EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Earle	**v**	**Arriva North London Ltd**

Heard at: Watford **On:** 22 & 23 March 2018

Before: Employment Judge Wyeth

Appearances:

For the Claimant: Mr T Clarke, Volunteer
For the Respondent: Mr M Noblet, Solicitor

JUDGMENT having been sent to the parties on 12 April 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

The claims

1. By way of a claim form dated 11 August 2017, the claimant brings a complaint of unfair constructive dismissal following his resignation on 11 May 2017. The respondent defends the claim. The claimant contends that his dismissal was either automatically unfair under section 100(1)(e) of the Employment Rights Act ("ERA") by virtue of his reasonable belief in serious and imminent danger, namely, the risk of injury to passengers in standing positions on his bus. In the alternative, he claims that his dismissal was nevertheless ordinarily unfair.

The issues

2. I was grateful to the parties for agreeing a List of Issues in advance of the hearing for my approval. After due consideration it was agreed that the issues for me to determine are as follows:

   2.1 Constructive dismissal

      2.1.1 Did the respondent breach the implied terms of the claimant's

contract of employment by:

2.1.1.1 failing to provide a safe working environment for the claimant?

2.1.1.2 failing to deal promptly with the claimant's grievances as to the safety of his working environment so as to be in breach of the implied term of mutual trust and confidence?

2.1.2 Save for any breach of the implied term of mutual trust and confidence (which, of itself, would be repudiatory) was any proven breach sufficiently serious to be repudiatory?

2.1.3 Was the claimant's resignation on 11 May 2017 in response to any proven breach of the aforementioned implied terms of his employment contract?

2.1.4 Did the claimant affirm his contract by remaining in employment in the year leading up to his resignation on 11 May 2017?

2.2 The list of issues made reference to any complaint being out of time but it was accepted by the respondent at the outset that there was no time point to be taken in relation to this matter and, accordingly, that was no longer an issue being pursued.

2.3 Automatic unfair dismissal

2.3.1 If a dismissal is found to have arisen:

2.3.2 Did the claimant reasonably believe there were circumstances of serious and imminent danger?

2.3.3 If so, did the claimant take or propose to take steps to protect himself or other persons from the danger?

2.3.4 If so was this the reason or principal reason for the claimant's dismissal in accordance with section 100(1)(e) of the ERA 1996?

2.3.5 Alternatively, if a dismissal is found to have arisen, was the reason for the claimant's dismissal potentially fair?

2.3.6 Was the dismissal of the claimant generally fair in all the circumstances?

2.4 When discussing the issues, it was accepted on behalf of the respondent that it would be difficult for the respondent to be able to establish that there was a fair dismissal given that if a dismissal did occur this would have come about because of a breach of the implied term of mutual trust and confidence and/or a breach of the implied term to provide a safe work environment.

2.5 Remedy

2.5.1 The claimant is seeking reinstatement in his former position of employment at Arriva London.

2.5.2 What remedy, if any, would it be just and equitable for the tribunal to award?

2.5.3 To what extent did the claimant contribute to his dismissal?

2.5.4 What was the chance of the claimant's employment coming to an end fairly regardless of any unfairness found (*Polkey*)?

Procedure

3. It was agreed that I would deal with liability initially, but insofar as they may be relevant the remedy issues regarding contributory conduct and *Polkey* would also be considered at this stage.

4. I had before me a bundle of documents consisting of 859 pages. This appeared disproportionate for a hearing listed for two days (no application was made by either party to extend the scheduled length of the hearing). I informed the parties that, as a matter of course, I would only be considering documents to which I was referred. The page references below relate to the bundle unless otherwise stated.

5. I was provided with witness statements from Mr O'Connor and Mr Mhagrh, both of whom were giving evidence on behalf of the respondent, and from the claimant. The statements were relatively succinct and made reference to relevant documents within the bundle and the page numbers. I was also taken to various documents as part of cross-examination of each witness.

6. I heard submissions from each side just before lunch on the second day.

The facts

7. I make the following findings of fact in relation to this matter.

8. The respondent is a bus operating company, one of the biggest in London providing bus services under a contract for Transport for London ("TfL"). The claimant was employed by the respondent as a bus driver from 8 May 2006 until his resignation without notice on 11 May 2017.

