EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104654/2018

Held in Glasgow on 15 and 16 November and 13 December 2018

Employment Judge: M Robison

Mr Edward McAllister	**Claimant** **Represented by:** **Mr S Connolly - Solicitor**
First Glasgow	**Respondents** **Represented by:** **Ms E McIlroy - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim is dismissed.

REASONS

1. The claimant lodged a claim with the Employment Tribunal on 10 May 2018 claiming that he had been unfairly dismissed from his position as a bus driver with the respondent. He claimed wrongful dismissal in respect of failure to pay notice pay. A claim for age discrimination was withdrawn. The respondent entered a response to the claim stating that the claimant had been dismissed for a fair reason, namely conduct, following a reasonable investigation. A time bar defence was subsequently withdrawn.

2. At the outset of the hearing, the claimant confirmed that he was no longer seeking reinstatement. During the hearing, the Tribunal heard evidence from the claimant; and for the respondent from Ms Donna Boylan, employed by the respondent as an incidents' investigator; Mr William Wood, depot operations manager, who conducted the disciplinary hearing; and Mr John Gorman, head

of operations, who conducted the appeal. The Tribunal was referred by the parties to a joint file of productions (referred to in this judgment by page number).

Findings in Fact

3. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

The incident

4. The claimant commenced employment with the respondent as a bus driver on 23 March 2000 and continued in that role until he was dismissed for gross misconduct on 12 December 2017, following a collision with a pedestrian.

The incident report

5. On 7 December 2017 around 16.35, the claimant was involved in an incident when his bus hit a passenger on Dumbarton Road, which he reported as required to the respondent. At 17.35 Peter Macdonald completed a serious incident report of significant incident form (known as an ARC) (page 63), which he forwarded by e-mail to a group of individuals who required to be informed about incidents of this nature (namely depot managers and health and safety officers, which included William Wood and John Gorman) (page 62).

6. The claimant also contacted the insurance department, as required, and reported the incident to a call handler, who completed the relevant form at 18.45 (64 – 67). On the basis of the information provided by the claimant, that form stated under “incident description” that a male passenger (hereafter called “the pedestrian”), who was under the influence of alcohol, had abused the claimant and intimidated passengers for about 30 minutes. It continues, “When he got off the bus he kept walking in the road and then back on the path which is where the driver lost sight of him. The bus was proceeding normally around a parked van when he came out from behind the van and showed his bum to the bus. The bus driver didn’t have time to stop and hit the

man in the back/side. The bus driver called for the police and an ambulance immediately….".

7. This form included information about the type of vehicle, the route, the speed (21-25 mph), the weather and road conditions (wet but not raining; dark but with street lighting) as well as damage to the vehicle (stated to be light: smashed front windscreen and cracked front bumper). The claimant advised the respondent of the names and addresses of six witnesses (page 66, 70 and 71), which were included in the form.

8. The incident was initially categorised as "cat 1" because the pedestrian had been injured and taken to hospital, but this was later downgraded to "cat 2" because the injuries were subsequently understood to be minor.

9. The claimant completed a section of the ARC in handwriting headed "incident circumstances", including a sketch plan (page 72), in which he explained that after reporting the circumstances of the third party (the pedestrian) being verbally abusive and aggressive and threatening, he stopped at Partick Police Station with a view to having the third party removed, but he left the bus and walked along the pavement east bound. He continued, "I continued in service, serviced the bus stop at Thornwood Park. I noticed he was on the road in the face of oncoming traffic. He then disappeared onto the pavement. As I progressed normally he stepped out onto the road from behind a parked van showing his rear end to the bus and we collided. The police stated that he would be charged with a breach of peace and reckless endangerment".

Incident investigation

10. On 8 December 2017, Donna Boylan, incidents' investigator, picked up the report and commenced an investigation in the usual way. A request to retrieve the CCTV footage was made (page 73). Donna Boylan then viewed footage of around 8-10 cameras which were on the bus. On viewing the CCTV footage she saw the pedestrian emerging from behind a parked car at least three car lengths ahead of the bus, which she noted was then travelling at 20 mph (screen shot taken at 16:31:52:02, page 78). She noted that the bus continued

to accelerate a second later to 21 mph and that the pedestrian continued to walk out further into the road, when the bus was two car lengths away from the pedestrian (page 79, first image, taken at 16:31:53:01), who proceeded into the middle of the road, when the bus was still accelerating to 22 mph (page 79, second image, taken at 16:31:54:04). The CCTV showed then the point of impact with the pedestrian, and the shattered windscreen, while the bus was travelling at 22 mph (page 80, top image, 16:31:54:85) and accelerating to 23 mph, at which point the brakes were applied (page 80, bottom image, taken at 16:31:55:84 and which shows the pedestrian lying at the near side front of the bus).

