Case Numbers: 3201168/2018
3201219/2018

EMPLOYMENT TRIBUNALS

Claimant: **Ms D Zion-Mensah**

Respondent: **CT Plus (CIC)**

Heard at: **East London Hearing Centre**

On: **13 and 14 February 2020**

Before: **Employment Judge Jones**

Representation

Claimant: Mr J Neckles

Respondent: Mr G Vials (Solicitor)

JUDGMENT

The judgment of the Tribunal is that: -

1. **The Claimant was fairly dismissed.**
2. **There was no breach of contract.**
3. **The complaint of unfair dismissal fails and is dismissed.**

REASONS

1. The Claimant's complaint was of unfair dismissal and of wrongful dismissal as she had been summarily dismissed. The Claimant had also made a complaint for automatic unfair dismissal and victimisation but these complaints were withdrawn by notice dated 29 April 2019.

2. The Respondent's case was that the Claimant had committed gross conduct, which entitled it to dismiss the Claimant summarily and that it did so by following a

reasonable investigation which was then followed by a reasonable and thorough procedure. Its case was that it was within the band of reasonable responses to dismiss the Claimant.

Evidence

3. The Tribunal heard live evidence from the Claimant and from Mr Neckles, trade union representative and advisor, on her behalf and from Ms Ojudun, Driver/Manager, who conducted the investigation; Mr Batchelor, Head of Operations, who conducted the disciplinary hearing; and Mr T Rampling, also Head of Operations, who conducted her appeal hearing.

4. On day 2 of the hearing, the Claimant's representative informed the Tribunal and Counsel for the Respondent that the Claimant had only just informed him that she was illiterate and that she could not read. This was not something that the Respondent had been aware of during her employment as she never told them and because the Claimant had been employed as a bus driver and needed to be able to read road/traffic signs and complete written work for the Respondent in order to perform the duties of her job. The Claimant was not in the room when Mr Neckles made this statement as he asked to speak to the Tribunal and Mr Vials separately. This was at approximately 11.10am, just before the Claimant was about to start her evidence. Mr Neckles confirmed that he only became aware of it that morning as the Claimant's son who had attended on the first day of the hearing went through her statement with her and confirmed that they were happy with it. He also confirmed that the Claimant's case was still that she told Ms Ojudun that she could not read the investigation notes because she did not have her reading glasses rather than because she could not read. The Claimant was asked about this in cross examination and her answers are incorporated in the findings of fact set out below.

5. The Tribunal make the following findings of fact from the evidence presented to it. The Tribunal has only made findings of fact on the evidence necessary to determine the issues in this case.

Findings of fact

6. The Claimant began her employment with the Respondent as a bus driver on 1 October 2008. The Claimant had completed 9 years 7 months' service at the date of termination of her employment on 11 May 2018.

7. The Claimant had what she referred to as a clean disciplinary record with the Respondent until the incident that led to her summary dismissal from the Respondent's employment.

8. In her live evidence, the Claimant confirmed to the Tribunal that she can read words but that she was not so good on her understanding of them. She said that she never told the Respondent about the difficulty she had with understanding words as she was embarrassed by this. The Claimant was able to read documents and parts of witness statements referred to her during her cross-examination. It was also confirmed that she had checked and signed her witness statement when it was sent to her in preparation for the hearing.

9. On 5 April 2018 the Claimant drove the number 812 service, which was a local bus route. One of the passengers on that bus made a written complaint that she then handed in to another of the Respondent's drivers, Mark Bishop, to take back to the depot.

10. Joyce Ojudun was a driver/manager at the same depot. She had received training from one of the Respondent's inhouse lawyers on the conduct of fact-findings/investigations and grievance hearings in line with the Respondent's policies and procedures. On her return from holiday in April, she picked up the complaint when she became aware that it had not yet been actioned.

11. The member of the public's complaint was in handwriting and was signed with her first name – Mary. It stated that she had been a passenger on the bus on 5 April and that the driver, who she referred to as Debra answered her mobile telephone while driving. She complained that the driver missed a stop where a passenger wanted to get off and then had to turn around and go back to let the passenger off. She referred to some driving errors the driver made including that she had shouted at a van driver and nearly hit a motorbike. The passenger ended her letter by stating that passengers should feel safe when using public transport and that she certainly did not, on this occasion.

12. The Respondent's practice on receipt of complaints from members of the public is to interview the driver concerned and gather all other evidence, including interviewing other people and all relevant information before deciding on what next steps, if any, should be taken. Ms Ojudun had been on holiday when the complaint first came in. When she returned from holiday, she invited the Claimant to an investigation/fact finding meeting to be held on 20 April.

13. At the start of the meeting, Ms Ojudun told the Claimant that she wanted to discuss the following, which had been notified to the Respondent by someone who had been a passenger on bus number 812, which the Claimant had been driving on 5 April 2018. Those points were: that she answered her mobile phone while driving; that she missed a stop where a passenger wanted to alight the bus; that she nearly hit a white van as she was pulling out of a side street; that she shouted abusive language to a 3rd party driver; and that she nearly hit a motorbike. The minutes record that Ms Ojudun read out the customer complaint to the Claimant.

14. At this point in the meeting Ms Ojudun informed the Claimant that she could have a trade union representative or workplace colleague with her, if she wanted. She advised the Claimant that she had seen Don Hall who was a trade union representative in the canteen and that she could go and ask him. The Claimant indicated that she did want to ask him and Ms Ojudun adjourned the meeting to allow her to do so.

15. The notes record that when Mr Hall came in to the meeting he was given the opportunity to read the complaint and Ms Ojudun confirmed in her evidence that it is likely that this is what happened. She did not give the Claimant a copy of the complaint but it was not her standard practice to do so when there is personal information on the document. The member of the public had signed her name at the bottom of the letter and Ms Ojudun was aware that this was a small service and that most of the drivers and customers had a certain level of familiarity with each other. In addition, the Claimant did not ask for a copy of the public complaint.

16. That Claimant stated that when she got to Sainsburys on her route she noticed that there were many missed called on her mobile phone. She called the depot back and informed them that she was on her way back. Her meal relief driver arrived soon after and gave her a message that she was wanted back at the depot. The Claimant is recorded as saying no to the questions whether she had been holding her phone while driving or speaking on the phone while driving. When asked whether the engine had been running while she was sitting at Sainsburys and speaking on the mobile telephone, it was noted that she answered 'yes' that she had.

