Case Number: 3327067/2017

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr S S Gill **v Connect 2 Work Menzies Aviation (UK) Limited**

Heard at: Watford **On**: 1-3 October 2018
4 October 2018 (chambers)

Before: **Employment Judge R Lewis**
Members: **Mrs G Bhatt MBE**
Mr C Surrey

Appearances
For the Claimant: Mr K Clair, Solicitor
For the Respondent: Mr B Frew, Counsel

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent and his complaint of unfair dismissal succeeds.

2. The claimant contributed to his own dismissal by a factor of 100% in relation to the compensatory award and by 70% in relation to the basic award.

3. The respondent is ordered to pay to the claimant compensation of £3,299.46 as the basic award for unfair dismissal.

4. The claimant's claim of wrongful dismissal fails and is dismissed.

5. The claimant's claims of racial discrimination, howsoever formulated, fail and are dismissed.

REASONS

Procedural

1. This was the hearing of a claim presented on 14 August 2017. Day A was 26 June and Day B was 13 July.

2. In accordance with the usual practice, where a claim involves a discrimination element, the claim was listed for case management when it was served.

3. By its response, the respondent denied all allegations, and asserted that the claimant had been fairly dismissed for gross misconduct. On Form ET3 it stated that it employed over 5,000 employees.

4. On 3 November the claimant sent to the Tribunal further particulars, in anticipation of the case management hearing due to be heard on 8 November. In the event, the case management hearing was adjourned and re-listed at Reading on 5 April 2018, when it came before Employment Judge Vowles. His Order was sent on 30 April. Neither the Particulars nor the case management order was in the bundle. Judge Vowles listed the present hearing.

5. Judge Vowles identified three heads of claim, direct racial discrimination, unfair dismissal and wrongful dismissal. He noted that the claims were "sufficiently set out" in the particulars of 3 November 2017. He gave case management orders, including an order for disclosure. Disclosure was to be completed by 7 June.

6. There was an agreed bundle of about eighty pages. The parties had exchanged the statements of witnesses. The claimant was the only witness on his own behalf. On the respondent's side there were statements from three witnesses, who in due course gave evidence, in the following order. They were Mr David Mutebi, Duty Manager, who had been the first manager on the scene of the relevant accident, had conducted the investigation and suspended the claimant; Mr Roger Scott, Duty Manager, who had dismissed the claimant; and Mr James Harvey, Operations Manager, and line manager of both Mr Scott and Mr Mutebi, who had rejected the claimant's appeal.

7. In discussions before evidence, a number of points arose. It was agreed that this hearing would deal with all issues including remedy, and agreed that the respondent would be heard first. There were, however, issues as to preparation on both sides.

8. The major issue was that although the November 2017 particulars, adopted by Judge Vowles in April 2018, had named four comparators in the claim of direct race discrimination, the respondent had given no disclosure about any of them, and had adduced no evidence about any of them in its statements.

9. The second was that the disclosure given by the respondent was plainly incomplete: brief perusal of the bundle showed that almost the first contemporaneous document in the case was an Accident Report completed by the claimant, which was not in the bundle and apparently had not been disclosed.

10. A third was that the claimant gave no evidence on remedy, and the bundle contained no disclosure on remedy, although the claimant conceded that he had taken up fresh employment in September 2017 and thereby extinguished his loss.

11. It emerged in discussion that the claimant's representative had made no application or request for further disclosure to remedy the deficiencies

above, nor did it appear that the respondent's representative had challenged the absence of disclosure on remedy.

12. Finally, it became apparent during the hearing that not all bundles in the room were identical.

13. One solution to all these matters was general adjournment. The representatives were plainly reluctant to adopt that course, particularly as the depletion in Tribunal resources meant that the hearing would have to be adjourned until the summer of 2019. The alternative of proceeding without any further information was one which the Tribunal rejected of its own initiative. If the discrimination claim failed due to lack of disclosure on the part of the respondent, the respondent would be rewarded for its own non-compliance with the Order of Judge Vowles. The Tribunal could be rightly criticised for failing to have proper regard to the generally accepted difficulties of proving discrimination, and to the fact that information about comparators is almost always only in the hands of the respondent.

14. The hearing therefore adjourned in the mid-morning of the first day, and the parties were given directions as to how to remedy these shortcomings. Overnight, the respondent produced a second witness statement from Mr Harvey, giving outline information about the comparator cases, and disclosing disciplinary outcome letters sent to each comparator. While that was an improvement, it was not full disclosure, such that it was later not appropriate to permit Mr Frew to cross examine or criticise the claimant for his inadequate knowledge of the comparator cases: if the claimant's knowledge were incomplete, it was because of the respondent's failure. Overnight the claimant produced a statement on remedy, disclosing one additional page (the first page of his new contract of employment). He sought in the same statement to add evidence to the existing claim. As he had not been given permission to do so, that material was disregarded.

15. The public hearing therefore started on the second day, and was completed on the afternoon of the third. The Tribunal twice watched the CCTV footage which formed part of the respondent's evidence.

General points

16. We preface our findings with general observations.

    16.1 In this case, as frequently happens in the Tribunal, we were referred to a wide range of matters, some of them in detail. Where we make no finding about a matter of which we heard; or make a finding but not to the depth to which the parties went, that should not be taken as oversight or omission but as a true reflection of the extent to which the point was of assistance.

