Case Number: 2300562/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MARTIN sitting alone**

BETWEEN:

Mr J Tomlin-Lindsay **Claimant**

AND

1) **The Go-Ahead Group Plc**
2) **London General Transport Limited**

Respondents

ON: **24/25 January 2018**

APPEARANCES:

For the Claimant: **Mr N Bidnell-Edwards - Counsel**

For the Respondent: **Mr R Bailey - Counsel**

REASONS

1. Oral reasons were given at the conclusion of the hearing. These written reasons are given at the request of the Claimant.

2. By a Claim Form lodged at the Tribunal on 3 February 2017 the Claimant contends that he was unfairly dismissed. This matter was heard over two days with the second being used for submissions and judgment. I heard oral evidence from Mr Barker and Mrs Ryder on behalf of the Respondent and the Claimant in support of himself. I have carefully considered such documents as I have been taken to in the bundle and read and listened to the closing submissions of the parties.

3. The Claimant was employed as a bus driver with the Respondent between 9 March 2009 until his dismissal on 10 October 2016.

4. It is for the Respondent to show that there was a potentially fair reason for dismissal. In this case the Respondent asserts that it was for a

conduct reason. Once that reason is established I have to consider section 98(4) of the Employment Rights Act 1996 to consider whether in all the circumstances of the case the Respondent acted reasonably or unreasonably in treating conduct as a sufficient reason for dismissing the employee whilst considering the equity and the substantial merits of the case.

5. I remind myself that it is not for me to substitute my own view for that of the Respondent but only to consider whether or not the processes and the decision to dismiss fell within a band of reasonable responses. My role is not to say whether or not the Claimant was actually guilty of the disciplinary charge. My role is to look at what the Respondent did in response to a complaint made by a member of the public.

6. In conduct cases I am to be guided by the case of ***British Home Stores v Burchell [1980] ICR 303.*** In the case of a reason relating to the employee's conduct, it is necessary that the employer should have genuinely believed that the employee misconducted himself and have arrived at that belief on reasonable grounds after a fair investigation. The duty of the Tribunal where an employee has been dismissed because the employer suspects or believes that he or she has committed an act of misconduct is expressed by Arnold J., in Burchell as follows:

"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question ... entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time ... First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief and thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate on the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further."

7. It was held in the case of Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 that: *'it is the function of the [employment tribunal] to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside the band it is unfair.'*

8. The case of J Sainsbury plc v Hitt [2003] IRLR 23 held that when considering whether an employee has been unfairly dismissed for alleged misconduct, the 'band of reasonable responses' test applies as much to the question of whether the employer's investigation into the suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss the employee for a conduct reason. The test is not whether the Respondent had carried out every avenue of investigation, but whether what it did was reasonable in all the circumstances.

9. The ACAS Code of Practice on Disciplinary and Grievance Procedures 2004 provides guidance which the Tribunal must take into account when considering whether a dismissal is fair or unfair (Lock v Cardiff Railway Co Ltd [1998] IRLR 358). At the outset of the hearing the Claimant's representative confirmed that the breach of the ACAS code alleged related to the investigation process only.

10. The Claimant was employed under a contract of employment which he signed, and which incorporated the workplace rules. He undertook training when he started working for the Respondents and at regular intervals thereafter. During this training safe driving was discussed and I am satisfied that the Claimant had the rule books, or the opportunity to acquaint himself with them and was suitably trained.

11. Rule 7 provides "*whilst in the cab of the bus you must not use any of the above or eat, drink…… or do anything which could distract your attention from driving…… **any breaches of this rule will be deemed as gross misconduct and could lead to dismissal**."* Rule 28 provides that *"Drivers cabs must be kept free from any article which might interfere with the safe operation of the bus. You must not take drinks containers such as cans, bottles or cartons into the cab or leave behind litter of any kind".* The Respondent's disciplinary procedures provide examples of gross misconduct including *"failure to observe rules and regulations designed to ensure the safety of other member of staff or members of the general public".* I am satisfied that the Claimant received these documents and understood the contents. He has signed to say he received the rule book and it is incumbent on him to acquaint himself with its contents. If he did not do so, that fault does not lie with the Respondent.

