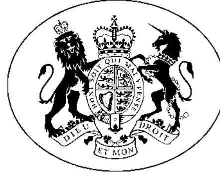

EMPLOYMENT TRIBUNALS

Claimant		Respondent
	v	
Mr R Sharpe		London General Transport Services Limited

Heard at: London South Employment Tribunal

On: 28-30 March 2022

Before: EJ Webster
Mr G Henderson
Mr M Marenda

Appearances
For the Claimant: Mr Onuegbo (Solicitor)
For the Respondent: Mr I Maccabe (Counsel)

JUDGMENT

1. The Claimant's claim for direct race discrimination is not upheld.
2. The Claimant's claim for harassment related to race is not upheld.
3. The Claimant's claim for health and safety detriment pursuant to s44 ERA 1996 is not upheld.
4. The Claimant's claim for unfair dismissal is not upheld.
5. The Claimant's claim for wrongful dismissal is not upheld.

WRITTEN REASONS

The Hearing

6. We were provided with a digital and hard copy bundles numbering 223 pages. We also received some additional documents in hard copy that had in fact been included in the digital bundle. We were provided with written witness statements for:

(i) The Claimant
(ii) Mr P Connolly
(iii) Mr D Barker
(iv) Mr N Wood
(v) Mr W Ashe

We heard from all 5 witnesses.

7. The issues of the case were agreed at the outset of the hearing. They largely reflected those as set out by EJ Mason at the preliminary hearing and were subject to the clarification given by the parties thereafter. Despite that clarification, the Tribunal was keen to understand the claimant's case with regard to s44 ERA 1996 and what detriments he was relying upon. Mr Oneugbo seemed to believe that he could bring a dismissal as a detriment claim under s44 ERA. When it was pointed at that this was not correct, he accepted that he had not specified that he was bringing an automatically unfair dismissal claim under s100 ERA 1996 and accepted that he was only able to put forward a detriment claim with the detriment being that the claimant was required to come in to work on 27 March 2020 despite raising health and safety concerns and his shielding covid status.

8. In all other respects the issues were as had been agreed between the parties at page 100l-n of the bundle and as cut and paste below.

9. Oral Judgment was provided at the hearing and the claimant requested written reasons at the conclusion of the judgment. The parties were made aware that the judgment would be published online.

The Issues

10. Unfair Dismissal

10.1 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (ERA)?
The Respondent asserts that it was a reason relating to the Claimant's conduct which is a potentially fair reason.

10.2 If the principal reason for dismissal was a fair one, was the dismissal fair or unfair in accordance with section 98(4) ERA, and, in particular, did the Respondent in all respects act within the so -called "band of reasonable"?

10.3 Was the procedure followed unfair and outside the band of reasonable responses in the following respects;
(i) the Claimant's suspension
(ii) the alleged failure to properly investigate;
(iii) the disciplinary hearing specifically

a. the alleged failure to provide the Claimant with a copy of the disciplinary policy/procedure before the disciplinary hearing;
b. the alleged failure to give him an opportunity to prepare;
c. the Respondent's appointment of a trade union representative for the Claimant at the appeal hearing and allegedly failing to advise him of his right to a representative of his own choosing;

(iv) the Respondent's failure to comply with relevant ACAS code in the following respects;

a) the alleged refusal by the Respondent to allow the Claimant's choice of companion to the appeal hearing;
b) the alleged imposition of a companion on the Claimant;
c) the alleged lack of fairness and transparency by the Respondent in allegedly failing to provide the Claimant their disciplinary policy and procedure, or where they can be found before the disciplinary hearing/appeal;
d) the alleged refusal by the Respondent to give the Claimant enough opportunity to put his case in response

10.4 Was the decision to dismiss unduly harsh and outside the band of reasonable responses because the Respondent allegedly failed to take into account;

