



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Hammoudan

**Respondent:** London United Busways Ltd

**Heard at:** Watford

**On:** 3 March 2021

**Before:** EJ Shastri-Hurst

## Representation

Claimant: Mr Gittins (counsel)

Respondent: Mr Nuttman (solicitor)

## COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

“This has been a remote / paper hearing on the papers which has been consented to/not objected to by the parties. The form of remote hearing was V (remote video hearing). A face to face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 218 pages, the contents of which I have recorded. The order made is described at the end of these reasons.”

# JUDGMENT

1. The Claimant’s claim of unfair dismissal is not well-founded and fails;
2. The Claimant’s claim on wrongful dismissal is not well-founded and fails.

# REASONS

1. The Claimant was employed as a bus driver by the Respondent from 21 October 2013 until 11 February 2019 when he was summarily dismissed.
2. The Claimant presented a claim of unfair dismissal under s98 of the **Employment Rights Act 1996** (“ERA”), as well as a claim for wrongful

dismissal, to the Tribunal on 9 July 2019, having undertaken the ACAS Early Conciliation process between 9 May 2019 and 23 June 2019.

3. The Respondent contests the claim, alleging that it fairly dismissed the Claimant by reason of conduct, namely:

“Unsatisfactory driving standards resulting in an incident that could bring the company into disrepute.”

4. The Claimant was represented by Mr Gittins and Mr Nuttman represented the Respondent. I am grateful to both representatives for their assistance throughout the hearing, and for their helpful oral submissions.
5. In determining the claim, I heard from Mr Nigel Harris, General Manager and the Appeal Officer during the Claimant’s internal disciplinary process. The Claimant gave evidence in support of his claim.
6. I have also had sight of a bundle of 218 pages on the issue of liability. I have seen a mitigation bundle although, as it was agreed that I would deal with liability only at this stage, I have not been taken to the mitigation bundle. I also had the benefit of a skeleton on behalf of the Respondent and an accompanying authorities bundle.

## **ISSUES**

7. The parties had attempted to provide me with an agreed list of issues however, on the morning of hearing, there were still some disagreements outstanding. We went through the list together, and the following issues were agreed as being those relevant to my decision making.

### **Unfair dismissal**

- 7.1. Did the Respondent dismiss the Claimant for the potentially fair reason of conduct? It is common ground that the Claimant was dismissed following an incident of grounding his bus on a roundabout. However, the Claimant puts the Respondent to proof as to whether that equates to the reason for dismissal being “conduct”.
- 7.2. Did the Respondent have a genuine and reasonable belief in the Claimant's guilt of the alleged misconduct for which he was dismissed?
- 7.3. Did the Respondent conduct a fair and reasonable investigation, in all the circumstances? The specific point raised by the Claimant was the investigation into the alleged damage to the vehicle in question.
- 7.4. Was the dismissal procedurally fair? The Claimant argues that the correct policy was not used or followed.
- 7.5. Taking account of all factors, was the sanction of dismissal without notice within the band of reasonable responses open to the Respondent? The Claimant highlights the particular following issues:

- 7.5.1. The Respondent wrongly relied on “three charges” in deciding to dismiss the Claimant;

- 7.5.2. The allegation did not amount to gross misconduct;
- 7.5.3. The Respondent failed to consider lesser sanctions;
- 7.5.4. The Respondent failed to consider the Claimant's length of service;
- 7.5.5. The Respondent failed to consider the Claimant's good service.

### **Wrongful dismissal**

- 7.6. Did the Claimant commit an act of gross misconduct so as to disqualify himself from entitlement to any notice pay?
- 7.7. If not, what notice is the Claimant entitled to, considering the need to avoid double recovery with any loss of earnings claim?

### **Remedy**

- 7.8. If all or any of the Claimant's claims succeed, to what remedy is he entitled?
  - 7.9. If the Claimant's dismissal was unfair due to procedural deficiencies to what extent would remedying those deficiencies have altered the outcome? What reduction, if any, should be made to any compensatory award in accordance with the principles of **Polkey v AE Dayton Services Ltd [1987] IRLR 503**?
  - 7.10. Should any uplift be awarded in respect of any breach of the ACAS Code of Practice? The Claimant relies upon the same point as under procedural fairness, i.e. the Respondent did not use or follow the correct policy.
  - 7.11. Should any reduction be made in respect of the Claimant's contributory fault under s123(6) **ERA**?
  - 7.12. Has the Claimant unreasonably failed to mitigate his losses and, if so, should this be reflected in the Claimant's awards?
8. As mentioned above, I had determined to deal with liability only first. It was agreed that this would also encompass issues 7.9 to 7.11 as recorded above.