11. Donna Boylan was very concerned by what she saw and watched the footage numerous times because she thought that the driver did have time to react but that he did not do so until on or after impact, which surprised her given what she had read in the claimant's report. In particular when she viewed the CCTV from the driver's cab, she noted the driver looking ahead, with nothing to distract him, and she did not understand why he would not see the pedestrian on the road in front of him. She saw no attempt to brake or swerve. Referring to government standard road-markings guidance (page 134), which requires each white line on roads with a speed limit of less than 40 mph to be four metres, with a gap of 2 metres between the lines, she calculated that there was around 10 metres between the pedestrian and the bus at the point that the pedestrian became visible. When she had viewed the CCTV, she telephoned William Wood, the Scotstoun depot manager, and she explained her concerns to him.

12. Based on viewing the CCTV footage, Donna Boylan was of the view that the driver should be required to attend a formal disciplinary interview to discuss the full circumstances of the incident. She recommended that the CCTV footage should be reviewed in real time and the driver asked to comment specifically on this particular aspect as part of the interview.

13. Donna Boylan sought further information from Police Scotland, particularly in respect of injuries suffered by the pedestrian and for confirmation about whether he had been charged, for insurance purposes, but this was not received (which is not unusual) (page 95). She did not believe that she required to contact any of the witnesses because from the CCTV she was of the view that none of the passengers were paying attention or would have had a clear view of the accident.

Disciplinary hearing

14. By letter dated 8 December 2017, the claimant was advised that he was suspended from duty and required to attend a disciplinary hearing on 12 December to "discuss the pedestrian collision on Thursday 7 December 2017". He was advised that disciplinary action could be taken up to and including dismissal. With that letter was attached "at the scene sheet", accident/incident history and witness details. The claimant was advised that CCTV would be available to view.

15. On 11 December 2017, Donna Boylan forwarded a written report to William Wood (p77-81).

16. On 12 December, the disciplinary hearing took place. Notes were taken by E. Harris (pages 87-89) and a note was subsequently typed up by William Wood (pages 90-91) in accordance with his usual practice. The claimant was accompanied by T. Clark, his union representative.

17. The meeting commenced at 10.20 am but was adjourned to allow the claimant and his union rep to view the CCTV and to read the Donna Boylan report, and the meeting resumed one hour and ten minutes later. The claimant was noted as saying in relation to the collision with the pedestrian that, "he never saw him until it was too late" that he first saw him "just before he hit him"; that "I may have looked as if I was looking ahead but I was looking to the side and he took me by surprise. I saw him just before impact". He said that he saw him walking along Dumbarton Road "then after I left the bus stop he sidled out". The claimant's union rep gave a demonstration of the man's crab like

movement out to the road. Later the claimant is noted as having stated, "When I saw him I was surprised, I didn't know I was looking at other things. I was still looking ahead and there was glare from other cars headlights. If I had braked everyone would have went flying". He asked William Wood what he would have done, to which he is noted as having replied, "If the choice was braking and people going flying or hitting a pedestrian I would be slamming my brakes on". The union rep responded, "To be fair to Willie your automatic reaction would be to brake not thinking of people on the bus". The claimant is subsequently noted as saying, "I only saw him a couple of seconds before impact" and of demonstrating what a couple of seconds was like by banging on the desk. William Wood is noted as counting out four seconds, then stating, "so you saw him two seconds before you hit him", to which the claimant is noted as having replied, "I am not going to say how long it was. When I saw him it was too late". The union rep is noted as having added, "I don't think Eddie saw him until the point of impact. In all fairness, the man crabs out not just walk out".

18. By letter dated 12 December 2017, William Wood advised the claimant that he was dismissed (page 92). That letter states inter alia that, "On viewing the CCTV footage on Friday 8/12/17 it was apparent to me that this was an at-fault avoidable incident and confirmed in the report by D Boylan….This is a serious matter and the outcome was that a man sustained relatively minor injuries but which could have had much more serious outcome for yourself and the company….I had to determine if there was any mitigation when making my decision. I feel that to allow you any further opportunity driving at First would be a failure on my part to be consistent with the standards that are expected of every employee at First…Taking this into account your employment with First Glasgow will be terminated as of the 12th of December 2017 on the grounds of unacceptable driving standards and failure to avoid a collision with a pedestrian". He advised the claimant of his right of appeal.

The appeal

19. By letter dated 14 December 2017, the claimant intimated his intention to appeal, requesting a meeting to "discuss the severity of the outcome", which took place on 10 January 2018, and was conducted by John Gorman, head of operations. Notes were taken by A. Smith (pages 105-107). The claimant was accompanied by T. Clark, shop steward and M. Dowds, full-time convenor.

20. In the notes, M. Dowds is noted as saying, "the appeal is based on the severity of the outcome….we are aware this is a serious issue…..there is mitigation. We know we're in a precarious position". He stated that the claimant was not concentrating fully on returning to his vehicle, and that he didn't see the individual at the point of impact. He asked that account should be taken of his frame of mind, having had to deal with an abusive passenger, and suggested that the outcome would have been different if he had time to calm down.

