EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr S Kaddu **v** **London United Busways Limited**

Heard at: London Central **On**: 15 and 16 September 2020

Before: Employment Judge A James, sitting alone

Representation

For the Claimant: Mr D Kalanzi, lay representative

For the Respondent: Mr E Nuttman, solicitor

JUDGMENT

(1) The claim for unfair dismissal fails and is dismissed.

REASONS

The issues

1. The sole issue before the tribunal is the fairness of the claimant's dismissal, the clamant having accepted that the reason for the dismissal was misconduct. The relevant legal principles are set out in the law section below.

History of proceedings

2. The claim form was submitted on 5 July 2018 but was rejected due to issues with the Acas early conciliation certificate. It was resubmitted and was subsequently accepted on 11 October 2018. A closed preliminary hearing took place on 15 February 2019, during which an open preliminary hearing was listed to deal with the issue as to whether or not the claim had been submitted in time. Further, the age and race discrimination claims and the holiday pay claims were withdrawn.
3. At an open preliminary hearing on 15 March 2019, it was determined that the unfair dismissal claim was presented in time and should proceed to a full hearing.
4. The claim had to be adjourned for various reasons and was re-listed for a final hearing on 15 and 16 September 2019. Witness evidence was heard on 15

September 2019 and submissions made. The witnesses who appeared before the tribunal were Mr George Mawoyo, Operations Manager, who conducted the disciplinary hearing and decided that the claimant should be dismissed; Mr Ray Clapson, General Manager, who heard the appeal against that dismissal; and the claimant.

5. At the conclusion of the evidence and submissions, the hearing was adjourned in order for me to make relevant findings of fact and draw my conclusions from those facts on the basis of application of the relevant legal principles. It was arranged that the parties would return at 3 pm on 16 September 2020 in order for judgement to be given orally. Written reasons were requested at the conclusion of the hearing.

Findings of fact

6. The claimant commenced for with the respondent on 16 October 1996 as a bus driver. He was employed between 2003 and October 2010 as a Service Controller. For reasons which are not relevant to this claim, the claimant recommenced as a bus driver on a part time basis, a role he continued in between 26 February 2009 and 6 June 2018. On that date he was dismissed with twelve weeks' notice, which meant that his effective date of termination was 30 August 2018. The claimant was not required to work during his notice period.

<u>28 February 2017 incident</u>

7. On 28 February 2017, the claimant was involved in a road traffic accident whilst driving one of the respondent's hybrid LT buses. During the accident, the bus hit a van which was parked on the roadside, only stopping when that van was crushed against the wall of a property in the neighbourhood. The driver of the van was injured and had to attend hospital. The claimant attended hospital as a precautionary measure although he was soon discharged. The van was written off, substantial damage was caused to the bus and the wall of the property was damaged. The total cost to the respondent was in the region of £60,000 - £70,000.

8. The claimant maintained that he could not understand what had caused the accident. He blamed it on 'the dreaded engine surge', a mechanical fault he believed was present in hybrid buses. The surge issue is discussed further below.

9. The incident was investigated by a Mr Simon Cooper. The claimant was suspended during the investigation. The claimant was subsequently invited to a disciplinary hearing which resulted in a finding of unsatisfactory driving standards. The claimant was represented by the RMT trade union in those proceedings. He was issued with a final written warning which was to remain on his record for 24 months. He was warned that if he were involved in a related incident during the period of the warning, his job would be at risk.

10. The claimant was unhappy with the investigation, the hearing and the outcome, maintaining that the problem was not with his driving but with surging in hybrid vehicles generally and a specific problem with the steering of that vehicle on the day. Despite these views, the claimant did not appeal the

findings or outcome. The warning therefore remained live at the time of the further incident referred to below.

11. After the incident the claimant's driving was reviewed by a qualified trainer who concluded that his driving was satisfactory.

