EMPLOYMENT TRIBUNALS

Claimant Mr. M. Bah

Respondent London United Busways Ltd

v

Heard at: Amersham

On: 13-16 January 2020 (15 January 2020 in chambers)

Before: Employment Judge Heal
Mr. W. Dykes,
Ms S. Hamill

Appearances
For the Claimant: Mr. Singh, counsel.
For the Respondent: Mr. Hare, solicitor

A request by the claimant for written reasons having been received in time, reasons are now provided.

REASONS

1. By a claim form presented on 26 June 2018 the claimant made complaints of unfair dismissal, race discrimination and discrimination on grounds of religion or belief.

Evidence

2. We have had the benefit of an agreed bundle running to 194 pages to which pages 195 to 197 were added by the claimant with the consent of the respondent at the outset of the hearing.

3. We have heard oral evidence from the following witnesses in this order:

Mr Mamadou Bah, the claimant, Bus Driver;
Mr Steven Harry, at the relevant time, Operation Manager at Park Royal bus garage and
Mr Ray Clapson, General Manager.

4. Each of those witnesses gave evidence in chief by means of a prepared typed witness statement which we read before the witness was called to give evidence and then the witness was cross examined and re-examined in the usual way. ***Issues***

5. The issues were identified by Employment Judge Robin Lewis at a preliminary hearing on 14 February 2019.

6. Judge Lewis identified those issues by reference to a draft list of issues produced by the parties and then with the cooperation of the parties we finalised the issues which we had to decide as follows at the outset of this hearing.

Unfair dismissal

6.1 It was not in dispute that the claimant qualified to claim unfair dismissal, his claim is in time and that he was dismissed.

6.2 Does the respondent prove its reason for dismissal namely, one related to conduct?

6.3 Did the respondent hold a genuine belief in the misconduct?

6.4 If so, was that belief based on reasonable grounds having carried out as much investigation as was reasonable in all circumstances?

6.5 The burden of proof is neutral here however it helps us to know what are the grounds of unfairness relied upon by the claimant, and Mr Singh identified those as follows. The claimant says that:

6.6 the reason itself was unfair because it was discriminatory;

6.7 the respondent carried out a surveillance observation of the claimant which the claimant says indicates that the respondent was looking for ways to dismiss him;

6.8 the respondent took into account two previous incidents on 9 April and 20 April 2018 which were taken into account but not investigated. The claimant says that these incidents should not have been taken into account in the absence of investigation.

6.9 The respondent did not consider alternative sanctions;

6.10 the respondent did not apply its own policy and procedure of disciplining with the purpose of education and guidance;

6.11 the claimant's mitigation was not properly considered.

6.12 the claimant was treated inconsistently with the treatment of A, B,C,D and E. (these comparators together with one relied on by the respondent , F, were referred to by name during the hearing but with the agreement of the parties we have anonymised them in this judgment pursuant to Rule 50, balancing the need for open justice against the Convention rights – to privacy and fair hearing - of the individuals concerned) .

6.13 Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

6.14 If the dismissal was unfair did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

6.15 If the respondent had adopted a fair/non-discriminatory procedure would the claimant have been dismissed in any event? If so, what is the percentage chance of a fair dismissal and when?

Race/Religion or belief discrimination

6.16 The claimant describes himself as black and a Muslim.

6.17 He relies upon direct discrimination only.

6.18 Has the respondent subjected the claimant to the following treatment falling within section 39 of the Equality Act 2010, namely:

1. dismissing him.
2. subjecting him to surveillance.
3. investigating his affairs outside work.

6.19 If so, did the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies upon the five actual comparators set out above (at paragraph 6.12) in his claim of unfair dismissal and also on a hypothetical comparator.

6.20 If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

6.21 If so, what is the respondent's explanation? Does it prove no discrimination whatsoever?

Facts

7. We have made findings of fact as follows, on the balance of probability. That means that we do not possess a fool proof method of discovering absolute truth. Instead, we listen to and read the evidence placed before us by the parties and on that evidence, where there are disputes of fact, we decide what is more likely to have happened than not. *Background*

8. The respondent is a limited company running bus transport in London.

9. The claimant began employment with NCP Challenger on 16 July 2008. In about 2010 there was a TUPE transfer by which the claimant's employment transferred to the respondent.

10. At all material times, the claimant was a bus driver.

11. The respondent's disciplinary policy contained the following:

'*All employees are required to comply with and maintain certain standards of performance and conduct in carrying out their work. This procedure which reflects the ACAS Code of Practice, is not primarily concerned with punishment but is designed to help and encourage employees to achieve and maintain the standards of performance, conduct and attendance that are required by the Company*'

'*GROSS MISCONDUCT/GROSS NEGLIGENCE*

The Company reserves the right of summary dismissal in the case of gross misconduct/gross negligence or a fundamental breach of contract. Summary dismissal means dismissal without notice or payment in lieu of notice.

When, following an investigation and disciplinary hearing, the Company is satisfied that gross misconduct or gross negligence has occurred, then the result will be summary dismissal. The employee will be provided with confirmation of the dismissal and details of the right of appeal.

