contracts or their breaks and about having to rent a room from the claimant in order to keep their jobs. These were serious matters. Mr Muezzin raised them in the statement written to complain about the way in which the claimant spoke to him on the evening of 10 July and not to complain about the subject they spoke about that night.

141. It is therefore our judgment that the claimant did not suffer this detriment.

Failed to rehear the disciplinary hearing

142. It is our judgment that in conducting the appeal, Mr Rudston effectively reheard the disciplinary hearing. He allowed the claimant the opportunity to re-argue why he considered that he had not committed the misconduct defined in the allegations or that even if he had, the dismissal was either imposed because of another reason or was too severe a sanction.

143. It is our judgment that this appeal hearing was an opportunity to go through the allegations again and to consider the evidence afresh. That is what Mr Rudston did. He considered Mr Baker's report but he did not restrict himself in conducting the appeal to just looking at new evidence or breaches of procedure. Instead, he went through all the allegations again, spoke to Mr Guvemli and came to his own conclusions on the allegations.

144. In our judgment, the respondent effectively did re-hear the disciplinary hearing. The claimant did not suffer this detriment.

Upheld the original decision to dismiss on appeal

145. It is our judgment that the respondent upheld the original decision to dismiss the claimant, following Mr Rudston's appeal hearing and after considering his report. It is our judgment that this was not done because the claimant made a protected disclosure. It is our judgment that this was done because the respondent came to the conclusion that the claimant had committed gross misconduct.

146. The respondent accepted the recommendations of the independent disciplinary hearing chair and the independent appeal officer that the claimant had committed serious misconduct and that dismissal was an appropriate sanction.

147. The respondent's management board considered that the reports and recommendations and decided that it accepted the findings and that dismissal was an appropriate sanction to impose on the claimant. Mr Guvemli signed the dismissal letter on the respondent's behalf. Mr Guvemli was on the respondent management board and therefore had the authority to sign on their behalf.

148. Deniz as HR signed the letter confirming that the claimant's appeal failed. As HR, he was authorised to do so by the respondent's management board.

149. There was no evidence that the decision to dismiss the claimant or to uphold the original decision and to dismiss the appeal related to the claimant's disclosure on 10 July 2019. The decision to dismiss the claimant and to dismiss his appeal was because of the serious misconduct that he had committed.

150. It is our judgment that the claimant did not suffer this detriment.

Unfair Dismissal

Automatic Unfair dismissal

151. The first question for the tribunal was whether the reason or principal reason for dismissal was that the claimant made a protected disclosure.

152. It is our judgment that the claimant was suspended during the nightshift on 10 July 2019. After his suspension for shouting and being abusive to Mr Muezzin, the respondent received a statement from Mr Muezzin in which he described what happened that night and then went on to describe other conduct matters concerning the claimant.

153. He made some serious allegations. The allegations potentially covered the following areas of concern: fraud, exploitation, bullying, theft and failure to follow management instructions. The respondent could not have ignored those allegations. The respondent properly focused on those allegations, in addition to the allegations that arose from the nightshift on 10 July and conducted an investigation and then followed a disciplinary process into those allegations.

154. During the process, the claimant did not deny renting rooms to employees. He denied and later accepted that he had used the company vehicles to drive home, without the express permission of his managers and accepted that he had not been giving the written contracts out to staff. He confirmed that he had given damaged goods to members of staff. Mr Talty confirmed that wages of some of the respondent's employees who lived at the claimant house were being paid into the claimant's personal bank account, without the respondent's knowledge or approval. Those were some of the serious matters that the respondent investigated against the claimant.

155. In our judgment, the respondent did not suspend, discipline and eventually dismiss the claimant because he made a protected disclosure on 10 July. The respondent disciplined and dismissed the claimant because of the serious misconduct outlined in the dismissal letter, after that misconduct had been investigated and tested in the disciplinary process.

156. Mr Talty admitted that when he arrived at the warehouse there were things on the floor, in the way and on pallets that would have made it difficult for the claimant and the night shift to do their job. The respondent did not agree that the state of the warehouse that evening was a danger to health and safety but it was agreed that it was in disarray. There was no evidence that the respondent was upset at the claimant for raising this issue. The matter was resolved that night either by the new staff who arrived with management or by the nightshift or by a combination of both working under Mr Balcik. There was no evidence to support the claimant's assertion that the respondent was upset by him making a disclosure or that it dismissed him for it. The evidence showed that the respondent's ongoing concern was the way in which the claimant raised the issue as he shouted and was abusive to Mr Muezzin and caused further disruption at the warehouse that night. It took some time to get him to calm down. That was Mr Talty's observation and the subject of Mr Muezzin's complaint.