17. The notes confirm that the Claimant denied all the other allegations.

18. She informed Ms Ojudun that when she went to collect her bus on 17 April a woman spoke to her and informed her that Mr Bishop and another woman had been overheard talking about her and were trying to get her dismissed. She gave no further information but Ms Ojudun thought that this may have been a reference to the lady who had sent in the written complaint. The Claimant confirmed that this was a route in which most of the passengers know their drivers as she stated that she frequently bought presents for passengers and they sometimes did for her and that someone may have been jealous of that.

19. At this point in the meeting Mr Hall stated that he knew of another driver at the same depot who had a mobile phone in his hand while seated in the cab but who had not been dismissed. He said that this had set a precedent. He was not able to remember the other driver's name but said that he would go to the union office and get his details and come back to the meeting. Ms Ojudun adjourned the meeting to allow him to do so. Mr Hall returned to confirm that the other driver was called Mr Vergara Piedra and that the incident occurred on 23 September 2017. He had copies of the relevant paperwork which he gave to Ms Ojudun. She stated that it looked to her that it was not the same as this case, as the engine had not been running but she would include all those details in her investigation report.

20. When she ended the meeting, Ms Ojudun stated that she would now produce a report but that it looked to her that the Claimant had a case to answer for breaching the Respondent's mobile telephone policy as she had used it while the vehicle's engine was running. Because the allegation was serious, the Claimant would be put on paid precautionary suspension while the investigation continued. She was informed that it was not a sanction and that she was not expected to attend work or discuss the matter with any other of the Respondent's employees while the investigation was being conducted. The matter was to be kept confidential.

21. The Claimant signed the minutes of the meeting to confirm that it was a true reflection of the meeting. it was signed and dated 20 April 2018. The Claimant confirmed in the hearing that this was her signature. The Claimant later suggested that she had been coerced into signing this document. Ms Ojudun's live evidence was that she had a practice where she would always invite the person being interviewed to read the notes and sign them at the end of the meeting. She recalled that at the end of this meeting that is what happened. She did not recall saying to the Claimant that she had to sign the notes but if she was going to sign them, she would have insisted that she read them before doing so. The Tribunal will return to this point later.

22. An updated version of the Respondent's mobile phone policy was in the bundle of documents. It stated that it was written in line with the Road Vehicles (Construction and Use) (Amendment)(No.4) Regulations 2003 and that it was the Respondent's policy that staff would not use a hand-held mobile phone (or similar device) whilst driving i.e. when the engine of the vehicle is running and the driver is in the driving seat, whether the vehicle is stationary or not. The policy stated that this extended to sending or receiving text messages, pictures or voice messages or any form of data. The only exception to the rule was the use of the phone to call the emergency services on 999 or 112 in response to a genuine emergency when it is unsafe or impractical to stop driving to make a call.

23. The policy stated that employees were expected to wait until they have reached their destination or have stopped the vehicle in a safe and legal place and turned off the engine before using a mobile phone. Staff were advised that two-way radios were also considered enough of a distraction to a driver to be treated in the same way as mobile phones and therefore they also could not be used while driving. Drivers could get company sanctioned hands free kits that they could use in a vehicle – if required to do so and with the approval of site management.

24. The policy ended by stating that any employees found to be contravening this policy may be subject to disciplinary procedures and that in view of the potential health and safety implications, such a contravention may also be viewed as an issue of gross misconduct.

25. The Respondent's Disciplinary and Performance Improvement Procedure was also in the bundle at pages 32 – 40. It confirmed that it applied to all of the Respondent's employees. It stated that where there are concerns over an employee's conduct or performance, which it decides to raise under the procedure, the key elements of the procedure that they should note were (1) that the concerns about conduct or performance would be set out in writing (2) that the Respondent would organise a meeting/hearing to discuss those concerns and listen to the employee's response (3) that if the Respondent decides that the concern is justified, it will explain the decision that it has decided to take, and (4) the employee would be able to appeal against any action taken by the Respondent.

26. The policy sets out that that the employee might be suspended if an investigation needs to be carried out and the concern relates to misconduct of a serious nature. In relation to the conduct of investigations, it stated that it would look into concerns about conduct carefully and that exactly how that would look would differ, depending on the circumstances of each case.

27. The policy stated that no decision about whether a hearing should be held will be made until the end of the investigation. Whereas in performance matters the same manager would perform the role of investigator and decision-maker, in cases of misconduct the Respondent would normally aim to keep the two roles separate.

28. Before a hearing is conducted the employee will be told of the Respondent's concerns in writing. The employee will be provided with copies of all witness statements and any other important documents. Witnesses would not be permitted to attend the disciplinary hearing. There would be at least 5 working days' notice of the disciplinary meeting, unless both parties agree a shorter time scale. Employees were advised that they would be able to bring a workplace companion or a qualified trade union officer with

them to the hearing. The policy outlined what an employee could expect at a disciplinary hearing and that the manager conducting it may decide to conduct further investigations which may be given to the original investigator to do or may be done by the hearing manager. Only in particular circumstances would the results of the investigation be sent to the employee for further comment.

29. At the end of the procedure, the hearing manager can decide to take no action or can issue a first written or final written warning or dismissal - with or without notice. The policy set out alternative forms of sanctions where the matter of concern related to performance rather than conduct. A first written warning was usually imposed for 6 months whereas a final written warning would be imposed for a year. In the case of gross misconduct, the policy stated that it would normally result in immediate dismissal without any notice or pay in lieu of notice. Within the list of examples of conduct that often falls within the category of gross misconduct was '(d) deliberate or grossly negligent contravention of company rules and procedures', '(p) bringing the company into disrepute', '(z) action likely to threaten the Health & Safety of yourself, fellow employees, customers or members of the public, and (bb) use of a mobile phone or hands-free equipment whilst in charge of a vehicle.

30. The policy also set out the procedure for appealing against a disciplinary decision and the conduct of the appeal hearing. The Claimant also produced a different disciplinary procedure which was on pages 89 – 94 of the bundle. It was not known when these documents were disclosed to the Respondent as they were in a separate supplemental bundle which the Claimant handed up. That document stated that it was the 2013 version. The procedure at pages 32 – 40 stated that the next review date was September 2020. The examples of gross misconduct in the 2013 procedure did not refer to the use of mobile phones as being an example of such gross misconduct. It does state that the list is not exhaustive and that other offences may also be included at the discretion of the company. Mr Batchelor's evidence was that it was more likely than not that the procedure he followed when dealing with this case was the one at pages 32 – 40 as he believed that it was the one operating at the time.

