EMPLOYMENT TRIBUNALS

Claimant: **Mr F U Ahmed**

Respondent: **East London Bus & Coach Company Limited**

Heard at: **East London Hearing Centre (in public, by video)**

On: **6, 7, 8, 9 July 2021**

Before: **Employment Judge Moor**
Members: **Mrs S Jeary**
Mrs M Legg

Representation
Claimant: In person
Respondent: Mr C Ludlow, counsel

JUDGMENT having been sent to the parties on **13 July 2021** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The Claimant was employed for over 14 years as a bus driver out of the Respondent's Bow garage in East London. After a period of sickness absence, starting on 5 July 2018, he was dismissed on 20 May 2019.

2. The dismissal was no fault of the Claimant who found himself in the very difficult situation of developing PTSD after a fatal accident he was involved in at work, for which he was blameless.

3. The hearing of this claim was delayed by a number of factors, we refer to EJ Burgher's summary of 11 March 2021.

4. The full hearing was held in public by video. It was a 'hybrid' hearing in that the Claimant and Mr Ludlow attended the Tribunal in person. This was to avoid technological difficulties. We thank them both for the courteous, careful and intelligent way in which they conducted their cases.

5. The Claimant speaks English, but the Tribunal appointed an interpreter, Ms R Uddin, to ensure he could fully participate. At the outset, we discussed with the Claimant how he preferred to use the interpreter. He chose to speak in English and ask for her help when needed. Sometimes the Tribunal asked the interpreter

to interpret questions or answers where matters were complicated or where it appeared the Claimant may have had difficulty in expressing himself fully in English. By this method we were satisfied that the Claimant had a full opportunity to give his best evidence and fully participate in the hearing.

6. We used both paper and electronic copies of documents. (In the future the Respondent's solicitor should make sure that the internal pagination of the PDF version of the bundles is consistent with the pagination of the paper copies. She can do this by either paginating the index or sending it under separate cover and by placing any additional documents at the end of the bundle rather than inserting them after pagination.)

Issues

7. We refer to the appendix to EJ Burgher's summary for the issues. [insert 193] We clarified that

7.1. Issue 5 means a 'reasonable' consideration of alternatives.

7.2. Issue 7: the comparative substantial disadvantage was not being able to drive a bus.

7.3. Issue 14: the legitimate aim contended for was the need to meet a tight budget in the context of a business that was subject to competitive tendering.

8. We heard evidence on both liability and remedy. We start with our decision on liability first.

Findings of Fact on Liability

9. Having read the witness statements and heard the evidence of the Claimant, Mr Ferguson, and Mrs Hannan, and having read the documents referred to us we make the following findings of fact.

10. The Respondent runs bus services in a contract with Transport for London. They operate out of 10 bus depots/garages in East London. They employ about 3200 drivers. Non-engineering staff otherwise amount to around 150 controllers, 40 garage supervisors, 2-3 clerks per garage and 10 pay clerks.

11. The Claimant started his employment as a bus driver, at first full-time, at Bow bus garage on 20 September 2004. In 2016 he requested and was granted flexible working because of his heavy caring commitments. At the relevant time he worked Saturdays and Sundays 16 hours a week. The Claimant was granted 5 months' unpaid leave when he needed time off work to deal with exceptional family needs. The Claimant had been a long-serving employee remaining committed to working even while having a burden of other caring commitments.

12. The Claimant's contract stated that he was entitled, after 6 years' service, to 26 weeks' company sick pay (which is around 70% of his basic pay) and 26 weeks' half company sick pay. The contract states '*there is no max and min period of sick leave. Each period of sick leave is reviewed regularly. Management are not obliged to grant the maximum sick leave before a decision may be taken, on the merits of an individual's case to terminate employment. Further sick leave will only*

be granted where there is a reasonable prospect of a return to duty.' (40)

13. In 2016, through no fault of his own, a motorbike collided head-on with the bus the Claimant was driving. The motorcyclist died. This was a horrible experience for the Claimant. He had a short period of absence. The Claimant had headaches soon after the accident. But, after a confidence drive, he was able to return to work. He drove Route 8. It was convenient for him because he could take his meal break at home with his family.

14. Over time the Claimant began to experience symptoms of Post-Traumatic Stress Disorder: headaches, nightmares, flashbacks, and difficulty sleeping. The accident played over and over in his mind. He would often awake feeling tired. He was better when he was with people and experienced worse symptoms alone. These symptoms gradually worsened. He struggled with them without telling anyone at work, and without even telling his family, until 2018.

15. There is a dispute about whether or not the Claimant was contracted only to drive on Route 8 or whether he was on the Spare rota. What the contractual position was is not relevant to our decision. We do decide that, when he was asked to learn other routes in July 2018, the stress of having to think about doing so increased his symptoms of PTSD.

16. From 5 July 2018 the symptoms of PTSD were such that the Claimant could no longer drive his bus and had to take sick leave.