157. It is our judgment that the respondent has proved that it dismissed the claimant for a fair and admissible reason - serious misconduct. The evidence showed that the reason for the claimant's dismissal was solely his serious misconduct and that the disclosure had nothing to do with it.

Ordinary unfair dismissal

158. The respondent has proved that the reason for the claimant's dismissal was his serious misconduct on the night of 10 July 2019.

159. In this tribunal's judgment, the respondent genuinely believed that the claimant had committed serious misconduct. The respondent came to that belief after conducting an investigation and a disciplinary process.

160. The matters of misconduct were initially raised by Mr Muezzin in his statement about what happened during the nightshift of 10 July. The respondent recognised those are serious allegations of misconduct and began an investigation into them. This included an allegation that the claimant had behaved in an aggressive and bullying manner to Mr Muezzin on 10 July.

161. Mr Muezzin sat in on two investigation meetings but it was clear to us that the investigation meetings with staff were conducted by Piotr. The claimant's investigation meeting on 25 July was conducted by Mr Talty, the transport manager, with support from Piotr. All of the allegations in Mr Muezzin's letter were put to the claimant and he had opportunity to comment on them.

162. The respondent asked him about: - renting rooms to staff and using that to control their behaviour by threatening them with eviction if they did not do as he said. They asked him about allegations of a threatening and aggressive style of management, that he failed to give staff their breaks or their written contracts of employment and that he signed attendance sheets for absent members of staff or falsified clocking/clock out sheets. He was asked about using company vehicles for personal use and for missing damaged goods. The claimant was also asked about the allegation that he had spoken to Mr Muezzin in an abusive manner on the telephone on 10 July 2019.

163. Although the 2nd meeting with Mr Talty on 13 August was labelled as a disciplinary hearing in the invitation letter, it was in our judgment, another investigation meeting as Mr Talty put to the claimant the results of his investigations so that the claimant could comment. This gave the claimant an opportunity to bring evidence to show that he had permission from the previous owners to use the company vehicles for his personal use and to rent rooms to members of staff. In looking at the substance of the meeting, it is our judgment that it was a 2nd investigation meeting as the claimant had opportunity to make further comment on the allegations, ask questions and provide further evidence.

164. The respondent's management board considered the statements obtained by Piotr and the notes and minutes of the investigation meetings with the claimant and it was on that basis the claimant was invited to a disciplinary hearing to face those allegations. The respondent did not proceed with all the allegations. It was appropriate that it should decide to only proceed with those that were the most serious or where there was evidence that the claimant had committed misconduct.

165. The findings and recommendation of the disciplinary hearing conducted by Mr Baker, the independent hearing manager, were adopted by the management board after due consideration. The claimant had every opportunity to produce evidence to confirm that he had permission from the previous owners to take the company vehicle for his personal use and to rent rooms to employees. He failed to do so. The claimant was accompanied to the disciplinary hearing and was aware of the seriousness of the hearing. He had been forewarned that he could be dismissed at the end of the hearing depending on Mr Baker's findings.

166. It is our judgment that the respondent had conducted a reasonable investigation. At the end of that reasonable investigation, the claimant had an opportunity to answer the allegations at a disciplinary hearing.

167. At the end of the disciplinary hearing, Mr Baker upheld the following allegations: - that the claimant rented rooms in his house and used that to control staff's behaviour by threatening them with eviction if they did not do what he said or by threatening them with dismissal if they decided not to continue to rent rooms in his property; that the claimant behaved in an aggressive and threatening manner towards staff; that the claimant's falsified attendance sheets for absent member of staff; and that the claimant used company vehicles for personal use, without prior authorisation. Mr Baker recommended that the claimant should be dismissed and after due consideration, the management board agreed and Mr Guvemli signed a letter of dismissal, on their behalf.

168. The tribunal did not agree with the claimant that the act of renting rooms to members of staff was a matter of private bargain between the claimant and the members of staff. The claimant would have excessive power over those members of staff which he allegedly used to threatening them with dismissal if they did not continue to rent rooms from him or with eviction, if they did not do as he wished at work. The respondent did not consider that it was appropriate that the claimant should have the power of withholding or terminating both the employee's means of earning a living and of securing shelter.