    16.2 We have disregarded the comments offered by the representatives about their professional opponent, save where we consider it necessary in the interests of justice and clarity to make a finding or observation.

Findings of fact

17. The respondent is part of the Menzies businesses, which provide a wide range of services at and around Heathrow Airport. We were concerned with a shuttle bus service between airport car parks and the terminals. The claimant, who was born in 1951, had service with the respondents since 2014, and deemed service through TUPE since 1999. He was a driver of shuttle buses, almost always working an early morning shift from around 4am. His record was unblemished. We heard this case on the understanding that he was a valued colleague.

18. We heard some background evidence about the respondent's service at Heathrow. We accept that it operated over fifty buses on the service, of which four were of the Dennis make. The buses were maintained by a service company, Scania, and each bus was serviced every few weeks.

19. The incident in this case took place when the claimant was driving bus P47, a Dennis. In accordance with the respondent's procedure (not in the bundle), he undertook a visual and mechanical check of the bus before the start of his shift, and signed a form known as VDF (Vehicle Defect Form). Each bus had a VDF for each day that it was in use, which was signed off by each new driver at the start of shift or after a break. Each VDF was returned to the office at the end of the day, and we were told that they were retained for two years. The bundle contained seven VDFs for bus P47 for the week 10 to 17 May. They appeared to have been signed by fifteen or more drivers, many of whom noted minor scuffs, but who also noted more serious matters, including a broken headlight and a mirror that needed to be replaced.

20. This case arose out of an incident which occurred at around 6.05am on Wednesday 17 May 2017. The claimant undertook a check of bus P47 at 4.10am and signed the VDF to confirm that he had done so. He did not report any defect. He drove his normal route between car parks and the terminals, and was on his third circuit of that route when the incident in question happened. He was not the only driver working for the respondent on the route, and if there were any specific environmental hazard affecting the route at that time (e.g. deep puddles, or a petrol or diesel spillage) it was not recorded by the claimant or any other driver.

21. Bus P47 was fitted with a number of CCTV cameras. A number captured footage taken inside the bus and were not shown to us. They could not have assisted us. One showed footage of the road ahead of the bus, i.e. the driver's viewpoint. We saw that, but all that it showed us was that the road was wet, and the light not yet full daylight. Before the incident the wipers were on, but we could not say if that was made necessary by falling rain or by spray from the road. We saw nothing to suggest hazardous amounts of water on the road.

22. The most material CCTV footage showed the claimant in his cab. It appeared to be shot from a height of about 2-3 metres, and showed the driver in full at work. It also showed a number of mechanical or electronic items. When the indicator was on, that showed on the footage and when the brakes were applied, the footage showed the word "brake". The

footage also showed the time, and the speed. It was of good visual quality. The claimant was familiar with the presence of CCTV.

23. We accept that the footage showed the bus turning into the car park precinct. It then drove a single lane straight stretch. During that section, the claimant stretched above himself to change the destination indicator. We accept that to do so, he remained seated in the driver seat, continued driving, but was obliged to remove his line of vision from the road onto the indicator for some seconds. We were told that the respondent's procedure was that a destination indicator should only be changed when the bus was stationary. No such written procedure was in the bundle. Mr Clair's comment, that the claimant did no more than is done by changing a car radio station, was not, we think, a fair comparison with what we saw. Our reason is that operating a car radio can be done by pushing a button, directly below the car windscreen with at most momentary distraction from the road. Mr Scott said that the claimant's action in changing the indicator while driving was 'cavalier.' We accept that Mr Scott was reasonably entitled to regard it as some evidence that the claimant was not working strictly to procedure. We also accept that the bus momentarily drifted into a marked pedestrian walkway immediately afterwards.

24. The footage showed the claimant proceeding up to a speed of 17mph, it being agreed that the car park limit was 15mph. As the claimant turned left within the carpark, he lost control of the bus. The light which would indicate the brake coming on did not show on the footage. The bus crossed a low hedge, and crashed into three parked cars. The Tribunal was later told (not documented in the bundle) that the total damage to the four vehicles was in the order of £46,000.

25. Once the bus stopped, a passenger can be heard asking what happened, and immediately the claimant can be heard replying, "Brakes failed". That was his immediate reaction, from which he never changed. Passengers are then seen leaving the bus. We add that no physical injuries occurred.

26. Mr Mutebi was Duty Manager. Like Mr Scott and Mr Harvey, he was a qualified driver himself, and he mentioned with some pride that he had started his working career as a driver, and had worked into management. He went to the scene.

27. Police Officers visited the scene. Mr Mutebi gave evidence that they offered the opinion that it looked as if the driver had taken the corner too fast in wet conditions. No further action was then taken which involved the police or the criminal justice system, a matter to which the Tribunal attaches no weight.

28. Mr Mutebi took photographs, which were in the bundle. He made arrangements to view the CCTV footage.

29. The claimant returned to the respondent's office and filled in an Accident Report Form, in which he wrote and signed the following, as well as giving contact details for one of the passengers:

> "At 6:05am on 17/05/17 in long stay car park after the entrance at the junction when turning left I just put my foot on brake to slow down, but bus speed up and

> gone through the fence and hit the cars."