## **LEGAL FRAMEWORK**

### **Unfair dismissal – reason for dismissal**

- 9. The relevant legislation is found at s98(1), (2) and (4) **ERA**.
- 10. It is for the employer to show the reason for dismissal and that it is a potentially fair one, such as conduct: this is not a high threshold for a respondent. In **Gilham and Ors v Kent County Council (No2) 1985 ICR 233**, the Court of Appeal held as follows:

“The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [s98(4)] and the question of reasonableness.”

## Unfair dismissal – fairness

### Substantive fairness

11. Regarding conduct cases, the oft-cited case of **British Home Stores Ltd V Burchell [1978] IRLR 379** encompasses the relevant test for fairness:
  - 11.1. Did the Respondent have a genuine belief that the Claimant was guilty of the misconduct alleged by the Respondent?
  - 11.2. If so, were there reasonable grounds for the Respondent in reaching that genuine belief? and,
  - 11.3. Was this following an investigation that was reasonable in all the circumstances?
12. In all aspects of such a case, including consideration of sanction, in deciding whether an employer has acted reasonably or unreasonably within s98(4) **ERA**, the tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances. Whether the tribunal would have dealt with the matter in the same way or otherwise is irrelevant, and the tribunal must not substitute its view for that of a reasonable employer – **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**, **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**, **London Ambulance Service NHS Trust v Small [2009] IRLR 563**.

### Procedural fairness

13. Following the case of **Polkey v AE Dayton Services Ltd [1988] ICR 142**, it is well established that fairness in procedure is a vital part of the test for reasonableness under s98(4) **ERA**. It is not relevant at this (the liability) stage to consider whether any procedural unfairness would have made a difference to the outcome: that is a matter for remedy (the issue in **Polkey** is set out below).
14. If there is a failure to adopt a fair procedure, whether by the ACAS Code's standards, or the employer's own internal standards, this will render a dismissal procedurally unfair.
15. Regarding dismissal for conduct issues, the reasonableness of the procedure rests fairly heavily on the reasonableness of the investigation, and the provision of opportunity for the employee to make his position, explanation and mitigation heard and understood.
16. Procedural and substantive fairness do not stand as separate tests to be dealt with in isolation – **Taylor v OCS Group Ltd [2006] ICR 1602**. It is, ultimately, a view to be taken by the tribunal as to whether, in all the circumstances, the employer was reasonable in treating the reason for dismissal as a sufficient reason to dismiss. It may therefore be that in a serious case of misconduct, it may be fair to dismiss, even if there are slight procedural imperfections. On the other hand, where the conduct charge is less serious, it may be that a procedural issue is sufficient to tip the balance to make the dismissal unfair.

## Wrongful dismissal/breach of contract

17. This claim requires the tribunal to perform a different exercise when compared to the test under s98 **ERA**. Here, the question is, as a matter of fact, was there a breach of contract in that the employer failed to pay the employee their contractual notice pay?
18. This requires a tribunal to consider first whether the employee acted in a way so as to fundamentally breach their contract to enable the employer to summarily terminate the employment contract.
19. Unlike under a claim for unfair dismissal, regarding a wrongful dismissal claim, it is for the tribunal to make findings of fact as to the nature and extent of the employee's conduct. The reasonableness of actions by the employer is irrelevant.
20. Therefore, a wrongful dismissal is not necessarily unfair, and an unfair dismissal is not necessarily wrongful – **Enable Care and Home Support Ltd v Pearson EAT 0366/09**.

## Limited remedy issues

### Polkey reduction

21. The decision in **Polkey v AE Dayton Services Ltd [1987] UKHL 8** permits the reduction of compensation when, even if a fair procedure had been followed, the Claimant would have been dismissed in any event.
22. Compensation can be reduced as a percentage, if a tribunal considers that there was a percentage chance of the employee being dismissed in any event. Alternatively, where it is found that a fair procedure would have delayed dismissal, compensation should reflect this by compensating the employee only for the length of time for which dismissal is found to have been delayed.
23. The Tribunal has to consider what difference a fair procedure would have made, if any. It is for the Respondent to adduce evidence on this point. It is always the case that a degree of uncertainty is inevitable, unless the process was so unreliable it would be unsafe to reconstruct events. However, the Tribunal should not be reluctant to undertake the exercise just because it requires speculation – **Software 2000 Ltd v Andrews [2007] ICR 825**.