15 May 2018 incident

12. The second incident happened on 15 May 2018 at the bus depot in Shepherd's Bush. The claimant was allocated to drive a bus which was parked at the far end of a line of buses by a wall. According to the claimant, in order to drive the bus out of the garage, he needed to drive it over a kerb. When the bus was climbing down the kerb the bus had suddenly gained speed and the claimant applied emergency braking and brought it to an immediate stop. That version of events is disputed by the respondent.

13. The respondent took the view that the incident was serious, and that the bus appeared to be out of control after it came off the kerb. It nearly hit an employee who was walking across the forecourt and stopping just short of a pillar. During cross-examination, the claimant denied that an employee was nearly hit. However, there is an employee clearly shown on still photographs taken from the CCTV images and I find that the respondent's version of events is correct.

14. The claimant also suggested that the bus only travelled about 3 m (about 10 feet). I prefer the evidence of Mr Clapson on this point and find that the bus travelled about 20 to 30 feet. Mr Clapson listened to the questions put to him during cross examination and did his best to answer them. By contrast, the claimant refused to answer a number of the questions put to him by Mr Nuttman or was evasive in relation to the answers given. The claimant refused to accept that the second incident was a serious one which warranted a disciplinary investigation. It clearly was serious and the claimant should have conceded that. Further, the claimant insisted that he been represented at the second hearing by the RMT trade union, even though it was clear from the record, which claimant accepted when he was taken it, that he was represented by Unite the Union at that stage. Mr Clapson's evidence is also consistent with the diagram showing the location of the bus at the start and end of the incident.

15. The log of any incidents with the bus involved in the accident was checked. It was found that there was no issue with the brakes, and no suggestion that it was prone to surging, in the months leading up to the accident. Nor was there any record or report of any such problems following the incident.

Disciplinary investigation

16. An investigation was conducted by Mr Simon Cooper, who as noted above had conducted the fact-finding interview in relation to the first accident. The claimant was, as already mentioned, represented by Unite the Union in the disciplinary process.

17. The claimant again maintained that there was an issue with the hybrid buses surging, due to a mechanical fault. He asked Mr Mawoyo to speak to some of the other witnesses, who saw the incident, there being a total of eight. Mr Mawoyo did not do so. He did however consider the CCTV evidence.

18. There was a conflict of evidence as to whether or not the claimant initially blamed the incident on the brakes. The service controller Mr A Hounsworth who spoke to the claimant after the incident says that he did. He was spoken to by Mr Mawoyo. I have not found it necessary to reach a conclusion as to whether the claimant raised an issue with the brakes or not with the service controller in arriving at the conclusions below.

The disciplinary hearing

19. Whilst the investigation was ongoing and about two weeks after the incident, Mr Mawoyo moved the claimant off route 148 to a route which meant he could drive a diesel bus, not a hybrid bus. This was not done as a disciplinary sanction. It was done as a precautionary measure, due to the claimant's complaints about hybrid vehicles and the alleged problem with surging. It was not due to the similarity between the incident in 2017 and the May 2018 incident. Prior to taking that step, Mr Mawoyo had not pre-judged the allegations.

20. The claimant also complains that he asked Mr Mawoyo to speak to a Mr François, an engineer, prior to coming to his decision. I find that the claimant did not make any such request. He only requested that Mr Mawoyo speak to the other employees who witnessed the incident. That is consistent with paragraph 25 of the claimant's witness statement which only refers to those eight employees, not to Mr Francois. He did not allege in his statement that he asked Mr Mawoyo to speak to Mr Francois/call him as a witness. Mr François did attend the appeal hearing in any event.

21. The disciplinary hearing took place on 6 June 2018. Mr Mawoyo concluded that the incident had happened because of pedal confusion, the same issue which led to the earlier incident. He rejected the claimant's argument that there was a mechanical fault with the hybrid buses. He is not aware of any such incidents or problems with alleged surging. Surging is the name given to the problem of buses suddenly moving forwards at speed, without the driver doing anything. There was simply no evidence of such problems. There were on the other hand occasional problems with pedal confusion. Mr Mawoyo is aware of about five such incidents, in seven years.

