Case no. 2303655/2015

THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE ELLIOTT
MEMBERS: MR G HENDERSON
MS S DENGATE

BETWEEN:

Mr M Hasan

Claimant

AND

Abellio London Ltd

Respondent

ON: 15 June 2017
IN CHAMBERS ON: 16 June 2017

Appearances:
For the Claimant: Mr J Neckles, trade union representative
For the Respondent: Ms A Carse, counsel

RESERVED JUDGMENT

1. The unanimous judgment of the tribunal is that:

a. The claim for unfair dismissal fails and is dismissed.
b. The claim for breach of the right to be accompanied under section 10 Employment Relations Act 1999 succeeds.

2. By a majority the claim for detriment for seeking to exercise the right under section 10 (above) fails and is dismissed.

REASONS

1. By a claim form presented on 15 August 2015, the claimant Mr Mohamed Hassan claimed unfair dismissal including automatically unfair dismissal, race discrimination, breach of contract and a failure to allow him to be accompanied at a disciplinary hearing.

2. A preliminary hearing took place on 8 April 2016 before Employment Judge Baron. At that hearing the claim for automatically unfair dismissal

under section 103A of the Employment Rights Act 1996 and race discrimination were struck out.

The issues

3. At the preliminary hearing on 8 April 2016 Judge Baron identified the remaining claims as ordinary unfair dismissal and a denial of the claimant's right to be accompanied at a disciplinary hearing.

4. It is an issue as to whether the respondent threatened to and/or denied the claimant the right to be represented or accompanied by his chosen trade union official or representative Mr John and/or Mr Francis Neckles of the PTSC union. The dates relied upon are four investigatory meetings on 18 March 2015, 23rd and 30 March 2015 and 1 April 2015. The claimant also relies on disciplinary hearing dates on 8th, 13th and 16 April 2015 and appeal hearings on 17th, 24th and 30 June 2015 and 2 July 2015.

5. It is also an issue as to whether the claimant suffered a detriment for having sought to exercise his right to be accompanied.

6. The claimant relies upon:

    a. The denial of the right to be accompanied (notwithstanding that this is a stand alone right under section 10 of the Employment Relations Act 1999 with a right to present a claim under section 11).
    b. Denying the claimant the "finalisation" of the appeal hearing.
    c. Imposing upon the respondent's choice of companion.
    d. Denial of his contractual right to be accompanied.

7. There is a claim for ordinary unfair dismissal and at the preliminary hearing on 8 April 2016 Mr Neckles accepted that the respondent "may well have complied with the Burchell guidelines". Mr Neckles said at the outset of the hearing that this was not conceded. The respondent gives the reason for dismissal as gross misconduct which is a potentially fair reason for dismissal under section 98(2)(b) of the Employment Rights Act 1996.

8. During cross-examination of the respondent's first witness it was conceded by the claimant that the conduct relied upon by the respondent potentially amounted to gross misconduct and that it was a serious accident.

9. Was there inconsistency of treatment with Mr Roy Curtin and Mr Raj Isiri, both of whom the claimant says had traffic accidents and were not dismissed.

10. Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what

extent and when?

Procedural background

11. There was a preliminary hearing on 7 March 2016. At that hearing directions were given and it was adjourned to 8 April 2016. The outcome of that hearing is referred to above.

12. It was listed for a 2 day full merits hearing on 8 and 9 August 2016. This was postponed on the respondent's application. It was relisted for 8 September 2016. It was postponed on the respondent's application. It was relisted for 14 October 2016. It was postponed on the claimant's application. It was listed for 14 February 2017 and relisted by the tribunal for 10 March 2017. This was followed by an application by the respondent for an unless order and a strike out warning at which point Employment Judge Baron decided to postpone the hearing and it was relisted for 24 April 2017. This was postponed on the respondent's application (to which the claimant consented). It was relisted for 15 June 2017.

13. As can be seen from the above narrative, the full merits hearing has been postponed six times and there have been two preliminary hearings.

14. At the start of the hearing Mr Neckles informed us that he had come today prepared to deal with a preliminary hearing on time limits and not a full merits hearing and this is why his client's witness statement consisted of only one substantial paragraph. He had overlooked Employment Judge Baron's decision of 8 April 2016 and mentioned that there were medical reasons for his oversight. Mr Neckles thought he could deal with this by using the ET1 as the claimant's witness statement and dealing with the inconsistency of treatment issue in oral evidence. Ms Carse for the respondent was of the view that the tribunal could deal with the matter in one day. We expressed our concern about the case going part heard as due to the listings situation and the availability of everyone involved, it could take some time to have the case back on again. We needed to balance this against the fact that this was a 2015 case that had been postponed six times.