21. The claimant is noted subsequently as having stated, "I wasn't fully concentrating. It wasn't till he stuck his bum out to the bus that I was taken by surprise….I couldn't believe he stepped out. I can't say anything else. I didn't brake in time."

22. John Gorman is noted as stating that, "there was about 4 seconds of time you could have avoided the incident…..you seem to be accelerating when guy is in front of you. His behaviour is clearly wrong but I've got to figure out whether you had a lapse in driving standards or whether there was something deeper especially looking at the nearside camera looking forwards. I thought you'd have slammed the brakes on and veered to the right but the bus moves towards where he is standing. You're saying this guy has abused me, I am going to give him a fright".

23. John Gorman stated that his main concern was the fact that the bus was accelerating and that the claimant kept driving until the pedestrian hit the windscreen, and that he was not moving his head. The claimant is noted as

responding, “I’m not picking up speed excessively. When he stepped out I didn’t react. I didn’t see him until then….my mind wasn’t on the job at the time”. Mr Dowds then made reference to the fact that the claimant’s wife was off sick because she had just lost her father, and said that it was fortunate that they were not dealing with a fatality.

24. By letter dated 12 January 2018 (page 108), John Gorman advised the claimant that he had not upheld the appeal, on the basis that “the decision to terminate your employment was proportionate to you failing to take any avoiding action when confronted by a pedestrian standing in front of your bus….in coming to this decision, I have listened to what you had to say and in particular noted your comments about feeling stressed at the time of the incident, due in the main to behaviour of the passenger towards you when he was actually on your bus. I agree that you should not have been abused in any way whilst in the course of your duties. That said, you are the professional driver here. It is my view that you did have enough time to have at least applied the brakes or moved the bus away from the danger which was clearly ahead of you. You are looking straight at the injured person and yet the bus continues to accelerate even to the point of impact, as you insist that you did not see the pedestrian. It is only after impact that you apply the brakes and bring the vehicle to a stop….I acknowledge your length of service as well. Given this and the training you have been through whilst employed it makes this incident even more serious…I believe the incident was avoidable and had you been driving to the standard you are trained to do, would have been avoided. You failed in your duty of care to yourself, passengers, other road users and specifically pedestrians. As discussed at your hearing, this is a reportable matter, I will be writing to the Scottish Traffic Commissioner regarding the incident and outcome”.

25. On 16 January 2018, John Gorman wrote to the Traffic Commissioner advising of the claimant’s dismissal (page 110). The claimant attended a hearing before the Traffic Commissioner on 12 March 2018 (page 113). By

17 October 2018 no decision had been made, for the stated reason that the claimant was seeking legal advice (page 119b).

Relevant law

26. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Conduct is one of these potentially fair reasons for dismissal.

27. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case.

28. In a dismissal for misconduct, in **British Homes Stores Ltd v Burchell [1980]** ICR 303 the EAT held that the employer must show that: he believed the employee was guilty of misconduct; he had in his mind reasonable grounds upon which to sustain that belief, and at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

29. Subsequent decisions of the EAT, following the amendment to the burden of proof in the Employment Act 1980, make it clear that the burden of proof is on the employer in respect of the first limb only and that the burden is neutral in respect of the remaining two limbs, these going to "reasonableness" under section 98(4) ***(Boys and Girls –v- McDonald [1996] IRLR* 129, Crabtree – v- Sheffield Health and Social Care NHS Trust EAT 0331/09)**.

30. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must also consider whether the procedure followed as well as the penalty of dismissal were within the band of reasonable responses **(Iceland Frozen Foods Ltd –v- Jones [1982] IRLR 439)**. The Court of Appeal has held that the range of reasonable responses test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached (**Sainsbury v Hitt 2003 IRLR 23**). The relevant question is whether the investigation falls within the range of reasonable responses that a reasonable employer might have adopted.

31. The Tribunal must be careful not to assume that merely because it would have acted in a different way to the employer that the employer therefore has acted unreasonably. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to dismissal, falls within that band of reasonable responses. If so, the dismissal is fair. If not, the dismissal is unfair.

Respondent's submissions

32. In oral submissions, Ms McIlroy first outlined the facts. She submitted that the respondent had carried out such investigation as was reasonable. Although the claimant was not interviewed in advance of the disciplinary hearing, the respondent had the claimant's perspective set out in the accident report form which he had completed. Neither the respondent's policy nor the ACAS code require the employee to be interviewed. Here the respondent had the benefit of an accurate recording of the incident through the CCTV and also the incident investigation report of Donna Boylan which although primarily for insurance purposes, could be used for the investigation and disciplinary hearing. The claimant was given an opportunity to comment on these at the disciplinary hearing. Nor was it necessary to interview third party witnesses because the CCTV footage was clear, and there was no information which they could give which would have made a difference to the outcome.