22. At the conclusion of the hearing, Mr Mawoyo adjourned to consider the evidence. He then reconvened and informed the claimant of his decision to dismiss him. He considered the final written warning in arriving at his decision. He wrote to the claimant on the same day. The relevant parts of the letter state:

> *"On closer examination of the CCTV footage, it is clear that your bus came into contact with the kerb then slightly rocked back It is evident that you had to accelerate a bit more to get over the kerb but soon after that, you accelerated at speed. Whilst I am satisfied that you accelerated on purpose to mount the kerb, you proceeded to accelerate for a couple more seconds than you intended to when you meant to have been braking. Your trade union representative clearly stated that you travelled further than you intended to — and it is evident from the footage that this was at a pace which demonstrates you had clearly lost control of the vehicle. You even jumped out of your [seat] on braking.*

"I found no evidence to suggest that there was a defect with the vehicle and we looked at the defects reported against the vehicle in the month prior to the incident and found none to be relevant. You also alleged that there was an issue with the type of vehicle, however, no evidence was provided to support this claim or indeed that any incidents were unique to this type of vehicle.

"Based on this, I find the charge against you proven. ….

"There is no doubt in my mind as to the seriousness of this incident. It is also clear particularly from the CCTV footage that this type of incident in the right time and location could have posed risk of serious injury or death. I am not satisfied that there was sufficient mitigation presented today. It is my opinion having taken this into consideration that your actions on the day in question constitute gross negligence.

Sadly, the fact that you are currently on a live disciplinary award of Final Written Warning for a related incident limits the possible outcomes. In order to reflect the progressive nature of the disciplinary procedure, my decision is to statutory dismiss you from the employ of London United Busways." [Note: statutory dismissal means dismissal with notice]

Appeal Against dismissal

23. The claimant appealed against the dismissal. His appeal letter complained that the dismissal was unfair; that there been a failure to hold a proper disciplinary hearing process; the decision was harsh; the key witnesses he wanted to attend were not invited to the hearing; Mr Mawoyo had failed to monitor the Green Road events at the time of the incidents to see what went wrong; and two service controllers had confirmed that drivers had to drive over the hump/kerb to get buses out of the garage and they were still doing so.

24. On 13 June 2018, the claimant was invited to an appeal hearing by Mr Ray Clapson, the appeal manager. The appeal was heard on 19 June 2018 by Mr Clapson and a side panel member, Mr Stirling Moss, a manager at Stamford Brook Garage.

25. I find, having heard Mr Clapson's evidence, that he approached the appeal with an open mind. I find that the trade union often asked for him to hear any appeal, as he is seen as a fair manager, who is willing to overturn dismissal decisions. Mr Clapson had in fact overturned a previous dismissal decision in relation to the claimant. Mr Clapson is fully aware of the devastating effect that a dismissal can have on an individual. He therefore takes his responsibilities in relation to appeal hearings very seriously.

26. Mr Clapson has come across a number of incidents of pedal confusion, at the rate of about one or two a year over a twelve-year period. These incidents arise with hybrid buses. All buses are automatic vehicles, whether they are diesel or hybrid. However, with automatic diesel buses, the vehicle moves forward automatically when in drive mode, without the accelerator being pressed. The brake has to be pressed to stop the vehicle moving forward. This is different to hybrid vehicles, which recirculate energy into the braking system. Which means that hybrid buses do not move forward unless the accelerator is pressed. It is this difference which can lead to pedal confusion

because when driving hybrid vehicles, the driver's foot will be hovering over the accelerator pedal, rather than over the brake pedal which is the case when driving diesel vehicles.