(i) the stressful effect of COVID-19 on the Claimant which could have contributed to the accident;
(ii) his previous long unblemished record; and
(iii) that he had been off with chest pain the previous week?
(iv) that the Claimant was allegedly not provided any PPE
(v) that the Claimant's work environment was allegedly not safe due to lack of masks and social distancing procedure in the middle of a pandemic
(vi) that the Claimant allegedly required treatment rather than sanction
(vii) that no risk assessment was allegedly ever made before the Claimant was required to work in an unsafe work environment
(viii) that no return from sickness meeting/risk assessment allegedly took place before the Claimant was immediately returned to work which would have allegedly indicated that the Claimant is extremely vulnerable and require shielding

10.5 If the Claimant was unfairly dismissed and the remedy is compensation, should any compensation awarded be adjusted to reflect:

(i) mitigation or any failure on the part of the Claimant to take reasonable steps to mitigate his loss
(ii) the possibility that the Claimant would still have been dismissed on 2 April 2020 or in time anyway? (Polkey v AE Dayton Services Ltd [1987] UKHL 8);
(iii) any failure by either party to comply with a relevant ACAS Code of Practice and, if so, would it be just and equitable in all the circumstances to increase or decrease any compensatory award, and if so, by what percentage, up to a maximum of 25%? (s207 Trade Union & Labour Relations (Consolidation) Act 1992);
(iv) and/or any blameworthy or culpable conduct on the part of the Claimant which caused or contributed to the dismissal to any extent? (122(2) and 123(6) ERA)

Race Discrimination

The Claimant identifies as Afro Caribbean.

11. Direct race discrimination: s13 Equality Act 2010

11.1 The Claimant says the Respondent subjected him to the following treatment:

A) requiring the Claimant to continue working considering his health condition without any risk assessment in the middle of pandemic;
B) requiring the Claimant to return to front line work in a pandemic without any effort to prevent the risk to his health that the work may cause;
C) suspending the Claimant from work without risk assessment or care of any injury from the accident or effect of Coivid-19 rather than send him to the OT or redeploy him;
D) requiring the Claimant to continue working without any return from sickness meeting;
E) requiring the Claimant to continue to work in breach of health and safety;
F) requiring the Claimant to work in an unsafe environment;
G) refusal to allow the Claimant's companion of his own choice at the hearing/appeal;
H) refusal to provide the Claimant with the company disciplinary policy/procedure before and during the process;
I) refusal to allow the Claimant time to prepare to put his case;
J) Failng to have a return from sickness meeting with the Claimant before requiring him to return to frontline role which would have shown/prove that he is an extremely vulnerable person who should be shielded under the government guideline rather than deployed to frontline role;

11.2 Was that treatment "less favourable treatment", i.e., did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?
The Claimant relies on the following hypothetical comparator: a White bus driver in not materially different circumstances?

11.3 If so, was this because of the Claimant's race and/or because of the Claimant's race more generally?

12. <u>Harassment related to race: s26 Equality Act 2010</u>

12.1 It is not in dispute that the Respondent suspended the Claimant
12.2 Was that conduct unwanted?
12.3 If so, did it relate to the protected characteristic of race?
12.4 Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

13. If the Claimant was discriminated against and/or harassed and the remedy is compensation, should any compensation awarded be adjusted to reflect:
13.1 mitigation or any failure on the part of the Claimant to take reasonable steps to mitigate his loss; and/or
13.2 the possibility that the Claimant would still have been dismissed at the EDT or in any time anyway (Polkey v AE Dayton Services Ltd [1987]UKHL 8)?

