EMPLOYMENT TRIBUNALS

Claimant: **Mr J Rowlands**

Respondent: **Phoenix Healthcare Distribution Ltd**

Heard at: **Cardiff (by video)** **On: 19 July 2023**

Before: **Employment Judge Harfield**

Representation:
Claimant: In Person
Respondent: Searle (Counsel)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that the application for interim relief is refused because it is not likely that, on determining the complaint, the tribunal will find that the principal reason for claimant's dismissal was the asserted protected disclosures.

REASONS

Introduction

1. This is the claimant's second claim. The first claim 1600638/2023 was presented on 29 March 2023. It appears to be either wholly or mainly a disability discrimination claim (it has not yet been case managed). This claim 1600940/2023 was presented on 19 May 2023 against the respondent and a second named respondent Mr Baldwin. It is a claim for notice pay, arrears of pay and disability discrimination. The claimant in box 8.2 also said he was complaining about protected disclosure detriment and also included the statement that the claimant was marked as unauthorised absent without pay while not being allowed to return which he said had effectively ended his employment with the company. He wrote on box 5.1 his employment had ended that day, 19 May 2023. So it has the hallmarks of including some kind of complaint relating to dismissal.

The same day again Mr Rowlands emailed the tribunal saying he wished to make an application for interim relied as he had been dismissed due to whistleblowing company failures to the DVSA. He said that the respondent had effectively refused to offer work and refused to allow him to attend work or discuss anything with other employees. He said they had also now refused to pay him which had effectively terminated his contract of employment. He said it was automatic unfair dismissal under section103A Employment Rights Act 1996 (ERA). The email referred to the claim number for the first claim but was treated by the tribunal as relating to the second claim, this claim. Regrettably the email was not referred to a Judge until 11 July 2023 when this interim relief hearing was then promptly listed. There is a case management hearing listed for 24 July.

2. There is recent correspondence on both files with requests for further particulars from the respondents to the claimant. The claimant has made an application to strike out the respondent's ET3 on this file and disputes an order made by EJ Brace to re-serve the proceedings on the respondents (which led to the ET3). I explained to the parties that I was not dealing with those matters today as they had not been listed before me, only the interim relief application. The situation can be discussed at the case management hearing on 24 July. I would not be able to countermand the decision of EJ Brace in any event.

3. Because of the flurry of correspondence I checked with the parties what they believed I need before me for the interim relief hearing. The claimant relied on a bundle he had filed (as directed by EJ Brace) and a further email with a chart of delivery routes, times and addresses etc. The respondent had at 2:34pm on 18 July filed a witness statement from Mr Baldwin with a bundle of attachments. The claimant told me he was unhappy about this and at several points throughout the hearing told me he was unhappy with the hearing. He said it was less than 48 hours notice and he had not done a written witness statement himself because he thought he would be able to speak. I did not hear formal witness evidence under oath tested under cross examination from either party because that is not how interim relief applications are intended to proceed. But I explained to the claimant several times that he was not being prevented from speaking; indeed most of the hearing involved hearing from the claimant.

4. At the start of the hearing I took an hour to complete my reading and so that the claimant could have further time to read the statement of Mr Baldwin and the appendices to Mr Baldwin's statement (which were documents he said he knew about anyway). I told him if he needed longer to look at Mr Baldwin's statement and documents he could have as long as he needed. He said he did not need more time. When the hearing reconvened I asked the claimant a series of questions relating to whether

and how he said he was dismissed or constructively dismissed. I asked him a series of questions about the protected disclosures he was relying upon for his interim relief application. We took an early lunch break so that the claimant also had chance to review the documents again before finishing identifying the protected disclosures he was relying upon. Again the claimant was offered more time for that if needed. I asked the claimant about how he said the things he is complaining about are linked to the protected disclosures relied upon. I asked him if there was anything else he wanted to say in general or in response to Mr Baldwin's statement or the documents. I again said if he wanted more time he could have it. The claimant said he did not need any. I heard oral submissions from Mr Searle. I adjourned to deliberate with the hope of delivering an oral judgment but there ultimately was not time for me to do so.

5. I asked the claimant questions because I needed the information to decide the interim relief application which has to be based on an evaluation of how he presents his case. I am satisfied he had the chance to say what he wanted to say. I have to decide the interim relief application on the material before me; I give no greater weight to Mr Baldwin's information because it is in the form of a witness statement than I do to information given to me orally by the claimant. It is the essence of what is before me that I am concerned with. I was satisfied that the claimant had time to consider and respond to Mr Baldwin's statement and exhibits. My approach accorded with the observations in London City Airport Ltd v Chacko [2013] IRLR 610 that an interim relief hearing is an expeditious summary assessment to be undertaken by me as to how the matter looks to me on the material that the parties are able, in the limited time available, to put before me. It is designed to be a swiftly convened summary hearing which involves a far less detailed scrutiny of the parties' positions than will ultimately be undertaken at the full hearing. It is inevitable in interim relief applications that documents get filed at short notice because the applications are listed urgently and with short notice of the hearing. The ability to postpone an interim relief hearing is also constrained as it can only be in special circumstances. But I ensured the claimant had chance to consider and respond to Mr Baldwin's evidence whilst also giving the respondent the opportunity to be heard on an application that can have significant consequences for a respondent.

The Legal Framework

Interim relief procedure

6. The relevant statutory matrix is found within the Employment Rights Act 1996, it states as follows:

"*128 Interim relief pending determination of complaint.*

(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—
(a)that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—
(i)section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or
(ii)…, or
(b)…,
may apply to the tribunal for interim relief.

(2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).

(3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.

(4) The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.

