Case No: 2301236/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT:	**LONDON SOUTH**
BEFORE:	**EMPLOYMENT JUDGE K ANDREWS**
MEMBERS:	**Ms C Bonner** **Ms T Williams**

BETWEEN:

Ms T Emerson

Claimant

and

Arriva London South Ltd

Respondent

ON:	**21-23 May 2018** **24 May 2018 &** **27 July 2018 in chambers**

Appearances:
For the Claimant: **In person**
For the Respondent: **Mr I Maccabe, Counsel**

JUDGMENT

The claimant was not unfairly dismissed nor unlawfully discriminated against.

The respondent has not failed to pay her wages due.

All claims fail and are dismissed.

REASONS

1. In this matter the claimant complains that she was dismissed unfairly both on ordinary principles and automatically on grounds related to union activities. She also says that she is owed wages and was subjected to sex, age and disability discrimination as set out in the earlier case management order dated 5 July 2017.

2. The issues arising in these claims were identified as follows:

3. Unfair dismissal: the respondent admits dismissal and says the reason for it was the claimant's conduct and that it was fair in all the circumstances.

4. The claimant says that it was unfair both because the real reason for it was her union activities and because it was procedurally (she says the respondent breached its own policy of issuing staged warnings for failure to complete vehicle condition reports (VCRs)) and substantively flawed (she says other employees were treated inconsistently despite the respondent's statements in its grounds of resistance which she says is factually incorrect, there was a significant delay between the audit and disciplinary action, there was a failure to review relevant CCTV evidence and whilst she admits she did not complete VCRs on certain dates the evidence proves that she always completed walk around checks) and dismissal was too harsh a penalty. She also says that the respondent failed to take proper account of the fact that she was going through the menopause which led to memory loss and poor concentration.

5. Age discrimination: the claimant says her dismissal was an act of direct age discrimination (section 13 of the Equality Act 2010 ("the 2010 Act")) and compares herself to Mr P Willott and Mr S Smith, both under 40 and who failed to complete VCRs but were not disciplined at all.

6. Age and sex discrimination: the claimant says that the reason she failed to complete VCRs was the memory loss and poor concentration she was suffering due to the menopause. This gives rise to claims of direct age and sex discrimination (the less favourable treatment being dismissal) and indirect age and sex discrimination (the PCP was the respondent's practice of requiring all drivers to complete VCRs and disciplining them if they failed to do so, putting menopausal women who suffer memory loss and poor concentration at a disadvantage) (section 19 of the 2010 Act).

7. Disability discrimination: the claimant says that going through the menopause amounted to a disability. The claims arising are direct and indirect (with the same PCP as above), arising from (section 15 of the 2010 Act) and a breach of the duty to make reasonable adjustments (section 20). As far as the arising from claim is concerned, the unfavourable treatment is dismissal and the something arising is memory loss and poor concentration. The reasonable adjustments claim is based on an alleged conversation on 5 September 2016 where the claimant says she told her manager she was menopausal and therefore forgetful. The PCP is as above and the alleged reasonable adjustment is rather than going straight to dismissal the respondent could have put in extra steps to remind the claimant and anyone else suffering from the menopause, to complete VCRs on time e.g. a reminder on the computer screen or weekly/more frequent audits.

8. It had been previously decided at another preliminary hearing that as at 5 September 2016 and at the date of dismissal the claimant was disabled. Although that judgment did not specifically record it, we have proceeded in

this Hearing on the basis that the disability is the menopause, the symptoms of which included memory loss and difficulties in concentration.

9. Unpaid wages: the claimant says she is owed an award for safe driving in 2016 which the respondent says has been paid. The claim in respect of one day's wages in January 2017 is withdrawn.

Evidence

10. We heard evidence for the respondent from Mr P Taylor (Operating Manager) who made the decision to dismiss and Mr N Bland (General Manager) who heard the appeal against dismissal.

11. For the claimant we heard from Mr P Berry (Bus Driver and Union Branch Secretary), Mr P Ainsworth (Union Convener), Mr S Smith (retired Bus Driver) and the claimant herself. We also read a signed written statement by Mr R Deascensao a former colleague, to which we accorded appropriate weight as Mr Deascensao was not present to attest to its truth or to answer questions about it.

12. Adjustments were made in respect of the claimant's disability particularly reflecting that she represented herself. She was given extra time to formulate her questions for the respondent's witnesses and the Employment Judge asked particularly relevant questions of all witnesses based on the agreed list of issues. We were impressed by the claimant's approach to these proceedings. She did a good job of presenting her claims especially taking into account the complexity of the underlying legal issues and had obviously prepared thoroughly.

13. We had a substantial agreed bundle of documents and were also referred to additional documents by the claimant regarding the menopause which were useful by way of general background. In making our Judgment however we have to find facts and draw conclusions specifically regarding this claimant and this respondent.

Relevant Law

14. Unfair dismissal: By section 94 of the Employment Rights Act 1996 ("the 1996 Act") an employee has the right not to be unfairly dismissed by his or her employer.

15. In this case the claimant's dismissal was admitted by the respondent and accordingly it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2). If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

16. In this case the respondent relies upon conduct and therefore the Tribunal must consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient reason for dismissing her.