It is not possible to give a comprehensive definition of behaviour which would be regarded as gross misconduct or gross negligence or a fundamental breach of contract, but the following may be taken as examples:

a) Failure to observe the Company's rules/procedures or lawful and reasonable instructions relating to employment, including those affecting the health and safety of staff or the public…

h) Negligence resulting in serious loss, damage or injury….

m) Use of mobile phones whilst bus driving or conducting and illegal use of mobile phone equipment whilst driving Company vehicles.'

12. The respondent's unchallenged evidence was that it had an equal opportunities policy, however this was not contained in the bundle or produced in evidence.

Chronology

13. In March 2013 Mr Harry joined the Park Royal depot where the claimant was working. Before his arrival, the depot had a poor record for road traffic accidents. Mr Harry adopted a 'zero tolerance' approach to drivers who had accidents and dismissed them all (regardless of circumstance, but also of gender, religion or ethnic origin). Mr Clapson developed considerable experience in overturning Mr Harry's dismissals. Over time, Mr Harry began to differentiate between cases and to apply an approach which Mr Clapson regarded as more fair.

Quiet room

14. We accept that the Park Royal depot, in common with the respondent's other depots, had a quiet room for the use of all staff. In 2013 (or possibly 2014 because one of the signatories to the document shown to us in this context did not arrive until 2014) this room was used particularly by the Muslim members of staff who came to regard it as a prayer room and kept their prayer mats laid out upon the floor. However, a new member of staff who was not a Muslim walked over the prayer mats in order to place a Chelsea football team poster upon the wall. This gave rise to a management issue which Mr Harry sought to resolve.

15. Mr Harry did so in part by writing a note for the staff – the full wording of which we have not seen – which included the words, '*we live in a multi-cultural society'*. We do not have the full wording to put that statement in context. He asserted to the staff however that the room was not exclusively a prayer room but was a quiet room for anyone to use to escape from the noise of the canteen.

16. The claimant produced a document setting out a grievance in response to Mr Harry's actions. He says he sent this by email to a 'higher ranking manager' but does not say that he sent it to Mr Harry. In that context, we accept Mr Harry's evidence that he did not receive it. Neither party has produced the email. The 70 signatures that appear on the back of the 'grievance' in our bundle have no text to connect them with the grievance itself and they were plainly originally written on a different sheet of paper, the edges of which we can see on the

copy. At this distance in time we find it impossible to discover in the evidence what has happened further than this.

September 2013 incident

17. On 2 September 2013 we find - on the balance of probability having considered the documents in the bundle - that the claimant took out his bus without having previously recorded pre-existing 'old body damage' on his log card. He returned the bus to the depot and went out on a different route with a different bus. In his absence, the damage to the first bus was noticed and because the claimant had not recorded the existence of previous damage, which appeared to be recent, he was asked about the cause of the damage. The claimant said that he had no knowledge of the accident and subsequently filled in an occurrence report complaining of having been accused of causing the damage. The matter was taken no further: he was not held responsible for the damage and was not disciplined either for the damage or for the failure to fill in the log card.

Three 2014 incidents

18. Three incidents took place in 2014. The scant and confusing evidence before us has made finding facts about these incidents a challenge. Mr Clapson explained to us that the documents in this case had been moved and subject to a flood. Management and HR personnel had also changed and therefore it had been doubly difficult to find the relevant documents; he said that, '*no-one owned the case*'. Mr Singh pointed out in submissions, fairly we think, that when an explanation is given like that orally and without warning it is difficult indeed to challenge it. We have however found Mr Clapson to be an unusually frank, reliable and honest witness and we do accept his explanation for the absence of relevant documents.

19. We have based our findings about the three incidents of 2014 on the outcome of a grievance dated 14 June 2016, which appears to us to be the most reliable evidence available.

20. The first 2014 incident took place on 4 March 2014. This appears in the claimant's witness statement but not in his further particulars of claim at p3132. In this incident, a gentleman fell over on the claimant's bus. Mr Fieldhouse conducted a meeting with the claimant about this and the claimant considered that Mr Fieldhouse was only interested in blaming the claimant for the incident. Although the claimant makes detailed allegations about Mr Fieldhouse in his witness statement including allegations that paperwork had been falsified it is clear from the grievance outcome that the claimant did not make these allegations *about this incident* in 2016. He did not then, as he does now, make allegations about Mr Fieldhouse's conduct, behaviour or professionalism. The claimant did not appeal the grievance outcome. In these circumstances we do not find the claimant's account of this matter in his witness statement reliable. We prefer the account reflected by the grievance outcome.

21. On 4 June 2014 the claimant was involved in a rear end collision. Disciplinary proceedings were started against him and subsequently abandoned. We do not have any of the of the documents recording these disciplinary proceedings. Mr Small's grievance outcome of 2016 records that the matter was investigated by Amanda Massingham in November 2014. She accepted that errors had been made by management in the disciplinary proceedings. In the light of that, Mr Small made no further findings in the grievance outcome. Although the claimant does not deal with this matter in his witness statement, he does refer to it in his further particulars of claim at page 31 where he says that it was proved that Mr Fieldhouse used falsified documents to discipline him. The claimant's witness statement does make allegations of falsified documents about an incident and a report to Amanda Massingham, but it attributes these events to the incident of March 2014. This confusion does not encourage us to rely upon the claimant's evidence.

