



EMPLOYMENT TRIBUNALS

Claimant: Mr A Hoque
Respondent: Tower Transit Operations Limited

Heard At: East London Hearing Centre (by Cloud Video Platform)
Before: Employment Judge John Crosfill
On: 26 March 2021

Representation

Claimant: Ms R Hodgkin of Counsel
Respondent: Mr C Ludlow of Counsel

JUDGMENT

1. The Claimant's claim for unfair dismissal brought under Part X of the Employment Rights Act 1996 is not well founded and is dismissed.
2. The Claimant's claim for notice pay brought as a claim for breach of contract under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 is dismissed.
3. The Claimant's claim for contractual sick pay brought under Sections 13 and 23 of the Employment Rights Act 1996 is well founded. The Respondent unlawfully deducted the sum of £1971.91 from the Claimant's pay between 21 August 2019 and 22 September 2019 and the Respondent is ordered to pay the Claimant that sum.
4. The Claimant's claim for contractual sick pay brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 succeeds but no remedy in addition to the

remedy above is given.

REASONS

1. The Claimant was employed as a bus driver. He started work for the East London Bus & Coach Co Ltd on 25 June 2011. The Claimant's contract of employment transferred through a series of transfers to the Respondent who was his employer at the time of his dismissal on 26 September 2019.

2. It was common ground that the Claimant was driving a bus that pulled up to a bus stop in Bow on 9 July 2019. There was then an altercation with a passenger who boarded the bus. Following that altercation, the Claimant was suspended whilst an allegation of violent conduct was investigated. The Claimant attended a disciplinary hearing which was conducted by Stephen Riggans a Business Operations Manager. Mr Riggans decided that the Claimant should be summarily dismissed. The Claimant appealed that decision and his appeal was heard by Sam Greaves the Head of Service Delivery. His appeal was dismissed.

3. The Claimant has presented claims of unfair dismissal, wrongful dismissal and brought claims for wages which he says are owed to him. He had initially brought a claim for holiday pay but at a preliminary hearing on 16 April 2020 the Claimant indicated that he wished to withdraw that claim.

The Issues

4. The issues in the case were not in dispute and had been discussed at the preliminary hearing on 16 April 2020. Only a brief list of issues is set out in the Case Management summary. I set out below a more expansive list of issues which reflects the case presented and the submissions made by the parties before me.

4.1. Unfair dismissal

4.1.1. It was admitted that:

4.1.1.1. The Claimant had sufficient continuity of service to present a claim of unfair dismissal without needing to show any automatically unfair reason for the dismissal; and

4.1.1.2. There was no dispute that the Claimant had been expressly dismissed by the Respondent; so

4.1.1.3. The first contentious issue was whether the Respondent could show that the dismissal was for a potentially fair reason. The Respondent says that the reason for the dismissal was conduct namely whether the Claimant had engaged in violent conduct on 9 July 2019.

- 4.1.1.4. The Tribunal needed to decide whether:
 - 4.1.1.5. There were reasonable grounds for the Respondent's conclusions which were;
 - 4.1.1.6. formed following a reasonable investigation; and
 - 4.1.1.7. whether the Respondent followed a reasonable procedure. In particular, whether it was fair or reasonable to consider evidence about the Claimant's behaviour when he visited the Respondents occupational therapist; and
 - 4.1.1.8. taking these matters into account whether the dismissal was fair or unfair applying the test in sub section 98(4) of the Employment Rights Act 1996?
 - 4.1.1.9. If the dismissal was unfair should any compensatory award be reduced to reflect any possibility that, had the Respondent acted fairly, the Claimant could or would have been dismissed in any event? and/or
 - 4.1.1.10. Whether any basic award and/or compensatory award should be reduced under sections 122(2) and/or 123(6) of the Employment Rights Act 1996 because of any conduct by the Claimant.
- 4.2. Breach of contract/Wrongful dismissal
- 4.3. the issues identified at the preliminary hearing were as follows:
- 4.3.1. how much notice was the Claimant entitled to?
 - 4.3.2. Did the Claimant fundamentally breach the contract of employment by an act of gross misconduct?
- 4.4. The claims for wages and other payments.
- 4.5. The issues identified at the preliminary hearing under this heading were as follows:
- 4.5.1. did the Respondent suspend the Claimant for a period of time during the investigation and if so, did the Respondent failed to pay the Claimant:
 - 4.5.1.1. all wages properly payable during this period?
And
 - 4.5.1.2. all pension contributions properly payable during this period?

- 4.5.2. Before me these issues changed. The issue became whether the Claimant was properly paid his sick period during the disciplinary process the respondent having treated him as sick even though they had also suspended him from his duties.

The hearing

5. The case had been previously listed for a final hearing before me on 15 December 2020. The hearing was conducted using the CVP video platform. The hearing was marred by difficulties as the parties had difficulties accessing the CVP program. We had started to hear evidence and the Respondent sought to adduce the CCTV footage that was considered by the Respondent. It became immediately apparent that viewing the CCTV over the video link created the impression that there were only a very few frames per minute. Mr Greaves, who was playing the CCTV footage and who could see the original, recognised that the other participants were not able to see what he was able to view. Ms Hodgkin had not been able to view the CCTV in advance as the Claimant had not provided her with a copy. We agreed that a postponement was the only solution. I had not reserved the matter to myself but was allocated the case in any event. Some time was saved because I had already read many of the documents in the bundle.

6. I had listed the hearing for a face-to-face hearing. However, in advance of the hearing with the agreement of the parties it was decided that one of the Respondent's witnesses, Mr Riggans and the Claimant's counsel would attend via a CVP link. We were able to place a large screen in the Tribunal room giving the CVP participants a good view of the witness table and the other participants. On this occasion we had minimal if any difficulties with the connection and no party raised any objection to the hybrid hearing.