129 Procedure on hearing of application and making of order.

(1) This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—

(a)that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—
(i)section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or
(ii)paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or

(b)that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met.

(2) The tribunal shall announce its findings and explain to both parties (if present)—
(a)what powers the tribunal may exercise on the application, and
(b)in what circumstances it will exercise them.

(3) The tribunal shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—

(a)to reinstate the employee (that is, to treat him in all respects as if he had not been dismissed), or
(b)if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.

(4)For the purposes of subsection (3)(b) "terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed" means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.

(5) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.

(6) If the employer—
(a)states that he is willing to re-engage the employee in another job, and
(b)specifies the terms and conditions on which he is willing to do so, the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions.

(7) If the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect.

(8) If the employee is not willing to accept the job on those terms and conditions—
(a)where the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and
(b)otherwise, the tribunal shall make no order.

(9) If on the hearing of an application for interim relief the employer—
(a)fails to attend before the tribunal, or
(b)states that he is unwilling either to reinstate or re-engage the employee as mentioned in subsection (3), the tribunal shall make an order for the continuation of the employee's contract of employment."

Protected disclosure dismissal

7. The issues that I have to undertake a summary assessment of are those which relate to the constituent elements of a protected disclosure and then consideration of the principal reason for the dismissal.

8. Those constituent elements are set out in section 43B-K, 44 and 103A of the employment Rights Act 1996.

9. Section 103A, so far as material, provides:

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

10. A "protected disclosure" is defined by s.44A of the 1996 Act as a "qualifying disclosure" that was made in accordance with ss.43C–H. In that regard, s.43B(1), so far as material, provides:

"(1) ... a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is in the public interest, and tends to show one or more of the following –
(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

11. To be a qualifying disclosure the disclosure also has to be made to the claimant's employer or other defined individual. Disclosures made not to the employer or other responsible person tend to have more criteria to satisfy. 43F permits disclosures to be made to certain prescribed bodies which to my knowledge includes the HSE and the Department for Transport.

The test to apply in an interim relief application

12. The burden of proof in respect of the interim relief application, rests on the claimant. The statutory test is whether it appears to the Tribunal that it is likely on determining the complaint to which the application relates the Tribunal will find that the reason (or principal reason) for the dismissal is that specified in section 103A.

13. The term "likely that on determining the complaint…" was examined in Taplin v Shipman Ltd 1978 IRLR where the test was expressed to be whether the claimant has a "pretty good" chance of succeeding in the final application to the tribunal. In Ministry of Justice v Shafraz [2011] IRLR

562 that test was again endorsed and was expressed to be a standard higher than having a fifty-one per cent prospect of succeeding. Again it was said in London City Airport Ltd v Chacko that the claimant has to "demonstrate a pretty good chance of success."

14. It is also important to remember that the Tribunal is engaged in a predictive exercise as to the likely outcome at the full hearing. It is not appropriate for me to seek to determine the factual issues as if this was a final determination of the matter; Wollenberg v Global Gaming Ventures (Leeds) Ltd and Herd UKEAT/ 0053/ 18 DA. Further the test of "likely to succeed" applies to all aspects of the claim that the claimant will have to prove not just the reason for dismissal; Hancock v Ter-Berg and another [2020] IRLR 97. It will therefore include all the constituent elements necessary to establish that a protected disclosure was made and not just whether the disclosure was the principal reason for dismissal.

The claimant's claim as relevant to the interim relief application

15. After I explained the concepts to him the claimant confirmed that he was arguing in the alternative either that (a) he was substantively dismissed by the respondent through the actions of Mr Baldwin, or alternatively that (b) he was constructively unfairly dismissed.

16. The claimant identified in respect of his unfair dismissal claim and for the purposes of this interim relief application that he was dismissed by the action of Mr Baldwin in:

    (a) Mr Baldwin unlawfully suspending him on 27 March 2023;

    (b) On 19 May 2023 Mr Baldwin moving him from suspended to unauthorised absence whilst also refusing to allow him to return to work without going through a welfare meeting;

    (c) Mr Baldwin held no meetings to discuss the unlawful suspension and detriments;

    (d) There were no communications from the respondent in the whole of April;

    (e) Mr Baldwin did not action the occupational health report of 14 April 2023 until he moved the claimant to unauthorised leave in May 2023.

17. What I suspect is at the heart of this is the claimant's viewpoint that if he is told he is on unauthorised leave, is unpaid, but is also not allowed to return to work then he viewed that as termination.

18. In respect of the claimant's alternative constructive unfair dismissal claim he identified the following alleged actions by the respondent as being in breach of contract that he says caused him to resign and treat himself as dismissed:

(a) The respondent held the belief they did not need to follow domestic law;

(b) The respondent violated the Transport Act;

(c) On 15 March 2023 the respondent promised to keep within 11 hours but did not stick to that. In particular in week commencing 20 March 2023 the respondent failed to follow the 11 hour promise;

(d) On 24 March 2023 the respondent marked the claimant as being sick with stress;

(e) Pay detriment: i.e. placing the claimant on unauthorised leave without allowing the claimant to return to work;

(f) No meeting was held to discuss the unlawful suspension;

(g) The respondent kept marking different reasons for the claimant's absence such as stress or unauthorised absence but the claimant had never requested any absence;

(h) Discriminatory conduct towards him, in particular:
   a. On 6 March 2023 on the shopfloor KS made discriminatory comments;
   b. On 14 February 2023 he was forced to wear uniform which the claimant cannot do due to sensory issues relating to autism;

(i) The respondent lost his documents (doctors notes, health reports, welfare meeting notes) and delayed in saying what they had lost. The respondent eventually said they could not locate them which meant they had breached Data Protection laws and they did not keep his personal data secure.