30. Mr Mutebi interviewed the claimant between 9:05 and 9:20am the same morning (30). The claimant was accompanied by a colleague, Ms Elsdon, and Mr Mutebi by a note taker. We accept the notes as a generally accurate summary.

31. Mr Mutebi correctly introduced the meeting as an investigation and asked the claimant if he was well enough to continue. The claimant said that he was. Mr Mutebi said that if the claimant needed a break, he should just ask. He then asked the claimant to describe what happened and the claimant gave an explanation consistent with what he had said at the time of the accident, and in the Report Form:

> "When I turned left and just as I put the foot on the brake instead of the vehicle slowing down more it went fast."

32. Mr Mutebi asked if the particular bus had given rise to previous issues and the claimant replied:

> "We complain all the time about that bus anyway because when we put the brake on it goes fast and when you use the accelerator it does not go fast."

33. Mr Mutebi asked the claimant about a number of other matters, which were plainly possible causes of an untoward incident. The claimant rejected the possibility that he might accidently have pressed the accelerator rather than the brake. Mr Mutebi asked the claimant about sleep and rest the night before, and about his health and any medication. He asked the claimant if he had anything to add and the claimant said:

> "I try my best and how it happened I cannot understand myself."

34. Mr Mutebi told the claimant that he had seen the CCTV footage, which showed that the bus was travelling at 17mph in a 15mph area. The claimant expressed regret for the accident. It was common ground at this hearing that his form of words expressed regret, not apology for an event for which he accepted any degree of personally responsibility.

35. The bundle contained a significant document at page 53A. It was a computer printout. It recorded data showing the last brake check conducted by Scania on P47 before the accident. That had been at 10am on 28 April. It recorded "post-accident brake test" undertaken at 9.31am on 17 May.

36. The print out did not identify the procedure which was carried out to check the brakes, or an individual responsible for the procedure. It used a number of acronyms and abbreviations which we did not understand and which were not explained. Each of the two tests contained the word "pass" or "passed" fourteen times. We understood page 53A to record accurately Scania having tested the brakes of P47. We accept that the vehicle brakes had fully passed tests undertaken (a) three weeks before the incident, and (b) three hours after it. The report was a standard workplace document, prepared for everyday working purposes, and Mr Clair's

criticism, to the effect that it was not in the form of an expert report, was factually accurate, but misplaced.

37. Mr Mutebi also (WS13) spoke to two Controllers, Mr Akram and Mr Khan, neither of whom could confirm that the claimant or a colleague had raised difficulties specific to P47. Although that matter was referred to in Mr Mutebi's witness statement, there was no record of it being noted or recorded anywhere in the papers for the claimant's disciplinary, and as the respondent's procedures did not oblige Mr Mutebi to prepare a report for the disciplinary officer, we are unable to make a finding as to whether Mr Scott was told of this. We do find that the claimant was not told of it. Mr Clair criticised Mr Mutebi for failing to speak to the passenger whose details the claimant had noted. We do not find that that failure took Mr Mutebi's investigation out of the range of reasonable inquiry. He was reasonably entitled to the view that a passenger could not add anything.

38. At the conclusion of the meeting Mr Mutebi told the claimant that because of the accident and the extent of damage, the claimant was suspended on full pay.

39. The respondent's disciplinary procedure provides for suspension and an investigation. By hand delivered letter of 17 May, Mr Mutebi confirmed suspension, reminding the claimant that suspension was not a disciplinary sanction, but "a neutral act to enable an investigation to be carried out promptly." The claimant was confirmed to be suspended on pay, and was instructed not to return to the workplace. We accept that Mr Mutebi took the decision to suspend on the basis of the evidence which he had, untainted by race. He also decided that there should be a disciplinary hearing, which would be conducted by another manager. That decision, and the investigation and reasoning which underpinned it, were not documented.

40. We note the part played in these events by the VDFs. The claimant asserted from 17 May onwards that he and colleagues had not reported defects on bus P47 on VDF, because Controllers told them not to: the implication was that entries on the VDF would cause delay, inconvenience and the expense of repair. At his appeal he asserted that all four Dennis buses demonstrated the same defective brakes. The respondent's managers checked a number of VDFs, which they found showed entries made by a large number of drivers. That was evidence that drivers did in fact complete VDFs. Those in the bundle for bus P47 had been completed by many drivers. The claimant's assertion that Controllers told drivers not to record concerns about braking systems, and that drivers unanimously complied (as shown by the absence of relevant entries on the VDFs) implied that all of those involved, Controllers and drivers alike, were willing on a daily basis to accept the risk of putting buses with faulty brakes on the roads. The claimant was perhaps not aware of the gravity of that allegation, or its inherent implausibility. He gave no satisfactory answer when asked by the Tribunal why he himself was prepared to drive a vehicle which could cause a fatal accident. We find that the respondent was reasonably entitled to reject that line of assertion.

41. After Mr Mutebi had suspended the claimant, his task was complete, and he passed the material to Mr Scott to conduct the disciplinary which would then take place.

42. The original arrangement was that the disciplinary would take place on 19 May. This was postponed when the respondent realised a mistake in its original letter of invitation (not in the bundle). Had the mistake not been made, it was the respondent's intention to conduct a disciplinary hearing, and possibly dismiss, within 48 hours of the incident. We saw no evidence of an operational need for this degree of haste.

