EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr C Miah	**v**	**London Borough of Islington**

Heard at: Watford (remotely by CVP) **On:** 1 to 3 March 2022

Before: Employment Judge Wyeth

Appearances:

For the Claimant: Ms C Goodman (Counsel)
For the Respondent: Miss S King (Counsel)

RESERVED JUDGMENT

1. The respondent accepts liability for the claimant's complaint of unauthorised deduction of wages and must pay to the claimant the agreed sum of £6,274.34

2. The claimant was fairly dismissed.

REASONS

The claims

1. By way of a claim form issued on 25 March 2019 the claimant brought complaints of ordinary unfair dismissal, unauthorised deduction of wages and race discrimination. The respondent defended the claims. The race discrimination was not particularised at all and was struck out by way of a Judgment sent to the parties on 13 December 2019 after the claimant failed to comply with two previous orders requesting details of this complaint, one of which was an Unless Order. Shortly before this Hearing, the respondent conceded the unauthorised deductions complaint and it was agreed that it would pay the claimant the sum of £6,274 in accordance with the amount specified in the claimant's schedule of loss.

2. Accordingly, only the complaint of unfair dismissal remained extant before me.

The issues

3. The matter came before EJ Hyams on 11 June 2020 who undertook case management (not least because of the difficulties caused by the pandemic and the restriction upon in person hearings). The matter was due to be heard on 31 August 2021 but due to failings on both sides in relation to the preparation of the case and witness availability EJ Alliott reluctantly postponed the hearing to 1 March 2022 for three days and ordered further case management.

4. The issues for this final Hearing were identified and set out in EJ Hyams' order sent to the parties on 28 June 2020. He recorded them as follows:

   "*11.1 What was the reason for the claimant's dismissal? (It appears likely that the respondent will satisfy the tribunal that the claimant's dismissal was for his conduct, but it is for the respondent to satisfy the tribunal that that is the case.)*

   11.2 Was the investigation which was carried out one which it was within the range of reasonable responses of a reasonable employer to carry out? (I do not understand that the claimant is challenging the fairness of the procedure followed in deciding that he should be dismissed.)

   11.3 Were there reasonable grounds for deciding that the claimant had committed the misconduct for which he was dismissed? (I do not see the respondent having much difficulty in that regard.)

   11.4 Was the claimant's dismissal within the range of reasonable responses of a reasonable employer? (This in my view is likely to be the key area of contention, given the factors that I describe in paragraphs 5 to 9 above.)

   11.5 If it was within that range, did the claimant fail to mitigate his losses by rejecting the offer of alternative employment described in paragraph 10 above?

   11.6 In addition was the claimant guilty of contributory conduct such as to justify a reduction in the basic or compensatory award payable to him in the event of the success of his claim of unfair dismissal?

   11.7 Had the claimant satisfied the tribunal that his overtime was underpaid to any extent at any material time?"

5. Reference to paragraphs 5 to 9 of his order relates to observations EJ Hyams made regarding the fact that the claimant had been dismissed for two distinct acts of misconduct and how the approach to both might impact upon the fairness of the dismissal. He referred to the House of Lords decision of Smith v City of Glasgow District Council [1987] ICR 796. That case involved dismissal for conduct of which part was not established or believed to be true. EJ Hyams commented, however, that Smith may not be directly on the point in this case. Nevertheless, he rightly identified, as the representatives did before me at the start of this Hearing, that the real focus of this case was on

the issue of whether the decision to dismiss the claimant for the misconduct alleged fell within the band of reasonable responses.

6. It was also agreed that I would consider issues relevant to liability only at this stage (including matters of contributory conduct and whether any failure to follow a fair process would have made any difference to dismissal). Other issues relevant to remedy would be clarified after any liability had been established. A remedy hearing was provisionally listed with the parties for 26 April 2022.

Evidence

7. Prior to the start of the hearing I was provided with a witness statement from the claimant consisting of 14 pages. For the respondent I received witness statements from Ms Nicolina Cooper, the disciplining officer (consisting of nine pages); and Mr Andrew Bedford, the appeal officer (consisting of seven pages). I also had before me an agreed electronic bundle consisting of 1524 pages. I observed that a bundle of that size, given the issues and the number of trial days, appeared contrary to the overriding objective and wholly disproportionate. I read the statements and the documentary evidence to which I was referred. I was greatly assisted by counsel for both parties who directed me to any further relevant documentation beyond what I had been referred to in the witness statements. Much of the remaining documentation related to the claimant's unauthorised deduction claim, which had been conceded by the respondent shortly before this Hearing not least because of a lack of documentation on the respondent's part enabling it to defend that claim. As a consequence a large amount of the bundle was irrelevant.

8. I heard evidence from the respondent's witnesses first in the following order: Ms Cooper and Mr Bedford. I then heard evidence from the claimant. The evidence was concluded by the end of day two. I heard submissions on behalf of the claimant and respondent in that order on the afternoon of the third day because the tribunal was unable to sit that morning. There was insufficient time for me to provide an extemporary judgment and reasons. I offered the parties an extra day to enable me to deliver a decision but instead both sides opted for a reserved judgment.

Findings of fact

9. I make the following findings of fact on the balance of probabilities from the evidence before me. Hereafter I use the term "respondent" and "Council" interchangeably.