19. Turning to the claimed protected disclosures relied upon for the interim relief application(there may be more in the substantive claim) the claimant relies on the following:

(a) A text message sent to DT on 14 June 2022 which said: "Need to review these routes and hours mate why am I working over 12 hours then having mass hours on a return it's unlawful drivers can not drive for this long its killing me";

(b) A text message to DT on 13 July 2022 which said: “Sorry how I was today just a lot going on both physically and mentally I keep telling you and kev these hours are too much it’s just wrong I’m physically dead on my feet and nobody listening so obz I’m getting annoyed with it.

The claimant says in these text messages he was disclosing information he was working hours above the legal requirements; that they were breaching the Transport Act which is there to stop drivers being fatigued and he was saying he was dead on his feet with fatigue.

(c) On 6 March 2023 (as part of a wider exchange on the shop floor) he told KS that domestic transport laws were being broken;

(d) On 10 March he sent a document headed “to whom it may concern” which included: “However in August last year it was found that some route selections resulted in myself driving for up to and above 14 hours a day. This resulted in blood clots traveling from my left knee to my lungs and having been admitted to hospital in a very serious condition…” He said that since the new management were in place corrective measures had been removed and “I have raised concerns about route allocations to be informed that’s the job don’t like it leave and we’re not treating you differently;”

(e) On 20 March 2023 he emailed NC in HR saying “Issues requiring immediate attention. Management ignoring Great Britain domestic rules on driving and duty limit. Drive limit maximum 10 hours. Duty limit maximum 11 hours. Improper use of opt out of 48 hours being used to increase hours Monday – Friday instead of the Saturday morning to which its intended. Informed management who state phoenix medical do not care about domestic rules and that’s the job they do not care about my medical care and doctors orders. Management find it funny in approach I believe I’m being forced to leave due to medically and legally not being able to do as instructed. This requires immediate attention I have entered Acas arbitration and given your information a company contact as Wrexham management merely respond laughing to concerns. I will attempt todays work in line with doctors orders and legal procedures set out in gb domestic rules as found below (C then included a link to drivers hours domestic rules._ I have already been hospitalised due to company not listening to these rule breaches in the domestic rules and currently stressed panicked and alarmed at risk to my physical health;”

(f) On 21 March 2023 he spoke to the HSE making a complaint the company were violating domestic laws in the Transport Act to do with driver hours;

(g) On 22 March 2023 he emailed MB (to do with who would attend at a meeting) saying "Health and safety and acas are heavily involved as I've been unable to get any joy out of raising concerns for past 5 week via internal routes. As doctors note stats I'm unable to be on duty over 11 hours due to risk of life – blood clots – and managements refusal to abide by domestic rules on driving and or review duty of care I've been forced to whistleblow.."

(h) On 23 March 2023 he spoke to VOSA making a complaint the company were violating domestic laws in the Transport Act to do with driver hours. He texted a manager AW saying sorry I'm behind now had to answer phone to dvsa;

(i) On 24 March 2023 he emailed NC saying "I have worked over the legal limit and over the implementation plan twice this week which has resulted in a breakdown in my physical health this was raised to management including Matt and ignored. I'm now unable to work until a active plan and welfare meeting is conducted and or the 6 month doctor's note completion. I'm unable to work forced by line management refusal to address duty of care? With regard to meeting with Matt he has cancelled it until I'm fit to work which is not the case until a plan is implemented where company are going to follow laws set out in gb domestic rules. I would like you to again view these rules that should have been discussed with you yesterday following conversation with vosa about your operating license.

20. The claimant told me in respect of his unfair dismissal claim that all actions he alleges Mr Baldwin did that amounted to dismissing him were motivated by his protected disclosures. In respect of his alternative constructive unfair dismissal claim he was focusing on:

- On 15 March 2023 the respondent promised to keep within 11 hours but did not stick to that. In particular in week commencing 20 March 2023 the respondent failed to follow the 11 hour promise;
- On 24 March 2023 the respondent marked the claimant as being sick with stress;
- Pay detriment: i.e. placing the claimant on unauthorised leave without allowing the claimant to return to work;
- No meeting was held to discuss the unlawful suspension;

- The respondent kept marking different reasons for the claimant's absence such as stress or unauthorised absence but the claimant had never requested any absence;

Does it appear to me, on the material available, that at the final hearing there is a pretty good chance the Tribunal will find the claimant made protected disclosures?

21. On what is before me, and the consideration I have been able to give it, I consider that the claimant has a pretty good chance of establishing that he made protected disclosures. I am presuming that he is relying upon making a disclosure of information that in his reasonable belief tended to show the respondent was failing to comply with a legal obligation, or possibly also that the heath and safety of any individual has been endangered (in practical terms these two are likely to be interlinked).

22. On the face of it the claimant was disclosing information that was capable of tending to show, and he genuinely subjectively believed, tended to show, that domestic legislation governing driver hours was being breached by the respondent and that it was impacting on his health and safety or legal obligations relating to duty of care. As he said to me, and Mr Searle acknowledged, the legislation is there to prevent drivers driving whilst too fatigued which could represent a danger to them and everyone around them.

23. The respondent does not dispute the claimant reasonably believed any such disclosures were made in the public interest.

24. There is a dispute as to the extent to which the claimant's belief in breach of the legal obligation was reasonable. Mr Searle argues the claimant's belief may not be reasonable where the respondent has done their own analysis of driving hours which it is said should have shown to the claimant that the claimant had it wrong.

25. The reasonable belief, however, has to be held as at the time the disclosure is made. The disclosures all pre-date when the grievance investigation was undertaken and communicated to the claimant (9 May 2023). Further, I do not understand that Mr Baldwin at the time provided the underlying data and analysis to the claimant (to be clear I am not saying he should have done).