### Contribution

24. Under s122(2) ERA, the relevant test is whether it is just and equitable to reduce compensation in light of conduct of the Claimant prior to the dismissal. The conduct need not contribute to the dismissal. The EAT has confirmed that the same test of “culpable or blameworthy” applies to the s122(2) reduction question as to s123(6) ERA – **Langston v Department for Business, Enterprise and Regulatory Reform UKEAT/0534/09**.
25. Under s123(6) ERA (Issue 4.8.2), the test is whether any of the Claimant's conduct prior to dismissal was “culpable or blameworthy” – **Nelson v BBC (No.2) 1980 ICR 110, CA**. This requires the Tribunal to look at what the

Claimant in fact did, as opposed to being constrained to what the Respondent's assessment of C's culpability was – **Steen v ASP Packaging Ltd [2014] ICR 56**.

26. The EAT in **Steen** summarised the approach to be taken under s122(2) and s123(6) ERA – paragraphs 8-14:
- 26.1. Identify the conduct which is said to give rise to possible contributory fault;
  - 26.2. Ask whether that conduct was blameworthy, irrespective of the Respondent's view on the matter;
  - 26.3. Ask, for the purposes of s123(6), whether the conduct which is considered blameworthy caused or contributed to the dismissal; and, if so,
  - 26.4. Ask to what extent the award should be reduced and to what extent it was just and equitable to reduce it.
27. **Steen** also indicated that a reduction of the basic award to nil would be a rare finding.

## **FINDINGS OF FACT**

28. I restrict myself to findings that are relevant to the list of issues set out above.
29. The Respondent operates public passenger transport bus services across central, west and south London under contract with Transport for London ("TfL").
30. The Claimant was employed as a bus driver for the Respondent from 21 October 2013 until his dismissal on 11 February 2019. From 18 February 2017, the Claimant was based out of the Hounslow Heath Garage – p52.
31. The Claimant's contract of employment is within the bundle, and I note specifically the following clauses:

“20 Notice of Termination of Employment

Entitlement to receive notice...of termination of your employment is as follows:

...

Two years or more, but less than 12 years – 1 week for each year of continuous employment.

The right is reserved to dismiss without notice, any member of staff found guilty of gross misconduct or gross negligence, in accordance with the Company Disciplinary Procedure.

21 Disciplinary Rules and Grievance Procedures

A copy of the Company disciplinary and grievance procedure is enclosed and you are asked to read it carefully and familiarise yourself with its contents.

...

The procedure is not intended to form a part of your Terms and Conditions of Employment and is not contractually binding.”

32. I have had sight of the Respondent’s Disciplinary Policy – p54. I note the following specific terms:

“2 Principles

...

(e) No employee will be dismissed for a first breach of discipline except in the case of gross misconduct or gross negligence.

...

(g) To reflect the progressive nature of this disciplinary procedure, an employee will not be moved through the disciplinary stages unless the offence or offences are related to a previous warning. The exceptions to this general principle are the occasions when the seriousness of the offence or offences is such that it is appropriate to enter the procedure at a higher level.”

33. Under the Disciplinary Procedure, there are four stages:

33.1. Stage 1 – Oral warning

33.2. Stage 2 – Written warning

33.3. Stage 3 – Final written warning or disciplinary suspension

33.4. Stage 4 – Dismissal

34. Stage 4 seems to relate to conduct, performance and attendance issues, as it states the following:

“If conduct, performance and/or attendance is still unsatisfactory and the employee still fails to reach the prescribed standards, DISMISSAL will normally result.

The decision will be made by an appropriate senior manager. The employee will be provided with the confirmation of the dismissal, the date of termination of employment and the details of the right to appeal.”

35. The Disciplinary Policy, at p56, also provides a non-exhaustive list of matters that may amount to gross misconduct and thus may attract summary dismissal.