33. William Wood had arranged and conducted the disciplinary hearing in accordance with procedure. The decision to move to a disciplinary hearing was based on the telephone call from Donna Boylan and it was necessary to suspend him when they had serious concerns about road safety. They had the report and the CCTV in time for the hearing and this does not suggest that the outcome was predetermined. She submitted that the extent of investigation prior to the hearing was adequate, and neither the claimant nor his TU rep asked for a postponement, and confirmed they were happy to go ahead with the hearing when he was given a full chance to give his position at the hearing.

34. With regard to the notification of the allegations in the letter of 8 December 2017, the allegations were clearly set out in that letter, given it related to a discrete incident which occurred over a few seconds, and the paperwork was enclosed. In any event, the allegations were made clear at the start of the hearing when the claimant had seen the report.

35. With regard to the outcome letter dated 12 December, this explained the reasoning and that it was serious, and reference was made to mitigation, having factored in his length of service. William Wood was entitled to come to that conclusion because the claimant had said in the accident report that he had seen the pedestrian step out and not that he had not seen him until he was in the middle of the road. The pedestrian was visible on the CCTV, and he concluded that he had time to react, such as decelerate or swerve, but he only braked after impact. He did not believe the claimant's version considering it to be inconsistent with the other evidence, with four different explanations, including that he had not braked because that would have sent passengers flying, that he had seen him come out from behind the van. His representation from his trade union that he had not seen him until the point of impact was inconsistent with the report. He also took account of his experience with the passenger.

36. Although in evidence William Wood said that he thought that it was deliberate this was not the basis on which the decision to dismiss was based, rather it was what was set out in the letter.

37. With regard to the allegation that the decision was pre-determined, William Wood had said in the dismissal letter that he thought it was apparent from the CCTV that he was at fault, and he made it clear in evidence that he had not made up his mind until he had heard from the claimant. He set out in his note the factors which he considered.

38. With regard to the appeal, the claimant did not deny that there had been misconduct, but rather the appeal was only against the severity of the sanction. The claimant, who was represented by a full-time trade union, confirmed he was fully aware of the allegations at this stage. His trade union representative said during the appeal that he did not see the pedestrian until the point of impact, when even the claimant said that he had seen the pedestrian in the appeal hearing. The claimant's position was that he was not acting in accordance with his instructions. John Gorman said that he thought that he had time to react even if he had not seen him at the earliest point when William Wood said that he should have seen him, but even giving him the benefit of the doubt he was of the view that he could have reacted in time. John Gorman took his length of service into account, and determined that given his experience he could have avoided the incident, and he also considered alternative sanctions, but decided that the risk was too high given that he had their licence to protect.

39. Ms McIlroy then set out the law and the Burchell test, submitting that the decision to dismiss was in the range of reasonable responses, taking account of the nature of the business, their obligations under their operator's licence as well as health and safety issues.

40. With regard to the claim that dismissal was procedurally unfair, Ms McIroy relied on Polkey and submitted that the claimant would be dismissed in any event, and for example if it is considered that he should have been given

further notice of the allegations, then that would have made no difference to the outcome. In any event, any compensation should be reduced for contributory fault.

41. Ms McIlroy made submissions about those aspects of the updated schedule of loss with which she did not agree.

Claimant's submissions

42. Mr Connolly set out the relevant law, by reference to the cases of *Burchell* and *Sainsbury v Hitt.* He submitted that there were four key questions which he considered in turn.

43. The first question was whether there was a reasonable investigation. He submitted that the investigation into the misconduct was unreasonable and there were no grounds on which to sustain the belief that he was guilty of misconduct.

44. Relying on *Crawford v Suffolk Mental Health Partnership NHS Trust 2012 EWCA 138*, he submitted that the extent of investigation in this case was insufficient where the outcome of the investigation could have significant adverse consequences for the claimant. The very fact of the requirement to refer the matter to the Office of the Traffic Commissioner (OTC) makes the allegation more serious where the decision to dismiss may be relevant to the decision of the OTC.

45. Donna Boylan failed to interview the claimant or any witnesses. Although the respondent had the benefit of the claimant's input, he completed the forms without the knowledge that he might face disciplinary charges. The report was for insurance purpose and was not a full and detailed account of events for disciplinary purposes.

46. Further Donna Boylan confirmed in her own view that the claimant would have reasonably have been expected to see the pedestrian at 16:31:53:01, at which time she said that the bus was 10 metres from the pedestrian, and her

view that a reasonable period of thinking time would be 1 to 2 seconds. He had braked at 16:31:55:84, and therefore the maximum time between seeing the pedestrian and braking was 2.83 seconds. John Gorman and William Wood agreed in cross examination that those time scales were reasonable.