26. I am making my predictive decision based on limited evidence. Given how vociferously and over the extended period of time, and to the different bodies, that the claimant researched and communicated his concerns I anticipate the likely outcome would be that the claimant's belief in breach of a legal obligation was (from the claimant's perspective) reasonably

held. He of course need only hold a reasonable belief; his belief does not ultimately have to be proved to be correct as a matter of law or fact.

27. There is a potential dispute about the disclosures to HSE and VOSA/DVSA. I have not heard detailed submissions about this or about the different routes to protection under the Employment Rights Act. My understanding is they are potentially both prescribed bodies and I consider the claimant has a pretty good chance of establishing they were qualifying disclosures to those bodies under 43F ERA on that basis.

Dismissal or Constructive Dismissal?

28. One thing the parties do now agree about is that the claimant's employment has terminated. But it is more ambiguous how that came about and who did it. The situation is not very common, but it is possible for there to be a dismissal or resignation where there are no direct words from either party terminating the contract of employment. Instead, the dismissal or resignation is inferred from the actions of the parties. A classic example of a dismissal through conduct would be sending someone their P45 as it is the employer communicating a termination. But normally if its the employer's conduct that is in issue the employee will bring a constructive dismissal claim rather than a dismissal claim.

29. I have summarised already above what happened on 19 May in terms of the claimant presenting this claim and making his interim relief application. An interim relief application has to be brought within 7 days immediately following the effective date of termination. In his claim form presented on 19 May the claimant wrote on his form his employment had ended that day.

30. In the run up to the 19 May the claimant had the grievance outcome on 9 May. That same day he was invited to attend a welfare meeting and the claimant said he had no desire to interact with Mr Baldwin or attend a meeting with Mr Baldwin. The claimant said he was out of the country until 19 May. On 15 May Mr Baldwin wrote to extend the grievance appeal process until 22 May (the claimant having said he did not wish to appeal). The letter referred to the welfare meeting the claimant had rejected and said the respondent would consider appointing someone else to conduct it. The letter then said: "For an employee to be out of the business they are either absence due to annual leave or absent due to sickness, as you have not booked any annual leave nor have you provided a fit note for your current absence I must therefore advise you that your current absence is unauthorised and unpaid. Should we not receive an appeal and do not receive your intentions in relation to discussing with us a return to work then we will have to consider how we manage your continued unauthorised absence."

30. The claimant's response on 16 May was to say "As I'm obviously now clearly free to return to work as Matthew has made me absent without pay incorrectly following this unlawful suspension I will be at work at 6am Friday morning please issue van and route for Friday morning." On 18 May Mr Baldwin wrote a letter saying before the claimant could return to work there needed to be a plan in place that was agreed by all. He said there needed to be a meeting to discuss what support the respondent could provide the claimant, discuss the recommendations in the occupational health report, the query regarding payment for period of absence and to agree a way forward. The letter said the first opportunity Mr Baldwin had to meet was 22 May. The claimant responded on 18 May to ask if there was any logic behind Mr Baldwin's actions as if he could not return how could his absence be unauthorised, that Mr Baldwin had held a meeting with himself on 9th removing the claimant from suspension to unpaid leave and finally to say: "This is literally untenable the detrimental impact your actions are having is wrong and fundamentally harmful." The day after that the presented his ET1 and application for interim relief. On 24 May, after an invite to a further welfare meeting, the claimant said his contract of employment was terminated by Mr Baldwin effectively immediately after Mr Baldwin unlawfully refused to pay him and unlawfully refused his return to work.

31. On a predictive assessment I consider it more likely the Tribunal at the final hearing would find that this was a resignation by the claimant (though not expressly said as much) on 19 May, potentially communicated through the claimant presenting his ET1 claim form and application for interim relief. What the claimant was saying by 19 May has the hallmark, in my view, of the claimant saying that by 18 May he considered the respondent to be in fundamental breach of contract, the final straw being the claimant's understanding he was not being paid but was also not being allowed to return to work when he wanted to return to work on 19 May. By 19 May he had decided to accept what he saw as being a fundamental breach of contract by the respondent, and was therefore bringing his contract to an end that day. Arguably, a reasonable employer in the respondent's shoes would take this to mean (at least when having seen the full picture) the claimant had terminated the contract (albeit that the claimant was saying it was in the face of conduct he was complaining about by the respondent).

32. That to me is the hallmark of a constructive dismissal rather than a dismissal by the respondent. Further on the face of it I cannot see anything from the respondent actually themselves communicating a termination of the contract; they were on the face of it seeking a meeting with the claimant to discuss a return to work.

33. That all said I doubt that the overall analysis on the interim relief application would be affected whether it is looked at as a dismissal through the conduct of the respondent or a constructive dismissal. Both have at the heart of them the same sequence of events coming to a head and an assessment of why the respondent did what the claimant is complaining about. I will therefore look at the various things the claimant identified as being relevant under both unfair dismissal and constructive unfair dismissal.

Does it appear to me, on the material available, that at the final hearing there is a pretty good chance of the Tribunal finding that the reason or principal reason for the claimant's dismissal was a protected disclosure or disclosures?

34. It remains important to bear in mind that this is a forecast summary; a predictive assessment. It does not mean that what I set out here is what the Tribunal at the final hearing will ultimately actually decide having looked at all the documents, and heard from all witnesses with their testimony tested under cross examination. It is simply not possible and not appropriate to do that at an interim relief hearing.