27. Mr Clapson was not aware of any issue with that kerb at the Shepherd's Bush garage. In any event, Mr Clapson made it clear that even if there was a potential issue when driving over kerbs, whether in a bus depot or otherwise, the driver has to keep control of the vehicle. He agreed with the evidence of the engineer, Mr François, that a bus driver would have to press hard on the throttle, in order to get over a kerb, and that there would be a release of that energy, when the bus started to come down the kerb. He likened it to what happens when you pull an elastic band tight and then let it go.

28. The issue for Mr Clapson however is that whether a bus starts to suddenly lurch forward because of it having been driven over a kerb; or whether for example, a driver needs to take evasive action because a dog runs out in front of the bus; drivers still have to retain control of the bus at all times by applying the brake to avoid a collision. Most of the time that is what happens. Occasionally, due to pedal confusion, buses are accelerated forward instead of the brake being applied. That is down to human error, not due to any problem with 'surging' caused by an inherent mechanical fault with the LT buses.

29. Mr Clapson is not aware of any problems with LT hybrid vehicles surging, and that if there was such a problem, it is likely that he and Mr Mawoyo would be aware of it. The issue of buses moving forward at speed after mounting a kerb is not therefore an issue on which Mr Clapson considers training is required.

30. Prior to hearing the appeal, I find that Mr Clapson watched the CCTV footage. This is not mentioned in his witness evidence, but Mr Clapson did describe to me his clear recollection of what the CCTV footage showed. What the CCTV footage showed was that the claimant did not immediately apply the brake after the bus came down from the kerb. The brake was not applied until just before the bus stopped. When the brakes are applied, a red light is visible in the cab, which will be visible on the CCTV footage and the stills taken from that. The evidence led Mr Clapson to the conclusion that pedal confusion was at issue here, not a problem with surging due to an inherent mechanical fault.

31. At the conclusion of the appeal hearing, Mr Clapson went through the points raised by the claimant in his appeal. Mr Clapson concluded that it was appropriate to place a temporary restriction on the claimant in relation to the route he was driving. Indeed, it was good practice to do so. He conceded that it would have been good practice to call witnesses if the claimant believe they would give relevant evidence and they were willing to accept that it was common practice to drive over the kerb. There was no evidence of any surging effect with the hybrid LT bus model. The brakes had been tested and worked fine. The final written warning was relevant, as the disciplinary procedure is progressive. Further, it was right for Mr Mawoyo to raise that with the claimant at the outset of the process, so that he understood that one of the potential outcomes of the hearing was dismissal.

32. Further, the evidence of the engineer did not support any problem with surging, as he understood the term. The problem occurred because the claimant pressed the accelerator to get over the kerb and continued to do so after the bus came down off it, which caused him to lose control. This was a

serious incident and dismissal was the correct sanction. Mr Clapson concluded that was so, as a result of the unwillingness of the claimant to accept any fault for the May 2018 incident. In such circumstances, he could not be sure that such an incident would not occur again, which next time could be fatal. That seriously damaged the trust that the respondent could place in the claimant's driving in future.

33. On 20 June 2018, an appeal decision letter was sent, confirming that the dismissal decision had been upheld.

The law

34. The law relating to unfair dismissal is set out in S.98 of the **Employment Rights Act 1996 (ERA)**. In order to show that a dismissal is fair, an employer needs to prove that the dismissal was for a potentially fair reason (S.98(1) and (2) ERA). A tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states:

> *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

35. In a misconduct case, the principles in **British Home Stores v Burchell [1978] IRLR 379** apply. The three elements of the test are:

    35.1. Did the employer have a genuine belief that the employee was guilty of misconduct?

    35.2. Did the employer have reasonable grounds for that belief?

    35.3. Did the employer carry out a reasonable investigation in all the circumstances?

36. The Tribunal must then determine whether the employer's decision was within the range of reasonable responses which a reasonable employer could come to in the circumstances. That is not a perversity test. But it does mean that the job of an employment tribunal is in effect to review the decision, rather than to decide what decision it would have come to in the circumstances of the case. This is something that is often misunderstood by claimants, who hope that when an employment tribunal considers an unfair dismissal case, the tribunal will consider the evidence afresh and arrive at its own decision as to what the disciplinary decision should have been. That would however mean the tribunal was guilty of the substitution mindset by substituting its own decision for that of the employer. The law is clear; tribunals cannot do that.