7. At the outset of the hearing I was provided with a laptop on which I was able to view the CCTV footage relied upon by the Respondent. I watched the relevant parts more than once before starting to hear evidence. Ms Hodgkin confirmed that she too had been able to view the CCTV.

8. I heard from:

- 8.1. Mr Riggans, who gave evidence via CVP and was the person who took the decision to dismiss the Claimant; and
- 8.2. Mr Greaves, who gave evidence in person and who heard the Claimant's appeal against his dismissal; and
- 8.3. From the Claimant himself who gave evidence in person.

9. Following the evidence, I heard submissions from both parties. I shall not recite those submissions but shall deal with the principle points raised in my discussions and conclusions below. Unfortunately, by the time that the parties had concluded their oral submissions there was insufficient time for me to deliberate and give judgment. I had to reserve my decision. There has since

been a substantial delay in providing this judgment to the parties for which I must apologise. I was able to dictate my reasons within a few days but have not had sufficient time to perfect that judgment principally as I have been using any available time to complete a judgment on a very long case I heard immediately before the present case.

Findings of fact – the unfair dismissal claim

10. In this section I set out my initial findings of fact drawn from the evidence I have heard and read. I shall not set out the entirety of the evidence but shall include only the evidence I considered sufficiently important to inform my decisions.

11. As set out above the Claimant was a long serving and experienced bus driver. It is regrettable that bus drivers carrying out their important role are not uncommonly subjected to bad behavior, insults and occasionally violence. The Respondent takes steps to prepare its drivers to deal with this type of behavior. The Claimant had attended 'Hello London' training in November 2016. That training had included training on managing conflict. In common with other London Bus companies the busses used by the Respondent separate the driver from the passengers with a translucent security screen. A passenger cannot access the drivers cab unless the driver opens the internal cab door. The Respondent instructs its drivers that in the event of any aggressive or violent incident towards them they should remain in their cab and use a 'code red' in order to call for assistance initially via TfL and through that to the emergency services.. The Claimant did not dispute that he was aware of this advice.

12. In 2014 a complaint had been made about the Claimant by a passenger. This had led to disciplinary proceedings. The complainant alleged that the Claimant had opened his cab door causing an injury. The passenger, having taken exception to the way he had instructed her to move away from the rear doors of the bus, had been taking photographs of the Claimant as he drove. The Claimant denied opening his cab door and injuring the passenger but did accept that he had told the passenger that if she did not stop taking photographs, he would break her telephone. The outcome of the disciplinary proceedings was that charges of violent conduct (opening the door deliberately) were not upheld but a charge of threatening behaviour, based on the Claimant's own admission, was upheld. The claimant was given a written warning for this incident that was expressed as remaining live for 12 months.

13. There were no other formal disciplinary proceedings concerning the Claimant before the incident that led to his dismissal.

14. In early 2019 the Claimant, and other drivers made a complaint about the way in which they were being treated by bus controllers at the Lea Interchange. There were a series of complaints made about what was described as bullying and victimisation.

15. On 9 July 2019 the Claimant was driving a double decker bus on the number 25/105 bus route. At around 17:45 he was approaching Bow Church

and pulled up to the bus stop. He was due to take an unpaid break and because of this it was necessary to tell the passengers on the bus that there would be a delay in the bus leaving. The Claimant did this using the intercom system on the bus.

16. As the Claimant was gathering his belongings together a passenger entered the bus through the open front door. It is sufficient for these general findings for me to say that the Claimant opened the door of his cab and that there was an altercation between him and the passenger. That altercation was broken up by other members of staff and the passenger was removed from the bus. The police were called to the scene but there was no evidence that any criminal proceedings were ever instigated.

17. When the Claimant returned to the depot, he completed an Incident Report form HS60. He described the incident as an assault and identified himself as the victim. He ticked boxes indicating that there had been a physical and verbal assault by a member of the public. That form has an option for recording a driver being spat at, but the Claimant did not tick that box. In the next section of the form the Claimant was required to record the nature of any injury. He ticked boxes suggesting that he had suffered bruising, a cut/laceration, dislocation, multiple injuries to arms, chest, fingers, hands, legs, shoulders, and wrists. He recorded that he had not had any treatment but indicated that that was awaited. A further Assault Incident Checklist was completed by a Bus Controller, Mr A Moalin. He records the CAD number issued by the police and records that a code red was used.

18. The Claimant attended his GP on 10 July 2019. His GP issues a fitness for work certificate stating that the Claimant was not fit for work until 17 July 2019. The reason given is 'Assault – injury to right hand and shoulder'.

19. At some point on 9 July 2019 the Claimant had asked the Respondent's HR department to issue him with a 'Lfl'. That is essentially a certificate of good standing that would allow the Claimant to change bus companies without any further need to prove his suitability. That caused an enquiry to be made as to whether the Claimant was on a final written warning or was currently suspended. A prompt response was given confirming that the Claimant did not have a final written warning and describing him as being currently stood down.

20. On 12 July 2019 an Admin Clerk at the Lea Interchange, Ms Nicklin telephoned the Claimant to discuss his absence from work. She had invited the Claimant to attend a meeting with her on 17 July 2019.

21. On 17 July 2019 the Claimant again visited his GP. He was given a further certificate that described him as being unfit for work. The description of the problem was 'Assault, shoulder pain, back pain, work related stress. The Claimant did not attend the meeting scheduled with Ms Nicklin. Ms Nicklin wrote to the Claimant inviting him to a further meeting on 22 July 2019. She warned him that if he did not attend, he would be considered 'AWOL' and his sick pay might be stopped.