35. Under section 103A ERA the making of the disclosure or disclosures must be the reason or principal reason for dismissal. In a protective disclosure constructive unfair dismissal complaint the Tribunal at the final hearing will have to decide whether the respondent was in fundamental breach of contract (entitling the claimant to resign and treat himself as dismissed). If so, the Tribunal will have to decide what was the reason or reasons why the respondent behaved in the way that gave rise to the fundamental breach of contract, and whether the making of a protected disclosure(s) was the principal reason for the respondent's behaviour.

36. I turning to the things the claimant identified to me has having been motivated by his protected disclosure and caused him to resign/consider himself dismissed.

    The allegation the respondent on 15 March 2023 promised to keep within 11 hours but did not stick to it and in particular in the week commencing 20 March 2023 failed to follow that promise.

37. On the claimant's account from mid January 2023, following a change in management, he was changed from doing routes he had been doing since August 2022 and placed back into general allocation. He says that he raised this with his manager, KS, that he legally and medically could not do routes that would have him working 11 hours or more but that he was told it was the job. He says he raised it again about a route allocated on 4 March. He says that on 6 March KS spoke to him inappropriately, amongst

other things criticising the claimant for being late. The claimant says that he raised the plan that had been put in place with DT in August 2022 and that domestic transport hours were being broken (a claimed protected disclosure). He says he also told KS he medically could not do the route and that they already had his doctors note. He alleges KS made comments such as that was the job, and they would not give the claimant special treatment. He says KS later told him that the documents the claimant had given to DT had been lost and the claimant would need to provide replacements.

38. I know from Mr Baldwin's subsequent grievance investigation KT denies making inappropriate comments. These are factual disputes that can ultimately only be resolved at the final hearing having heard from all the witnesses and understanding the full context of what the different witness accounts are. The respondent says they did not know about any arrangements with DT and there were no records. They say the only arrangements that were known were that the claimant would sometimes informally swap routes so his was closer to home. The respondent says in light of this they asked the claimant to get a copy of the recommendation from his GP about working hours. There is nothing before me to say the claimant gave the respondent a copy of his previous text messages with DT at the time.

39. The claimant spoke with his GP. It led to the GP producing a new fit note dated 10 March which says from that date until 10 September 2023 the claimant may be fit for work on amended duties or hours with shifts not to exceed 11 hours. The claimant also handed in his handwritten letter of 10 March (a claimed protected disclosure) which spoke both of his historic complaints from the summer of 2022 and that more recently the measures he had in place had been removed, he had concerns about the route allocations, and had been told it was the job etc.

40. The welfare meeting on 15 March was then arranged. There appear to be various factual disputes about what was said at that meeting, and whether it was appropriate. The claimant accepts there was a discussion about his medical condition, hospital and the August 2022 plan but says the meeting was then used as an opportunity to ambush him about other things such as a parking ticket, wearing uniform and his start time. The respondent in their ET3 to the first claim says it was agreed an Occupational Health ["OH"] report would be arranged, and that the claimant agreed to disclose his medical record but subsequently refused so the OH referral was made without them. The sequence of events is logical as I know there subsequently was a OH report and often OH doctors want to see some GP records.

41. On 16 March 2023 the claimant emailed NC making a formal grievance. He complained about the removal of his active plan saying that working hours in the past exceeding contractual obligations had caused him to suffer a pulmonary embolism and put his life at risk. He said the management team had acted in a discriminatory manner. He said they had lost his documents. He complained about the welfare meeting. He said he would be working to the plan, and going to Acas as he was medically unable to do work that required working hours greater than his contractual obligation.

42. The claimant says that on 15 March 2023 a promise was made to keep his working hours within 11 hours. I have not seen all documents or heard from all witnesses. I am making a predictive assessment on what I have seen. From that perspective I do not find there is a pretty good chance of the Tribunal at the final hearing finding there was such a concrete promise. I think it is more likely the commitment made was set out in the subsequent letter of 22 March which says "you have requested that your shifts do not exceed 11 hours day, we agreed during the meeting that we would review your request, in the meantime should you have any concerns with your hours or routes you should discuss with your line manager." The idea of a review also fits with the obtaining of an OH report.

43. The claimant says that there was then a dispute with a supervisor, AW, about his route and working hours for the week commencing 20 March. The claimant says he told AW that his working day would violate GB domestic rules and against the plan agreed with HR. That evening he sent a text message to AW saying the working day of 12 hours 10 minutes and driving hours 10 hours 25 minutes with no break did not comply with domestic rules, or duty of care, or his adjustments and he recorded that the response he had was that's the job, don't care, and domestic rules don't apply.

44. I know from Mr Baldwin's subsequent grievance investigation (and from what the claimant told me at the hearing) that there is a substantial factual dispute between the parties as to the extent to which the claimant's working hours were within 11 hours (including in particular the claimant's duty end time when he either returned to depot if doing returns or returned home). Mr Baldwin says that he analysed the claimant's daily hours from 3 January until the claimant was absent in March and the only time it exceeded 11 hours was 20 March 2023. The respondent's position is that this was because the claimant had not followed the correct start time and the route planners had a particular start time built into their calculations.