22. In these circumstances, on the balance of probability, we accept that management made unspecified errors in these disciplinary proceedings, but on balance we do not find that documents were falsified in order to discipline the claimant.

23. On 16 November 2014 the claimant was involved in an incident in which two buses became stuck facing one another with insufficient room to pass each other. There was an allegation that the claimant had touched another vehicle with his bumper and his evidence is that there was a slight red line on the bumper. He denied causing the damage. He declined to speak with Mr Fieldhouse for a post incident meeting in the absence of his union representative. Therefore, that post incident interview did not take place.

24. The claimant was not disciplined as a result of this incident and on 4 December 2014 Mr Fieldhouse wrote to him referring to it as a 'blameworthy incident'. Because of the time delay, Mr Fieldhouse did not ask the claimant to undertake further training but he did ask the claimant to come and see him to review the CCTV footage and discuss the incident so that Mr Fieldhouse could offer the claimant some guidance.

25. Although the claimant's union representative was available at certain periods during the week, the claimant did not take up this offer and no further action was taken in relation to the incident. The claimant was dissatisfied with Mr Fieldhouse's handling of the incident because he had written to him referring to the incident as blameworthy.

August 2015 incident

26. On 22 August 2015 the claimant was involved in an incident in which it appears that he stopped his bus suddenly to avoid a pedestrian and as a result an elderly female passenger fell over. Mr Fieldhouse conducted a fact-finding interview with the claimant and showed him the CCTV stills of the incident. The claimant wished to see the full CCTV footage. We accept however that it is standard practice for the respondent to rely only upon CCTV stills where possible because of the complication and delay caused by the need to seek full CCTV footage.

27. On 11 September 2015 Mr Fieldhouse wrote to the claimant inviting him to a disciplinary hearing to be chaired by Mr Fieldhouse.

28. At that disciplinary hearing, the claimant's union representative objected to Mr Fieldhouse chairing the hearing when he had himself conducted the fact-finding interview. The matter was referred to Mr Harry and as a result, the disciplinary hearing was abandoned on that day and the claimant heard no more about it. In the subsequent grievance outcome in 2016, Mr Small accepted that it was wrong for Mr Fieldhouse to attempt to chair the disciplinary hearing in these circumstances and also that the respondent was at fault in leaving the matter unresolved without giving the claimant an update on the situation.

2016 Grievance

29. In 2016 the claimant presented his grievance complaining that Mr Fieldhouse and Mr Harry were orchestrating a campaign of bullying against him. We do not have a copy of the original grievance from either side. We have seen the grievance outcome (to which we have referred extensively above) but we have seen no other documents in the grievance.

30. After making his findings, Mr Small - who was the Operations Manager of Shepherd's Bush garage - found that the claimant had been on the receiving end of some poor decision-making, but he did not feel that there had been a campaign of bullying. He recommended that, in an attempt to help repair the obvious disconnect between the claimant and his management, a form of mediation be carried out involving the claimant, his trade union representative, Mr Fieldhouse, Mr Harry and a chairperson/mediator. Mr Small also told the claimant of his right to appeal within 10 calendar days.

31. The claimant did not appeal.

32. The respondent did not take forward the suggested mediation and nothing further was done about it by anyone. We have not heard evidence from those involved and do not know the reason why the mediation was not taken further.

33. Mr Harry and Mr Clapson did not see the grievance outcome letter.

34. As a background issue, the claimant complains of a failure to proceed with the 'enquiry' in 2016. We think in the circumstances that it is the failure to take the mediation further that he is concerned with here.

Two incidents in April 2018

35. On 9 April 2018 the claimant was involved in an incident while driving his bus in which the outside of his nearside front door flap was damaged and the tyre, mud guard and suspension of another vehicle were damaged. The incident was regarded as minor; there were no injuries.

36. On 20 April 2018 the claimant was involved in a further incident while driving his bus. In order to make space for another bus to pass him, he reversed and collided with a third-party vehicle. There was damage to the bonnet and bumper of the third-party vehicle.

37. The claimant says that the rear camera of the bus was not working, which contributed to the accident. He submitted an occurrence report on 23 April alleging bullying in management compelling him to take the bus out despite having a defective camera.

Investigation of possible outside work

38. The documents in the bundle show a collection of images from a Facebook page headed 'Moebile valeting'. These were on the claimant's personal file. They show a van with Moebile valeting livery and a series of images of cars which appear to have been cleaned. The Facebook page does not appear to be the claimant's own personal, private or family page. It is headed 'Moebile Valeting', is a public page and appears to be for the purposes of advertising.

39. There are also stills taken by the respondent's CCTV camera showing the van and a number of motor vehicles at the back of the respondent's garage.

40. A manuscript note under the image of the van says,

'*under investigation due to 2 fault incidents he was involved in on 09/04/2018 and 20/04/2018, possible working before he starts work with RATP*.'