31. After the fact-finding meeting with the Claimant, Ms Ojudun met Mark Bishop on 27 April to investigate the allegation that the Claimant made against him. The notes of that meeting were also in the bundle. Mr Bishop was another of the Respondent's bus drivers. He stated that he did not know the person who made the complaint and that she had simply got on his bus and handed it to him. The woman told him that she had tried to get through to the office but had been unsuccessful and had therefore decided to put it in writing. He stated that she shouted at him and stated that she did not have to put up with the Claimant being on the phone while working. He denied that he was trying to get rid of the Claimant. He stated that the woman who gave him the written complaint was not one of his regular passengers but may have been a regular on another bus. He also added that he considered that the Claimant was a lovely person and that he would not do anything like that to her. This is likely to have been a reference to the question of whether he and the woman had been trying to get rid of the Claimant.

32. Following her meeting with Mr Bishop, Ms Ojudun prepared a written report summarising her investigation which she passed to Mr Batchelor for review. The report stated that she believed that the Claimant had a case to answer for using a mobile phone whilst at the driver's seat with the vehicle's engine running. In her report Ms Ojudun referred to the Respondent's mobile phone policy referred to above. She stated that the

Claimant had denied the other allegations which the member of the public made against her and that in the absence of CCTV footage and any other witnesses, she was unable to prove or substantiate any of the customer's allegations. She informed Mr Batchelor about the Claimant's suspension. It was for Mr Batchelor to review the papers and decide what action he intended to take.

33. Mr Batchelor had a look at the papers and decided that there was a case to answer. At that point, he made no other decision. He wrote to the Claimant and invited her to a disciplinary meeting. The meeting was held on 5 May 2018. In the invitation letter the Claimant was informed that the disciplinary hearing was happening following an investigation conducted in regard to a customer complaint. The charges that the Respondent intended to consider at the meeting were:

a. any use of a mobile phone or hands-free equipment (Bluetooth) whilst being in the driving cab and the engine is running, including the use of any type of earpiece or portable music device, and breaches of relevant law or statute including PCV regulations
b. dangerous driving
c. bringing the company into disrepute
d. action likely to threaten the Health & Safety of yourself, fellow employees or members of the public
e. conduct likely to give major offence to customers, suppliers, visitors or fellow employees of the company.

34. The Claimant was told that these were very serious charges which fall under gross misconduct which, if proven, could result in her summary dismissal. She was advised that Mr Batchelor would conduct the hearing with a notetaker present and that she could be accompanied by a work colleague or a trade union representative of her choice. She was asked to keep these matters confidential.

35. The Claimant was represented at the hearing by Mr Neckles, who also represented her at this hearing.

36. At the disciplinary hearing, the Claimant alleged that Ms Ojudun had put pressure on her to sign the minutes of the investigation meeting and that she had not had her glasses with her and had been unable to check the accuracy of the notes. Mr Neckles asked for the Unite representative to be invited to the meeting so that he could question him about this. Mr Batchelor refused this request but asked him to let him know the questions that the Claimant would want to put to Mr Hall and he would do so. The Claimant did not call the Unite representative as a witness in this hearing. Mr Batchelor also did the same as far as Ms Ojudun was concerned. He asked Mr Neckles to tell him what questions he wanted him to ask her and then he put those to her when he met with her.

37. The Claimant told Mr Batchelor that she did not touch the phone while on the bus but that she did do so once she had finished working and came off the bus at Sainsburys. She stated that while she was on the bus the mobile phone never came out of her bag. She also stated that she was confused when she told Ms Ojudun that she had used the phone while at Sainsburys bus stand and while the engine was on.

38. The Claimant confirmed that she knew the person who made the complaint and that the person was a white woman whom she described as racist. The Claimant also stated that she believed that there was disparity of treatment. She alleged that Ms Ojudun had not investigated where the passenger who made the complaint had been seated in the bus and that Ms Ojudun should not have referred the matter as there was no evidence.

39. After a short adjournment, Mr Batchelor resumed the hearing and informed the Claimant that it was not unusual for passengers to present complaints to drivers to hand in to the garage. That was not an issue for him. He stated that he would conduct further investigations, both with Ms Ojudun and Mr Hall, into the Claimant's allegation that the investigation notes were incorrect. He would also look into the case of the other driver who the Claimant said had a mobile phone out but had not been dismissed. He noted that the Claimant had alleged race discrimination but had not produced any evidence to support it.

40. Mr Batchelor met with Mr Hall on 8 May. Mr Hall stated that he did not remember whether the Claimant had her reading glasses with her. He also stated that he could not remember whether the Claimant admitted to using her mobile phone with the engine running at Sainsburys. Mr Batchelor met with Ms Ojudun on the same day. Ms Ojudun confirmed that the notes were an accurate record of what had been said on the day. She confirmed that she typed her notes directly into her computer during the investigation meeting and that she had been totally impartial while conducting the hearing. She confirmed that she gave the Claimant the notes to read at the end of the meeting. The Claimant never mentioned her reading glasses or that she was having difficulty reading the notes. She read the notes in the office in Ms Ojudun's presence and signed them. Ms Ojudun was clear that the Claimant was treated the same as she would treat anyone else and that the minutes were a correct record of what was said in the meeting.

41. In her evidence to the Tribunal Ms Ojudun was also clear that the investigation meeting notes accurately recorded what had been said at that meeting. It was also her evidence that at no point during the investigation meeting did the Claimant say that she had been checking her mobile phone because she was concerned about her mother's health.

42. Mr Batchelor knew that the 812 was a single decker yellow bus that the Respondent operated for the local authority. It was not a TFL bus and there was no CCTV on it. He decided that there would be no point in looking for CCTV when it was already known that there was none on the bus. He was satisfied that there were no further lines of enquiry to follow.

43. In considering his decision, Mr Batchelor's live evidence was that he was aware that far from needing to get rid of some drivers, the Respondent had a shortage of drivers. Also, it costs about £8,000 - £9,000 to train a bus driver, which means that dismissing a driver would be a waste of resources unless it was warranted. He would not go out of his way to dismiss a driver. Dismissal was a last resort and not something that he would have done lightly. In considering the Claimant's mitigation, his evidence was that he looked at the Claimant's personnel records and he could see that it was a clean record and that there was nothing in her record that said that she had a propensity to lie. He also considered that the Claimant may have used the phone as she had many messages from the depot and thought that there was an emergency with her mother.

44. By letter dated 11 May, Mr Batchelor informed the Claimant of his decision on her disciplinary. Mr Batchelor informed her of the further investigation meetings that had occurred following the disciplinary hearing and their outcome. He informed her that he had decided that as she had admitted in the investigation meeting that she had been using the phone at the bus stand while the engine was on; that charge was proved. He found this to be gross misconduct. It was his decision that it was appropriate to dismiss her for this serious misconduct. The Claimant was summarily dismissed on 11 May 2018. She was also advised that she had a right to appeal against that dismissal and informed how to do so.

