EMPLOYMENT TRIBUNALS

Claimant: **Mr Phillip Towning**

Respondent: **Monarchs Childcare Limited**

Heard at: **East London Hearing Centre**

On: **2 & 3 August 2017 and 4 August 2017 (in chambers)**

Before: **Employment Judge Ferguson**

Members: **Mr S Dugmore**
Mr P Pendle

Representation

Claimant: **In person**

Respondent: **Mr J Peters (Director)**

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:-

1. **The Claimant's complaint of automatic unfair dismissal succeeds.**

2. **The Claimant's complaints of detriment on the ground of making a protected disclosure are dismissed, with the exception of the complaint relating to the reference provided to Euroloo Limited, which succeeds.**

3. **A remedy hearing will take place at 10am on Tuesday 24 October 2017 with a time estimate of three hours. Directions are contained in a separate document.**

REASONS

INTRODUCTION

1. By an ET1 presented on 5 January 2017 the Claimant brought a claim of

automatic unfair dismissal under s.103A of the Employment Rights Act 1996 ("ERA") and detriments on grounds of having made protected disclosures under s.47B ERA. In essence the Claimant claims that he made protected disclosures about the lawfulness of the Respondent's operation of minibuses and that these disclosures led to detriments and eventually to his dismissal, and indeed after his dismissal to an unfair and untrue reference given to a prospective employer. The Respondent defended the claims, asserting that the Claimant was dismissed on the ground of redundancy.

2. The issues were agreed at a Preliminary Hearing on 6 March 2017 and clarified during the hearing as follows:

Protected disclosures

3. The Claimant relies on the following alleged protected disclosures:

    3.1 9/12/15: 19.09 email to the Respondent

    3.2 12/12/15: 17.58 email to the Respondent

    3.3 Conversation in early January 2016 between the Claimant and the Respondent: "Jesse I still think it's illegal to use the minibuses without an operator's licence I covered this on the course with James".

    3.4 01/09/16 text to Jesse ref: MOT

    3.5 01/09/16 email to Jesse 17.14

    3.6 29/9/16 conversation with Jesse: "You can't do that that's illegal. You can't apply for a permit using a charity then use it to profit Monarchs, a limited company, that's against the law".

4. In respect of each alleged disclosure:

    4.1 Did the disclosure occur?

    4.2 Did the Claimant reasonably believe:

        4.2.1 That the disclosure was in the public interest?

        4.2.2 That the disclosure tended to show one or more of:

            4.2.2.1 A criminal offence?

            4.2.2.2 Breach of a legal obligation?

            4.2.2.3 That either of those things had been or were likely to be deliberately concealed?

5. It is not in dispute that the alleged disclosures were made to the Respondent.

Unfair dismissal

6. Can the Claimant show that the reason or (if more than one) the principal reason for the dismissal was the disclosure(s)?

Detriments

7. The Claimant relies on the following alleged detriments:

7.1 Reducing the Claimant's hours from 40 to 17.5 from 5 September 2016.

7.2 Not providing the Claimant with a contract of employment despite requests on:

7.2.1 16/4/16: 15.52 email

7.2.2 4/9/16: 11.36 email

7.2.3 5/9/16: 5.32 email

7.2.4 21/9/16: 11.04 email

7.3 Immediately terminating the Claimant's employment via an email dated 10 October 2016.

7.4 Not offering the Claimant reduced hours or reduced overtime, alternative employment or lay off with statutory guaranteed pay.

7.5 Not consulting with the Claimant to discuss redundancy, any alternatives, selection criteria or giving him an opportunity to put forward his views.

7.6 Providing an unfair, untrue reference to Euroloo Limited.

8. In respect of each alleged detriment:

8.1 Did the events occur as alleged?

8.2 Did the events amount to a detriment to the Claimant?

8.3 Can the Respondent show that the detriment was not done on the grounds that the disclosure(s) was/were made?

9. We heard evidence from the Claimant and, on behalf of the Respondent, from Mrs Simone Peters and Mr Jesse Peters, Directors of the Respondent company. Short written statements from two School Escorts, Mr Leslie Steven and Ms Margaret Cheese, were also admitted on the basis that the Claimant did not challenge their contents.

FACTS

10. The Respondent operates a nursery in Grays, Essex, for children aged from three months to 5 years. In addition to a standard nursery it operates breakfast and

after-school clubs for children attending nearby primary schools. Those children are taken to and from the schools in 17-seater minibuses driven by employees of the Respondent. It is not in dispute that at all material times the minibuses were owned by a charity called Youth Prospects. The Directors of the Respondent are a married couple, Mr Jesse Peters and Mrs Simone Peters. Mr Peters's evidence was that the Respondent employs around 55 members of staff. Mr Peters also set up Youth Prospects and continues to be heavily involved in the charity.

11. Given that the Claimant's alleged protected disclosures relate to the operation of the minibuses it is necessary to set out a summary of the legal position relating to Public Service Vehicles ("PSVs").

12. The Vehicle & Operator Services Agency ("VOSA") issues a document entitled "Public Service Vehicle Operator Licencing: Guide for Operators", which we consider to be a sufficient summary of the law for present purposes.