37. Instead, the function of the Employment Tribunal, as an industrial jury, is to determine whether in the circumstances of each particular case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair. Further, in looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the tribunal's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses that an employer could reasonably come to in the circumstances.

38. Where there are problems with the disciplinary hearing itself, those can in some circumstances be remedied by the appeal, even if the appeal is not a complete rehearing. What is important is that the procedure was fair overall - see **Taylor v OCS Group Limited [2006] IRLR 613**.

39. In **Davies v Sandwell MBC [2013] EWCA Civ 135**, the Court of Appeal identified the "need for a restrictive approach to the question of when it is legitimate for a tribunal considering the fairness of a dismissal to go behind a final written warning given in the past". An Employment Tribunal can however consider whether a final warning was "manifestly inappropriate", when assessing the reasonableness of the decision to dismiss which was based on that warning.

Conclusions

40. Mr Kalanzi accepted that the reason for the claimant's dismissal was misconduct. The sole issue before the employment tribunal therefore was the question of the fairness or otherwise of the dismissal, bearing in mind the legal principles set out above, starting with the **Burchell** test.

Genuine belief

41. As for the question of genuine belief, I conclude that both Mr Mawoyo and Mr Clapson had a genuine belief that the claimant was guilty of misconduct, namely unsatisfactory driving standards, as a result of pedal confusion.

Reasonable belief

42. I conclude that this belief was reasonable in all the circumstances. On the basis of the evidence before them both, it was reasonable for them to conclude that the problem was unsatisfactory driving standards due to pedal confusion, not an inherent mechanical fault with the hybrid LT buses; or a lack of relevant training. I shall expand on these conclusions below, in relation to the specific issues raised on the claimant's behalf.

Reasonable investigation

43. Finally, I conclude that the investigation was reasonable in the circumstances. I bear in mind that the tests to apply is whether the conduct of the investigation is within the range of reasonable responses. It does not have to be a perfect one, with no stone left unturned.

44. Turning to the particular issues raised on the claimant's behalf, I reject the argument that Mr Cooper should not have conducted the investigation into the second incident, due to his involvement in the first. I find that the investigation

that he conducted was a reasonable one, on the basis of the information before him.

45. Next, I do not consider that on the facts of this case, it was necessary for Mr Mawoyo to speak to the eight bystanders. The CCTV evidence was sufficient, in the circumstances. That reasonably demonstrated what happened outside as well as inside the cab. Oral evidence from bystanders would not have been as reliable or informative or be likely to have added much if anything.

46. As for the engineer Mr Francois not being called to the disciplinary hearing, I refer to the fact-finding above, that this was because the claimant had not asked for him to be present. In any event, he was present at the appeal, so if there had been any fault on the part of the respondent in relation to his non-attendance at the disciplinary process (a conclusion which I reject), that was cured by the appeal process.

47. Mr Kalanzi complains that the CCTV evidence was not given to the claimant prior to the disciplinary hearing. He only had 20-minutes to consider that with his representative and consider his defence. I do not consider that this means that the investigation was outside the range of reasonable responses. To the extent that the respondent relies on data protection issues in support of any general argument that CCTV evidence cannot be provided in advance of the hearing, I accept Mr Kalanzi argument that it would be relatively easy to arrange for a claimant and their representative to view the evidence, at the one of the respondent's offices, prior to the hearing. That is perhaps something that the respondent may wish to look at in future. However, I conclude that any disadvantage to the claimant was minor in the circumstances of this particular case and that his defence would not have been any different, and nor would the outcome, if he had been able to view the CCTV evidence several days before the disciplinary hearing, rather than just during the hearing itself.

48. I further conclude that it was reasonable for Mr Mawoyo to conduct the disciplinary hearing. Moving the claimant to a different route, so that he could drive a diesel bus, was done to protect the claimant, in the light of his insistence that there was a mechanical fault with the hybrid buses. Whilst the disciplinary policy does allow for individuals to be moved to different shifts or different garages, as a disciplinary sanction, at the conclusion of a disciplinary hearing, that was not the reason for the claimant being moved to a different route. Nor did it mean that Mr Mawoyo had in any way prejudged the issues.

Overall fairness and the range of reasonable responses

49. As for whether the dismissal was within the range of reasonable responses, I conclude that it was. As for the training issue, the claimant's own evidence in relation to whether or not there was a problem with driving over the kerb was unclear. The evidence he gave to the tribunal was that the 2017 incident was not related to him driving onto the kerb. In those circumstances, there would be no reason why the respondent would have provided any training in relation to that issue. Further, I accept Mr Clapson's position that the fact that buses might start to shoot forward having been driven onto and off a kerb, is not the real issue. The real issue is whether, in any circumstances where drivers have to take evasive action, they are able to maintain control of the bus by pressing the right pedal; in this case the brake, instead of the accelerator. That did not require training.

50. The conclusion that the 2017 and 2018 incidents were caused by pedal confusion, rather than there being a mechanical fault with the hybrid buses was an eminently reasonable conclusion for Mr Mawoyo and Mr Clapson to come to. Even though I accept that the claimant has a genuine belief that there is a problem with the hybrid buses, that is not supported by the evidence.

51. The claimant said that there were other drivers who knew that there were problems with surging but they were afraid to come forward. That bare assertion is not a reasonable basis upon which I could conclude that there is indeed such a problem, given that the clear evidence given by Mr Mawoyo and Mr Clapson that hybrid buses are not involved in a higher incidence of accidents compared to other types of vehicle. I am satisfied that the relatively rare problems that do occur at the respondent's workplace (one or two a year), occur as a result of pedal confusion, not any inherent mechanical fault.

52. Given that relative rarity, the fact that the claimant had been involved in two serious incidents, in relatively quick succession, was something that the respondent was entitled to take into account, when deciding whether or not to dismiss. That is particularly so, in the light of the claimant maintaining that the fault was with the buses, and not with his driving. In those circumstances, it was reasonable for Mr Mawoyo and Mr Clapson to conclude that the claimant would not accept any culpability, and there might therefore be a further incident, in which the consequences could be fatal. They were entitled to refuse to take that risk. And they were entitled to lose trust in the claimant, because of to the position he maintained.

The final written warning

53. Finally, as for the final written warning, that was not something that was challenged at the conclusion of the disciplinary hearing outcome in 2017, even though the claimant was represented by a trade union then as well. Further, issues were not raised in relation to that warning at either the disciplinary or the appeal hearing in relation to the second incident. They were only raised at this hearing for the first time. That would be sufficient for me to conclude that it was reasonable for the respondent to take that warning into account in deciding whether or not dismissal was an appropriate sanction.

54. In any event, there was simply no evidence put before me upon which I could reasonably conclude that the final written warning was a manifestly inappropriate sanction. On the contrary, the evidence that was before me lead me to the conclusion that the sanction was an entirely reasonable one, and that were it not for the claimant's long service record, the respondent would have dismissed the claimant in 2017 and seriously considered doing so at the time. It also made clear what the consequences would be of a related incident occurring whilst the warning was still live.

55. For all of the above reasons, I concluded that the claimant's dismissal was fair, by reason of misconduct. The unfair dismissal claim is therefore dismissed.

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Employment Judge A James
London Central Region

Dated 16 September 2020

Sent to the parties on:

16/09/2020

For the Tribunals Office

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