169. The tribunal is satisfied that the respondent conducted a reasonable investigation of these allegations. The appointment of outside consultants to

conduct a disciplinary process, including the disciplinary and appeal hearings is a proper and reasonable practice for the purposes of ensuring an objective and dispassionate process, especially where the claimant's managers (Mr Muezzin, Mr Guvemli and Mr Talty) had been involved in the incident on 10 July.

170. The claimant had a fair appeal. The claimant had an option to bring further or new evidence to that hearing to prove that he had the various permissions that he said that he did. The claimant's contract stated that he would need to ask permission to use the vehicles and he never did of these owners or of Mr Talty, the Transport manager. Mr Rudston reheard the claimant's disciplinary hearing. He went through every allegation with him and gave him another opportunity to put his responses and explanations to them. He listened and investigated by considering the documents and speaking to Mr Guvemli.

171. Mr Guvemli took responsibility for the decision to dismiss the claimant and to confirm that dismissal on appeal. He considered the report produced by the independent chairs of the disciplinary and appeal hearings and, together with the management board, made the decision to adopt their recommendations. Mr Guvemli did not involve himself in the investigation or disciplinary processes.

172. In the circumstances, it is this tribunal's judgment that the respondent conducted a reasonable investigation, that it believed that the claimant was guilty of serious misconduct at the time and that the respondent otherwise acted in a procedurally fair manner. There was no evidence that the witnesses were presented with pre-typed statements. The respondent did not rely on anonymous statements. These statements were in the hearing bundle and the contained the names of those who made them. The claimant had every opportunity to respond to the allegations made against him. At no point that the claimant say that he did not understand the allegations or that he was unable to respond to them. The claimant was able to respond to every allegation. It is simply that the respondent did not accept his explanations for the 4 allegations for which he was dismissed.

Was dismissal within the range of reasonable responses?

173. At the time of his dismissal, the claimant had been employed at the respondent for approximately 15 years. The claimant had occupied the position of the nightshift manager for the whole period of his employment. The claimant therefore knew the job very well. He would have been familiar with the wholesalers and the respondent's clients as well as with all aspects of the job. In the circumstances, it was reasonable for the respondent to conclude that there was not an issue of the claimant not knowing the job or needing training or support to do it. The claimant had been found to manage in an aggressive and bullying manner. The respondent would have needed to be able to rely on the claimant to manage nightshift on his own without the oversight of other managers, in contrast to if he had been the manager on the day shift. The claimant had been found guilty of renting rooms in his house to members of staff and using the power that gave him to threaten to dismiss staff if they did not do as he said. These were all matters of serious misconduct.

174. In our judgment, it was reasonable for the respondent to conclude that in the circumstances, a final warning or any sanction short of dismissal would not have been appropriate. In this tribunal's judgment the decision to dismiss the

claimant summarily was within the band of reasonable responses of the reasonable employer, in the circumstances in which the respondent found itself.

Wrongful dismissal/breach of contract

175. It is this tribunal's judgment that the claimant was guilty of gross misconduct. The claimant had rented property to individuals in return for offering them position on the nightshift. This meant that he had the power of shelter and employment over them, which was expressed in the dismissal letter as *'if you rent my room, I will also give you a job'.* That was the claimant's admission. The claimant had been abusive to Mr Muezzin on 10 July. The claimant had used company vehicles for personal use without authorisaton and permission from the respondent and he had falsified the clock in and out sheets.

176. Those were serious acts of misconduct and appropriately labelled as serious/gross misconduct. In cases of gross misconduct, the claimant's contract stated that the respondent had the option of summary dismissal.

177. In the circumstances, it is our judgment that the claimant was fairly dismissed summarily, for gross misconduct. The claimant is not entitled to notice pay.

Unlawful deduction of wages

178. We heard no evidence on this issue. The claimant failed to prove that the respondent owed him any wages. This complaint fails.

Judgment

179. The claimant made a protected disclosure on 10 July 2019.

180. The claimant was not subjected to detriment on the ground that he made a protected disclosure. The complaint of automatic unfair dismissal fails and is dismissed.

181. The claimant was dismissed. The complaint of ordinary unfair dismissal fails and is dismissed.

182. All of the claimant claims fail and are dismissed.

Employment Judge Jones

4 October 2021