15. There had been no case management orders following the hearing on 8 April 2016 and the parties had agreed between them dates for the bundle and statements. The parties had exchanged statements on about 9 March 2017 but as the full merits hearing for 10 March 2017 did not take place, Mr Neckles had not looked at them further or questioned why the respondent's statements dealt with the full merits. The respondent had asked the claimant if his brief statement was the one he was relying upon and he told them that it was.

16. Neither side had led evidence on the inconsistency of treatment issue which was clearly in issue following Employment Judge Baron's decision (paragraph 27 bundle page 53).

17. We asked the parties what they wanted to do and gave them a break to take instructions. Both sides wished to proceed.

18. It was agreed that the claimant would use his Particulars of Claim as his witness statement and that any oral evidence in chief be limited to matters pleaded. As the respondent did not have the benefit of knowing what the claimant would say in chief, the respondent wished the claimant to go first and we agreed to this. The respondent introduced some documents in relation to the two drivers upon whom the claimant relied for inconsistency of treatment purposes. During the hearing the claimant said that he only relied upon one such driver in relation to his inconsistency of treatment argument, namely Mr Raj Isiri and he no longer relied upon Mr Roy Curtin.

Witnesses and documents

19. The tribunal heard from the claimant. For the respondent the tribunal heard from Mr Lorna Murphy Acting Operations Director and dismissing officer and Mr Andrew Worboys, Finance Director and appeal officer.

20. There was a bundle of documents of 253 pages including pages introduced by the respondent on the day of the hearing.

21. We had oral submissions from both parties. We have summarised the submissions below, they are not set out in their entirety. All submissions were fully considered.

Findings of fact

22. The claimant is a bus driver holding a PCV licence. The respondent is a provider of public transport services under contract to Transport for London (TfL).

23. The respondent operates public transport services across central south and west London and North Surrey. It operates over 600 buses across in excess of 40 routes and employs approximately 2,100 members of staff.

24. The claimant worked for the respondent from 9 June 2008 until his dismissal for gross misconduct following a disciplinary hearing on 17 April 2015. The parties agreed at the preliminary hearing on 8 April 2016 that the effective date of termination was 20 April 2015 being the date upon which the claimant received the dismissal letter. A decision was made at that hearing that the claim was within time.

25. On 16 March 2015 while driving route 344, the claimant's vehicle was involved in a serious road traffic accident. The respondent produced a serious incident report on 16 March 2015 and this confirmed that the claimant was driving his bus into a bus stand and he collided with another stationery bus, lost control of his bus and drove into a brick wall

and knocked down a concrete bollard. This involved crashing into two stationary cars and one moving car. The police and ambulance services had to attend the scene. A photograph of the damage to the wall was at page 97 of the bundle. The damage was substantial. Fortunately the bus was empty at the time.

26. The claimant had an injury to his arm and he was taken to hospital. The stationery bus, the three cars and the respondent's bus were all damaged as well as the wall.

27. The respondent prepared a Serious Incident Report form (page 59). It said "*Driver Mohamed Hassan 4960 route 344 entering the bus stand at St John's Hill lost control of the his bus, hit stationary bus 9488 which Driver Scott and Sqs Khan was on then crashed through the wall & hit three cars on St John's Hill vehicle not known at present one lady in car, passenger or driver not known sustained an arm injury type of injury not known company drivers has been taken to hospital Police & ambulance called*".

28. There was an Official Report Form (page 61). This said: "*The driver named above was going on to the stand number 72 fleet 2429 and the driver lost control. The bus hit running number 62 fleet 9488…….. The bus 72 went through the wall and then crashed into three cars that were driving down St John's Hill. One lady in a car complained of an arm injury. Police and ambulance were sent to the incident….. Driver involved in an accident has been taken to St George's Hospital. The bus was damaged on the N/S and front bumper/windscreen/blinds have been damaged".* The claimant accepted this as an accurate summary of what happened.

29. On 18 March 2015 Mr Ray Newman, Driving Standards Manager, wrote to the claimant inviting him to an investigatory meeting on 23 March 2015 (page 64). The letter said "*The purpose of an investigatory meeting is to find out as much information relating to the allegation detailed above and to give you the opportunity to respond. It is not a disciplinary hearing. There is no statutory right to be accompanied by a work colleague or a trade union representative at an investigatory meeting*." The letter said that the matter under discussion was the collision dated Monday, 16 March 2015.

30. By an email dated 19 March 2015 the claimant by his representative Mr Francis Neckles of the PTSC union said (page 66) that he believed there were serious mechanical faults with the bus, resulting in his accident. The claimant in evidence initially told the tribunal he had not seen this document before and the day of the hearing was the first time he had seen it but that he had written it and sent it to his representative who sent it on to the respondent. He was not clear, given the length of time since March 2015, whether he had seen it or not. Given the claimant's uncertainty we find he had not seen it before.

31. On 23 March 2015 the claimant attended the investigatory meeting with Mr Ray Newman, Driving Standards Manager. The claimant wanted to be accompanied by his chosen representative, Mr Francis Neckles. Mr Newman told him that Mr John and Mr Francis Neckles were not allowed on the respondent's premises. The claimant said he did not feel well so the meeting finished. The respondent organised an occupational health appointment for him.

32. The claimant attended occupational health on 24 March 2015 and the OH doctor (Dr K Broad) said (page 70) that the claimant had experienced significant pain during five days following the accident but this had subsided by 24 March 2015. The doctor said that by 27 March 2015 the claimant should be fit for work and fit enough to attend an interview with the respondent. Claimant was signed off sick until 31 March 2015.

33. Because the claimant had asserted serious faults with the bus, the respondent instructed VOSA (Vehicle & Operator Services Agency) to carry out an inspection of the claimant's bus. The report was at pages 71-72. Checks were carried out on the braking, steering and electronics and no fault was identified. The claimant accepted that VOSA is independent but he still contended that there was a fault with the bus.

34. The claimant was invited to attend a reconvened investigatory meeting with Mr Newman. This took place on 1 April 2015. Mr Newman said there was CCTV footage that they would view. The claimant said he would not make any comment without his union representative. The respondent had banned Mr John and Mr Francis Neckles from its premises. The claimant said he did not know the reason why. He said he asked both Mr John and Mr Francis Neckles but they did not tell him why they had been banned. The claimant was not permitted to be accompanied by either Mr Neckles at that meeting.

35. At the meeting on 1 April Mr Newman read out the accident report and showed the claimant photographs of the scene of the accident. The photographs included at page 63, photographs of the scene of the accident taken by a member of the public and posted on twitter, with the comment "*Clapham Junction is so exciting. Bus crash*". The claimant again declined to answer questions at that meeting without the presence of his representative.

36. Mr Newman decided that there was a case to answer. He told the claimant he was moving to a disciplinary hearing and that the claimant had the right to be represented "*as long as it's not Francis or John Neckles*" page 76.

37. The claimant was suspended from work from 1 April 2015 and was invited, by letter of 8 April 2015 to a disciplinary hearing to take place on 13 April 2015.

38. We saw a copy of the disciplinary policy with the categories of gross misconduct at page 106. The disciplinary charges were taken from this list and set out in the invitation to the disciplinary hearing at page 79. The disciplinary charges were as follows:

    - Action likely to threaten the health and safety of yourself, fellow employees, customers or members of the public;
    - Gross misconduct, which causes an acceptable loss, damage or injury;
    - Bringing the company into disrepute

39. The invitation to the disciplinary hearing gave the claimant the statutory right to be accompanied but made it clear that Mr John and Mr Francis Neckles were not permitted on to the respondent's premises. The letter told the claimant on page 80 that if the allegations were found proven, it would amount to gross misconduct and his employment could be terminated. The letter said:

    > *"I note from the minutes of the investigatory meetings that you were requesting Francis Neckles accompany you. I must remind you that both John and Francis Neckles have been banned from representing members at any of our premises for various reasons relating to (1) threatening behaviour towards Abellio members of staff and (2) dishonesty. The company has written to both John and Francis Neckles and the PTSC union is fully aware of the reasons for the ban. I should add for completeness that we will not be attending hearings off site."*

40. As to the reasons for the ban, we were taken to the decision of the ET in ***Gnahoua v Abellio London Ltd*** case number 2303661/2015 (referred to below) and in particular paragraphs 15-18 of the reasons to that decision. In summary form Mr Francis Neckles was dismissed from the respondent on 20 August 2013 for harassment and intimidation of another member of staff. Francis Neckles brought a tribunal claim and was reparented by his brother Mr John Neckles. Those claims were struck out on the basis of vexatious conduct and an award of costs was made against the two brothers. The vexatious conduct was found to be falsifying the date on which a witness statement was prepared.