17. By 20 May 2019, when he was dismissed, he remained unfit to drive a bus. Despite 6 sessions of counselling and a course of Cognitive Behavioural Therapy (CBT), his symptoms had not improved. We accept that during the appeal hearings, he told Mrs Hannan that he felt no better than at the start of his sick leave. During his sick absence the Claimant was worried about harming himself or others if he continued to drive a bus. He would panic if he heard a motorbike and had lost his confidence.

18. The GP note records the first diagnosis of PTSD on 9 July 2018 and stated the Claimant was unfit for 3 weeks with no advised adjustments. The GP referred him for CBT but there was an 18 week wait. This is not to say the Claimant had not had symptoms before this date. It is however the first time he attended his doctor about them, (apart from the headaches soon after the accident.)

19. The Claimant requested therapy on 27 July 2018. Early in August Mr Ferguson asked OH whether this could be arranged through the company (85). (see question (d) OH report 7 August).

20. The Claimant visited OH in August for a usual age check. There was a mix-up at this stage and the management referral to OH made by Mr Ferguson did not happen. He therefore referred the Claimant again. As a result, there are two OH reports in August and September that are in very similar terms.

21. The Claimant requested help with therapy again on 17 August 2018 (80), by which time Mr Ferguson had already asked OH.

22. Both OH reports in August/ September 2018 stated that the Claimant was likely to have PTSD, that he was suffering flashbacks and stress, and was unfit for work.

23. OH thought that the question of the route the Claimant could drive was a contractual one not a medical one and the Claimant agreed.

24. OH advised that CBT could be beneficial and that he was on the waiting list for it. They also advised that counselling could be arranged through the company.

25. A further fit note signed the Claimant off for 2 months as unfit with no advised adjustments on 3 September 2018.

26. The Claimant went to a first sickness review meeting with his manager Mr Ferguson on 13 September 2018. The invitation letter said 4 areas would be covered: the time frame for his return including whether that could be phased; whether adjustments could be made; whether it was unlikely that he would be able to return (and if so dismissal could be an outcome) and whether there was alternative work that might be available. On the same day the Claimant asked that he be given time for treatment to help him recover.

27. At the meeting on 13 September 2018, Mr Ferguson confirmed that the Respondent would pay for counselling and arranged a further review meeting. This counselling began on 27 September 2018 and lasted 6 weeks.

28. At all of the sickness review meetings with managers the Claimant was told he had the right to be accompanied but he chose to attend alone. After each meeting, Mr Ferguson and Mrs Hannan, wrote a summary letter of the discussion and sent it promptly to the Claimant.

29. OH had consent to speak to Claimant's GP if it required any further information.

30. On 1 November 2018, the Claimant met Mr Woods, Head of Operations. His report of the meeting was created on the same day. We find the Claimant told Mr Woods he was not able to drive and did not know when he would be able to return to driving. Mr Woods was sympathetic. They discussed possible alternatives in a future phased return including driving school, mentoring and education. We accept his note about this is likely to be accurate because it was written at the time. The Claimant recalls Mr Woods referring to the 'possibility' of a job recording 'lost mileage'. We find that Mr Woods is likely to have referred to lost mileage not as a vacancy but rather as an example of possible future roles. We do not accept he offered the Claimant this alternative at the time: the Claimant's own statement refers to it as only a possibility. Another referral was made to OH.

31. The Claimant was signed off work as unfit to work for a further 2 months on 1 November 2018, with no adjustments. OH reported again on 19 November 2019 that the Claimant was unfit for work and continued to have 'significant symptoms of PTSD' including significant anxiety, nightmares and tightness in his chest. The counselling had not assisted except temporarily around the time of the sessions. OH said it was not clear whether the Claimant would respond to the planned CBT but it was worth 'giving him the chance'. It recommended consideration of alternative non-driving roles, if possible, near to home. The prognosis remained uncertain and dependent on the outcome of treatment.

32. On 2 January 2019, the Claimant was signed off as unfit to work with no adjustments for a further 2 months.

33. On 23 January 2019 the Claimant had a sickness review meeting with Ms Alder, Staff Manager. Her note of this meeting was created on the same day. The Claimant stated he was too stressed to return to work. They both remember having a short discussion about alternatives. She said it would be a discussion they would continue after a referral to OH, once it was established he could not return to driving. We do not accept that Ms Alder said to the Claimant he should find another job: this is because she did not dismiss him and it is not consistent with her having the discussion about alternative roles.

34. On 28 January 2019 the course of CBT began.

35. On 30 January 2019 OH reported again. By now the Claimant had been absent from work for about 6 months. OH stated the course of CBT had started and that this had given the Claimant hope. OH could give not give an opinion on the prognosis until the course of CBT had finished. OH suggested a review in April.

36. Mr Ferguson asked OH about whether the Claimant was eligible for IHR to ensure he considered all the options. The later advice was that this was not recommended.

37. On 22 February 2019 the OH report continued to advise that the Claimant had the same symptoms; that he was not fit for driving but he was fit for a non-driving role, if that was operationally possible. This is because the Claimant continued to worry about the risks of driving but felt able to do other work. The CBT was continuing.