47. The claimant gave a consistent explanation on several occasions, namely that he did not see the pedestrian until it was too late; and that when he did see the pedestrian, he braked as quickly as he could. The claimant simply used different words to explain the same thing, and William Wood had disregarded his explanation. William Wood set up the disciplinary hearing before he had seen the Donna Boylan report or the CCTV, forming a view before the claimant had viewed the footage or been asked to comment on it as recommended in the report.

48. If William Wood had read the report and viewed the CCTV, he could not have asserted as he did that he had four seconds to react. The claimant had given consideration to the impact on the passengers before he braked, as required by standards set down in the drivers' handbook.

49. The second question is whether the investigation established gross misconduct on the part of the claimant. Relying on the decision of the EAT in *Sandwell & West Birmingham Hospitals NHS Trust 2009 UKEAT 0032/09*, at paragraphs 109 -113 and *Burdett v Aviva Employment Services UKEAT/0439/13* paras 29-31, the claimant's actions could not be categorised as gross misconduct because gross misconduct must be either a wilful or deliberate act or gross negligence.

50. There is no basis to conclude that this conduct was gross misconduct since there was nothing in Donna Boylan's report that there was a deliberate or wilful contradiction of contractual terms. Although William Wilson said in evidence that it was a deliberate act, that was not relied on. Nor is there any evidence to support any claim that there was gross negligence. The incident was one of extremely short duration in unusual circumstances where a pedestrian deliberately walked out without warning, having been observed

before he moved into the carriageway, and the claimant was not expecting him to come out. Even if it is accepted that he had 2.84 seconds to react, while that is outside the two second expected reaction time, this is still not sufficient delay to establish gross negligence. There was therefore a failure to establish a potentially fair reason for dismissal. The only reasonable conclusion on the evidence was that there was a capability issue on the standard of driving.

51. With regard to the third question, whether the procedure followed was fair and reasonable, that is the fairness of the procedure, Mr Connolly complained that the outcome had been pre-determined by William Wood, given the timing of the notice of the hearing and the reference in the dismissal letter to the claimant being at fault.

52. With regard to the fourth question, whether the decision to dismiss was within the range of reasonable responses, the respondent did not take proper account of the background circumstances. Neither William Wood nor John Gorman gave the claimant the opportunity to put forward any mitigation, as is shown by William Wood's notes and the appeal minutes and outcome. The only factor taken into account by John Gorman was that he understood that the pedestrian had created a stressful situation.

53. In particular, the respondent failed to take account of the following mitigating circumstances: (a) Length of service: William Wood and John Gorman said he was an experienced driver and should have been able to avoid the collision. That is not taking length of service into account in relation to the appropriate sanction but rather in relation to whether an act of misconduct was committed. There was a failure to properly take account of the fact that he had worked for the respondent for 18 years; (b) Prior disciplinary record: the claimant had no live disciplinary warnings and only one expired warning; when considering that the case relates to a reaction time of 2.85 seconds over 18 years, insufficient weight was given to that. (c) The claimant did not deny that he had collided; he was open and clearly regretted it and said that he would have avoided it if he could have: (d) Insufficient weight was given to the

background circumstances and he behaviour of the pedestrian when taking account of the delayed reaction; (e) The claimant was not charged with any road traffic offences, whereas the pedestrian was charged with criminal offences, and plead guilty; and (f) With regard to the referral to the Office of the Traffic Commissioner, the fact of the collision needs to be reported but that need not result in disciplinary action or dismissal. There was no evidence that in not dismissing the claimant a risk would be created in respect of the respondent's licence.

54. With regard to the claim for notice pay, referring to the gross misconduct issue, there was no act of material breach. Accepting that there cannot be double recovery, but if the unfair dismissal claim fails, he claims notice pay because the conduct could not be described as gross misconduct.

55. Mr Connolly thereafter made detailed submissions about the updated schedule of loss lodged.

Tribunal's deliberations and decision

Observations on the evidence and the witnesses

56. In this case, there is little dispute on the key facts. Where there is a dispute, which may come down to the question of seconds, it is a question of the interpretation of the facts, an assessment of reaction times, and of the respondent's expectations based on the facts established.

57. I accepted the evidence of the respondent's witnesses was credible and reliable. Indeed, Mr Connolly accepted that Donna Boylan was a credible witness and I considered that she gave evidence in a comfortable and straightforward way, suggesting she was knowledgeable and experienced in her role. I also found William Wood and John Gorman gave evidence in a straightforward and informed way, showing they had given the matter careful thought.

58. In contrast, I found the claimant to be rather defensive in the way that he gave his evidence. On a number of occasions, he hesitated for some time before answering questions, suggesting that he was thinking about the significance of the answer. He appeared at times to be somewhat disingenuous, at other times to go off on tangents and not answer questions directly. For these reasons, where there was any conflict of evidence, I preferred the evidence of the respondent's witnesses.