9. Following the commencement of his employment, the claimant trained and qualified as a Passenger Carrying Vehicle Driver in June 2006, otherwise known as PCV. He also obtained a BTECH qualification in PCV driving. For as long as the claimant has been employed by the respondent, he has operated a driver only bus and has never had a conductor on board.

10. Insofar as it is relevant, in October 2011 the claimant had an accident whilst

driving one the respondent's vehicles. As a result, some passengers in the bus that were standing and seated were thrown forward and hit the floor. The claimant explained to the respondent that he believed it was because of an oversized offside mirror, but the respondent disagreed and concluded that the accident was probably due to a lapse of judgment. It seems from a disciplinary card at page 71, that the claimant received a caution by the respondent for this incident, but I was not specifically taken to this document and it was not dealt with expressly in evidence.

11. In November 2015, the claimant was informed that the respondent had become aware of two incidents on his bus that led to two passengers being injured on 23 October 2015 and 29 October 2015 respectively. Both passengers raised complaints by the TfL complaints mechanism. The nature of the complaints were that the claimant had driven erratically on both occasions. The first complaint involved a male passenger, who said that he hit his head against an internal mirror which smashed with impact allegedly because the claimant pulled away aggressively after being rude to the passenger. The second complaint was by an elderly lady who fell to the floor whilst standing shortly after alighting the bus. On both occasions the attitude and behaviour of the claimant was in question.

12. On 2 November 2015, the respondent requested the claimant to complete an insurance report form in accordance with rule 24 of the Drivers' Handbook to which he was subject. The Duty Operating Manager explained that the respondent needed him to complete the incident report forms in respect of both complaints because of the nature of the complaints being made against the respondent on each occasion. The claimant was requested to complete those forms and return them to the Operations Manager within a 24-hour period. As at 11 November 2015, the claimant still had not completed the form in breach of rule 24 of the Drivers' Handbook. It appears the claimant had concerns about the inclusion of the wording "in contemplation of litigation" on the form. A meeting was held to discuss the claimant's reservations. It was explained to him that this was a standard requirement but he still refused to complete the form. The claimant was given a further 24 hours to complete and return it. He continued to refuse and was suspended pending an investigation into what the respondent described as failing to carry out a reasonable management instruction.

13. The Deputy Operating Manager held a meeting with the claimant on 18 November 2015 in order to investigate: a) his refusal to complete an incident report form; and b) the incidents themselves, which occurred on the bus on the dates in October. The claimant's suspension was also reviewed at that time. The claimant continued to be suspended following that meeting and was initially not paid during that period (the respondent did ultimately pay the clamant for this period but nothing material rest on this).

14. Eventually the claimant completed the insurance report form for each incident and at the same time raised a grievance in relation to being forced to complete and sign those forms. The claimant ceased to be suspended at that point.

15. He was informed at the meeting held on 20 November 2015 with the Operating Manager at that time, Mark Gardener, that he would be required to attend a formal hearing in due course regarding his conduct. The respondent decided to stay the disciplinary process while it dealt with the issues raised in the claimant's initial grievance regarding its handling of the claimant's refusal to complete the insurance report form.

16. The grievance meeting took place on 8 December 2015. The respondent wrote to the claimant rejecting his grievance on 21 December 2015 and due to various postponements, an appeal hearing did not take place until 15 March 2016. Mr Mhagrh, who conducted the grievance appeal process agreed to pay the claimant his rostered earnings for the period of suspension, but rejected the majority of his appeal. Thereafter the respondent proceeded with the disciplinary hearing in relation to the incidents that occurred on the claimant's bus in October 2015.

17. Having been delayed so that the grievance process could be concluded, the disciplinary hearing was held on 24 May 2016.