41. We have not heard evidence from those involved in this gathering of evidence, however we find as a fact that the manuscript note explains why the respondent carried out some investigation of the claimant's possible valeting business outside work. That is, someone was concerned that the claimant had been involved in two incidents in April while driving his bus and was concerned that

he might be tired because he was performing work outside his employment with the respondent.

The final incident: 25 April 2018

42. On 25 April 2018 another driver reported that the claimant's bus had driven into his bus from behind, causing major damage to both buses so that both buses had to be towed back to the depot.

43. Returning to the issue of investigation of outside work, the claimant says that on 26 April Ms Adeyekuw initiated a discussion with him about activities outside work. We have not heard from Ms Adeyekuw but if she did this, it would be consistent with the existence of the Facebook images and CCTV stills on the claimant's file. It is plain that someone was concerned about the claimant's outside activities. However, we accept Mr Harry's evidence that *he* did not know of this interview and did not say to Ms Adeyekuw that, 'looking at the incident it was not looking good for the claimant.'

44. On 26 April 2018 the claimant provided a short statement which said,

'*I only remember stopping on Putney Bridge thinking I was in service. I can't remember the rest of my journey to the hit.*

All I can say I was confused I think I was not there mentally. having been dealing with private situation.'

Fact finding

45. The claimant attended a fact-finding interview on 27 April 2018. His union representative was not present but was aware that the fact-finding was taking place. Mr O'Neill chaired the interview.

46. The claimant said that he was driving out of service from Wandsworth to Willesden Junction; he remembered stopping at Putney Bridge and after that he went blank and the only thing he could remember is when he hit the other vehicle. Mr O'Neill worked through the CCTV footage with him noting a number of incidents which might appear to indicate that the claimant was driving while tired. The claimant denied being tired. He said that he had a rest day the day before.
47. Mr O'Neill considered that due to the serious nature of what he had witnessed on the CCTV and what was presented to him at the interview, he would suspend the claimant. He felt there was a case to answer of poor and dangerous driving. He told the claimant that due to the seriousness of the matter the decision of the hearing might affect his future employment with the respondent.

The interview with Mr Harry

48. By letter dated 27 April 2018, Mr O'Neill confirmed the above in writing and asked the claimant to attend an interview with Mr Harry on 2 May 2018.

49. The claimant was told that he was entitled to be accompanied at the hearing by either an official trade union representative or workplace colleague.

50. The claimant attended the disciplinary hearing on 2 May 2018 together with his union representative Mr Mackay. The hearing was chaired by Mr Harry.

51. At the hearing, the claimant did not dispute *'the errors that he has made on this trip'*. His representative explained that he had been going through a divorce and there were upsetting family issues (the detail of which we do not propose to set out in this judgment). He had not realised the effect this had upon him. He was not thinking straight, was not tired physically but may have been mentally fatigued. He was going through counselling and was thinking about his wife and family and what was going on. However, he clearly denied falling asleep.

52. Mr Harry reviewed the CCTV footage with the claimant and the claimant accepted that the notes taken at the fact-finding were correct. Those fact-finding notes record 16 incidents of behaviour which in Mr Harry's view tended to indicate that the claimant was falling asleep. These included the claimant tilting his head back towards the back of his seat, driving over diagonal stripes separating the bus from oncoming traffic, touching his face with his hand, driving towards a traffic island in the middle of the road and then swerving into his own lane, travelling towards a red light at 21 mph and then stopping the bus past the solid white line, rubbing his face with his hands, moving away from green traffic lights with his arms folded, drifting towards the pavement and dropping his head.

53. Mr Mackay wrote out a summary of the mitigation which he gave to Mr Harry. He said that the claimant had worked for the respondent for 10 years and was a good employee. He had no current disciplinary awards and had been commended for his driving in the past. He was aware that his driving on the night of the accident was below his usual standard. He had been going through a messy divorce and family proceedings which had led to a lot of mental fatigue and anguish.
54. Mr Mackay continued to say that the claimant had not realised what a toll this family issue had taken on him until the collision. He had been honest throughout the disciplinary hearing and had the company interests at heart. Mr Mackay urged Mr Harry not to punish him but to encourage the claimant to do better. He said that the claimant had learned from this episode and regretted not noticing his problem before. He asked the company to support the claimant through this difficult time and help him return to be an asset to the company.

The decision to dismiss

55. Mr Harry decided to dismiss the claimant summarily. He noted that there were 16 incidents on the CCTV footage where the claimant was either not in full control of the vehicle, not paying attention to the traffic conditions or showing signs of fatigue such as rubbing his face. The CCTV footage also showed that before the collision the claimant followed the bus in front which was seven seconds in front of him. The brake lights of the bus in front came on at 23.03.36 but the claimant did not react until 23:03:42 when he swerved to the right in an attempt to avoid the collision. The claimant's reaction was too late, and he collided with rear offside of the bus in front.

56. Mr Harry noted that the claimant agreed with the incident described in the fact findings and accepted full responsibility for the collision. Mr Harry had reviewed the claimant's work history and length of service and had looked at the mitigating circumstances. His written summary of his findings records the claimant's account of his divorce and family issues and the effect that these had upon him.

57. Mr Harry noted in his written summary that this was the third road traffic collision the claimant had been involved in during April 2018 or showing the claimant was liable. He noted too a discussion about the claimant's attendance which resulted in no formal sanction. (Pausing there it is clear from the context that both these matters are a setting out of the recent record, not an analysis of factors in the decision to dismiss. We accept that Mr Harry would have made the same decision in the absence of those two previous incidents).

58. More significantly, Mr Harry accepted that the claimant's personal situation was on his mind but could not accept that the claimant was unaware of the incidents revealing fatigue throughout his drive. Mr Harry thought that there were many indicators that would have alerted the claimant while he was driving that he was tired. He thought that the claimant should have stopped therefore and reported the situation but did not.

59. Mr Harry said that he had a reasonable belief that the claimant was aware that he was suffering from fatigue, and was therefore unfit to carry on with his duties as a driver but continued to drive for 20 minutes during which he endangered the public and other road users.

60. Mr Harry considered the options available and also looked at comparable disciplinary decisions. He accepted that the claimant had shown remorse for his actions and was aware that the company approach to discipline was to educate and guide. He did not have feel however that this was a training issue. Judging the case on its own merits, he believed that the claimant continued driving knowing that he was suffering from fatigue, thereby making him unfit to drive and putting the safety of the public at risk.

61. For those reasons, he considered that the claimant had committed gross misconduct and therefore should be summarily dismissed.

62. He told the claimant of right to appeal within seven days of the decision.

63. Mr Harry confirmed his decision to the claimant in writing by letter dated 4 May 2018.

The appeal

64. The claimant did appeal, on the basis of the severity of the award.

65. Mr Clapson heard the appeal on 29 May 2018 together with Josephine Adeyekuw, staff manager at Park Royal. The claimant attended with his union representative, Mr Waterman.

66. Mr Waterman said on the claimant's behalf that Mr Harry's summing up was biased, the claimant was treated differently to other bus drivers of rear accidents and there were other incidents where no one had been dismissed. He gave no examples of previous inconsistent cases. He said that the claimant was not falling asleep and if Mr Harry thought the claimant had been falling asleep, he should have sent him for a medical. Mr Clapson wanted to find out why the claimant hit the other vehicle. However, the claimant could not explain.

67. Mr Clapson adjourned to view the CCTV and having done so raised a concern with the claimant that he crossed the road when there was a cyclist coming towards him. He asked the claimant whether he could remember and explain this. The claimant did not give an explanation.

68. Mr Clapson wrote out a statement of his decision. He reminded himself that the appeal was based on the severity of the sanction. He explained to the claimant that this meant he accepted the original charge but would then give a mitigation as to why the sanction was too severe.
69. Mr Clapson said that he and Ms Adeyekuw had looked at each of the two previous incidents and said that in normal events the claimant would have been seen and dealt with for both of them, but they could not see a link between them and the third accident.

70. He expressed gratitude for the fact that the claimant had accepted responsibility but said that the claimant had still not really explained why the accident had happened. He could not accept that the other vehicle was at fault. He said that the other vehicle was plain to be seen and it was the claimant's speed that caused the collision in that he did not slow down but in fact speeded up. This

was consistent with someone who was not conscious or was waking up just before the collision occurred.

71. Mr Clapson noted that the claimant had not given details of any other comparators to support his argument of inconsistency. He said that all incidents were taken individually and that this appeal was considered on its own merit. He said that he had dealt with similar incidents in the past and the people involved who could not give a reason for why a collision occurred had been dismissed.

72. Mr Clapson said that he was sorry about the claimant's personal issues and the effect on his concentration however he emphasised that as a responsible person presenting himself for work as a PCV driver the claimant was holding himself out as fit and able to discharge his duties safely.

73. Mr Clapson had tried to understand why this accident happened. The claimant said he was not fatigued or tired but only zoned out. The CCTV however showed that something was clearly not right. Mr Clapson thought that the claimant's behaviour and previous driving issues highlighted before the collision were '*classic falling asleep behaviours*'. He said that the respondent could not fully understand what caused the collision but it had a duty of care to the claimant, other road users and members of the public and because of the lack of understanding of what caused the accident the respondent could not guarantee that such an accident would not occur again with similar or more serious consequences. Therefore, there was no reason to reduce the sanction given and the summary dismissal stood.

74. This decision was confirmed to the claimant in writing on 14 June 2018.

The comparators

75. The claimant has given us 5 examples of cases which he says show that he has been treated inconsistently with others.

76. A who is white and not a Muslim fell asleep while driving. Mr Harry was not at work on the day of this incident and as a result A was not immediately suspended. As soon as Mr Harry returned and heard about the incident, he suspended A. A did not attend his disciplinary hearing and he was in fact dismissed in his absence.

77. B is of Chinese origin and not a Muslim. He did not fall asleep while driving: he failed to apply his handbrake and bumped the rear of the vehicle in front.

78. C is white and not a Muslim. He was initially dismissed by Mr Harry under a policy of zero tolerance for mobile phone offences. C was then re-instated on

appeal, transferred to Shepherd's Bush and later left prior to a disciplinary process for a further mobile phone incident. He did not fall asleep while driving.