14. <u>Wrongful Dismissal</u>

14.1 The parties agree that the Claimant's contractual/statutory notice period was 7 weeks.

14.2 Did the Claimant fundamentally breach the contract of employment by an act of gross misconduct?

14.3 If the Claimant was wrongfully dismissed, should any damages be adjusted to reflect:

(i) mitigation or any failure on the part of the Claimant to take reasonable steps to mitigate his loss; and/or

(ii) any failure by either party to comply with a relevant ACAS Code of Practice and, if so, would it be just and equitable in all the circumstances to increase or decrease any compensatory award, and if so, by what percentage, up to a maximum of 25%? (s207 Trade Union & Labour Relations (Consolidation) Act 1992) Health and Safety [jurisdiction of such claims is not accepted by the Respondent]

15. Health and Safety Detriment Claim – s44 ERA 1996

15.1 Did the Claimant bring to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety?

The Claimant relies upon going off sick.

15.2 If yes, did the respondent subject the claimant to a detriment namely requiring him to come into work on 27 March 2020?

15.3 Did the claimant, in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger?

The claimant relies upon going off sick.

15.4 If yes did the respondent subject the claimant to a detriment namely requiring him to come into work on 27 March 2020?

Facts

Background

16. The claimant was employed as bus driver from 23 July 2012 until his dismissal on 2 April 2020. The respondent states that he was dismissed for gross misconduct. The claimant claims that such a sanction was disproportionate, that he was treated less favourably due to his race and that he should not have been at work that day because he was concerned about his safety due to Covid and was meant to be shielding. He submits that he provided the respondent with a letter on 24 March 2020 from the NHS saying that he was at risk and needed to be shielding and that despite this he was told to attend work.

The Claimant's Health and general observations regarding the Covid pandemic

17. The claimant had been off sick with chest pains. He has explained that this was due to muscular pains. He returned to work on 23 March 2020. It is agreed that there was no return to work meeting between his return on 17 March 2020 or by the time he was dismissed on 2 April 2020.

18. The respondent did not have an explanation as to why. However they explained that return to work meetings were scheduled depending on the individual and the managers' shift patterns. This meant that meetings could happen between 1 and 12 days from the date on which the person returned to work. Managers only worked during the week and would not have been in the office when an individual was working an early shift or a night shift. The respondent witnesses were not sure why the claimant had not had one by the time of the incident on 27 March but suggested that the shift patterns might have been the cause.

19. The claimant states that he handed in a letter on 24 March 2020 that was an NHS letter telling him to shield. A copy of the letter was in the bundle. The letter is dated 21 March 2020. The claimant was on a rest day on 24 and 25 March 2020 but says that he came in on the 24th March to hand on the letter which he had received by post on the 23rd March after his shift had finished. He says that Mr Ashe told him to leave the letter at the counter and go to work.

20. The respondent maintains that they never received the letter. They say that they were receiving many of these letters at the time and had a procedure whereby individuals were immediately sent home on presentation of a letter. This was before there was a furlough scheme was enacted. Mr Ashe's evidence was that he had no conversation with the claimant and that he received no letter from the claimant. All the respondent's witnesses said that they had been unaware of the NHS letter until it was raised as part of the Tribunal process.

21. We conclude on balance of probabilities that the claimant did not provide the letter to the respondent. We reach this conclusions for several reasons including:

    (i) We do not find it plausible that the claimant would have continued to attend the workplace as many times as he did after receiving such a letter without raising a concern;
    (ii) We accept the respondent's witness evidence that none of the individuals involved in the process had seen the letter because if they had they would have acted differently and treated him as they treated the many other members of staff who were shielding;
    (iii) We accept the respondent witness evidence that they had many drivers who were required to shield and that at this early stage of the pandemic anyone who produced this letter was not required to work;
    (iv) The claimant did not mention this letter at any stage of the process including; the fact finding meeting, the disciplinary meeting, the appeal meeting, the Preliminary Hearing for this case or the further and better particulars provided by the claimant's solicitors. It was only raised as an issue in correspondence between the solicitors on 15 and 24 September 2021 when it was raised by the claimant's solicitor. The respondent had received the letter in July 2021 as part of disclosure but at the time it was

disclosed for (in the claimant's solicitors' words) mitigation purposes. There was no reference to it being relevant to the substance of the case.