43. On 18 May Mr Scott wrote to the claimant to instruct him to attend a disciplinary hearing on Tuesday 23 May. He identified that the meeting would be disciplinary, and who would be present. He confirmed that dismissal was a risk and advised the claimant of his right of accompaniment. He identified the matter which gave rise to the disciplinary and wrote, "Please find enclosed a copy of the notes from the Investigation Meeting that will be discussed during the hearing." The only item sent to the claimant before the disciplinary meeting was the note taker's record of the meeting with Mr Mutebi.

44. The claimant attended the disciplinary meeting with Mr Scott on 23 May. Although it was recorded as lasting fifty minutes including two breaks, the notes are less than two pages of A4. Ms Allan, HR Manager, was present, and took notes. The claimant was accompanied by another driver, Mr Feron.

45. The claimant confirmed that he had received the investigation notes and had a correction about a point of detail, which was accepted. Mr Scott asked the claimant if he had seen the CCTV footage and the notes record "CCTV footage viewed." That was the first the claimant had seen the footage. We do not know which camera footage he saw, and if any footage was shown more than once. Mr Scott asked the claimant about the footage, in particular about the speed which it showed.

46. After seeing the footage, the claimant commented:

> "I have worked since 1999 in the same car park and I know it well. In this bus we always put foot on brake and it goes faster. We have complained about this vehicle to the Controllers."

47. Mr Scott had obviously prepared for this point, because he had brought to the meeting a number of VDFs to show the claimant, which did not bear out the claimant's assertion that reports about the brakes on P47 had been made by drivers. When asked why there was no reference to the brakes on the VDFs, the claimant said there was no point in reporting. The claimant had not before then known that the VDFs were part of the case against him, and apart from the VDF of 17 May, he had not in fact seen any of the others, as he had not driven P47 for some weeks before 17 May. When the claimant repeated that the vehicle was faulty, Mr Scott said:

> "Following the accident, the vehicle was taken to the Scania workshop and there were no defects found. It was put on the brake test machinery and passed all tests showing no defects whatsoever with the vehicle."

48. While that remark accurately summarised what was on our page 53A, the document was not shown at the meeting, and the claimant had not seen it (nor indeed had Mr Scott at that stage). Mr Scott suggested that the claimant had made a grave misjudgement and the claimant repeated,

> "I reported it to the Controllers and they did not listen."

49. After an adjournment of ten minutes, and when the claimant confirmed that he had no more to add, Mr Scott told the claimant that he was dismissed, which Mr Scott confirmed in writing by letter of the following day. The dismissal letter included the following:

> "Having reviewed the CCTV footage, and taken into consideration all the evidence available to me, it is clear that you drove without due care and attention, you brought the company into disrepute and the company have lost confidence and trust in you to continue to be employed within the business. Your lack of honesty and integrity are brought into question in that at no point have you shown any remorse for the accident and placing blame on a faulty vehicle. As discussed at the meeting the vehicle received a full test after the accident and no defects were found, passing all legal requirements."

50. In closing, Mr Clair submitted that there might have been 'short term immediate failure' of the brakes, caused perhaps by overheating, or by water from the road. In oral evidence, Mr Scott told the Tribunal more than once that he was "100% sure" that the brakes had not failed as alleged by the claimant. When asked by the Tribunal how he could be so confident, he answered that mechanical objects do not fail and then repair themselves, and that he accepted the outcome of the Scania test at 9.30 on the morning of the accident.

51. In reaching his conclusions, Mr Scott placed heavy weight on three items of evidence. The first was the CCTV footage, which the claimant had not seen before the disciplinary meeting, and which was shown to him in the course of the meeting. The second was the Scania report, which the claimant saw for the first time late in the disclosure process in these proceedings. Third were the VDFs for P47 for the previous week, which were in the bundle. They are not recorded as having been shown or given to the claimant at or before the disciplinary meeting.

52. When asked why dismissal had been the outcome in this particular case, Mr Scott (and later Mr Harvey) focused in evidence heavily on the manner in which the claimant had reacted to the allegation against him. When asked by the tribunal what the claimant could have said at the disciplinary to save his job, Mr Scott answered to the effect that 'sorry' would have been a good start. Although flippantly expressed, that answer captured an underlying truth in the case: both Mr Scott and Mr Harvey were of the view, which we accept was genuine and to which they were reasonably entitled, that the claimant's denial of responsibility was a significant factor in the decision to dismiss. This was not, as Mr Clair submitted, a "damned if you do, damned if you don't" response (i.e. plead guilty and be dismissed for

being guilty versus plead not guilty and be dismissed for denying guilt). We accept that it was the witness's analysis of the personal qualities required of a driver who has experienced an accident. As Mr Frew stressed, a bus driver works alone and unsupervised (albeit under surveillance), and the respondent may require a range of qualities in a person who works in that setting. Those qualities included understanding of the event, learning lessons from it, accepting responsibility, including accepting some form of disciplinary action if appropriate, and thereby reassuring the respondent that there was unlikely to be a recurrence. We accept that the claimant's response to the incident was a substantial part of the decision to dismiss him, and later to reject his appeal.

53. On 25 May and immediately after receipt of the dismissal letter, the claimant wrote to Mr Harvey, the named appeal officer, to ask for the CCTV footage "and recorded interviews".

54. Matters then took a regrettable turn. The respondent's disciplinary procedure accurately recorded the statutory right of accompaniment, and stated the following:

> "For the avoidance of doubt this does not include solicitors …"

55. Disciplinary procedures which expressly exclude a right of legal representation, or which limit rights of accompaniment to the statutory minimum of trade union representative or colleague, are not unusual in the experience of this Tribunal.

56. The claimant instructed Messrs Sterling Lawyers to correspond on his behalf with Mr Harvey about an appeal. The bundle did not contain the complete correspondence. The portion which we saw was at times emotive. The substance which we saw was to complain that the claimant had been unfairly treated, and wished to proceed with an appeal and/or to the Tribunal; they asked for information and documentation; in their letter of 12 June, they asserted that the claimant had been discriminated against in dismissal. It appears that there was also email correspondence (not in the bundle) which led Mr Harvey to assert that the solicitors had called him personally a racist. The respondent did not reply for some time to Messrs Sterling Lawyers, such that when the solicitors wrote to Mr Harvey, he replied, if at all, by writing to the claimant.

57. The respondent has over 5,000 employees. It is a company of significant size and administrative resource. They had dismissed an employee of over 18 years service. It would have taken a moment's work for Mr Harvey or an HR representative to write a polite, short letter to the claimant and Sterling Lawyers telling them both formally that the respondent declined to correspond with solicitors, and would correspond with its own ex-employee. That would have been a more constructive approach.

58. The claimant's appeal came before Mr Harvey on 27 June. That does not seem to us an excessive or disproportionate period of delay to arrange an appeal. Mr Harvey was accompanied by Ms Allan from HR, and the claimant by a fellow driver, Mr Thanjal. The notes indicate a meeting of over two hours. They also indicate that from early in the meeting Mr

Harvey was angry about Sterling Lawyers, and at times aggressive towards the claimant as a result. He appears not to have reflected on whether he was able to give the claimant's appeal the fair consideration which it deserved.

59. As the notes indicate, there was an early discussion, to no great purpose, about the role of the claimant's solicitors, and that Mr Harvey thought that they had called him a racist (we can make no such finding, as the material letter or email was not in the bundle). There was a discussion about access to CCTV. The claimant was offered the opportunity of another viewing, which he declined. There was discussion of the VDFs, and the claimant declined to name any Controller who had advised against completion of the VDFs. There was discussion of the incident, and of the matters which had been rehearsed before: the brake testing of the vehicle, the CCTV and so on. At Mr Harvey's suggestion, Mr Thanjal was asked if any Controllers told him not to record defects on the VDFs, and he answered no.

60. Mr Harvey did not give his decision immediately, which was sent by letter of 30 June. Mr Harvey wrote that he had found "no reason to overturn the decision taken by Roger Scott."

Discussion of unfair dismissal

61. This was a case of unfair dismissal. The task of the Tribunal is first to find what was the reason for dismissal, meaning the operative consideration in the mind of Mr Scott when he dismissed the claimant.

62. We must next consider it through the provisions of section 98(4) of the 1996 Act, which provides,

> "[T]he determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case."

63. We had to have regard to the guidance given in authorities, notably British Home Stores v Burchell 1978 IRLR 379 (always bearing in mind that that case was decided under a burden of proof which differs from that now in force) and Sainsburys Supermarkets Ltd v Hitt 2003 IRLR 23. The tribunal must take care not to substitute its own view for that of the employer at any stage, and to bear in mind that at each stage where the employer exercises discretion, the question is whether its decision or conclusion has been within the range of reasonable responses: that range includes the range of reasonable inquiries open to the reasonable employer investigating the allegation. An employer is not duty bound to pursue every line of inquiry. In setting penalty, the question is not whether the tribunal considers the sanction of dismissal to be harsh or excessive, but whether it is within the range of reasonable responses.

64. The questions to be answered by the tribunal are whether in dismissing the employee, the respondent had a genuine belief, based on a

reasonable inquiry and on reasonable evidence, that the claimant had committed the misconduct alleged; and if it did, was dismissal within the range of reasonable responses.

65. We find that the reason for dismissal was that given in the dismissal letter, broadly that the claimant's driving on 17 May 2017 caused a serious accident; that there was no evidence of a cause of the accident other than driver error; for which the claimant had not accepted responsibility. We find that that is a reason relating to the claimant's conduct and therefore a potentially fair reason.

66. We ask next whether Mr Scott genuinely believed the claimant was guilty of misconduct on reasonable evidence. The matters which Mr Scott had in consideration were: over forty years personal knowledge of the industry and of driving in the industry (he had held a PSV licence from 1973 to 2014); and sufficient technical understanding to form the definite view that, as quoted above, a mechanical fault did not occur and then repair itself. Mr Scott had, in chronological order of event, seen the VDF completed by the claimant at 4.10am on 17 May; watched the CCTV footage; read the claimant's Accident Report and Mr Mutebi's investigation notes; he knew what was in the Scania print out (even if he had not himself seen 53A) and he had checked other VDFs for the same bus. The claimant had stuck with an explanation which no other evidence supported, and much other evidence appeared to refute.