Reason for dismissal

59. Turning to the substantive case, the first issue which the Tribunal considered was whether the respondent had shown that the claimant had been dismissed and that the reason for the dismissal was misconduct. The first limb of the Burchell test requires the employer to show that they believed that the employee was guilty of misconduct.

60. As I understood his argument, Mr Connolly submitted that there was no potentially fair reason for dismissal because the claimant was not guilty of gross misconduct, and indeed nor was he guilty of "ordinary" misconduct, rather that if there is a potentially fair reason for dismissal that was capability.

61. I did not accept that argument. In this case, the claimant accepted that there had been a collision while he was driving. The dismissal followed from evidence of CCTV footage and report complied following analysis of it. The investigation and procedures related to the cause of that accident, which was attributed to the claimant, and I accepted that the reason for dismissal was misconduct. I accordingly find that the respondent has shown that the reason for the dismissal of the claimant was conduct, which is a potentially fair reason for dismissal.

62. I considered Mr Connolly's argument more relevant to the second and third Burchell limbs, that is whether the employer had in mind reasonable grounds upon which to sustain the belief that the claimant was guilty of misconduct following a reasonable investigation, to which I now turn.

Reasonableness of decision to dismiss

63. The key question for the Tribunal is of course whether the respondent acted reasonably in dismissing the claimant for misconduct. The question is whether it was reasonable in all the circumstances for the respondent to dismiss the claimant for misconduct, and not whether this Tribunal would have dismissed the claimant in these circumstances. Rather, the question is whether the dismissal was within the band of reasonable responses available to the respondent in all the circumstances.

Reasonable grounds for belief

64. In considering whether or not dismissal was reasonable in all the circumstances, I considered the second limb of the Burchell test, that is whether or not the respondent had in mind reasonable grounds upon which to sustain the belief that the claimant was guilty of misconduct.

65. The claimant argued that the respondent did not have reasonable grounds for their belief that the claimant was guilty of misconduct. Relying on case law including *Sandwell* and *Burdett*, Mr Connolly argued that in this case the conduct could not be said amount to gross misconduct, because such conduct must be a wilful or deliberate act or gross negligence, amounting to a fundamental breach of contract. This, I accept, is a separate question from whether the respondent acted within the range of reasonable responses in dismissing the claimant for gross misconduct.

66. Mr Connolly submitted that there was no evidence upon which the respondent could conclude that that the actions of the claimant were wilful or deliberate such as to amount to a fundamental breach. In particular, there was nothing in Donna Boylan's report to suggest that it had been deliberate or wilful. He argued that it is for the Tribunal, and not a matter for the respondent, to assess whether or not the conduct is properly characterised as "gross misconduct".

67. Mr Wood suggested in evidence that he was of the view that the claimant's actions had been deliberate, that of course was in answer to a question which

he was asked, and I accepted that he was simply telling the truth. As Ms McIroy pointed out however, the respondent did not rely on that view, rather the conclusion was based on the fact that the claimant had failed to react when he had sufficient time to do so.

68. Mr Connolly further submitted that there was no evidence to support the view that the claimant's actions amounted to gross negligence, where the circumstances, of a pedestrian walking out into the middle of the road, were unusual and where the claimant had a matter of seconds in which to react. He submitted that even if he reacted outwith the expected reaction time, it was a matter of mili-seconds which was not sufficient to establish gross negligence.

69. Ms McIroy did not take issue with the legal principles which Mr Connolly relied on, but she argued that there was sufficient evidence that the claimant committed a deliberate act, which she submitted included a deliberate failure to do something. The respondent's position was that the claimant had time at least to take his foot off the accelerator, and that was something which he failed to do, and which was therefore a deliberate and wilful act which amounted to gross misconduct. She submitted that there was ample evidence from the CCTV which showed the claimant looking ahead, and from the lack of a credible explanation, upon which the respondent could rely to conclude in the circumstances that these actions amounted to gross misconduct.

70. I accepted that submission. There was sufficient evidence in this case indicating that the claimant had failed to react as quickly as he could have done after the pedestrian came into view. All of those who viewed the CCTV, either as experienced investigators or bus drivers/managers were of the view that the claimant had time to react in some way, at least to decelerate or swerve to attempt to avoid the pedestrian. The consequences of his actions where potentially very serious indeed. It was apparent also that the claimant's union representatives would have assumed that the driver would brake in those particular circumstances. In the circumstances, I concluded that there were reasonable grounds for the belief that the claimant was guilty of the

conduct in question and that such conduct was capable of amounting to gross misconduct.

The investigation

71. Mr Connolly's focus in argument was on the extent of the investigation and whether it was sufficient to justify a belief that the claimant had committed gross misconduct. This of course relates to the third limb of the Burchell test. The question is whether at the stage at which the respondent formed the belief that the claimant was guilty of gross misconduct, he had carried out as much investigation into the matter as was reasonable in the circumstances.

