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EMPLOYMENT TRIBUNALS

Claimant: **Mr I A Ramzan**

Respondent: **CT Plus (CIC)**

Heard at: **East London Hearing Centre**

On: **Wednesday to Friday 27, 28 & 29 March 2019**

Before: **Employment Judge Ferguson (sitting alone)**

Representation

Claimant: Mr A Morgan (Counsel)

Respondent: Mr H Hayre (Counsel)

JUDGMENT having been sent to the parties on13 April 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

INTRODUCTION

1 The Claimant was employed by the Respondent as a bus driver. His continuous employment began on 17 December 2002 with a different company and he transferred to the Respondent's employment in February 2016. He was summarily dismissed on 16 January 2018.

2 By a claim form presented on 10 May 2018 following an early conciliation period from 10 March to 9 April 2018, the Claimant brought complaints of unfair dismissal, wrongful dismissal and "victimisation". The Respondent defended the claim. The precise complaints were not clear from the claim form but they were clarified at a preliminary hearing on 6 August 2018 as unfair dismissal, both ordinary and automatic under section 101A or 104 of the Employment Rights Act 1996 ("ERA") or Regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006

("TUPE"), wrongful dismissal and unlawful deduction from wages in respect of holiday pay for the years 2016, 2017 and 2018.

3 The Claimant confirmed at the start of the hearing that the complaint of automatic unfair dismissal under section 101A was not pursued.

4 The issues to be determined were agreed as follows:

Unfair dismissal

4.1 What was the reason for the Claimant's dismissal and was it a fair reason under section 98(1) to (2) ERA? The Respondent says the reason was conduct. The Claimant said it was the fact that he had asserted a statutory right by complaining about unpaid holiday pay and/or it was for a reason related to the TUPE transfer that took place in 2016.

4.2 If the reason for dismissal was conduct:

4.2.1 Did the Respondent believe that the Claimant committed the misconduct in question?

4.2.2 Were there reasonable grounds for that belief?

4.2.3 Did the Respondent carry out as much investigation as was reasonable in all the circumstances of the case?

4.2.4 Did the Respondent follow a fair procedure in all the circumstances?

4.2.5 Was the decision to dismiss within a range of reasonable responses?

4.3 If there was any procedural unfairness, what is the chance the Claimant would have been dismissed following a fair procedure?

4.4 If the dismissal is found to be unfair, should there be a reduction under sections 122(2) or 123(6) ERA in respect of the Claimant's conduct?

4.5 As regards remedy, the Claimant claims reinstatement and/or compensation.

Wrongful dismissal

4.6 Was the Respondent entitled by reason of the Claimant's conduct to terminate the contract without notice? It is not in dispute that the Claimant's notice period was 12 weeks.

Holiday pay

4.7 Did the Respondent underpay the Claimant in respect of holiday pay in the years 2016/17 and 2017/2018? If so, by how much?

5 On behalf of the Respondent I heard evidence from Sinead McGuire, Jonathan Batchelor, David Langer and Sean Williams. I also heard evidence from the Claimant.

THE FACTS

6 The Respondent is a community interest company running public bus services in East London. The Claimant was employed as a driver based at the Ashgrove depot. He drove a double-decker bus on route 26. His continuous employment dated back to 2002 when he was employed as a bus driver by First Group. He then transferred under TUPE to Tower Transit and on 27 February 2016 he transferred to the Respondent. It is not in dispute that the Claimant's terms of employment were governed by a document produced by Tower Transit entitled "Pay and Conditions for Drivers 2014/15 and 2015/16". As regards holiday pay it states:

"**Holiday pay (non WTD)**

As set out on latest Implementation Notice.

Holiday entitlements

…

See Appendix

Note – the first 28 days AH/BH are paid at the personal 12 week WTD average (or Company Holiday Pay Rates, if higher) and the balance of any additional AH/BH is paid at Company Holiday Pay Rates."

7 Neither party had a copy of the Implementation Notice and Ms Williams, who dealt with the Claimant's query about his holiday pay, said she did not believe she had ever seen it. Neither party had a copy of the relevant Appendix either.

8 Throughout the Claimant's employment with the Respondent his holidays were paid on the basis of a 40-hour week at the rate of his basic hourly pay. It is not in dispute that the Claimant also worked overtime and this was not taken into account when calculating his holiday pay.