67. In closing, Mr Clair pointed out that there were other possible explanations for the accident which had not been explored, and he quoted possible oil or diesel spillage on the road, or aquaplaning caused by flooding, as possibilities. In the same spirit, Mr Clair submitted that the question, 'what was the cause of the accident' was one that, in his words, 'has to be answered.' That submission had the ring of inviting us to speculate about the event, and then find that we had a reasonable doubt as to the claimant's culpability. It was a misplaced submission, because it applied the wrong approach and the wrong test. The role of the tribunal is to inquire if the evidence relied upon was reasonable, which it plainly was. The material before Mr Scott showed that the route had been serviced by the respondent's buses for about two hours before the accident took place. In the absence of any evidence, indication or report from any source that there was any environmental issue, and in the absence of any suggestion to that effect by the claimant, Mr Scott was reasonably entitled not to pursue a line of inquiry of which was there no evidence. More bluntly and more shortly, the evidence available to Mr Scott indicated that there was no material to suggest an environmental or external cause of the accident; that the mechanical cause suggested by the claimant had, in Mr Scott's reasonable view, been excluded by the Scania investigation; which left only human error, which could only have been on the part of the claimant. This was a workplace event, and Mr Scott was entitled to rely on the integrity of the established contractors and testers, namely Scania, without need of any more formal report. Investigating what the passengers had seen, heard or thought could not add to that evidence.

68. We find that in all the circumstances, dismissal was within the range of reasonable responses, even if a harsh sanction for a single event in a long career.

69. When we come to consider whether Mr Scott reached his conclusion after reasonable process, we find that he did not. The claim of unfair dismissal succeeds on the grounds which now follow.

    69.1 The most crucial evidence against the claimant was the CCTV footage. It was seen by Mr Mutebi before 9.00am on 17 May. It was not given to the claimant in any form. He first saw it during the disciplinary meeting which ended with termination of his employment.

    69.2 The Scania report seems not to have been available to Mr Scott, although he knew what was in it. (Plainly it was not available to Mr Mutebi). It was a crucial document, which led Mr Scott to the conclusion that he was "100% sure" that the claimant's line of defence was unfounded. It was not given to the claimant at any point before disclosure in this litigation.

    69.3 The claimant's line of defence placed the integrity of the VDFs in issue. The claimant knew what he had written on the relevant VDF on 17 May, but was not provided with the other VDFs seen by the deciding managers before the disciplinary hearing with Mr Scott; and although Mr Harvey to his credit said that he had researched earlier VDFs, there was no evidence that they were shown to the claimant.

    69.4 We add two further points which added to the weight of the above three. We repeat first that we saw no evidence of an operational need for this disciplinary to proceed as quickly as it did. Secondly, despite the respondent's size and resources, there was no evidence of Mr Scott or Mr Harvey having requested or being offered HR advice. The three points of unfairness were within the knowledge of the HR Manager who was present at both hearings. There was no evidence that her role went beyond passive note taking.

    69.5 On appeal, Mr Harvey did not remedy the unfairness which had presented.

70. Drawing these matters together we find that the claimant was dismissed in reliance on evidence which he either did not see at all before his dismissal; or which he did not see sufficiently in advance of his dismissal to be able fairly to reflect on what he had seen, consider his response, seek advice if he wanted it, and present his defence.

71. We have said that page 53A appears not to have been made available until the course of these proceedings. It will be recalled that on the day after his dismissal, the claimant asked for CCTV footage. This led to correspondence between Sterling Lawyers and Mr Harvey. Mr Harvey took the view that as the footage might show passengers who had not consented to be identified, it could not be released due to data protection

restrictions, to which he added gratuitous comment about the lawyers' understanding of data protection.

72. It was not appropriate or fair that at the appeal Mr Harvey expressed his irritation with the claimant's lawyers. The notes convey the impression that his decision making was tainted by that extraneous consideration. More to the point, this tribunal has regular opportunities to view CCTV in the course of our work, and having seen the CCTV footage in this case, we regard Mr Harvey's objections to its disclosure as unfounded. We saw two crucial sequences of footage. The first was of the road in front of the bus. No data protection issue arose because no people were seen. The second was the footage of the cab. The material footage was that up to the moment when the claimant lost control of the bus. After the bus had come to rest, a passenger's voice is heard, and seconds after that there is a fleeting view of passengers leaving the bus. It was open to the respondent, as a matter of fair procedure in the claimant's disciplinary case, to redact the footage, cutting it before any passenger is seen, and to disclose the remainder to the claimant. Alternatively, it could have made arrangements well in advance of a disciplinary hearing for the claimant and/or representatives to view the footage by appointment.

73. At the time of the disciplinary, the claimant was aged 66, with over eighteen years' service. Dismissal from a long employment at that age carries the risk of long term or permanent unemployment. It is a particularly serious decision. The claimant was entitled to consideration and credit for his length of unblemished service. Although his English was fluent, he was not a particularly articulate person, and in attending a disciplinary hearing, he may have for the first time in his working life been on unfamiliar, potentially life changing territory.

74. Drawing all of those matters together, the respondent's procedures were fatally and fundamentally unfair. The claimant was not given any or any adequate opportunity to see the accumulation of evidence against him, reflect on it calmly and slowly, take advice on it, consider his position, and address it at a fair disciplinary hearing. When the matter came to appeal, Mr Harvey failed to rectify those shortcomings, and compounded them, we find, by approaching the appeal with a negative and emotive mindset against the claimant.

75. The claim of unfair dismissal succeeds.

The Polkey issue

76. We have found that the dismissal was unfair, because of the failure of this substantial business, with professional HR support, to provide to the claimant in advance of his disciplinary hearing any of the crucial pieces of evidence. We must then consider what would have happened if that had been done.

77. Our deliberations on this point lead us to what we accept is an unusual destination. In the usual case of this kind, consideration of a Polkey chance leads to the argument that if the dismissed claimant had had advance notice of the evidence against him, he would have had time and

opportunity to prepare a reply which would have made the difference of saving him from dismissal.

78. Our deliberation in this case is different. From the moment of impact, the claimant was committed to the position that the brakes had failed, and that he was not at fault in the slightest. If he had had, in good time, and away from the workplace and colleagues, access to the CCTV footage, the brake test, and the VDFs, it is possible that he would have reflected on them, and possible that he would have taken advice from a well-informed objective source. It is possible that he would have been advised that the weight of evidence was against him. If he had asked experienced colleagues, or his trade union (Unite), he might well have been advised that it would be, at least, strategically expedient to set aside his strong feelings, and to tell management that he accepted that he must have been at fault, and would accept the consequences. If he had reached that point, and accepted a momentary lapse in a long blameless career, we are confident that the respondent would not have dismissed him. The unusual destination to which this train of deliberation takes us therefore is one where remedying the procedural defect leads to an admission of fault by the claimant.

79. We do not however decide a Polkey chance on the basis of what is possible, let alone a trail of possibilities. We find that the procedural defects would have been remedied by giving the claimant the evidence, and adjourning the meeting for a week. The claimant's employment would have continued for that week. We then ask whether, on balance of probabilities, we can find that each of the steps in the previous paragraph which might have saved the claimant from dismissal, would have done so. We find not, for two reasons. First, the trail of speculation is simply too long, and has too many variables; and secondly, the depth of the claimant's conviction of his own blamelessness was established immediately after the accident. We do not think that he would at the time have accepted the evidence against him, and openly acknowledged fault, let alone returned to work after perhaps refresher training and / or a disciplinary warning.

80. We therefore conclude that remedying the unfairness which we have found would have made no difference to the ultimate outcome of the disciplinary process. It would have prolonged the claimant's employment by the time necessary to remedy the unfairness, which we find to be one week. But for contribution, we would have limited the financial loss element of the compensatory award to one week's net pay.

Contribution

81. We then turn to reduction by virtue of contribution. ERA s.123(6) provides that,

> 'Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable …'

Applying that provision, we find that the compensatory award is extinguished entirely. There were no factors which contributed to the claimant's dismissal other than his own actions on 17 May and thereafter. We therefore find that the compensatory award is fully extinguished.

82. When we consider the basic award however, we bring to bear a different consideration of the language of s.122(2), which provides, '

> 'Where the tribunal considers that any conduct of the complainant before the dismissal … was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.'

83. That language does not ask whether the claimant contributed to his dismissal, but whether in light of any conduct before dismissal it is just and equitable to reduce the award. The basic award in this case would have been the agreed figure of £10,198.18. That figure represents substantially eighteen years of unblemished service and it does not seem to us just and equitable that that service should be extinguished by a momentary accident and by the claimant's response to it. It seems to us that it is not just and equitable to extinguish the basic award, but to reduce it by a proportion which illustrates that the claimant has been more at fault than the respondent. The reduction is 70%, and accordingly we award 30% of the basic award, the figure stated at the head of this judgment.

Wrongful dismissal

84. As stated the claimant was dismissed without notice. He was entitled to at least twelve weeks' notice by statute or, if greater, to contractual notice; his contract was not in the bundle. The question for the Tribunal is whether it has been proved by the respondent to the tribunal that on balance of probabilities the claimant committed gross misconduct such as to disqualify him for receiving notice. We find that it has. We find that it has been demonstrated on balance of probabilities that the accident on the 17 May 2017 was not caused by any factor other than driver error, and that all the circumstances, including the claimant's familiarity with the route and with the respondent's systems, the gravity of the accident, and the nature of the claimant's response, taken together constituted gross misconduct which entitled the respondent to dismiss the claimant without notice.

Discrimination

85. We turn finally to the claim of racial discrimination. It was set out in the November particulars, as encompassing the claimant's dismissal and nothing else. It pleaded as matters from which an inference could be drawn Mr Harvey's hostility at the appeal, and the 'failure to engage with solicitors' correspondence.'

86. We accept, as a matter of common sense, Mr Frew's submission that no adverse inference can be drawn against the respondent from its failure to have a written policy or system for managing different types of road accident. The respondent maintains a large fleet on one of the busiest stretches of road around London, in and around Heathrow Airport. It

would be impossible to conceive of a policy which stated rules and criteria for the countless variables which could occur.

87. The claimant named four comparators. It is a matter of record, and concern, that for eleven months after he had done so, he did not have the benefit of disclosure or witness evidence about any of them; and that what he received was the barest minimum at the shortest notice.

88. We find as follows, taking the comparators in the order in which they were set out in the November 2017 Particulars:

    88.1 Mr Scott on 14 December 2016 issued Mr A Robinson with a 12-month final written warning. He had clipped another vehicle when turning right in heavy traffic at a traffic light. Mr Scott thought, but could not be sure, that Mr Robinson might have been dazzled by sunlight. He said in evidence that Mr Robinson had not been reckless and had not driven dangerously. He had accepted responsibility, and accepted the sanction given.

    88.2 Mr Mutebi on 26 September 2016 issued Mr C Honor with a 9 month first written warning. He had misjudged and collided with the vehicle in front of him when they were moving off from a traffic light. He accepted that the collision was his fault, and he accepted the sanction.

    88.3 Mr Mutebi on 10 July 2017 issued Ms Carroll with an extension to her final written warning for a further twelve months. Mr Mutebi described an incident when it appeared that Ms Carroll and another motorist irritated each other, and collided side to side. Mr Mutebi's outcome letter referred to 'carelessness and aggression,' and as Ms Carroll was at that time on a final written warning, she was perhaps fortunate to keep her job. Mr Mutebi's evidence was that she and the other driver were each 50% to blame, and that Ms Carroll accepted her degree of fault in the matter.

    88.4 Mr Scott on 20 May 2016 issued Ms Dobrin with a 12-month final written warning. She had not seen a parked vehicle and had not been aware of a minor collision. She accepted the sanction. There was evidence (not pleaded) about Ms Dobrin's subsequent withdrawal from driving on medical grounds.

89. The respondent's general evidence in relation to the four comparators was that each had been involved in an accident or accidents, and had not been dismissed. The respondent submitted that there were material differences between the cases of the claimant and of the comparators. Their defence therefore engaged s.23 Equality Act 2010, which provides,

> 'On a comparison of cases for the purposes of s.13 .. there must be no material difference between the circumstances relating to each case.'

90. We accept the general approach of the respondent to the allegations of discrimination. That was that none of the comparators relied upon was a true comparator due to a difference in the material circumstances between their cases and that of the claimant. The fundamental material difference

was that each of the four comparators accepted having been at fault, and accepted a disciplinary sanction. As Mr Scott said, the claimant, from the moment of the accident, persisted in blaming everyone but himself, despite the weight of evidence against him, and despite the absence of any other evidence to support him.

91. We accept that a critical factor applicable to all drivers was that they work in a role which requires trust, and requires drivers to work autonomously. We find that the respondent places high value on personal responsibility and the ability to accept management and learn from mistakes. What placed the claimant in a different category from all the comparators was (1) his insistence from the moment of the the accident onwards, that he had done nothing wrong, and that the accident was entirely brought about by mechanical failure; coupled with (2) the mechanical examination which the respondent reasonably regarded as disproving mechanical failure; compounded by (3) the claimant's adherence to arguments which were not independently supported (eg VDFs were deliberately incomplete) and which the respondent reasonably regarded as unsustainable.

92. The claimant did not suggest, nor did the respondent's late disclosure indicate, that any comparator included the material factors. On the contrary, the management of the comparators was consistent with treating individual cases and circumstances individually, with a common-sense acceptance of the hazards of professional driving.

93. We add, although the point did not assist, that the respondent named a fifth person, a driver of Indian origin, who had been involved in a serious accident and not been dismissed. The material produced by the respondent indicated that that driver had for medical reasons had a blackout at the wheel. That was a full explanation of the accident. The medical cause was a physical condition which had been treated, and there was no suggestion that the individual was unfit to drive once the treatment had been completed.

94. Our finding is that giving the claimant the benefit of the doubt, the claimant has proved facts which have caused the burden to shift, namely that after a driving accident he was dismissed, and that four non-Asian drivers who had had accidents at and around the same period were not dismissed. We find that the 'material difference' between the claimant's case, and the other cases, was that each of the others accepted some or all responsibility for the accident, and accepted the disciplinary sanction, along with any other form of management which might follow. We accept that that was a critical factor in the minds of the relevant decision makers.

95. In so saying, we must bear well in mind that our task is to decide whether the claimant's dismissal was to any material degree on grounds of race. We accept that the claimant's race played no part whatsoever in Mr Scott's decision to dismiss the claimant, or in the procedural flaws which rendered it unfair.

96. We have seen nothing from which we might infer discrimination on the basis of the respondent's failure to engage with Sterling Law, no matter how discourteous that was.

97. The final matter was that the claimant asked us to draw an inference from 'The hostility of Mr Harvey to the race complaint and the Claimant having recourse to solicitors.' We saw no material which supported the second half of that sentence. The first could have drawn some support from the recorded exchange at the start of the appeal meeting, when Mr Harvey said,

> 'I have received a letter from your solicitor in which they state that I am being racist. How can I respond to that, how can they deem I am a racist.'

98. We were not invited to reach any stand-alone decision about that comment, or what followed. We find that however ill-stated, that remark (and the subsequent irritation expressed by Mr Harvey about Sterling Lawyers) is not material from which we draw an inference of direct discrimination in dismissal of the claimant's appeal.

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Employment Judge R Lewis

Date: 23/10/2018

Sent to the parties on: .....

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For the Tribunal Office