72. Mr Connolly submitted that this was one of those cases where the consequences for the claimant were particularly far-reaching, given the referral to the OTC, and the fact that the claimant could lose his licence to drive PCVs. Given that he argued that the extent of investigation was unreasonable. While I accepted that this case could potentially have far-reaching consequences for the claimant, I did not accept that there was a failure to conduct a sufficient investigation in that context.

73. In particular, I did not accept that the failure to interview the claimant for the investigation report, or prior to the disciplinary hearing, could be said to render the extent of investigation to be unreasonable. I did not consider the fact that he had completed the accident report form without the knowledge that it might be relied on to decide whether to take the matter forward to a disciplinary hearing to render the investigation unreasonable. Ms Boylan had the CCTV footage. She was an experienced investigator who was "really concerned" by what she saw. She thought that it did not tally with the description given by the claimant in the accident report. In particular, she thought that it was an at fault/avoidable incident, and she conveyed her concerns to Mr Wood.

74. While she had recommended that the footage should be viewed in real time, and the driver asked to comment, the claimant attended the disciplinary hearing and spend one hour and ten minutes with his union representative reviewing the footage. When the disciplinary hearing re-commenced, both the

claimant and his union representative confirmed that they were happy to proceed. Any concerns that they had with the conclusions from Donna Boylan's report (which they had also read at the hearing) could have been raised at that point. By the time of the disciplinary hearing William Wood had read that report and had watched the CCTV footage. The only difference was that the investigator had not watched the footage with the claimant, whereas the claimant had more than enough time to watch the footage, was represented by his union rep and both he and his rep were given the opportunity to comment in the disciplinary hearing.

75. Nor, in my view, did the fact that the investigation report was prepared primarily for insurance purposes mean that it was not appropriate to rely on it in the context of a disciplinary hearing, when the claimant had the opportunity to raise any concerns that he might have with it.

76. Mr Connolly made a good deal about the time frame from when the claimant would be expected to see the pedestrian and the point of braking. He relied on Donna Boylan's view that a reasonable period of thinking time was one to two seconds, and that, according to the CCTV footage, the pedestrian could be seen only 2.83 seconds before he reacted.

77. Ms McIroy did not accept that there was a difference of opinion on the time scales, or that there had been any error or misunderstanding on the part of the respondent about the facts upon which the decision was made. She submitted that the respondent's position was that the relevant time period was from the time that the pedestrian became visible to the point at which the claimant reacted and not the collision – the claimant only having braked after the collision had taken place.

78. Whatever time period is taken, I accepted that the respondent's conclusion, given their expertise on these matters, that the claimant had sufficient time to have reacted or at least taken some avoiding measures in the time frame. I noted Mr Gorman's particular concern, which I accept was entirely reasonable

and appropriate, was that the claimant did not decelerate at all during the time frame. That is not in dispute.

79. I accepted that there were some inconsistencies in the reasons which the claimant gave to explain his actions. Mr Connolly said that there were no inconsistencies, because the claimant said the same thing, using different words, that is he did not see the pedestrian until it was too late. That arguably is correct, but there were inconsistencies in his explanation about the reason why he claims he did not see the pedestrian until it was too late. The claimant's position was that although he was shown on the CCTV to have been looking ahead, he was in fact looking around him, he was not concentrating, he was distracted because of the stress caused by the passenger, because of the glare of the headlights and because that he was thinking first of the impact that braking would have on the passengers. In the hearing itself, he made reference to a new type of lights used by on-coming cars and to "the camber of the road", which I had not noted he had said elsewhere.

80. Further the respondent was of the view, and I accept that there is some inconsistency here, that the claimant in his handwritten report had stated that "As I progressed normally, he stepped out onto the road from behind a parked van showing his rear end to the bus and he collided". This would appear to confirm that the claimant saw the pedestrian step out into the road before the point of impact, which is contrary to his assertion that he did not see the pedestrian until he collided with him by which time it was "too late". There was also a reference to "sidling out" and "crab-like" movements which suggests that he did in fact see the pedestrian, and notwithstanding, he took no action at all to attempt to avoid him, not even to decelerate.

81. Mr Connolly also suggested that the investigation was not a reasonable one because of the failure of the respondent to interview the witnesses. However, I accepted the evidence of the respondent's witnesses that they would have added nothing to the key issue which was being investigated. Ms Boylan said that from the CCTV she could tell that they were minding their own business,

and in any event this was a case where the respondent had CCTV footage from up to 10 cameras, so that there was no requirement to interview the witnesses.

82. As discussed above, I found Ms Boylan to be a credible and in particular a reliable witness. She was an experienced accident investigator. She explained in evidence about how concerned she was about what she saw. She said that the CCTV which she viewed several times was not what she had expected given the written accident report.

83. It was not clear what further investigation could have added to the knowledge and information which the respondent had. I conclude that by the time the respondent made the decision to dismiss the claimant the respondent had conducted as much investigation as was reasonable. This was particularly in light of the fact that the respondent had real time CCTV footage from 8-10 cameras on the bus which had been analysed in depth.

Reasonableness of the sanction of dismissal

84. I then turned to consider whether the sanction of dismissal was reasonable in all the circumstances, having regard to equity and the merits of the case.

85. As Mr Connolly submitted, the conclusion that there was gross misconduct does not automatically mean that dismissal in the circumstances will be fair. Rather the test from the Employment Rights Act must be applied, and consideration given to whether dismissal was reasonable in the circumstances.

86. Mr Connolly argued that the respondent had failed to take account of the background circumstances, and in particular they had failed to consider at all or sufficiently a number of mitigating factors.

87. On the question of length of service, Mr Connolly accepted that this was taken into account, by Mr Gorman at least, but that to take it into account to conclude that there was misconduct, rather than to view it as a mitigating factor.

However, it is clear then that Mr Gorman was aware of the fact that the claimant had eighteen years service, and it could not be said that he did not take it into account when considering the sanction. No reliance was placed either on any previous disciplinary warnings which were in any event no longer live.

88. Mr Gorman did also state that he had taken into account that the claimant had been severely provoked by the pedestrian when he was a passenger and acknowledged that drivers should not have to put up with that behaviour.

89. Notwithstanding, taking that into account, I was conscious too that when considering whether the sanction of dismissal was reasonable that I should take account of the fact of the sector in which this dismissal took place. The range of reasonable responses test is designed precisely to take account of the fact that conduct that may be reasonable in one sector may be unreasonable in another. Clearly bus drivers do have to be held to high standards given the responsibilities they have for passengers and pedestrians. They attend advanced driving courses and it could be expected that their awareness may be greater than the average driver. That is the case notwithstanding how critical the operators' licence is to the organisation, and the fact that every collision of this nature must be reported. While Mr Connolly relied on the fact that it was accepted that not all such collisions with pedestrians will result in dismissal or even disciplinary sanctions, still I considered that the respondent was entitled to take account of the seriousness of the misconduct in this particular case.

90. I noted too that the union made it clear at the appeal that this was a serious issue, and that they were in a "precarious position". The union recognised that the misconduct in this case was serious, and sought to focus in the appeal on the sanction of dismissal by focussing on mitigation.

Procedural fairness

91. I went on to consider whether the dismissal was nevertheless unfair on procedural grounds. The question was whether in all the circumstances a fair

procedure was followed, and the band of reasonable responses test applies not only to the decision to dismiss but also to the procedure relating to dismissal.

92. Mr Connolly focused, in support of his submission that there were procedural flaws, on his argument that the outcome had been predetermined. This related in particular to the fact that the claimant had been suspended and a disciplinary hearing set up on the strength only of a telephone call between Mr Wood and Ms Boylan, before Mr Wood had read the report or watched the CCTV. He also made reference to the dismissal letter which stated "On viewing the CCTV footage on Friday 8/12/17 it was apparent to me that this was an at-fault avoidable incident and confirmed in the report by D Boylan".

93. I do not accept that this indicates prejudgement. It makes reference to it being "apparent" from the CCTV that it was an at-fault avoidable incident. Ms McIroy submitted it was clear that this was a reference to Ms Boylan's view which she had conveyed to Mr Wood. In any event, Mr Wood had followed up those "appearances", by watching the CCTV himself and reading the report and then in the disciplinary hearing itself, when the claimant had an opportunity to explain himself. His evidence, which I accepted, was that he had not prejudged matters, but rather that he had based his conclusions not only on what he saw on the CCTV but also on the basis of the claimant's explanation about his actions, which he did not accept. I did not accept Mr Connolly's submissions that he was not open to the explanations preferred by the claimant at the disciplinary hearing because he had closed his mind to any other outcome. Rather, the reasons why he did not accept the claimant's explanation was not only because of the CCTV but also because of the inconsistencies in his explanation.

94. Thus, I did not consider that the evidence supported Mr Connolly's submission that the procedure leading to dismissal was unfair because I did not accept that it supported the submission that Mr Wood had prejudged the outcome or closed his mind to any alternative explanation. I concluded therefore that it could not be said that the procedure leading to dismissal was unfair.

95. In all the circumstances, I consider that the procedure followed by the respondent fell within the band of reasonable responses and therefore that the procedure followed could not be said to render the dismissal unfair.

96. Consequently, in all the circumstances, I decided that dismissal for gross misconduct was within the range of reasonable responses open to the respondent.

Conclusion

97. I therefore concluded, in all the circumstances, that dismissal for gross misconduct was within the range of reasonable responses open to the respondent, and therefore that the dismissal was not unfair. The claim is therefore dismissed.

Employment Judge: M Robison
Date of Judgment: 09 January 2019
Entered in register: 09 January 2019
and copied to parties