13. Under the section "Do I need a licence?", it states, so far as relevant:

> 1. Who needs a PSV operator's licence?
>
> You will need a PSV operator's licence if your vehicle is designed or adapted to carry nine or more passengers and payment is taken for carrying passengers (this is called 'hire or reward').
> …
> There is an exception for not-for-profit organisations who provide transport. These organisations may be eligible for a section 19 or section 22 permit…
>
> **Take note**: It is an offence to operate a PSV without a valid licence. You could be liable for prosecution and your vehicle could be impounded.
>
> 2. Definitions
>
> **Hire or reward**
>
> Hire or reward is any payment in cash or kind which gives a person the right to be carried, regardless of whether or not that right is exercised. It is also regardless of whether or not a profit is made.
>
> The payment may be made to the operator, the driver or any agent or representative acting on behalf of the operator.
>
> The payment may be made by the passenger, or on the passenger's behalf. It may be (a) a direct payment (e.g. a fare) or (b) an indirect payment (this could be an exchange for services such as a membership subscription to a club, payment for a bed in a hotel, school fees or payment for concert tickets where travel is included…).
>
> …
>
> **The Operator**
>
> The operator is deemed to be the driver if he/she owns the vehicle and, in any other case, the person for whom the driver works (whether under a contract of employment or any other description of a contract personally to do work).

14. Under Annex 4: "Not-for-profit transport", the Guide states, so far as relevant:

> **Permit schemes**
>
> Some operators of small vehicles, minibuses and, in a few cases, larger buses are free from PSV operator licensing if they use their vehicle under a permit. These permits let the holder carry fare-paying passengers in fairly restricted circumstances.
> …
> There are two permit schemes:
> - standard and large bus permits: issued under section 19 of the Transport Act 1985, as amended; and
> - community bus permits: these are issued under section 22 of the Transport Act 1985, as amended.
>
> **Section 19 permits**
>
> Not-for-profit groups concerned with education, religion, social welfare, recreation (standard permits only) or other activities of benefit to the community can get permits… They allow the holder of the permit to carry members of the group (e.g. Scouts) or people whom the group aims to help (e.g. disabled people). The permit gives details of those who may use the vehicle but it must not be the general public.

15. In order to obtain a PSV Operator's Licence the operator must employ a "Transport Manager", who is qualified and registered as such.

16. The Claimant began employment for the Respondent on 6 July 2015 as a minibus driver, working approximately 15 hours a week during term time at £10 per hour. After two or three months' employment the Claimant offered to take on some DIY tasks for the Respondent in addition to his driving duties. In October 2015 he was offered and accepted a salaried position as Site Manager, working 40 hours a week on a salary of £21,000 per annum. This role started on 28 November 2015 and the agreed intention was that in due course his job title would be changed to "Site and Transport Manager", with an increase to £25,000 a year. That was dependent on the Claimant attending a course and obtaining a qualification as a Transport Manager, at the Respondent's expense.

17. The idea of the Claimant becoming a qualified Transport Manager seems to have come about as follows. Mr Peters's evidence was that he had wanted to generate additional income by hiring out the minibuses at weekends and during school holidays. Mr Peters spoke to a Transport Manager called James Dunnett, who suggested Mr Peters set up a separate transport company for that purpose. The Respondent thereafter engaged Mr Dunnett to apply for an Operator's Licence on the Respondent's behalf. The application was ultimately not pursued because the vehicles were owned by Youth Prospects, not the Respondent, so they could not supply the correct paperwork. Mr Peters said that he spoke to VOSA around this time who said that although the Respondent did not have an Operator's Licence they were happy for the Respondent to hire out the vehicles as long as they employed a Transport Manager. We make no finding about whether this conversation took place as Mr Peters alleges. Mr Peters decided to employ a Transport Manager mainly in order to facilitate the additional potential business. He decided that the cheapest way of achieving this was to train an existing staff member to take on the role. The Respondent ended Mr

Dunnett's services and booked the Claimant onto a Transport Manager course run by Mr Dunnett's company.

18. The Claimant attended the Transport Manager course in early December 2015. On 9 December 2015, the third day of the course, the Claimant emailed Mr and Mrs Peters as follows:

> "Hi Jesse & Simone,
> Hope everything is OK.
> That's the 3rd day completed, information overload is an understatement!
> Loads still to learn but a full week until the exam.
> Now for some bad news.
> James having looked at all our licences informed me that i had a 101 restriction on my D1 category, we have now also covered this on the course.
> Unknowingly to me this means i can not drive a minibus carrying any passengers on the highway.
> Not sure if any of the other drivers have this same restriction, but they should not be driving if they do or they are breaking the law and any insurance cover will be in-valid?
> I will not get the results of the exam until mid january 2016.
> Speak to you soon
> Phillip"

19. On 12 December 2015 the Claimant again emailed Mr and Mrs Peters with various queries about the tasks they wanted him to undertake. In the course of that email he wrote, "So i will come in on Friday as usual all day, but remember i cannot drive the minibus because of licence restriction".

20. On 14 December 2015 Mr Peters sent a text message to the Claimant as follows:

> "Hello Phillip i was sure but have double checked with our insurance who have a copy of your licence that we are covered for you to drive the minibuses they have confirmed. In regard to what James is saying he in essence creating business for himself as he offers driving licence courses. What he says is correct to some degree as i have spoken in length with vosa who have also been down to see the operation. Vosa are the authority who act on hire for reward licencing etc. They have stated that as long as we are working towards an operator licence it is ok for us to continue to operate. In regards to yourself you are not employed to drive the minibus and as such do not receive any reward for driving the vehicle, you are the site manager. James may state that it is not if you are rewarded but the company, the vehicles are not owned by the company they are hired in. James is not aware of this which negates this point.
> That said Gene was in a car accident at the weekend and we need you to drive your regular school run this afternoon."

21. The Claimant replied, "Ok i will drive today but will do checks myself with vosa."

22. Mr Peters then wrote:

> "Ok when checking do not mention Monarchs as although we are making progress it will make them look at us again before time and if they feel we have

> not made enough progress they may take us to Court. You can enquire independently about the legality of you driving vehicles to transport children to and from after school and breakfast clubs in a voluntary capacity as this best describes your role in regard to this."