41. The dismissing officer Ms Murphy was asked in evidence why the respondent would not hold a meeting off site. She said that because of the threatening behaviour, members of the respondent's staff (including herself) were not prepared to be put in such a situation.

42. The claimant showed the letter to Messrs Neckles. They did not suggest to him that someone else in the PTSC could be found to accompany him instead of themselves.

43. The claimant attended the disciplinary hearing but refused to answer questions without Mr Francis Neckles in attendance. The notes of the hearing started at page 91. Ms Lorna Murphy chaired the disciplinary hearing. The claimant told Ms Murphy that Mr Neckles was waiting outside to represent him.

44. Ms Murphy explained to the claimant that the position had been explained to him in the letter of eighth April and that there were other members of the PTSC union who could accompany employees to hearings. She mentioned Mr Errol Edwards who worked at that depot. The claimant said that Mr Neckles was "his official choice of union rep". Ms Murphy decided to give the claimant three days to find an alternative representative and she therefore adjourned the hearing until 16 April.

45. Ms Murphy wrote to the claimant on 13 April 2015 (page 83-84) explaining once again that Francis and John Neckles were banned from the respondent's premises and that he could choose any other PTSC representative or workplace colleague. Ms Murphy mentioned to the claimant two PTSC representatives who worked at the respondent namely Errol Edwards at Battersea and Barrington Hunt at Walworth. Ms Murphy explained to the claimant that it was very important that he participate in the process and he should do everything possible to find someone so that he felt able to participate.

46. The rescheduled hearing commenced on 16th April. Once again the claimant refused to answer questions for the same reason as before. The claimant did answer some questions at this hearing. The note of the meeting (page 86) shows the following exchange which we find took place:

> *LM: do you entertain the possibility that you could have hit a wrong pedal?*
> *HM: no*
> *LM: were you feeling tired, stressed or under the weather?*
> *HM: no*
> *LM: were you distracted by anything as you made a turn into the stand?*
> *HM: no*
> *LM: you were off sick after the incident, are you fully recovered?*
> *HM: not quite yet, I still have a back pain and taking painkillers.*
> *LM: what kind?*
> *HM: paracetamol*
> *LM: does that help?*
> *HM: yes*
> *LM: have you got anything else to say about what happened that day?*
> *HM: as I said not without my official union representative.*

47. Ms Murphy said she would adjourn and asked if the claimant was willing to wait and hear the decision or whether he wished her to write with the outcome. He said "*you can write to me*". Ms Murphy also asked the claimant whether she wanted the claimant to consider his staff records when making the decision and the claimant said "*yes you can*". We find based on this that Ms Murphy took account of the claimant's clean disciplinary record when making her decision to dismiss.

48. On 17 April 2015 Ms Murphy wrote to the claimant terminating his employment for gross misconduct. In the dismissal letter Ms Murphy said (page 89):

> *"To summarise the CCTV footage the run up to the incident is uneventful. You appear alert at all times and exercise good driving standards. You maintain a decent gap between you and the vehicles in front and your speed is appropriate. Your mirror checks are also good. Your customers disembark at the last stop by Clapham Junction Station and you then proceed up the hill to turn right into the stand. Another bus is on the stand already. You turn into the stand as normal. The first 90 degrees of the turn are uneventful but when you start the next 90 degrees you pick up speed, collide with the bus and keep going through the brick wall that is the barrier between the stand on the pavement. Narrowly missing pedestrians you then continue the turn colliding with three separate cars. Your end position is across the road as if you were partway through making the turn into the stand.*
> *We now know that just after you passed through the brick wall you knocked down a concrete bollard which became lodged by the front wheel so kept the wheels locked on, hence the full turn before you stopped.*
> *A lot of damage was caused and a lot of people were involved although thankfully there were no serious injuries."*

49. By an email dated 24 April 2015 sent by Mr Francis Neckles the claimant appealed against his dismissal. He said (page 91) "*I hear by confirm that I wish to appeal your sanction following your decision to terminate my contract of employment for asserting my contractual and legal rights under s. 10 ERA 1999. It is my belief that I have been discriminated/victimised by you on grounds of my race and on grounds for belonging to the PTSC union,".*

50. The claimant was invited to an appeal hearing on 22 May 2015 (letter page 93). Once again he was told that Messrs Neckles were banned from representing members at the respondent's premises.

51. The hearing did not go ahead and he was invited to a rescheduled hearing on 3 June 2015 which was further rescheduled to 10 June 2015. There were two further postponements to 26 and 30 June.