18. The purpose of the hearing was to consider what the respondent described as "avoidable passenger injuries" that occurred whilst the claimant was driving on 23 and 29 October 2015. In respect of the first incident the respondent had been informed of a complaint that the claimant had pulled away aggressively after allegedly being rude to the passenger. The second incident involved an elderly lady who was believed to have been injured as a result of the claimant allegedly pulling away from the stop without ensuring that she was secure. Following the hearing the claimant was issued with a first level caution in relation to each incident and the respondent concluded that both incidents were deemed to be avoidable accidents, for which the respondent was responsible.

19. In evidence before me it was apparent that the claimant considered that these criticisms of his driving were unjustified. Nevertheless, I am satisfied that the respondent had a duty to investigate the complaints and was entitled to exercise the judgment that it did in determining that the claimant had a part to play in those incidents. Ultimately the claimant as the bus driver had to be responsible for passenger safety insofar as it was within his capability and control. The complaints related to the claimant's behaviour and alleged conduct. They were not related to the behaviour of other road users or unforeseen circumstances that may cause an unintended or unavoidable accident to arise.

20. I interpose at this point that whilst hearing evidence I was taken to a report by TfL's Transport Committee in which there is an emphasis in paragraph 1.2 (p654) about the extent of injuries and incidents that occur on buses. That paragraph states:

> "The most common cause of injury is "slips, trips and falls" (Figure 1). Sharp breaking and other poor driving practices are likely to cause these injuries, the passenger survey we undertook reflects this – 55 per cent of respondents said they had experienced sharp breaking on their bus in the last month. Nearly as many had experienced acceleration that they consider to be too sharp."

Accordingly, it is entirely proper for a bus company to want to ensure that its bus drivers are accountable for any inappropriate driving. I am satisfied on the evidence before me that the respondent was seeking to maintain that objective and was not acting in any unreasonable way in the approach it adopted with the claimant over these incidents.

21. Following the decision to caution the claimant about those matters, there were a number of further complaints about the conduct of the claimant by various passengers, all unrelated. In August 2016, the respondent received a complaint from a TfL Revenue Protection Officer regarding an altercation between that Revenue Officer and the claimant. According to the Revenue Officer the claimant was unnecessarily rude to him and uncooperative. The claimant was suspended on or around 11 August 2016 and Mr O'Connor, the Deputy Operating Manager of the Wood Green Depot, was appointed to investigate the alleged misconduct. Mr O'Connor held a meeting with the claimant on 18 August 2017 and determined that he would not take any further action in relation to that matter.

22. Nevertheless, there was another customer complaint made to the respondent about the claimant in September 2016. By this point there had been a significant number of complaints about the claimant's behaviour over the previous twelve-month period. As a consequence, it was decided that the claimant would be subject to a disciplinary hearing about those matters.

23. On 3 October 2016, the claimant attended a hearing with Mr O'Connor once more. Each of the customer complaints were discussed with the claimant. According to Mr O'Connor the claimant refused to accept responsibility for any of those complaints and suggested that some of the complaints had been fabricated. For these purposes I am entirely satisfied on the balance of probabilities that there was no basis for the claimant to believe that those complaints had been made up.

24. At the conclusion of that meeting, Mr O'Connor determined that the claimant had committed misconduct in the way that he dealt with customers, leading to a significant number of complaints about his attitude. Once again, the claimant was issued with the lowest level of formal disciplinary sanction being a first level caution. Furthermore, Mr O'Connor arranged for the claimant to attend some training in relation to dealing with passengers generally and customer relations issues. Accordingly, the claimant attended a whole day of training on 18 October 2016 with Maxine Deslandes, Assistant Training Manager in driver training. Ms Deslandes was satisfied that the claimant was capable of performing what was required of him in relation to customer relations but the claimant refused to do so because he did not consider customer relations his responsibility. Instead he considered his job was to simply drive the bus from one point to the next.

25. I find as fact that this was a wholly unrealistic position for the claimant to take. In reality, the claimant was responsible for passengers on the bus including customer safety and customer relations. In his capacity as bus driver he was the ambassador of the respondent company and the only

representative of the respondent company on the bus at the relevant times.

26. On 29 November 2016, the claimant lodged a grievance with the Depot Operating Manager, Mark Gardener. Coincidentally a customer complaint about the claimant had also been made on the same day. It was determined that the grievance would be investigated first before dealing with the most recent customer complaint. The claimant was invited to attend a grievance meeting by Mr Gardener, but the claimant objected to Mr Gardener dealing with that grievance. As a consequence, Mr O'Connor was appointed to deal with it instead.

27. Mr O'Connor met with the claimant on 19 January 2017. He decided that it was necessary to separate the claimant's grievance into two parts. The first part dealt with the assertion by the claimant that he had not received any training regarding the following: 1) Driving and moving off so that passengers do not fall; 2) The Code Red and medical emergency procedure, 3) Emergency evacuation of a bus; 4) Major accident procedures; and 5) The boarding procedures at a bus stop, including all duties expected to be performed up to moving off.

28. Mr O'Connor was satisfied that all drivers including the claimant would have received such training. I too am satisfied as a matter of fact, on the evidence before me that the claimant did receive training in these matters at the outset of his employment. Aside from the fact that such training formed an integral part of the PCV license and BTECH qualification obtained by the claimant, there was also evidence before me, at page 45 for example, that he had signed to confirm that he had received such training, including with regard to use of mirrors, blind spots, moving off, slowing down and stopping. Furthermore, by this time the claimant had over ten years' experience as a bus driver and, save for the incident in 2011 and two incidents in October 2015, did not seem to encounter any problems relevant to the training he claimed to have lacked.

29. Nevertheless, Mr O'Connor arranged for the claimant to receive specific training on these matters from the bus driver instructor and garage mentor, David Chandler. The first session took place on 20 February 2017. The claimant did not consider that session to be satisfactory, so Mr O'Connor arranged a further session, which took place on 18 April 2017. The claimant has maintained throughout that the further training provided by Mr Chandler was not sufficient. I am entirely satisfied that the respondent took reasonable steps to provide adequate training to address the claimant's concerns and that such training, not limited to Mr Chandler's involvement, was satisfactory. Much of what the claimant sought guidance on was simply common sense.

30. The second aspect of the grievance related to an incident on 8 September 2016, when a passenger on the claimant's bus required medical attention. In that situation, the procedure that any bus driver is required to follow is to contact Centrecom (which is a facility run and provided by TfL and not the respondent). There was an obligation on drivers to report the need for an ambulance to Centrecom. The claimant complained that Centrecom required him to provide further information of the incident, so that they could

determine whether or not an ambulance was necessary. In particular, they required him to answer five relatively simple questions, such as whether the casualty was conscious, breathing, male or female, bleeding etc to enable a better informed assessment to be made about the need and urgency for an ambulance.

31. As a consequence of providing that information to Centrecom on 8 September 2016, according to the claimant an ambulance was not dispatched to the bus. The claimant accepted in evidence that ultimately the passenger agreed to be taken to the next stop and would walk home so that she could make her own arrangements to attend hospital if necessary. That of itself demonstrated the common sense approach of the Centrecom triage type process. I am satisfied that the requirement of Centrecom to obtain further information about the incident was precisely to deal with that sort of situation. In effect, Centrecom wanted to establish the priority of obtaining an ambulance to attend at any particular incident.

32. Nevertheless, the claimant maintained in evidence before me that he wanted the respondent to obtain a letter from Centrecom guaranteeing in essence, that whenever the claimant requested an ambulance, Centrecom would comply. Need it be said, I find that this was putting the respondent in an almost impossible position. Centrecom formed part of TfL and had its own mechanisms for ensuring that ambulances were only sent when and where they were required. It was almost certain that Centrecom would refuse a demand by the respondent that an ambulance be sent unconditionally at the command and insistence of one of its drivers regardless of the circumstances.

33. Furthermore, as I have already stated, I cannot see what problem or reasonable objection the claimant would have, or could have had, to the fact Centrecom required him to answer five relatively simple questions when requesting an ambulance. Those are matters that he either could or could not answer and he could and would no doubt explain that to Centrecom at the time of making the request. This was an entirely sensible and common sense approach and I firmly reject the suggestion that it was in any way unreasonable. Nor do I accept that the claimant would have needed any training in relation to that approach by Centrecom. Again, it is a matter of common sense.

34. Notably no blame was placed at the claimant's door in any way in relation to the incident on 8 September 2016. Instead the respondent wrote to the claimant to clarify the procedures that he should follow in those circumstances and send him the Code Red details that were provided by Centrecom specifying what he should do in such situations.

35. The claimant also enquired as part of his grievance whether risk assessments had been carried out on hybrid vehicles before they were renewed. Mr O'Connor confirmed that risk assessments had been obtained and prepared. Furthermore, risk assessments were produced in evidence before me and I am entirely satisfied that the respondent had undertaken all the necessary risk assessment processes both for the vehicles and the routes that were required to be taken by this vehicle.

36. Notably, the respondent gave the claimant assurances that the risk assessments were in place in the first of the grievance outcome letters. Given that there had been no criticism of the claimant in relation to the incident on 8 September or otherwise (save for the incidences involving injuries in October 2015), I find as fact that the respondent had no obligation to provide this information or indeed the existence of them in any event. There was some suggestion by the claimant during his evidence and the manner in which his case was put to the respondent's witnesses, that the risk assessments did not adequately deal with the matters of concern to the claimant. I again reject that suggestion. The risk assessments covered what was necessary to be dealt with in these circumstances and they were entirely appropriate.

37. The claimant also took issue with the fact that passengers had not been properly notified that they should not talk to the driver whilst the bus was in motion. I am satisfied that there was sufficient notice displayed on the buses in accordance with the respondent's evidence produced to me. In any event the claimant in my view would exercise common sense when dealing with passengers that may not have noticed such signage or simply disregarded it. It is open to any bus driver, including the claimant to ignore any passengers that are seeking to discuss anything with the driver or engage in communications with him or her whilst they are driving, if the driver considers that to be a distraction. Certainly, the claimant could inform a passenger that he would not respond while the vehicle was in motion. To that extent there was no risk of any health and safety incident arising save for any inherent risk that would apply in circumstances where individuals simply ignored this requirement regardless.

38. The claimant also took issue with the fact that he had not been properly trained in how to evacuate his bus in the event of an emergency. Again, I consider this was an unreasonable position for the claimant to take insofar as he was alleging that the respondent should have gone to additional lengths to explain what process was required. The claimant confirmed in oral evidence that in his (circa) 11 years' experience of driving buses, he had never needed to evacuate his bus. Again I am satisfied that this was a matter of common sense. No employer could have provided training to cover every possible eventuality and the claimant himself accepted that in an extreme case it would be necessary for him or one of the passengers to break a window. The claimant accepted that at least one window on the bus had been identified as an emergency exit. Therefore, it was far from clear what further training the respondent could have been expected to provide to the claimant beyond the training it had already provided to the claimant and others in relation to these matters.

39. The claimant maintained that the buses he was required to drive were not safe because of the size of the mirrors being used. These cause blind spots in that they block an aspect of the driver's vision. Again, I reject the suggestion by the claimant that the mirrors cause the claimant to work in an unsafe environment or for that matter, cause the vehicles to be unsafe.

40. It stands to reason that if indeed the claimant was correct in that assertion,

undoubtedly a number of relevant statutory bodies/agencies would have exercised a keen interest and in all likelihood taken any necessary intervening action. In any event, the respondent never disputed there were blind spots in existence and that drivers needed to be aware of those and how to mitigate the risks that such blind spots imposed. I accept Mr O'Connor's evidence that of the circa 430 drivers working at the claimant's depot, none of them had raised complaints about matters similar to those expressed by the claimant and each of them were apparently able to function within the rules and requirements expected of them by the respondent. Accordingly all other bus drivers working for the respondent were generally able to function safely.

41. The claimant referred to the dismissal of Mr Chin, a driver who was considered negligent by the respondent when fatally hitting a pedestrian on one of his bus routes. Whilst there was mention of a blind spot being a possible cause in Mr Chin's explanation for what happened, I have seen no evidence that the mirrors were an issue in that incident.

42. Additionally, the respondent had engaged a specialist firm to advise on updating the mirrors on its buses and was undertaking a trial of those in 2016. All drivers were able to provide feedback on those mirrors and whilst some of the feedback was negative, there was also equally positive feedback. Furthermore, the claimant volunteered in evidence that he was able to adjust his mirror specifically to improve his line of sight, so as to resolve any significant problem.

43. Likewise, whilst the claimant had concerns about the possibility of having to manage excessive passenger numbers on his bus at any particular time, I am entirely satisfied this did not create an unsafe working environment for the claimant or impose an intolerable burden upon him. It is entirely reasonable, rational and appropriate that the respondent through its rules, policies, expectations and general common sense should require the driver of driver only buses to be primarily responsible for passenger safety and comfort. This expectation applies to all its drivers. The respondent was at pains to emphasise to all its drivers, including the claimant, that it would never expect a driver to proceed where there is a perceived safety issue, a point emphasised by Mr Mhagrh in oral evidence and indeed a matter that he referred to in a letter that he wrote to the claimant's MP responding to his enquiries prompted by a consultation the claimant had with his MP about these perceived safety matters. If the claimant suspected that his bus was exceeding its capacity, it was his responsibility not to move away until the problem had been resolved and to seek assistance if necessary from the respondent's Service Control Team or Centrecom as appropriate.

44. Following notification of the outcome of the claimant's grievance which was not to the claimant's satisfaction, the claimant submitted an appeal on 27 April 2017. On 9 May 2017, Mr Mhagrh rejected the claimant's grievance appeal and as a consequence the claimant wrote a letter dated 11 May 2017 resigning from his employment. The claimant stated in that letter:

> "After a disappointing grievance appeal meeting, I received the final response on Tuesday. You seem unwilling to acknowledge that Arriva cannot simply set expectations, without being able to prove they are viable, safe and can be done

reasonably by any employee. You seem to expect me to accept any changes without an appropriate risk assessments. You were asked to prove appropriate risk assessment of a serious incident which had been carried out, as per your contract; but you have provided only a rudimentary route assessment. So despite several right turning accidents, Arriva remains one of the only two TfL bus operators, with an oversized offside mirror. Neither have you provided written confirmation, that your change to medical emergency procedures, will not result in an ambulance not being called. In fact the management has failed to show it understands the limitations of the driver in any emergency that may occur on the bus; and simply stating 'the driver is responsible for the passengers' safety' is all it needs to do.

The two disciplinary actions taken against me in the last 12 months were not supported by the necessary demonstration, that your expectations could be met. You refuse to accept that forcing me to a do a job designed for two; increasing the standing room; insufficient visibility; insufficient notice and instruction of passengers on buses or during complaint process, is so unreasonable, that even your instructor refused to demonstrate it.

I therefore have no confidence that you take your duty of care to minimise risk, to your drivers or passengers seriously. You have rejected my 'driving under protest' so I consider that I have been constructively dismissed, as of today."

The law

45. The law relating to unfair dismissal is predominantly contained in Part X of the Employment Rights Act 1996 ("ERA 1996"). Section 95(1)(c) states that there is a dismissal when "*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*". In accordance with the seminal case of *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221, the employer's conduct must amount to a *repudiatory* breach of contract. The conduct of the employer must be a breach sufficient to go to the root of the contract or demonstrate that the employer no longer intends to be bound by one or more of the essential terms of the contract.

46. For these purposes, it is accepted that it is not necessary to show that an employer intended any repudiatory breach of the contract. The tribunal's function is to look at an employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it (as per Mr Justice Browne-Wilkinson in the EAT in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666 and approved by the House of Lords in *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)* [1997] ICR 606).

47. An employer must not "*without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*" according to Lord Steyn in *Malik*. Accordingly, the claimant must demonstrate that the respondent's conduct was sufficiently serious to destroy or seriously damage the relationship of trust and confidence between them and that he resigned promptly as a result.

48. It is very important to note that the test in *Western Excavating* and *Malik* did not introduce a concept of reasonable behaviour on the part of employers. It is not enough to demonstrate that an employer has behaved unreasonably to prove a constructive dismissal. The matter requires further analysis to demonstrate that any such behaviour did amount to a *fundamental* breach. Whilst unreasonable conduct by an employer may amount to a breach of the implied term of mutual trust and confidence (which, is, by its very nature, a fundamental term of the contract), it is not a foregone conclusion that all unreasonable behaviour will be a breach of that term as it may not be of itself enough to breach the trust and confidence of an employee.

49. The EAT in *Parsons v Bristol Street Fourth Investments Ltd t/a Bristol Street Motors* EAT 501/07 confirmed that conduct for these purposes must be viewed objectively. The intention of the parties is not central. Although the subjective reaction of the claimant may be a factor to be taken into account, this is not to be a determinative factor.

50. There has been much debate as to whether the "band of reasonable responses of a reasonable employer" test applies to the conduct giving rise to the issue of whether or not there has been a breach by the employer. The Court of Appeal in *Buckland v Bournemouth University Higher Education Corporation* [2010] IRLR 445 upheld the EAT's decision that the test is not relevant to determining whether there is a breach resulting in a constructive dismissal, but is instead relevant to the issue of deciding whether the dismissal was reasonable where the employer seeks to argue a potentially fair reason in circumstances where the claimant has resigned. Accordingly, when determining whether the respondent has committed a fundamental breach of contract the tribunal must revert back to the test established by Lord Steyn in the House of Lords decision of *Malik* referred to above.

51. One other important aspect of the *Buckland* decision is that a repudiatory breach, once it has occurred, cannot be 'cured' by an employer so as to prevent acceptance.

52. As *Buckland* also confirms, however, even if the claimant is able to demonstrate that there was a constructive dismissal, it is not a foregone conclusion that such a dismissal is unfair. It is open to the respondent to argue that such a dismissal was fair for one of the potentially fair reasons set out in section 98 ERA 1996. The tribunal must then consider whether the dismissal was generally fair and, more specifically, whether the respondent acted reasonably or unreasonably in treating that reason as sufficient for dismissal.

53. A course of conduct can cumulatively amount to a fundamental breach of contract following a "last straw" incident. Whilst any "last straw" incident need not be blameworthy or unreasonable conduct per se, if the act relied upon is entirely innocuous then this cannot be a final straw incident regardless of the claimant's mistaken interpretation surrounding it (*Omilaju v Waltham Forest LBC* [2005] ICR 481.

54. If there is found to be a fundamental breach of the claimant's contract of employment by the respondent then it is necessary for the claimant to demonstrate that it was the breach that caused him to resign and that there was no other underlying reason for his resignation. Furthermore the claimant must also demonstrate that he resigned in good time and did not acquiesce to the breach in such a way as to affirm the contract.

55. Under section 100(1)(e) of the ERA, an employee shall be regarded as unfairly dismissed if the reason, or if more than one, the principal reason for the dismissal is that the employee "*in circumstances of danger which the employee reasonably believed to be serious and imminent, … took (or proposed to take) appropriate steps to protect himself or other persons from the danger*".

56. Where, as in this case, the claimant is alleging constructive dismissal, the tribunal will need to be satisfied that any repudiatory breach was as a consequence of the claimant taking or proposing to take steps in the circumstances described. Unless the claimant can demonstrate this, even if the respondent is found to have been in breach of contract, his claim under s100(1)(e) will fail to be made out.

57. Should the tribunal find that the claimant was unfairly dismissed it is still under a statutory obligation to consider whether the claimant contributed in any way to his dismissal and, if so, by what percentage the claimant's compensation should be reduced. Such a reduction would usually be applied to both the Basic Award and Compensatory Award elements.

58. Additionally, the tribunal must consider whether the claimant's employment would have terminated anyway regardless of any unfairness (automatic or otherwise). If such circumstances arise, the tribunal will form a view as to the percentage chance of the claimant's employment ending regardless of whether a fair procedure was followed or not. This is of course the well-known *Polkey* principle.

Conclusions

59. Applying the relevant law to the facts that I have found and addressing the issues identified at the outset, I am satisfied that the respondent was not in breach of the claimant's contract in any way.

60. The respondent did not fail to provide the claimant with a safe working environment. I appreciate that the claimant had a heighten sense of risk and was very concerned about matters of safety, but that is not the same thing as concluding that the respondent put him in an unsafe working environment. Whilst reasonable concerns about safety must be a virtue and to any employee's credit, the matters that the claimant had raised were matters of perception that were disproportionate to the reality of the situation and, for the reasons I have already stated in my findings of fact, there was no unsafe environment. The respondent was operating in accordance with its requirements expected by TfL and other agencies.

There was nothing untoward about the mirrors that existed on the respondent's buses or the respondent's requirements of its drivers. The claimant was not being expected to do anything more than anyone else employed by the respondent in a similar position.

61. I am also entirely satisfied that the respondent was not looking to blame the claimant for any incident or accident that may occur whilst he was driving regardless of the circumstances. Instead, as would be expected, the respondent would investigate any incidents, accidents or injuries sustained by passengers to establish whether or not the claimant was in any way at fault or blameworthy. Notably on the occasions that the claimant was disciplined for the incidents involving passenger injuries in October 2015, the respondent had undertaken a reasonable and proper investigation and reasonably concluded that the claimant was at fault in some way. The respondent had determined that on the first occasion he braked too suddenly and on the second occasion he had driven away too quickly. Notwithstanding the circumstances, the respondent had issued the lowest form of disciplinary caution to the claimant which, again, was far from unreasonable.

62. As I have recorded in my findings of fact, it is entirely proper for a bus company to want to ensure that their bus drivers are accountable for any inappropriate driving and the respondent did not step outside of those parameters in any unreasonable way in its treatment of the claimant.

63. With regard to the matter of failing to properly deal with the claimant's grievance as to the safety of his working environment, I note that the claimant continued to work whilst his grievance was being investigated even though he considered there were health and safety concerns and he purported to be working in an unsafe environment. There was no unnecessary or unreasonably delay in the handling of that grievance. The claimant wanted an alternative individual to investigate his grievance, a requirement that the respondent met. That resulted in some delay. The claimant raised a number of concerns and it was inevitable that it would take time for the respondent to be able to properly respond to those matters. Furthermore, not only did the respondent respond positively to the claimant's grievance by setting up further training, it provided not just one but two separate episodes of training because the claimant was dissatisfied with the initial training. The claimant was then allowed the opportunity to appeal against the decision of the grievance and that was properly investigated by Mr Mhagrh. There can be no real criticism of the respondent in the manner in which it handled the claimant's grievance and the respondent's conduct certainly did not come close to destroying the relationship of trust and confidence that should exist between the claimant and the respondent.

64. As such I am satisfied that there was no breach of the implied term of mutual trust and confidence in the way in which the respondent handled the grievance process being utilised by the claimant or indeed the issues that the claimant raised in that grievance.

65. As a result of my decision on those matters and the fact that the respondent

did not breach the claimant's contract in any way, the other issues become academic in terms of the result in this case. Nevertheless for completeness, I am satisfied that if there had been a breach of the implied term because of the matters raised by the claimant, he resigned because of those matters (and thus any purported breach) and not for some other unconnected reason. Furthermore, it was evident that the claimant was seeking to exhaust the grievance procedure before resigning and accordingly he would not have acquiesced to any breach or affirmed the contract had the respondent been in breach of contract which it was not.

66. Likewise, even if there had been a breach of contract and, consequently a dismissal (which there was not), the claimant would nevertheless have failed in his complaint under s100(1)(e) ERA. He did not and had not proposed to take steps to protect himself and others from danger he believed to be serious and imminent. Firstly, for the reasons found already, the claimant's belief was not reasonable. Secondly, the claimant was not taking or proposing to take appropriate steps but was, instead, complaining about a perceived risk of danger.

67. As a consequence of my conclusion that there was no breach of contract, the claimant was not entitled to treat himself as having been dismissed and therefore there was no dismissal either on health and safety grounds or on any ordinary basis of unfair dismissal. On that basis, the claimant's complaint of unfair dismissal fails and is not well founded.

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Employment Judge Wyeth

Date: 5 June 2018

Judgment sent to the parties on

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For the Tribunal office