22. For all of these reasons we find the claimant's account of whether he handed in the letter implausible. He had every opportunity to tell the respondent that he was shielding but did not do so and continued to come into meetings and attend work thus displaying no behaviour from which the respondent could have gleaned that he was meant to be shielding or was worried about Covid.

23. The claimant ascribes some of his behaviour during the incident on 27 March to the fact that he was very scared about getting Covid and that this was a distraction causing him to drive badly. The claimant's representative drew our attention to a Covid risk assessment carried out by the respondent on 26 March (the day before the incident) which recommended various measures be taken and highlighted the possible risk to the drivers. It was accepted by the respondent's witnesses that they did not consider the risk assessment at all during the investigation, the disciplinary process or the appeal as they did not think it was relevant. We agree that it was irrelevant to the incident involving the claimant on 27 March 2020. It was a risk assessment about Covid infection for drivers at the very early stages of the national lockdown. The claimant had not seen the risk assessment as at the date of the incident. The risk assessment was not in any way related to the undisputed driving errors made by the claimant on 27 March. The respondent had no reason to consider Covid in relation to the incident as nothing about the incident suggested it was related to Covid and the claimant did not raise covid or his own health (including any fear caused by the pandemic) at any stage of the process.

24. We note from the documents were provided and due to the time of the pandemic (4 days into lockdown) that at this point facemasks were not recommended or considered mandatory at this time. There was no PPE recommended for drivers as confirmed by the document dated 6 April 2020 at page 96.

25. We accept that the claimant may have been understandably worried about catching covid 19 whilst at work. However we find that at no point did he raise this with the respondent. At no stage did he or his TU representatives raise that he either felt unwell due to Covid, suspected that he felt unwell due to Covid, was scared of contracting Covid on the day of the accident or that Covid or the pandemic situation as a whole, contributed in any way to his poor driving on the day in question. That is only something that has been raised during the course of these proceedings.

<u>The Incident</u>

26. The incident in question occurred on 27 March 2020; just 4 days into the first national lockdown.

27. On 27 March he was working an early shift. The timeline of the day is not in question. Nor is it in question that during his drive, he crashed into a parked car and caused 5 cars to be damaged including two being written off. The CCTV footage showed that he drove with only one hand, ran a red light, speeded

through an amber light and repeatedly exceeded the speed limit and crossed chevrons. Those core facts were not disputed by the claimant at any stage including before the Tribunal.

28. Part of the claimant's case, introduced for the first time today, was that he was worried that he had been suffering from Covid and that it was incumbent on the respondent to check, after the incident, whether he had covid. We disagree. There was nothing about the incident or the claimant's health at the time that suggested that he had covid or symptoms. He states he doesn't know because the respondent did not offer him a test – but given the date of the incident, tests were not available to employers or the public in general at this time. He did not say to anyone on the day in question nor has he said since (including his witness statement) that he was feeling unwell or displayed any of the possible covid symptoms that were known about at the time.

29. The claimant also sought to suggest that Mr Connolly ought to have called the claimant an ambulance when he arrived at the scene and that failure to do so demonstrates a poor investigation and poor care for an employee. We disagree. We note that Mr Connolly did not arrive until 45 minutes after the crash. During that time the police had arrived and not felt an ambulance was necessary. The claimant did not, either when Mr Connolly arrived or since then, suggest that an ambulance or any medical treatment at all was necessary because of the accident. There appears to be no evidence, (including the claimant's own witness evidence) that he was hurt in the accident in any event. It is therefore not clear on what basis he is now asserting that an ambulance or medical treatment of any kind ought to have been suggested by Mr Connolly.

30. The claimant's representative also suggested that given that the claimant was breathalysed he ought to have been tested for Covid. The Tribunal pointed out that testing was not available to employers or individuals outside a healthcare setting at that time.

