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# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Hume  
**Respondent:** East London Bus Limited  
**Heard at:** East London Hearing Centre  
**On:** 6 & 7 April 2017 and 13 June 2017  
**Before:** Employment Judge M Hallen

## **Representation:**

**Claimant:** Mr M Rubbert (Lay Representative)  
**Respondent:** Mr C Ludlow (Counsel)

# RESERVED JUDGMENT

**The judgment of the Tribunal is that the Claimant's claim for unfair dismissal is unfounded and is dismissed.**

# REASONS

## Background and Issues

1 In his Claim Form received by the Tribunal on 25 October 2016 the Claimant claimed unfair dismissal. The Respondent in its Response Form received and acknowledged by the Employment Tribunal on 6 December 2016 resisted the claim for unfair dismissal submitting that the Claimant was fairly dismissed by reason of conduct. At the outset of the hearing, the parties agreed the issues as follows:

- 1.1 What was the reason for dismissal and did it fall within the reasons outlined in Section 98(1) of the Employment Rights Act 1996 (ERA). In this case, the Respondent asserted that the reason was misconduct.

- 1.2 Was the reason for dismissal fair or unfair within the meaning of Section 98(4) ERA? In this case, as the Respondent asserted that the reason for dismissal was misconduct, the Tribunal had to consider whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of employee at the time the misconduct occurred. This involved three elements. First, there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all of the circumstances of the case.
- 1.3 Was the penalty of dismissal by reason of misconduct within the band/range of reasonable responses which a reasonable employer might have adopted after a fair dismissal procedure had been adopted?

2 The Tribunal had before it an agreed bundle of documents as well as a supplementary bundle of documents prepared by the Claimant. The Claimant prepared a written statement and there was written witness statements from the Respondents two witnesses, Stephen Ayres the dismissing officer and Ms Diane Hannan the appeal officer. All witnesses including the Claimant were subject to cross-examination and re-examination as well as questions from the Tribunal.

### **The Facts**

3 The Claimant was employed by the Respondent as a bus driver and was based at the Respondents Rainham garage. His written particulars of employment were at pages 36 – 37 of the bundle of documents. The Tribunal noted from the particulars (page 36) that the commencement date for the Claimant was stated as 15 October 1996. The Tribunal accepted that this was the Claimant's start date for the purposes of continuous service. Evidence was given by the Respondent at the Tribunal that the Claimant worked for Capital City Bus which was later taken over by First Group. He then transferred across to the Respondent in 2001. However, the Tribunal was not satisfied by this evidence. If this was correct the written particulars of employment would not have specified the commencement as 15 October 1996. The effective date of termination for the purposes of gross misconduct was agreed by both parties as being 17 October 2016 at which time the Claimant was dismissed from his employment without notice or payment in lieu of notice.

4 The Respondent's disciplinary policy statement was at pages 39 – 40 of the bundle and the disciplinary procedure were at pages 43 – 50 of the bundle. Both policies were agreed with the Respondent's recognised trade union Unite. In addition, in the bundle of documents at pages 51 – 52 was the appeals procedure. The Claimant acknowledged receiving these documents and confirming that he was aware of the content of them. In particular at page 40 of the bundle, gross misconduct is defined as follows:-

*"A serious failure to observe rules/procedures affecting the safety of other staff or of the public;*

*Serious negligence which causes or might cause loss, damage or injury."*

5 The Claimant was involved in an accident with another vehicle, a Land Rover, on 5 September 2016 which was the subject matter of the disciplinary action which subsequently led to his dismissal. The Claimant completed an accident form on the date of the accident which was at pages 76 – 77 of the bundle of documents approximately 30 minutes after the accident had occurred at a time when he understood the importance of that document and accepted in cross-examination that events were fresh in his mind. He confirmed to the dismissing officer, Mr Ayres that the accident form was a factual account of what had happened. The Tribunal noted that nowhere in that document did it mention that the other driver of the vehicle flashed the Claimant to let him through or gave way to him.

6 In the notes of the fact finding meeting which was held with the Claimant on 7 September 2016 (pages 91 – 94 of the bundle) the Claimant was asked by Ms Sherwood, the investigating officer, why the Claimant did not stop the bus to avoid the collision. The Claimant stated that he did not know why he did not stop (page 92). The Tribunal noted that the Claimant did not say at this point that it was because the third party had flashed him as if to let him through, something which he later told Mr Ayres, the dismissing officer at the disciplinary hearing on 13 October 2016 and Ms Hannan at the appeal hearing on 24 October 2016. The Tribunal was of the view that the reason the Claimant failed to state this at the investigation meeting was because it did not happen.

7 In addition, at the fact finding meeting, the Claimant stated to Ms Sherwood that when he was trained he was taught defensive driving and that as a bus was the bigger vehicle, it must command the road. He went on to state that the Highway Code stated that a smaller vehicle must give way to the bigger vehicle. At his disciplinary hearing, the Claimant accepted that he had incorrectly stated the position to Ms. Sherwood at the fact finding meeting and knew at the disciplinary that this was not the case (page 137 of the bundle of documents). The Tribunal noted that at the time of the fact finding meeting, the Claimant's incorrect view as to the Highway Code was in fact indicative of his attitude whilst driving the vehicle on 5 September 2016 and was a strong factor that led to the collision.

8 After a period of sick leave and due to the seriousness of the collision on 5 September 2016, following the completion of the fact finding meeting on 7 September 2016, the Respondent concluded that the Claimant's conduct in respect of "driving standards" could amount to gross misconduct pursuant to its procedures. The Claimant was informed of this in writing by letter dated 5 October 2016 which was at page 122 of the bundle of documents. The disciplinary hearing was conducted by Mr Stephen Ayres on 13 October 2016. The relevant investigation paperwork and the Respondents procedures relating to the allegation of gross misconduct were provided to the Claimant and his representative ahead of the disciplinary hearing. At the hearing, the Claimant confirmed that he had viewed the CCTV footage with his representative and that his accident report which was at pages 76 – 77 of the bundle of documents was correct. The Claimant's representative, Mr Holman of Unite stated that the footage showed that at the point the Land Rover (third party vehicle) was visible there was enough room for either party to stop and pull over. The Claimant also admitted that since the fact finding interview he had been corrected and accepted that it was not the case that the law required priority to be given to larger vehicles. Mr Ayres, the dismissing officer considered that the Claimant had ample time to pull over and that the Claimant's version of events now differed from his accident report which was completed on the date of the

accident. Mr Ayres noted that there were six seconds from the point that the Land Rover became visible to the accident itself. The Claimant said that he had assumed that the Land Rover was going to pull over into a gap to let him through. Whilst the Claimant asserted that the Land Rover had flashed its lights to let him go, Mr Ayres did not believe this to be the case after reviewing the CCTV footage.

9 The Tribunal had the benefit of viewing the CCTV footage and noted that there appeared to be no flash from the Land Rover to confirm that the Claimant could proceed contrary to what the Claimant had said to the dismissing officer. Regardless of this, Mr Ayres expected the Claimant to have slowed down and move partially towards the side of the road which the Claimant did not do. Again, the Tribunal had the benefit of seeing the footage and noted that the Claimant did have an opportunity to pull across and that had he done so, the collision could have been avoided. There appeared to be plenty of time for the Claimant to take such action in the Tribunal's view which the Claimant for some inexplicable reason had chosen not to do. Mr Ayres took the view that the Claimant should have stopped but instead he chose to continue which resulted in the collision. He took the view that the accident could have been avoided and the Tribunal after having viewed the footage was of the same opinion.

10 Much was made at the Tribunal hearing by the Claimant and his representative of the positioning of the bus and the Land Rover in the lead up to the collision. However, the Tribunal was of the view that this was all irrelevant. From the Tribunal's own viewing of the CCTV footage, the Tribunal noted that the Claimant had ample opportunity to assess the road conditions on a route that he was very familiar with and as a professional driver he had ample opportunity to pull over to avoid the collision occurring at all. There appeared to be no good reason for the Claimant's failure to do so.

11 Mr Ayres found the charge of driving standards proved. He referred to the company's policy statement on discipline which was at page 40 of the bundle of documents and considered that the Claimant's action amounted to gross misconduct. He viewed that the Claimant had deliberately proceeded, in the belief that he was the larger vehicle and that the Land Rover should give way. Such a conclusion was based upon the Claimant's own admission at the fact finding meeting that as the larger vehicle the bus had right of way. Mr Ayres was of the opinion that the Claimant having been a professional driver for many years had enough time and space to act to avoid the collision. He could and should have slowed down and pulled over. By doing so, the accident could have been avoided. Mr Ayres decision and reasoning was communicated to the Claimant at the reconvened disciplinary hearing on 17 October 2016 and confirmed in the letter dated 18 October 2016 which was at pages 136 – 141 of the bundle of documents. Mr Ayres gave evidence to the Tribunal which was accepted that his decision was not influenced by the written warning awarded to the Claimant on 5 July 2016 for driving standards. Mr Ayres considered that the Claimant's actions on 5 September 2016 led to the collision and was sufficiently serious to amount to gross misconduct in its own right. Mr Ayres considered mitigating circumstances which would militate against dismissal by reason of gross misconduct. However he did not consider that there were mitigating factors to resile from dismissal for gross misconduct. He noted that the Claimant did not express much remorse for the accident and was defensive when giving his version of events seeking to blame the driver of the Land Rover rather than taking responsibility himself.