45. The Claimant appealed against her dismissal in writing on 19 May 2018. Her grounds of appeal were that the sanction was too severe, that there was no evidence to substantiate Mr Batchelor's decision and that the disciplinary decision was contrary to natural justice, in breach of contract and in breach of her right to assert a statutory right and an act of victimisation.

46. Mr Tim Rampling invited the Claimant to an appeal hearing. The hearing took place on 5 June 2018. The Claimant was accompanied by Mr Neckles, her trade union representative.

47. At the hearing Mr Rampling confirmed that he had been aware of Mr Batchelor as they had worked at Abellio around the same time. However, they were not work colleagues. While at Abellio, Mr Rampling had been the general manager for the Western depots whereas Mr Batchelor had been an operations manager.

48. Mr Rampling also confirmed that he as far as he was aware, the Respondent had zero tolerance for the use of a mobile phone by drivers within the driver's cab area of a bus. He believed that approach was applied consistently.

49. At the start of the hearing the Claimant's representative handed Mr Rampling a copy of the Claimant's ET1 complaint form. Mr Rampling started the meeting by asking the Claimant to confirm her grounds of appeal.

50. The minutes show that Mr Neckles made submissions at the hearing on the Claimant's behalf. He stated that the Claimant had done nothing wrong and even if she did, she had given explanations as to why this should not be a disciplinary matter. He asked why Mr Batchelor had failed to address five charges that had been in the invitation letter in the disciplinary meeting or outcome letter.

51. He submitted that the stand where she was parked was a transit stand. He also stated that the reasons why the Respondent had dismissed her was because it has a surplus of drivers that it needed to get rid of as it had lost some of its routes and the Claimant, as a senior drier was on a higher salary that more recently recruited drivers. He asked that the Claimant should be reinstated. He submitted that the Claimant was taking calls on the day because her sister in Ghana had been seriously ill and had since died. He submitted that taking calls about a family emergency was not a sackable offence and not in breach of the Respondent's mobile phone policy. He denied that she had taken a call while sitting in the driving seat of the bus. The Claimant also informed Mr Rampling that she had a flight booked to Ghana to attend her sister's funeral.

52. Mr Rampling considered the Respondent's mobile phone policy after the appeal hearing. He looked at the investigation notes, the notice of appeal, the decision letter and Ms Ojudun's report. He looked at the Respondent's disciplinary procedure on pages 32 – 40 of the hearing bundle. He also considered the Claimant's evidence and the inconsistencies within it. He could see that she initially said to Ms Ojudun that the depot had been calling her and that she saw missed calls on her mobile. In the disciplinary hearing she told Mr Batchelor that the phone had been in her bag until she came out of the driver's cab of the bus. If that were true, she would not have been able to see the missed calls. Later, in the appeal hearing, it was stated on her behalf that she had been taking a call because her sister was ill in Ghana and that it was not a breach of the policy to take calls about a family emergency.

53. Mr Rampling wrote to the Claimant on 7 June to notify her of his decision on her appeal. He decided that it was likely that Mr Batchelor had not discussed charges 2 – 5 as set out in the disciplinary invitation letter because there was no supporting evidence going towards those charges and they could not be substantiated. He found that Mr Batchelor had given the Claimant the benefit of the doubt in relation to those charges and not considered them. He then went on to discuss the charge that was found proved against the Claimant. Mr Rampling considered that if the Claimant did not have her glasses with her in the investigation meeting, she could have said so. Instead, she signed the notes as an accurate record. He did not accept her case that she had not said what was recorded or that the notes were inaccurate. He stated that the bus was not fitted with CCTV as it was not a TFL route and therefore not obliged to have it. The Respondent had not failed in relation to any statutory duty to investigate something it knew that the bus did not have.

55. Mr Rampling stated in the letter that he was concerned that there were inconsistencies in the Claimant's account of the incident as when she spoke to Ms Ojudun, she stated that she used the phone when she got to the Sainsburys stand as she had seen several missed calls from the depot but in his meeting, the Claimant stated that she used the phone to call her family about her sister. He concluded that based on what he knew of Ms Ojudun from working with her for two years he had never known her to exaggerate or to act inappropriately; it was therefore likely that her minute of their meeting was accurate.

56. He confirmed that he had spoken with Mr Batchelor who denied that the Claimant had been dismissed to reduce the numbers of drivers or to save money or because of her race or gender. Mr Rampling accepted this.

57. Mr Rampling confirmed Mr Batchelor's decision and upheld the Claimant's dismissal.

58. The documents concerning the other driver, Mr C Vergara Piedra were in the bundle. Some of these documents were shown to Ms Ojudun during her investigation meeting but she had not seen all of them. The documents show that Mr Vergara Piedra had a preventable collision on 4 September 2017. This was witnessed by a supervisor and he was referred for an investigation. The managerial review of the incident was undertaken by a manager called Sinead Maguire. She stated on the review form that she reviewed the CCTV and considered that Mr Vergara Piedra had been driving the bus when it hit the kerb. While reviewing the CCTV she noticed that Mr Vergara Piedra took his phone out of his pocket and put it in his top pocket. During the investigation meeting

she advised Mr Vergara Piedra that he should not have his phone out while in the driver's cab. Although he told her that he had not used the phone and that the engine had been off, she confirmed that she would include this in her report. Ms Maguire referred the matter to an independent manager for review and for that person to decide whether any further action was required.

59. Mr Vergara Piedra was referred for a disciplinary hearing. Both the invitation letter and the outcome letter were in the bundle of documents for this hearing. The disciplinary hearing was conducted by a manager called Gary Dobbs. The issue of the mobile phone being seen on the CCTV was referred to in the decision letter. Mr Vergara Piedra was seen taking the phone out of his trouser pocket, keeping under the steering wheel, then putting it into his breast pocket, taking it out of the pocket and returning it to his pocket. The handbrake had been on. He was not sanctioned for this but was advised that in future when he is in the driver's cab of a bus he must ensure that his mobile phone is placed in his back or somewhere where it would not be a distraction to him. He could only use the phone when he is outside of the bus.

60. In his live evidence to the Tribunal, Mr Neckles accepted that it was an offence under the Road Vehicles (Construction and Use) (Amendment)(No.4) Regulations 2003 for staff to use a handheld mobile phone or similar device whilst driving i.e. when the engine of the vehicle is running and the driver is in the driving seat, whether the vehicle is stationary or not. He considered that this did not mean that the Claimant had to be dismissed and submitted that the Respondent had a closed mind as to whether there was any other sanction that could be applied instead of summary dismissal.