31. We accept that the claimant may have been in shock to some extent just after the incident. However, he was not physically hurt and he did not raise any concerns about the lack of care he received from Mr Connolly until these proceedings. No mention of it was made at the fact finding meeting, the disciplinary meeting or the appeal meeting.

32. The claimant's sole representation to Mr Connolly at the time was that he did not remember the accident or his journey there at the time. This may indicate shock. Once back at Mr Connolly's office the claimant explained that he had had some time off sick due to chest pains and that he was taking pain killers. He did not say that he had had chest pains before or during the incident. He confirmed to Mr Connolly that the chest pains were muscular. The claimant said that Mr Connolly gave him some paracetamol. Mr Connolly later stated to the Tribunal that this must have meant that he enquired as to how the claimant was feeling – otherwise he would not have known to offer him paracetamol. We agree and accept his evidence in this regard.

<u>The Investigation</u>

33. The investigation consisted of Mr Connolly going to the scene, watching the CCTV footage and speaking to the claimant at the fact finding meeting. Mr Connolly accepted that he did not consider the respondent's Covid 19 risk assessment, the possible impact of the pandemic on the situation, or whether the claimant ought to have been wearing or provided with PPE or other covid-related safety precautions as part of his investigation. He also accepted that he did not suggest that the claimant needed medical attention though he stated that he would have ensured that the claimant was okay before taking him back to the depot.

34. His explanation for this is that he did not think that the pandemic was relevant to the incident.

Suspension

35. Mr Connolly suspended the claimant. The respondent's case is that he suspended the claimant and verbally informed him of the next steps i.e. that he was suspended with pay and needed to attend the fact finding meeting on 30 March. It was accepted that nothing was provided to the claimant in writing at this stage.

36. We accept that the claimant was aware that he was suspended and needed to attend the meeting on 30 March given that he did attend on the date and time in question along with his union representative. We note that no written polices or instructions on where to find them were given to the claimant at this stage and none of the information about the suspension was confirmed in writing to him. Nevertheless he clearly understood enough of the situation to attend the fact finding meeting with a union representative.

37. We accept that it was standard procedure to suspend individuals when an accident as serious as this occurs. The suspension was not for long and it accords with the respondent's policy that they suspend in these situations on basic pay. The suspension was for a short period until the fact finding meeting on 30 April 2020.

38. At the fact finding meeting the claimant was given an opportunity to explain what had happened. He said at the disciplinary hearing, that he didn't tell Mr Connolly what he remembered because he was so nervous. That may have been the case but he was accompanied by his union representative and Mr Connolly gave them the opportunity to review the CCTV footage and explain his version of events. That he chose not to do so does not mean that he was not given the opportunity .

39. At no point during that interview did the claimant deny:

(i) He was speeding in multiple different speed limit zones
(ii) He was driving one handed
(iii) He drove across some chevrons
(iv) He went through red and amber traffic lights

(v) He crashed into a parked car and caused significant damage to 5 cars in total.

40. His explanation to the Tribunal was that he was worried about Covid causing him to be nervous and distracted. We cannot see that said in the minutes of the fact finding meeting the disciplinary or the appeal. The claimant's representations via his union representatives were that his driving as a whole that day was a mistake for which he was sorry and that would not happen again.

41. After the fact finding meeting or at the end of it we accept that Mr Connolly gave the claimant the document at page 148 called at DP1 which was an instruction to attend a disciplinary hearing. The relevant sections are:

"At the hearing you may, if you wish, be accompanied by a spokesman who may be a Trade Union representative or a workplace colleague no in authority over you.

….
Your attention is drawn to the Company's Policy and Procedures on Discipline which sets out the disciplinary awards that may be imposed up to and including summary dismissal (depending on the seriousness of the offence). A copy of the Disciplinary Policy and Procedure is available for inspection from your manager or Trade Union representative."

42. The claimant asserts that the respondent failed to provided the claimant with a copy of the disciplinary policy and procedure. We accept that the respondent did not give the claimant a copy but also note that the claimant did not ask for a copy and was represented by his trade union at all the meetings.

43. In evidence the respondent said that the claimant would also have known that the policies were on the portal. We have no evidence to suggest that the claimant ought to have been aware of this or of the functionality of the portal at this time.

44. We note finally on this matter that the claimant and his trade union representatives did not suggest at any of the meetings that the claimant did not understand the policy or the procedure or what he was being disciplined for or the possible outcome. We note that Mr Barker checked that the claimant understood the policies and the process at the outset of the disciplinary meeting and he and his union representative confirmed that they did. The claimant has also not given evidence on how any lack of knowledge of the processes has negatively affected him. He attended every meeting, he was represented at every meeting and he was invited to make representations at every meeting.

The Disciplinary meeting

45. The Claimant was not sent the fact finding investigation report, the minutes of his conversation with Mr Connolly, or the CCTV footage in advance of the disciplinary hearing. They were provided to the claimant and his representative on the morning of the hearing. When the meeting started Mr Barker asked whether they

had had enough time to which both the claimant and his TU rep said that they had. We accept Mr Barker's answer that had they needed more time he would have given it to them.

46. At the disciplinary hearing the claimant did not raise:

    (i) His covid/shielding status
    (ii) That he needed access to the policies or was confused by the process in any wat
    (iii) That any of the behaviour he was alleged to have committed had not occurred
    (iv) Any issue regarding his health or the overall Covid situation

47. What the claimant did say, and his union representative submitted on his behalf, was:
    (i) that he was sorry,
    (ii) That he had misjudged the position of the parked vehicles
    (iii) that he was the main breadwinner for his family
    (iv) he had a good employment record and
    (v) that they should be lenient.

    Covid, the claimant's health or any of the other matters now raised in the Tribunal– were not raised by the claimant or his trade union representative at this meeting. He was asked about whether there was any medication he was taking that could have contributed to the accident to which the claimant confirmed that he was taking paracetamol. We accept that it is normal perhaps for an individual not to

48. Mr Barker confirmed his decision to dismiss for gross misconduct at the end of the meeting. He says his decision that his decision was based on the severity of the bad driving throughout the CCTV footage, not just the collision. He explained to the Tribunal that he took into account the claimant's longevity of service and his clean record but the collection of behaviours displayed in the CCTV footage were so serious that he felt he had to dismiss the claimant despite his apology. The claimant was told verbally that he had the right to appeal.

49. He was written to with confirmation of that decision with a letter dated 2 April 2020 (page 154). In that letter he is told of his right to appeal.

<u>The Appeal</u>

50. The claimant did not appeal within the relevant time frame or if he did it wasn't to the correct email address. Nevertheless his email dated 24 April to the HR department was taken as an appeal and a hearing was convened on 6 May 2020. His email dated 28 April confirmed that the grounds of his appeal were the severity of the award. There was some question in the Tribunal hearing as to the use of the word 'award' instead of sanction. It was suggested by Mr Oneugbo in cross examination that the respondent's use of the word award had confused the claimant. However we can see from this email from the claimant that he knew what it meant as he uses it himself when appealing.

51. It is asserted by the claimant that he was not given the chance to bring his own representative to the appeal hearing and that the respondent imposed Mr Paul Ainsworth upon him as a representative.

52. Mr Ainsworth is the full time convenor for Unite Union. At the time he was stood down from his normal duties full time and was a full time union representative. It was not disputed that the respondent arranged for Mr Ainsworth to accompany him and at page 159 they sent the claimant a letter saying that Mr Ainsworth was going to be his representative at the appeal hearing.

    "*You are entitled to representation at this hearing and your trade union advocate Mr Paul Ainsworth has therefore been notified of this appointment."*

53. In evidence the claimant said that he felt he did not have any choice but to accept Mr Ainsworth because of this letter. However in response to questions from the Tribunal he said that he had spoken to the trade union representative who had represented him at the fact finding meeting and the disciplinary meeting (Mr Mark Alleyne) at this point. We consider that this suggests that he knew that he did have a choice as to who represented him. He says that Mr Alleyne explained that he was not qualified to represent him at the appeal hearing and that this was why Mr Ainsworth would attend. We are not sure how correct that can be given that Mr Alleyne did represent the claimant at the actual dispcilinary hearing which seems more serious than the appeal hearing. Nevertheless, the fact that the claimant called his other union representative and questioned Mr Ainsworth's presence suggests that he knew he had a choice and that the knew that it was between him and the union as to who represented him.

54. At the outset of the appeal meeting he was asked whether he was content for Mr Ainsworth to represent him and he said yes. His case to the tribunal was that this was unfair because he ought to have been able to choose his own representative in accordance with their policy. He also states that he was disadvantaged because Mr Ainsworth was known to be racist and good friends with Mr Wood and therefore would not have properly represented him.

55. We agree that the claimant ought to have a choice about who represented him. The letter appears to suggest that someone has been appointed for him. However we do not accept that the respondent told him he had to be represented by Mr Ainsworth or that the claimant genuinely believed that he had no choice in the matter. The respondent had organized it but they did not insist upon it. The claimant knew that he had a choice otherwise he would not have spoken to Mr Alleyne and questioned the choice of Mr Ainsworth. Further, it was for him to contact the Union if he was unhappy with the representation he had access to. He had time to do so as he was notified of the appeal date and Mr Ainsworth's representation 6 days before the meeting. He confirmed in evidence that he did not complain to Unite.

56. Finally on this point we also note that the claimant has not said how Mr Ainsworth fell short in his representation. He has not said what Mr Ainsworth ought to have done or said to represent him better at that hearing and how his presence

disadvantaged him. The case put forward by Mr Ainsworth at the appeal hearing was similar to that put forward by Mr Alleyne and included the suggestion that the claimant be sent on a training course as opposed to being dismissed. On reading the notes the Tribunal considered that the points made by Mr Ainsworth were consistent with someone trying to defend someone who has appealed on grounds of leniency. The claimant has not suggested that something else ought to have been said in his defence or that he asked Mr Ainsworth to make representations and Mr Ainsworth refused. it is therefore unclear as to what disadvantage the claimant suffered having Mr Ainsworth there.

57. The decision of Mr Wood was to uphold the original decision to dismiss. The reasonableness of this conclusion was questioned by the claimant's representative during the Tribunal hearing. His challenge was (at least in part) on the basis that Mr Wood had accepted that if the claimant was to be sent for re-training he did not doubt that the claimant would pass the test. Mr Wood's explanation for this not being a convincing factor for him was that the issue was one of conduct not capability – he accepted that the Claimant could drive well – just that he chose not to on this occasion which made it conduct not capability. This factor therefore did not convince him to overturn the original decision.

The Law

Unfair Dismissal

58. Section 98 of the Employment Rights Act 1996 (ERA) provides as follows:
    (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
        (a) The reason (or if more than one, the principal reason) for the dismissal, and
        (b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
    (2) A reason falls within this subsection if it –
        (a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
        (b) Relates to the conduct of the employee,
        (c) Is that the employee was redundant, or
        (d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

        ….

    (4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismiss is fair or unfair (having regard to the reason shown by the employer) –
        (a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer

acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee and

(b) Shall be determined in accordance with equity and the substantial merits of the case.