### Claimant’s performance

36. The Claimant’s performance appears to have had its peaks and troughs during the course of his employment.

37. As part of employment with the Respondent, drivers partake in driving assessments and customer experience surveys where they receive a score indicative of their driving competency. The Claimant’s scores for the last two years of his employment were as follows:

37.1. 12 July 2017: Bus Customer Experience Survey, overall driver score of 91 (the current network average being 85) – p74/75;

37.2. 28 September 2017: Driving Assessment, the Claimant was awarded Box 3b “more than one serious fault was observed” – p78;

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- 37.3. 17 November 2017: Driver Assessment, the Claimant was awarded Box 3b “below the standard expected and has some minor faults and a potentially serious fault” – p80;
  - 37.4. 6 February 2018: Bus Customer Experience Survey, overall driver score of 89 (the current network average being 86) – p82/83;
  - 37.5. 5 March 2018: Bus Customer Experience Survey, overall driver score of 84 (the current network average being 85) – p88/89;
  - 37.6. 22 March 2018: Driver Assessment, the Claimant was awarded Box 3b “due to FIVE major areas of concern, areas that need to be addressed so that you drive at the desired safe standard – p93;
  - 37.7. 30 April 2018: Driver Assessment, the Claimant was awarded Box 1 “representing an excellent drive” – p96;
  - 37.8. 5 September 2018: Bus Customer Experience Survey, overall driver score of 76 (the current network average being 86) – p103/104.
38. In 2017, the Claimant was disciplined due to unauthorised late departure – p64. For this misdemeanour, he was given “Strong Advice” – p65.
  39. In the same year, the Claimant received a letter that would remain on his staff record. This letter regarded the Claimant’s failure to provide an on the scene card following an accident – p71.
  40. In 2018, the Claimant was required to attend a Hazard Perception Training (“HPT”) Course – p86/87.

Incident of 4 February 2019

41. On 4 February 2019, the Claimant was late for his shift: he was scheduled to drive the Route E10. This is a route he had driven regularly for several months by this stage.
42. Once the Claimant had done his requisite preliminary checks, he drove the bus to Islip Manor bus stand, which is situated on a roundabout with only one exit/entrance. In other words, it is effectively a turning circle for buses and other large vehicles such as bin lorries. I note that this is not a mini roundabout, but a “full” roundabout, with a raised and curbed central island that is markedly different to the white centre of a mini-roundabout.
43. At the time of the Claimant reaching the Islip Manor bus stand, another bus was stationary at the bus stand. This partially blocked the Claimant’s route around the roundabout. In order to attempt to bypass the stationary bus and continue his journey by going 360 degrees around the roundabout, the Claimant attempted to manoeuvre around the parked bus and the roundabout. In so doing, the Claimant’s bus mounted the central island of the roundabout, and became stranded there, unable to move due to some of its wheels becoming stuck in the mud of the central island. I will explore the precise mechanics of the Claimant’s manoeuvre later in this judgment.

44. A recovery vehicle was required to attend the scene in order to release the Claimant's bus from its beached position on the central island. As a result of this incident, there was damage to the bus and roundabout. Regarding the bus damage, there was structural damage as well as damage to the rear off-side panel – p106 & 112. I am told by the Respondent that it was lucky that the tank did not rupture and leak fuel.
45. Under their agreement with TfL, the Respondent is obliged to report any such incident to TfL, and also to the relevant local authority. The incident was duly reported.

#### Disciplinary process

46. On the same day, the Claimant attended an investigation meeting; the investigating officer was a Mr Keith Munroe. In this meeting, the Claimant said (notes at p115):
  - 46.1. He had misjudged the manoeuvre and was going to hit the parked bus's mirror: at that stage, the Claimant reversed. His wheels then started to spin and he got stuck;
  - 46.2. He was late to work that morning, because he thought he was due to start at a later shift time;
  - 46.3. He made an error in judgment.
47. The Claimant was suspended from duty on full pay following this meeting.
48. The Claimant was then invited to a disciplinary hearing by letter of 7 February 2019 – p120. The allegation was recorded in that letter as being:

“Unsatisfactory driving standards resulting in an incident that could have brought the company into disrepute.”
49. The disciplinary hearing was held on 12 February 2019, chaired by a Mr Paul Teixeira, with the Claimant attending with his Unite the Union representative, Mr. Yusuf – notes at p122. In the disciplinary hearing, the Claimant gave his account as follows:

“I started to go over the roundabout, I went back because of the other bus being there, I tried to go forward that's when the wheels got stuck in mud.”
50. The Claimant accepted that he did not think to ask the driver of the stationary car to move as his (the Claimant's) mind had “zoned out”. In mitigation, the Claimant explained that he had issues going on in his family life and that, as a result, he had no fixed abode. He did however accept that his driving on 4 February was “substandard”, “an error” and “by doing what [he] did, [he] did bring the [Respondent] into disrepute” – p123. The Claimant apologised for the incident.
51. There was a brief adjournment in proceedings in order for Mr Yusuf to produce a written statement summing up the Claimant's position, accepting fault but putting forward mitigation regarding the Claimant's personal circumstances – p125.