10. The claimant began employment with the local authority respondent on 16 September 2013 as a Passenger Service Vehicle driver for the Accessible Community Transport ("ACT") service, having worked as an agency worker for the respondent since 2009. Primarily he was a bus driver responsible for transporting children with special educational needs and learning difficulties to and from Samuel Rhodes Primary School ("the school"). By definition those children were vulnerable.

11. In accordance with the claimant's contract of employment it was a condition of his employment that he adhere to the Council's code of conduct ("the Code") setting out the standards of behaviour and conduct expected of staff.

12. In accordance with the general expectations within paragraph 2.1 of the Code (p437), employees are required to "*deal appropriately with difficult and/or potentially compromising situations*."

13. Under the heading "High Standards" (p438) paragraph 4.4 states:

"*At all times employees are required to:*
- *give the highest possible standard of service to the public and make service delivery their main priority;*
- *do nothing inside or outside their working hours which could undermine public confidence in them as Council employees and/or in the Council;*
- *work in the best interests of the Council and the community it serves;*
- *do nothing which results in the Council (or any other public authority) being denied revenue to which it is entitled …;*
- *Follow Council policies and procedures and meet laid down standards.*"

14. A little further on there is a section headed "Behaviour at Work" (p440) containing paragraphs 4.14 and 4.15 which state:

"*4.14 The way employees behave at work directly affects the service, colleagues, the workplace, and the public's perception about Council services.*

4.15 council employees must always:

- *show respect for the public and colleagues and behave in a way which cannot reasonably cause offence to anyone*
- *exercise self-control – never behave in a loud, aggressive and angry manner, nor use foul and abusive language.*"

15. It could be said that these are matters of common sense and common decency and need no clarification in writing but the fact that they are set out in unequivocal terms within the code of conduct leaves no room for doubt about the respondent's high standards and expectations of its staff.

16. The council also has a detailed disciplinary procedure (pp404-428). Section 6 of that procedure sets out the arrangements that are necessary for a formal disciplinary hearing. Section 7 covers the appeal procedure and further guidance is contained in the various appendices. Examples of misconduct and gross misconduct are listed in Appendix 4. There are numerous examples of the type of behaviour that would be regarded as gross misconduct in section two. The list of examples in paragraph 2.1 contains the following:

(c) serious failure to comply with the code of conduct;
(f) physical assault, fighting and threats of violence;

(t) bringing Islington Council into disrepute (lack or decline of good reputation);
(u) undermining trust and confidence; and
(v) conduct which jeopardises health and safety.

17. Again, it could be said that these are matters of common sense but nevertheless the policy serves as an unequivocal reminder of the kind of conduct that the respondent will regard as sufficient to justify summary dismissal.

18. On 18 October 2018 the ACT Service manager, Mr Ian Spencer, received a complaint from the Associate Headteacher at the school relating to the claimant's behaviour that morning. Mr Spencer is the 'grandparent' line manager of the claimant. Mr Bagshaw who line managed the claimant was in turn line managed by Mr Spencer.

19. In essence it was alleged that the claimant had behaved inappropriately in a loud, aggressive and angry manner towards a taxi driver who was also providing a service to the Council in an area where the actions were witnessed by school staff and members of the public.

20. For the most part there was little dispute between the parties about what actually happened. The taxi driver was transporting another child to the school and had parked in the space allocated for school buses next to the main door in to the school for SEN children resulting in the claimant being unable to park directly outside the school. Instead, the claimant had to double park on the road next to the taxi. The taxi driver maintained he had been there about ten minutes and was unable to move because the child being transported was refusing to leave his vehicle and that staff were trying to persuade the child to get out. The claimant says it was not uncommon for vehicles to park in the space allocated for buses and this had been a source of concern for him and a matter that he had previously reported to his line management.

21. Likewise, there is no dispute between the parties that the claimant got out of the bus and proceeded to take pictures of the taxi - a step he says he had taken in relation to other vehicles parked similarly in the past. The claimant says he took this action to protect his own position given that he was unable to park in the allocated space.

22. Much of the dispute between the parties involved what happened next. The taxi driver maintained that when he asked the claimant why he was taking pictures of his taxi the claimant told him to fuck off. He said that this upset him and in reply he said to the claimant "you are an idiot". The claimant maintains that he was not the one to swear and that the taxi driver called him a "fucking idiot." Be that as it may, there was no dispute between the taxi driver or the claimant that in response to being called an idiot the claimant approached the taxi driver who remained in his vehicle.

23. The taxi driver claimed that when the claimant had approached him in his vehicle the claimant had thrown a punch at him but failed to hit the driver as he managed to move out the way. The claimant always denied this,

maintaining instead that he had approached the driver to ask why he had called him an idiot and used foul language in front of the children.

24. The taxi driver also stated that it was necessary for school staff to intervene telling the claimant to stop and asking him to move away. Notably, the claimant accepted during the investigation meeting that one teacher intervened. He later told the respondent that he had been pushed by a member of staff, conduct he believed had been captured on CCTV footage recorded by a camera on his bus.

25. Later that day the respondent received an email from a representative of the company employing the taxi driver which contained a statement in the form of bullet points from the taxi driver setting out his version of events outlined above.

26. Thereafter, the claimant was asked by Mr Spencer to remain at home. Despite this instruction, the claimant believed that he was simply required to do a different job the next day and when he arrived at work the following morning (19 October 2018) he was met by his line manager, Mr Bagshaw who asked him to wait to see Mr Spencer.

27. The claimant says that when he met with Mr Spencer at around 9am he was told to go home and that Mr Spencer would call him later about what was expected of him. The claimant was due to work for Action for Children during the school holiday the following week and was unclear about whether or not he would be doing so.

28. Having heard nothing from Mr Spencer, the claimant emailed him on 23 October clarify his work situation. Mr Spencer explained that he had texted the claimant's work phone requesting that he remain off but this was not received by the claimant because he had no access to it as it was company policy for the phone to remain on the bus at the end of each shift. Mr Spencer informed the claimant that he was to attend the workplace on Friday 26 October 2018.

29. On 26 October 2018 the claimant went to the depot to meet with Mr Spencer who took the claimant to meet with Ms Cooper, Mr Spencer's line manager, who was at that time Head of Traffic and Parking Services.

30. It seems that the purpose of the meeting was to inform the claimant that he was being suspended in relation to two allegations of misconduct and that he would be expected to attend a formal investigation meeting on 1 November 2018. The allegations were set out in writing by way of a letter given by hand to the claimant (incorrectly) dated 23 October 2018 as follows:

"*On Thursday 18 October 2018 behaved inappropriately in a loud, aggressive and angry manner to a taxi driver who was providing a service to the Council. In an area where your actions were witnessed by school staff and members of the public. [sic]*

Inappropriate use of a Council vehicle to transport a student from school to home without any prior authorisation."

31. That letter following up this meeting (p147) is confusing. Clearly its date (23 October 2018) was incorrect because it refers to the meeting on 26 October 2018. It also suggests that Ms Cooper would be conducting the investigation when self-evidently that was not the position. Indeed, the letter states:

    "*Once I have heard your response to the allegations and completed my investigation the possible outcome is likely to be one of the following:*
    1. I may decide to take no further action;
    2. I may decide that it is appropriate to deal with the matter informally;
    3. I may decide to deal with the matter under the procedure for managing poor work performance;
    4. I may decide to refer the matter to a formal hearing;
    5. I may decide to take some other course of action appropriate to this case."

32. The letter states on the second page that the claimant will continue to be suspended on full contractual pay while "*I conduct this investigation*" then lists a number of conditions to apply during that period of suspension. Notably, there was an expectation that the claimant would liaise predominantly with Mr Homer if necessary during his suspension and Mr Homer is identified (on the first page) as the person to ask for when arriving for the meeting on 1 November 2018.

33. The confusion in the way this letter was written did not appear to be much of a feature in the disputed areas of this case not least because the parties had accepted in advance that the issues in this case did not include any real challenge to the disciplinary procedure followed by the respondent in reaching its decision to dismiss the claimant. Indeed, as I noted above this very point was recorded by EJ Hyams in his case management order of 11 June 2021 and the parties representatives confirmed at the outset of this hearing that his record of the issues set out at paragraph 11 was accurate and complete.

34. In any event, the claimant would have been in no doubt from 1 November 2018 that Mr Homer was conducting the investigation and not Ms Cooper because he attended the investigation meeting with his GMB trade union representative, Mr Carpenter on that day.

35. Having been appointed the investigating officer Mr Homer prepared a disciplinary procedure management report dated the 29 November 2018 (pp167-171) with evidence in the form of notes of meetings and witness statements attached in appendices 1 and 2 (pp172-197).

36. I turn first to allegation one relating to the taxi driver.

37. In the process of completing that report Mr Homer interviewed eight witnesses to the incident including the claimant and the taxi driver. The remaining six witnesses were staff at the school (teachers or teaching assistants) none of whom were direct employees of the respondent. An additional written statement was obtained from the passenger assistant who was apparently employed by HATS (the company employing the taxi driver).

38. After considering all the evidence he had gathered from each of the witnesses, Mr Homer drew the following salient conclusions in relation to the incident on 18 October 2018.

39. A heated verbal altercation had taken place between the claimant and the taxi driver. During this time passenger assistants, teachers and teaching assistants were in the process of helping to get children off the bus and out of the taxi.

40. There was a particular difficulty getting the child out of the taxi resulting in the taxi being parked longer than it would have otherwise been parked. Teachers and teaching assistants became concerned at the nature of the altercation between the claimant and the taxi driver which appeared to them to be heated and physical. Indeed, one of the teachers (or teaching assistants) found it necessary to radio the Deputy Headteacher warning that there was an altercation that might become physical.

41. Another teacher or teaching assistant intervened and escorted the claimant away from the scene back on to the bus. The claimant appeared to be extremely agitated and visibly upset by what had been said to him by the taxi driver. There was no active onboard CCTV recording system on the bus that day as the hard drive had been removed to assist with the investigation into a separate incident on 17 October 2018 (this matter is addressed below). None of the witness statements or interviews corroborated the use of foul language other than one teaching staff member reporting that the claimant was said to have asked the taxi driver "why are you calling me a fucking idiot?". As such Mr Homer did not determine that the claimant used such specific language towards the taxi driver.

42. Mr Homer acknowledged the dispute of fact between the taxi driver and the claimant about whether there was an attempt by the claimant to hit the taxi driver (which the claimant denied). Notwithstanding the claimant's denial, Mr Homer referenced the fact that several of the witnesses from the school recalled the claimant leaning in through the window of the taxi, had bent down to reach eye level with the taxi driver and was grabbing the taxi driver whilst leaning in. They claimed that although the claimant did not hit the taxi driver "it was physical". Based on that evidence, Mr Homer concluded that the claimant was physically aggressive and threatening towards the taxi driver but did not actually physically assault him.

43. Mr Homer did also reference the fact that the taxi driver acknowledged calling the claimant an idiot. However, the witnesses generally described the claimant as agitated and upset and repeatedly asking the taxi driver why he had called him an idiot. He noted that the witnesses generally described a heated verbal altercation with raised voices and a threatening physical posture in the presence of the vulnerable children, parents and teaching staff whilst acting as an employee of the respondent and being responsible for a council vehicle and the safety of the children as bus passengers. Notably Mr Homer concluded that it was clear that it was the intervention of one or more of the teachers or teaching assistants that led directly to the end of the altercation. In summary, Mr Homer determined that the evidence showed that the claimant had responded to what was a difficult and stressful situation

in an inappropriate manner and in breach of the Council's code of conduct. He went on to conclude that the claimant's behaviour constituted misconduct or gross misconduct under the Council's code of conduct.

44. I interpose here that during the claimant's evidence I asked him why so many of the witnesses in this investigation (who worked at the school and were not colleagues of his working for the respondent council directly) would give evidence that was clearly unfavourable to the claimant. In essence, his response was that they were conspiring against him in support of their colleague who he alleged had pushed him during the altercation with the taxi driver having told her at the time that she was being filmed by the CCTV device on his bus that he believed to be recording events. I find that explanation implausible and conclude on balance that the testimony provided to Mr Homer was genuine and not tainted by any form of bad faith. Furthermore, the account of a considerable number of those contributors to the investigation indicated undoubtedly that the claimant was the aggressor.

45. Notably, the claimant accepted during his investigation meeting with Mr Homer that the assistant head, referred to as "Mo", came on to the bus after he had walked away and told him to calm down. He also accepted that at least one teacher intervened to calm things down (p175).

46. It is clear from any objective reading of those statements (pp177 to 197), coupled with the notes of the meeting with the claimant, that Mr Homer's report was fair and balanced and properly reflected what he had been told. Furthermore, from that witness testimony, on the balance of probabilities, it was the claimant who was the aggressor that morning notwithstanding provocation from the taxi driver. There is little dispute that it was the claimant who: 1) approached and confronted the taxi driver in circumstances where he could and should have simply walked away; 2) was seen to have leaned in to the taxi driver's window; 3) was said to have been grabbing the taxi driver; 4) had to be ushered (if not pushed) away (p183); and 5) was said to be agitated and had to be calmed down. During all that time the taxi driver, unlike the claimant, remained in his vehicle. Furthermore, this behaviour was taking place in full view of members of the public, school staff, the vulnerable child who was a passenger in the taxi and right next to the claimant's bus full of vulnerable children waiting to alight.

47. As for allegation two, Mr Homer asked the claimant at the meeting on 1 November 2018 to explain what happened regarding that matter. From the notes of that meeting the claimant told Mr Homer that he was issued a list in September of the children permitted to be on the bus. He also accepted that the child in question who he had allowed on to the bus, who he says was familiar to him since attending primary school and was friends with another child who travelled on the bus, was not on that list.

48. Mr Homer also asked Mr Spencer (the claimant's grandparent line manager) about this incident during his investigation meeting with Mr Spencer on 7 November 2018 (pp178-179). Mr Spencer explained that CCTV footage of the incident on 18 October involving the taxi driver was not available because a colleague had removed the hard drive from the claimant's bus to investigate a complaint he had received from a passenger assistant that the claimant had

apparently transported a child who was not on the 'round sheet'. According to Mr Spencer, allegedly the claimant had allowed this to happen more than once. He maintained that the footage proved that the child was present on the bus on 17 October 2018 even though the child was not an authorised passenger. Notably, Mr Spencer suggested to Mr Homer that the claimant did not have bad motives for this but that the Council could be challenged on safeguarding. He added that the claimant had good intentions but that it still should not have happened.

49. Mr Homer summarised the above in the second part of his investigation report and concluded that the claimant did knowingly transport a child on his bus who was not on the passenger list on at least one occasion, namely 17 October 2018. He added that this behaviour constituted misconduct under the Council's Code of Conduct.

50. I am satisfied on balance that there was no malice on the part of Mr Spencer towards the claimant in relation this allegation. Firstly the claimant accepted that he had transported a child who was not on the list. Secondly, Mr Spencer appeared to be making allowances for the claimant's conduct by acknowledging the claimant's "good intentions", something he was very unlikely to do if this was driven by antipathy towards the claimant. Thirdly, on account of the fact that a passenger assistant saw fit to complaint to the ACT management about the claimant's decision to allow the child passenger on to the bus, this would suggest that it was known by those involved in the transport of children that this was not something that was appropriate regardless of any good intentions.

51. I also find that the account of what happened on 17 October 2018 given by the claimant in his witness statement at paragraphs 49 to 56 is not one that he offered to Mr Homer at the investigation meeting (or, for that matter, Ms Cooper at his subsequent disciplinary hearing and Mr Bedford who heard his appeal). He did not mention to any of them anything of what he now says before this tribunal despite being represented by his trade union at both meetings.

52. In the recommendations section of his report, Mr Homer concluded that in respect of both allegations a disciplinary offence had been committed amounting to misconduct or gross misconduct and that both allegations should be referred to a formal disciplinary hearing.

53. The claimant attended a disciplinary meeting chaired by Ms Cooper on 17 December 2018. At that meeting he was once again accompanied by his trade union representative Mr Carpenter of the GMB union. A note of that meeting is at pp203 to 206. Surprisingly, however, there was no letter of invite to that meeting. I was told that the respondent appeared to be unable to locate a copy. As a consequence, there was nothing in written evidence before me to clarify exactly what documentation was sent to the claimant in advance of that meeting. There can be no doubt that this poor record keeping (coupled with the confusing content of the letter erroneously dated 23 October 2018 referred to above) reflects negatively on the respondent in terms of the care it has taken to preserve relevant correspondence during this process. Be that as it may, I am drawn to the conclusion that on the

balance of probabilities the claimant did receive the full investigation report and appendices (statements and meeting notes) in advance of his disciplinary meeting because it would have been an inevitable point of challenge no doubt by his union representative at the outset of the meeting if such documentation had not been provided beforehand. Furthermore, this would have been an obvious challenge to make to the general fairness of the procedure followed in the lead up to his dismissal. This was not a point that was being advanced on the claimant's behalf at any of the preliminary hearings (including the one before EJ Hyams at which the issues were initially clarified and agreed).

54. At the outset of the disciplinary meeting, Ms Cooper asked the claimant if he was admitting the allegations. Initially the claimant stated that he was denying the allegations but after some initial discussion about the lack of access to the CCTV footage, the claimant indicated to Ms Cooper that he was admitting allegation two (transporting a child without authority). Ms Cooper sought clarification again that the claimant was admitting allegation two and he confirmed this to be correct. As a result no further discussion about the incident involving allegation two took place and certainly what the claimant now advances in his witness statement was not something that was put by him or on his behalf at the disciplinary meeting.

55. At the disciplinary meeting the claimant's union representative raised a concern that the bus was able to be utilised without the availability of CCTV. The claimant then alleged for the first time during the disciplinary process that one of the teachers pushed him during the incident. That is, of course, consistent with the statement of that staff member on p183. On the balance of probabilities, I find that it is quite possible that the member of staff did push the claimant to some degree but if that occurred it was in an effort to separate the claimant from the taxi driver so as to avoid the situation deteriorating further. Indeed, in her statement the member of school staff refers to the fact that the claimant accused her of pushing him but remarks that "they [the claimant and the taxi driver] were fighting".

56. Ms Cooper explained that the CCTV camera was installed for the purposes of safeguarding the children on the bus.

57. The claimant also denied that there was a child in the back of the taxi and produced photos in support of that assertion. However, the notes of the meeting record that Ms Cooper considered that the photos were indecisive and asked the claimant how they showed that no child was in the car, particularly as three witnesses said that the child was present. There was some uncertainty whether the photos in the bundle before me were those that were produced at the disciplinary hearing. Nevertheless, whether or not the child was in the taxi could not be established from the photos in the bundle of evidence before me either. I interpose here that given the reference by Ms Cooper to the claimant as to what particular witnesses have said, again, if the claimant had not received the witness statements in advance of this meeting, this discussion would have taken an entirely different form. Having regard to that discussion and analysis I conclude on balance that it was reasonable for Ms Cooper to determine that the child remained present in the taxi during the altercation.

58. The claimant also raised his concerns about parking issues outside the school. Ms Cooper's response was that the claimant's role was not enforcement.

59. After a short adjournment, Ms Cooper reconvened the meeting and informed the claimant that he was to be dismissed with five weeks' notice paid in lieu. She concluded that the claimant's behaviour towards the taxi driver was unacceptable, exacerbated by the fact that this took place in front of vulnerable children, and that this had destroyed the trust that should exist between an employer and employee.

60. In conclusion, the claimant indicated his intention to appeal his dismissal and referred to his ongoing pay dispute with the Council in which he had involved his MP, the Right Honourable Jeremy Corbyn, implying that this might have had some bearing on this matter. I do not need to go into detail in relation to that pay dispute save for the following. There was no dispute that Mr Spencer was initially responsible for investigating the claimant's complaint regarding his pay. The matter was then referred to Ms Cooper (Mr Spencer's superior). Ms Cooper was cross-examined about certain email communications referring to the pay dispute between her and Mr Spencer. In an email dated 6 September 2018 on pp113-114 she says to Mr Spencer: "*Ian, please can I have* [the claimant's] *timesheets. I am meeting him next week and need to get these to HR and respond to the many complaints he has put in via various channels. I have asked several times for this now, what is the holdup? Nic*". On any objective reading of that email Ms Cooper was engaging with the claimant's complaint and seeking to advance the investigation. Furthermore, there is an apparent sense of frustration at the lack of response she had received to her requests for the documentation needed to resolve the issue one way or another (something she confirmed in her oral evidence before me). There was nothing in Ms Cooper's evidence to this tribunal that suggested she was approaching the claimant's pay dispute with reluctance or frustration. I find as fact that there did not appear to be anything untoward in the way she was approaching that complaint.

61. Ms Cooper followed up that meeting with a letter dated 19 December 2018 (pp201-202) confirming her decision to dismiss the claimant. Her letter noted that the claimant had admitted the second allegation and that she considered that the first allegation was made out on the basis of the evidence collated by Mr Homer. She expressed concern that leaving the vehicle to challenge the taxi driver placed the children in the claimant's care in a vulnerable situation. Ms Cooper was challenged in cross examination about this reference in her letter. It was put to her that the claimant's actions did not put the children in a vulnerable position. Even if that was a fair proposition, I am satisfied that this reference is not the sole basis for her decision. On the contrary, Ms Cooper had already recorded in her letter that the second allegation was not in dispute and the first allegation was made out. In any event, I am satisfied that Ms Cooper's reference was reinforcing the fact that the claimant had vacated his vehicle whilst it was double parked in the road in a position that the claimant himself considered dangerous enough to result in him taking another driver to task. In the process, he had left a group of vulnerable children in the vehicle whilst he engaged in an altercation with the taxi driver.

I am not at all satisfied that this was an unreasonable reference or that it suggested Ms Cooper's focus and conclusion was misguided in some way.

62. By an email dated 10 January 2019, the claimant appealed the decision to dismiss him. In short, the claimant challenged the decision on the basis that no reasonable manager could have reached the decision to dismiss him in the circumstances. He also suggested that his pay dispute may have been a factor in the decision and that dismissal was a means of avoiding that issue. Notably the claimant did not suggest anything in his grounds of appeal that challenged Ms Cooper's understanding that the claimant had admitted allegation two.

63. The claimant was invited to an appeal meeting on 1 February 2019 chaired by Andrew Bedford, Head of Public Realm (Greenspace & Leisure) Environmental & Regeneration Department. Again, I simply remark that somewhat surprisingly the invite letter was absent from the bundle before me but the omission of that letter before me had no relevance to the actual process followed. Ms Cooper was present at the appeal meeting and the claimant was represented by a different union representative, Mr Sharkey of the GMB union. Numerous matters were discussed including the absence of CCTV footage. Mr Bedford queried why the claimant had left the bus to take photos of the position of the taxi if he believed the CCTV to be working. In reply the claimant said that the footage would not have shown what he wanted.

64. It was suggested by Mr Sharkey on the claimant's behalf that a final written warning would have been more appropriate and a change of bus route, given that the claimant's overall character was not in question.

65. It was suggested again that the pay dispute had influenced Ms Cooper's decision, something that she categorically denied when addressing Mr Bedford at the appeal meeting. She said that the claimant had instead failed to understand the severity of the incident involving the child in question (in the taxi) who had been removed from the bus because of her vulnerability and was present whilst the altercation with the taxi driver took place.

66. Amongst the matters discussed, Mr Bedford asked Ms Cooper if she considered alternatives to dismissal. In reply Ms Cooper stated that she had but was concerned that the claimant may behave in the same way again. She considered he had shown no remorse, even at the appeal stage. When Mr Bedford asked the claimant for his response to that suggestion, he expressed the view that he had done nothing wrong.

67. Ms Cooper was adamant that she stuck by her decision that, in effect, all trust in the claimant had been lost.

68. At the end of the meeting following a short adjournment, Mr Bedford explained that he was upholding the decision to dismiss because the claimant had caused stress and anxiety to vulnerable children in his care and had shown no remorse or acknowledgement that his actions were inappropriate. Notwithstanding this, Mr Bedford indicated that because the failings were (in his view) around safeguarding, he was willing to offer to downgrade the

decision to dismiss to a final written warning on record for three years on the basis that the claimant transferred to an alternative role at the same grade but working as a driver/loader in the waste and cleansing service.

69. The claimant declined this offer not least because he considered the work involved to be very different from the bus driver role he had performed up to the point of dismissal. Consequently, the claimant's dismissal was not overturned. I find as fact that the offer of alternative employment away from vulnerable children was in effect a benevolent gesture towards the claimant that the respondent was not obliged to make and one that would not have been made if there had been an agenda to remove him because of the ongoing pay dispute to which the claimant referred. It was not a reflection on the appropriateness of the decision to dismiss the claimant. It may well be that this role did not appeal to claimant but Mr Bedford had no reason to believe that to be the case at the time he made the offer.

70. The appeal outcome was confirmed in writing to the claimant by letter dated 7 February 2019.

Submissions

71. Both counsel went to considerable time and effort to prepare and provide me with comprehensive written submissions. I read each of these with great care and considered the content as part of the process in coming to my decision.

72. I should add that each party was very well represented by their counsel, both of whom argued their respective client's cases with real force and persuasion.

The law

73. The law relating to unfair dismissal is predominantly contained in Part X ERA 1996. The respondent must first demonstrate that the principal reason for the claimant's dismissed was for one of the potentially fair reasons set out in s98 (in this case, misconduct). The tribunal must then consider whether the dismissal was generally fair and, more specifically, whether the employer acted reasonably or unreasonably in treating that reason as sufficient for dismissal. The burden of proving whether or not a dismissal was reasonable is a neutral one.

74. This reference to the 'principal reason' for dismissal is aimed at preventing employers from putting forward multiple reasons under different headings in the hope that one or two might be accepted as the basis for a potentially fair dismissal. Smith v Glasgow City District Council [1987] ICR 796, HL (applied by the EAT in Robinson v Combat Stress EAT 0310/14) and Broecker v Metroline Travel Ltd EAT 0124/16 have established that, where the employer has a number of different complaints against the employee, each of which forms part of its reason to dismiss, a tribunal must examine all those complaints because together they comprise the reason for dismissal. The tribunal must then go on to assess fairness under s98(4) ERA on the basis of that composite reason. It is not open to a tribunal to determine that an employer could have dismissed fairly on any one of the points comprising the decision to dismiss if others are not made out unless an employer is alleging

different grounds for dismissal and each ground justified dismissal independently of the others. In short, it is not for a tribunal to determine that an employer *could* have been dismissed for any of the alleged conduct. Instead, it is necessary to properly identify the principal reason for dismissal and be satisfied that if dismissal was for the composite reason, each of the allegations is made out in accordance with the test to be applied.

75. In accordance with the seminal case of British Home Stores Limited v Burchell [1980] ICR 303, the respondent is not required to have conclusive direct proof of the claimant's misconduct, only a genuine belief on reasonable grounds after carrying out as much investigation into the matter as is reasonable in the circumstances.

76. When deciding the issue of reasonableness, the tribunal must apply the band of reasonable responses test. Consequently it cannot substitute its own view for that of the employer but must instead ask the question as to whether no reasonable employer would have dismissed in those circumstances. Only then will a tribunal conclude that a dismissal fell outside the band of reasonable responses.

77. Furthermore, the band of reasonable responses test also applies to the extent of any investigation required to be conducted by the respondent in accordance with the third limb of the Burchell test. Again, the tribunal cannot substitute its own view as to what it would have done to investigate the matter but must instead ask itself whether what was done in terms of the investigation fell within what a reasonable employer would have done in those circumstances (J Sainsbury plc v Hitt [2003] ICR 111, CA).

78. The Court of Appeal decision in Newbound v Thames Water Utilities Limited [2015] IRLR 734 serves as a reminder to tribunals and parties that the band of reasonable responses is not an infinite one. It does have boundaries and it is right that the tribunal properly identifies those boundaries.

79. The ACAS Code of Practice on Disciplinary and Grievance Procedures sets out the basic requirements of fairness that will be applicable in most conduct cases and is to be taken into account by a tribunal when determining the reasonableness of the dismissal in accordance with section 98(4).

80. If compensation is to be awarded then the tribunal must order the respondent to pay a basic award (calculated on a standard formula) and a compensatory award. In accordance with s123(1) ERA the compensatory award is to be such amount as the tribunal considers just and equitable. Both awards may be subject to reductions for certain reasons. Section 122(2) ERA provides that the basic award may be reduced where the claimant's conduct before dismissal renders it just and equitable to do so. Under s123(6) ERA, the tribunal must likewise consider whether the claimant contributed to their dismissal in some way and if so reduce any compensatory award accordingly. For a reduction to be made for this reason, the relevant action by the claimant (proven on the balance of probabilities) must be culpable or blameworthy; it must have actually caused or contributed to the dismissal; and it must be just and equitable to reduce the award by some proportion. Furthermore, the compensatory award may be reduced where it is evident that the claimant

might have been dismissed fairly regardless of any actual unfair dismissal (the Polkey principle).

Applying the law to the facts

81. Turning to the first issue – the reason for dismissal - I am satisfied that the claimant was dismissed for misconduct. For the reasons set out in my findings of fact, Ms Cooper, the disciplining officer, had an honest belief on reasonable grounds following reasonable investigation that the claimant had a) behaved in an inappropriate, loud, aggressive and angry manner towards the taxi driver; and b) had made inappropriate use of a council vehicle to transport a student from school to home without authorisation.

82. There was overwhelming evidence before the investigating officer and the disciplining officer that the claimant was the aggressor in relation to events on 18 October 2018 and that the claimant had been physically threatening towards the taxi driver (irrespective of any provocation). The decision maker need only have a reasonable belief that the misconduct is made out but, in any event, it was undisputed that the claimant left his bus and approached the taxi driver whilst the taxi driver remained sitting in his vehicle. That was ill-judged, wholly avoidable and unnecessary conduct on the part of the claimant and supports the conclusion, irrespective of the witness testimony, that the claimant was responsible for the escalation of the incident. Nevertheless whilst there was some inconsistency in the witness testimony (as would be expected), the general consensus was that the claimant was the aggressor. I reject the suggestion that all or a large proportion of the witnesses offering their account (who were not colleagues of the claimant) were doing so in bad faith or as part some form of conspiracy against him. That is both improbable and implausible.

83. Before moving on to consider the relevance of the composite reason for dismissal there is a further point that I should address for completeness when determining the principal reason for dismissal. Whilst it was never the claimant's case that he had been automatically unfairly dismissed for asserting a statutory right (s104 ERA) it was put on the claimant's behalf that the decision maker, Ms Cooper, may have been influenced to reached her conclusion because of her involvement in the pay dispute being pursued by the claimant. I reject that suggestion on the basis of the evidence before me and for reasons I have identified in my findings of fact.

84. Other than the fact that Mr Spencer and Ms Cooper happened to be involved in investigating the claimant's pay dispute, there was nothing to suggest that this had any bearing on the disciplinary proceedings leading to the claimant's dismissal. On the contrary, Mr Spencer, who had been responsible for looking into the claimant's pay issue, appeared to be giving the claimant some support in terms of allegation two by indicating to the investigating officer that the inappropriate conduct was with "good intentions", something the investigating officer reflected in his report. Furthermore, as referred to in my factual findings above, Ms Cooper appeared frustrated with Mr Spencer in an email she sent to him for his delay in providing the timesheets she had requested to enable her to properly investigate the claimant's complaint. I am alive to the fact that I must be sure that dismissal is not for an ulterior

reason even though circumstances exist that might entitle an employer to dismiss, akin to the kind of situation in Aslef v Brady [2006] IRLR 576 EAT. Need it be said, I am entirely satisfied that the reason or principal reason for the claimant's dismissal was his misconduct and nothing to do with his pay dispute.

85. The incident on 18 October 2018 was in large part of the claimant's own making and it was undoubtedly very serious misconduct. I do not doubt that the claimant was a devoted employee who thoroughly enjoyed his job and felt a sense of dedication to the children he transported. Nevertheless, I am satisfied on the balance of probabilities that on the day in question he inexplicably displayed aggressive behaviour towards the taxi driver in full view of vulnerable children, school staff and members of the public, something he has never accepted subsequently. He also accepted and admitted the misconduct in relation to the second allegation. It may well be that on reflection he regrets that admission and wished he had said more about the context of his behaviour as he seeks to do before this tribunal. Nevertheless, there is no doubt that he accepted that second allegation against him without challenge at both his disciplinary meeting and his appeal meeting – having been accompanied on each occasion by two different trade union representatives.

86. Having given careful consideration to the submissions made on the claimant's behalf, this is not a case in which he is assisted by the principle in Smith regarding composite reasons for dismissal. There is no doubt that the claimant accepted unconditional culpability for the second allegation of misconduct at both the disciplinary meeting and appeal meeting. I fully accept that such conduct of itself would not be sufficient to justify dismissal by an employer acting reasonably. Indeed, that may well be why the claimant was willing to accept culpability without challenge. This is not, however, a case in which the claimant has been dismissed for conduct that was unfounded as part of a composite reason. It cannot be said that dismissal must be unfair in circumstances where the respondent has taken account of admitted conduct that would not have justified the claimant's dismissal of itself alongside disputed conduct that it found to have occurred that was so serious as to justify dismissal.

87. The principal reason for dismissal was the composite reason of misconduct. The first allegation was made out because of the respondent's reasonable belief in the misconduct and the second allegation was made out by reason of the claimant's unconditional admission. The fact that the respondent did not seek to enquire about, or look behind, the claimant's admitted misconduct in relation to the second allegation did not render the dismissal unfair. Accepting the claimant's admission at face value was not outside the band of reasonable responses of a reasonable employer, especially in the circumstances I have outlined in my factual findings. As such both allegations were made out and dismissal for the first allegation alone (notwithstanding being coupled with the second allegation) was enough to justify the decision to dismiss.

88. Given the evidence, there was no challenge that could be realistically made to the procedure followed and I am satisfied that it was fair in all the

circumstances and complied with the spirit of the ACAS Code. Need it be said, I am satisfied that the investigation in relation to the first allegation was thorough and balanced and fell well within the band of reasonable responses. There was no need to undertake any further investigation in relation to the admitted second allegation.

89. There can be no doubt that the misconduct found to have occurred was sufficiently serious to justify summary dismissal in all the circumstances, irrespective of the claimant's length of service or past disciplinary record. It involved a physical altercation in which he appeared to be the aggressor that took place not only in public but in full view of vulnerable children towards whom he and others had a responsibility. It is not for this tribunal to determine whether it would have dismissed the claimant (notwithstanding the devotion he clearly had to his job). That is of course not the test and would be an error of law. His conduct was indeed gross misconduct. The respondent's decision to dismiss the claimant given the circumstances of this case cannot be said to fall outside the band of reasonable responses of a reasonable employer. It is noteworthy that during the appeal stage even the claimant's union representative suggested a final written warning as an alternative to dismissal, thus acknowledging to some degree the seriousness of the misconduct in issue.

90. Even if the dismissal was found to have been unfair in some way (which I have rejected) the evidence before me upon which my findings of fact are based leads me to the conclusion that irrespective of the claimant's dedication to his job, on 18 October 2018 he inappropriately lost his temper and behaved aggressively towards the taxi driver becoming involved in a physical altercation that was wholly avoidable if he had just walked away in response to anything the taxi driver said to him. All of this took place in front of vulnerable children, the safeguarding of whom was paramount. As such, I am bound to conclude that even if the dismissal had been unfair (which it was not) I would have reduced the claimant's compensation (both basic and compensatory award) by no less than 90 per cent to reflect the fact that, on the balance of probabilities, he was fully responsible for blameworthy and culpable conduct that resulted in his dismissal.

91. For all the above reasons, the claimant was fairly dismissed.

Employment Judge Wyeth
Date: 11 April 2022.
Judgment sent to the parties on

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For the Tribunal office