Law

Unfair Dismissal

61. The Respondent has the burden of proving the reason for dismissal and that it is a potentially fair one. The Respondent submitted that the Claimant was dismissed for gross misconduct.

62. The Claimant did not accept the Respondent's reasons for her dismissal. She submitted that she was not guilty of the offence and furthermore, that even if she was, the decision to dismiss her fell outside of the range of reasonable responses open to the Respondent because it was not so serious an offence, the Respondent had not taken her length of service and prior clean disciplinary record into account and it had failed to consider action short of dismissal. She submitted that there were other reasons for her dismissal which were to do with the Respondent's business rather than to do with her conduct.

63. The law considered by the Tribunal started with the seminal case of BHS v Burchell *[1980] ICR 303*, where a three-stage test was outlined for tribunals in assessing complaints of unfair dismissal. The employer must show that: -

(a) he believed the employee was guilty of misconduct;

(b) he had in his mind reasonable grounds which could sustain that belief, and

(c) 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.

64. The means that the employer does not need to have conclusive direct proof of the employee's misconduct but only a genuine and reasonable belief of it, which has been reasonably tested through an investigation.

65. If the Tribunal concludes from all the evidence that this is the case; then the next step for the Tribunal is to decide whether, taking into account all the relevant circumstances, including equity, the size of the employer's undertaking and the substantial merits of the case, the employer has acted reasonably in treating it as a sufficient reason to dismiss the employee. In determining this, the Tribunal should be mindful not to substitute its own views for that of the employer. Whereas the onus is on the employer to establish that there is a fair reason, the burden in this second stage is a neutral one. The *Burchell* test applies here again and the Tribunal must ask itself whether what occurred fell within "the range of reasonable responses" of a reasonable employer. The law was set out in the case of *Iceland Frozen Foods v Jones [1982] IRLR 439* where Mr Justice Browne-Wilkinson summarised the law by pointing to the words of section 98(4) themselves and then stating that the tribunal must consider the reasonableness of the employer's conduct, not simply whether they (members of the tribunal) consider the dismissal to be fair as the tribunal must not substitute its decision as to what was the right course to adopt for that of employer. He stated that in many (though not all) cases there is likely to be a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonable take another and the function of the Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable response which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

66. The Claimant submitted that the investigation and disciplinary process was flawed. In her submissions, the issue of her suspension was developed into another aspect of unfairness.

67. In the case *of Linfood Cash and Carry Ltd v Thomson* [1989] IRLR 235 the EAT stated that the relevant question is whether an employer acting reasonably and fairly in the circumstances could properly have accepted the facts and opinions which he did. The tribunal is not entitled to interfere simply on the grounds that it prefers one witness to another; it must have logical and substantial grounds for concluding that no reasonable employer could have assessed the credibility of the witnesses in the way the employer did.

68. That analysis was adopted by the Court of Appeal in *Morgan v Electrolux Ltd* [1991] IRLR 89 in which it was said that serious allegations, at least where disputed, must be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by lay persons and not lawyers. The test is still whether a reasonable employer could have acted as the employer did.

69. In the case of *Sainsbury's Supermarket v Hitt* [2003] ICR 111 it was held that all aspects of the *Burchell* test fell to be determined by the range of reasonable responses test. In *OCS v Taylor* [2006] ICR 1602, the Court of Appeal clarified that the proper approach is for the tribunal consider the fairness of the whole of the disciplinary process. The court stated that our purpose is to determine whether, due to the fairness or

unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage. The Court went on further to say that the tribunal should not consider the procedural process in isolation but should consider the procedural issues together with the reason for dismissal as it has found it to be and decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss.

70. In her submissions, the Claimant referred to the case *of Strouthos v London Underground Ltd* [2004] IRLR 636 and the Court of Appeal's statement that an employee should only be found guilty of the offence with which he has been charged. In that case, the Court stated that it is a basic proposition that the charge against an employee facing dismissal should be precisely framed, and that evidence should be confined to the particulars given in the charge. Care should be taken with the framing of a disciplinary charge and where such care has been taken and the charge is formally put to an employee, the normal result would be that only the matters charged can form the basis of dismissal.

71. The Claimant submitted that the principles of natural justice were engaged in this case and that the Respondent breached those as follows: by not disclosing the details of investigation meetings conducted with colleagues whom she alleged did the same offence that she allegedly did. By the investigation officer formulating a charge against the Claimant which was not raised by the member of the public and not acting as a fair judge in the Claimant's process.

72. The Claimant referred to *W Weddel v Tepper & Co. Ltd* [1980] 96 which held that an employer who suspects and employee of misconduct justifying dismissal cannot justify the dismissal simply by relying on an honest belief in the employee's guilt. There must be reasonable grounds and they must act reasonably in all the circumstances in coming to the decision to dismiss, having regard to equity and the substantial merits of the case. They do not have regard to equity if they do not give the employee a fair opportunity of explaining before dismissing him or if they jump to conclusions which it would have been reasonable to postpone in all the circumstances.

73. The Claimant referred to the case of *Whitbread plc v Hall* [2001] IRLR 275 CA in which the Court of Appeal confirmed an employment tribunal decision that although the employee's dismissal following his admission that he had been guilty of misconduct was within the range of reasonable responses which was open to a reasonable employer, the disciplinary process had been so flawed as to render the dismissal unfair. Even if misconduct is admitted by an employee, the requirement of reasonableness in section 98(4) relates not only to the outcome in terms of the penalty imposed by the employer but also to the process by which the employer arrived at that decision. Therefore, the employer should not only ask itself whether dismissal fell within the band of reasonable responses but should also apply that test to the procedure used in reaching the decision to dismiss. There is a procedural as well as a substantive element to the band of reasonable responses open to an employer faced with such misconduct. The relevant facts of the case were that dismissal had been decided by the employee's supervisor who had a bad relationship with him and who had gone in to the process with her mind made up. That was a response that was not open to an employer of the size and with the resources of these employers and the employee was successful in his complaint of unfair dismissal.

74. Lastly, the Claimant submitted that the investigation officer also acted as a judge in her own cause and that was therefore an unfair part of the process. It was also submitted that the disciplinary officer had been involved at the investigation stage and referred the matter for a disciplinary hearing and then, proceeded to conduct the disciplinary hearing to determine the original allegations to which he added others which had not been canvassed at the investigation stage. It was submitted that both the investigation and disciplinary officers acted as judges in their own cause, thereby performing dual roles in the process which is not permissible under the ACAS Code of Guidance and which should not have been accepted by the appeal officer and made the dismissal unfair.

75. It was the Respondent's case that the Claimant admitted the misconduct in the investigation meeting. The Respondent referred to the case of *Royal Society for the Protection of Birds v Croucher* [1984] IRLR 425 as authority for the proposition that where an employee admits the misconduct, the employer will not usually have to conduct an investigation, or the extent of the investigation will be significantly reduced. The Respondent also submitted that it did conduct a reasonable investigation.

76. In response to the Claimant's submissions on what she saw as procedural flaws in the process, the Respondent relied on the case of *Hussain v Elonex* [1999] IRLR 420 in which the Court of Appeal held that failure to disclose witness statements to an employee will not be fatal, so long as the employee knows the substance of the case against them. The Court stated "*There is no universal requirement of natural justice or general principle of law that an employee must be shown in all cases copies of witness statements obtained by an employer about the employee's conduct. It is a matter of what is fair and reasonable in each case."*

77. The Respondent did not accept that there were any procedural flaws in the process followed but it also submitted that even if they were, the Tribunal should not consider them in a vacuum but instead, the Tribunal should consider reasonableness in the context of the employer's decision to dismiss. Only faults which have an impact of the employer's decision to dismiss should affect the reasonableness of the procedure (*City and County of Swansea v Gayle* UKEAT/0501/12).

78. As far as the comparators the Claimant relied on are concerned, the Respondent submitted that the facts of the comparator's case was totally different from hers and that in any event, the employer's decision not to dismiss a different employee for the same offence would only make a dismissal unfair in two types of cases (1) where the employer had previously condoned the conduct or treated it less seriously so that the Claimant and her colleagues had been led to believe that this sort of conduct would be overlooked, or where it can be inferred that the employer's asserted reason for dismissal in this case was not the real reason; and (2) where employee in 'truly parallel circumstances' arising from the same incident are treated differently. (*Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352(EAT) and *Paul v Surrey District Health Authority* [1995] IRLR 305 (CA). The Respondent submitted that there were not truly parallel circumstances between the Claimant and her comparator.

The ACAS Code of Practice (2015); and
Discipline and Grievances at work: the ACAS Guide

79. The Code states that it provides basic practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace. A failure to follow the Code does not, by itself, make the organisation liable to proceedings however, the Tribunal must take the Code into account when considering relevant cases.

80. The Code states that whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. The Code identifies the following elements to that:

> employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions;
>
> employers and employees should act consistently;
>
> employers should carry out any necessary investigations, to establish the facts of the case;
>
> employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made;
>
> employers should allow an employee to appeal against any formal decision made
>
> The Guide provides good practical advice for dealing with discipline and grievances in the workplace and complements the Code. Employment Tribunals are legally required to take the Code into account when considering relevant cases

Applying law to facts

81. As it was agreed between the parties that the Claimant had been dismissed, the first issue that the Tribunal had to decide was what was the reason for dismissal.

82. The burden to prove the reason for dismissal is on the Respondent.

83. The Respondent's case was that the Claimant was dismissed because of gross misconduct. It is this Tribunal conclusion that the Claimant was investigated for gross misconduct and that ultimately, that was the reason for her dismissal. The disciplinary action taken by Mr Batchelor was supported by the investigation conducted by Ms Ojudun and the appeal conducted by Mr Rampling. The disciplinary process arose from the complaint sent in to the depot by the member of the public and the findings from Ms Ojudun's investigations.

84. There were no other matters between the Claimant and her managers. One colleague described her as a lovely person and it is likely that she got on well with

colleagues. There was no other reason for the Claimant to be subjected to disciplinary action or for the Respondent to decide to end her employment.

85. Although the Claimant referred to her perception that the Respondent needed to cut down the numbers of drivers on its books because of the need to make financial savings and because it had lost some routes; she did not have any evidence to support this. Mr Batchelor's evidence was that the Respondent was short of drivers and that training a driver was expensive and the Respondent would prefer to retain the trained and experienced drivers that it already employed rather than spending its resources to train a new driver.

86. The Tribunal did not have evidence to support the Claimant's contention that any other matter was the real reason for her dismissal. It is this therefore this Tribunal's judgment that the Respondent has proved that it dismissed the Claimant for gross misconduct.

87. The Respondent has therefore proved that the Claimant was dismissed for gross misconduct which is a potentially fair reason under section 98(2) of the Employment Rights Act 1996. The next issue for the Tribunal to decide is whether the dismissal was fair, pursuant to section 98(4) of the same Act, as discussed above.

88. The first matter that the Claimant complains about is her suspension. The Respondent's procedure gave Ms Ojudun the authority to suspend her to allow the investigation to continue. In this Tribunal's judgment the matter of concern that needed to be investigated was of a serious nature. The Respondent's procedure specifically allowed for suspension in such a case.

89. One of the main areas of dispute between the parties was whether the Claimant was accurately recorded as agreeing with Ms Ojudun that she had been on the bus, in the driver's cab, with the engine running when speaking on her mobile phone. This is clearly recorded in the minutes of the investigation meeting which bears the Claimant's signature. The Claimant confirmed her signature.

90. The Claimant gave no reason why Ms Ojudun would falsely record an admission by her in the notes. She accurately recorded the Claimant's responses to the earlier questions in which she denied holding the phone while driving or answering the phone while driving. There was no dispute about those or any other statement in the notes of the investigation meeting apart from the statement in which the Claimant incriminates herself. Ms Ojudun was a credible witness and Mr Batchelor gave evidence that in all the time that they had worked together he had no reason to doubt her. As the notes are signed by the Claimant, it was reasonable for Mr Batchelor to assume that she agreed them and that they correctly record what was said in the meeting. It was reasonable for him to conclude that once the Claimant realised the severity of what she had admitted to, she might try to backpedal from the statement. That is not the same as saying that she never said it in the first place.

91. It is also the Tribunal's conclusion that the Claimant's version of events is not credible. If the Claimant had been unable to read the notes produced by Ms Ojudun – either because she could not read or because she did not have her glasses – then it is not clear why she signed them and why she did not simply ask to be allowed to take them away or have them read back to her. To that she says that she was coerced into signing

them. Mr Batchelor did not simply take Ms Ojudun's word on this. He also spoke to Mr Hall, the trade union representative who accompanied the Claimant in the meeting. If there had been any coercion it is highly likely that he would have complained and advised her not to sign the notes.

92. Lastly, if the Claimant had not admitted to speaking on the phone with the engine on, while at the Sainsburys stand then it is highly unlikely that Mr Hall would have volunteered information about another driver he knew of who had committed a similar offence but who had not been dismissed. He was quick to see the similarities between the two situations and to seek to use it to the Claimant's benefit. He went to the union office and retrieved paperwork for Mr Vergara Piedra's case, which he gave to Ms Ojudun for her consideration. It is this Tribunal's judgment that he would not have done so if the Claimant's responses at the meeting had been that she had never done as alleged. There would be nothing to compare with Mr Vergara Piedra's case as he clearly had been seen on the CCTV holding his phone.

93. It is this Tribunal's judgment that it was reasonable for Ms Ojudun, Mr Batchelor and Mr Rampling to conclude that in the investigation meeting the Claimant admitted that she had been speaking on her mobile telephone on the bus stand at Sainsburys, while the engine was on.

94. Unlike the employers in the case of *Whitbread* referred to above, the Respondent did not proceed to dismiss the Claimant on her admission. The Respondent followed its disciplinary procedure and considered the allegations and gave her an opportunity to bring evidence to support her case, before coming to a decision to dismiss.

95. The member of the public made a written complaint. It was appropriate for the Respondent to take this complaint seriously. This could have an adverse effect on the Respondent's reputation and its business. The prohibition on using a mobile phone while driving is based on the legislation and on Health & Safety concerns. It was therefore a serious matter and it was reasonable for the Respondent to treat it as such.

96. Ms Ojudun conducted her investigation in accordance with the Respondent's internal procedures. She also conducted her investigation in a similar way to the investigation conducted by Ms Maguire into the allegations against Mr Vergara Piedra. Both investigators met with the driver concerned and created a report with all the evidence they obtained from the investigation. Ms Ojudun interviewed Mr Bishop, since the Claimant made accusations against him. It would not have been appropriate for the Respondent to interview the member of the public as she is not a party to the employment relationship and her complaint was clear. There was no need for any further involvement from her. To interrogate members of the public any further would run the risk of putting them off making complaints or raising issues about public services, which would be an undesirable consequence.

97. In the same way that Ms Maguire referred her investigation report to another manager for consideration of whether there was a case to answer, Ms Ojudun also referred her investigation report to Mr Batchelor so that he could assess whether there was a case to answer. That was in keeping with the Respondent's process. It would not be up to the member of the public to devise the disciplinary charge/s as that is the province of the employer. The member of the public makes a complaint and it is then up the employer to investigate and conclude whether there is any part of that complaint which

warrants further investigation internally. On completion of her investigation, Ms Ojudun considered that there were a number of things that required further investigation, including the question of the Claimant's possible breach of the Respondent's mobile phone usage policy. That came from her conversation with the Claimant in the investigation meeting. It was entirely appropriate for her to conclude from that meeting that there was a case for the Claimant to answer in relation to that allegation/admission. She made no decision on this matter but referred the report and her recommendation that the Claimant had a case to answer in relation to that issue, to Mr Batchelor for review. She was also clear in her report that there was no independent evidence of the other matters.

98. There was no suggestion that Mr Batchelor knew the Claimant before conducting this hearing or that he had anything against the Claimant. There is an allegation that he was a judge in his own cause because he decided that the matter should go forward to a disciplinary hearing. He simply reviewed the paperwork from Ms Ojudun and decided that this was something that should be considered at a disciplinary hearing and that he would hear it. It is this Tribunal's judgment that he made no other decision at the review stage. This was not Mr Batchelor's cause. There was no evidence that he could not go on to properly and fairly conduct a disciplinary hearing after reviewing the papers.

99. Mr Batchelor conducted a fair disciplinary hearing. He went through all the matters with the Claimant. Mr Neckles made representations on the Claimant's behalf, all of which Mr Batchelor considered and referred to in his decision letter. Mr Batchelor had a genuine and reasonable belief that the Claimant had been speaking on the telephone when sitting in the driver's cab of the bus she had been driving, while the bus was at the Sainsburys stand with the engine running. That reasonable belief came from the Claimant's admission in the investigation meeting which was contained in the signed notes of that meeting. He also had her statements in the disciplinary hearing and the information he gleaned from speaking to Ms Ojudun and Mr Hall in his further investigations after that meeting.

100. Mr Batchelor did not go back to the Claimant after speaking to Ms Ojudun and Mr Hall. He decided that he already had the Claimant's version of events and he just wanted to know what they would say if it were put to them. There was no need to go back to her again as it was highly likely that she could continue to say what she had said in the disciplinary hearing. Mr Batchelor had all the information he needed in order to be able to make a decision. (*Hussain v Elonex*)

101. It is this Tribunal's judgment that Mr Batchelor had reasonable grounds to sustain his belief that the Claimant had committed gross misconduct. It was reasonable for him to conclude that if the Claimant had not said as recorded in the investigation meeting, then Mr Hall would not have gone to get the documents about the comparator. Also, that if she had been coerced into signing the minutes, Mr Hall would have complained right there in the meeting. If the Claimant had denied that she had been on the phone and in the driver's cab while the engine was running then it is likely that this would have been recorded in Ms Ojudun's notes as her other denials were recorded. In addition, when asked about this at the disciplinary hearing the Claimant stated that she was confused by Ms Ojudun's question. She did not state that Ms Ojudun recorded something that she had not said. The effect of what she said was that although she had said as recorded, she did so because she was confused rather than that the statement was inaccurate.

102. As he concluded that it was likely that the Claimant said as had been recorded in the investigation notes, Mr Batchelor did not investigate the member of the public or the bus. It was reasonable for him not to have done so. *(Sainsburys v Hitt).*

103. It was reasonable in all the circumstances for Mr Batchelor to conclude that he had reasonable grounds to sustain a belief that the Claimant had been speaking on the phone while sitting in the driver's cab of a bus, while the bus was stationary and with the engine on. Mr Batchelor agreed with Ms Ojudun that it was appropriate and reasonable to give the Claimant the benefit of the doubt in relation to the other matters that the member of the public raised in her complaint. He could not do so in relation to the mobile phone allegation which had arisen from the investigation into the public complaint – in circumstances where the Claimant admitted it and where it was in breach of the Respondent's internal mobile phone policy and legislation. The use of the mobile phone in these circumstances was listed as an example of gross misconduct in the Respondent's Disciplinary and Performance Improvement Procedure. In those circumstances, it was reasonable for the Respondent to consider that the Claimant had committed gross misconduct.

104. At the time that Mr Batchelor formed his belief, the Respondent had carried out as much investigation as was reasonable in the circumstances of the case. The investigation and the procedure that the Respondent followed was within the band of reasonable responses open to a reasonable employer.

105. It is this Tribunal's judgment that Mr Batchelor considered all mitigation points before coming to the decision that dismissal was the appropriate sanction to impose in this case. He confirmed in his live evidence that he checked the Claimant's personnel records and that he would not have dismissed a driver unnecessarily as there was a shortage of drivers. Although the Claimant had a clean disciplinary record over the period of her employment, which at that time was over 9 years that was to her credit but as this was an act of gross misconduct it outweighed her clean record and his decision was to terminate her contract of employment.

106. The Claimant was given a right of appeal which she exercised. It is this Tribunal's judgment that Mr Rampling was an independent manager who was unknown to the Claimant at the time he heard the appeal. Although he knew Mr Batchelor from their time at a previous employer, there was no suggestion that they were friends. Mr Neckles did suggest in his witness statement that Mr Rambling felt obliged to confirm the dismissal to support Mr Batchelor but he did not provide any evidence to support such an assertion, there was no independent evidence of it and Mr Rampling denied this in the hearing.

107. In this Tribunal's judgment, Mr Rampling considered all the Claimant's points submitted at the appeal. He did not accept the Claimant's points about her admission in the investigation meeting. In this Tribunal's judgment it was reasonable for him to reject her points on that matter for the reasons already outlined. Further, in the appeal hearing the Claimant stated that she was calling her family about her sister whereas earlier she had stated that she called the depot as she had several missed calls. As the Claimant was inconsistent in her case, it was reasonable for Mr Rampling to accept that Ms Ojudun's notes accurately recorded what had been said in the investigation meeting. It was not just that he believed Ms Ojudun over the Claimant but that the Claimant's evidence was unreliable.

108. The Claimant submitted that the Respondent had failed to prove that they it had considered action short of dismissal. This is not the test. The test is whether having concluded that it was likely, on the balance of probabilities that the Claimant had committed gross misconduct; was dismissal was within the band of reasonable responses open to the employer? It is this Tribunal's judgment that it was.

109. It is this Tribunal's judgment that the Respondent had not changed the charges laid against the Claimant as in the *Strouthos* case. A member of the public cannot lay charges against one of the Respondent's employees. They can make a complaint. The complaint is then investigated by the Respondent and charges may or may not arise out of what the investigator finds. It was reasonable for the Respondent to conclude that the Claimant admitted during in the investigation meeting that she had been speaking on the phone while sitting in the driver's cab of the bus while it was on the Sainsburys stand with the engine on. It was appropriate for Ms Ojudun to refer this to a manager for review and consideration. It was reasonable for the manager to refer it to a disciplinary hearing and it was not unfair or unreasonable for him to them conduct an in-depth disciplinary hearing on the matter. The charges that Mr Batchelor laid against the Claimant were the same charges that were considered on appeal and contained the issues that Ms Ojudun raised in her report. The Respondent did not change the charges that it brought against the Claimant.

110. It is this Tribunal's judgment that the Respondent conducted a reasonable investigation and followed a reasonable disciplinary procedure. The Respondent complied with the ACAS Code and Guide in the procedure it followed. The Respondent came to a reasonable conclusion that the Claimant had committed gross misconduct. There were no defects in the disciplinary process. The appeal process was similarly reasonably concluded and came to a reasonable conclusion.

111. Given the seriousness of the offence, that it was breach of the Respondent's mobile phone policy and that it is illegal to use a mobile telephone while driving, it is this Tribunal's judgment that it was within the band of reasonable responses for Mr Batchelor to conclude that notwithstanding the Claimant's mitigation that it was appropriate to dismiss her summarily for her gross misconduct.

112. As far as the comparator is concerned, it is this Tribunal's judgment that Ms Ojudun was correct in that the facts of Mr Vergara Piedra's case was different to the Claimant's case. In investigating an allegation against him in relation to an accident, a manager noticed on the CCTV that he had his phone in his hand and this was picked up as an additional point, even though it had not been the original issue with the incident. Upon investigation and consideration during a disciplinary hearing, a manager concluded that although he had the phone in his hand, he had not been speaking in to it or using it.

113. In contrast, the Claimant admitted speaking on her mobile while the engine was running and she was sitting in the driver's cab of the bus. This is very different as she was using the phone whereas Mr Vergara Piedra took the phone out of one pocket, then put it in another and then into another pocket. He never used it. The prohibition in the mobile phone policy is on using the phone as opposed to holding it. He was spoken to about it but he was not sanctioned for it as he had not been using it at the time. The cases are similar in that it was during an investigation on the accident that the handling of the mobile phone was seen and it was referred to the manager for review and to see whether it should be considered at a disciplinary hearing. The manager considered that it was.

Similarly, in investigating a complaint from a member of the public about her driving and her use of her mobile phone while driving a bus, the Respondent concluded that the Claimant had been speaking on the phone while sitting in a driver's cab while the engine was on. It was appropriate to refer that matter to a manager for review and for that manager to invite the Claimant to a disciplinary hearing to consider it further.

114. It was not unfair for the Respondent to dismiss the Claimant for speaking on her mobile while sitting in the driver's cab of the bus while the engine was on; while a year earlier, no sanction had been applied to another driver who was observed on CCTV taking his mobile phone out of one pocket and putting it into another, while sitting in the driver's cab. He had not been *operating* or *using* his mobile telephone at the time (Tribunal's emphasis on words used in the Respondent's policy) and in this Tribunal's judgment, the Respondent has proved that was the reason for the difference in treatment. These cases were not truly parallel circumstances as envisaged in the case of *Hadjioannou* referred to above. The Claimant did not use her mobile phone because she had heard that the Respondent condoned Mr Vergara Piedra's actions. There is therefore no issue of inconsistency of treatment here.

115. The way the Respondent treated Mr Vergara Piedra shows that it takes any possibility of a driver having their mobile telephone in view while in the driver's cab, as a serious matter that requires investigation. Once investigated, the Respondent took the appropriate action in his case. The Claimant's circumstances were different and warranted a different response.

116. Taking into account all the circumstances, it is this Tribunal's judgment that the Respondent followed a fair and reasonable process in coming to the decision that the Claimant had committed gross misconduct. It is also this Tribunal's judgment that the decision to dismiss the Claimant was fair and one that fell within the range of reasonable responses open to a reasonable employer *(Iceland Frozen Foods v Jones).*

117. The Claimant's complaints fail and are dismissed.

Employment Judge Jones
Date: 16 July 2020