52. The hearing was reconvened later that day, and the Claimant was informed that the decision had been taken to summarily dismiss him for gross misconduct. Mr Teixeira's statement of decision is at p126. In that decision, CCTV footage is mentioned: the Claimant tells me that he was not shown any CCTV, and none has been adduced in evidence before me.
53. Mr Teixeira's summary of the CCTV states:
- “It is clear to see that you were clearly rushing on your way to Islip Manor Bus Stand and when you arrived and saw the Bus on the Bus Stand you didn't hesitate you put your bus into reverse and attempted to drive over the centre of the roundabout, which contained a mud/grass centre with both axles and all the wheels of the vehicle.”
54. Mr Teixeira found that the Claimant's conduct had fallen below the driving standards expected of the Respondent's drivers, and that it may have brought the Respondent into disrepute, given the need to report this matter to TfL and the local authority.
55. It appears that Mr Teixeira also took into account that it was likely that a claim would be made against the Respondent for damage to the roundabout. I note that I have no evidence to suggest such a claim was made. He also referred to the cost of repairs to the bus and cost of recovery. Mr Teixeira did note the Claimant's mitigation within his reasons, but found that this was not sufficient to excuse a short fall in or breach of Company Standards and Policies.
56. Mr Teixeira concluded that this was a serious act of misconduct which equated to gross misconduct worthy of summary dismissal, and therefore that Stage Four of the Disciplinary Policy had been reached.
57. An outcome letter was sent to the Claimant dated 12 February 2019, in which Mr Teixeira noted:
- “As a result of three of the charges being found proven this has resulted in you being Summarily Dismissed this being Stage 4 of the London United Busways Disciplinary Procedure.”
58. The Claimant was informed of his right to appeal this decision. The Claimant duly appealed by note of 12 February, stating he wished to appeal on the grounds of “severity of award”. An appeal hearing was held on 5 March 2019, during which the Claimant was represented by Mr Cushen of Unite the Union. The appeal chair was Nigel Harris, with Ms Shantelle Francis as his side member; Mr Harris' notes are at p134. Mr Harris told me that he did not review any CCTV evidence.
59. At the appeal, the Claimant told the appeal panel that many drivers go over that central island when the weather is dry. He also raised that the sanction was unfair as Mr Teixeira had given weight to his belief that the incident could have led to a fuel spillage, but that it in fact did not – p136. The Claimant accepted that he should have asked the driver of the stationary bus to move his vehicle. The Claimant was remorseful and apologetic during the appeal.
60. The appeal was rejected. The Claimant was informed by cover letter and Statement of Decision of 5 March 2019 – p140. Mr Harris concluded that the

Claimant had deliberately driven over the central island of the roundabout, which caused body damage to the offside rear of the bus. He too referenced that it was fortunate that the fuel tank had not ruptured. Mr Harris told me that he did not believe the Claimant had misjudged the manoeuvre, but that he had decided to drive over the central island.

61. Mr Harris also referenced the Claimant's disciplinary record, in that the Claimant had an expired written warning for two collisions in 2014 and an expired final written warning for failure to report an accident in the same year. Mr Harris noted that the Claimant had been in nine collisions since February 2017 – see his manuscript note at pp135 & 138.

62. Mr Harris concluded:

“Taking into account your poor record in terms of driving standards it is clear that we do not see any signs of improvement and that you continue to be involved in collisions which are mostly your fault including this latest serious incident.

Therefore we believe that if we decided to allow you to return to work you would continue to be involved in collisions despite further training and warnings about your driving standards and as a Traffic Manager and holder of the O license we cannot allow this to continue and risk the repute of the company or risk the safety of the travelling public.”

63. Mr Harris in evidence to me clarified that, by a lack of “signs of improvement”, he really meant a lack of consistency of improvement.

64. In light of the rejection of the Claimant's appeal, he approached ACAS to commence the process of presenting a claim to the tribunal.

#### Manoeuvre conducted by the Claimant on 4 February 2019

65. For the purposes of the wrongful dismissal claim, it is necessary for me to consider of what conduct the Claimant was guilty. I consider that this requires me to determine what manoeuvre the Claimant performed on 4 February, an accidental reversing may attract a different level of severity than a deliberate moving forwards.