45. Making my predictive assessment I consider there is a pretty good chance the Tribunal will find the claimant was protesting about his duty times that

week, particularly on 20 March and that he considered it did not comply with domestic rules, duty of care, adjustments under his doctor's note and (on the claimant's belief) against a plan agreed with HR. But I do not consider, on balance, there is a pretty good chance of the Tribunal finding that the respondent failed to keep a promise in the week of 20 March because the claimant had made protected disclosures on 14 June 2022, 13 July 2022, 6 March 2023, or 10 March 2023. The events of 2022 were some 9 months or so previous. Further, I have already said I am not convinced that the Tribunal is likely to find that a promise had in fact been made on 15 March in the terms the claimant asserts or believed that was then broken. As such it seems more likely to me, on what is before me in total, that AW was allocating duties in the usual way being adopted at that time and therefore had not set out to specifically target the claimant because the claimant had alleged breach of a legal obligation on 6 March or 10 March. If AW carried on allocating the duties in the way he had been doing before, even if he thought the domestic rules did not apply, or that he was not bothered about such regulations, it does not mean that the reason why he was allocating them was because the claimant made a protected disclosure. There is also the point that (and as I have said I appreciate this is hotly contested) the respondent may establish at the final hearing that on the planner the anticipated duty/driving time was not excessive, and that if it did end up exceeding 11 hours it was due, for example, to the claimant not meeting an anticipated start time. Further that they had a contractual right to require the claimant to work a reasonable amount of overtime.

<u>Allegation that on 24 March the respondent marked the claimant as being sick with stress</u>

46. On 20 March the claimant emailed NC in HR as outlined in the claimed protective disclosure. On 21 March the claimant says he contacted the HSE. On 22 March the claimant was sent an invite to a grievance meeting which was due to take place on 27 March. On 22 March the claimant emailed Mr Baldwin in the claimed protected disclosure email saying health and safety were heavily involved/he had been forced to whistleblow. On 23 March the claimant says he spoke to VOSA/DVSA and told AW this in a text message.

47. On 24 March the claimant sent Mr Baldwin an email saying "Currently off on sick as had episode yesterday when I threw up then coughed up Flem and blood which resulted in a panic attack. I returned to doctor who instructed I have infection in my blood and I'm to return to taking blood thinners and oral antibiotics and return to hospital if any further blood is brought up. I shall attend meeting Monday as per agreement however not in a physical position to be working over 11 hours as notified august 02/08/23 and again 10/03/23so am currently sick." Mr Baldwin replied

"Sorry to hear your are unwell. Given your current sickness and you now being off from work we will need to rearrange this meeting to when you have returned to work. Once you have returned to work please let me know and we will arrange the grievance hearing." The claimant said "I'm unable to return to work due to company not wishing to do any duty of care and follow doctor guidance of 11 hour duty time. So what is the advice? Follow the 6 months doctors note you have been provided?" The claimant also made contact with HR and the grievance meeting was reinstated as he wanted to attend.

48. The claimant also emailed NC in a claimed protected disclosure on 24 March, saying he had worked over the limit twice that week resulting in a breakdown of physical health which had been reported and ignored and he was unable to work until an active plan and welfare meeting is conducted or the 6 month doctor note completed. He said he had spoken to VOSA the day before about operating licenses. He also sent other emails to say until a welfare meeting was conducted and a plan implemented to bring his hours in line his sick note could be taken (i.e. potentially suggesting he considered himself to be under a sick note).

49. The claimant now says that he had worked a half day and had not reported sick or said he was too ill to work or handed in a doctor's note. He says he just asked for cover for half a day.

50. Undertaking a predictive assessment on what is before me, if the claimant was marked sick on 24 March I consider it likely that was simply because that was understood at the time what the claimant was. He himself said "Currently off sick" and "am currently sick" even if he went on to say it was because he could not work 11 hour duty time. Mr Baldwin's email response at the time likewise referred to the claimant "being off work". If indeed there was any error or mistake in the recording of the claimant's absence (which is not obvious to me as the email on the face of it reads as someone self reporting a sickness absence and later saying he considered himself to be under the sick note) I do not consider the claimant has a pretty good chance of establishing it was motivated by the making of protected disclosures, as opposed to the Tribunal being likely to find it came down to an understanding or misunderstanding of what the claimant was saying at the time. In relation to it being termed stress as opposed to a physical condition I again consider it more likely that was the result of a mistake or misunderstanding. The claimant had at times in emails referred to mental health difficulties such as panic attacks.

<u>Allegation of unlawful suspension on 27 March</u>

51. This was the grievance meeting held by Mr Baldwin. In his further information for the first claim the claimant says he told Mr Baldwin that he

had discussed working hours with the DVSA and Mr Baldwin refused to allow the claimant to return to work even though a plan had been agreed with HR on 15 March. He says the management team did not want to follow the plan and that at the end of the grievance meeting Mr Baldwin told him he was unable to attend the workplace and unable to discuss with any drivers.

52. There are grievance notes signed by the claimant. At the top of the form there is a template section for the manager to read out which says "I would advise everybody in this room today that this is a confidential hearing and what is discussed throughout this hearing should not be discussed with any colleague who you work with." The template nature of the document suggests this was a standard statement and it is my general experience that employers will encourage people involved in grievance investigations to keep their discussions private. I think the pretty good chance is at the final hearing the Tribunal will find it was a standard, innocuous statement said at grievance meetings and not motivated by a wish to silence the claimant because of the claimed protected disclosures.

53. There is no record in the minutes of the claimant mentioning the DVSA but he had mentioned it in an earlier email and his message to AW.

54. The signed meeting notes record the claimant saying "I am not coming back into work until a plan is in place or until Acas intervention." The end of the template form suggests the manager should say that they need to make further enquiries and will not be able to provide a response that day but instead a second hearing may be arranged or they will write in due course with their findings.

55. Mr Baldwin in his statement says he made it clear in the grievance hearing that there would need to be a separate discussion with the claimant about the claimant's return to work but this was essentially on hold while the investigation took place into the issues the claimant was raising. It seems a logical thing for Mr Baldwin to have potentially said bearing in mind the grievance related to working hours and duties and there was an OH report outstanding.