22. The Claimant attended a meeting with Ms Nicklin on 22 July 2019. She made a record of that meeting a copy of which was included in the bundle. She recorded the Claimant as giving the following account of the incident on 9 July 2019 and his injuries:

'You were on duty on 9 July 2019 on route 25. You told me that you were coming off for your meal break and waiting the takeover driver who was waiting. You were getting out of the cab when a male passenger boarded the bus before you had got out of the cab. You told me that when the passenger got on the bus he started verbally abusing you saying abusive things about your family. You told me that you were trying to get out of the cab the time when he then started to punch you and try and close the cab door on you, trapping your left leg and right hand in the cab door. You told me that you retaliated and got the male in a head lock but you did not physically touch the male. You told me that all you done was got the male in a headlock and then the driver who was going to take over and a few other drivers and roadside controller Virginia Seeburn step in to help you and they managed to get the male off the bus. You told me that when you are off the bus the male was still trying to pull at your bag.

You attended your GP the next morning 10 July 2019. Your GP did not send you for any x-rays in your hand but prescribed you Naproxen to reduce the swelling on your hand and told you that if the swelling does not reduce then you are to return to see your GP. You do not have any further appointments your GP at present. You told me today that you are finding it hard to grab on or hold anything in your right hand and your right arm.'

23. Ms Nicklin decided to refer the Claimant to the Respondents occupational therapy service. She made an appointment for the Claimant for 30 July 2019 at the Westbourne Park Bus Depot. I have seen the management referral to occupational health completed Ms Nicklin. That referral form discloses some skepticism about the nature of the injuries claimed by the Claimant. In a section headed Current problem and concerns Ms Nicklin says as follows:

'Mr Hoque is complaining of being unable to grip anything with his hand and his finger is still swollen. When I first spoke to Mr Hoque over the phone after the incident he originally told me it was his left hand and there was no mention of any injury to either of his legs....'

24. The Claimant attended the appointment with the occupational health provider on 30 July 2019. The appointment was conducted by Dr Barthes-Wilson. Her report is contained in a letter dated 9 August 2019. She set out the Claimant own description of his injuries and the effect that he claims that those injuries have upon him. She records the Claimant saying that his right hand was injured when it was struck by the cab door during the altercation took place on 9 July 2019. He also said that during the altercation he became aware of

worsening pain in his right foot which had been giving him trouble since September 2018. He said that when he took his shoes off having returned home, he noticed some bleeding from a toe on his left foot. She then records him saying that he was having a lot of difficulties doing everyday activities because the pain in his right foot and the pain in his right hand. She records in claiming to be unable to lift anything with his right hand is cause severe pain and pins and needles going from his neck down the horror his right arm. He says is no longer able to go shopping and was not able to carry anything. He said that he struggled putting shoes on due to the pain his right foot, main his right heel and top of his right foot. He also claimed that pain in his right foot meant that he was unable to climb stairs, finds it very difficult to get up from a chair and the toilet. He always had to hold onto something. He is not able to get up in the normal way. He also claimed that he can walk but is only able to do so very slowly due to the pain his right foot.

25. It is clear from the letter that Dr Barthes-Wilson challenged the Claimant's account. She says that she observed the Claimant getting up and down several times in his chair in the waiting area also during and after the meeting without any perceptible difficulty or hesitation and without assistance. She records that she noted he was able to get up each time without holding onto anything. She says he took off his laced shoes off and on again without any perceptible difficulty. She did identify the ring finger of his right hand was swollen but says that she observed him writing with his right hand and untying tying his shoelaces using both hands normally. She says he was carrying a bag was able to get things in and out of his bag and handle paperwork get letters and an envelope with his right hand which was his dominant hand. She records that she challenged the Claimant and suggested that his reported symptoms were inconsistent with her observations. She then records that towards the end of the meeting the Claimant became verbally aggressive speaking in a loud voice and demanding that the doctor asked him specific questions if she wanted more information. She says that she was not prepared to continue the meeting in those circumstances. Her conclusion is that it was not possible to rely on the veracity of the Claimants reported symptoms and that she considered him fit to return to normal duties.

26. On 1 August 2019 the Claimant was invited to a fact-finding meeting to be conducted by Martyn Lathey, a Staff Manager, in respect of the incident that took place on 9 July 2019. I was not told who decided that this was necessary. I infer that the Respondent had started to believe that the Claimants account of the events that had taken place was inaccurate.

27. The fact-finding meeting took place on 5 August 2019. Martyn Lathey completed a pro forma which provided him with a script to follow during the meeting. One of the questions that he is required to answer was whether the matter was a potentially gross misconduct offence at that stage he indicated that it was not.

28. The Claimant attended the meeting on 5 August 2019. He was taken through his incident report and confirmed that it was accurate. He said that he still had severe pain his right hand which he had not realised until the day after the incident itself. He also said that he had an injury to his toe which he was

not aware of to the took issues of at home and noticed the blood.

29. Martyn Lathey discussed with the Claimant report that had been made by a member of the HR team who had spoken to Dr Barthes-Wilson. He suggested that the Claimant have become aggressive. The Claimant denied this.

30. Martyn Lathey then showed the Claimant the CCTV footage which had been taken from the bus's CCTV system. The notes of the fact-finding meeting set out what Martyn Lathey considered that that CCTV showed. They read as follows:

- *CCTV footage was viewed by ML and AH*
- *Footage shows passenger aboard an attempt to "tap in"*
- *Passenger then speaks to AH while cab door is shut*
- *AH opens cab door and passenger and AH proceed to exchange words for a short period*
- *Passenger places hand on lower portion of the cab door*
- *AH is seen to punch/hit passenger in the face*
- *Passenger and AH hold each other whilst moving around front area of the cab*
- *Other passengers pull the passenger fighting with AH away and out of the entrance doors*
- *AH kicks out towards passenger whilst he is taken from the bus*
- *other drivers are seen on the bus speaking to AH while passenger is outside*
- *AH is seen collecting belongings and pacing the bus*

31. The Claimant was then asked why he punched the passenger initially and is recorded as responding that it is because he was aggressive, abusive and that he was causing pain by pushing the cab door onto his foot. He is also asked why he kicked out towards the passenger when he was being taken off the bus and the explanation given was that the passenger was holding onto the Claimant bag which had his personal information and driving license within it.

