EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss M McClary	AND	First South West Limited t/a First Buses of Kernow

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 22 and 23 March 2017

EMPLOYMENT JUDGE N J Roper **MEMBERS** Ms R Hewitt-Gray
Mr G Jones

Representation

For the Claimant: In person
For the Respondent: Mrs S Lumsden, HR Manager

JUDGMENT

The unanimous judgment of the tribunal is that:
1. The claimant was unfairly dismissed and the respondent is ordered to pay the claimant compensation in the sum of £2,848.00; and
2. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply; and
3. The claimant's claim for sex discrimination is dismissed; and
4. The respondent is ordered to pay the claimant the tribunal hearing and issue fees of £250 and £950 (totalling £1,200) pursuant to Rule 75(1)(b).

REASONS

1. In this case the claimant Miss Michelle Dirkje McClary claims that she has been unfairly dismissed, and also brings a claim for direct sex discrimination. The respondent contends that the reason for the dismissal was misconduct, that the dismissal was fair, and denies the discrimination claim.
2. We have heard from the claimant. We have heard from Mr Dave Evans, Mr Melvyl Williams and Mr Alex Carter on behalf of the respondent. We also considered statements from Mr Nick Semmens and Mr Clive Bennetts on behalf of the respondent, but we can

only attach limited weight to these because they were not here to be questioned on this evidence.

3. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent is a bus company which is based in Cornwall. The claimant was employed as a bus driver from October 2007 until her dismissal for repeated misconduct which was effective on 11 January 2016. This followed an unsatisfactory number of accidents and collisions.
5. The claimant had been issued with a written statement of the terms and conditions of her employment, which included a written disciplinary procedure, although for some reason we were not referred to it in the course of these proceedings. Clearly safety is an important issue for the respondent, not least to protect the health and well-being of the public and its employees, and to safeguard its Operator's Licence.
6. The respondent offers and arranges training for new employees, who have to complete a probationary period and driving assessments. In addition, existing employees can be offered remedial training where appropriate. Nonetheless as qualified and licensed PSV drivers safe driving remains the responsibility of the drivers. Unfortunately the claimant had a poor record as a driver. The claimant received a written warning from Mr Evans (the respondent's Training and Compliance Manager) dated 14 August 2014 for reversing a bus into a wall at Penzance bus station, and for failing to report the incident as required under the relevant procedure. She did not appeal that warning. She was provided with remedial training and was able to demonstrate that her driving was of the required standard.
7. Unfortunately there was another incident on 7 December 2015 when the claimant caused substantial damage to one of the respondent's buses. This resulted in a disciplinary hearing on 23 December 2015, at which the claimant was accompanied by her trade union representative. She was issued with a final written warning and the notes of the hearing record that the claimant was told: "This award will remain on your file for one year. Should there be any further incidences of a similar nature, this award will be taken into account and you could face dismissal from the company's employment." By letter dated 23 December 2015 Mr Evans confirmed that the claimant was being given a final written warning which was to remain on file for 12 months. The claimant was offered the right of appeal against that final written warning, but chose not to appeal.
8. It was also agreed at the disciplinary hearing that the claimant would receive some further remedial training. This was arranged after the Christmas break on 14 January 2016. Unfortunately before this could take place on 7 January 2016 the claimant was involved in another incident in which she hit a wall with her bus. This resulted in an investigation meeting with Mr Semmens on 8 January 2016, and then a subsequent disciplinary hearing on 11 January 2016. The claimant was informed that the allegation was serious and that it might result in her summary dismissal. She was also informed of her right to be represented. Mr Bennetts (the respondent's Staff Manager Cornwall) chaired the meeting and the claimant was accompanied by her trade union representative. Mr Bennetts reviewed the claimant's past driving record and the final written warning which had been issued only two weeks previously, and he concluded that the claimant's conduct warranted dismissal. He decided to dismiss the claimant and she was paid her eight weeks' notice pay in lieu of notice and also paid her accrued holiday pay.
9. The respondent's relevant procedure allows two levels of appeal, and the claimant appealed by letter dated 11 January 2016. Her only ground of appeal was set out as follows: "I feel that the company has failed in their duty of care after my final written warning when I was asked for and was agreed to more training. I feel I have been issued with penalty after penalty with no meaningful training."