56. On a summary, predictive assessment I do not think the claimant has a pretty good chance at the final hearing of establishing that Mr Baldwin, following the claimant having said he discussed working hours with the DVSA, told the claimant he was unable to attend the work place/ effectively suspended the claimant or that Mr Baldwin was motivated to do so by the claimant making protected disclosures to the DVSA (or anyone else). I think it more likely the Tribunal will find that Mr Baldwin simply said that there would be a separate discussion in the future about a return to work, having in mind his investigation to follow and the outstanding OH

report. That accords with the statement in the outcome letter of 9 May which refers to moving forward, the OH by then having been received and a welfare meeting to be arranged in due course to discuss the contents. The claimant himself had, according to the notes, said he was not coming back until a plan was in place. I think it more likely the Tribunal will find the claimant was not expressly told that he was not allowed to attend work.

Allegation that on 19 May the claimant was placed on unauthorised leave without allowing him to return to work

57. In mid April the OH report was produced. It said the claimant was fit to return to work once it was agreed that the claimant would not be entailed to drive for more than 11 hours (as a reasonable adjustment of the risk of blood clots). It also said if possible and if it suited business needed the respondent could potentially look at giving the claimant a fixed route.

58. Mr Baldwin's account is that on 4 May KS told him there had been an anonymous call saying the claimant had been seen on 2 May wearing a DPD uniform and driving a DPD van.

59. On 9 May 2023 the grievance result was sent to the claimant. His grievance was not upheld. Amongst other things Mr Baldwin said that his analysis was that the claimant was not regularly working more than contracted hours of 9.5 a day during the week. He says there was only 1 day (as above) where it looked like the claimant was over 11 hours by 1 minute but that this did not factor in the lunch break or that the claimant had started at different time to that envisaged by the route planners. Mr Baldwin sent the claimant an invite to a welfare meeting on 12 May.

60. The claimant responded to say he would not meet with Mr Baldwin in any capacity as he had no faith or trust in Mr Baldwin's competence. He also said he was out of the country until 19 May. The respondent says the claimant also stated he had no intention of appealing. That is logical to me as the claimant has not said he did appeal.

61. Mr Baldwin says he felt the claimant was not engaging in a return to work process, possibly because of working for DPD. He says that when the company had recorded the claimant as "sick" on the system the claimant had gone in and changed it saying he was not sick but just could not work excessive hours. He says he had the view that if the claimant was not on sick leave and had not booked holiday and the claimant had been on full pay at the respondent's discretion while the grievance was investigated. He says a combination of the claimant saying the claimant was not intending to appeal (while disagreeing with the outcome), not co-operating with attending the welfare meeting about a return to work, the claimant

being out of the country, and the allegation the claimant had been working for DPD, all made him think the claimant had no intention of cooperating. He says he suspected the claimant probably did not intend on coming back to work at all. He says he decided the claimant should no longer be supported on full pay.

62. Mr Baldwin sent the claimant a letter on 15 May giving the claimant a further opportunity to appeal the grievance outcome. He referred to the welfare meeting that had intended to discuss the OH report and a return to work, and said that the respondent could appoint someone else to do it if the claimant wished. Mr Baldwin said the claimant had not booked annual leave and had not provided a fit note for his current absence and it was therefore unauthorised and unpaid. He said if there was no appeal and no discussion about a return to work they would have to consider how to manage the claimant's continued unauthorised absence.

63. The letter generated various emails in response from the claimant in essence about how he considered he had been effectively suspended in the grievance meeting by refusing to offer the claimant work even after HR had agreed to a plan as the managers were refusing to implement it. He said the refusal to offer work was punishment for bringing the grievance.

64. On 16 May the claimant said he was free to return to work and as he was on nil pay he would be returning to work on 19 May. On 18 May Mr Baldwin wrote to say before a return to work there should be an agreed plan in place, to look at support, to discuss the OH recommendations, to answer the claimant's query about pay and agree a way forward. Mr Baldwin said the earliest he could offer was 22 May. The claimant sent various emails in response saying if he cannot return to work it cannot be an unauthorised absence and it was an untenable situation.

65. On what is before me I cannot say there is a pretty good chance of the Tribunal finding that the respondent placed the claimant on unauthorised leave, on nil pay, refused to allow the claimant to return to work and was motivated to do so by the claimant making protected disclosures.

66. This is only a summary, predictive assessment but on the material before me I consider it more likely the Tribunal would find that Mr Baldwin made the pay decision and to place the claimant on unauthorised absence because: he had by this time suspicions as to whether the claimant wanted to return to work (in part because of the suggestion the claimant may be working for DPD); he thought the claimant was obstructing a return to work meeting; he by this time thought the claimant was on full pay as a discretion rather than sick leave (influenced by the claimant deregistering himself as being on sick leave); he thought the purpose of that pay discretion had come to an end as the grievance process had

finished but in his view claimant was not engaging in a return to work. On a predictive assessment I find that more plausible reasoning than Mr Baldwin doing so out of ill will to the claimant for making protected disclosures bearing in mind the claimant's abrupt response to the invite to a welfare meeting and the claimant's statement he was out the country (with no suggestion of the claimant having booked annual leave or notified a manager he was going). The claimant says he was not working for DPD. That is ultimately a matter to be assessed on the evidence at the final hearing; I am not making a finding the claimant was. But on what is before me I consider it plausible that Mr Baldwin was told that (irrespective of whether it turns out to be true or not). On the face of it, it is an odd (and risky) thing to entirely invent. Further, Ms Smith later wrote to the claimant about the same concern and Mr Baldwin said there were by then several sources alleging the claimant was working for DPD. The claimant also says that he was not obstructing a return to work, it was what he was trying to achieve throughout and went to great lengths to do. He says it was the respondent who was obstructing it. Again that is ultimately a matter for evidence at the final hearing. But even if the claimant is correct about his own motivations it does mean that Mr Baldwin did not feel the way Mr Baldwin describes in terms of his own decision making. It is what was going on in the mind of Mr Baldwin that the Tribunal at the final hearing has to look it.