23. The Claimant did not in fact contact VOSA and continued to drive the minibuses.

24. The Claimant took the Transport Manager exam on 17 December. After the Christmas break, in early January 2016, the Claimant and Mr Peters met in Mr Peters's office to discuss various work issues. The Claimant has given a detailed account of the conversation, which Mr Peters denies in its entirety.

25. We found Mr Peters had a tendency in his evidence to deny anything said by the Claimant without giving proper thought to the matter. For example, he initially denied that any of the text messages alleged to be sent between him and the Claimant, reproduced in the bundle as word-processed documents, had been sent. Mr Peters said they were unable to check their own phones because Mrs Peters's phone had been damaged by water and lost all its data and Mr Peters has a new handset each year and does not migrate the messages. He claimed to have no memory of any of the messages. We allowed the Claimant to show Mr and Mrs Peters the messages on his phone(s) during the hearing and even then Mr Peters was very reluctant to accept that they were genuine. Eventually he conceded that they were sent. Given this general attitude towards the evidence and the fact that the Claimant's account of the conversation in early January is consistent with the surrounding correspondence, we accept that the conversation took place as alleged by the Claimant.

26. During the conversation the Claimant said to Mr Peters, "Jesse, I still think it's illegal to use the minibuses without an Operator Licence, I covered this on the course with James". Mr Peters replied along the following lines:

> "Listen James has his own Agenda, do you know he offers driving training courses, exactly, as i said before VOSA have been down to Monarchs and have given us permission to continue to operate as long as we are moving towards applying for a licence. That's why we sent you on the course… Monarchs is not operating hire or reward, we have lawyers who advise us about this type of thing."

27. The Claimant accepted this explanation, but said he was worried about taking on the additional Transport Manager position, if he passed the exam, because of the stress and responsibilities.

28. On 26 January 2016 the Claimant was informed that he had not passed the Transport Manager exam. He told Mr Peters by email.

29. On 24 February 2016 Mr Peters emailed the Claimant to say that the Claimant was required to resit the Transport Manager exam on 5 April. The Claimant replied as follows:

> "Hi Jesse and Simone,
> Not sure if you remember our conversation when i explained that having taken the course + sitting the exam the stress and responsibilities of being a Transport Manager was not something I wanted to take on at my age, even with the

increased salary you offered.
To comply with all the legal rules and regulations with 5+ minibuses its requires 4-5 hours work a day.
I think the role is best suited for a younger person with previous experience in the Transport Industry.
I will bring in my course folder tomorrow.
Phillip."

30. The matter was not taken any further. On 16 April 2016 the Claimant emailed Mr and Mrs Peters as follows:

"Hi Jesse & Simone,
Returned to work last night at 9.15pm to turn off the parking light as left on by Les.
As of yet I have not receive a contract explaining my daily role and responsibilities, etc… as Site Manager/Maintenance Person/Minibus Driver ?
But i have noticed i am being allocated more and more responsibilities associated with a Transport Managers position.
As outlined in my previous email i did not want to take on this additional responsibility which i feel is gradually being allocated to me.
I hope you understand
See you Monday
Phillip"

31. Shortly after this Mrs Peters gave birth to twins, born prematurely and admitted to the neo-natal intensive care unit for three months. Both Mr and Mrs Peters were on leave for several months and attended the nursery site rarely during this time. They both gave evidence that this was an extremely difficult time for them and we accept that without hesitation.

32. Around this time fencing contractors, hired by Mr Peters, were on site at the nursery installing new fences. A dispute arose with the contractors because they refused to install one panel due to the presence of a tree stump. They eventually left the site without the final panel having been installed and refused to return.

33. On 28 August 2016 Mr Peters emailed the Claimant saying that one of the minibuses was due its MOT and asking him to book it in "first thing Tuesday and we need it done same day".

34. On 1 September 2016 the Claimant sent a text message to Mr Peters saying "I come away from the mot station stressed, i did not know it was part of Thurrock council, They were saying we should be displaying a permit the tacho should be used and a speed Limiter should be fitted and if the police stop me i would be in big trouble, i just played dumb. But I am concerned."

35. Mr Peters replied, "I will look into this".

36. Later the same day the Claimant sent an email to Mr and Mrs Peters as follows:

"Hi Jesse & Simone,
After hearing the points raised by the council run MOT centre today regarding:
Having a section 19 permit displayed

Not using the tachograph and me not holding a valid tacho card
Not having a speed limiter fitted (Just on BG12 KZB the other 3 do)
I have serious concerns regarding the legality of me driving the minibuses.
Therefore from tomorrow i will not be driving any of the minibuses with or without passengers.
I cannot risk loosing my driving licence for the sake of being unsure legally and without written proof.
Hope you understand.
Phillip."

37. Mr Peters replied saying they would review the Claimant's position and get back to him. On 3 September 2016 he emailed the Claimant as follows:

"Good evening Phil

Having reviewed your position, initially the plan was for you to hold the combined role of Transport Manager and Site Manager. Unfortunately you didn't pass the Transport Manager course therefore you were unable to take on this role. Now that you are unable to drive the minibuses you cannot fulfill this role also. Due to these circumstances it has become necessary to redefine your role as solely Monarchs Site Manager. Your title will change to Site Manager with key holder responsibilities the basic hours being 17.5 hours a week at your current rate of pay of £10.09 per hour…

We trust you understand the need to redefine the position as your duties have been substantially reduced. I will be in on Tuesday if you would like to discuss the position…"

38. The Claimant replied the following day stating that he was "happy to take on this redefined site manager roll with my basic hours reduced to 17.5 hours per week from tomorrow".

39. On 8 September the Claimant emailed Mr and Mrs Peters as follows:

"I am now in the possession of a drivers tacho card but will need to learn how to use it, as should the other drivers.