38. As a result of the recommendation about non-driving duties, Mr Ferguson, prior to the next sickness review meeting, asked Mr Owens, Recruitment and Training manager, about any vacancies for alternative non-driving employment but there were none. This is confirmed by the email correspondence at the time (110).

39. On 28 February 2019, at a sickness review meeting Mr Ferguson dismissed the Claimant. (He was later reinstated by Mrs Hannan during the appeal process). By this stage he had been off 222 calendar days, 67 working days.

40. Mr Ferguson dismissed the Claimant because, in his view, the prognosis was so uncertain there was no prospect of a return to work in the foreseeable future, there had been a long absence, and there was no suitable alternative work available. He did not think it reasonable to wait until April.

41. On 5 March the Claimant appealed on the grounds that insufficient time had been allowed for his recovery; that insufficient evidence had been sought and that he was disabled and this had not been taken into account.

42. Mrs Hannan, Operations Director, dealt with the appeal. She met with him on 14 March 2019. The Claimant told her he was still unfit for work and he felt no better than when his sick leave started. They talked about alternative work. She told him about two vacancies for full-time General Hand positions at West Ham and Plumstead. She adjourned the meeting to get an opinion from the CBT therapist.

43. Pending the outcome of the appeal, Mrs Hannan arranged for sick pay to be reinstated until it was concluded. She thereby reinstated the Claimant pending the appeal.

44. By a letter of 20 March 2019, Mrs Hannan sent the Claimant details of alternative jobs: the General Hand's position and a part-time Engineering Clerk role at Bow. The clerk job would involve using computers.

45. A further fit note certified the Claimant unfit for work until 30 June 2019 with no adjustments advised.

46. Mrs Hannan asked questions of the therapist. On 4 April 2019 the therapist told her that 4 sessions of the 6 had been completed and he was not yet in a position to respond. She delayed the appeal hearing to 11 April 2019 to account for this.

47. The Claimant wrote suggesting he job-share a role that did not involve driving. He contended he had been offered a role by Mr Woods recording lost mileage. Mrs Hannan saw that this was not in Mr Woods' record of the meeting. He alleged Ms Alder had told him he should leave if he was unable to drive. Mrs Hannan asked for Ms Alder's response to this and she denied it.

48. At the reconvened appeal meeting on 11 April 2019 we find, on balance, that the Claimant did say to Mrs Hannan at this meeting that his mental health was getting worse and worse: this is recorded in a near contemporary summary (the letter of 18 April) with the kind of detail that we consider it unlikely Mrs Hannan would have made-up. That part of her summary was not objected to by the Claimant at the time.

49. They discussed the alternative jobs. The Claimant stated felt he was probably not fit enough to do the General Hand role but was happy to give it a trial. He asked to be considered for the part-time Engineering Clerk role. He did not have computer skills but thought that with some training he could use a computer package. Mrs Hannan put his name forward and explained there were two other drivers in similar circumstances to him who had expressed an interest.

50. Mrs Hannan told the Claimant that she would not conclude the appeal until hearing about the conclusion of the CBT the last of which was to be on 29 April 2019. And she would wait to see the outcome of clerk interview.

51. On 16 April 2019 the Claimant had an interview for the clerk role. One other driver competed for this role. That driver was also long-serving who had had a stroke and lost their PCV licence in October 2018. That driver had been on long-term sick and had been dismissed. Their TU representative had argued there was some hope they would regain their licence after a year. Mrs Hannan thought there was doubt about this, using her experience of that kind of case.

52. The other driver was chosen for the clerk job after interviews scoring 53 points to the Claimant's 29. Given that the Claimant says he has no computer skills, we are not surprised that he was not preferred for this administrative role. It required the use of computers. Even with training, starting from such a low base would be bound to have put the Claimant at a disadvantage in applying for this job. (So lacking are his computer skills that in the two years since his dismissal, he has not been able to use the internet at all to search for work.)

53. On 3 May 2019 OH gave a further report. The Claimant remained unfit for driving duties. The OH doctor records '*unfortunately I am unable to say when he can return to a driving role given the slow progress he is making'*. OH

recommended a non-driving role for *at least 4* months with the possibility of starting confidence driving thereafter.

54. Mrs Hannan asked Mr Vincent, Engineering Manager, and Mr Owens whether the General Hand role could be adjusted to remove the driving part of it. But the managers told her that driving was a core part of the job. The majority of the job involved substituting buses out on the road to minimise lost mileage, taking buses to MOT tests, collecting parts, and assisting in parking buses correctly. We find the General Hand's role was not structured in terms of the time. A General Hand could be expected to pick up driving duties as and when necessary throughout the day, interspersed with other work.

55. There were no other vacancies nor for a lost mileage recording position.

56. The final CBT session was delayed until 13 May and therefore Mrs Hannan delayed the hearing until 14 May 2019. At this hearing, the Claimant said he felt no better. He said the therapist was going to try an alternative therapy to begin on 17 June 2019.