17. In that exercise, the Tribunal is guided by the principles set out in British Home Stores Ltd v Burchell [1978] IRLR 379, affirmed by the Court of Appeal in Post Office v Foley [2000] ICR 1283. Accordingly the Tribunal will consider whether the respondent by the standards of a reasonable employer:
    a. genuinely believed the claimant was guilty of misconduct;
    b. had reasonable grounds on which to sustain that belief; and
    c. at the stage at which it formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

18. Any evidence that emerges during the course of any internal appeal against dismissal will be relevant in that exercise but otherwise material not before the employer at the relevant time is irrelevant.

19. Further, the Tribunal must assess – again by the standards of a reasonable employer - whether the respondent's decision to dismiss was within the band of reasonable responses to the claimant's conduct which a reasonable employer could adopt (Iceland Frozen Foods v Jones [1983] ICR 17 and Graham v S of S for Work & Pensions [2012] IRLR 759, CA). The band of reasonable responses test also applies to whether the respondent's investigation was reasonable (Sainsbury's Supermarkets v Hitt [2003] IRLR 23). One factor to consider is whether the respondent has acted inconsistently in its treatment of employees but only where those employees are in "truly parallel circumstances". The EAT emphasised in Hadjioannous v Coral Casinos Ltd ([1981] IRLR 352) that flexibility must be retained and employers are not to be encouraged to think that a tariff approach to misconduct is appropriate.

20. When considering the procedure used by the respondent, the Tribunal's task is to consider the fairness of the whole of the disciplinary process. Any deficiencies in the process will be considered as part of the determination of whether the overall process was fair (OCS Group Ltd v Taylor [2006] ICR 1602). The Tribunal will also take account of the ACAS Code of Practice on Disciplinary and Grievance procedures.

21. In coming to these decisions, the Tribunal must not substitute their own view for that of the respondent but to consider the respondent's decision and whether it acted reasonably by the standards of a reasonable employer.

22. In addition, all employees have the right not to be dismissed if the reason for the dismissal, or the principal reason, was that the employee was or proposed to become a member of an independent trade union or had taken part or proposed to take part in the activities of such a union at an appropriate time (section 152 of the Trade Union and Labour Relations Consolidation Act 1992). If that is the reason for a dismissal that dismissal shall automatically be unfair.

23. Discrimination

24. The position on burden of proof in claims of discrimination is set out at section 136 of the Equality Act 2010 ('the 2010 Act'). In summary, if there are facts from which the Court could decide, in the absence of any other explanation, that the claimant has been discriminated against then the Court must find that that discrimination has happened unless the respondent shows the contrary. It is generally recognised however that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with these provisions and the guidance set out in Igen v Wong and others ([2005] IRLR 258) confirmed by the Court of Appeal in Madarassy v Nomura International plc ([2007] IRLR 246). In the latter case it was also confirmed, albeit when applying the pre-2010 Act wording, that a simple difference in protected characteristic and a difference in treatment is not enough in itself to shift the burden of proof; something more is needed. It is important in assessing these matters that the totality of the evidence is considered.

25. Direct discrimination: section 13 of the 2010 Act provides that a person discriminates against another if, because of a protected characteristic, he treats that person less favourably than he treats or would treat others. Age, sex and disability are all protected characteristics.

26. To answer whether treatment was "because of" the protected characteristic requires the Tribunal to consider the reason why the claimant was treated as she was. The Equality and Human Rights Commission Code of Practice states that whilst the protected characteristic needs to be a cause of the less favourable treatment it does not need to be the only or even the main cause.

27. It is a matter for the Tribunal to determine what amounts to less favourable treatment to be interpreted in a common sense way and based on what a reasonable person might find to be detrimental.

28. Section 23 refers to comparators and says that there must be no material difference between the circumstances relating to each case. The relevant circumstances are those factors which the employer has taken into account when treating the claimant as it did with the exception of the protected characteristic (Shamoon v Chief Constable RUC [2003] IRLR 285).

29. Direct discrimination is rarely blatant. Notwithstanding the burden of proof provisions referred to above, we acknowledge that it is usually not easy for a claimant to establish that discrimination has taken place. It is rare for there to be an overtly discriminatory act which is why we look carefully at all the evidence and are willing to draw inferences where appropriate.

30. Indirect discrimination: section 19 of the 2010 Act states:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

31. Section 19(2)(d) is commonly referred to as justification. The burden of establishing justification on the balance of probabilities lies on the respondent and the test is an objective one.

32. Discrimination arising from disability: section 15 of the 2010 Act states:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

33. The EHRC Code advises that there must be a connection between whatever led to the unfavourable treatment and the disability. Further that the 'consequences' of disability include anything which is the result, effect or outcome of the disability. It also gives guidance on the justification defence.

34. The Court of Appeal decision in City of York Council v Grossett ([2018] EWCA Civ 1105) confirms that section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an identified 'something'? and (ii) did that 'something' arise in consequence of B's disability? The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment occurred by reason of A's attitude to the relevant 'something'. The second issue is an objective matter; whether there is a causal link between B's disability and the relevant 'something'. It also confirmed that there is no requirement that A be aware that the 'something' has occurred in consequence of B's disability.

35. In Risby v LB of Waltham Forest EAT 0318/15, the EAT had previously confirmed that only a loose connection is required between the 'something' and the unfavourable treatment. The meaning of 'unfavourable' was considered in Trustees of Swansea University Pension & Assurance Scheme & anor v Williams ([2015] IRLR 885) and described as having the sense of placing a hurdle in front of, or creating a particular difficulty or disadvantaging a person.

36. In Grossett the Court also considered the justification defence and confirmed that the test is objective and it is for the Tribunal to make its own assessment.

37. Reasonable adjustments: section 20 and schedule 8(20) of the 2010 Act make provisions with regard to the duty to make adjustments. If an employer applies a PCP which puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, that employer has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The duty does not arise if the respondent did not know, and could not reasonably be expected to know, that the claimant was disabled and was likely to be placed at that disadvantage (Wilcox v Birmingham CAB Services Ltd 2011).

38. Section 212(1) states that "substantial" means more than minor or trivial.

39. The test whether it was reasonable to make a particular adjustment is an objective question for the Tribunal to answer (Tarbuck v Sainsbury's Supermarkets 2006 UKEAT).

40. In the case of Environment Agency v Rowan ([2008] IRLR 20), the Employment Appeal Tribunal held that in a claim of failure to make reasonable adjustments the Tribunal must identify:

    a. the PCP applied by the employer;

    b. the identity of the non-disabled comparators where appropriate; and

    c. the nature and extent of the substantial disadvantage suffered by the claimant.

Findings of Fact

41. Having assessed all the evidence, both oral and written, we find on the balance of probabilities the following to be the relevant facts.

42. Background

43. The respondent is one of the largest bus operators in London and has a highly unionised workforce. It employs about 330 drivers – about 10% of whom are female - at the South Croydon garage on 10 routes. The drivers are of all ages but Mr Taylor confirmed the majority are under 40. Both Mr Taylor and Mr Bland have received generic training from the respondent regarding equality and diversity; neither have received specific training in relation to the menopause.

44. The respondent has a disciplinary policy and statement of policy on discipline. The statement of policy says, inter alia:

> 'It is emphasised that the purpose of disciplinary action is to ensure that employees maintain a standard of performance and behaviour consistent with their employment and, as a last resort, to dismiss, after due consideration, any employee who is unable or unwilling to meet such requirements. It is not primarily concerned with punishment. Disciplinary decisions will be made on the "balance of probability" following a proper investigation and careful consideration of the evidence.'

and includes a non-exhaustive list of examples of gross misconduct, including failure to observe the rules affecting the safety of other staff or of the public. The disciplinary policy itself is what one typically expects of a large employer providing for a two-stage process and a variety of disciplinary sanctions depending upon the severity of the misconduct.

45. The respondent issues a rulebook applicable to the claimant and of which she was fully aware. Rule 16 states:

> 'At the start of duty, you must examine your bus see that it is properly equipped and fully fit for service…
>
> If any damage or loss of equipment is discovered, it must be reported…
>
> All defects… must be recorded on the appropriate vehicle defect sheet, in accordance with Company policy.'

46. A specific requirement of all bus drivers is that at the commencement of any spell of duty starting in a garage (there are usually two spells in a shift with a meal break in between though there can be three) a first use check of some 46 items is carried out in relation to the vehicle and a VCR is completed in relation to each such check. The VCR form is left on the vehicle. If the shift comprises of two spells both starting at a garage/terminus, therefore, one would expect to see two first use checks completed on the VCR.

47. In March 2014 an open letter was sent to all drivers from the respondent's Director of Operations. It was headed 'Drivers Responsibilities - Vehicle Defect Reporting' and reminded drivers that it was their responsibility to ensure the vehicles they use are roadworthy and that they must report any defects that could prevent safe operation. It said that in most situations a full inspection can be completed prior to service but on a 'live' relief (where a spell starts not at a garage or terminus) it is best to carry out a cursory external inspection and undertake a full inspection at the end of the journey. All defects found must be recorded in writing and the engineers notified. Further, drivers are also required to record on the VCR if in their opinion the vehicle has no apparent defects. The claimant acknowledged that she was aware of this letter and the responsibilities that it described.

48. In respect of each shift drivers also complete a personal log card which records the vehicle numbers driven and arrival and departure times at each terminus.

49. The claimant commenced employment with the respondent as a bus driver in 2002 based at South Croydon. She was employed part time and as a 'spare' driver i.e. she did not have her own regular route but filled in on all routes as required.

50. The claimant accepted that bus drivers are informed that completing log cards and VCRs is required and that if they are not completed this can lead to disciplinary action. This is part of their training and there are notices to this effect on a notice board in the 'output area' of the garage which is where

all drivers sign in and out of duty for each shift. There are also messages to this effect shown from time to time on television screens within the garage - one in the canteen area and another in the output area. In particular a staff notice, dated 19 May 2014, on the noticeboard is headed 'First Use Inspections' (in red large font) and says:

> 'All staff are reminded of their responsibility to undertake a full and proper first use inspection prior to taking a vehicle out of the garage.
>
> The first use inspection is an important part of the Company's Operators licence and as such any individual failing to undertake a full and proper check could render themselves subject to disciplinary action, which could include sanctions up to and including dismissal.'

51. Log cards are checked daily by a supervisor to ensure they have been completed properly. VCRs are similarly checked weekly. Those checks however would not highlight any complete failure to fill out a VCR. At the time of the events in question therefore there was also a quarterly check of one day's VCRs and log cards which were compared to identify any occasion where a VCR had not been completed at all. Following the events surrounding the claimant those checks were increased to monthly.

52. In the event that a VCR is completed but only partially or incorrectly, the respondent adopts a staged approach starting with 'advice' to the driver that a VCR has not been fully completed, the need to do so and any future failures may result in disciplinary action. Mr Smith confirmed that he had received this sort of advice when he had completed the form but refused to sign it.

53. The reasons these checks are so important is not only the obvious safety imperative of ensuring the vehicle is roadworthy but also because DVSA audits of the respondent check proper completion of VCRs. Non-compliance could put the respondent's Operator's licence in jeopardy.

54. <u>The claimant's personal circumstances and union activities</u>

55. At the time of the disciplinary action in question the claimant was aged 48 and had been going through the menopause with symptoms including loss of memory and reduced concentration. In March 2015 in an Occupational Health (OH) referral form Mr Bateson, Mr Taylor's deputy, had noted that the claimant was under investigation for both depression and 'life change'.

56. The claimant is a member of Unite the union and describes herself as an activist. She held no formal role within the local branch but had been involved in a number of campaigns in relation to her employment. In 2011 she set up a Facebook group known as Bus Drivers United which now has some 500 members and is used as a forum for furthering the cause of drivers within the industry. On 30 December 2016 she had also written to the Managing Director of the respondent regarding drivers' pay.

57. A dispute arose at the South Croydon garage in November 2016 regarding route 194 which led to a ballot in December 2016. It appears that the union's campaign was successful at least to some degree. The claimant

participated in that campaign and ballot and associated union meetings but the correspondence with the respondent from the union was conducted by Mr Berry.

58. Both Mr Taylor and Mr Bland denied any particular knowledge of the claimant's union membership or activities. Mr Taylor moved to the South Croydon garage at the beginning of 2016 and says that there was no particular reason for him to deal with the claimant or acquire any knowledge about her union status. Mr Taylor said that he was not aware of her union involvement 'in any way at all'. Given the involvement of the claimant in various campaigns within the garage and wider we find that surprising.

59. The claimant said, although it was not in her witness statement, that Mr Bland had specific knowledge of her union activities as he had confronted and restrained her when she was on a picket line and had said words to the effect of 'I've heard all about you'. Mr Bland said he had been present at the picket line but did not remember talking to the claimant. He had marshalled the pickets onto the pavement for safety reasons but he said he had not touched her or anyone else whilst doing so.

60. Overall, we find that neither Mr Taylor nor Mr Bland had any particular knowledge of the claimant and her trade union activities beyond what was the norm amongst drivers.

61. <u>Events leading to dismissal</u>

62. In September 2016 the claimant was involved in a blameworthy accident within the garage and this led to a disciplinary hearing with Mr Taylor. This was the claimant's first blameworthy accident in her then 14 years of service. The outcome was a caution both in relation to the accident and also her failure on that occasion to properly complete the log card. During her disciplinary hearing the claimant informed Mr Taylor that she was going through the menopause and as a consequence was suffering from memory loss and reduced concentration. No action was taken by Mr Taylor in relation to that. The claimant's case is that she should have been referred to OH at that point to consider her suitability for driving especially as this was her first blameworthy accident. Further she says that Mr Taylor at that point should have done a risk assessment. We agree that a referral to OH, with the claimant's consent, might have been best practice but bearing in mind that the claimant was continuing to present herself as fit to work and Mr Taylor's evidence that based on the situation at the time he did not consider any further action was necessary, we go no further than that. It is certainly the case however that the respondent was aware from September 2016 that the claimant was experiencing the effects of the menopause.

63. The claimant's performance record report shows that that a caution was awarded for a log card error and separately for a VCR error. This was incorrect. Mr Taylor says that this was simply an inputting error by Mr Bateson and that, in any event for disciplinary purposes, the record would not be relied upon and is therefore irrelevant. The claimant says that it is more sinister than that and that it is a striking coincidence that this error was

made just as she was facing disciplinary action for a VCR error. It is not possible to see from the print out when the entry was inputted. We accept Mr Taylor's evidence that this was simply an error and is not indicative of any other motive.

64. Sometime in December 2016, probably in the second half of that month but before the Christmas break, a whistleblower reported to Mr Taylor that one individual (not the claimant but another, male, driver) was not completing VCRs. As a result Mr Taylor asked Mr Chaney, the senior garage supervisor, to carry out a spot check of all routes from South Croydon garage on one day. This spot check revealed that two individuals, the claimant and Mr Leach, had failed to complete VCRs as required.

65. Mr Taylor then asked Mr Chaney to check the records for the claimant and Mr Leach over a five-day period. This showed that they had both failed to complete VCRs on other dates as well.

66. As far as the claimant was concerned, it showed failures to complete a VCR at all for spells on each of 10, 12, 13 & 15 December 2016 (the claimant pointed out she also worked on 11 December 2016 yet no failure was found indicating that she did complete a VCR on that occasion).

67. On 13 January 2017 Mr Taylor issued a notice of a disciplinary hearing to the claimant (known internally as a DP1) which was due to be heard on 23 January 2017. He did not suspend her. His explanation was that although he regarded failure to complete VCRs as safety critical, he considered that he had mitigated the risk of the claimant committing further breaches as the DP1 set out the possible consequences if the allegations were upheld

68. At the request of the claimant the meeting was rescheduled to 30 January 2017 as her choice of union representative was not available. On 30 January 2017 she requested another postponement as again he was not available. That was refused and Mr Berry stood in to assist the claimant. It is clear that she was not happy about this arrangement although she ultimately consented. It appears that Mr Berry did a good job on her behalf both during the hearing itself and assisted with the correction of notes afterwards. He has also attended to support her in this Hearing.

69. There was a significant issue between the parties as to the accuracy or otherwise of Mr Taylor's notes of the disciplinary hearing. Unfortunately no independent note taker was present. Mr Taylor made his own handwritten notes during the hearing and shortly afterwards prepared the typed notes that appear in the bundle. It is clear that they are not verbatim however they are very full and record the substance of what was discussed. The claimant said at the later appeal that the notes were inaccurate in significant ways. An exercise was done during the appeal hearing where Mr Berry explained handwritten notes that he had made on Mr Taylor's typed notes where he believed there were errors or omissions. Mr Bland went through all the alleged omission/errors (he was not actually given a copy of Mr Berry's notes at that stage) and carefully and properly recorded those concerns in his notes of appeal and discussed each of them with Mr Taylor.

Consequently by taking all those exchanges into account, we are able to understand the respective positions of Mr Taylor, the claimant and Mr Berry as to what was and was not said at the disciplinary meeting.

70. Having taken all those matters into account our findings as to the disciplinary hearing are as follows.

71. The hearing was not conducted in a shoddy or biased way as has been alleged by the claimant. Although there are, mostly, relatively minor discrepancies between her and Mr Taylor as to what was said that is almost inevitable in the absence of an audio recording and transcript. Any errors or omissions by Mr Taylor were not as result of any bias or predetermination on his part or any deliberate refusal to consider points that she was making. His admission during the appeal hearing that in some respects Mr Berry's notes were a better version of what was discussed does not detract from that finding.

72. Mr Taylor properly considered the claimant's request for witnesses to attend the hearing but reasonably concluded that their evidence was not relevant.

73. He acknowledged that there had been an error on the performance record as described above.

74. He reasonably declined to adjourn the hearing as requested by the claimant. Her reasons for requesting an adjournment were first because she said Mr Taylor was not fit and proper to conduct it and second because her preferred choice of union representative should be available.

75. Mr Taylor went through with the claimant each of the alleged failures to complete a VCR. The claimant accepted that they were not completed but stated that she felt other people had not been doing so either. She also said that the reason she had not completed the VCRs was because she had been suffering from side-effects of the menopause, that she had raised this at her last disciplinary hearing and that Mr Taylor had failed to make reasonable adjustments for her condition. Mr Taylor asked the claimant how it affected her and she confirmed that she became forgetful. The claimant then presented Mr Taylor with documents outlining the effects of menopause and asked him if he had received any training in relation to women suffering the menopause. Mr Taylor's notes do not show that he expressly answered that question but he confirmed at the appeal hearing and at this Hearing that he has not.

76. Mr Taylor asked the claimant what reasonable adjustments she felt should have been made to which she said that advice and guidance should be given. There is a significant difference between the parties as the claimant says she also referred to the need for health and safety guidance and risk assessments. At the appeal Mr Taylor said he did not recall this being raised. On this issue we accept the claimant's and Mr Berry's evidence that these issues were raised. The claimant further said, although this was not reflected in Mr Berry's notes, that at this point she also asked for reminders on the television screens in the garage and on the monitors in drivers' cabs.

We note that when this item was discussed at the appeal with the claimant and then again with Mr Berry, neither mentioned screens/monitors. On balance we find that this was not raised with Mr Taylor at the hearing.

77. The claimant also advised Mr Taylor that she was under a lot of stress at the time but for non-menopause related reasons.

78. There was a discussion about why the claimant did not appeal the outcome of her previous disciplinary hearing if she felt that that outcome had been unfair. Mr Taylor accepted at the appeal that Mr Berry's notes of the claimant's response to this question were better; namely, that she was proud of her driving record and wanted to protect that and therefore was prepared to accept the caution.

79. The claimant acknowledged that VCRs and log cards are as important as each other. Mr Taylor asked her to explain why she had satisfactorily completed her log cards but not her VCRs and she said that it was because she had been focusing on the cards since the previous disciplinary which drew her attention away from other aspects of the job. The claimant acknowledged that vehicle inspections and recording them is important and confirmed that she had in fact carried out a check on all occasions. She referred to the fact that she was having to telephone the garage several times a day to check her duties and that the disciplinary process should be 'progressive'. Mr Berry was asked for his comments. Mr Berry's notes show that at this point he invited Mr Taylor to adjourn the hearing so that he could take advice from a doctor or HR regarding the menopause given he said he had no training in these issues. At the appeal Mr Taylor confirmed that there had been lots of conversation around this but he could not recall it. We find Mr Berry's notes are accurate.

80. The hearing was then adjourned at 16.27 and reconvened at 17.20. During the adjournment Mr Taylor 'Googled' the menopause. Exactly what he searched and what he found was not before us and he could not now recall. However in his evidence he confirmed that what he found supported what the claimant had been saying to him about the effects of the menopause regarding memory and concentration. He also told us that overall he disregarded the menopause as being the main factor in the claimant's behaviour – he had found there were too many inconsistencies and took into account that she had completed overtime dockets for the shifts on 12, 13 & 15 December.

81. When the meeting reconvened Mr Taylor gave his decision to the claimant. In summary he found that the evidence clearly showed she had not completed the VCRs on seven of the nine occasions she was required to and that she had only completed it when she found a defect. Further that he had taken into consideration arguments regarding the menopause and stress but that it was the responsibility of the employee to decide whether they are fit enough to work and if they are not they must inform the employer which the claimant had not done. Accordingly he found the charge proven and that the failure to complete the VCRs had been a wilful act. He referred to the discrepancy between the log cards being fully completed and the

VCRs not. Mr Taylor did not refer, as he has done in his evidence before us, to the fact that the claimant had also completed overtime dockets in respect of these days. Accordingly the claimant did not have an opportunity to comment on that point which she should have had if Mr Taylor was taking it into account. Mr Berry's notes, which we accept, also show that Mr Taylor said that he had to protect his own 'arse' as he was a nominated transport manager.

82. Mr Taylor informed the claimant that he believed her actions constituted gross misconduct and that despite her service record and length of service his decision was to dismiss her summarily. The dismissal was confirmed in writing to the claimant on the same day together with her rights of appeal. Unfortunately that letter contained an error as it referred to dismissal on notice.

83. Appeal

84. The claimant submitted an appeal on the grounds of:
    a. breach of procedure;
    b. facts of case; and
    c. severity of award.

85. That appeal was heard by Mr Bland and Ms Ryland (Operating Manager – Thornton Heath) on 24 February 2017. On this occasion the claimant was accompanied by Mr Ainsworth (a Unite convener employed by a different bus company). As described above, Mr Bland went through the claimant's concerns about the accuracy of Mr Taylor's note of the disciplinary hearing first with her in some detail, then with Mr Berry and with Mr Taylor.

86. Mr Ainsworth was asked to put his case forward which he did stating that it was wrong to go straight to conduct and dismissal, that the claimant had made mistakes and appropriate sanctions might be a final caution and retraining and that other staff received advice letters not summary dismissal. He also referred to her long record as a good driver with good attendance. In conclusion the claimant confirmed that if she had been told of her omission then she would have corrected it, that she was aware of the contents of the garage notice boards and that she regularly checked them.

87. Mr Bland and Ms Ryland then adjourned and when the meeting reconvened, some 3½ hours later, Mr Bland read out a summary of their decision that Mr Taylor's decision was upheld. That summary included a statement that they had spoken to Mr Taylor and confirmed that there was an error in the termination letter and the termination was summary, that paperwork is a critical part of the procedures as noted in numerous notices and posters in garages and that it was fair to conclude on the balance of probability that the claimant had not carried out checks and had not complied with procedure by properly completing VCRs and that the charge was proven. Further taking into account the claimant's length of service and general record, Mr Taylor's decision had fallen within the band of reasonable responses. He confirmed that they had reviewed the claimant's personnel records and considered her suggestion that the omissions had been as a

result of memory issues linked to the menopause but on balance did not accept that this had been justification for her actions.

88. Other Employees

89. The claimant compares herself to various other employees of the respondent. Our findings as to the relevant circumstances of relevant other employees are set out in the Appendix to this Judgment.

90. Unpaid wages

91. The respondent pays an annual award to employees who meet the criteria for safe driving. This is paid towards the end of a calendar year in respect of that same calendar year but the amount is calculated by reference to the number of avoidable collisions in the previous calendar year. Accordingly although it is calculated by reference to previous years it is not paid in arrears. The claimant's payslip dated 16 December 2016 shows that she was paid £145.60 for a safety allowance.

Conclusions

92. Unpaid wages

93. Given our findings of fact above, when the claimant was paid on 16 December 2016 in respect of the 2016 annual safety award, the respondent had no further liability towards her. Accordingly her claim for unpaid wages is dismissed

94. Reason for dismissal: claims of automatically unfair dismissal and direct discrimination

95. We have regard to our findings of fact that although Mr Taylor is likely to have generally known that the claimant was active in the union neither he nor Mr Bland had particular knowledge of the claimant or her union activities. Although she had been active in November and December 2016 on collective issues, we find that they were not particularly aware of this and it had no bearing on their decisions with regard to her disciplinary process (even taking into account our comments below on the harshness of the penalty). Therefore the claim of automatically unfair dismissal claim fails.

96. The claimant also says that the reason for her dismissal was her age, disability and/or gender.

97. In relation to age, the claimant compares herself to drivers aged under 40 and in particular Mr Willott and Mr Smith. Mr Smith would only have been under 40 until 1998. We saw no evidence that he received more lenient treatment than the claimant at that time. Any such evidence would in any event be of limited relevance given the passage of time. The evidence we did have about Mr Smith was when he would have been in his 50s and did not relate to a total failure to complete a VCR. As for Mr Willott, the claimant did not refer to him at all in her evidence or questions for the respondent. The information in the Appendix was obtained from the respondent's

documents. This shows that Mr Willott's dismissal, for misconduct different to the claimant's, was reversed on appeal. We do not however conclude from this that age was a factor in the respondent's decision making.

98. As for whether the claimant's sex was the reason for her dismissal, there was no evidence before us to support this claim other than a general allegation that Mr Bland in particular is a misogynist and 'part and parcel of institutionalised sexism prevalent in the respondent'. She relied upon an allegation that he has reinstated 'numerous males who have been dismissed for gross misconduct, for example sexual assault, and theft but has failed to my knowledge to reinstate any females'. These are serious allegations but there was no compelling evidence to support them. We conclude that the claimant was not dismissed because of her sex.

99. As for the allegation that the reason for the dismissal was the claimant's disability, there was no evidence before us to support such a finding other than the claimant's belief and the fact that she had been going through the menopause and had been dismissed. We conclude that the claimant was not dismissed because of her disability.

100. Accordingly the claims of direct age, sex and disability discrimination fail and are dismissed.

101. <u>Unfair dismissal</u>

102. We accept that the respondent's reason for the claimant's dismissal was what they regarded as her misconduct i.e. wilfully failing to carry out first use checks and complete VCRs on the specified dates.

103. We find that the respondent's belief in that misconduct was genuine. Both Mr Taylor and Mr Bland formed a genuine belief that the claimant had wilfully failed to complete the inspection and VCRs.

104. As to whether there were reasonable grounds for that belief the respondent relies on:
    a. The claimant having successfully completed log cards (having previously been reminded to complete them) for the same shifts that she did not complete VCRs.
    b. Further, she completed VCRs on those shifts when she had found defects.
    c. The efforts of the respondent to communicate to drivers the importance of their obligations in this regard.

105. We find that those are reasonable grounds upon which to base the belief especially as when the VCRs are analysed it shows that she only filled them in when a defect was found and on no occasion on the four days in question did she fill one in when there was no defect. (Mr Taylor also referred to the claimant's successful completion of overtime forms. This was not put to her for comment however at either dismissal or appeal stage and therefore it is not reasonable for the respondent to rely on that ground in this context.)

106. We also find that there had been a reasonable investigation when that belief was formed. All relevant log cards and VCRs were examined (albeit that those in relation to one day were obtained during the disciplinary hearing). As far as CCTV is concerned, the claimant says if it had been viewed it would have shown that she had in fact carried out the checks in which case her only failing was not completing the VCRs. Mr Taylor's evidence was that he did not consider this but, in any event, it is wiped after 10 days and therefore was not available to him. It would have been best practice for CCTV to have been available and reviewed as part of the investigation. It was not outside the band of reasonableness however for it not to be reviewed especially as the issue was not raised by the claimant at either the disciplinary or appeal hearing.

107. Mr Taylor was expressly asked to take advice from HR or a doctor regarding the effects of the menopause, which he did not do. He did have the information given to him by the claimant during the hearing which he considered during the adjournment and he did his own Google search. It was not unreasonable, having reasonably concluded that the claimant had wilfully committed the misconduct rather than it being because of the menopause, to decline to make further enquiries about the menopause.

108. The claimant says that the process followed by the respondent was unreasonable. We do not agree. She specifically alleged that the outcome was predetermined which we do not find to be the case. Mr Taylor was not biased nor tainted by any involvement with the whistleblower. We find that he was open-minded throughout. His notes were reasonable and the error on the claimant's performance record report was just that - an error - and it was not used against her. The decision not to agree to a second postponement was not unreasonable and it was reasonable to deny the claimant the opportunity to call witnesses at both stages of the process as they were not relevant. Mr Taylor went through with her in some detail why she wanted them and Mr Bland reviewed the position at appeal. Finally there was no unreasonable delay in concluding the process – in fact it was relatively prompt.

109. Turning to whether it was within the band of reasonable responses to summarily dismiss the claimant we have considered this very carefully as in our own view, which of course is not what is important, the penalty applied was harsh and close to the edge of the band. The relatively long service of the claimant, the statements within the disciplinary process that dismissal is a last resort and Mr Taylor's belief that it was acceptable for the claimant to continue driving whilst the misconduct was investigated as she had been put on notice of her failure (which suggests that a lesser penalty, say a final warning, could have had the same effect) could all indicate that a lesser penalty would be appropriate.

110. However, in light of the notices and warnings to employees posted in the common parts, which make it very clear that failure to comply with these requirements can lead to disciplinary action including sanctions up to and including dismissal, the safety and business critical nature of proper checks and record-keeping and the respondent's genuine belief reasonably formed

that the claimant had wilfully failed to complete the checks and the VCRs, we cannot find that summary dismissal was outside the bounds of reasonable responses.

111. Finally, was the claimant treated consistently with other employees? Having regard to the information contained in the appendix, we note that Mr Leach was also summarily dismissed for the same offence as the claimant identified in the same audit. The claimant points out that Mr Leach did not appeal and that we do not have a record of what he said at his disciplinary meeting nor details of his work record and therefore he may not be a true comparator. This is all true but he does appear to be the closest comparator based on the information before us. None of the other individuals referred to in the Appendix are in truly parallel circumstances with the claimant although there are some that have been summarily dismissed for similar offences (Mr Skerrett and Mr Beverley). We do not conclude that there was inconsistent treatment of the claimant such as to render her otherwise fair dismiss unfair.

112. Claims of Indirect Discrimination

113. The PCP relied upon by the claimant in respect of all three claims of indirect discrimination (age, sex and disability) is the respondent's practice of requiring all drivers to complete VCRs and disciplining them if they fail to do so. Clearly on the facts that was the respondent's practice and they applied it to all their drivers.

114. The menopause clearly only has effect where there is a combination of the female gender and age but as section 14 of the 2010 Act (which provides for dual protected characteristics) is not in force, we have to analyse the situation by reference to each of the relevant protected characteristics separately.

115. The PCP when applied to female bus drivers does not put them at a particular disadvantage. Neither does it put bus drivers over 40 at a particular disadvantage. Unfortunately therefore the statutory regime of indirect discrimination does not lend itself to protect the claimant by reference to her age or gender in these circumstances. (In passing we note that the unreported Tribunal case that the claimant referred us to, Merchant v BT, is not of assistance to her not only because it is a first instance decision but also it only considered allegations of direct sex discrimination in the context of a capability dismissal.)

116. Even if we are wrong in that analysis, and somehow the facts can be analysed to bring them within the statutory regime, we have considered whether the claimant has satisfied the next required step, namely whether the PCP actually put her at a disadvantage. This requires us to find as a matter of fact whether the claimant's failure to complete the VCRs was because of memory loss/poor concentration resulting from the menopause. Having regard to the factors we identified above as reasonable grounds for the respondent's conclusion that she was guilty of misconduct together with her successful completion of overtime claims for some of the same shifts.

We also have an expectation that if memory loss had been the cause of the failures there would be a random pattern to those failures which there was not. Accordingly, we conclude as a matter of fact that the claimant's failure to complete VCRs was not due to the menopause and therefore her claim of indirect discrimination fails also at that stage.

117. Again, if we are wrong about that, we have gone on to consider the respondent's primary argument that in any event any indirect discrimination could be justified. We accept that the respondent had a legitimate aim for the PCP, namely maintaining safety for members of the public, other road users and employees but we conclude that dismissing an employee for a first offence in circumstances where that misconduct was as a result of a discriminatory PCP, without much more investigation would not be proportionate. Instead, we would expect a respondent to have proper regard to what the employee was saying, take appropriate advice from at least HR and probably OH, give proper consideration to the claimant's medical position and actively consider whether it was right to take action under either the disciplinary process or any capability process. Accordingly, if the claimant had been able to establish the first three requirements of indirect discrimination, the respondent would not on these facts have been able to justify their action.

118. That is not the situation however and the claims of indirect age and sex discrimination fail and are dismissed.

119. The claim of indirect disability discrimination is easier to analyse as there is a clear protected characteristic that can be used to identify the relevant comparator group. We also have an actual person, Mr Leach, as an example of that comparator group and we know that he was dismissed for the same misconduct as the claimant.

120. In any event for the same reason as identified above, we conclude that on the facts that the claimant did not suffer any disadvantage because of her disability. Therefore the claim of indirect disability discrimination also fails.

121. <u>Discrimination arising from disability</u>

122. Asking ourselves the first question posed by Grossett, did the respondent dismiss the claimant because of memory loss/poor concentration, we conclude that the answer is no because the reason for the dismissal – looking at the respondent's 'state of mind' – was gross misconduct. They found there had been a wilful failure to complete. They did not accept the memory loss explanation.

123. Accordingly the claim of discrimination arising from disability also fails.

124. <u>Reasonable Adjustments</u>

125. The claimant relies upon the same PCP as identified above. On the facts as we have found them the claimant was not put to a substantial

disadvantage as a result of that PCP and therefore the duty to make reasonable adjustments was not engaged. That claim therefore also fails.

126. Concluding observation

127. The claimant in the course of her cross examination of the respondent's witnesses and her submissions referred to the fact that the respondent does not offer specific training for its employees on the menopause notwithstanding the TUC's recommendation that employers do so. That might be something that the respondent wishes to consider addressing.

_____
Employment Judge K Andrews
Date: 10 August 2018

Appendix

Dates: Various occasions pre-2014
Name: Mr S Smith
Gender: Male
Age: 60
Garage: South Croydon
Charges: failure to complete VCR by refusing to sign
Sanction: series of warnings

Dates: March 2015
Name: Mr L Pareja-Rios
Gender: Male
Age: 46
Garage: Brixton
Charges: failure to carry out a satisfactory first use check leading to unfit bus being in service
Sanction: summary dismissal – upheld on appeal

Date: January 2016
Name: Mr D Appasamy
Gender: Male
Age: 42
Garage: South Croydon
Charges: special probation review – attendance and failure to carry out a vehicle check
Sanction: summary dismissal – reduced to dismissal on notice on appeal

Date: May 2016
Name: Mr D Beverley
Gender: Male
Age: 68
Garage: South Croydon
Charges: (1) failure to carry out a vehicle check (2) making a false statement re checking of bus (rule 16)
Sanction: (1) final caution (2) summary dismissal – upheld on appeal

Date: August 2016
Name : Mr Onisifrou (not employed by the respondent)
Gender: Male
Age: 32
Garage: Wood Green
Charges: failure to carry out a first use inspection check
Sanction: summary dismissal – upheld on appeal

Date: January 2017
Name: Mr C Leach
Gender: Male
Age: 61
Garage: South Croydon
Charge: failure to carry out a vehicle check and record
Sanction: summary dismissal – no appeal

Date: April 2017
Name: Mr C Skerrett
Gender: Male
Age: 47
Garage: Norwood
Charges: failure to carry out first use inspection
Sanction: summary dismissal – unclear if he appealed

Date: unknown
Name: Mr P Willott
Gender: Male
Age: under/around 40
Garage: South Croydon
Charge: not reading notices and completing scheduled mileage
Sanction: final caution and dismissal – reinstated on appeal