52. The claimant attended the appeal hearing on 30 June 2015 before Mr Andrew Warboys, Finance Director, but again refused to answer questions without either Mr Neckles present. The note of the appeal hearing was at page 95. It is titled "Grievance hearing" but we find that this was simply a typing error and it is a note of the appeal hearing. The claimant was given three options:

    a. *To reschedule to find an alternative PTSC union representative*
    b. *To submit evidence in writing for the respondent to consider*
    c. *To withdraw his appeal.*

53. These options were not contained in the respondent's disciplinary appeal procedure.

54. Mr Warboys wrote to the claimant on 2 July 2015 with the appeal

outcome. He said that if the claimant did not reply choosing one of the three options within seven days, he would assume that the claimant no longer wished his appeal to be heard and it would be treated as withdrawn. It is not in dispute that the claimant did not choose one of the three options and therefore the respondent treated his appeal as withdrawn.

55. It was put to the claimant in cross examination that in addition to Mr Errol Edwards and Mr Barrington Hunt he could have asked Ms Marcia Francis or Mr Roy Nembhard of the PTSC to accompany him. The claimant said he did not know these people and he wanted his own choice of union representative.

Comparators

56. The claimant relied upon the treatment of Mr Raj Isiri in support of his case that there had been inconsistency of treatment.

57. We did not hear from the disciplinary officer in Mr Isiri's case, but we had the outcome of the disciplinary hearing dated 21 January 2015 at pages 252-253. This disciplinary predated the claimant's disciplinary. The facts of Mr Isiri's case were that he was driving from the Battersea garage rather than from his home garage of Walworth. He was not as familiar with the route. He took a wrong turning which took him to a low bridge. He slowed down and hit the bridge. The disciplinary officer Mr J Batchelor accepted that Mr Isiri was feeling stressed and confused. He admitted that he did not check properly the pack he was given for his duty when he signed on at Battersea. The bridge was well signposted as being a low bridge. He was given warning messages on the bus radio. He did not use the radio until he had hit the bridge.

58. Like the claimant, Mr Isiri had a good record prior to the date of the accident. It was put to Ms Murphy that Mr Isiri went under the bridge and took the top off the bus. Ms Murphy said this was not correct as Mr Isiri had hit the front of the bridge at a slow speed and there was damage to the windscreen and some of the corner panels made of fibreglass. We saw no documentary records showing that the top had been removed from the bus and we accept and find that the accident happened as Ms Murphy said.

59. Mr Isiri faced an allegation of gross misconduct in relation to a blameworthy or avoidable accident, bringing the company into disrepute and gross negligence which caused unacceptable loss, damage or injury. There was no evidence of anyone suffering injury as a result of Mr Isiri's accident.

60. The outcome of Mr Isiri's disciplinary was set out in the outcome letter at page 253 as follows: "*…if found proven you could face summary dismissal as the charges against you are so serious they fall into gross misconduct. Nevertheless I have taken into account your previous good*

all round record and although this is gross misconduct I have decided to give you a final written warning which will remain on your file for a period of 12 months and take you off the rail panel."

61. The claimant was cross-examined on three other comparator examples. At page 224 we saw the dismissal letter of Mr Andrew Thompson dated 11 February 2014. Mr Thompson was dismissed following a collision in January 2014 when he fell asleep at the wheel. He was driving on a busy road incorporating a cycle superhighway and with pedestrians present. Fortunately there were no injuries.

62. At page 226 we saw the dismissal letter of Mr Idowu who was dismissed following a collision in January 2015 when he hit a pedestrian with his bus in Knightsbridge.

63. We saw the dismissal letter at page 228 of Mr Fouad who was dismissed following a collision in September 2014 when he hit a taxi on a bridge. The dismissing officer in that case was Ms Murphy, the same as for the claimant. She found that Mr Fouad did not see or react to the taxi until very late so he hit the taxi on the rear offside corner with the front nearside of his bus.

The status of the disciplinary procedure

64. The disciplinary procedure was in the bundle starting at page 98. It was produced following collective bargaining with the Unite union. It did not say expressly whether it formed part of an employee's contract of employment or not.

65. Neither side had disclosed or included the claimant's contract of employment within the bundle.

66. It was contended by the claimant that the policy gave the right to be accompanied at an investigatory meeting. Section 4 of the policy on page 101 said that the right to be accompanied applied at all stages of the formal procedure. Section 5 of the policy on page 102 said that there were three sanctions in the formal procedure, and described the formal procedures as Stage 1 a first written warning, Stage 2 a final written warning and Stage 3 dismissal or action short of dismissal. We find that section 4 refers to those stages mentioned in section 5 and not as contended by the claimant, section 6, which deals with the separate matter of the investigation.

Submissions

The respondent's submissions

67. The respondent submitted that there had been compliance with the ***Burchell*** principles, the investigation consisting of photographs of the aftermath and a technical report from VOSA. It was unclear on the respondents submission as to whether the claimant actually wrote the

account of the accident in the email from Mr Francis Neckles on 19 March 2015. The claimant refused to answer questions and Ms Murphy took account of his clean disciplinary record. On mitigation it was submitted that the claimant relied on nothing more than there being something wrong with the bus. On appeal the claimant was given three options and did not take any of them so that his appeal was treated as withdrawn.

68. On unfair dismissal at, it was submitted that there was no evidence from the claimant as to what he would have said if his representative had been with him or what he would have said that would have made the respondent change its mind.

69. The respondent argued for contributory fault of 100% and/or a *Polkey* reduction of 100% if the tribunal found against it on unfair dismissal.

70. On the right to be accompanied the respondent took us to a decision of the London South Employment Tribunal sent to the parties on 28 February 2017, a decision of the tribunal chaired by Employment Judge Fowell in the case of ***Gnahoua v Abellio London Ltd*** (the same respondent) case number 2303661/2015 and we were asked to take judicial notice of facts found in that decision.

71. The respondent also relied upon findings made by Employment Judge Lamb in the London South Employment Tribunal in case number 2344649/2013 in the case of ***F Neckles v Abellio London Ltd.***

72. On the respondent's submission the request to be accompanied by Messrs Neckles was not reasonable. The respondent had even suggested other individuals who would be suitable and the claimant has not shown any particular detriment.

<u>The claimant's submissions</u>

73. The claimant submitted that as a result of EC Directive 91/533 implemented into domestic law in sections 1-4 of the Employment Rights Act 1996 the right to be accompanied was both contractual and statutory. The claimant relied upon section 3 which relates to the obligation to provide a written statement of particulars of employment and provides that a statement shall include a note specifying any disciplinary rules applicable to the employee or referring the employee to the provisions of a document specifying such rules which is reasonably accessible to the employee.

74. The claimant relied upon the case of ***Toal*** (set out below) saying that this case "hit the nail on the head".

75. The claimant disputed the findings in the ***Gnahoua*** case and we said we had not heard the evidence and we would not interfere with the findings of fact in that case. The claimant said the case was decided wrongly.

76. The claimant also submitted that it was not open to the employer to ask him to choose another representative as this was tantamount to contracting out and contrary to section 203 of the Employment Rights Act.

77. It was mentioned that the respondent had a list of trade union officials who are barred and the claimant said that this was contrary to Regulations 3 and 9 of the Employment Relations Act 1999 (Blacklists) Regulations 2010. This was not an issue before us for determination and we make no finding of fact upon it.

78. In submissions the claimant accepted that this was potentially a case of gross misconduct but that this was not the real reason for dismissal and we had to look at the comparative situations.

79. In reply the respondent said in relation to the Employment Relations Act 1999 (Blacklists) Regulations 2010 that a list in itself is not a "prohibited list", this was an irrelevance and no admission was made in relation to those Regulations.

The law

80. Section 98(4) of the Employment Rights Act 1996 provides that 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.

81. In relation to section 98(4) the EAT recognised the importance of consistency of treatment in ***Hadjioannou v Coral Casinos Ltd 1981 IRLR 352.*** A complaint of unreasonableness based on inconsistency of treatment is only relevant in limited circumstances:

    a. Where employees have been led to believe that certain conduct will not lead to dismissal
    b. Where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason
    c. Where decisions made by an employer in truly parallel circumstances indicate that it was not reasonable for the employer to dismiss.

82. Waterhouse J said: "*Industrial Tribunals should scrutinise arguments based upon disparity with particular care and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate*

basis for argument".

83. ***Hadjioannou*** was followed in ***Procter v British Gympsum Ltd 1992 IRLR 7*** in which the EAT held that "*Whatever the relevant factors, the overriding principles must be that each case must be considered on its own facts and with freedom to consider mitigating aspects. The dangers of a tariff and of untrue comparability are only too obvious. Not every case of leniency should be considered to be a deviation from declared policy*."

84. In ***Securicor Ltd v Smith 1989 IRLR 356*** the Court of Appeal held that in deciding to distinguish between two cases, it can only be challenged where it was so irrational that no employer could reasonably have accepted it. The ***Hadjioannou*** test was upheld by the CA in ***Paul v East Surrey District Health Authority 1995 IRLR 305.***

85. Section 10 of the Employment Relations Act 1999 confers the right to be accompanied at a disciplinary or grievance hearing.

(1) This section applies where a worker—

(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and

(b) reasonably requests to be accompanied at the hearing.

……..

(3) A person is within this subsection if he is—

(a) employed by a trade union of which he is an official within the meaning of sections 1 and 119 of the Trade Union and Labour Relations (Consolidation) Act 1992,

(b) an official of a trade union (within that meaning) whom the union has reasonably certified in writing as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings, or

(c) another of the employer's workers.

86. Section 12 of the 1999 Act gives 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 he exercised or sought to exercise the right under section 10 and provides that a dismissal for that reason shall be automatically unfair.

87. The EAT in ***Toal v GB Oils Ltd 2013 IRLR 696*** said that provided the proposed companion is a fellow worker, or a lay or paid union official within the statutory definitions, the worker is entitled to his or her choice of companion: there is no additional requirement that the companion be reasonably chosen. The word "reasonably" in section 10(1) governs only the act of requesting to be accompanied. The facts of ***Toal*** were similar in that the claimants in that case asked to be accompanied to a

grievance hearing by a Mr Lean from Unite. The respondent declined this request and they brought a workplace colleague instead. At the internal appeal again they were not permitted to be represented by Mr Lean.

88. The EAT in ***Roberts v GB Oils Ltd 2014 ICR 462*** affirmed the decision in ***Toal.*** In ***Roberts*** it was conceded for Mr Roberts that if a companion was unreasonably chosen, the tribunal could make a reduced, or nil, award of compensation. The EAT rejected an argument that the employee, by agreeing to alternative representation, had waived the right to be accompanied by his initial choice of companion as being void under section 203 of the Employment Rights Act

89. In the summary to the ***Roberts*** decision the EAT (HHJ Burke) said "We expressed some concern about the effect of Toal; what if the chosen companion had a history of disruptive behaviour? However, we followed Toal, having regard to the acceptance on behalf of the claimant that if the rejection of the companion was on the facts justified, the ET could reduce the compensation, even to nil".

Conclusions

Did the claimant have a contractual right to be accompanied at a disciplinary or investigatory meeting?

90. We have found above that the disciplinary procedure provides for the right to be accompanied at a formal disciplinary meeting and not at an investigatory meeting.

91. The disciplinary procedure did not say whether or not it was contractual. The claimant's contract was not produced. We had insufficient evidence upon which to make a finding that the disciplinary procedure was contractual and therefore we find that it was not.

92. We do not accept Mr Neckles' submission that sections 1-4 of the Employment Rights Act 1996 create a contractual right. These sections give a right to be provided with written particulars of employment, not a contract of employment.

93. We find that the claimant did not have any contractual right to be accompanied at a disciplinary or investigatory meeting.

Unfair dismissal

94. We find that there was a reasonable investigation. Mr Ray Newman met with the claimant and sought to investigate with him. Although the claimant was uncooperative the respondent took that step. Upon the allegation that there was a fault with the bus, they instigated a report from VOSA. They considered CCTV footage and photographs.

95. As the claimant admitted that the conduct complained of was potentially

gross misconduct and it was a serious accident, this is enough for us to find that Ms Murphy formed a reasonable belief that the claimant had committed the misconduct relied upon and on the matters she considered, she had reasonable grounds upon which to form this belief.

96. The claimant concedes it was a serious accident. There was substantial damage to a wall, three other vehicles were involved. The claimant required treatment at St George's Hospital and a woman driver sustained a minor arm injury. There was reputational damage to the respondent from the posting on twitter and members of the public observing the accident. We find that Ms Murphy reasonably formed the view that this was gross misconduct and dismissal fell within the band of reasonable responses subject to a consideration of consistency of treatment and mitigation.

97. We saw examples of accidents in the cases of Mr Andrew Thompson, Mr Idowu and Mr Fouad, all of whom were dismissed. The claimant contends that there is inconsistency of treatment between himself and Mr Isiri. We find that the claimant's case and Mr Isiri's were not truly parallel. Mr Isiri put in mitigation and it was found that he was "stressed and confused" whereas the claimant told Ms Murphy at his disciplinary hearing that he was not "tired, stressed or under the weather". In addition in the claimant's case both he and a female driver suffered injury. There was no evidence of any personal injury being sustained in Mr Isiri's case. Mr Isiri accepted that he was at fault. The claimant did not accept that he was at fault and he blamed faults with the bus. We find for those reasons that the claimant and Mr Isiri were not in truly parallel circumstances and the dismissal is not rendered unfair by inconsistency of treatment.