66. As set out in the facts above, there is a dispute of fact between the parties as to the manoeuvre that led to the Claimant's bus being beached on the central island of the roundabout.

67. The Claimant reported to me that he began to move around the roundabout, but realised he would not be able to pass the stationary bus safely. At that stage, he reversed and in doing so ended up mounting the central island.

68. Conversely, the Respondent avers that the Claimant decided to drive forward straight across the central island in order to overtake the parked bus and continue with his journey.

69. Of assistance to me are the Claimant's sketch at p107 and the photographs at pp108-114. Comparing these documents, the Claimant's sketch of his bus's position is clearly inaccurate: his sketch shows only a small portion of the nearside on the central island of the roundabout. From the photographs, clearly a much more substantial part of the bus was beached on the central

island. It appears from the photographs that the bus's near-side wheels were all stuck in the mud on the central island. There is no sign on those photographs of reversing tracks in the mud.

70. I note that I do not have photographs of the off-side of the bus on the island. I consider that, if those wheels were also stuck in the mud, equivalent photos would have been taken. However, regardless of the exact position of the offside wheels, it is apparent from the photograph at p113 that the bus had roughly dissected the central island and was placed, at the time of its recovery, with the nearside of the bus roughly along the diameter of the central island. In short, the bus was covering roughly half of the island.
71. I also note from the photographs that the bus's wheels that are stuck in the mud are aligned fairly straight; they are not at any acute angle, as one may expect had the Claimant been attempting to reverse out of a tight spot.
72. In terms of the manoeuvre undertaken to get the bus into that position, I notice that in the Claimant's initial statement (the first statement, written or oral, he gave) at p107 he stated:

“I tried to go around another bus on stand and ended up mounting the round-about and then my tyres got stuck in mud and I tried to get out and made it worst [sic].”

73. There is no mention there of the Claimant having reversed.
74. If the Claimant had (as he told me) initially tried to go around the roundabout, and had only mounted the island in reversing once it became clear he could not make it, I find it difficult to see how he would have reversed so as to end up on the roundabout. If he was concerned about hitting the stationary bus, he could have just reversed along exactly the same line as he had initially gone forward (i.e. not altered the position of his steering wheel) to take him back to his original position, remaining clear of the central island.
75. I note how Mr Teixeira summarised the CCTV evidence on p126 of his Statement of Decision, and I repeat it again here:

“...you didn't hesitate you put your bus into reverse and attempted to drive over the centre of the roundabout, ...”

76. I consider that this remains consistent with the view that the Claimant entered onto the central island in a forwards motion. It is also consistent with the Claimant's account to the disciplinary hearing – p122:

“I started to go over the roundabout, I went back because of the other bus being there, I tried to go forward, that's when the wheels got stuck in the mud.”

77. I find that, on his initial entry onto the roundabout proper, the Claimant went some distance forward before realising that he would not make it around the stationary bus, and then reversed back to his starting point (not touching the central island, as would be the case if he left his steering wheel alone as set out above). Having reversed to his original position, he at that point moved forward onto the central island of the roundabout in an attempt to circumnavigate the parked bus.

78. Therefore, I find that the Claimant entered onto the central island of the roundabout by driving forwards onto it, and did so deliberately.
79. Even if I am wrong on the Claimant's direction of travel onto the central island, due to the curb around the island, the Claimant would have felt instantly that he was encroaching onto the island (whether in reverse or moving forwards) and could have stopped well before becoming so established on the central island. His failure to stop, and the resulting end position of the bus, leads me to conclude that the manoeuvre was undertaken intentionally in order to attempt to get past the stationary bus quickly, and to make up time due to the Claimant running late.

## **CONCLUSIONS**

80. I will take the issues set out above as a framework for my conclusions.

### **Reason for dismissal**

81. Although the Claimant does not accept that the reason for dismissal was conduct, there has been no real challenge to the Respondent's case on this point. The Claimant was effectively putting the Respondent to proof as to the reason.
82. As I have set out above, this is not a high threshold for an employer to overcome. There is no evidence pointing away from conduct and towards some other reason. This is not a case where it has been suggested that there is an underlying reason or design to remove the Claimant from the workplace, for which conduct was a cover.
83. I am therefore satisfied that the reason for the dismissal was conduct, which is a potentially fair reason.