9 When the Claimant was employed by Tower Transit he would receive two payments for each period of annual leave; one described as "WTD holiday" calculated on the basis of a 40-hour week at his basic hourly rate and one entitled "WTD Top Up" which would vary. In the year 2015/16 the Claimant received these top up payments in respect of each period of one week's holiday varying between £163.24 and £356.78.

The total amount over the year was £1,277.29. Neither party knows how these figures were calculated.

10 In May 2017 the Claimant raised with the Respondent that he was not receiving "Working Directive pay", which he used to receive from his two previous employers. He was told that the payroll department were looking into the issue. The matter was eventually passed to Sian Williams of HR but nothing much was done for several months despite the Claimant regularly sending chasing emails. Eventually, on 1 October, the Claimant wrote a letter to the Respondent saying that the Respondent had still not paid his "working time directive pay" or "WTD pay". He asked to be either sent back to Tower Transit or made redundant.

11 The following day Ms Williams replied by email apologising for the delay and saying that she was calculating the Claimant's entitlement. She said that in future this entitlement would be calculated on an annual basis.

12 On 4 October Ms Williams sent an email to Vince Dalzell of Tower Transit asking, in respect of the staff who had been transferred to the Respondent, "what pay elements were used to calculate annual leave payments as per the WTD", and how frequently the calculations were made. Mr Dalzell replied on 12 October. In response to the first question he said: "Any basic pay and compulsory overtime". As to the second question he said: "Every time the employee is on annual leave up to a maximum of 28 days including BH i.e: 20 + 8". On 19 October Ms Williams notified the Claimant that the sum of £633 would be paid to him in respect of the period up to March 2017. She said she would calculate the shortfall from April 2017 to date "over the next few weeks".

13 Ms Williams's oral evidence, which is supported by contemporaneous documents and which I accept, was that she obtained the Claimant's complete pay record from his start date with the Respondent until 10 March 2017. For each period of annual leave taken she calculated his average pay based on the previous 12 weeks including overtime. She then used this figure to calculate his holiday pay and noted the difference between her calculation and the sum actually paid. The total shortfall for the period of just over one year was £633; this was paid to the Claimant on 20 October 2017.

14 On 12 November the Claimant wrote to the Respondent again disputing the figure of £633 and saying that he should have been paid approximately £1,700. He also did not agree to the figure being calculated on an annual basis in future. Ms Williams replied the following day saying that she would calculate the remainder of the money due by the end of the week. That did not happen. The Claimant chased the matter again in early December and Ms Williams made a further promise to update the Claimant. Eventually, on 15 December, Ms Williams told the Claimant that the outstanding payment had been approved and would be paid in his next week's pay. She did not tell the Claimant the amount, but her evidence, which again I accept for the same reason as above, was that she conducted the same exercise for the period April 2017 to 8 December 2017 and calculated the shortfall as £98. She assumed that the payment had been made but by the time of the hearing she discovered that it had been overlooked. She therefore accepts that the Claimant is owed £98.

15 On the night of 5 to 6 January 2018 the Claimant was working a night shift. He started at 8pm and completed two rounds of his route. He was then due to take a meal break for which he had to return the bus to the depot. He took the bus out of service and drove back to the depot without no passengers on board. The back entrance to the depot is accessed via a road with four turnings to the right. The first two are for a different bus company, the third is the entrance to the Respondent's staff car park and the fourth is the bus depot entrance. The Respondent's staff car park is a multi-storey brick building with a low entrance suitable for cars. It is obvious looking at it, which the Claimant does not dispute, that it is much too low for a double-decker bus. The Claimant accepts that he was very familiar with the layout of the roads having parked his car in that car park at least five times a week since he started working for the Respondent almost two years beforehand.

16 On the night in question, as the Claimant was approaching the depot at three minutes past midnight, he turned into the car park entrance and the top section of the bus collided with the building.

17 The manager on duty, Mr Rahman, contacted John Batchelor, Head of Operations, to inform him of the collision. The Claimant was suspended pending an investigation. Mr Rahman completed a serious incident report form which suggested that the Claimant had said he: "made a sudden move as if he was in his car and turned to enter the car park". It also records that the Claimant was asked if he was okay and he said he was fine but nervous and shaken up.

18 On 8 January the Claimant attended a meeting with Sinead McGuire Accident and Insurance Manager, to discuss the incident. She asked him if he was okay and if he was injured. The Claimant said he was not injured but was very upset over the incident. Ms McGuire asked the Claimant why he had driven into the car park and he said he did not know, he said he normally parks his car there. She asked him if he took responsibility for the collision and he said no. She reviewed the CCTV and concluded that it was a preventable incident and that it was serious. The engineers in the depot had estimated the damage to the bus at around £25,000.

19 Ms McGuire referred the matter to Mr Batchelor. In her investigation report she noted that the Claimant had had one incident in the previous 12 months which was deemed non-preventable i.e. there was no fault on the Claimant.

20 On 10 January Mr Batchelor invited the Claimant to a disciplinary hearing on 16 January. The charge was "Driving standards: - 'preventable collision on 6 January 2018'". The Claimant was warned that a possible outcome was summary dismissal. The letter referred to the company disciplinary procedure but it is not clear whether a copy was enclosed.

21 The Respondent is part of HCT group and it applied the HCT Group Disciplinary and Performance Improvement Procedure. This procedure lists examples of gross misconduct, including: "Blameworthy or preventable major accidents whilst in a company vehicle". Examples of misconduct include: "Blameworthy or preventable minor accidents whilst in a company vehicle". The Claimant disputes that this procedure applied to him. No alternative disciplinary policy was produced by either

party.

22 The disciplinary hearing took place on 16 January, the Claimant was represented by a union representative, Don Hall. At the end of the hearing Mr Batchelor concluded that the Claimant should be summarily dismissed and he informed the Claimant of his decision. The decision was confirmed in a letter dated 19 January, it states:

> "I went through your statement and advised you that I watched the CCTV. You confirmed you had seen the CCTV when you attended the investigation.
>
> You stated you did not know how this had happened and that you have a very good driving record. You have been on night work for a long time. This was your first night at work following 2 days off. You were coming into the depot to have your meal break.
>
> Your union representative asked me to take into account that no-one was injured, you good record and that it was an accident.
>
> Following an adjournment I advised you that I had reviewed all the paperwork during the adjournment & taken into account what you and your representative had said. This was a very serious incident which was preventable with an estimated cost to the company of 25k. I have found the charges against you proven. My decision is therefore to summary dismiss you from the company, your last working day being today the 16th January 2018. I took into account that you are a professional driver and have held a PCV licence for a long time. Your actions on this day were not acceptable and not what I would expect from someone with your experience."

23 The Claimant appealed against his dismissal on the basis that the sanction was too harsh. He said he had repeatedly expressed remorse and claimed that his driving record was otherwise exemplary.

24 The Claimant's appeal was heard by David Lange, Acting Head of Community Transport, on 2 March 2018. The Claimant was represented by a different union representative, Mr Maflin. During the hearing Mr Maflin said the Claimant did not deny the accident was preventable and that it was expensive, but objected to Mr Batchelor basing his decision on the cost of the repairs. He also questioned the consistency of treatment with other drivers. Mr Maflin claimed that there had been many accidents over the years involving injuries to passengers and damage to vehicles but drivers had not been dismissed. He said that he did not know of anyone being dismissed for accidents in the last 10 years. He alleged the Claimant had had no accidents in the last 17 years of employment. He described the incident as "a split second lapse of concentration". When asked by Mr Lange about the health and safety considerations Mr Maflin said the incident was on private land nobody else was about and there was nobody on the bus at the time.

25 Mr Lange adjourned the meeting to check on the consistency of treatment

argument. He reconvened the meeting and said that he had been told the Respondent had dismissed drivers for single incidents in the past. He adjourned the meeting for further consideration.

26 After the appeal hearing Mr Lange looked at the Claimant's personnel file to check on his claim that he had an exemplary record. Mr Langer produced a one-page document of the Claimant's driving record, including where he had been praised for good driving. There were seven previous avoidable incidents dating back to 2004, one of which resulted in a written warning.

27 On 7 March Mr Lange wrote to the Claimant informing him that his appeal was dismissed. He addressed the three issues that had been raised in the appeal hearing. He said he had spoken to Mr Batchelor who confirmed that the basis of his decision was the fact that the Claimant "could offer no reasonable explanation as to why the accident had happened which was then viewed as gross negligence". As to the consistency point he noted that there were varying degrees of severity for preventable accidents. This accident, in his view, had compromised health and safety. The Claimant had been unaware of his surroundings. He had a collision with a building containing other vehicles and the impact on the building could have been a lot worse. Mr Lange also confirmed that other drivers had been dismissed for having a preventable accident that amounted to gross misconduct. On the issue of the Claimant's driving record Mr Lange attached the one-page document he had produced and noted that it suggest the Claimant's claim to have an exemplary record was not accurate. Mr Lange concluded:

> "When considering matters relating to an appeal against the termination of someone's employment, I am obliged to consider the employee's mitigation that this was a one-off lapse of judgement and weigh this against the severity of the incident which occurred.
>
> Having viewed the CCTV footage it is quite apparent that you were not paying due care and attention whilst driving your vehicle. Actions such as these have the potential to cause significant harm not only to you but to passengers and other road users. It was fortunate in this instance that you were within our compound when this occurred and there were no passengers upon your vehicle; however, there were other employees, visitors etc. within our compound on that day, each of which you placed in jeopardy by your actions. Every PSV driver is responsible for his own and every else's Health and Safety from the time they sit behind the wheel of their vehicle until their vehicle is parked up and the keys removed, the obligation to pay due care and attention at all times is paramount in ensuring that this occurs.
>
> Your actions in this instance wholly display a lack of meeting this requirement for a PSV driver and as such I cannot with good conscience overturn the decision made by Jon Batchelor.
>
> I have a duty of care to consider and ensure that I mitigate any further lapses of concentration which are wholly negligent and that whilst carrying passengers on a public highway might result in an accident of more serious consequences,

something I would have on my conscience for the rest of my life.

It is therefore my belief that Jon Batchelor's decision to terminate your employment was an appropriate sanction and as such I cannot uphold any point of your grounds for appeal."

28 The Claimant disputes that Mr Lange's document setting out his driving record is accurate. He accepts that the incident which led to the written warning happened but could not recall all of the other incidents.

29 The receipts for the repair to the bus were produced in the bundle and are not disputed. The final bill was just over £19,500 including VAT.

30 The Claimant received two payments from the Respondent in March 2018, one was for accrued and untaken holiday calculated by reference to his basic pay, the other was for one week's work and the Respondent says this was an overpayment. It has never been recouped by the Respondent. The Claimant disputes that this was an overpayment but having examined all of the payslips from the start of January 2018 onwards, I am satisfied that it was.

THE LAW

31 Section 104 ERA provides, so far as relevant:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee –

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1) –

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section –

…

(d) the rights conferred by the Working Time Regulations 1998, …

…

32 Regulation 7(1) of TUPE provides:

(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is –

(a) the transfer itself; or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

33 On a complaint of unfair dismissal, pursuant to section 98 ERA it is for the employer to show the reason for the dismissal and that it is one of a number of potentially fair reasons or "some other substantial reason". A reason relating to the conduct of an employee is a fair reason within section 98(2). According to section 98(4) the determination of the question whether the dismissal is fair or unfair:

(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.

34 In misconduct cases the Tribunal should apply a three stage test, set out in British Home Stores Ltd v Burchell [1980] ICR 303, to the question of reasonableness. An employer will have acted reasonably in this context if:-

34.1 It had a genuine belief in the employee's guilt,

34.2 based on reasonable grounds

34.3 and following a reasonable investigation.

35 The Tribunal must then consider whether it was reasonable for the employer to treat the misconduct as a sufficient reason for dismissal. In respect of each aspect of the employer's conduct the Tribunal must not substitute its view for that of the employer but must instead ask itself whether the employer's actions fell within a range of reasonable responses (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439).

CONCLUSIONS

36 I will address s.104 ERA and Regulation 7 of TUPE first. The Claimant believes that he had made himself unpopular with management by persistently complaining about his holiday pay post-transfer and that the Respondent saw this incident as a convenient opportunity to get rid of him. The Claimant did not allege, and it was not put to any of the Respondent's witnesses, that any of the managers involved in the disciplinary process even knew about the holiday pay dispute, let alone that they were motivated by it. It is also notable that the Claimant did not allege any connection between that dispute and his dismissal until he submitted his claim form. There is no evidence on which I could conclude that any of those involved in the decision to dismiss the Claimant were motivated by him asserting a statutory right or that his dismissal was for a reason connected to his transfer to the Respondent. I accept that the reason that has consistently been given by the Respondent for the dismissal, namely the Claimant's conduct on 6 January 2018, was the real reason. That is a potentially fair reason under s.98 ERA.

37 There was no dispute during the disciplinary process about what had happened on 5/6 January 2018. The Claimant therefore does not take any issue with the genuineness of the Respondent's belief or the grounds for that belief. He does, however, criticise the investigation. He argued that the Respondent should have watched more of the CCTV footage which shows the Claimant driving responsibly and safely in the 13 minutes before the collision. There was never any question of the Claimant's driving during that time being criticised in any way so this was simply not relevant to the Respondent's assessment. It is also argued that the Respondent should have either referred the Claimant to occupational health or advised him to go to his GP. It is accepted, however, that there were no health issues that could have contributed to the accident and the Claimant confirmed at the time that he was fine, although understandably somewhat shaken. I do not accept that it was unreasonable of the Respondent not to investigate a possible health concern.

38 The real dispute is about the severity of the sanction. Mindful that I must not substitute my own assessment of the appropriate sanction, I am satisfied that that dismissal was a reasonable outcome in this case. It may have been a single episode of a lapse of concentration but I do not accept Mr Morgan's characterisation of it as equivalent to a car driver missing a turning. Bus drivers have an enhanced duty to take care when driving. By driving the bus into a building the Claimant demonstrated very serious failure in that duty on his part. There was no excuse for it, he had not been distracted by something or someone, there were no medical issues, he simply took a wrong turn and attempted to drive into an entrance which he knew well, and knew was not designed for double-decker buses.

39 The Claimant suggested in his evidence that the entrance should have been more clearly marked with a maximum height notice, but he did not make that point at any stage during the disciplinary process and in any event, I do not consider it mitigates the Claimant's conduct. He accepted he was very familiar with the area. It would be obvious to anyone that it was too low for a double-decker bus. This was a serious lapse of concentration for which he had no excuse. The cost of the damage to the bus was a relevant consideration. It was an indicator of the seriousness of the

collision. It is also obvious that the Claimant's conduct was a risk to health and safety. The Claimant's length of service was clearly relevant, but the Respondent has a duty to members of the public, its customers and other road users, and it was not unreasonable for it to conclude that this was such a serious incident that it justified dismissal. I reach that conclusion without reference to the HCT Group disciplinary policy. I also note that the Claimant was unable to give any examples of a similar incident following which the driver had not been dismissed.

40 There were no particular criticisms of the procedure other than Mr Lange failing to give the Claimant an opportunity to comment on the one-page document he had produced setting out the Claimant's driving record. I accept that it would have been fairer to the Claimant to allow him to comment on that document, but I have found that the original decision to dismiss was reasonable and I do not consider that this rendered the process unfair.

41 For these reasons the unfair dismissal complaint fails; it is therefore unnecessary to address the issues relevant to remedy.

42 As to wrongful dismissal, I find that the Claimant's conduct amounted to gross misconduct and/or gross negligence and was a fundamental breach of his contract of employment. For much the same reasons as those given by the Respondent at the time, I accept that this was a very serious lapse of concentration for which the Claimant had no excuse. It caused substantial damage and was a risk to the health and safety of himself and any others who could have been in the car park or the surrounding area. The Respondent was therefore entitled to terminate the contract without notice.

43 As for the wages/holiday pay claim, the burden is on the Claimant to establish that he was underpaid. He has failed to discharge that burden. The only evidence of the Claimant's holiday pay entitlement at Tower Transit is Mr Dalzell's email of 12 October 2017. The Claimant accepted that this was the correct way of calculating his holiday pay, i.e. to work out his average pay including compulsory overtime for the 12-week period prior to the period of annual leave. It is slightly curious that this seems to have been treated by both Tower Transit and the Respondent as a contractual entitlement over and above the statutory right to holiday pay because compulsory overtime should, in any event, be taken into account when calculating holiday pay for the first 20 days of holiday taken. It appears that the Respondent has not generally been doing so and I suggest it reviews its practice in this respect. There was also some confusion about whether overtime was compulsory or voluntary. Even if it is voluntary it may need to be taken into account. It is possible that Tower Transit had been calculating holiday pay in this way before the law had been clarified by the EAT and it also appears to have adopted the same calculation for the full 28 days, not only the 20 days holiday under the Working Time Directive.

44 The Claimant's difficulty is that he does not accept Ms Williams' calculations are correct but he has not put forward an alternative calculation and has no basis for saying that she has got it wrong. The amount that he was paid in his last year at Tower Transit is unlikely to be a reliable indicator because it varied, presumably depending on the amount of overtime worked. The Claimant asserted that he had worked more overtime at the Respondent than he had at Tower Transit but there was

no evidence of this and it was not put to Ms Williams.

45 There is no basis on which I could conclude that Ms Williams' calculations are not correct. She accepts that the Claimant is owed £98 so I award that amount.

Employment Judge Ferguson
Date: 10 June 2019