10. Mr Williams, the respondent's Business Manager, from whom we have heard, chaired the appeal hearing on 27 January 2016. The claimant was accompanied by her trade union representative. The main thrust of the hearing was to discuss the nature of the training which had been provided to the claimant, and the fact that the remedial training had been arranged for 14 January 2016, but that the claimant had been dismissed before this took effect. Mr Williams considered all the relevant circumstances, but decided that the claimant had always performed adequately when subjected to testing and assessment, and despite repeated training had always seemed to relapse into a series of accidents. He decided that dismissal was justified in the circumstances, and rejected the claimant's appeal.
11. The claimant then exercised her further right of appeal to the Managing Director Mr Carter, from whom we have also heard. There was a second appeal hearing on 10 February 2016 at which the claimant was again accompanied by her trade union representative. Mr Carter considered all the relevant circumstances and decided that the dismissal was fair and appropriate and decided to uphold the decision to dismiss and he rejected the claimant's appeal. However, Mr Carter was aware that the claimant enjoyed her job and had a good rapport with passengers, and was persuaded by the claimant's trade union representative that after a break of some weeks the claimant could be re-employed as a seasonal driver. This was subject to the claimant carrying out further driver training and induction training, and passing an assessment before recommencing employment, initially for a six month probationary period. The commencement date of this arrangement was originally agreed as 4 April 2016, and in the event the claimant rejoined a week later on 11 April 2016. Unfortunately it only took a week before there was another serious incident. Despite being accompanied by a "buddy", who alerted the claimant to the presence of a wall, the claimant proceeded to hit the wall with her bus. This resulted in the claimant's dismissal again, this time within her new probationary period.
12. The claimant complains of unfair dismissal in respect of her first dismissal on 11 January 2016 for two main reasons: first, the sanction of dismissal was too harsh given that it could have been dealt with by further training; and secondly, because she was treated inconsistently with another driver namely Mr Palmer. She also asserts that she was treated less favourably than Mr Palmer because of her sex. The circumstances of the disciplinary proceedings against Mr Palmer are as follows.
13. Mr Palmer was also a driver, and he had joined the respondent's employment in about 2011, and therefore had shorter service than the claimant. He also had a poor record of driving with a number of accidents and collisions and had also progressed through the disciplinary process with the result that he had received a final written warning on 25 March 2015, which was expressed to last for twelve months.
14. On 29 January 2016 Mr Palmer was responsible for another collision with a wall. In fact he appears to have driven into one of the same walls for which the claimant had been disciplined for hitting. Mr Bennetts chaired the disciplinary meeting with Mr Palmer and his trade union representative on 11 February 2016. Mr Palmer apologised and explained that he had been ill, and in particular that his wife was seriously ill. Mr Bennetts took these mitigating factors into account, and the fact that the 12 month final written warning had almost expired. He decided not to dismiss Mr Palmer, but to renew that final written warning for a further 12 months.
15. Despite this there was a further incident on 27 February 2016 in which Mr Palmer was involved in a collision with a barrier. This resulted in a further disciplinary hearing which took place on 9 March 2016. The hearing was chaired by Mr Semmens and Mr Palmer was accompanied by his trade union representative. Mr Semmens was not a sufficiently senior manager to hold delegated authority to dismiss employees. Apparently there was an agreement with the trade union that disciplinary proceedings are to take place within 14 days of the incident in question and it is suggested by the respondent that no one else was available to hold the disciplinary hearing. Be that as it may, Mr Semmens did not dismiss Mr Palmer, and decided to renew the final written warning yet again for a further 12 months.

16. We have accepted a statement from Mr Semmens who was not called to give evidence by the respondent, and we can therefore only attach limited weight to this. Mr Semmens suggests that Mr Palmer was not dismissed on 9 March 2016 because of the mitigating factors involving his wife's illness. In fact it is clear from the contemporaneous minutes that it was at the earlier disciplinary hearing with Mr Bennetts on 11 February 2016 when this was discussed, and apparently not on 9 March 2016 with Mr Semmens as suggested. Mr Semmens was not present today at this hearing to be questioned further on this aspect and to clarify any confusion.
17. What is clear however is that when the claimant was given a final written warning and was involved in another incident two weeks later she was dismissed. On the other hand Mr Palmer was reprieved from dismissal in the face of his final written warning on two occasions in about three weeks; once when his final written warning had almost expired, and secondly when the renewed final written warning had only just been renewed for a second time. We have not been provided with a satisfactory explanation as to why the claimant was dismissed when Mr Palmer was reprieved from dismissal in near identical circumstances.
18. Having established the above facts, we now apply the law.
19. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 (“the Act”).
20. We have considered section 98 (4) of the Act which provides “…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case”.
21. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides: "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."
22. The compensatory award is dealt with in section 123. Under section 123(1) "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".
23. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides: "where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."
24. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as “s. 207A(2)”) and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 (“the ACAS Code”).
25. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 (“the EqA”). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination. The protected characteristic relied upon is sex, as set out in sections 4 and 11 of the EqA.
26. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

27. We have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Polkey v A E Dayton Services Ltd [1988] ICR 142 HL; Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; The tribunal directs itself in the light of these cases as follows.
28. We deal first with the claim for sex discrimination, because any such successful claim might well have an impact on the fairness of the dismissal. With regard to this claim for direct sex discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of her sex than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have been dismissed. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination".
29. In this case there is no indication from the evidence, either verbal or documentary, that the claimant received any less favourable treatment than Mr Palmer (or any hypothetical male comparator), on the grounds of her sex. The claimant has not proven any facts upon which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination fails, and is hereby dismissed.
30. We now turn to the unfair dismissal claim. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.
31. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
32. At first glance the claimant's dismissal in this case appears to be one which was fair and reasonable in all the circumstances. It is obvious that the safety of the public and the respondent's employees are of significant importance and that the respondent is justified in taking disciplinary action against repeatedly careless drivers. Towards the end of her employment at least the claimant had a consistently poor driving record with a number of minor collisions, which caused the respondent varying degrees of expense and administrative aggravation. The respondent disciplined the claimant and progressed

through its disciplinary procedure from written warning, to final written warning, and ultimately dismissal. At each stage of the process the claimant was aware of the allegations against her and able to state her case in reply in the presence of her chosen trade union representative. She was afforded the right of appeal, but accepted the written warning and final written warning without appeal. She was afforded two appeals against her dismissal, with each one dealt with by a senior manger who was independent of the earlier decision. She had been offered remedial training and had driver assessments throughout, although the responsibility for safe driving remained with her as a qualified PSV driver. The investigation into her conduct appeared to be as full and fair as was necessary in all the circumstances of the case. Dismissal would ordinarily be within the band of responses reasonably open to an employer when faced with these facts, namely that the employee committed further misconduct within about two weeks of a final written warning which warned of dismissal for further recurrence of that misconduct. In simplistic terms the respondent believed that the claimant had committed repeated and further misconduct, that belief was based on reasonable grounds, it followed a full and fair investigation, and it followed a valid final written warning.

33. However, this case is complicated by the inconsistent treatment given to Mr Palmer as compared to the claimant. Mr Palmer had shorter service than the claimant, and an equally poor record as a driver, and he was also on a final written warning. A short explanation of the disparity in treatment between them was given by Mr Semmens in his statement, but the respondent did not call him to give evidence and we can only attach limited weight to this because he was not here to be questioned on this evidence. He suggests that they were treated differently because their circumstances were different, namely that at Mr Palmer's disciplinary hearing on 9 March 2016 he was given credit for mitigating circumstances, namely his wife's serious illness, and that his final written warning was nearly at the end of its twelve month lifespan. It was therefore renewed, rather than dismissing Mr Palmer. In addition Mr Semmens explains that he did not have authority to dismiss employees, and the matter was time sensitive under a union agreement.
34. This version is not corroborated by the contemporaneous documents which we have seen. It is clear that whilst under a final written warning Mr Palmer was reprieved not once but twice despite having two separate further accidents whilst under his final written warnings. It was at a disciplinary hearing on 11 February 2016 which was taken by Mr Bennetts (who did have authority to dismiss) and not Mr Semmens that Mr Palmer spoke of his wife's illness and at which the final written warning was extended for a further twelve months as an alternative to dismissal. Mr Palmer then had yet another accident, and at the disciplinary hearing on 9 March 2016 before Mr Semmens there was no apparent mention of mitigating factors, and the twelve month period was extended yet again rather than dismissing Mr Palmer. This was in sharp contrast to the earlier treatment of the claimant. When she had another accident shortly after her final written warning was issued, and after the remedial training had been arranged but was yet to take place, she was dismissed immediately. She was not allowed an extension of her final written warning at all, and certainly not twice in short succession. In addition she was not disciplined by a manager who had no authority to dismiss in the first place. Mr Palmer's first extension was granted at the same time as the claimant failed to overturn her dismissal at the second appeal before Mr Carter.
35. The claimant was unaware of the full details at the time, but now complains of unfairness by way of disparity and inconsistency of treatment. We agree with her complaint. Given that Mr Palmer was allowed to remain in employment and continued driving despite his poor record of collisions, and given that the claimant was eventually invited to reapply for employment to cover summer vacancies, the risk of repeated minor collisions and scrapes was apparently a risk that the respondent could live with. The dismissal of the claimant in these circumstances, and not Mr Palmer, in almost identical circumstances, when he was given a reprieve against dismissal not once but twice in short succession, is in our judgment not a decision which was within the band of reasonable responses open to the respondent when faced with these facts.

36. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer, and we have not done so. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. Were it not for the inconsistent treatment of Mr Palmer we would unanimously have held that the dismissal of the claimant was within the band of reasonable responses open to the respondent when faced with these facts. However, we unanimously find that the decision to dismiss the claimant (when Mr Palmer was reprieved not once but twice in strikingly similar circumstances) is not one where the employer can be said to have acted reasonably in treating it as a sufficient reason for dismissing the claimant, which is a decision to be determined in accordance with equity and the substantial merits of the case.
37. Accordingly we find that bearing in mind the size and administrative resources of this employer the claimant's dismissal was not fair and reasonable in all the circumstances of the case, and we therefore find that the claimant was unfairly dismissed.
38. We now turn to compensation for unfair dismissal and in the first place the basic award. The claimant was aged 40 at the time of her dismissal and had completed eight years' service. Her gross weekly pay was £356.00 per week. Her basic award is £2,848.00. Given the disparity of treatment between the claimant and Mr Palmer, and our comments with regard to the compensatory award below, we do not consider that it would be just and equitable to reduce the amount of the basic award to any extent under section 122(2) of the Act.
39. However we do apply section 123(6) of the Act, and we consider that the dismissal was wholly caused by the actions of the complainant in having another at fault accident and causing further damage to a bus within about only two weeks of receiving a final written warning for similar misconduct. We consider that it is just and equitable to reduce the compensatory award by 100% as a result of that finding. We therefore make no compensatory award.
40. The respondent is therefore ordered to pay compensation to the claimant for unfair dismissal in the total sum of £2,848.00.
41. The respondent is also ordered to pay costs to the claimant under Rule 75(1)(b) of the Employment Tribunals Rules of Procedure 2013 in the sum of £1,200.00 (£250.00 and £950.00) in respect of the issue and hearing fees paid by the claimant in these proceedings.
42. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the Recoupment Regulations") do not apply in this case.
43. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 17; a concise identification of the relevant law is at paragraphs 19 to 27; how that law has been applied to those findings in order to decide the issues is at paragraphs 28 to 36; and how the amount of the financial award has been calculated is at paragraphs 38 to 40.

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Employment Judge N J Roper
Dated 23 March 2017
Judgment sent to Parties on

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