12. There was an issue in relation to the payment of the Claimant's sick pay which resulted in him raising a grievance which was heard by Mr Barker (who dismissed it) however it was ultimately resolved in his favour. The grievance concluded on 24 June 2016.

13. On 30 August 2016 a member of the public made a complaint about a driver of a bus. It was alleged the driver was eating in the cab, holding a food container and driving with one hand. The report gives the date of the incident as 23 August 2016 and the time as 17.00.

14. The report which was made by telephone, was forwarded to Head office who reviewed the on-board CCTV for the date and time concerned. There was no evidence to substantiate the complaint. The Complainant when told, visited the Camberwell bus garage on 13 September 2016 to say he had a video on his phone of the incident which he later took into the depot. The exact date he took this to the depot is not known. The time originally reported was incorrect and the video evidence has the maker of the video saying the time was 15.33. By this time the CCTV evidence from the bus had been overwritten and was so unavailable. It is normal practice that CCTV images are overwritten after about 10 – 12 days.

15. It was common ground that the bus was identified on the video by number EH39. The Claimant claimed that there were several buses with this identifying number. The Respondent said the number was unique to each bus. I prefer the evidence of the Respondent.

16. The Claimant was at work on this date as shown by various records produced in the bundle. The Claimant accepts he was at work and driving EH 39. He had a log which he completed during his route by hand. There is also and ibus system run by TfL which identifies where a bus is at a particular time. All the evidence pointed to the bus being at the place stated in the complaint at the time stated in the complainant's video.

17. The Claimant was invited to an investigation meeting on 15 September 2016 with Mr Goodyer when he saw the video. Mr Goodyer was satisfied it was the Claimant in the video and noted the company records. He recommended disciplinary action.

18. The first disciplinary hearing was postponed as the Claimant's workplace representative was not available. It was relisted for 10 October 2016. The Claimant was notified by email and by recorded delivery letter. The recorded delivery letter was returned to sender and the Claimant alleges he did not receive the email. His workplace representative attended the hearing, but the Claimant did not. The letter rearranging the meeting said that if the Claimant did not attend it would be heard in his absence. His workplace representative did not know why he was not there and did not request an adjournment. The hearing went ahead with the representative taking part in the discussion. The outcome was that Mr Barker decided that it was the Claimant on the video and that this was supported by the Respondent's records which showed him driving that bus on that date and at that time. The offence was categorised as gross misconduct and the Claimant was summarily dismissed. Mr Barker did not specifically look at his disciplinary record, and as he had worked with the Claimant for some time, knew he had a reasonable length of service with the Respondent. The decision was given at the conclusion of the hearing and was sent by email and post to the Claimant. The Claimant said his representative visited him and told him the outcome and gave him the appeal form (which had also been emailed).

19. The Claimant appealed the same day. The appeal said *"the day of the hearing was on my day off. I was not scheduled to be at work as it was my rest day. The charges made against me are not written in my contract. I have been recently told it is in a rule book which I never signed for*". He did not say he did not know of the hearing.

20. The appeal was heard by Ms Ryder on 31 October 2016 and was a rehearing. The Claimant was given the opportunity to expand on his grounds of appeal which he did, but did not mention not knowing about the original disciplinary hearing. The Claimant accepts he was given the opportunity to put his case at that hearing. The outcome was that the dismissal was upheld. Ms Ryder viewed the video with the Claimant and

was satisfied that it was the Claimant in the video especially taken with the other records showing he was driving that bus on that date and at that time.

21. I conclude that the Respondent has demonstrated that the Claimant was dismissed for a conduct reason. I do not accept that there was any link between the dismissal and his earlier grievance. The disciplinary process was started following a complaint from a member of the public which once made needed to be investigated.

22. The Claimant did not attend the original disciplinary hearing which was heard in his absence. I do find it strange that he did not tell the Respondent at any time until his claim to this Tribunal that he did not receive notice of the hearing. In any event, the Claimant was given every opportunity to defend himself against the allegations at the appeal. The appeal was a rehearing and therefore the Claimant could put forward whatever evidence he wanted, and he was invited to expand his grounds of appeal which he did and had there been any defects in the original disciplinary hearing these were remedied on appeal. The Claimant was invited to bring witnesses to the appeal hearing but chose not to.