67. I also consider it more plausible that Mr Baldwin wrote on 18 May suggesting there needed to be a meeting before the claimant returned to work because he thought there should be such a meeting to discuss the OH report, any support about a return to work, and the pay dispute. The claimant had been away from the workplace for some weeks, there was an OH report, and I consider it plausible on what is before me that Mr Baldwin would have wanted to speak to the claimant about start times in light of his conclusions in the grievance outcome report. The date Mr Baldwin was suggesting was only 3 days later (albeit I appreciate the claimant's pay situation). I also factor in that on 24 May Mr Baldwin again tried to invite the claimant to a welfare meeting. I do appreciate the claimant says he was being told on the one hand he was on an unauthorised absence (on nil pay) but on the other hand was being told not to return to work until there had been a meeting on 22 May and that seemed contradictory and unfair. However, on the material before me, whatever the logic or fairness of the approach, I find it more plausible the Tribunal will find that was Mr Baldwin's reasoning as opposed to being motivated by the claimant making protected disclosures. Ultimately 3 days later the claimant could have been back in work.

<u>No meeting was held to discuss the unlawful suspension and detriments</u>

68. On what is before me I do not consider there is a pretty good chance of the Tribunal finding there was a decision to not hold a meeting to discuss unlawful suspension and what the claimant was saying about detriments motivated by the claimant making protected disclosures. I have found already I find it more likely that the claimant was not suspended on 27 March. Instead, the grievance investigation was to happen, the OH report be obtained and things would be taken from there in a welfare meeting. Mr Baldwin did seek to arrange a welfare meeting when he issued the grievance outcome letter.

No communications for whole of April

69. The claimant considers that Mr Baldwin was seeking to keep him out of the workplace and delay things because of the claimant making protected disclosures. On what is before me I consider it more plausible that there was a gap in April 2023 because the grievance investigation was ongoing and the OH report being obtained. On the face of it, it slots into the time frame.

The respondent kept marking different reasons for the claimant's absences such as stress or unauthorised absence but the claimant had never requested any absence

70. I have addressed the unauthorised absence point already above. On 13 April the claimant emailed Mr Baldwin saying he was not sick and Mr Baldwin was merely refusing to offer work. He said it was in breach of contract as told to Mr Baldwin many times and will need to be addressed prior to any return. It seems plausible to me that links in with Mr Baldwin's statement that if on the company records the claimant was recorded as being on sick leave the claimant would un-log it. On a predictive assessment on what is before me I again consider it more plausible that any issue as to what to label the claimant's absence as came down to confusion or misunderstanding as to the claimant's status rather than being done to deliberately disadvantage the claimant because the claimant made protected disclosures. Until the unauthorised absence point the claimant was being maintained on full pay and there was in place the global fit note issued by the GP that the claimant himself at times seemed to suggest he was relying on.

Mr Baldwin did not action the occupational health report of 14 April 2023 until he moved the claimant to unauthorised leave in May 2023.

71. I do not know the date that the OH report was actually received by Mr Baldwin. But on what is before me I consider it more plausible that the grievance was investigated, an outcome report prepared, in the meantime the OH report was obtained and the plan was to then have a welfare

meeting to discuss the way forward. In particular, the claimant was sent an invite to a welfare meeting when the grievance outcome report was sent to him.

72. I have also taken a step back and considered the claimant's case in the round. On what is before me I do not consider the claimant has a pretty good chance of the Tribunal finding at the final hearing that any fundamental breach of contract committed by the respondent (if indeed there was one) happened for the principal reason that the claimant made a protected disclosure or disclosures. In my analysis I have taken into account that many of the claimed disclosures were happening at around the time of the detrimental treatment the claimant is complaining about, and that the claimant was on the face of it making disclosures to outside agencies such as the HSE and DVSA. I acknowledge the claimant's point that in the grounds of resistance to the first ET1 the respondent says that driving and duty hours limits do not apply to them as they are not driving HGV vehicles over 3.5 tonnes and that he says they are very wrong about that. I also take into account his point that whilst it could be said the respondent's exchanges with him are measured in tone, it could be window dressing as the respondent would have been taking legal advice. I have given due regard to his belief that overall there is a picture of him being silenced, or attempts being made to forced him to accept the respondent's conduct or being forced out because he was making repeated disclosures, including to external agencies, that the respondent did not want to hear. But on what is before me they do not fundamentally alter the analysis I have undertaken above.

73. These and his other points are of course all points the claimant can take at the final hearing and cross examine witnesses about where appropriate. As said already and I will say again, my interim relief decision is a summary prediction based on limited information. It cannot and is not intended to mirror what happens as a final hearing. The claimant remains free to continue to bring his claims which continue unencumbered by my opinion. There can be an inherent limitation in interim relief proceedings because the burden of proof is on the claimant, but the essential question is often about what was going on in the minds of a respondent decision maker where there is live evidence tested under cross examination and limited paperwork. The final hearing does not have those limitations.

74. For these reasons I am *not* satisfied that the claimant's case that the principal reason for his dismissal was the making of a protected disclosure or disclosures has a pretty good chance of succeeding before a Tribunal. I do not make an interim relief order in favour of the claimant. Both cases now proceed to case management. For the claimant's benefit in advance I flag up now that this will again involve a process of trying to distill from him

the exact allegations he is making so that they can be incorporated into a list of issues.

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Employment R Judge Harfield
Dated: 20 July 2023

JUDGMENT SENT TO THE PARTIES ON 20 July 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche