**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4109291/2021**

**Held on the Cloud Video Platform on 17, 18 and 19 January 2022**

**Employment Judge A Jones**
**Tribunal Member L Brown**
**Tribunal Member W Muir**

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| **Mr B Hewitson** | **Claimant**<br>**In person** |
| **Nash Asset Holdings Ltd** | **Respondent**<br>**Represented by**<br>**Ms E Nash**<br>**HR Manager** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous judgment of the Tribunal is that:

- The claimant was not harassed on the ground of a disability;
- The respondent made unauthorised deductions from the claimant's wages on 26th February 2021 and is ordered to pay the claimant the sum of £107.60 gross in respect of i) A deduction of 5 hours pay relating to an allegation that the claimant had not cleaned a vehicle, and ii) a deduction of 4 hours pay where the claimant was

contractually entitled to be paid 8 hours for working 4 hours in addition to any call out fee for work carried out on 13 February 2021

- The claimant was automatically unfairly dismissed because he made a protected disclosure to a client of the respondent, and the respondent is ordered to pay to the claimant compensation for loss of earnings of £2644.04 gross, and
- The respondent failed to provide the claimant with a statement of terms and conditions of employment in compliance with section 1 Employment Rights Act 1996 and is ordered to pay to the claimant compensation of £1080 gross, being a sum equivalent to two weeks' wages.

## REASONS

### Introduction

1. The claimant brought claims of harassment on the grounds of disability, unlawful deductions from wages and automatically unfair dismissal on the basis of having made a protected disclosure. The claimant was based at Dunbar Cement Works, which is a site operated by Tarmac. The respondent provides industrial cleaning services to clients across the UK including at the Dunbar Cement Works.

2. Preliminary hearings took place for the purposes of case management in this case on 2 July and 7 September 2021.

3. Further particulars had been provided by both parties in advance of the final hearing. The respondent accepted that the claimant was a disabled person and that it had knowledge of the claimant's disability. However, it did not accept that the claimant had been harassed on the ground of his disability. In addition, the respondent denied having made any unlawful deductions from the claimant's wages. Finally, the respondent did not accept that the claimant had made a protected disclosure, its position being that in any event the claimant had been dismissed on the basis of his performance.

4. The claimant has represented himself throughout the proceedings. The respondent has been represented by their HR Manager, Ms Nash. Ms Nash made clear at the commencement of the final hearing that she had no experience of conducting tribunal proceedings and had no understanding of what procedure should be followed. While the Tribunal accepted that Ms Nash did her best to represent the respondent, it was very surprised at various comments made by her during the proceedings, for instance that she had 'googled' making of submissions during lunchtime on the last day of the hearing to familiarise herself with what was required. This was particularly surprising as the Tribunal had raised the issue of submissions the previous day. Ms Nash's comments gave the Tribunal the impression that the respondent had not treated the proceedings as seriously as might have been expected.

5. The claimant gave evidence on his own behalf. The Tribunal heard evidence on behalf on the respondent from Mr Riley their Business Manager, Mr Pickford their IT Manager and Services Manager, and Mr Orton who works at various locations for the respondent and who worked with the claimant for a period of around two weeks.

6. The respondent had originally intended to call a Mr Flint who was based at Dunbar and was the claimant's supervisor. On the first day of the proceedings, Mr Flint sought to give evidence in his lunch break from what appeared to be a locker room at his workplace from his mobile phone. The Tribunal could not hear or see Mr Flint sufficiently and the respondent's representative was reminded that it was for them to make suitable arrangements for any witnesses to be called by them to give evidence. It was therefore suggested that arrangements would be made to hear from Mr Flint on the second day of the hearing. Ms Nash advised on the second day of proceedings that the respondent would no longer call Mr Flint as it did not wish for him to lose out on wages or his lunch break and that Mr Flint had been anxious about the prospect of continuing to give evidence. The Tribunal explained to Ms Nash that it was for the respondent to make decisions about how the question of the provision of pay for witnesses giving evidence on its behalf would be dealt with. While Ms Nash indicated she understood the position, she confirmed that

Mr Flint would not now be called. The Tribunal therefore disregarded any evidence which had been heard from Mr Flint.

7. A joint list of documents was provided for the Tribunal.

**Issues to determine**

8. The Tribunal was required to determine the following issues:

   (i) Had the claimant been subject to unwanted conduct related to his disability and if so, had that conduct the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for the claimant.

   (ii) Had the respondent made unlawful deductions from the claimant's wages in terms of section 13 Employment Rights Act 1996 ('ERA')?

   (iii) Did the claimant make a protected disclosure in terms of sections 43C-G Employment Rights Act and if so, was the reason or principal reason for the claimant's dismissal that he had made that protected disclosure?

**Relevant law**

9. Section 26 of the Equality Act 2010 ('EQA') provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Disability is a relevant protected characteristic for the purposes of this section.

10. Section 13 ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

11. Sections 43A-G ERA set out the definition of a protected disclosure. For a disclosure to be protected, it must be a qualifying disclosure within the terms of section 43B. It must be a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one of the following -

    (i) A criminal offence has been committed, is being committed or is likely to be committed

    (ii) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject

    (iii) That a miscarriage of justice has occurred, is occurring or is likely to occur,

    (iv) That the health and safety of any individual has been, is being or is likely to be endangered,

    (v) That the environment has been, is being or is likely to be damaged, or

    (vi) That information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be concealed.

12. Sections 43C-G set out to whom a disclosure may be made for it to amount to a protected disclosure. Section 43G, on which the claimant relies, provides that the disclosure will be a qualifying disclosure if

    b) the worker reasonably believes that the information disclosed, and any allegation contained in it are substantially true,
    c) he does not make the disclosure for purposes of personal gain,
    d) any of the conditions set out in subsection (2) are met and
    e) in all the circumstances of the case it is reasonable for him to make the disclosure. In addition,

The conditions set out in subsection (2) are

a) that at the time he makes the disclosure the worker reasonably believes that he will be subject to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

b) that in the case where no person is prescribed for the purposes of section 43F in relation to the relevant, failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to this employer, or

c) that the worker had previously made a disclosure of substantially the same information

i) to his employer, or

ii) in accordance with section 43F.

13. In determining whether it was reasonable for the worker to make the disclosure, regard shall be had in particular, to – the identity of the person to whom the disclosure was made, the seriousness of the relevant failure, whether the relevant failure is continuing or is likely to occur in the future, whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person, in a case falling within subsection (2)(c)(i) or (ii) above, any action which the employer or the person to whom the pervious disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and in a case falling within subsection (2)(c)(i) whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer

**Findings in fact**

14. The Tribunal makes the following findings in fact:

15. The claimant was employed by the respondent from 5 January 2021 until his dismissal on 9 March 2021. He was employed as a driver/operative of a vehicle used to clean industrial premises. He was based at the Cement Works in Dunbar which was operated by Tarmac.

16. The claimant's average weekly wage was £540 gross.

17. The respondent provides industrial cleaning services to Tarmac and other similar sites across the UK. It employs around 86 staff although the numbers vary.

18. The respondent found it difficult to recruit to the role carried out by the claimant given the nature of the duties and the pay associated with it.

19. The claimant was provided with a letter offering him employment with the respondent which he signed on 12 December 2020. The letter said his contracted hours were 45 hours per week. He was paid £12 per hour for hours worked during the week, £14.40 on Saturday, and £16.50 on a Sunday or nights. He was also entitled to a call out payment of £100 together with an hourly rate. The letter indicated he would have a probationary period of up to three months and that his hours paid per week were '45 truck inc maintenance or 42.5 without truck maintenance'. There was no further explanation as to what was involved in truck maintenance.

20. Prior to the commencement of his employment, the claimant filled in a medical history questionnaire where he indicated that he suffered from mental health issues, specifically anxiety and that he took fluoxetine medication to help with this condition.

21. The claimant's supervisor was a Mr Flint. Mr Hayman was also in a managerial position and had responsibility for sites in Scotland. Mr Pickford was the next line manager and Mr Riley was business manager for the respondent.

22. An incident took place early in the claimant's employment where he was working with a colleague and Mr Flint became annoyed at the claimant because the bucket being filled by the claimant for Mr Flint to empty was difficult to manage as it didn't have handles and threw the empty bucket passed the claimant. The claimant reported this matter to Mr Hayman who said he would report it to management in Buxton.

23. A few days after this incident, Mr Flint made a comment to the claimant and another colleague to the effect that they should 'get off their arses and help'. The claimant reported this incident to Mr Hayman.

24. Shortly after this incident Mr Riley, who was based in Buxton, came up to the Dunbar site to speak to the staff there as he had concerns regarding working relationships. The claimant was advised that Mr Flint's response to the concerns being raised was that the claimant and others were lazy, and that 'he (being Mr Flint) grew up when men were men'

25. On 11 February, the claimant was late to work. There were freezing temperatures that day up to -14 degrees centigrade and the Scottish Government had issued advice against non-essential travel. The claimant had attended work but, as there was no running water available at the site, he stopped to get a coffee on his way to work. A number of other colleagues did not attend for work at all because of the weather conditions. Mr Flint indicated that because the claimant had been late for work, there would be a deduction from his pay. The claimant contacted Mr Riley in relation to this matter and no deduction was in the event made to the claimant's pay.

26. The vehicle which the claimant drove developed mechanical difficulties. The vehicle was taken to a garage in Macmerry where it remained for a number of weeks. During this period the country continued to experience sub-zero temperatures. Once it had been determined that the truck was not viable it was towed to the respondent's headquarters in Buxton.

27. On 26th February, around three weeks after the claimant had carried out any work with the vehicle, Mr Pickford telephoned the claimant and advised him that the truck was dirty and in an unacceptable state and that he believed it to have been the fault of the claimant. The claimant was advised that as result there would be a deduction from the claimant's wages.

28. A Mr Beverley was sent by the respondent to Dunbar to assist in training the claimant. The claimant experienced difficulties working with Mr Beverley. Mr Beverley had previously been banned from another site on which the

respondent provided services. Mr Beverly shouted at the claimant and told him that he was hopeless and that he should be a labourer and not a driver. Mr Beverly called the claimant 'a fucking useless cunt' and repeatedly called the claimant 'a dick'. Mr Flint laughed at the language used by Mr Beverly.

29. The claimant reported these issues to Mr Pickford who said that he would investigate matters and revert to him. While the claimant was subsequently advised that a Mr Orton would be sent up to provide the claimant with training, no further information was provided to the claimant regarding any steps taken in relation to Mr Beverly.

30. Around 16 February, Mr Hayman contacted the claimant and asked him to work a shift on a Saturday. He said that although he would only be required to work four hours, he would be paid for eight hours. The claimant was subsequently only paid for four hours of work that day together with the call out payment to which he was entitled.

31. The claimant had not completed training in relation to working in confined spaces which limited the duties he could carry out.

32. On 3rd March, the claimant was working with Mr Orton and was fixing a piece of machinery called 'the scooby'. The claimant went for a toilet break and then went for lunch. Shortly after Mr Orton approached the claimant and said words to the effect 'thanks for telling me you had gone for your lunch'. When the claimant tried to explain what had happened to Mr Orton, Mr Orton told the claimant to 'fuck off'. Mr Orton then went into the cabin which was the staff area and the claimant heard him shouting about him.

33. Shortly thereafter the claimant sent a text to Mr Pickford stating, 'not very well, struggling with bullying culture, emotional today'. Mr Pickford did not respond to that text. The claimant then phoned his partner as he felt he might walk off site. His partner urged him to stay.

34. When the claimant went back to his duties, Mr Orton said to him 'where the fuck have you been'. The claimant asked Mr Orton to calm down and said to him that he might have a heart attack, to which Mr Orton responded, 'I'm not

fucking working with you'. There was no contact with the claimant from anyone in management for the rest of that day and the claimant went home after work.

35. On 4 March, the claimant returned to work and was told by Mr Pickford that he would be supervised by Mr Orton, and that Mr Orton would give him time periods in which specific tasks had to be completed. The claimant expressed his concern to Mr Pickford about this given he had already complained about Mr Orton's conduct towards him. Mr Pickford advised the claimant that he would phone him back.

36. The claimant was unsure what he should do and could not locate his colleagues. While walking round the site, he met a Mr Robertson who worked for Tarmac and another manager Mr Autrand who also worked for Tarmac. The claimant told them that they should know that there was a bullying culture within the respondent's organisation.

37. The claimant then tried to contact Mr Pickford by phone who said that he would phone him back. Mr Pickford then called the claimant and said that he should go to the cabin as HR wanted to talk to him. The claimant waited in the cabin for over an hour and then phoned Mr Pickford and told him that he wasn't well and that he felt he should go home. Mr Pickford agreed and said that the claimant should not come back to site.

38. In the meantime, Mr Autrand from Tarmac phoned Mr Riley to express concern about having been informed of a bullying culture within the respondent's organisation. Mr Riley was aggrieved at having been contacted by the client in this manner.

39. Ms Nash who is responsible for HR for the respondent then phoned the claimant at home. Mr Riley was in the room at the same time although he left the room from time to time during the call. The claimant informed Ms Nash of the various incidents which had occurred since the beginning of his employment with the respondent.

40. The claimant was then contacted on 5 March by the respondent and advised that there was no evidence of a bullying culture at the organisation.

41. On Saturday 6 March, Mr Riley emailed the claimant on his personal email and attached a letter inviting him to a disciplinary hearing on Monday 8 March at 9am. The claimant does not work on a Saturday. The letter stated 'At this meeting, the question of disciplinary action against you, in accordance with the Company Disciplinary Procedure, will be considered in particular poor performance, dereliction of duties and unacceptable behaviour on-site. Following an internal performance review, it has been reported that your standard and knowledge of the work required is below where we'd expect you to be, you are reported to have been continually leaving your position and no following given instructions from your supervisor.' No specification of the detail of the allegations was provided and the claimant was not provided with any disciplinary procedure.

42. The claimant responded by email indicating his disappointment at being phoned by Mr Pickford on a Saturday morning and told to respond to the invite to the disciplinary hearing. The claimant also made reference to his bullying allegations being dismissed, to having contacted Mr Robertson and asked to postpone the hearing until he could 'get ACAS to intermediate'.

43. Mr Riley responded by indicating that the hearing would be delayed until 11.30am on the Monday. The claimant was asked for his preferred method of communication. The claimant indicated that he wished communication to be written or a chat over the laptop (by which the Tribunal understood the claimant to mean a video call). The claimant said he had not been given enough notice to prepare a defence. The claimant then set out an extract from information on the ACAS website regarding the information he ought to be provided with in advance of a disciplinary hearing. In particular the claimant indicated that he had not been provided with 'the alleged misconduct or performance issues, or 'any evidence from the investigation.'.

44. Mr Riley responded by indicating that the hearing would then be postponed until Tuesday 9th at 9am. The email stated, 'Tuesday's meeting will allow you to answer any questions regarding alleged performance issues raised in the previous letter'. The email said it attached a 'statement received regarding your

performance on site.' This was information obtained from Mr Orton. Mr Orton had not at any point provided a statement.

45. At 14.10 on Saturday the claimant emailed again asking when this training report/statement was taken as it was undated and untimed. He also asked for confirmation that this was the only evidence being presented. Having received no response, the claimant sent a further email at 18.13 stating 'Oh well I give up. Please note my reservations below.

    1)contract issue/grievance procedure

    2) I have asked to appeal your decision re bullying yet you have not said my appeal will be heard, instead focussing on a disciplinary

    3)Can I please have a subject data access request sent

    4)Have I to turn up at work on Monday? Am I suspended and if so is it with pay?'

46. Mr Riley responded at 7.46pm advising the claimant should not return to work until after Tuesday's meeting; that the claimant had failed to bring bullying up with him or Ellie Nash, that 'Upon a thorough investigation by Ellie Nash and myself, with statements from the site team, Disab operators and Tarmac management we felt there were no grounds for the comment you made about the "bullying culture"; that HR and he would be willing to speak regarding the above on Monday and that the meeting on Tuesday was about the claimant's job role, how you are progressing, following procedures, issues and competence.'

47. While the respondent had some informal discussions with some of the claimant's colleagues, it did not at any stage obtain statements from them or any statements from Tarmac management.

48. The claimant responded at 21.49 providing a definition of workplace bullying and harassment and set out some of the comments he alleged had been made to him. The claimant also referred to the respondent's own rules posted in the cabin regarding the use of foul language not being tolerated.

49. Mr Riley then responded on Sunday at 4.37pm indicating that while the company did not condone abusive language directed at other people and the persons in question had been spoken to. That having investigated, the language was used 'out of frustration at your continued lack of support to your team member, failing to follow given instruction and your aggressive manner to other members of the team, and not to victimise bully or intimidate you.' Mr Riley then set out the three incidents when the claimant had been sworn at.

50. The claimant responded by indicating that ACAS had advised it was too early for them to get involved and that he needed to exhaust the respondent's process. The claimant also indicated that he had still not received a copy of that process and that it was for the employer to contact ACAS in the first instance for advice as ACAS could not contact them.

51. A disciplinary hearing then took place by telephone. Mr Riley was in attendance at the respondent's offices with Ms Nash and Mr Pickford. No notes of that hearing were provided to the Tribunal. The claimant indicated that he was not willing to address the allegations as he had not been given advance notice of them. The claimant was then advised that he was to be dismissed with one week's notice and that he had not to return to the site.

52. The decision to dismiss the claimant was confirmed in writing to him by letter dated 9 March. The decision was taken by Mr Riley although there was input from Ms Nash and Mr Pickford. Neither Ms Nash nor Mr Pickford had ever met the claimant in person and all their communications with him had been on the phone.

53. The claimant was advised that he had a right of appeal against the decision. The claimant appealed against his dismissal in an email of 11 March setting out grounds of appeal. No appeal hearing took place and a letter dated 15 March was sent to the claimant dismissing the claimant's appeal. The letter was signed by Ms Paula Nash, Managing Director, but the decision to dismiss the claimant's appeal was taken by Mr Riley. Ms P Nash had no involvement in the claimant's appeal at all.

54. The respondent did not, at any time prior to the disciplinary procedure, raise concerns regarding the claimant's performance with him. The respondent did not advise the claimant that an internal performance review was being conducted.

55. The respondent did not ever provide the claimant with a statement of terms and conditions of employment. It was the respondent's practice not to issue any statements of terms and conditions to staff until they had been employed for three months.

56. The claimant obtained comparable alternative employment from 11 May 2021. From 17 March until he commenced alternative employment, he had income of £1655.96. Therefore, he had a loss of income between the termination of his employment and the commencement of new employment of £2664.04.

**Observations on the evidence**

57. The Tribunal found the claimant to be generally credible and reliable. He had a clear recollection of most events, although it appeared that he was confused regarding the dates on which some events occurred. The Tribunal found Mr Riley to be a wholly unsatisfactory witness. He was neither credible nor reliable. He had to be reminded that he was giving evidence under oath at one point when he gave three different answers to the same question (that of whose decision it was to dismiss the claimant) within the space of five minutes. It appeared to the Tribunal that Mr Riley remembered events when he thought that this would be in the respondent's favour but could not remember events when the evidence would be unlikely to be in the respondent's favour. Mr Riley indicated that the disciplinary hearing at which the claimant was dismissed was a zoom meeting when it was a telephone call. While that matter was not material to the Tribunal's findings, it was indicative of Mr Riley's approach to the evidence. Indeed, it appeared to the Tribunal that Mr Riley could not understand why he was being required to give evidence at all. At one point when asked if he had familiarised himself with the claimant's position in relation to what he had been subjected to prior to the disciplinary hearing he indicated ''I've got a lot of stuff to deal with, I wasn't aware'. Mr Pickford generally sought

to answer questions in as honest a manner as possible. However, it appeared to the Tribunal that he was reluctant to give any evidence which might be contrary to the interests of the respondent. Where Mr Pickford's evidence was in conflict with that of the claimant, the Tribunal had no hesitation in preferring the claimant's evidence.

58. Mr Orton's evidence was of limited value to the Tribunal. However, the Tribunal did not find aspects of his evidence credible. He indicated that he challenged the claimant for leaving him alone carrying out a job as he might have died, and the claimant would have had to phone his wife to tell her this. Notwithstanding this apparent concern, Mr Orton did not ever contact anyone directly regarding concerns about health and safety matters. The Tribunal was of the view that Mr Orton exaggerated his evidence regarding his interactions with the claimant. In any event, he only worked with the claimant for a period of two weeks.

59. The Tribunal also thought it relevant to make reference to evidence it might have expected to have been led but was not. There was no evidence led in relation any disciplinary or grievance procedure operated by the respondent. Although reference was made to a disciplinary procedure, this was not produced either to the claimant during the procedure or to the Tribunal. Moreover, no policies or procedures at all were produced by the respondent. There was no evidence that the respondent had a whistleblowing policy, grievance policy or a health and safety policy. There was no evidence about any policies in relation to bullying or harassment, other than reference to a notice in the staff cabin advising staff that they should not use foul or abusive language.

**Submissions**

60. The claimant did not wish to make any submissions and indicated that he felt that all the evidence had been heard.

61. The respondent submitted that they had not been legally represented in the case not by choice but because it was not financially viable for them. While it was recognised by Ms Nash that there were areas highlighted which needed improvement on the part of the respondent, they felt justified in dismissing the claimant. It was said that having received versions of events which contradicted that of the claimant they didn't know what more they could have done. They had wanted to give the claimant a chance and ought to have monitored him more formally. It was said that they had a duty of care to other employees and their contractors, and the claimant had not been overlooked. They spent time on the decision-making process which had taken a physical and mental toll on some of them. It was said that contrary to Mr Riley's evidence, the respondent only employed 45 employees. The Tribunal highlighted that Ms Nash had been given an opportunity to reexamine witnesses and the Tribunal had explained the purpose of reexamination and therefore the Tribunal had some difficulty given the evidence heard, which had not been challenged or clarified, was that the respondent employed around ninety staff. The Tribunal wishes to highlight that having reviewed the ET3 after the conclusion of the proceedings it is stated that the respondent employed 86 staff. Finally, the respondent submitted that it was a small family run business, and the success of the claimant's case might have implications for the job security of other employees.

**Discussion and decision**

*Was the claimant harassed for a reason relating to his disability?*

62. The Tribunal was satisfied that the claimant had been subjected to unwanted conduct which had the purpose or effect of violating the claimant's dignity and which created an intimidating, hostile and offensive environment for him. There appeared to no dispute that Mr Flint, Mr Beverley and Mr Orton all swore at the claimant, insulted him, called him abusive names and laughed about this. While the Tribunal appreciated that the environment in which the claimant worked was industrial it also noted that the respondent had a sign up in the staff cabin advising staff that they should not use foul or abusive

language. Mr Riley appeared to accept that such language had been used, but that it had been justified on the basis that those using the language did so out of frustration with the claimant. However, Mr Riley also indicated that staff had been disciplined as a result of the use of such language. No evidence was led that this was the case and indeed it seemed contradictory to Mr Riley's position. He appeared to accept that there had been bullying treatment but was of the view that this was justified. The Tribunal found his position, as one of the most senior people in the respondent's organisation to be very surprising. It seemed to the Tribunal that there was a culture at the respondent's operations at which the claimant worked where staff could abuse other staff without that being a disciplinary matter. Particularly relevant was the comment said to have been made by Mr Flint who, when challenged about his language, said that 'he grew up when men were men'. It was also notable that the respondent accepted that Mr Beverley ought not to have been sent up to train the claimant and that there had been issues with Mr Beverley's conduct in the past such that he was banned from one of the sites on which the respondent operated. It therefore seemed to the Tribunal that the respondent tolerated a culture where staff bullied each other when it was in their interests to do so.

63. However, the Tribunal was not satisfied that the treatment of the claimant was in any way related to his disability. Rather, it seemed to the Tribunal that there was simply a culture where such behaviour was tolerated. There was no evidence to suggest that any of the claimant's colleagues were aware that he suffered from anxiety. While Mr Pickford, HR and Mr Riley were aware of the claimant's condition, his colleagues were not. The claimant did not suggest that the circumstances in which any of his colleagues used inappropriate language towards him arose out of his disability. There was simply no evidence on which the Tribunal could conclude that the conduct was in any way related to the claimant's disability. Therefore, the claimant's claim of harassment in relation to his disability fails.

*Did the respondent make unauthorised deductions from the claimant's wages?*

64. The first alleged deduction related to the alleged failure of the claimant to keep his vehicle in a clean condition. It was accepted that the claimant did not receive what the respondent called the 'maintenance bonus' of 2.5 hours per week for a two-week period. This was because Mr Pickford was of the view that the poor condition of the vehicle the claimant had been responsible for when it was returned to Buxton was because of the claimant's failures.

65. The claimant's offer of employment letter states under contracted hours '45' and under 'hours paid per week' 45 hours including maintenance or 42.5 without truck maintenance. There is no provision in the offer letter relating to a 'bonus'. There was no dispute that the claimant worked 45 hours per week. There was nothing in the letter of offer to suggest that the respondent could deduct monies from the claimant's wages in certain circumstances. There was nothing to explain what was meant by 'without truck maintenance'. There was nothing to suggest what standards were required in relation to truck maintenance or how these would be assessed.

66. The Tribunal therefore concluded that the claimant was entitled to be paid for 45 hours for each week he worked. The deduction of five hours over a period of two weeks amounted to an unlawful deduction from the claimant's wages and the respondent is therefore required to pay to the claimant the sum of £60 gross being five hours pay at £12 per hour.

67. The Tribunal then considered the claimant's claim that he had been advised by Mr Hayman that he would be paid for eight hours work on a call out even though he would only be required to work for four hours. The claimant's evidence in this regard was not challenged. Rather it seemed to be the respondent's position that Mr Hayman did not have the authority to advise the claimant that he would be paid for 8 hours even though he would only have to work 4 hours. The Tribunal heard that Mr Hayman was the Scotland Area Supervisor who reported to Mr Riley and Mr Pickford. Mr Riley and Mr Pickford both accepted in evidence that the claimant would not reasonably be aware that Mr Hayman did not have the authority to agree with the claimant that he would be paid for eight hours work. The Tribunal agreed with this

assessment. The respondent's position appeared to be that Mr Hayman had been confused when agreeing terms with the claimant in relation to different arrangements for what was called 'spot work' and 'contract work'. There was no dispute that the claimant was advised by a supervisor that he would be paid for eight hours work although he would only be required to work four hours work. There was no explanation as to why Mr Hayman was not entitled to have agreed this with the claimant. The claimant was therefore contractually entitled to be paid those sums. The failure to do so amounted to an unlawful deduction from wages of 4 hours, at £14.40 per hour being £57.60 gross and the respondent is therefore required to pay the claimant the sums which were unlawfully deducted from his wages.

*Did the claimant make a protected disclosure?*

68. There was no dispute that the claimant had informed the managers of Tarmac, the respondent's client, that there was a bullying culture within the respondent's organisation. The respondent denied that this amounted to a protected disclosure although they did not at any stage set out the basis for their denial.

69. The Tribunal had no hesitation in accepting that the claimant had made a disclosure of information when he informed Tarmac managers that there was a bullying culture in the respondent's operations. This was not simply the claimant making an allegation, he was conveying the fact that there was a bullying culture based on his experience over the time of his employment with them.

70. The Tribunal then considered whether the disclosure was within the scope of section 43B(1)(a)-(f) ERA. The Tribunal was satisfied that the allegation of bullying could come within section 43B(1)(b) or (d). In particular, the Tribunal concluded that the allegation that the respondent allowed a bullying culture to prevail could amount to a breach of the duty to provide a safe working environment for the claimant and his colleagues. In addition, the Tribunal was satisfied that a bullying culture had caused the claimant's health and safety

to be put at risk and was likely to continue to be put at risk so long as the culture prevailed.

71. The Tribunal was also satisfied that the disclosure was made in the public interest. The site at which the claimant worked was an industrial site and the Tribunal heard that issues of health and safety were of paramount importance. There were clearly hazards for staff working there and exposing a bullying culture which might impact on the health of staff was certainly within the public interest. The Tribunal accepted that the claimant made the disclosure to Tarmac because he had become frustrated at the lack of action on the part of the respondent to the allegations of bullying he had made. While the claimant had a personal interest in this matter, there was a wider public interest given the nature of the respondent's operations, the site on which the claimant worked and that there were other staff employed on that site, with additional staff visiting it for training and other purposes. While the Tribunal accepted that it was the conduct towards the claimant himself which had caused him to inform Tarmac of the bullying culture, the Tribunal had no hesitation in coming to the view that this culture could impact on any employee in an environment where swearing, name calling and inappropriate criticizing of work standards without providing assistance to meet requirements, prevailed.

72. Therefore, the Tribunal was satisfied that the claimant had made a qualifying disclosure. The Tribunal then went on to consider whether it was a protected disclosure.

73. Although there was no dispute that the claimant had made this disclosure to his employer, he relied on the disclosure he subsequently made to Tarmac managers as being the reason or principal reason for his dismissal.

74. In terms of section 43G a disclosure will be a qualifying disclosure if various conditions are met. In summary these are that the claimant reasonably believed that the information disclosed and any allegation in it were substantially true; the disclosure was not made for personal gain; in all the

circumstances it was reasonable for them to make the disclosure and one of the conditions in s.43G(2) applied.

75. The Tribunal had no hesitation in accepting that the claimant reasonably believed that the information, that there was a bullying culture at his place of work, was true. The claimant had considerable experience of bullying treatment. There was no suggestion made that the claimant had made the disclosure for personal gain and the Tribunal accepted that he had not. The Tribunal also accepted that it was reasonable in all the circumstances for him to have made that disclosure. In that regard the Tribunal was obliged to take into account the following factors: the identity of the person to whom the disclosure is made — S.43G(3)(a);the seriousness of the relevant failure — S.43G(3)(b); whether the relevant failure is continuing or is likely to recur — S.43G(3)(c);whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person — S.43G(3)(d);in the case of a previous disclosure to the worker's employer or a prescribed person, the response of the employer or prescribed person — S.43G(3)(e); and in the case of a previous disclosure to the worker's employer, whether the worker complied with an internal procedure authorised by the employer — S.43G(3)(f).

76. In the first instance, the Tribunal was of the view that it was reasonable of the claimant to make the disclosure to management of the company who had overall responsibility for the site at which he worked and was a client of the respondent. The failure was not of exceptional seriousness in nature but it was, the Tribunal concluded, ongoing and serious. The respondent had been advised of bullying treatment and had done nothing about it. Although it could be said that removing Mr Beverley from site was an attempt at addressing the issues, the claimant was never advised why Mr Beverley was removed from site or whether the respondent had taken any action against him in relation to his conduct and language when on the site. The Tribunal was also of the view that the failure (that is to address a bullying culture at its operations) was ongoing. It was not until the claimant raised the issue with Tarmac that the respondent took any steps to speak to the claimant to find out the specific

details of his concerns. However, it was also the Tribunal's view that the steps taken by the respondent were no more than appearing to take the claimant's complaint seriously. It had no real intention of addressing bullying behaviour and it was likely that such behaviour would continue.

77. No evidence was led by the respondent regarding any procedure the claimant could or should have followed. No whistleblowing procedure or grievance procedure was produced. While it was suggested to the claimant at one stage (not in evidence before the Tribunal but when dismissing his concerns) that there was a folder of policies in the cabin at his place of work, this was not produced. The Tribunal was very sceptical as to whether such folder existed and if so, what policies might be in it. It could see no reason why the respondent would not produce these policies before the Tribunal if they had existed. Given there was no dispute that the claimant was not issued with a statement of terms and conditions of employment during his employment, nor was it put to him in what way he would have known that there were policies in existence, the Tribunal concluded that even if such policies existed, there was no basis on which the claimant could reasonably have been aware of them.

78. Finally, in relation to section 43G, the Tribunal was satisfied that the claimant had previously disclosed the information to his employer in terms of section 43G(2)((c). The Tribunal was therefore satisfied that the claimant had made a protected disclosure.

79. The Tribunal then went on to consider whether the reason or principal reason for the claimant's dismissal was that he had made the protected disclosure.

80. The Tribunal had little hesitation in concluding that the reason for the claimant's dismissal was that he had made the protected disclosure. The Tribunal rejected the respondent's position that the claimant was dismissed on the basis of his performance for a number of reasons.

    (i) The claimant was invited to a disciplinary hearing immediately after he was advised that his allegations of bullying were being dismissed.

(ii) The claimant was advised that he should not return to site almost immediately after the respondent became aware that the claimant had informed Tarmac that there was a bullying culture within the respondent's operations.

(iii) There was no 'internal performance review' of the claimant as was suggested in his letter of dismissal. Any information regarding the claimant's performance was obtained in the context of staff being asked about the claimant's allegations of bullying.

(iv) The claimant was never advised that there was a 'performance review'. He was never given any information as to what such a review might involve or given the opportunity to comment on this. Rather allegations were put to him at a hearing over the telephone in circumstances where the claimant had made clear that he did not have sufficient information in relation to the allegations against him, when the respondent knew the claimant was suffering from anxiety and he had gone home sick on his last day of work.

(v) There was no evidence led regarding why the respondent had to take such immediate steps to dismiss the claimant. The claimant was advised that his allegations of bullying were dismissed on Friday 4 March and was invited to a disciplinary hearing, during the course of the weekend(which he did not work), to take place at 9am on the next working day.

(vi) The respondent's evidence was that it was very difficult to recruit staff to the claimant's role. If the respondent had genuine concerns regarding the claimant's performance, the Tribunal formed the view that the respondent would have put these to the claimant and given him the opportunity to improve. However, the respondent did not at any time express to the claimant concerns about his performance.

(vii) The Tribunal concluded that Mr Riley was aggrieved at having been contacted by Tarmac and informed of what the claimant had said to

them. Mr Riley concluded that the most straightforward solution was to remove the claimant from the site.

(viii) Mr Riley was involved in the investigation into the claimant's allegations, took the decision to dismiss the claimant and took the decision to dismiss his appeal against dismissal. The Tribunal was mindful that this was not an 'ordinary unfair dismissal' in that the claimant did not have two years' service and therefore the Tribunal was not required to consider whether the dismissal was fair in terms of section 98(4) ERA. Nonetheless, the Tribunal was of the view that it was a relevant factor to take into account when determining the reason for the claimant's dismissal that it was Mr Riley who had been contacted by Tarmac, Mr Riley who oversaw what investigations were conducted into the claimant's allegations of a bullying culture, Mr Riley who arranged the disciplinary hearing and took the decision to dismiss the claimant and Mr Riley who took the decision to reject the claimant's appeal against his own decision. The Tribunal was very concerned at the nonchalant evidence of Mr Riley when asked why the correspondence regarding the claimant's appeal was signed by Ms Nash he said that 'we sometimes just put her name on correspondence'. It appeared to the Tribunal that Mr Riley had no regard at all for the ACAS Code of Practice or any requirement to follow any kind of fair or reasonable procedure in dismissing the claimant and was willing to misrepresent that the decision to dismiss the claimant's appeal had been taken by the respondent's managing director when in fact he had taken the decision.

(ix) The complaints of a bullying culture by the claimant were not dealt with in any meaningful manner. There was no grievance hearing. There was no reference to a grievance procedure. Despite the claimant indicating that he wished to appeal against the decision to dismiss his allegations, he was never told why this option wasn't open to him.

81. In all these circumstances, the Tribunal concluded that the reason for the claimant's dismissal was that he had made a protected disclosure. He was therefore automatically unfairly dismissed in terms of section 103A ERA. The Tribunal awards the claimant compensation for loss of earnings between the termination of his employment and commencement of new stable employment of £2644.04.

*Failure to provide statement of terms and conditions of employment.*

82. The respondent had failed to provide the claimant with a statement of terms and conditions of employment as required by section 1 ERA. As the Tribunal has found in favour of the claimant in relation to claims included in Schedule 5 Employment Act 2002, the Tribunal is obliged in terms of section 38 (3) to award the minimum of two weeks' pay and consider whether it is just and equitable to award four weeks' pay. The Tribunal is of the view that it is appropriate to make an award of two weeks' pay. As the claimant's weekly pay is less than the maximum calculation of a week's pay, the Tribunal awards the claimant the sum of two weeks' pay, being £1,080 gross in respect of the respondent's failure to provide the claimant with a statement of terms and conditions of employment.

83. Therefore, the respondent is ordered to pay to the following sums to the claimant:

| | |
|---|---|
| Unlawful deduction from wages | £107.60 |

| | |
|---|---|
| Compensation for automatically unfair dismissal | £2644.04 |
| Failure to provide statement of terms and conditions of employment | £1080 |
| **Total** | **£3831.64** |

Employment Judge: Amanda Jones
Date of Judgment: 31 January 2022
Entered in register: 08 February 2022
and copied to parties