23. The Claimant has criticised the investigation process conducted by Mr Goodyer. He says that more investigation should have been taken about whether he was clean shaven and had hair at the time of the incident. He also suggests that CCTV of the depot should have been viewed. While I accept these are possible avenues of investigation, I do not find that they were necessary in the circumstances. The video was viewed with the Claimant by Mr Goodyer who although he had not met the Claimant before could see him sitting before him. He was satisfied it was the Claimant on the video. Mr Barker knew the Claimant both from the Camberwell depot and from the Stockwell depot where they both worked and he had conducted the Claimant's grievance. He therefore knew what the Claimant looked like. Ms Ryder had the Claimant sitting before her. She had not previously met the Claimant.

24. The Respondent did not just rely on the video evidence. It had evidence that the Claimant was driving the bus at the time from the ibus system and other records. The Claimant suggests that the Respondent should have checked the time and date of the video. However, given there was a telephone complaint saying the incident was on 23 August 2016 and there was no suggestion that the telephone complainant was not the same person who provided the video it was reasonable for the Respondent to accept the video evidence as relating to the complaint. The Claimant's suggestion that the Respondent downloaded something from the Internet is not accepted particularly as the bus in the video was the bus the Claimant was driving. It would be extremely unlikely that someone could find a video with the same EH number displayed.

25. The Respondent does not have to undertake a forensic examination of the evidence. I do not accept that there was any special type of investigation needed as submitted by the Claimant because of the gravity

of the offence. I do not find this matter to fall into that category.

26. The Claimant alleges that the investigation was not undertaken promptly and that as a result the CCTV footage was lost. However, the original complaint was investigated in relation to the timing originally given. When the Respondent received the video (13 September 2016) it conducted a fact-finding investigation two days later. This can not be said to be a delay. It would have been helpful to have the CCTV footage, however the reason it was not available was because of misinformation by the complainant (or maybe the person noting down the details) and nothing sinister should be read into this.

27. There was no suggestion by the Claimant at the fact-finding interview with Mr Goodyer (who had not met the Claimant) that the driver in the video was clean shaven and had more hair than he had. The Claimant at the Tribunal had a beard. Therefore, this did not prompt Mr Goodyer to investigate what the Claimant looked like on 23 August 2016. The Claimant was able to bring this evidence to the appeal if it was something he thought would exonerate him but chose not to. Further the Claimant's representative did not dispute the identification of the Claimant in the video when he watched it at the disciplinary hearing with Mr Barker.

28. At the appeal the notes of the meeting show he admitted he was the one in the video. The Claimant's suggestion that this is not correct, and he was talking hypothetically is not accepted. It was submitted that if he had admitted it the appeal hearing would have stopped there and then. The only real reference to this is when the decision was being given when the Claimant is recorded as saying *"The vehicle was stationary when I was eating, I was not driving".* Given this came after the decision was made, it clearly did not form part of the decision-making process and did not weigh in the mind of Ms Ryder. The comment was made in reaction to the decision reached. The other reference is more oblique.

29. I am satisfied that the investigation was reasonable and within the range of reasonable responses and that following on from that investigation and the hearing there were genuine grounds upon which the Respondent held their belief that the Claimant was guilty of gross misconduct. I am satisfied that the decision to dismiss fell within a band of reasonable responses in the same way that I am satisfied that the process was reasonable. Both Mr Barker and Mrs Ryder said that neither a bad disciplinary record or a good record would have changed their decision. Mr Barker was aware of the Claimant's length of service. The single issue of eating in the drivers cab and driving one handed is enough to dismiss summarily. It is clearly stated in the rule book which the Claimant accepted as being received by signing his contract of employment.

30. I find that the procedure adopted by the Respondent was reasonable as was the decision to dismiss. I can not say that the disciplinary sanction was outside the range of reasonable responses open to a reasonable employer. Whilst the Claimant says it is a harsh decision I find it to be within the range.

31. Accordingly, I dismiss the claim for unfair dismissal.

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Employment Judge Martin
Date: 18 April 2018