### **Substantive fairness**

#### Genuine belief on reasonable grounds

84. Without having heard from Mr Teixeira, I face some difficulty here. Of particular concern to me are the following points:
- 84.1. Mr Teixeira saw CCTV that he did not disclose to anyone else, and relied upon this to decide the manoeuvre that the Claimant undertook on 4 February 2019;
- 84.2. He also recorded in his decision letter that "three of the charges" had been found proven when there was only ever one charge – p129. Although I note that only one charge is referred to in the record of the disciplinary at pp126 and 128.
85. I address these two issues at discrete points further below. I do however remind myself that the appeal can rectify any issue with the disciplinary hearing/decision.
86. I also remind myself of the charge for which the Claimant was ultimately dismissed:

“Unsatisfactory driving standards resulting in an incident that could bring the company into disrepute”.

87. Given that the Claimant during the course of the disciplinary process accepted that he was at fault, that he made an error, and that his error could have brought the Respondent into disrepute, I find that these admissions by the Claimant alone are sufficient to satisfy me that Mr Teixeira and Mr Harris did hold a genuine belief based on reasonable grounds that the Claimant was guilty of the conduct with which he was charged.

#### Reasonable investigation

88. The specific point raised by the Claimant was the failure to properly explore the damage to the bus.
89. Throughout the disciplinary process, the Respondent’s managers explained to the Claimant that there was panel damage as well as structural damage. I can see some of the damage from the photographs.
90. There was no particular challenge from the Claimant regarding the damage during the course of the internal process. Therefore, there was no need for the Respondent to explore the damage more than it had done in order to establish that there was structural damage that would require repair.
91. Although there was speculation that it was more luck than judgment that the fuel tank had not ruptured, it has never been the Respondent’s case that it did in fact rupture.
92. I am therefore satisfied that no further investigation into the damage was necessary. The investigation was, in all the circumstances, reasonable.

#### Sanction

93. This is truly where the heart of the Claimant’s case lies. I remind myself that the Claimant specifically raised five issues regarding sanction:
- 93.1. The Respondent wrongly relied on “three charges” in deciding to dismiss the Claimant;
- 93.2. The allegation did not amount to gross misconduct;
- 93.3. The Respondent failed to consider lesser sanctions;
- 93.4. The Respondent failed to consider the Claimant’s length of service;
- 93.5. The Respondent failed to consider the Claimant’s good service.
94. The severity of the sanction appears to come at least in part from the Respondent’s belief that the Claimant took the step of driving across the roundabout deliberately. I accept that, on the evidence the Respondent had in front of it, it was reasonable for the Respondent to conclude that the Claimant had deliberately opted to drive forward across the roundabout. I find this for the following reasons:

- 94.1. The Claimant in his initial statement made no reference to reversing on to the island;
  - 94.2. The photographs of the scene do not appear to show any reversing marks in the mud on the central island;
  - 94.3. The Claimant referred to other drivers driving over the island. Even if this is not true (and I make no finding on this point), it suggests the Claimant was offering an excuse for a conscious action/decision.
95. I note Mr Teixeira recorded that the CCTV showed that the Claimant “didn’t hesitate [he] put [his] bus into reverse and attempted to drive over the centre of the roundabout”. Although I recognise that this summary references reversing, this reads as if the CCTV showed the Claimant reversing (to some extent), not over the central island, but on the road part of the roundabout, and then opting to move forward onto the central island.
96. I therefore find that the Respondent was reasonable in treating this as a deliberate action, the Claimant opting to manoeuvre over the central island.
97. Turning then to the Claimant’s specific causes for concern, first I will deal with the reference to “three charges”. As I have set out above, I have found that Teixeira provided other documents regarding a single charge at pp126 and 128. I therefore conclude that this was a mistake by Mr Teixeira. Even if I am wrong on that, the mistake or confusion was rectified at the appeal stage by Mr Harris, who was clear to me that the reference to three charges was a mistake.
98. Secondly, it was argued for the Claimant that the conduct of which the Claimant was guilty was not “gross misconduct”. In terms of the part of the policy relied upon by the Respondent, I accept and agree with Mr Harris’ evidence to me, that Stage 4 of the process at p55 covers dismissal which can include cases where there has either been a failure to improve or where gross misconduct is involved. No separate process is set out for gross misconduct, other than Stage 4: the only detail that appears below the subheading of “Gross Misconduct” is the non-exhaustive list of examples to which I have already referred, and the Respondent’s right to summarily dismiss. Given this reference to summary dismissal, I conclude that the detail under the subheading of “Gross Misconduct” is to be read as being included within the umbrella of “Stage 4 – Dismissal”.
99. I also accept that matters bringing the Respondent into disrepute (whether they amount to criminal conduct, or fall short) can amount to acts of gross misconduct. I therefore conclude that the Claimant’s conduct was such that it could be classed as gross misconduct.
100. With regard to consideration of lesser sanctions, I found one piece of Mr Harris’ evidence particularly pertinent. He told me:

“I don’t want to see employees dismissed. Trained bus drivers are an expensive commodity: if I am in a position to bring them back to work and sleep easily, that is the decision I have to make. Our decision was we thought this so serious, it put the

company in jeopardy. A bus stuck in the middle of a roundabout; anybody could take a photo and it end up on social media...”

101. This indicates to me that he had contemplated the possibility of having the Claimant remain in the Respondent’s employ, and therefore that he had considered lesser sanctions, but did not deem them appropriate.
102. The two remaining factors the Claimant raised were his length of service and his good service. I find that, although the Claimant had received some good, even excellent, reports, the Respondent was entitled to conclude on the evidence in front of it that his driving record was not consistently “good” as the Claimant suggests. This is supported by his disciplinary history. I accept Mr Harris’ evidence that when considering sanction, he did not treat the Claimant as having any live warnings etc, but that he was entitled to consider the Claimant’s disciplinary history when considering the Claimant’s driving ability and performance. It is clear from Mr Harris’ outcome letter, specifically p142, that the Claimant’s years with the Respondent, and his performance over those years, had been taken into account.
103. One new issue arose during the course of the hearing. The Claimant, for the first time in cross-examination, raised that Mr Harris had dealt with conduct that was worse than the Claimant’s and yet had not dismissed other individuals. Inconsistent treatment is not an argument that was pleaded in the ET1, nor was it raised in the Claimant’s witness statement. It is also not a point that was put to Mr Harris. There is no evidence to support this assertion; I therefore give it no weight.
104. Taking all the above into account, I cannot be satisfied that dismissal is a sanction that no reasonable employer would impose. I accept that the sanction of dismissal may have been harsh, and that other employers may not have dismissed the Claimant, however that is not the relevant legal test, nor is it for me to substitute my view for that of the Respondent.
105. I therefore find that dismissal was a sanction that fell within the band of reasonable responses open to a reasonable employer.
106. The Claimant’s dismissal was therefore substantively fair.

### **Procedural fairness**

107. I do not accept Mr Gittins’ argument that the Respondent proceeded under the wrong policy or part of policy. It is clear to me that the policy that starts at p54 is designed to deal with disciplinary matters, as well as performance and attendance: I cannot see that the multipurpose nature of the policy presents any issues in this case.
108. As set out under the sub-heading of “sanction” above, I accept that summary dismissal for gross misconduct falls within the umbrella of Stage 4. Therefore, I find that there was no procedural error in the way the Respondent approached this.
109. It would have been desirable for the CCTV footage to have been shared with the Claimant, and indeed Mr Harris and the tribunal. However, as Mr Harris and his side-member made their decision independent of the CCTV, I find

that the lack of disclosure of the CCTV footage did not act to undermine the fairness of the procedure in all the circumstances.

110. I therefore find that the dismissal was procedurally fair.
111. The Claimant's claim for unfair dismissal therefore fails.
112. On my findings above, I need not deal with the issues of contribution, ACAS uplift or reduction following the case of **Polkey**.

### **Wrongful dismissal**

#### Was the Claimant's conduct sufficient to equate to a fundamental breach of contract?

113. I have set out my findings as to the Claimant's actions above, namely that he consciously drove some significant way onto the central island of a roundabout, when other options were available to him.
114. I accept that such action is capable of bringing the Respondent into disrepute, as indeed was accepted by the Claimant. With the modern tendency for instant photographs to be uploaded, and the "name and shame" culture that is prevalent on social media, I accept that there was a real risk of the Respondent being brought into disrepute by the Claimant's conduct. I further accept that the reporting of this incident to TfL, the Respondent's only client, would have been embarrassing to say the least.
115. I therefore conclude that the Claimant's conduct was sufficient to amount to gross misconduct and a repudiatory breach of his employment contract so as to release the Respondent from its obligation to pay him notice pay. The Claimant's wrongful dismissal claim therefore fails.

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**Employment Judge Shastri-Hurst**

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Date 14 April 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

23 April 21

FOR THE TRIBUNAL OFFICE