98. The respondent considered the long service and clean records of both Mr Isiri and the claimant. The claimant did not put forward any mitigation other than accepting Ms Murphy's offer to look at his past record.

99. So far as the appeal against dismissal was concerned, Mr Warboys gave the claimant three options which were not part of the respondent's disciplinary appeal procedure. When the claimant did not respond, he treated the appeal as withdrawn. This does not affect the decision to dismiss, but goes to procedure. We find that if Mr Warboys had fixed another date for the appeal hearing it would have been a repeat of 30 June 2015. The respondent would not have permitted representation by Mr Neckles and the claimant would not have engaged. On a balance of probabilities we find that the outcome would have been the same.

100. In these circumstances we find that the claimant was fairly dismissed.

101. Even if we are wrong about this, on the facts we would have found that the claimant contributed to his dismissal by 100% by his culpable conduct in the way he drove the bus and we would have made a *Polkey* reduction of 100%.

102. The claim for unfair dismissal fails.

The right to be accompanied

103. The statutory right to be accompanied was engaged in relation to the disciplinary and appeal hearings, but not the investigatory meeting. ***Toal*** says that the choice of companion does not have to be reasonable, it is the request that has to be reasonable. We find that the request was reasonable and it was the choice of representative to which the respondent objected.

104. Based on ***Toal*** and ***Roberts***, authorities which are binding upon us, we find that the claimant was denied the statutory right to be accompanied contrary to section 10 of the Employment Relations Act 1999. This claim succeeds.

105. The detriments relied upon by the claimant were set out in his Grounds of Complaint in the ET1 at pages 20-21 of the bundle. He relied upon the sanction of dismissal as a detriment under section 12 ERA 1999. We find against the claimant on this. Our finding above is that the reason for dismissal was misconduct and not the asserting of his right to be accompanied.

106. The claimant relied upon the detriments of having been denied the right to be accompanied at his investigatory, disciplinary and appeal hearings. We have found above that the claimant had no right to be accompanied at an investigatory meeting so this was not a detriment. The denial of the right to be accompanied is dealt with under section 10, it is not a detriment in its own right.

107. The claimant also relied upon the denial of "finalisation of Appeal Hearing". The reason the respondent did not hold a further appeal hearing after 30 June was because the claimant wanted to be accompanied by Mr Neckles and he did not accept any of the three alternatives put forward by Mr Warboys on 30 June. As a majority (Employment Judge and Ms Dengate) we find that ***Gnahoua*** is on point with this case and that there is no detriment over and above not having a companion to represent him. We agree with the conclusion in ***Gnahoua*** that to succeed under section 12 there has to be a specific detriment over and above the lack of representation. The reason the appeal was not "finalised", to use the claimant's words, was because of his choice of companion. That, as found in ***Gnahoua,*** does not add to the breach of section 10.

Minority decision

108. The minority (Mr Henderson) considers that there was a detriment to the claimant in that it thwarted the possibility of the decision to dismiss being overturned. The minority considered this to be a small possibility based

on the fact that the ground of appeal (page 91) was the claimant's belief that he had been dismissed for asserting his right to be accompanied. The claimant also contended in his email of appeal sent by Mr Francis Neckles that his dismissal was discriminatory or on union grounds. We have found unanimously that the reason for dismissal was gross misconduct and not the grounds relied upon by the claimant. Based on Mr Warboys' evidence and his view of the reason for dismissal, the minority finds that the possibility of him overturning the decision to dismiss was no more than between 10% to 15%. It could only have been based on mitigating factors in relation to the misconduct itself.

109. The claimant also relied on the respondent imposing a representative of their choice. As we have found above, the respondent did not "impose" an alternative choice of representative, but made suggestions as to whom the claimant could ask to accompany him if he wished. We unanimously find against the claimant on this.

110. The claimant relied upon the denial of a contractual right and we have found unanimously against him on this.

Listing a date for a provisional remedies hearing

111. At the conclusion of the liability hearing we listed a date for a provisional remedies hearing on **11 October 2017** all parties having checked their availability. As the claimant has succeeded on the section 10 claim and we have not heard submissions on quantum, this hearing date is effective. We consider that a full day is not required and reduce the hearing length to 2 hours.

112. The claimant was ordered by consent to serve a schedule of loss on the respondent by 4pm on 22 June 2017.

Employment Judge Elliott
Date: 19 June 2017