57. Mrs Hannan confirmed from her investigations that no new roles had become available. She agreed to delay the meeting again for the Claimant to discuss medication with his GP. But it turned out he had concerns about anti-depressant addiction and side effects.

58. By this time the Claimant requested that he be allowed up to a year's unpaid leave to see whether that would aid his recovery.

59. At the reconvened appeal meeting on 20 May 2019. Mrs Hannan reached the decision to dismiss the Claimant.

60. Her reasons were:

60.1. There had been no positive developments. The Claimant felt no better than when he started sick leave. Indeed he had said his mental health was worse.

60.2. There was no suitable alternative work.

60.3. She had waited for the CBT to take place, but this had not assisted.

60.4. There were no grounds for allowing further time to recover. She took into account the lack of progress in 10 months so far. And that OH could not give a prognosis of a return in foreseeable future.

60.5. We do not accept the Claimant's argument that the saving of his senior salary was part of her decision – there was a fairly high turnover of drivers, it cost several thousand pounds to train a new driver, and Mrs Hannan valued the experience of senior drivers.

61. In her outcome letter Mrs Hannan informed the Claimant that if he could come back to driving within 3 months he would be reemployed with his seniority and then grade. She also informed him the Respondent would look favourably on any reapplication later.

62. We also considered the business background to staff absence management and Mrs Hannan's decision.

62.1. TFL requires the Respondent to tender for business every 5 years (with a 2-year extension if they meet targets). It is a very competitive business environment. While they have a large turnover, the difference between losing and winning a contract could be as little as £25,000. We accept this means that the Respondent had a real need to control costs and keep close to its budget.

62.2. As part of its contract it had to show that it provided a good service.

62.3. Driver wages were obviously a large part of its costs.

62.4. Spare drivers cover some expected sick leave. But sick leave above the norm was covered by overtime which is an additional expense.

62.5. Some driver leave cannot be covered by overtime because drivers do not always volunteer for it. This then leads to buses not going out and gaps in the service (lost mileage), which can lead sometimes to customer complaints. These matters affect whether it can show it is complying with its TFL contract.

62.6. Sick pay is an additional expense. Even when sick pay stops, paid holiday continues to accrue on sick leave. That person remains in the establishment numbers and prevents another person from being employed.

62.7. While Mrs Hannan noted that if another person was employed to cover someone on long term sick, the company risked ultimately employing too many drivers in the long term. We set against this her evidence that they were constantly recruiting drivers because they were short of drivers.

63. Mrs Hannan was aware at the time she managed the case that it was likely that the Claimant could be disabled.

64. His sick pay would have been exhausted at about the end of June 2019.

65. There was a pool of about 30-40 drivers on long term sick at any one time who were looking for temporary or permanent non-driving work for medical reasons. We find this is likely given the figures of those on long term sick were even greater than that.

66. Mrs Hannan told us it was rare to extend sick leave but she could think of two types of cases where that happened beyond a year: first for terminally ill workers so that they could remain in service at their death gave the families extra benefit; the second was where a driver had an extended illness but a good prognosis and date for return to work.

Submissions

67. We refer to Mr Ludlow's very useful submissions on the evidence in writing and his comprehensive submissions on the law. We do not repeat them here.

68. The Claimant provided lucid and persuasive written submissions. In summary he argued.

68.1. The reason for his dismissal was to save money on his senior wages versus a new recruit's lower wage.

68.2. He should have been given an alternative non-driving position.

68.3. He should have been given the part of the General Hand position that was non-driving.

68.4. He should have been preferred for the clerk role because the other employee (who was also on long term capability absence) had a better chance of returning to driving.

68.5. He should have been kept on in employment until his sick pay had expired or indeed for a further year without pay. The Respondent had previously allowed him 5 months' pay for caring and this could have happened again.

68.6. He should have been offered a phased return.

68.7. Consideration was not given to his length of service and the fact the accident happened at work. Despite the abuse he had experienced as a driver, he had been committed to the Respondent for many years.

Law

Unfair dismissal

69. Section 98(2) ERA requires us to consider whether the reason for dismissal was 'potentially fair'. Capability is one such reason, which includes health, section 98(3) ERA.

70. We apply section 98(4) of the Act. This provides that we must consider whether the dismissal is fair or unfair in accordance with equity and the substantial merits of the case, bearing in mind size of employer.

71. Case law gives the Tribunal guidance on how to apply the Act. In sickness cases East Lindsay DC v Daubney and Spencer v Paragon Wallpapers Ltd establish the key principles. We should ask (unless there are exceptional circumstances):

71.1. Would a reasonable employer have been expected to wait longer for the employee to return (Spencer)?

71.2. A fair procedure generally requires, considering it as a whole: consultation with the employee; an investigation of the medical information (to establish what the illness and its prognosis); consideration of other options in particular alternative employment.

72. We remind ourselves we must not decide the case according to what we would have chosen to do. We must apply the standard of what a reasonable

employer would have done: depending on the circumstances there may be a range of responses that a reasonable employer could have adopted.

73. The test of reasonableness also applies to the procedure as a whole (employer's investigations and whether it has reasonable grounds for its belief as to the medical position and prognosis.)

74. We agree with the Respondent that the creation of a new job that was not necessary would not be something that a reasonable employer would have to do.

75. We spell out here that a dismissal in relation to sickness is not criticise the employee. It is clear to all of us that the Claimant had a significant and genuine condition. Nor does dismissal necessarily lead to a conclusion that the employer has no sympathy for the employee's situation.

Disability Discrimination

Disability

76. It is agreed the Claimant was disabled from 22 February 2019. The events complained of post-date this time. There is no need for us to decide whether he was disabled before this.

77. To be a disabled person under the Equality Act requires a person to have an impairment which has a long term, substantial adverse effect on day-to-day activities. Long term means lasting at least 12 months or likely to last 12 months.

Reasonable Adjustments
Knowledge

78. The duty to make reasonable adjustments does not arise if the employer did not know the Claimant was disabled and that he was subject to the disadvantage. The required knowledge is of the *facts* of the disability, not whether those particular facts meet the legal definition. Knowledge includes whether the employer knew facts about the duration or likely duration of the condition.

79. Tribunals should take a structured, step-by-step approach to the consideration of whether there was a duty to make reasonable adjustments. Contrary to popular assumption: the duty does not arise in every case of disability.

79.1. First identify the provision, criterion or practice ('PCP') been applied?

79.2. Second, does that PCP put the Claimant to a substantial disadvantage compared with a person who is not disabled.

79.3. Third, has the employer taken reasonable steps to avoid that disadvantage? This is an objective question, the focus being on the practical result. There must be a prospect (some cases say a 'real prospect') of the step being effective.

80. Paragraph 7.29 of the Code sets out factors that may be relevant in deciding what is reasonable here. The size and resources of the employer; what proposed adjustments might cost; the availability of finance or other help in making the adjustment; the logistics of making the adjustment; the nature of the role; the

effect of the adjustment on the workload of other staff; the other impacts of the adjustment; the extent it is practical to make. Another factor is the likely effectiveness of the step: the chance that it likely to be successful.

81. It would not be reasonable to create a wholly unnecessary job. (If authority is required, see para 50 Tarbuck v Sainsbury's Supermarkets Ltd [2006 IRLR 664 EAT.)

82. Finally, we were referred to Wade v Sheffield Hallam University UKEAT/0194/12 an EAT decision upholding the decision that it was not a reasonable adjustment for the employer to waive its competitive interview process and appoint a claimant to a new role. In that case the Claimant was not suitable for the role and it could not be reasonable to have therefore appointed her. While this might be a useful illustration, we remind ourselves that the test for us is what was reasonable on the particular facts of this case.

Section 15

83. Section 15 Equality Act 2010 ("EQA") provides:

> **"(1) A person (A) discriminates against a disabled person (B) if—**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**

84. Section 15 recognises that a disabled employee may be adversely treated for something that other employees would be adversely treated for, but where that something arises '*in consequence of their disability'* the disabled employee is afforded greater protection.

85. Section 15 does not give the disabled employee complete protection: the employer is not liable if it can 'objectively justify' the treatment.

86. First, it must show that the treatment (dismissal here) was to meet a legitimate aim. It should identify a real need or objective of the business. Generalisations are insufficient (Code para 4.26)

87. Mr Ludlow helpfully directed us to the Code para 4.29: that aiming solely to reduce costs cannot be a legitimate aim. This is supported in the case law referred to by Mr Ludlow. It was put into context by Underhill LJ in Heskett v SOS for Justice [2020] EWCA Civ 1487: we quote the headnote

> 'The aim in the present case could not have been characterised as no more than a wish to save costs. An employer's need to reduce its expenditure, and specifically its staff costs, in order to balance its books can constitute a legitimate aim for the purpose of a justification defence: that proposition is correct in principle. There is no principled basis for ignoring the constraints under which an employer is in fact having to operate. It is never a good thing when tribunals or courts are required to make judgements on an artificial basis. Almost any decision taken by an employer will inevitably have regard to costs to a greater or lesser extent;

> and it is unreal to leave that factor out of account. That is particularly so where the action complained of is taken in response to real financial pressures, as in the present case…. It may sometimes be difficult for a tribunal to draw the line between a case where an employer simply wishes to reduce costs and cases where it is, in effect, compelled to do so.'

88. Mr Ludlow also drew our attention to HM Land Registry v Benson [2012] ICR 627 EAT that held that a decision about how to allocate resources could constitute a legitimate aim (keeping to a self-imposed budget). We have since read this decision and agree with that summary.

89. If it establishes a legitimate aim, the employer must then satisfy us that the treatment (here dismissal) was a proportionate way of achieving this aim. This means it must be:

89.1. both an '*appropriate'* way of achieving it and

89.2. '*reasonably necessary'* (not the only possible way but we should ask whether lesser measures could have achieved the same aim).

90. In assessing proportionality we ourselves must weigh the 'discriminatory' effect of the treatment against the needs of the business and decide which outweighs the other. The more serious the impact the more cogent must be its justification. (This is an objective test and does not matter if employer did not have these reasons in its mind at the time. Nor is it a 'range of reasonable responses test.)

91. We have had regard to the guidance in the Code at 4.32: '*The greater financial cost of using a less discriminatory approach cannot, by itself, provide a justification for applying a particular provision, criterion or practice. Cost can only be taken into account as part of the employer's justification for the provision, criterion or practice if there are other good reasons for adopting it'*.

Application of Facts and Law to Issues

Unfair dismissal

92. We find there was a potentially fair reason for dismissal, namely capability. This follows from our findings of fact as to the reason for dismissal: sickness absence and lack of a foreseeable return date. Section 98(1) of the Employment Rights Act 1996 is therefore satisfied.

93. We then go on to ask ourselves whether this dismissal was fair under section 98. We have applied the test of a reasonable employer and considered those aspects that we would expect to see a reasonable employer follow.

94. First consultation: we find it was reasonable here. We have looked at the procedure overall. There were a lot of review meetings, three with Mrs Hannon. Both managers genuinely considered what the Claimant was saying and acted upon it. For example, Mr Ferguson checked with OH about therapy on the Claimant's request; Mrs Hannan discussed with him carefully his views about alternative jobs; what he thought about his condition and the future. She was also careful to investigate the allegations he made about Mr Woods and Ms Alder. As per the Claimant's request, Mrs Hannan delayed making a decision until finding

out the outcome of the CBT. And both summarised their meetings in detail in letters to him. We understand that such meetings can themselves create stress, but they were necessary for a reasonable employer to keep itself informed.

95. Second, we find there was a reasonable Investigation of the medical position. There were 5 separate OH reports and Mrs Hannan went further and spoke with the therapist, Mr Whitehead. A reasonable employer did not need to investigate with the GP *and* OH because that essentially would have been to double-up on the same information. If OH was in any doubt, they had consent to speak to the GP. Overall we consider the investigation of medical position was detailed, careful and timely. Managers also asked appropriate questions of the doctors about treatment, prognosis, alternatives and adjustments.

96. Third, we find the Respondent reasonably considered the alternatives, particularly during the appeal. Mrs Hannan looked into non-driving alternatives in detail. This was reasonable because the medical evidence throughout was that the Claimant was unable to drive.

96.1. General Hand work: we accept Mrs Hannan's explanation for why it was not suitable as reasonable. Put simply, the core of it involved driving and it could not be split in two because it required flexibility between driving and non-driving tasks.

96.2. Clerk: we accept that there were two employees in a very similar situation. Both were long serving, had been on long-term sickness absence, and had been initially dismissed. Neither could drive because of illness. We do not accept the other had a good chance of return – this was merely expressed as a hope. It was only fair when looking for alternative employment for both to have a competitive interview. Plainly this was the action of a reasonable employer. Unfortunately, the Claimant did not succeed.

96.3. On the facts, we have not accepted that there was a lost mileage recording vacancy.

97. We then looked at the reason for dismissal. Would a reasonable employer have waited any longer for the Claimant's return?

98. First, we find Mrs Hannan had reasonable grounds to believe that there was no foreseeable date for return to work to driving: this is apparent from the OH reports giving an uncertain prognosis and the Claimant's own account that he was no better. The suggestion of a non-driving role for at least 4 months was made in the last OH report, but even it could not give a date for a likely return. It was reasonable for Mrs Hannon to view this as uncertain. She also reasonably took into account in her decision the lack of progress over 10 months despite treatment. In other words, there had not been any progress towards recovery: even though she had reinstated the Claimant and given a further 3 months to await the outcome of CBT. Finally, there were no alternatives to the driving work.

99. Second, it was reasonable to draw the line at this stage bearing in mind the business considerations:

99.1. Having to cover his absence by spare drivers or by overtime, albeit that this was only 2 days a week. This still a risked gaps in the

service.

99.2. The Respondent could not recruit to his position.

99.3. His absence was still costing sick pay and holiday.

99.4. There had already been a long absence.

99.5. There was an uncertain prognosis with no certain date for return.

100. There was a clear difference between this situation and the request for unpaid leave that had been allowed earlier on in the Claimant's employment. It was clear then that he was returning to work. Not so now.

101. The Claimant suggests his long service was not taken into account. We disagree: Mrs Hannan told us and we accept that she valued his experience and wanted to keep experienced drivers wherever possible.

102. For these reasons we find her decision fell within a range of reasonable responses of a reasonable employer to the sickness absence.

103. Thus the dismissal was fair.

Disability

104. The Respondent accepts the Claimant was a disabled person because of PTSD from 22 February 2019 (the point at which they say the evidence shows it was likely to be long term). We find the Respondent had knowledge from at least this date because it had access to the OH reports and information from the Claimant about how he was feeling and had been feeling by this time. By then they knew he had significant symptoms of PTSD (described above); that they had a substantial adverse impact on day-to-day activities: not least in the form of tiredness during the day and difficulty facing driving (not just a bus). And it was likely that it was long term.

105. We do not need to consider whether the claimant was disabled before because the claims are about acts/omissions after that date.

Reasonable adjustments

106. The practice (PCP) here is being required to attend work as a bus driver.

107. This practice put the Claimant to a comparative substantial disadvantage because he was not able to drive a bus because of PTDS when a non-disabled bus driver with the same qualifications as the Claimant could drive a bus.

108. We ask of the proposed adjustments:

108.1. whether it was a step that had a prospect of avoiding the disadvantage.

108.2. Then, whether it was reasonable. We consider the factors set out above. The focus is on the practical result.

Alternative Non-Driving Roles

109. Plainly if an alternative role existed then, subject to reasonableness, it would have avoided the disadvantage in enabling the Claimant to stay in work while not driving. Therefore, we have considered in relation to each suggested role whether it was reasonable to offer it to the Claimant.

110. We have decided it was not reasonable to split the general hand vacancy into two for a job share or part -time non-driving work because: it was not practical because majority of the tasks were driving and it was not structured in time and flexibility for it to be practical to split it. In this role the hand had to drive as and when required and driving formed a core part of the role. The general hand role was therefore not a reasonable adjustment.

111. It was not reasonable to appoint the Claimant to the clerk role. First, it was not available having gone to another person after a competitive interview. It would not have been reasonable to appoint the Claimant to it without interview: one of the factors is to consider the impact of the adjustment on others. To give this job to the Claimant would have been to disadvantage a person in similar circumstances more suited to it. In any event, the Claimant had absolutely no computer skills, we therefore would have found it would not have been a reasonable adjustment anyway to provide that job to the Claimant without an interview. An employer would reasonably expect some use of computers as a starting point for this administrative job. We have to focus on the practical result: for all these reasons it was not a reasonable adjustment.

112. On the facts we have decided there was no mileage role available. Nor was it reasonable to create one as it was unnecessary.

Phased Return

113. We do not consider this was a reasonable adjustment because the Claimant still could not drive at all and there was no foreseeable prospect of him driving. This adjustment was therefore not effective to avoid the disadvantage he was under.

Counselling

114. In our judgment counselling was provided by the Respondent in a reasonable time frame. Mr Ferguson asked the question of OH in August. And as soon OH confirmed, it began on 27 September.

Resolution of Grievance about the Route

115. The resolution of the grievance would not have been an effective to avoid the disadvantage. The medical evidence was not that the Claimant was concerned about the route and that was sustaining his symptoms. The Claimant anyway agreed with OH that this was a separate contractual matter and not medical. In our view resolution of this issue would not have returned the Claimant to driving any sooner. (And while it is not necessary to our decision, we note the Claimant cross-examined Mr Ferguson that he had been given reassurance during the appeal that he could drive route 8 and from those questions it appears his grievance may have been resolved.)

Extending Sick Leave by up to a Year

116. We have considered this proposed adjustment with great care weighing up the evidence for it and against it.

117. To trigger the obligation to make this adjustment there must be a prospect that it would have got the Claimant back to work.

117.1. On the one hand the prognosis was very uncertain. At the time of dismissal there had been no progress towards recovery or at least very slow progress. These factors go against the realistic prospect that a further period of sick leave held out the prospect that the Claimant in that time would recover enough to get back to driving work. (This was a very different situation from his unpaid leave request earlier or the person whose leave is extended because both had certain dates at which they could return.)

117.2. On the other hand, allowing the Claimant to 'remain on the books' might well have improved his confidence and therefore recovery; and given the size of the employer we cannot exclude the chance that a suitable non-driving vacancy would have come up in the time. Such a chance is very difficult to assess bearing in mind, too, that there was in that pool of other drivers looking for non-driving positions likely to have been other disabled workers.

117.3. Doing the best that we can with this we are prepared to accept that a period of unpaid leave of a year held out a prospect of a return because of the chance of some recovery towards driving and/or an alternative vacancy. (The size of this prospect is a factor in overall reasonableness which we assess below.)

118. We have gone on therefore to consider the reasonableness of extending the period. Again, we have weighed up the factors for and against.

119. In favour of it being reasonable to extend sick leave:

119.1. Mrs Hannan had been prepared to wait for 3 months anyway, given her promise to reemploy on the same grade. We do not consider however she considered this was likely to happen given her view about the prognosis.

119.2. In June to start a new kind of therapy was going to be tried.

119.3. This is a large employer always short of drivers thus the establishment problem that Mrs Hannan referred to was not in practical terms an obstacle.

119.4. The Claimant only worked 2 days – his absence had therefore a more limited impact on costs.

120. We considered whether, because the PTSD stemmed from an accident at work that, could be a factor we could take into account. While of course it made us really sympathetic to the Claimant, we concluded this was no more or less of a misfortune than any driver who, through sickness became disabled and could not

drive. The cause of the disability and whether it is connected to work are not factors set out in the Code. We did not therefore take in into account.

121. The factors that suggest this step was not reasonable are:

121.1. whether it was likely to be effective. We refer above to our discussion of the prospects of recovery. While there was 'a' prospect of recovery in a period of extended leave, after much discussion, we all agreed it was small prospect for the same reasons Mrs Hannon reached her decision. There was an uncertain prognosis, a lack of progress so far despite treatment, and even the chance of alternative employment was reduced by the pool of other staff and reduced by the complete lack of computer skills.

121.2. Albeit a lesser factor, there were some costs to this measure in extra overtime and holiday pay, and some sick pay.

121.3. There was the potential by his absence to give rise to overtime costs and gaps in service. In relation to this case this was not weighty because he only worked on weekends.

121.4. Where extended time had been given, this was because it was effective to bring the driver back – certain return dates. This was not the case here.

122. We then balanced these factors. With a focus on the practical result of a proposed adjustment we concluded that the extension of sick leave was not a reasonable adjustment: the chance of it being effective was small and effectiveness – the likely practical outcome – weighed most heavily in our assessment.

123. We decide therefore that the Respondent did not fail to make a reasonable adjustment in this case.

Section 15 Section 39

124. Our concern in this claim is whether the dismissal can be objectively justified. This is because dismissal was because of something (the absence) arising as a consequence of the disability.

125. What is the legitimate aim: the real business need or consideration? We must be specific about this. Here the Respondent had a need: to keep to its staffing cost budget in order to ensure that it was competitive in the next tender and a need to provide a good service to keep to the contract with TFL. The management of sickness absence was plainly relevant to meeting those needs: absence cost money and risked a reduction in service.

126. This dismissal was not therefore in our view solely a cost reduction exercise, rather it was as part of absence management the purpose of which was to keep to budget and the terms of its contract. These were in our view legitimate aims.

127. Was dismissal appropriate way of meeting the aim? Plainly the one was

connected to the other and therefore appropriate.

128. Was dismissal reasonably necessary to meet those needs? Could lesser measures have achieved them?

129. We have already decided that there were no reasonable alternatives or adjustments.

130. We asked ourselves again the question whether extending sick leave could be a lesser measure? If we consider only the Claimant then, very soon by the end June, it would only have cost the Respondent arguably some small amount of overtime and holiday pay to keep him employed. The Claimant worked two days a week, so this was not as large an expense as a full-time worker. We initially asked, was this really going to impact on the difference between winning and losing the next contract? We noted the risk of service disruption through his absence and the risk of no driver taking up the overtime needed. And we thought those risks not so great where only two days per week must be covered and where spare drivers were often used.

131. However, it seems to us in this part of our decision that we must consider the bigger picture beyond the Claimant's individual case. We are looking at the contention that this dismissal was reasonably necessary as part of absence management, in order to keep to budget and maintain service standards. We therefore also looked at the dismissal not as a one-off but as a decision as part of that absence management in general.

131.1. First, the budget point begins then to make more sense. In the Respondent's business is this not a theoretical argument: it has a pool of 30-40 staff on long term sick and looking for a temporary or permanent non-driving jobs. Inevitably some of those will be near the point where a decision has to be made about their future.

131.2. Second, the risks in service gaps when overtime is not taken up becomes greater the more driver absences are counted: this again is a real concern in the business as a whole because the Respondent always had driver vacancies.

132. To illustrate this point, if the Claimant's contract were extended for a year as he suggests, then holiday pay alone would cost the company £1383 (5.6 x gross) not including pension contributions. This does not include any extra cost of overtime. If the Respondent has an obligation to extend the Claimant's employment, then it would have the same obligation for other disabled drivers in the same or similar situation. Looking at the matter conservatively, let us say only 10 of the pool of 30-40 others were disabled and risking dismissal in any one year and say that those 10 worked an average of 4 days a week. The holiday pay bill alone (a cost the Respondent could not avoid legally) of extending their sick leave by a year would be about £27,000 very roughly. And this is before we consider the overtime cost and greater gaps in service those absences might create. The numbers of staff the Respondent has makes a difference. We emphasise this is purely illustrative, but it is not an unrealistic example for why overall the management of staff absence goes beyond one case. It shows that without some control, staff absence could realistically impact on the Company's ability to remain competitive and win its next contract.

133. Thus, although it is easy to say a large employer could have managed the costs of delaying the dismissal of one disabled driver, when it has a tight budget, in a competitive market, with additional service quality requirements to meet. It becomes far more difficult to do so when that large employer has 30-40 staff off sick at any one time on long term sickness absence and cannot drive, some of whom are likely to be disabled.

134. Once we look at the business overall, we agree with the Respondent that it was reasonably necessary to dismiss in order to meet its need as part of managing staff absence in order to keep to its budget and provide a good service.

135. The dismissal was therefore objectively justified, and the section 15 claim does not succeed.

136. In conclusion the Claimant was not unfairly dismissed and there was no disability discrimination.

137. We would like finally to observe that we have a huge amount of sympathy with the Claimant. He had an excellent work record. He was committed to his job which at times could be difficult. Our decision is no reflection on his record.

Employment Judge Moor
Date: 24 January 2022