32. Martyn Lathey decided that in the light of what had been viewed on the CCTV he was going to suspend the Claimant. The Claimant had not been accompanied at the fact-finding meeting by a trade union representative. In line with the Respondent's policy Martyn Lathey decided that he should not continue the fact-finding meeting until the Claimant had officially been suspended in the presence of a trade union representative. He decided that the fact-finding meeting should reconvene on 13 August 2019 A meeting took place later in the same day conducted by a different Staff Manager Mr Gambles. A trade union representative, Mr Ali attended the meeting as did the Claimant. The CCTV footage was played for a second time. Mr Gambles decided that the Claimant should be suspended pending further investigation. He decided that the suspension would be reviewed by him on 13 August 2019, the same day of the resumed fact-finding meeting. Those matters were confirmed to the Claimant in a letter sent on 7 August 2019.

33. On 7 August 2019 the Claimant obtained a further certificate from his GP stating that he was unfit to work for a period of three weeks. The reason that is given in the certificate for this is *'pain (awaiting specialist assessment), hand injury following assault'*.

34. The Claimant did not attend the meeting on 13 August 2019. Martyn Lathey decided in the circumstances to conclude the fact-finding. He decided that the matter should proceed to a disciplinary hearing. That was confirmed in a letter dated 19 August 2019. The disciplinary meeting was fixed for 27 August 2019. The allegation is described in the letter as *"Violent conduct towards a passenger in relation to an incident dated 9 July 2019"*. The Claimant is reminded of his right to be accompanied at that meeting and is informed that if he wishes to share documents provided under cover of that letter or request permission of his representative to view the CCTV he should complete the short form set out at the foot of the letter. He is referred to the company handbook and the company disciplinary procedure. He is warned that a failure to attend may result in the matter being determined in his absence.

35. Stephen Riggans was appointed to hear the disciplinary. He was the Business Operations manager and has a background in the bus industry. The Claimant did not attend the meeting on 27 August 2019. He says that he had telephoned the depot and informed the Respondent that he was unable to attend because of the pain in his leg. Whilst the Respondent's disciplinary procedure would have permitted Stephen Riggans to have proceeded in the absence of the Claimant, Stephen Riggans decided that that was not appropriate. He reviewed the papers and the CCTV footage. He decided that before reconvening the disciplinary hearing further investigation should take place. In particular, he felt that the bystanders at the Bow Church bus stop should have been interviewed.

36. On 27 August 2019 a statement was taken from Ms Seeburn, an employee of the Respondent who was present at the bus stop. She confirmed that she had been present and observed an altercation. She said that it had needed herself and two drivers in order to break up the physical assault. She does not appear to be asked precisely what she observed, nor does it seem that she was taken to the CCTV footage. She does go on to say that she had recognised the passenger as somebody who had been abusive to her in the past. She recalled that she had asked the Claimant what had happened and that the Claimant had said that the man had used abusive language towards him in his native tongue to insult him and his mother whilst he was trying to get out of the cab to hand over. She says that the Claimant had been extremely upset and had some physical injuries to his arm and leg. She says that the passenger was given a strong warning about his behaviour by the police when they arrived and was made to leave the area. Within her statement, Ms Seeburn refers to the fact that two other employees Ms Roppa and Mr Misba had also been present.

37. On 11 September 2019 a statement was taken from another driver a Mr Basra. He confirmed that he too had been present on 9 July 2019 at Bow Church. He said that he did not observe the beginning of the altercation or know how it started. He had got on the bus to separate both people who were

physically engaged in fighting activity. He said that words had been exchanged between the Claimant and passenger, but he had not been able to understand them as they were in the Claimant's native language. He then went on to the Claimant's behaviour was very unprofessional and that he had never witnessed anything like that in his career.

38. On 11 September 2019 the Claimant obtained a further medical certificate saying he was unfit to work between 28 August and that 10 October 2019. The reason given was foot/ankle pain. It is clear that the certificate is partially retrospective.

39. The disciplinary hearing was reconvened by Stephen Riggans on 23 September 2019. I have been provided with notes taken of that meeting and it was not suggested to me that there were any material inaccuracies. On this occasion the Claimant did attend. Again, the Claimant was not represented by a trade union representative. Stephen Riggans checked with the Claimant whether he was content to proceed and the Claimant confirmed that he was. Stephen Riggans made it clear to the Claimant that if he changed his mind, he should say so and a trade union representative will be permitted to attend.

40. The minutes of the fact-finding interview were then read out the Claimant was asked whether he agreed that the contents were accurate. The Claimant was then asked whether he wished to say anything about what had happened, and he gave his own account. He says that when he tried to explain to the passenger that there was a driver change over the passenger became aggressive, punched him, abused him and his mother in his native language and tried to grab his bag from him. Stephen Riggans explained that he had reviewed the documentation on 27 August 2019 and had thought that additional people should be interviewed. He then suggested that they view the CCTV footage together. Having watched the CCTV Stephen Riggans suggested to the Claimant that what was shown did not correspond with his account of the events. He asked the Claimant why, if the passenger was being aggressive, he had not simply stayed in his cab as this would be a safe zone. The Claimant is recorded as saying that the comments which were made that upset him were made only after he had opened the cab door. Stephen Riggans, who believed that the Claimant had opened the cab door very forcibly, asked the Claimant whether this could have led to the altercation.

41. After further discussion about the incident Stephen Riggans asked the Claimant about the events that had taken place between him and Dr Barthes-Wilson. He read out the report that had been produced and asked the Claimant whether he had any comments. Specifically, Stephen Riggans asked the Claimant why the GP would have considered that he was aggressive. The Claimant denied that he had become aggressive and said that he was just asking some clarification.

42. Stephen Riggans decided to adjourn the meeting until 26 September 2019. When the meeting reconvened, the Claimant was again present without a trade union representative. In the meantime, Stephen Riggans had spoken to Ms Gentles who had initially received the complaint from Dr Barthes-Wilson. Ms Gentles had told Stephen Riggans that the Claimant had come in to see

her after his appointment complaining about the way the medical examination had taken place. She had said that the Claimant was animated during this conversation. Stephen Riggans informed the Claimant of what had been said by Ms Gentles and invited him to comment upon it. The Claimant denied that he had been animated at any time.

43. Stephen Riggans then briefly adjourned to consider his decision. The notes of the disciplinary meeting show that Stephen Riggans set out a history of the disciplinary process before turning to his findings. He briefly summarised the way the Claimant had described the altercation before making his own findings. He rejects the Claimants account and summarises his conclusions from the CCTV as follows: *'on review of the CCTV the third party can be seen boarding your bus attempting to tap his oyster card on the reader, quite soon thereafter you appear to thrust the cab door open and the door narrowly missing the third parties face. You were then observed punching the third party with your right hand before grabbing him by your left arm and then getting involved in a brawl whereby you roll about on the platform of the vehicle, as other people separate you both, and the third party is taken off the bus, you then also attempt to kick him. This conduct took place in full view of the public on and off your vehicle and did not reflect well on the company or indeed the many hard-working bus drivers in London.'*

44. Stephen Riggans said that he considered whether a final written warning would be a sufficient sanction, but he decided as there was a sustained physical attack on a member of the public he decided that the appropriate sanction was summary dismissal. Included in his reasons is the following passage:

'I explained to you that I was concerned that you could do such a thing in the future should you lose your temper and that I had a duty of care towards you and also anyone you may come into contact with during the course of your duties. I am also aware that when you were referred to the company's GP you were aggressive towards her and that she abandoned her medical review with you, Sonia Gentles, HR Advisor also confirmed to me that you were being very aggressive and shouting whilst in her office and in the output office on the day in question, this gives me caustic for concern as it would appear to me that you do appear to have an aggressive demeanour.'

45. Stephen Riggans decision was confirmed to the Claimant in a letter dated the 26 September 2019 which repeated the reasons that he had given orally during the hearing. The Claimant is informed that he had a right of appeal which he later exercised.

46. The Claimant set out his grounds of appeal in a letter sent under cover of an email sent on 14 October 2019. In that letter the Claimant said that his reaction to the situation on the date of the incident was at first to be 'calm as always'. He went on to say self-defense was a natural reaction from the pain suffered by the actions of the perpetrator. He went on to say that the decision of Stephen Riggans had failed to take into account his injuries.

47. The appeal was conducted by Sam Greaves he is the Head of Service Delivery. In advance of hearing the appeal he was provided with the original incident report the assault injury checklist the documents in relation to medical reviews including the occupational health report. He was provided with the minutes of the fact-finding meeting and the disciplinary meeting itself amongst other documentation.

48. The appeal hearing took place on 22 October 2019. Again, the Claimant attended without a workplace colleague or trade union representative but stated that he was happy to proceed. Sam Greaves spent some time trying to understand the basis of the Claimant's appeal and concluded that the Claimant was maintaining that Stephen Riggans factual conclusions were inaccurate and that he had taken the side of the passenger. Sam Greaves then viewed the CCTV together with the Claimant. The Claimant is given a further opportunity to explain what is shown on the CCTV.

49. Sam Greaves concluded that the Claimant was maintaining an account of what happened which was at odds with the CCTV. He decided to dismiss the appeal and set out his conclusions in a letter dated 28 October 2019. He agreed with Stephen Riggans that the charge of violent conduct was made out. He set out in his letter that he gave some consideration to the Claimants length of service which he acknowledged was a weighty matter. He had regard to the earlier disciplinary outcome where the Claimant had been given a warning which included a warning that he should not leave the cab when there is a confrontation. He acknowledged that this was not a live warning but suggested it was relevant to the question of mitigation. Sam Greaves decided to dismiss the Claimant's appeal.

50. On 5 November 2019 the Claimant issued the present proceedings where he claims unfair dismissal, notice pay and arrears of pay.

The law to be applied - Unfair dismissal

51. The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. Where, as here, there is no dispute that an employee was dismissed the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held

(2) *A reason falls within this subsection if it—*

(a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

(b) *relates to the conduct of the employee*

(c) *is that the employee was redundant, or*

(d) *is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

(3) *.....*

(4) *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.*

52. For the purposes of Section 98(2) ERA 1996 'conduct' means actions 'of such a nature whether done in the course of employment or outwith it that reflect in some way upon the employer/employee relationship': **Thomson v Alloa Motor Co Ltd [1983] IRLR 403**, EAT. It is not necessary that the conduct is culpable **JP Morgan Securities plc v Ktorza UKEAT/0311/16**.

53. Where the reason, or principal reason, for the dismissal is established as conduct then it will usually, but not invariably, be necessary to have regard for the guidance set out in **British Home Stores Ltd v Burchell [1978] IRLR 379**, which lays down a three-stage test: (i) the employer must establish that he genuinely did believe that the employee was guilty of the misconduct; (ii) that belief must have been formed on reasonable grounds; and (iii) the employer must have investigated the matter reasonably. Following amendments to the statutory scheme the burden of proof is on the employer on point (i) (which goes to the reason for the dismissal) but it is neutral on the other two points **Boys and Girls Welfare Society v McDonald [1996] IRLR 129**.

54. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**. That test recognises

that two employers faced with the same circumstances may arrive at different decisions but both of those decisions might be reasonable.

55. The range of reasonable responses test applies as much to any investigation and the procedure followed as it does to the substantive decision to impose dismissal as a penalty **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.**

56. In terms of the reasonableness of the investigation and the procedure that was followed, the "relevant circumstances" referred to in Section 98(4) include the gravity of the charge and their potential effect upon the employee **A v B [2003] IRLR 405.** **A v B** also provides authority for the proposition that a fair investigation requires that the investigator examines not only the evidence that leads to a conclusion that the employee is guilty of misconduct but also that which tends to show that they are not.

57. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

"any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."

The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

Unfair dismissal - discussions and conclusions

58. The first issue I must deal with is whether the Respondent has established that the reason of if more than one reason the principal reason for the dismissal was 'conduct'. I find that engaging in violent conduct towards a passenger on the bus driven by the Claimant would satisfy the definition of conduct set out in **Thomson v Alloa Motor Co Ltd.**

59. In her closing submissions Ms Hodgkin sensibly accepted that the Respondent had shown that the reason Mr Riggans dismissed the Claimant was his genuine belief that the Claimant had engaged in violent conduct on 9 July 2019. She accepted that this fell within the definition of 'conduct'. That disposed of a suggestion intimated by the Claimant that he had been singled out either as a driver on TUPE'd terms and conditions or because he had complained about bus controllers. The dispute between the parties was therefore narrowed and focused on whether the dismissal was fair or unfair.

60. Before looking at whether the Respondent had reasonable grounds the conclusion is that it reached, I shall deal with the points that were raised about the quality of the investigation. Ms Hodgkin focused on the fact that the Respondent had not spoken to all members of staff present at the bus stop and, in particular, not to speak to the two individuals mentioned in the statement of Ms Seeburn.

61. It is correct that the Respondent had not interviewed everybody who was present at the bus stop. I was not told why the two individuals who were interviewed were selected. The two statements have a very different tone but do not differ wildly in respect of their observations. Neither of the two witnesses is able to comment on how the altercation started save that both report the Claimant as saying that he had been insulted. Both report the fact that there is a fight between the Claimant and the passenger which needed to be broken up. Thereafter the tone of Ms Seeburn's statement is to view the Claimant as being the victim whereas Mr Basra condemned the Claimant's behaviour.

62. The question for me is whether it was reasonable for Respondent to interview everybody who was present. Ms Hodgkin argued that, given the apparent conflict between the two statements that were taken, it was incumbent to take the matter further by asking the two identified individuals what their views were on the culpability of the Claimant. I accept that some employers would have taken that additional step. However, the two statements that were obtained were not useful in determining how the altercation started or whether the Claimant account of being punched by the passenger was true. I consider that it was reasonable and appropriate for Stephen Riggins to decide that some questions should be asked of those present at the scene. However, in this case the CCTV was able to accurately record the physical movements of both the Claimant and the passenger. The employees at the bus stop only saw the tail end of the incident. I find that, the decision by Stephen Riggins that it was unnecessary to pursue this line of investigation any further was one which was reasonably open to him.

63. An essential element of a reasonable investigation is that the Claimant had an opportunity to view all the evidence considered by the decisionmaker and to comment upon it. I find that in this case the Claimant did have such an opportunity. He was able to watch the CCTV on a number of occasions and give his own account of the events. He was given a further opportunity to do so during the appeal meeting.

64. I find that, the investigation that took place was reasonable. I agree that it would have been possible to ask additional employees what they saw but do not consider the failure to ask absolutely everybody present means that the investigation was unreasonable. By far the best evidence in this case was the CCTV evidence and any explanation that the Claimant could give as to what the CCTV showed. The essential core of the investigation was to identify what happened at the outset. What happened after the altercation started was never seriously in dispute.

65. A turn to the question of whether Stephen Riggins had reasonable grounds for his conclusion the Claimant had engaged in violent conduct. I was shown the CCTV but remind myself but for these purposes I am not making primary findings of fact about what I believe the CCTV shows but asking myself whether Stephen Riggins conclusions were reasonable. However, as my own findings do not differ, that reinforces the conclusions that I reach here.

66. I find that it was reasonable for Stephen Riggins to conclude that the Claimant had opened the cab door very swiftly just missing the passenger after

the passenger had started to walk down the bus. The significance of this being that any insulting comments or aggression had already taken place before the Claimant decided to leave his cab. It was reasonable for him to reject the suggestion by the Claimant that the passenger had punched him - a suggestion which the Claimant had made at various times throughout the investigation. There could be no serious dispute that the Claimant had punched the passenger. This is shown clearly on the CCTV. The Claimant punches the passenger sufficiently hard that his head is seen to move backwards. There is an no dispute that thereafter there was a struggle between the Claimant and passenger. The Claimant did not deny that when the passenger was taken off the bus, he aimed a kick at him. That is also clearly shown. Whilst Stephen Riggans does not comment on it, the CCTV does show that at the time the passenger has his hand on the Claimant's bag. I find that it was reasonable to disregard this as providing any support for the claim that the Claimant was acting in self-defense. Whilst a person may be entitled to use reasonable force to defend property the force used by the Claimant on his own account was manifestly disproportionate to the threat to his property. The passenger was at that stage surrounded by other drivers.

67. The quality of CCTV varies considerably. I have commented above on the circumstances that led to this case being adjourned. The CCTV footage available to Stephen Riggans is of good quality and is clear. Stephen Riggans could, and did, reasonably conclude that the actions of the Claimant went well beyond self-defense. He could also have reasonably concluded that the Claimant left the safety of his cab in circumstances where he risked escalating the conflict by doing so. The CCTV footage flatly contradicts the Claimant's account of being physically attacked.

68. I conclude that Stephen Riggans could reasonably have found that the Claimant engage in violent conduct, in public, in circumstances where he disregarded the standing instruction to remain in the cab.

69. The next point taken by Ms Hodgkin is whether it was unfair to have had any regard to the behaviour of the Claimant during the examination by Dr Barthes-Wilson. She argued that it was not fair to do so. The basis of that argument was that she suggested that the Claimant was effectively being accused of something not included within the disciplinary charge set out in the letter inviting him to the disciplinary meeting. She said that this meant that the Claimant did not have an opportunity to properly answer that charge and that there had been no separate investigation.

70. Had Stephen Riggans treated the allegation that the Claimant had behaved badly towards Dr Barthes-Wilson as a separate disciplinary matter I can see that Ms Hodgkin's argument would have a great deal of force. I find that that was not the approach that was taken. In giving his reasons for the dismissal at the conclusion of the disciplinary meeting Stephen Riggans considered whether the Claimant was guilty of the charge of violent conduct before dealing with what had occurred between the Claimant and Dr Barthes-Wilson. Where he takes account of that latter matter is in considering whether he could be confident that if he were to impose a sanction any less than a dismissal the Claimant would not behave in the same way again. He

considered the evidence in respect of Dr Barthes-Wilson only for the purposes of deciding whether to put any trust in the Claimant in the future. It seems to me that that is not to be equated with making a separate disciplinary finding.

71. Even had the approach being to treat the incident between the Claimant and Dr Barthes-Wilson as a separate matter I find that the Claimant had every opportunity to comment on what was said against him. A difficulty for the Claimant is that he had no explanation why Dr Barthes-Wilson would have provided a false account of her interactions with him. I believe that Stephen Riggans had a reasonable basis for preferring the account of Dr Barthes-Wilson over that of the Claimant.

72. Whilst the list of issues included in the Case Management summary of Employment Judge McLaren following the hearing 16 April 2020 included a consideration of whether there was any breach of the ACAS code no breach was identified before me. However, I have considered on my own volition whether there was any such breach. I take the view that there was not.

73. I consider that the appeal process was fair and thorough. Sam Greaves took sufficient care to identify the manner in which the Claimant put his case on appeal. He reviewed the CCTV footage with the Claimant and came to a reasonable conclusion that the Claimant's account of the events was inconsistent with the CCTV footage. In reviewing the sanction was imposed Sam Greaves had more information than Stephen Riggans. He was aware of the previous instance where the Claimant was warned not to leave his cab. I find that this was a matter which could properly be considered in assessing whether the decision to dismiss the Claimant should be upheld.

74. I must assess the process as a whole. The question that I must ask is whether the decision to dismiss the Claimant for the reasons found by the Respondent fell within a range of reasonable responses. I have decided that the Respondent had reasonable grounds for concluding that the Claimant had engaged in violent conduct towards a passenger. That includes a finding that it was reasonable to believe that the Claimant had gone beyond any reasonable self-defense. Stephen Riggans did consider alternative sanctions decided they were not appropriate. The question of the Claimant's long service was a matter considered most obviously when the matter is heard on appeal.

75. As I have set out above it is most unfortunate that bus drivers are subjected to unpleasantness, abuse and sometimes violence. However, in recognition of this they are given clear instructions and guidance on how to avoid and de-escalate any conflict. A minor overreaction to a perceived threat or abusive conduct would not, in my view, necessarily justify the dismissal of the long serving employee. However, on Stephen Riggans findings this was not just a minor overreaction. He believes on reasonable grounds that the Claimant had left the cab after any aggression had started. The Claimant had punched the passenger. Even after the passenger had been restrained the Claimant aims a kick at him. The Claimant is correct that the passenger had hold of his bag but the use of a kick in those circumstances is well beyond appropriate self-defense. The passenger is at that stage being restrained by others.

76. I find that overall, both the process followed, and the conclusions reached, were reasonable in the sense that they fell within a band of reasonable responses. I have therefore concluded that the dismissal was fair.

77. In my conclusions in respect of the wrongful dismissal claim, where I needed to make primary findings of fact about what occurred on 9 July 2019, I have reached the same conclusions as the Respondent. I have found below that the conduct of the Claimant went significantly beyond reasonable self-defense. In those circumstances had I found the dismissal to be unfair I need to go on to consider compensation. I would have reduced both the basic and compensatory award by 90% to reflect what I consider to be exceedingly poor behaviour by a professional bus driver.

Wrongful dismissal

78. There was no dispute between the parties that, unless the Respondent can show that the Claimant's conduct on 9 July 2019 amounted to a serious breach of contract, he was entitled to damages in respect of a 12-week period of notice. The issue for me was whether the Claimant's conduct amounted to a serious breach of contract - gross misconduct.

79. It was not suggested before me that there was any express term of the Claimants contract of employment that was relied upon by the Respondent. The Respondent must therefore rely on the implied term that the employee will not without reasonable cause conduct himself in a manner calculated or likely to seriously damage the mutual duty of trust and confidence.

80. In a wrongful dismissal case, it is for me to make my own findings of fact. However, having heard from the Claimant and having reviewed the CCTV for myself I find myself in complete agreement with the conclusions of the Respondent. I accept the Claimant's evidence that when the passenger boarded the bus, he was abusive when learning that there was to be a change of driver. However, I agree with Stephen Riggans that the CCTV shows the passenger starting to move down the bus before the Claimant swings the cab door open. That just missed the passenger causing him to turn back. I accept that the passenger can be seen to put his hand against the door before the Claimant gets through the gap. I do not accept that the passenger could have exerted any pressure on the door from that position causing an injury to the Claimant. I find it more likely than not that the Claimant injured his right hand punching the passenger. Even if the Claimant felt trapped by the passenger, I find that punching the passenger in the head as a response was manifestly excessive and did not amount to self-defense.

81. The Claimant then continued to struggle with the passenger for some time. I find it quite possible that the passenger stepped on the Claimant's foot and caused a minor injury. When the passenger is restrained the Claimant aimed a kick at him. I accept that that was a means of getting the passenger to release the Claimant's bag but again find that this was a manifestly excessive use of force.

82. It follows that on my findings the conduct of the Claimant went beyond

any reasonably necessary force. The conduct took place in a public area. Bus drivers provide a public service. The public are entitled to expect them to have a high standard of behaviour (even in the face of appalling provocation). I find that the Claimant was well aware of the guidance that he remain in his cab where there is a risk of an attack or escalation of violence. I find that the Claimant had the opportunity to do so.

83. I find that the conduct I have found above amounted to a serious breach of contract. The conduct was such that the Respondent could have no confidence that the Claimant would not behave in the same way again.

84. Accordingly, I find that the Respondent was entitled to dismiss the Claimant without notice.

The claim for wages

85. I shall not set out the legal principles save to say that it was agreed before me that the claim for sick pay could be maintained as a claim for unlawful deduction from wages or a claim for breach of contract. The real issue was whether the amount contractually due to the Claimant had been paid.

86. The Claimant said nothing about his claim for pay in either of his witness statements nor does he make it clear what he is claiming in his ET1. The Claimant has drawn up a schedule of loss. That refers to a claim for 'unpaid pension' of £1766.77 and 'missing sick pay' of £2158.08.

87. Stephen Riggins filed a supplementary witness statement that corrects some errors in his first statement and deals expressly with the Claimant's entitlement to sick pay.

88. The position that had previously been taken by the Respondent (and by Stephen Riggins acting in good faith based upon what he was told, was that the Claimant's company sick pay entitlement expired on 13 August 2019. Stephen Riggins corrects that in his supplementary statement. He accepts that the terms and conditions applicable to the Claimant were the 'Stagecoach terms and conditions' and those included an entitlement to 26 weeks full pay and 26 weeks half pay.

89. The argument put forward by the Respondent was that the entitlement to sick pay is discretionary. Steve Riggins suggests that a decision must have been taken to withhold sick pay in the light of the report of Dr Barthes-Wilson or some other failure of the Claimant to provide sick notes. In his evidence Stephen Riggins accepted that where an employee provides sick notes late then a back payment of sick pay is made. An employee would normally provide medical certificates at a return to work meeting or an absence management meeting. As the Claimant was dismissed there was no such meeting.

90. Through no fault of its own the Respondent does not have a copy of the contractual terms that applied to the Claimant. It was accepted that the Claimant was entitled to Stagecoach terms and conditions. The Claimant had provided a summary of some of those terms that included information about

sick pay. The Respondent has accepted that that document correctly describes the number of weeks sick pay that might be paid was 26 weeks full and 26 weeks half pay. The document does not indicate that there is any discretion given to the Respondent whether to pay or withhold sick pay.

91. What the Respondent is inviting the tribunal to do is infer that there are some circumstances where the Respondent is entitled to withhold sick pay. That is a bold argument when unsupported by any evidence. However, I accept it in part. I am prepared to infer that any express terms providing what are generous sick pay terms would include a power to withhold sick pay where the employee failed to provide evidence of ill health by providing medical certificates to cover any period of absence. That is a term almost invariably included in employment contracts. I am also prepared to accept that sick pay would not be payable where the Claimant was in fact fit for work and had used deception to obtain a medical certificate. If not expressly included such a term might be readily implied

92. The Claimant had in fact attended his GP and obtained medical certificates for the whole period of his employment from 9 July to 22 September when he is dismissed. I do not consider that the fact that one of these (covering 28 August to 10 October 2019) is partially retrospective means that it is not valid evidence that the Claimant was considered unfit for work.

93. The period where no contractual sick pay was paid was from 13 August to the dismissal in 22 September 2019. It is therefore necessary for the Respondent to justify why the pay was withheld during that period. I find that the reason that the sick pay was withheld was an error about the Claimant's entitlement and not because the Respondent had exercised any discretion (assuming that one existed). However, I will go on to look at whether the Respondent could have declined to pay sick pay for the reasons I have identified above.

94. I do not find that the Respondent was entitled to withhold sick pay on the basis that the Claimant had not provided a medical certificate. The Claimant had a medical certificate to cover the relevant period issued on 11 September 2019. He was not asked to produce that and there was no return to work meeting which was the usual occasion to provide medical certificates.

95. I accept that the report of Dr Barthes-Wilson casts some doubt on the issue of whether the Claimant was as ill as he suggested. On the other hand, the Claimant attended his GP, another health professional, and she or he has certified that he was unfit to work. Dr Barthes-Wilson's report does not directly refer to the relevant period.

96. I consider that if the Respondent seeks to assert that it was entitled to withhold contractual sick pay because the Claimant was not actually unfit to work then it would bear the burden of proving that fact. I am not satisfied that the Respondent has discharged that burden. There may be some basis to doubt that what the Claimant told his GP was true, but I would need more than a letter from an OH practitioner to find that the Claimant had engaged in deception to obtain sick pay.

97. I find that the Claimant has succeeded in this part of his claim. He is entitled to the difference between the company contractual sick pay to which he is entitled and the statutory sick pay that was in fact paid.

98. I was supplied with a spreadsheet setting out what was paid to the Claimant. That tells me that the gross rate of company sick pay paid to the Claimant is £539.52 per week. That matches the figure given by the Claimant in his schedule of loss and I shall use that figure. The same schedule sets out that the weekly rate of SSP is £94.25 per week. That was the rate in force in 2019.

99. The Claimant was treated as being suspended from 14 to 21 August and was paid his basic pay for that period. The Claimant suggests in his schedule of loss that he was not paid any company sick pay for 4 weeks between 5 to 26 September 2019 (that period appears to be 3 weeks). The Respondent's schedule, consistent with its case suggests that the Claimant was correctly paid sick pay up to 13 August 2019, was treated as suspended from 14 August 2019 to 21 August 2019 but thereafter was only paid SSP. I find that the Claimant is entitled to be paid the difference between contractual sick pay of £539.52 per week and £94.25 per week for those 31 days.

100. I calculate that to be $31/7 (\pounds 539.52 - \pounds 94.25) = \pounds 1971.91$. That is a gross figure and will be paid subject to any deductions required by law.

101. I record for completeness that no claim for pension contributions was pursued before me, but as sick pay is pensionable there will need to be adjustments made to reflect this when the sick pay is paid to the Claimant.

Employment Judge Crosfill
Dated: 8 September 2021