There is still the issue of the mini buses needing a section 19 permit not o licence which i think we can apply for.

From tuesday next week i am able to work some overtime if required. Moving forward i suspect 3.5 hour per day will not provide enough income to pay my mortgage etc…

Further to our conversation on tuesday i agree the work load has decreased, but realistically i need at least 6 hours work per day or an increase in hourly rate?
Whether this extra is made up helping prepare the school runs, stock checks and maybe helping someone to manage the minibuses (without sole responsibility) this is your decision. I do not want to leave Monarchs but may be forced to, subject to my future income."

40. Mr Peters replied saying he would review the position. On 20 September he emailed the Claimant saying, "We will be able to give you 30 hours a week starting as soon as you are able Monday – Friday 6.30am – 12.30pm, I will forward full duties, daily schedule and reporting templates tomorrow."

41. The Claimant agreed to this, starting from 26 September 2016. He also said in his email, "Please can you draw up a employment contract for me as i have been working for Monarchs for 15 months and still have not received one."

42. At this time the Respondent employed four drivers, one of whom, Richard Porter, was due to leave shortly for a new job. On or around 28 September the Claimant had a conversation with the other three drivers who asked whether he would be taking over Mr Porter's route. The Claimant explained why he had stopped driving the minibuses and said that Mr and Mrs Peters had no intention of disclosing the legal concerns he had raised. It appears that at least one of the drivers, Mr Mike Bacon, then raised the issue with Mr Peters because Mr Peters emailed the Claimant asking whether he had discussed his "feelings regarding driving the minibuses" with Mike. The Claimant replied saying that he was asked whether he would take over Richard's route once he leaves. He explained he would not be driving due to the 101 restriction on his licence. He said Mike had been researching his eligibility to drive once he reaches 70.

43. Mr Peters then emailed the Claimant saying "I thought you held a D1 without a 101 restriction have you checked your licence?". The Claimant replied, reminding Mr Peters of the correspondence they had on the issue in December 2015 and forwarded the email of 9 December 2015.

44. That evening Mr Bacon emailed Mr Peters saying that he had investigated the driving licence issue and discovered that he has a D1 licence with a 101 restriction, which means he can drive a minibus provided it is not for hire or reward. The email states:

> "As I understand it now that to drive a 16 seat minibus where monies are concerned in way shape or form requires a PSV licence involving a medical, a theory and further practical driving test all at considerable expense.
>
> I would hazard a guess that my driver colleagues may be in the same precarious situation for if we became involved in any situation when conveying children if the Police or Vosa or other authorities became involved, and my suspicions were indeed correct my driving licence could be proven to be invalid, as would the insurances on the bus and a possible claim for damages and have points on my licence may ensue.
>
> To clarify the situation I see it as a matter of urgency that we meet with all the drivers also as soon as possible in order that you can fully explain the situation."

45. On 29 September 2016 the other two drivers, Mr Davis and Mr Kennedy, resigned and left immediately. Mr Peters's evidence was that they did not give a reason and did not respond when he tried to contact them. We find that to be unlikely, but even if it is true, we find that Mr Peters believed that they resigned because, having spoken to the Claimant, they were concerned about the legality of driving the minibuses. That day the Claimant and Mr Peters were working together on a new outdoor play area for the nursery. Again, Mr Peters denies the Claimant's account of

the conversation, but we accept that it took place as described by the Claimant. He has given a detailed account, consistent with the surrounding correspondence. We considered him to be a credible witness because he answered questions in a straightforward manner, despite the hearing becoming extremely heated at times, and he did not seek to exaggerate or embellish. Mr Peters on the other hand was often evasive in his oral evidence and, as noted above, had a tendency to dismiss everything that the Claimant said.

46. During the morning of 29 September Mr Peters received a phone call informing him about the resignation of the drivers. He was agitated about this and had a heated discussion with the Claimant about it, implying that the Claimant was responsible. The Claimant then overheard Mr Peters having a telephone conversation in which he mentioned applying for permits and sending documents with charity details on. Mr Peters then told the Claimant that they would be applying for minibus permits. The Claimant responded along the lines, "You can't do that, that's illegal, you can't apply for a permit using your charity and then use it to profit Monarchs a limited company, that's against the law". Mr Peters told the Claimant to "keep quiet" and that it was not his concern. The Claimant told Mr Peters he had had more than enough time to sort out the issue and accused him of "taking no notice", claiming that VOSA gave him permission, and expecting the drivers to keep driving illegally. "Why do you think the drivers walked out?" he said. Mr Peters then spoke to Mrs Peters on the phone about engaging agency drivers. It is not in dispute that the cost to the Respondent of employing an agency driver was considerably more than the amount it had been paying for its own drivers.

47. During the evening of 29 September 2016 Mr Peters replied to Mr Bacon's email as follows:

> "As discussed today I am emailing to confirm the position as it stands the vehicles we operate are not operated for profit and therefore the 101 restriction on your licence does not prohibit you from driving the minibuses.
>
> I have been in contact with VOSA over the past 12 months regarding how we operate the vehicles and they have advised that we can continue to operate as we are, with the requirement to register either for a full Operators Licence or a Section 19/22 whichever best suits how we operate our vehicles. After much research and reading we have submitted section 19 permits which will be confirmed and issued in the next few weeks confirming our position that the vehicles are not operated for hire or reward. We will also be introducing the use of the vehicle tachographs as an element of good practice…"

48. Mr Peters copied below the text of an email he had received from a Traffic Examiner at VOSA dated 27 July 2015 stating, "If your operation fits into this it has an exemption for the D1 on the licence". A document entitled "Sec 19 Minibus Permit" was attached.

49. On 1 October 2016 Mr Bacon responded to Mr Peters, saying he was still "not convinced that the correct vehicle legislation has been followed and put in place for the utilisation of the minibuses", which could have a serious impact on his driving licence. He tendered his resignation with effect from after the school run on 3 October. Mr Peters replied saying that he would not be required to cover the school runs on Monday, so his last day was 30 September 2016.

50. On 6 October Mr Peters sent the Claimant a text message asking him to bring in all the keys he holds for the Respondent's properties on the following day, ostensibly to carry out an audit of all keys. He was also asked to bring various tools and equipment. The Claimant did so. On Monday 10 October the Claimant attended work as normal. That evening he received an email from Mr Peters as follows:

> "Good Evening Phil,
>
> Unfortunately following recent events which you are aware of we are no longer in a position to continue your employment with Monarchs this is primarily down to the increase in staff wages as a direct result of the drivers walk out, forcing us to pay substantially higher rates of pay to secure new qualified staff to fulfill this necessary post. As you are a non essential member of staff we will be able to recoup some of these additional expenses but only a fraction of the full cost.
>
> I know this will be disappointing but I am sure you understand the financial strain this has caused us and that we have no option but to end your employment effective immediately. If our financial position changes we will be in touch if you are still available."

51. The Claimant responded on 16 October disputing the reason for his dismissal and asserting that he could claim unfair dismissal on the grounds of whistleblowing.

52. Over the next couple of months the Respondent sought to reduce the salaries of some members of staff and the assistant cook was dismissed on grounds of redundancy. Most of the salary reductions were agreed, but one member of staff resigned.

53. The bundle contained copies of three "Section 19 permits" issued to Youth Prospects in respect of the three minibuses used by the Respondent, dated 12 October 2016.

54. It was not in dispute that the Respondent has now changed all of the signage on the minibuses. While the Claimant was employed they bore the name and logo of the Respondent. Very shortly after his dismissal these markings were removed and the name and logo of Youth Prospects were added. It was suggested to Mrs Peters in cross-examination that this took place within a week of the Claimant's dismissal and she did not dispute that.

55. Mrs Peters also accepted that changes had been made to the job advertisements for minibus drivers. Whereas previously a "Monarchs" email address was given as the point of contact, they now give a Youth Prospects email and phone number. The bundle contained a number of advertisements by the Respondent dating from 31 December 2016, for minibus drivers at £20 an hour, giving the Youth Prospects email address and phone number. Mrs Peters said this was done "to separate the two".

56. Changes were also made to the Respondent's website in January 2017. As at 12 January 2017, the page giving details of the breakfast club contained a section stating:

> "School Drop off
>
> Depending on which school your child attends, we drop them off to school using our centre minibus (fully insured with qualified and CRB checked nursery driver). Your child is escorted with our fully qualified staff (in uniform and high visibility vests) to their classroom before the start of the school day!"

57. The page also sets out the fees: £29 per week or £6 per day.

58. Sometime before 25 January 2017 the whole section entitled "School Drop off" was deleted and a sentence was added stating "For information or a booking please contact our Out of School Club on [number]".

59. The same section on School Drop off was included in the page on the After-School Club until at least 12 January 2017 and similarly was deleted by 25 January 2017.

60. The fees for After-School club are given as £55 per week or £14 per day.

61. Mrs Peters's evidence was that the drop-off section must have been deleted inadvertently when she attempted to add the out of hours contact number. We do not accept that. When she first gave evidence she denied any knowledge of or responsibility for the running of the business, other than the "education and childcare" aspects. She denied any knowledge, for example, of the amount of profit generated by the breakfast and after-school clubs. She also denied knowledge of an email sent to all staff when the company's finances made it necessary to delay payment of full salaries. During Mr Peters's evidence it became clear that in fact Mrs Peters had responsibility for placing job advertisements and for the content of the website, so she had to be recalled in order to be questioned about these matters. He also confirmed that both he and Mrs Peters managed the payroll staff. We noted that Mrs Peters also referred to the company as "my business" during her evidence. Overall our impression was that Mrs Peters sought to distance herself from the running of the company when asked difficult questions, and in fact she is closely involved in all aspects of the business. We did not find her evidence about the website to be credible. Removing the section on School drop-offs is consistent with the change to the vehicle markings and the changes to the job advertisements, both of which were accepted, and we find that it was done deliberately.

62. We find that all of these changes were made in response to the concerns raised by the Claimant and subsequently by Mr Bacon, in an effort to support the contention that the minibuses are operated by Youth Prospects, not by the Respondent.

63. Early in 2017 the Claimant secured a trial period as a driver for Euroloo Limited. On 8 February 2017 Mrs Peters supplied a reference, answering a number of standard questions as follows:

> "*Would you employ the candidate again?* No
> *Did you find the applicant to be honest and trustworthy?* No
> *Did you find the candidate to be reliable in carrying out her/his duties?* No
> *Was the applicant's time-keeping acceptable?* Yes
> …

> *Do you think that the applicant would be a suitable person to undertake this post?* No
> *Additional comments:* Mr Towning comes across well but once in post he was not able to follow simple instructions he consistently believed he knew more than his superiors and would regularly not complete jobs as directed instead doing them in a substandard way which he believed was easier for him."

64. Both Mr and Mrs Peters gave evidence that this reference gave an accurate reflection of the Claimant's work, referring to three particular matters: (a) flooring in the nursery which had bowed because of the Claimant's allegedly substandard work, gluing tiles when he had been instructed not to; (b) failing to ensure that the fencing contractors returned to install the final fence panel; (c) screening outside the nursery, which became detached in windy weather, allegedly due to the Claimant's failure to secure it properly.

65. We do not accept that any of those matters were genuine matters of concern as to the Claimant's standard of work or that they were real the reason for the negative reference. No concerns were raised with the Claimant before these matters were raised in the Respondent's ET3 and indeed such correspondence as we have seen relating to each of them suggests that the Claimant was in close contact with Mr and Mrs Peters throughout and that they either expressly or impliedly approved what he did. Further, when Mrs Peters was questioned about the assertion that the Claimant was not "honest and trustworthy" she could provide no justification for this, again referring only to the fact that he did not follow instructions. We therefore conclude that the Respondent maliciously provided a negative reference. Its motivation for doing so is addressed in our conclusions below.

66. There is a dispute as to whether the reference caused the Claimant to lose the job with Euroloo for which he was on trial. Although this is not relevant to liability, we deal with it here because we heard evidence on the issue and it may be relevant to any future hearing on remedy. The Claimant's evidence was that he was told by Euroloo that he failed his trial period because of the reference from the Respondent. The Respondent contends that this is contradicted by an email it received from Euroloo saying that the reason for his employment being terminated was that he was "unsatisfactory within his trial period". According to email correspondence between the Claimant and Euroloo the trial period was ended on 15 February 2017, which is after the date of the reference. The Claimant said in that correspondence "Because of this reference I was told my trial period was terminated and the Job Centre will need to know why". This is consistent with the Claimant's oral evidence that he was told the reference was the reason for him failing the trial period, and there is nothing in Euroloo's email to the Respondent to contradict that. We accept that the reference caused the Claimant to lose that job opportunity.

67. It is not in dispute that over the course of his employment the Claimant made a number of requests for a written contract. The Respondent argues that the Claimant was given sufficient details in the email offering him the original driver position and then in a document entitled "job offer" relating to the Site Manager position, signed by the Claimant on 12 November 2015, and that these documents complied with sections 1-4 ERA. No formal contract was provided because the Claimant's job role changed over time, he did not pass the Transport Manager exam as expected, and from 1 September 2016 until the Claimant's dismissal they were engaged in consultation over his position.

68. We find that the Claimant was never given a statement of initial employment particulars that complied with s.1 ERA. In particular he was not given a document that included, alongside particulars of remuneration, hours, etc., particulars of terms and conditions relating to holiday entitlement and holiday pay or of his place of work.

THE LAW

69. Section 1 ERA requires employers to give employees a written statement of employment particulars within two months of the beginning of employment. The statement may be given in instalments, but pursuant to s.2(4) the following particulars must be contained in a single document:

69.1 The names of the employer and employee

69.2 The date when the employment began

69.3 The scale or rate of remuneration or the method of calculating remuneration

69.4 The intervals at which remuneration is paid

69.5 Any terms and conditions relating to hours of work

69.6 Any terms and conditions relating to entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated).

69.7 The title of the job which the employee is employed to do or a brief description of the work for which he is employed

69.8 Either the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer.

70. As regards protected disclosures, the ERA provides, so far as relevant:

> **43A Meaning of "protected disclosure"**
> In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.
>
> **43B Disclosures qualifying for protection**
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
> (d) that the health or safety of any individual has been, is being or is

likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

…

43C Disclosure to employer or other responsible person
(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure . . .—
(a) to his employer, …

47B Protected disclosures
(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
…

103A Protected disclosure
An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

71. As to s.43B, the definition has both a subjective and an objective element: the worker must believe that the information disclosed tends to show one of the six matters listed in sub-section (1), and that belief must be reasonable. A belief may be reasonable even if it is wrong (Babula v Waltham Forest College [2007] EWCA Civ 174, [2007] ICR 1026).

72. Pursuant to s.48(2) ERA, on a complaint under s.47B it is for the employer to show the ground on which any act, or deliberate failure to act, was done. The employer must prove on the balance of probabilities that the protected act did not materially influence the employer's treatment of the employee (Fecitt v NHS Manchester [2012] ICR 372).

73. In El-Megrisi v Azad University (IR) in Oxford UKEAT/0448/08 (4 June 2009, unreported) the EAT held that where an employee alleges that he or she has been dismissed because of multiple public interest disclosures, and a tribunal finds that they operated cumulatively, the question is whether the cumulative impact was the principal reason for the dismissal. It is not necessary to consider each disclosure separately.

74. Under s.103A ERA the burden of proving the reason or principal reason for dismissal is on the employer unless the claimant lacks the qualifying period of employment (and therefore needs to show that the tribunal has jurisdiction to hear his or her claim) in which case the burden of proof lies on the employee (Kuzel v Roche Products Ltd [2008] ICR 799).

CONCLUSIONS

Protected disclosures

75. We have found that all six of the disclosures relied upon by the Claimant occurred. Each of them conveyed essentially the same information: that the

Respondent's operation of the minibuses was such that the Respondent was obliged to comply with the law applicable to PSVs and it had not done so. The first two disclosures specifically concerned the Claimant's ability to drive the vehicles with a 101 (not for hire or reward) restriction on his licence, but later disclosures were more generally concerned with the need for the Respondent to have an Operator's Licence. The Claimant also suggested that the insurance on the vehicles may not be valid in light of the absence of proper licence(s).

76. The Respondent did not seek to argue that the disclosure of such information was not made in the public interest and we have no doubt that it was. Other than a concern about his own potential liability, there was no "private interest" at stake; indeed it was arguably contrary to the Claimant's private interest to raise the matter because it meant that he was unable to drive the minibuses, which was initially his only job and this remained a substantial part of his role until 5 September 2016. There is a clear public interest in all vehicles, but particularly those transporting children, being properly licenced and insured. We therefore find that the disclosures were, in the reasonable belief of the Claimant, made in the public interest.

77. As to whether the disclosures tended to show the type of wrongdoing set out in s.43B(1), we are satisfied that the Claimant believed that they did and that that belief was reasonable. It is not necessary for us to make a finding as to the actual legal position, but the Claimant's belief as to the legal requirements accorded with an ordinary reading of the VOSA guide. We also note that the Claimant's original concerns came from the course he was attending with Mr Dunnett, a qualified transport manager, covering precisely these issues. It is also relevant that at least one other driver, Mr Bacon, had the same concerns. The Claimant's belief was plainly reasonable.

78. Specifically, we accept that the Claimant had a reasonable belief that the disclosures tended to show:

78.1 That the Respondent was the "operator" of the vehicles, notwithstanding Mr Peters's implicit contention that Youth Prospects was the operator. The drivers were employed by the Respondent only and, according to the VOSA guide, that meant the Respondent was the operator.

78.2 That the vehicles were operated for hire or reward, notwithstanding Mr Peters's assertions to the contrary. The service being provided by the Respondent was a breakfast and after-school club including transport to and from the schools. Parents pay the Respondent for this service and therefore pay for the transport indirectly.

78.3 That the vehicles were therefore PSVs and the Respondent required either an Operator's Licence or a s.19 permit.

78.4 That obtaining a s.19 permit in the name of Youth Prospects would not suffice because Youth Prospects was not the operator and such permits are not intended for vehicles being used by a profit-making company.

78.5 That drivers with a 101 restriction on their licence were not permitted to drive the vehicles.

78.6 That all of the above may invalidate the insurance on the vehicles.

78.7 (In respect of the disclosure on 29 September 2016) That by applying for s.19 permits in the name of a charity, the failures above were being deliberately concealed.

79. Those matters clearly fall into the category of criminal offences and/or breach of legal obligations and/or concealment. The disclosures were therefore qualifying disclosures and there is no dispute that they were made to the Respondent, so they were "protected disclosures" within the meaning of s.43A ERA.

Unfair dismissal

80. Because the Claimant does not have sufficient qualifying service for "ordinary" unfair dismissal, the Tribunal only has jurisdiction to consider unfair dismissal if he can show that the protected disclosures were the reason or principal reason for the dismissal, such that it was automatically unfair under s.103A ERA.

81. We have already found that the disclosures conveyed essentially the same information and we further consider that they had a cumulative effect; initially the Claimant was prepared to accept Mr Peters's assurances, but he continued to have concerns and later raised the same matters after taking one of the vehicles for an MOT. The consequences of the disclosures also escalated. At first Mr Peters did nothing other than respond to the Claimant, saying that he had misunderstood and the minibus operation was in fact lawful. On 1 September 2016 the Claimant informed the Respondent that he would no longer drive the minibuses. Then the other drivers resigned and finally Mr Peters applied for s.19 permits. In those circumstances we consider that it is appropriate to consider whether the cumulative impact of the disclosures was the reason or principal reason for the Claimant's dismissal.

82. Mr Peters claimed that the period from 1 September 2016 onwards amounted to "consultation" of the Claimant over his proposed redundancy and the decision to terminate his employment was not made until 10 October 2016. We do not accept the Respondent's account, for the following reasons:

82.1 There was never any suggestion before 10 October that the Claimant's position was redundant, or that there was a redundancy situation generally. It is true that his hours had been reduced to 17.5 after he informed the Respondent that he would not drive the minibuses, but there is nothing in the correspondence to suggest that the "site manager" aspect of the Claimant's role had decreased or ended. Indeed the Respondent was happy to increase the Claimant's hours after a few days to 30 hours a week.

82.2 There was never any suggestion before 10 October that the Claimant's employment might be terminated altogether. If this were a genuine redundancy situation one would expect that risk to have been mentioned so that he could consider alternatives. The Respondent contended that there were no alternatives that would have been acceptable to the Claimant, given that he had not been happy working 17.5 hours a week, but there was no proper basis for such a conclusion and we do not accept that this was the genuine belief of Mr or Mrs Peters. They did not

know what the Claimant's position would be if he were informed that there was a redundancy situation.

82.3 If the Respondent had been engaged in genuine consultation it would have, at the very least, discussed with the Claimant on or before 10 October the fact that he was at risk of dismissal; instead his employment was terminated summarily by email.

82.4 If it were a genuine redundancy situation one would expect the Claimant to have been required to work his one-week notice period. The Claimant's evidence, which we accept, was that he was part-way through the job of installing safety locks on all the windows at the nursery when he was dismissed. The Respondent has not provided any sensible explanation for its decision to terminate the Claimant's employment summarily, leaving an important task unfinished.

82.5 We consider it likely that the decision to terminate the Claimant's employment was made on or before 6 October and that the request to return keys was in order to facilitate summary dismissal by email.

82.6 There is evidence that the Respondent was in some financial difficulty, but there was little evidence as to effect of that on the Claimant's role. The Claimant had been the "site manager", working 40 hours a week, since the end of November 2015. Contrary to the Respondent's arguments, his job title was never "site and transport manager" because that was expressly dependent on him passing the transport manager exam and it entailed an increase in salary which never occurred. The change in early September 2016 was therefore a reduction in hours only; it was not a change in job role, other than the fact that the Claimant was no longer prepared to drive. Both parties agreed, however, that by this time driving was a minor part of the Claimant's role. As at 20 September 2016 the Respondent had enough work for the Claimant to do to justify employing him for 30 hours a week and there is no evidence that the requirements to do that work changed between then and 10 October. The increased cost of using agency drivers has nothing to do with the need for the type of work the Claimant was doing. There is no evidence of any discussion, let alone a formal meeting, in which it was decided to dispense with the role of site manager and allocate the tasks among other staff. Nor is there any evidence of how this work has been undertaken since the Claimant's dismissal.

83. In fact, the reference in the dismissal email to the increased cost of using agency drivers is telling as to the real reason for the dismissal. We consider that, on the balance of probabilities, the reason for the Claimant's dismissal was the fact that Mr and Mrs Peters were annoyed about the position he had put them in by making the protected disclosures. They had been forced to address an issue which had first been raised in December 2015 and which they had managed to avoid for nine months. Mr Peters's text messages in December 2015 suggest that he was aware of the requirements and was seeking to avoid them by presenting a misleading picture of the Respondent's minibus operation. On any view the drivers were not working in a voluntary capacity. He also appears to have been keen to avoid scrutiny, asking the Claimant not to mention the Respondent to VOSA. Similar inferences may be drawn

from his comments to the Claimant in January 2016; suggesting that the minibuses were not used for hire or reward was not accurate and we find that Mr Peters knew that. We note that his position changed somewhat between December 2015 and September 2016. Initially he said he had been advised the Respondent did not need an Operator's Licence as long as it employed a transport manager, or as long as it was "working towards" a licence. Later he suggested that they were exempt from the PSV requirements because they were eligible for s.19 permits (albeit that no such permits were applied for until late September 2016). Overall the impression given is that Mr Peters was trying to avoid compliance with the law on PSVs. That provides a strong motive to dismiss an employee who continually raises the issue.

84. There are three other factors which, together with this background, lead us to conclude that the protected disclosures were the reason for the Claimant's dismissal:

84.1 The manner of the Claimant's dismissal. As noted above, summary dismissal by email after requesting keys be returned is not consistent with a genuine redundancy.

84.2 The timing of the Claimant's dismissal. The decision to dismiss was made within a few days of the Respondent being forced to address the issue as a result of the drivers walking out.

84.3 The markings on the vehicles and the wording of the website and job advertisements were all changed shortly afterwards to support Mr Peters's contention that the vehicles are operated by Youth Prospects, a position that he knew the Claimant believed to be dishonest.

85. We are doubtful whether the increased cost of using an agency driver and a desire to save cost elsewhere was a genuine factor at all, but even if it was we find that the decision to dismiss the Claimant as opposed to any other method of cost-saving was motivated by a belief that he had "caused" the situation and should therefore bear the consequences.

86. Our overarching assessment of the evidence is that by early October 2016 Mr and Mrs Peters resented the Claimant for having made the protected disclosures, causing them difficulties with the other drivers and calling into question their honesty. Mr Peters had asked the Claimant to "keep quiet" and in the following few days decided that dismissing him was the best way of achieving that. The Claimant's dismissal was automatically unfair by virtue of s.103A ERA.

Detriments

87. In contrast to the unfair dismissal complaint, the burden lies on the Respondent to show that the protected disclosures were not the reason for the alleged detriments. We address causation first because we have concluded that it disposes of all but one of the alleged detriments.

Reducing the Claimant's hours from 40 to 17.5 from 5 September 2016

88. We are satisfied that this decision was not motivated by the protected disclosures. The fact that the Claimant's hours were very shortly afterwards increased

to 30 a week, despite him having initially agreed to 17.5 hours, is inconsistent with the notion that he was being "punished" for having made the protected disclosures. The immediate reason for the reduction was the fact that the Claimant had just said he was not prepared to do any driving, which remained an aspect of his job. We accept that this caused Mr and Mrs Peters to reconsider the Claimant's role more generally and that although they wished to continue employing him they felt they could not justify employing a full time site manager. When he started that role he had been one of the regular minibus drivers and it was intended he would take on the transport manager role within a number of weeks. That issue had been left unaddressed while Mr and Mrs Peters were dealing with their new twins. The reduction to 17.5 hours was based on their assessment of the requirements for the role at the time.

Not providing the Claimant with a contract of employment

89. We also accept that the failure to provide a contract of employment was not motivated by the protected disclosures. The Respondent had already failed to provide a statement of initial employment particulars by the time the first disclosure was made. There is nothing to suggest that the later failure to provide a formal contract, despite promises to do so, was related to the protected disclosures. We accept Mr Peters's evidence that they did not have a "standard form" contract for a site manager because the position was new, and we consider that the failure to create one over several months, despite specific requests by the Claimant, is consistent with Mr Peters's generally informal approach to running the business and his tendency to avoid administrative tasks. We also accept that the birth of Mr and Mrs Peters's twins was a factor in the delay.

Immediately terminating the Claimant's employment/ failure to consult/ failure to offer alternatives

90. All of these alleged detriments relate to the manner of the Claimant's dismissal. Although we have found that the protected disclosures were the reason for the Claimant's dismissal, we do not consider that the *manner* of the dismissal involved separate detriments motivated by the protected disclosures. It is artificial to consider the reason why the Claimant was not consulted, offered alternative employment or given notice of dismissal when redundancy was not the genuine reason for dismissal. It cannot be said that "but for" the protected disclosures the Claimant would have been afforded these benefits because we do not accept that there was a genuine redundancy situation. These matters have been taken into account when considering the reason for the dismissal, but they are not separate detriments.

Providing an unfair, untrue reference to Euroloo Limited

91. There is no dispute as to the fact of the reference or its contents. Nor could it be disputed that it constituted a detriment to the Claimant. He lost a job opportunity as a result of it.

92. We have already found that the Respondent included the negative comments in the reference out of malice towards the Claimant. The Respondent has not put forward any alternative explanation for that and in view of our findings above about the general resentment felt by Mr and Mrs Peters towards the Claimant because of the protected disclosures, we find that the Respondent has failed to show that the reference was not motivated by the protected disclosures. We infer that the protected disclosures

materially influenced Mrs Peter's decision to provide an unfair negative reference. This aspect of the detriments complaint therefore succeeds.

Employment Judge Ferguson

8 August 2017