79. D is white and not a Muslim. He was dismissed on medical grounds (as the claimant appears to agree) and not having fallen asleep while driving.

80. E was a driver trainer. She attempted a three-point turn in a bus and had a collision as a result. There is no suggestion that she fell asleep and she was demoted to bus driver but not dismissed.

81. F is a comparator put forward by the respondent. He is white and not a Muslim. He had sleep apnoea. He fell asleep at the wheel while driving and drove into the back of another bus. He was dismissed and Mr Clapson heard the appeal. Part of the reasoning in the decision on the appeal was that F should have realised before the accident that he was not alert and should have withdrawn himself from driving.

82. A group of drivers (who Mr Harry said were 'probably Muslim') from Twickenham had been investigated about working as Uber drivers while also working as bus drivers. Upon investigation however it emerged that they had worked as Uber drivers previously and not at the same time as working as bus drivers. The suspected 'Uber drivers' were not dismissed or disciplined once it emerged that they were not driving for Uber at the same time as working for the respondent.

Law.

Unfair dismissal

83. Our starting point is always the wording of section 98 of the Employment Rights Act 1996. No point of construction arises from the wording of section 98 so we will not set it out here.

84. Where an employer has a suspicion or belief of an employee's misconduct and dismisses for that reason, we have to apply the three-stage test set out in *British Home Stores v Burchell* [1980] ICR 303. We find it helpful to remind ourselves of the relevant passage in the judgment of Arnold J:

"*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 at 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. It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure," as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt." The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."

85. It is with that test in mind that we have formulated the issues in this case. The burden lies upon the employer to prove the reason for the dismissal: that it had a genuine belief in the misconduct. Thereafter the burden is neutral. On that neutral burden we ask whether the employer had in its mind reasonable grounds upon which to sustain that belief, and also, on a neutral burden of proof, we ask whether the employer had carried out as much investigation as was reasonable in all the circumstances.

86. We remind ourselves that it is not for us to substitute our own view for that of the employer. The question at this stage is not whether the claimant was actually guilty of misconduct, or whether we would have dismissed in the circumstances or even whether we would have investigated as this employer did. The question is whether this employer took an approach which was open to a reasonable employer: was it within the reasonable range of responses? We find those principles set out in the judgment of Browne- Wilkinson P in *Iceland Frozen Foods v Jones* [1983] ICR 17 paragraph 24.

87. We have to apply that test as much to the question of whether the employer carried out a fair procedure as to the question of whether dismissal was a fair sanction. We have to focus therefore on the evidence that was actually before the employer, not on evidence that we have heard but that the employer did not hear.

88. Inconsistency of treatment of similar cases by an employer can render a dismissal unfair. However, the allegedly similar situations must truly be similar (*Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352 followed in *Procter v British Gypsum Ltd* [1992] IRLR 7). Waterhouse J, giving the judgment of the

Employment Appeal Tribunal in *Hadjioannou v Coral Casinos Ltd* in paragraph 25, said this, which we bear in mind:

"…[employment] tribunals would be wise to scrutinise arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant, and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a tribunal may be led away from a proper consideration of the issues raised by [s 98(4) of the ERA]. The emphasis in that section is upon the particular circumstances of the individual employee's case. It would be most regrettable if tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems and, in particular, issues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained, and we hope that nothing that we say in the course of our judgment will encourage employers or tribunals to think that a tariff approach to industrial misconduct is appropriate. One has only to consider for a moment the dangers of the tariff approach in other spheres of the law to realise how inappropriate it would be to import it into this particular legislation".

Discrimination

89. We have reminded ourselves in particular of the principles set out in the annex to the Court of Appeal's judgment in *Igen Ltd v Wong* [2005] EWCA Civ 142, [2005] IRLR 258:

> *(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.*
>
> *(2) If the claimant does not prove such facts he or she will fail.*
>
> *(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.*

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

> *(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.*

90. Expanding on that, it is the claimant who must establish his case to an initial level. Once he does so, the burden transfers to the respondent to prove, on the balance of probabilities, *no discrimination whatsoever*. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing a claimant which it would be very difficult to overcome if he had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race or religion. What then, is that initial level that the claimant must prove?

91. In answering that we remind ourselves that it is unusual to find direct evidence of unlawful discrimination. Few employers will be prepared to admit such discrimination even to themselves.

92. We have to make findings of primary fact on the balance of probability on the basis of the evidence we have heard. From those findings, the focus of our analysis must at all times be the question whether we can *properly and fairly* infer discrimination.

93. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the *'same, or not materially different'* as those of the claimant.

94. Facts adduced by way of explanations do not come into whether the first stage is met. The claimant, however, must prove the facts on which he places reliance for the drawing of the inference of discrimination, actually happened. This means, for example, that if the claimant's case is based on particular words or conduct by the respondent employer, he must prove (on the balance of probabilities) that such words were uttered or that the conduct did actually take place, not just that this might have been so. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof.

95. If unreasonable conduct therefore occurs alongside other indications (such as under-representation of a particular group in the workplace, or failure on the

part of the respondent to comply with internal rules or procedures designed to ensure non-discriminatory conduct) that there is or might be discrimination on a prohibited ground, then a tribunal should find that enough has been done to shift the burden onto the respondent to show that its treatment of the claimant had nothing to do with the prohibited ground. However, if there is no rational reason proffered for the unreasonable treatment of the claimant, that may be sufficient to give rise to an inference of discrimination.

96. It was pointed out by Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] ICR 337 (at paragraphs 7–12) that sometimes it will not be possible to decide whether there is less favourable treatment without deciding *'the reason why'*. This is particularly but not only, likely to be so where a hypothetical comparator is being used. It will only be possible to decide that a hypothetical comparator would have been treated differently once it is known what the reason for the treatment of the claimant was. If the claimant was treated as he was because of the relevant protected characteristic, then it is likely that a hypothetical comparator without that protected characteristic would have been treated differently. That conclusion can only be reached however once the basis for the treatment of the claimant has been established.

97. Some cases arise (See Martin v Devonshire's Solicitors [2011] ICR 352 EAT paragraphs 38 - 39) in which there is no room for doubt as to the employer's motivation: if we are in a position to make positive findings on the evidence one way or the other, the burden of proof does not come into play.

Analysis

98. We have analysed this case using the structure of the list of issues. The issues appear below in italics.

Unfair dismissal

Does the respondent prove its reason for dismissal, namely conduct?

99. Yes. We have accepted that the respondent's reason for the dismissal was that the claimant was involved in a collision which caused serious damage to two buses after 16 incidents in which he should have become aware that he was too tired to drive safely. This in the respondent's view was poor and dangerous driving.

Did the respondent hold a genuine belief in the misconduct?

100. Yes. The damage to the buses was clear, the claimant admitted fault and the events were confirmed by CCTV. These facts made it highly likely that the respondent genuinely believed in the conduct.

If so, was that belief based on reasonable grounds having carried out as much investigation as was reasonable in all circumstances?

101. Yes: again, the claimant admitted the accident and the CCTV confirmed the previous 16 incidents which showed that the claimant should have realised that he was too tired to drive safely. In those circumstances there is a limit to how much investigation was needed; however, the respondent properly viewed the CCTV on at least three occasions and did so with the claimant. The respondent asked the claimant to explain how the collision happened: at the fact-finding interview, at the dismissal hearing and again at the appeal. He gave no defence that required further explanation: the respondent did not doubt what he said about his divorce, but the fact remained that the although claimant denied tiredness and sleeping, he could not otherwise explain why the events had happened.

The burden of proof is neutral here however it helps us to know the grounds of unfairness relied upon by the claimant and Mr Singh identified those as follows:

The claimant says that the reason itself was unfair because it was discriminatory; 101

We have analysed this under discrimination below.

The respondent carried out a surveillance observation of the claimant which the claimant says indicates that the respondent was looking for ways to dismiss;

102 Had the respondent had no or no reasonable grounds for carrying out surveillance of the claimant, then there might be evidence that it was looking for reasons to dismiss him. However, the evidence shows us that the respondent had reasonable grounds to be concerned that the claimant was working outside his employment and therefore might be at increased risk of road accidents or of infringing rest requirements. This does not mean that the respondent was looking for ways to dismiss him, rather that there were legitimate grounds for concern about him.

The respondent took into account two previous incidents on 9 April and 20 April 2018 which were taken into account but not investigated. The claimant says that the incidents should not be taken into account in the absence of investigation.

103 We can see from the evidence that the respondent was aware of the previous incidents and had them in mind to a degree. Mr Harry plainly checked the claimant's records. However, we find that these two incidents had no bearing on the decision to dismiss and added nothing to it. The severity of the incident on 25 April meant that

any previous incident became irrelevant. They were not 'taken into account' in the sense that, say, a previous warning may be taken into account. In the circumstances it was within the range of reasonable responses not to investigate those incidents further.

The respondent did not consider alternative sanctions;

104. The respondent did consider lesser sanctions: just because Mr Harry and Mr Clapson did not elect to impose a lesser sanction does not mean that they did not consider them. The index event was so severe that it was within the range of reasonable responses to dismiss.

The respondent did not apply its own policy and procedure of disciplining with the purpose of education and guidance;

105. We consider that this incident was so severe that the respondent was within the reasonable range of responses in considering that situation had moved beyond education and guidance. It had reached the point at which it could not take the future risk of exposing the public and other road users to the claimant's driving.

The claimant's mitigation was not properly considered.

106. The evidence shows us that the claimant presented his mitigation to managers who listened to him and were concerned to hear about his personal circumstances. However, the respondent was within the reasonable range of responses in deciding that the mitigation was not sufficient to outweigh the risk of allowing the claimant to continue to drive. The fact that they dismissed him does not mean that they did not consider the mitigation.

The claimant was treated inconsistently with the treatment of A,B,C,D and E

107. A and F were in similar circumstances to the claimant in that both were involved in incidents caused by lack of consciousness while driving. In both cases they were dismissed. The other cases lack the elements of fatigue and loss of consciousness, including the element of a long lead in period during which the claimant should have realised that he was unfit to drive. There is no unfair inconsistency.

Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

108. This incident was so serious that it gave the respondent to believe that it could not take the risk of permitting the claimant to continue to drive. This was

particularly the case given that he was unable to explain why the accident happened. Without such an explanation the respondent could not find ways to solve the problem or take steps to remove the risks. It was within the reasonable range of responses to dismiss especially when one considers the vital safety aspect of the respondent's business.

If the dismissal was unfair did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

109. In case we are wrong about any of the above, we consider that this is one of the rare cases in which we should make a substantial reduction for contributory fault. If it were only the case of an accident caused by a momentary lapse of attention, the reduction might not be so high, however we take into account the period of at least 15 minutes of loss of attention and previous near misses during which the claimant could and should have withdrawn from driving. We take into account that the claimant must have had in mind that he was driving a potentially very dangerous vehicle, yet he continued to drive when it was unsafe to do so. In the circumstances we do consider that the respondent has proved culpable conduct to the extent of 100%.

If the respondent had adopted a fair/non-discriminatory procedure would the claimant have been fairly dismissed in any event? If so, what is the percentage chance of a fair/non discriminatory dismissal and when?

110. This is now academic.

Race/Religion or belief discrimination

Has the respondent subjected the claimant to the following treatment falling within section 39 of the Equality Act 2010, namely:

1. *dismissing him*

   111.Yes.

2. *subjecting him to surveillance;*

   112.Yes.

3. *investigating his affairs outside work.*

113. Yes.

If so, has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies upon the five actual comparators set out above in his claim of unfair dismissal and also on a hypothetical comparator.

Dismissal

114. None of the comparators put forward by the claimant are comparators actually treated more favourably than him in circumstances that are the same or not materially different.

115. A and F are the near comparators who shed most light on how a hypothetical comparator of a different race or religion would have been treated: any comparator of any race or religion in the claimant's situation would have been dismissed as they were because the respondent regarded the circumstances of the incident as so serious.

Surveillance/investigation

116.We take these together.

117.We do not have any actual comparators of a different race or religion to the claimant in relation to these matters.

118.We do have some oral evidence from Mr Harry that a group of drivers (who he said were 'probably Muslim') from Twickenham had been investigated about working as Uber drivers while also working as bus drivers. Upon investigation however it emerged that they had worked as Uber drivers previously and not at the same time as working as bus drivers.

119. We do not consider that this evidence shows that a hypothetical comparator of a different race or religion would have been treated more favourably than the claimant: we think the evidence shows that the respondent had a genuine concern that its drivers should not be engaged in outside activities which meant they would be getting insufficient rest. That the suspected 'Uber drivers' were not dismissed or disciplined once it emerged that they were not driving for Uber while working for the respondent is evidence that the respondent's investigations were genuinely motivated by concerns about outside activities and not by religion. Once the concerns about outside activities were removed, the investigations stopped.

120.On the evidence we consider that a hypothetical comparator of a different race or religion to the claimant who had been involved in two road traffic incidents in one month and about whom there was reason to suspect him of outside activities would also have been investigated or subject to surveillance.

If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

121 Without primary facts showing that a comparator was or would have been treated more favourably than the claimant, this too becomes academic.

122.During the course of this hearing we have had some very real concerns about the absence of many documents and the lack of disclosure by the respondent. In other circumstances we might have taken a failure to disclose documents as a reason to find that the burden of proof transfers. However, we have given careful thought to the credibility of the witnesses and we are confident that we can rely on the explanation given by Mr Clapson. We are struck by the honesty of a witness who will tell us that a colleague had a policy of dismissing everyone who had an accident and that he therefore had many decisions to overturn on appeal.

123.We consider that we can rely on Mr Clapson and we would not draw an inference from the lack of disclosure.

124.We have worked with care through the background issues put forward by the claimant to show that Mr Harry in particular was hostile to him and discriminated against him. We have not accepted the claimant's interpretations of those events for the reasons set out in our findings of fact. We have found his evidence somewhat confused and not entirely reliable. There have plainly been some errors in the way the respondent (and not always Mr Harry) has dealt with the claimant. Moreover, the evidence we have heard shows us that Mr Harry at first (as Mr Clapson told us) took a 'zero tolerance' approach to *any* driver who had an accident and not just the claimant. We have not accepted the claimant's account of documents being falsified: because of the inconsistencies in his own evidence. Contrary to the claimant's view, Mr Harry did in fact take his part when Mr Fieldhouse should not have chaired a disciplinary hearing and there are several occasions when the claimant has been treated leniently rather than otherwise.

So, what is the respondent's explanation? Does it prove no discrimination whatsoever?

125. In any event we are confident of our findings of the 'reasons why' in this case. The reason why the respondent dismissed the claimant was because of the accident on 25 April. The reason why it was investigating him and 'carrying out surveillance' was because of concerns about his outside activities and the risk of accidents arising.
126. For all those reasons therefore, we dismiss the claims.

_____

Employment Judge Heal
Date : 27/03/2020

Sent to the parties on:

…27/03/2020…….

For the tribunal: