EMPLOYMENT TRIBUNALS

Claimants:	Mr Jason Beaman	
Respondent:	The Southern Vectis Omnibus Company Limited	
Heard at:	Southampton	On: 1 and 2 October 2018
Before:	Employment Judge Gardiner	

Representation:

Claimant: Ms I Burkett, Employment Advisor
Respondent: Mr P Mills, Consultant

JUDGMENT was sent to the parties on 18 October 2018, and a request for Written Reasons was received within the relevant time limit, the following Written Reasons are provided.

WRITTEN REASONS

1. On 22 January 2018, Mr Beaman was summarily dismissed from his role as a bus driver employed by the Respondent. The reason for his dismissal was gross misconduct as explained in the disciplinary outcome letter written by Simon Moye, the disciplinary officer.

2. Mr Beaman claims that his dismissal was an unfair dismissal contrary to Section 94 of the Employment Rights Act 1996. He also claims that this dismissal without any notice pay was a wrongful dismissal.

3. I have heard evidence from Mr Bob Bartram, who conducted the disciplinary investigation, from Mr Simon Moye who heard the disciplinary hearing and from Mr Richard Tyldsley, who conducted the appeal. I have also heard evidence from the Claimant. All witnesses confirmed their written witness statements and were cross-examined by the other side’s representative. At the end of the case, both sides handed up written submissions, which they amplified orally.

4. I will first consider Mr Beaman's unfair dismissal claim, before turning to consider his claim for wrongful dismissal.

The law – unfair dismissal

5. Under Section 98(4) of the Employment Rights Act 1996, the Tribunal is to consider whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, in accordance with equity and the substantial merits of the case.

6. On a claim for unfair dismissal, where the reason advanced for the dismissal is the Claimant's conduct, the Tribunal must consider whether the dismissing officer genuinely believed that the Claimant was guilty of misconduct, whether that was a reasonable belief and whether the belief was reached after a reasonable investigation had been carried out.

7. It is not for the tribunal to substitute its own decision as to whether the circumstances warranted dismissal. Instead, the Tribunal must consider whether the decision to dismiss fell within the band of reasonable responses that a reasonable employer would take, given the employer's understanding of the nature of the misconduct for which the Claimant was being disciplined.

8. When considering whether there was unfairness in relation to the procedure that led to the dismissal decision, the Tribunal is also to consider whether the procedure that was adopted fell within the range of reasonable procedures open to a reasonable employer in the circumstances. It is also appropriate to consider the extent to which the procedure adopted corresponded to the procedure set out in the ACAS Code of Conduct on Disciplinary and Grievance Procedures.

9. In an unfair dismissal case, the language of Section 98(4) of the Employment Rights Act 1996 is wide enough such that an expired warning is a potentially relevant circumstance that can be taken into account when deciding whether a reasonable employer was entitled to dismiss for the later misconduct : *Airbus Limited v Webb* [2008] ICR 561 – see paragraphs 46, 47, 55 and 74 in particular.

The facts

10. On 4 January 2018, the Respondent received a complaint from a customer in relation to Mr Beaman. The customer alleged that Mr Beaman had failed to stop at a request bus stop at which she was standing. In order to consider this complaint, the Respondent viewed the CCTV footage taken from cameras mounted on Mr Beaman's bus. In so doing, it was noticed that Mr Beaman was using a mobile telephone on two occasions whilst seated behind the wheel in his cab.

11. Mr Bartram was asked to carry out a disciplinary investigation. He wrote to Mr Beaman on 14 January 2018, suspending him pending the outcome of the investigation. Mr Beaman wrote to the Respondent setting out his version of

events. The Respondent also obtained a statement from Mr Andrew Gore, Service Quality Controller. It was Mr Gore who Mr Beaman had telephoned on two occasions whilst he was sitting in his cab.

12. A disciplinary hearing took place on 22 January 2018. The hearing was conducted by Simon Moye, Operations Manager. During the hearing the following question was put to Mr Beaman by Mr Moye :

> You were seen on the mobile phone with the engine running stationary, handbrake on at Bullen Cross, you then did same again at Malborough Road. Do you agree that this happened ?

13. In response, Mr Beaman said "Yes I do". He did not seek to suggest that his engine was not running or that he had not been using his phone. His explanation was that he was using his phone to telephone his controller, Mr Gore. On the first occasion, he was alerting Mr Gore to the fact that the road had been closed ahead of him due to a fallen tree, and asking Mr Gore to advise him of a new route. In that call Mr Gore had asked him to call back when he reached a particular point on his route. The second call was again to Mr Gore when he had reached the point at which he had been asked to telephone.

14. He was asked : "The situation was not an emergency – do you agree ?" to which his answer was "I agree". The dialogue went on : "You could have left the cab?" "I agree".

15. There was a discussion about the Respondent's mobile phone policy. The policy which was current at the time was written in 2012 and expressed in the following terms :

> The company has a zero tolerance approach regarding the use of mobile phones … and other electronic mobile devices. The Company must ensure the safety of our customers, the public and employees. Employees have a duty to work with maximum care and efficiency. The use of a mobile phone (or other electronic mobile device) whilst driving or in charge of a vehicle is highly likely to affect performance, efficiency and behaviour and therefore compromises safety.
>
> The following sets out the company policy for the use of mobile phones and other electronic mobile devices for those employees in charge of a vehicle.
>
> 1) Whilst driving a PCV vehicle it is not permissible to use a mobile phone or hands free kit at anytime. Should you need to make a call you must safely secure the vehicle, switch off the engine and exit the cab. Any employee driving any non PCV vehicle on company business (including your own vehicle being used on company business) must not use a mobile phone unless a car installed hands free kit is used.

2) Any employee whilst driving any vehicle must not use, manipulate or handle any electronic mobile device such as a mobile phone, smart phone, tablet PC, PDA, or eBook reader. Employees should only consult an electronic device if they are stationary with the handbrake applied.

Notwithstanding point 1 above an employee in charge of a company vehicle may use a mobile phone whilst in the cab area (but not in the driving seat) provided the vehicle is stationary with the handbrake applied and the employee :

a) Is contacting Control or the Police for assistance. Note that in normal circumstances the employee is expected to use any radio communication device if provided on the vehicle. (If there is a risk to personal safety a mobile phone can be used in the cab area as long as the vehicle is stationary and the handbrake is applied)

b) Has been instructed by Control or Engineers regarding a defective bus which requires the employee to be in the cab area/driving seat so that they can communicate with Control/Engineers to assist with the diagnosis or rectification of a defect. Again, in normal circumstances, the employee is expected to use any radio communication device provided on the vehicle.

…

Breach of any of these rules could result in disciplinary investigation and were proved, appropriate action will be taken. Note that a proven breach of points 1 and 2 above will be considered as Gross Misconduct.

16. Mr Beaman signed a copy of the Policy to confirm that he had read and understood and would abide by the policy details as listed above.

17. In September 2014, Mr Beaman received a Final Written Warning for his use of a mobile phone whilst seated in the cab at Newport Bus Station. That warning was to remain on his file for a period of 12 months after which time the warning would be considered spent.

18. The letter went on to say : “The company policy is quite clear that any usage of a mobile telephone whilst seated in the cab of one of our vehicles, may result in disciplinary action being taken with any award issued up to and including that of dismissal with no notice period. If it is found that there is a repeat of this matter, then you may be dismissed”

19. Mr Beaman’s case before the Tribunal has been that the policy was very unclear. However, there is no evidence that he disputed what was written in the letter in which he previously received a final warning, or asked for further clarification of the policy. I accept that the policy was not posted on a noticeboard so that it was not readily available for him or other employees to view.

20. In 2017, the Respondent issued a Staff Handbook to all employees. That document contained the following wording [96]

> The Company has a zero tolerance approach regarding the use of mobile phones (including ear pieces even if those are not being used) and other audio equipment.
>
> The company must ensure the safety of our customers, the public or employees. Employees have a duty to work with maximum care and efficiency. The use of a mobile phone (or personal audio equipment) whilst driving or in charge of a company vehicle is highly likely to affect performance, efficiency and behaviour and therefore compromises safety.
>
> Employees are therefore not permitted to use mobile phones (or personal audio equipment) or manipulate or handle any electronic mobile device … whilst the vehicle is in motion. Mobile phones should not be used for any purposes when the driver is sitting behind the wheel and other electronic devices may only be consulted if the vehicle is stationary with the handbrake applied.
>
> Any breach of these rules is liable to be regarded as gross misconduct and is an extremely serious issue. Further details are contained within the company mobile phones and other electronic mobile devices policy and employees are required to comply with these requirements at all times.

21. At the disciplinary hearing, Mr Beaman set out his understanding of the policy, namely that he was not permitted to make private calls from the cab. This was not an accurate summary of the contents of the policy.

22. At the end of the disciplinary hearing Mr Moye adjourned the meeting in order to consider the appropriate outcome. The meeting resumed an hour later when Mr Moye informed him that he would be dismissed for gross misconduct. The decision was confirmed in a dismissal letter which was dated the same date.

23. Mr Beaman exercised his right to appeal. His main ground of appeal, according to the notice of appeal, was that he had been led to believe that it was acceptable to call the controller from the cab area, because no disciplinary sanction had been applied when previously disciplined for calling the controller from the cab area.

24. His appeal was heard by Mr Richard Tyldsley. He upheld the dismissal decision. The appeal outcome letter contained the following wording :

> You made a telephone call on your mobile phone whilst seated in the cab of your bus, with the engine running and in the highway.
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> You seemed oblivious to fact that your actions were against the law and company policy. As you are a professional driver, this was very concerning.

> You had received several copies of the mobile phone policy, yet you still failed to adhere to it.
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> You had received a Final Written Warning in 2014 in relation to the use of your mobile phone whilst in charge of a bus.
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> You thought it was okay to use your mobile to call control, but not make personal calls, and seemed generally unaware of your responsibilities around the use of your mobile phone whilst in charge of a vehicle.

25. Mr Beaman remained dissatisfied with the outcome of the appeal. He asked for and was granted the opportunity to have a special review of the dismissal decision. This was a paper review carried out by the Managing Director, Mr Andrew Wickham. He did not speak to Mr Beaman, Mr Moye or Mr Tyldsley. Mr Wickham said as follows in his outcome letter dated 16 February 2018 :

> I have reviewed the notes of the two meetings. In the original disciplinary meeting, Mr Moye stated that "You were seen on the mobile phone with the engine running stationary, handbrake on at Bullen Cross, you then did the same again at Malborough Road. Do you agree that this happened ? You replied, Yes I do"
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> …..
>
> From the notes of the interview, I am satisfied that you did use a mobile phone whilst sitting in the bus cab with the engine running on two occasions.
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> I am not considering whether the outcome of your disciplinary meeting on 9th September was appropriate. This disciplinary award was in force for one year. It had therefore expired and should have not been taken into account in your 22nd January disciplinary interview or 25th January appeal.
>
> The company's position on mobile phone use is simple and clear. It is that no employee should use a mobile phone at any time whilst they are in control of a company vehicle. The company makes it clear that being in the cab of a vehicle with the engine running means that a driver is in control of the vehicle. It is also clear that contravention of this policy will be regarded as gross misconduct and can result in summary dismissal. Therefore, it is my belief, that even without referring to an expired award, the result would still have been the same.
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> Having reviewed your case I do not believe that there was a significant failure in the administration in the procedure, nor has there been a serious issue of principle, nor has there been a clear injustice. The company's policy on mobile phone use is clear and well known, and the fact that Mr Tyldsley heard your appeal is not irregular. He is a manager more senior to Mr Moye and was not previously involved in your case.

26. The company's position on mobile phone use is simple and clear. It is that no employee should use a mobile phone at any time whilst they are in control of a company vehicle. The company makes it clear that being in the cab of a vehicle with the engine running means that a driver is in control of the vehicle. It is also clear that being in contravention of this policy will be regarded as gross misconduct and can result in summary dismissal.

27. It was suggested by Mr Beaman that his dismissal was inconsistent with the way in which other employees had been treated. His difficulty is that he identified those employees for the first time at the start of the final hearing and has not led detailed evidence as to the circumstances in which those individuals have been treated. Before the start of the hearing, he had not asked the Respondent to disclose details of how those other employees were treated. The Tribunal asked the Respondent to provide such details as it could as soon as it could before the Final Hearing concluded. Limited details were provided about RH, DF and two other drivers.

28. So far as RH is concerned, RH was allegedly also on his phone on the same day, also whilst seated in the drivers seat in order to talk to the Controller and get an alternative route. However, Mr Beaman's only basis for alleging this is what he was told by the Police. It was not brought to the Respondent's attention at the time and so was not something they could investigate.

29. So far as DF is concerned, he received a final written warning for allegedly listening to the radio through an earpiece. However, that was a materially different situation in that he still had two hands on the wheel. DF had denied listening to anything and apparently did not have any previous disciplinary record, whether expired or current.

30. Two other drivers were apparently dismissed for mobile phone misuse and only re-employed recently. The fact that they were dismissed rather supports the Respondent's zero tolerance approach to this issue.

The position under criminal law

31. The position is that the criminal law prohibits the use of mobile phones whilst driving. What amounts to driving has been the subject of caselaw. From the limited research provided to me, the upshot appears to be that it is only when a vehicle is safely parked that there is no contravention. Using the phone whilst in stationary traffic or even whilst stationary with the engine running still amounts to 'driving'.

Unfair dismissal - conclusions

32. The reason for the dismissal was the Claimant's alleged gross misconduct – it was not (as the Claimant alleged) because of his particular rota and the

company's desire that employees should be offering more flexibility – there is no evidence that this was a factor in the Claimant's case.

33. When he took the decision to dismiss, Mr Moye genuinely believed that the Claimant was guilty of misconduct, namely using his mobile phone in circumstances when this was prohibited by the company's policy on the use of mobile phones.

34. This was a reasonable belief – Mr Beaman had accepted in the disciplinary hearing that he was seated in his cab when he telephoned and that the engine of the bus was still running. He had accepted that this had been the case on two separate occasions in the same shift, and that in neither case was it an emergency. The wording of the applicable policy makes it clear that use of a mobile phone whilst in the driving seat is not permitted, even if calling the Police.

35. This belief was reached after a reasonable investigation. The relevant CCTV footage had been examined; evidence had been gathered from Mr Gore, the Controller to whom Mr Beaman was speaking; and Mr Beaman had been given a full opportunity to set out his version of events – he had accepted in the disciplinary hearing that the engine was running. He has not suggested any further steps that should have been taken to investigate the incident beyond those that were taken. The investigation clearly fell within the band of reasonable investigations.

36. So far as the sanction of dismissal was concerned, there were clear mitigating factors in the Claimant's favour : he was calling the Controller at the time, rather than making a personal call; the Police were at the scene when he made the first call and did not appear concerned that he was making a call on his mobile whilst seated in the drivers seat; for whatever reason, he had not been punished previously when he had been previously accused of mobile phone misuse at a point when customers had been boarding at Ryde Bus Station. The evidence about that incident was scant.

37. However, dismissal was within the band of reasonable sanctions that a reasonable employer could taken, given Mr Moye's reasonable belief as to Mr Beaman's misconduct, for the following reasons :

    a. In phoning the controller whilst seated in the driver's seat with the engine running, he was in breach of the Respondent's policy on mobile phone usage;

    b. He had done this on two occasions within the same shift;

    c. By the date of the incidents for which he was being disciplined, he ought to have clearly understood the policy, given that he had been previously disciplined for misuse of mobile phones and received a final written warning. The disciplinary outcome letter in 2014 had made it clear that "any use of a mobile telephone whilst seated in the cab of one our vehicles, may result in disciplinary action being taken";

d. The policy had stated that there was a zero tolerance approach to the use of mobile telephones. This had been reiterated in the company handbook that he had been given in 2017;

e. He accepted that he could have exited his cab in order to make the call and could not provide an acceptable explanation for why he had not done so;

f. It was relevant to consider the previous final written warning in relation to the mitigating circumstances : A reasonable employer could not take into account the 2014 final written warning to justify dismissal where dismissal would otherwise have been an excessive sanction, given that that sanction had now expired. However, in circumstances where the incident in January 2018 was potentially severe enough in itself to justify dismissal, it was relevant to the extent of the mitigating circumstances for a reasonable employer to have regard to the fact that he had previously been disciplined for breaching the same policy. The Claimant did not have an unblemished disciplinary record during his fifteen and a half years of service. He had previously been disciplined for the very same issue. The outcome letter had also warned him that "if it is found that there is a repeat of this matter, then you may be dismissed";

g. Unless he was safely parked up, then using a mobile phone seated in the driver's seat was against the law. On the first of the two occasions in January 2018, Mr Beaman was not safely parked up. He was waiting in a queue of traffic in circumstances where the road was blocked with his engine running. On the second occasion, the evidence indicated that he had pulled into the side of the road, although the bus's engine was still running.

38. Various criticisms have been made of the procedure that was followed – I reject the suggestion that the dismissing officer Mr Moye was involved in the investigation or that Mr Bartram was involved in the disciplinary decision because he attended the disciplinary meeting as a notetaker. At one point it was being suggested that the Claimant had been deprived of relevant documents, but it is now accepted that he had sufficient opportunity during the process to consider the evidence that was being used in the disciplinary process.

39. I do not consider that the Respondent used the Claimant's previous expired final written warning as the factor that justified his dismissal, although the Respondent should have been clearer in the outcome letter as to the relevance of that decision to his dismissal – namely, as I have already found, that it was referred to because it showed that the Claimant knew of the policy and that it was relevant to the limited extent that it could not be said that the Claimant had a clean disciplinary record, particularly when it came to mobile phone use.

40. Therefore the decision to dismiss was within the band of reasonable responses. It was a fair dismissal. It is not necessary for the Tribunal to consider the issue of *Polkey* or of contributory fault.

Wrongful dismissal

41. The Claimant is entitled to be paid his notice pay, unless his conduct amounts to a repudiatory breach of his employment contract, entitling the Respondent to bring the contract to an immediate end.

42. In order to determine this issue, the Tribunal has to make its own findings of fact as to the nature and the extent of the misconduct, and then evaluate the gravity of the conduct. Unlike in an unfair dismissal case, it is not reviewing the reasonableness of the decision that the Respondent has taken.

43. In this case, the facts are largely uncontroversial. The only difference between the view taken by Mr Moye and the Claimant's evidence is that he considers it likely that his engine was switched off on both occasions when he called the Controller, although he accepted that he could not be 100% certain on this issue. In my view, the likelihood is that the engine was still running, as the Claimant admitted in the disciplinary hearing. As a result, the bus was not safely parked up when the calls were made.

44. There are mitigating factors that reduce the seriousness of the Claimant's conduct. I accept that the use of the mobile phone was for work purposes. I accept that it was done on the first occasion when the Police were present and the Police did not seem to have a problem with the way in which he was using his mobile telephone. I accept customer safety was not compromised on either occasion as a result of the use of the phone. I accept that it appears on a previous occasion he had not received a sanction for misusing his phone when customers were boarding, although the precise circumstances of this potential disciplinary matter have not been clearly stated in evidence.

45. However, the Claimant's use of his phone was in breach of the Respondent's policy in that he was sitting in the driving seat when he did so and his engine was running. That policy emphasised a zero tolerance approach to the misuse of mobile telephones by drivers. He knew or ought to have known the details of the policy from signing it, from the disciplinary action he faced in the past, and from receiving the company handbook. There was good reason for the Respondent's policy to be as strict as it was – the criminal law also adopts a strict approach to misuse of mobile telephones. Strictly speaking the Claimant's use of his phone on both occasions on 3 January 2018 was a breach of the criminal law.

46. In addition, the Policy makes it clear that mobile phones should be placed out of sight of customers. In using his phone seated in the driver's seat he was potentially visible to customers. The sight of a driver on his phone in the driver's seat whilst the engine was running was potentially a matter that could have caused reputational damage to the Respondent, whether or not it also caused customers to complain.

47. In these circumstances, albeit with some hesitation, I have come to the view that the Claimant's conduct was sufficiently serious to amount to a repudiatory

breach of his employment contract entitling the Respondent to terminate his employment without notice.

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Employment Judge Gardiner

Dated: 18 January 2019