12 Following the Claimant's dismissal by reason of gross misconduct effective as of

17 October 2016, the Claimant was advised of his right of appeal which the Claimant exercised by letter dated 24 October 2016. The appeal was heard by Ms Diane Hannan the Operations Director of the Respondent, who was more senior to Mr Ayres and had not previous involvement in the matter. The appeal hearing took place on 24 October 2016 and the Claimant was provided with all the relevant documents as well as an index which was at pages 147 – 148 of the bundle of the documents. The Claimant was again represented by his trade union representative who was again Mr Holman of Unite. Prior to the appeal hearing, Ms Hannan reviewed all the relevant documents. During the hearing, the Claimant made allegations of bullying against Ms. Heather Sherwood (Assistant Garage Operations Manager) and investigating officer at the fact finding meeting on 7 September which Ms Hannan agreed to investigate as part of the appeal. One of the allegations was that Ms Sherwood had been very eager to refer the Claimant to Occupational Health. In addition, it was asserted that Ms Sherwood had bullied and harassed the Claimant. Ms Hannan treated the allegations as a grievance which, after speaking to Ms Sherwood and investigating, she rejected. Her findings were that there was no evidence to support the Claimant allegations of bullying or harassment by Ms Sherwood.

13 At the appeal hearing, the Claimant stated that he had prepared the accident report (pages 76 – 77) 30 minutes after the collision. He claimed he had not been thinking straight and this was why it differed from his later version of events. He told Ms Hannan that he had misread the situation and thought the Land Rover was giving way.

14 Ms Hannan went through the circumstances leading up to the collision with the Claimant and the Claimant said that there were parked cars on his near side which explained his road positioning. The Claimant accepted that he should not have assumed that the Land Rover had or would pull in but he did not think that there was any need to stop the bus. The Claimant confirmed that he had been approached by two passengers following the collision who said that they had hurt their knees.

15 At the appeal hearing, an allegation was made that the Land Rover driver was known to route 287 drivers who had told Mr Hume that the driver of the Land Rover had driven at them. There was, however, no evidence presented to Ms Hannan to support this claim at all and she noted that it had not been raised with Ms Sherwood at the fact finding meeting or with Mr Ayres at the disciplinary meeting.

16 At the appeal hearing, the Claimant did not want to view the CCTV footage during the course of the appeal meeting and so Ms Hannan viewed it afterwards. Upon reviewing the footage, she noted that the Claimant failed to take any precaution to avoid the collision namely reducing his speed and adjusting his road positioning. As a professional, long serving driver, the Claimant should have read the road conditions ahead. It was obvious to Ms Hannan that the gap between the Claimant and the Land Rover was insufficient for both vehicles to pass through safely. Ms Hannan did not consider that the Claimant genuinely believed the Land Rover had flashed him to give him way not least because this was not stated in the accident report form. This was a significant matter which had it been true, the Claimant would have stated in the accident form right away. After reviewing the footage, Ms Hannan came to the view that the Claimant had sufficient room to pull over and to avoid the accident taking place.

17 In her outcome letter which was at pages 152 – 162 of the bundle of documents

she confirmed to the Claimant that his appeal against dismissal had failed. She also set out her reasoning commenting specifically on the CCTV footage. She highlighted how important driving standards were to the company and that the Claimant failed to demonstrate that his driving met the Respondents very high standards. She noted that the collision had been entirely avoidable and considered that the Claimant's actions on 5 September 2016 had been reckless. She confirmed that she agreed with Ayres decision that there had been a serious breach of conduct and this amounted to gross misconduct warranting summary dismissal.

18 At the Tribunal hearing, the Claimant sought to assert that his dismissal was in some way due to the company seeking to reduce "major labour costs". The Tribunal did not accept this assertion. After reviewing the evidence and in particular details of the disciplinary hearing as well as the CCTV footage the Tribunal was of the view that the reason for dismissal was as stated by the Respondent namely gross misconduct in respect of driving standards.

### **The Relevant Law**

19 Section 98(1) ERA provides that it is for the employer to show the reason or principal reason for the dismissal of the employee and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. If the Respondent fails to do so the dismissal will be unfair.

20 If the Tribunal decides that the reason for dismissal of the employee is a reason falling within Section 98(1) or (2) ERA it will consider whether the dismissal was fair or unfair within the meaning of Section 98(4) ERA. The burden of proof in considering Section 98(4) is neutral.

21 Section 98(4) ERA provides:-

"The determination of the question whether the dismissal is fair or unfair (having regards to the reason shown by the employer) –

- (a) depends on whether in the circumstances (including the size and administrative recourses 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."

22 In the case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT**, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances in each case 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.

23 In the case of **Sainsbury's Supermarket Ltd v Hitt [2003] IRLR 23CA**, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer and to the sanction, or penalty of the dismissal.

24 The Tribunal should not substitute its own factual findings about events giving rise to the dismissal for those of the dismissing officer, nor should it impose its view of the appropriate sanction in exchange for that of the employer (**London Ambulance Service NHS Trust v Small [2009] IRLR 563**).

25 In the case of **British Home Stores Ltd v Burchell [1978] IRLR 379 EAT**, guidance was given that, in a case where an employee is dismissed because the employer suspects or believe that he/she has committed an act of misconduct, in determining whether dismissal was unfair, an Employment Tribunal has to decide whether the employer who discharged the employee on the grounds of misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. This involves three elements. First, there must be established by the employer the fact of that belief; that the employer did believe it. Second it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage of which he informed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all of the circumstances of the case.

### **Tribunal's Conclusion**

26 The Tribunal was satisfied that in this case the reason for dismissal was misconduct and that it was serious misconduct pursuant to the Respondent's disciplinary policy statement which was at pages 39 – 40 of the bundle of documents warranting dismissal without notice. The Claimant confirmed that he was in possession of these procedures and the conduct in question was a serious failure to observe rules/procedures affecting the safety of a staff or of the public and/or serious negligence which caused or might cause loss or damage or injury. It was important to bear in mind that the Respondent, like all bus companies, should take driving standards very seriously. Professional drivers (which the Claimant was one) were clearly held to a high standard and as Mr Ayres quite properly stated in evidence, "I believe that any professional driver should take into account what is in front of him and adjust his driving accordingly." There was no doubt that the Claimant was involved in an accident with another vehicle whilst driving a bus during the course of his employment on 5 September 2016. He filled in an accident report form accordingly and the same form highlighted that the vehicle was significantly damaged and that two passengers had confirmed to the Claimant that they had injured their knees (page 76 – 77 of the bundle of documents).

27 The Tribunal then had to be satisfied that the Claimant undertook a reasonable investigation in respect of the alleged misconduct in question. The Tribunal accepted that a reasonable investigation was carried out by the Respondent; the Claimant knew what was being investigated and thereafter a reasonable disciplinary process was adopted. The Tribunal accepted that the entire disciplinary process appeared to be fair and that as a matter of fact, very little issue was taken by the Claimant at the relevant time with the procedures that were adopted by the Respondent during the course of the Claimant's dismissal.

28 With regard to specific matters, the CCTV was analysed by the Respondent and this was done independently of the fact finding officer Ms Sherwood, the Dismissing Officer, Mr Ayres or the appeal officer, Ms Hannan. Analysis of the relevant CCTV footage was carried out on 6 September 2016, the day after the collision and this was evidenced by documents produced at page 81 of the bundle of documents.

29 Ms Sherwood invited the Claimant to an investigation meeting on 7 September 2016 during which the CCTV was viewed and the Claimant was given a chance to put his side of events following which and in the light of that meeting, Ms Sherwood took the perfectly reasonable step of referring the Claimant to Occupational Health as evidence at the time available to the Respondent indicated that the Claimants health may have had an impact on the collision. Such referral, the Tribunal concluded, was to the benefit of the Claimant to ascertain whether he had any underlying medical condition which had a direct cause on the accident. As it transpired, the medical evidence later showed that there were no underlying medical conditions which impacted on the Claimant's ability to drive on the day in question. The referral to Occupational Health appeared to be the actions of a reasonable employer discharging its duty to fully investigate how the accident had occurred and the Tribunal found that there was no evidence to suggest that this was a sustained campaign of harassment or bullying by Ms Sherwood as asserted by the Claimant.

30 The Claimant was provided with an invitation letter to the disciplinary hearing dated 5 October 2016 which clearly set out the charge, "driving standards", enclosed relevant documents and confirmed that should the charge be found proven, the Claimant may be dismissed for gross misconduct. It was clear from the documentation viewed by the Tribunal that the Claimant was given plenty of time to view the CCTV footage prior to the fact finding meeting with Ms Sherwood and the disciplinary hearing with Mr Ayres. He declined to view the CCTV footage during the appeal hearing as he had already viewed it with his union representative, Mr Holman, before the start of that hearing.

31 The Tribunal accepted that the Dismissing Officer, Mr Ayres was entitled to reach the interpretation of the CCTV evidence and conclude that summary dismissal without notice was the appropriate penalty. Mr Ayres provided a detailed and reasoned analysis of his conclusion in his letter of dismissal dated 18 October 2016 which was at pages 136 – 141 of the bundle of documents. In essence, Mr Ayres was of the view that the Claimant drove negligently and had sufficient time to drive safely and pull over to allow the oncoming Land Rover to pass safely. The Claimant could give no rational explanation for failing to do so and, indeed, the Claimant's own union representative, Mr Holman, properly summed up the matter very well when he asked the Claimant whether or not he was "playing chicken" with the driver of the other vehicle, (page 138 of the bundle).

32 Under cross-examination, Mr Ayres remained entirely consistent with his view of the CCTV footage as set out in the dismissal letter, stating variously of the Claimant's driving: "there was no brake until collision at 20 miles per hour", "no sign that Mr Hume was going to pull over to the left hand side", "the Land Rover was on his side of the road with nowhere to go", "Mr Hume should have slowed down and should have pulled over", "there was absolutely no reaction until the collision itself." Of the alleged flashing lights on the Land Rover, Mr Ayres did not agree that they were flashing and instead said "I think the lights were even; I think lights were on". The Tribunal had the benefit of seeing the CCTV footage and noted that there was no flash from the Land Rover to give the bus the



right of way and the lights of the Land Rover appeared to be on throughout. Mr Ayres stated that what made the accident so serious as to amount to gross misconduct was that it was very rare that this type of accident happened and that “it was my belief that he had ample time to pull over and stop”, “Mr Hume for reason I cannot understand collided into the Land Rover”. It was the Tribunal’s view that the Claimant erroneously held the view that he initially stated at the fact finding meeting with Ms Sherwood that he should “command the road” as the bigger vehicle and that small vehicles should automatically give way. This appeared to be the Claimant’s prevalent thinking at the time of the collision and in the Tribunal’s view was a strong reason for it. This view the Claimant later acknowledged was an erroneous view.

33 Following the disciplinary hearing which led to the Claimant’s dismissal the Respondent considered the matter at an appeal hearing which was conducted by Ms Diane Hannan who set out comprehensively in her letter dated 7 November 2016 the reasons for her dismissing the appeal. This was at pages 152 – 162 of the bundle of documents. The Tribunal accepted that it was reasonable for her to conclude that safety could not be compromised and that the Claimant was negligent in his duties as a professional bus driver. It was her view and after viewing the CCTV footage, that the accident was totally avoidable had the Claimant responded differently to the situation. It was clear to Ms Hannan and to the Tribunal that there was sufficient room for the Claimant to pull over safely and permit the Land Rover to pass without any risk. The Claimant deliberately chose not to do so and set out no rational explanation for this failure.

34 On the basis of the evidence heard by the Tribunal, The Tribunal was satisfied that the reason for dismissal was serious misconduct relating to driving standards. The Respondent conducted a reasonable investigation into the misconduct in question with a fact finding meeting, a disciplinary meeting and an appeal meeting. The Claimant was given a reasonable opportunity of putting his case at both the disciplinary and appeal meeting which was properly weighed up by the dismissing officer and appeal officer. After considering the charge against the Claimant both Mr Ayres, the dismissing officer and Ms Hannan, the appeal officer did in fact believe that the Claimant to be guilty of the misconduct with which he was charged. After viewing the CCTV footage, the Tribunal agreed with their analysis and their opinions as cited above. As a consequence, the Tribunal was of the view that dismissal of the Claimant in the circumstances of this case was within the range of reasonable responses open to a reasonable employer. Accordingly, the Claimant’s claim for unfair dismissal was dismissed.

Employment Judge Hallen

21 June 2017