59. The respondent's case was that this was dismissal for conduct. That is a potentially fair reason under s 98(2)(b) Employment Rights Act 1996 ('ERA'). In the event that the respondent is correct in that context a determination of the fairness of the dismissal under s98(4) ERA is required. This involves an analysis of whether the respondent's decision makers had a reasonable and honest belief in the misconduct alleged. Further a tribunal must determine whether there were reasonable grounds for such a belief after such investigation as a reasonable employer would have undertaken. The burden of proof is neutral in relation to the fairness of the dismissal once the respondent has established that the reason is a potentially fair reason for dismissal. The tribunal must also determine whether the sanction falls within the range of reasonable responses to the misconduct identified. This test of band of reasonable responses also applies to the belief grounds and investigation referred to.

60. The test as to whether the employer acted reasonably in section 98(4)ERA 1996 is an objective one. We must decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (*Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*). We have reminded ourselves of the fact that we must not substitute our view for that of the employer (*Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82*);

61. We have reminded ourselves that this test and the requirement that we not substitute our own view applies to the investigation into any misconduct as well as the decision. (*Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*. This means that we must decide not whether we would have investigated things differently, but whether the investigation was within the range of investigations that a reasonable employer would have carried out. We know that we must assess the reasonableness of the employer not the potential injustice to the claimant Chubb Fire Security Ltd v Harper [1983] IRLR 311). and only consider facts known to the employer at the time of the investigation and then the decision to dismiss (W Devis and Sons Ltd v Atkins [1977] IRLR 31.)

S44 Employment Rights Act 1996 – Health and Safety Detriment (sections relied upon by the claimant only)

62. S44 (1)An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(c)being an employee at a place where—

(i)there was no such representative or safety committee, or

(ii)there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

….

(e). in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

…

(4) This section does not apply where the worker is an employee and the detriment in question amounts to dismissal (within the meaning of Part X).

63. **S136 Equality Act 2010 - The Burden of Proof**

    S.136(2) provides that if there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the EqA, the court must hold that the contravention occurred; and S.136(3) provides that S.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

64. The EHRC Employment Code states that 'a claimant alleging that they have experienced an unlawful act must prove facts from which an employment tribunal could decide or draw an inference that such an act has occurred' – para 15.32. If such facts are proved, 'to successfully defend a claim, the respondent will have to prove, on the balance of probabilities, that they did not act unlawfully' – para 15.34.

65. The leading case on this point remains Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931. This was further explored in *Madarassy v Nomura International plc 2007 ICR 867, CA*; and confirmed in *Hewage v Grampian Health Board 2012 ICR 1054, SC*.

66. In the case of Igen, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place (on the balance of probabilities). If so proven, the second stage is engaged, whereby the burden then 'shifts' to the respondent to prove on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground.

67. The Court of Appeal in *Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT*, gave guidelines as follows:

    (i) it is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail

(ii) in deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that 'he or she would not have fitted in'

(iii) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal

(iv) The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination — it merely has to decide what inferences could be draw

(v) in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts

(vi) these inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information

(vii) inferences may also be drawn from any failure to comply with a relevant Code of Practice

(viii) when there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent

(ix) it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act

(x) to discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground

(xi) not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment

(xii) since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden — in particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice.

Direct discrimination – s 13 Equality Act 2010

68. s 13 EqA "(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

69. We have reminded ourselves that discrimination such as this is rarely obvious and it is unusual that any such treatment is openly admitted to or confirmed by clear written evidence as confirmation. The tribunal must consider the conscious or subconscious mental processes which led A to take a particular course of action in respect of B, and to consider whether a protected characteristic played a significant part in the treatment.

70. For A to discriminate directly against B, it must treat B less favourably than it treats, or would treat, another person. The Tribunal must compare like with like (except for the existence of the protected characteristic) and so "there must be no material difference between the circumstances" of the claimant and any comparator. (*section 23(1), EqA 2010*).

71. In this case the claimant is relying on a hypothetical comparator. The claimant did not address us on who he considered the hypothetical comparator should be. We have determined that the appropriate comparator would therefore be a person who drove in a similar way to the claimant who was white.

72. The claimant in evidence to the Tribunal cited knowledge of an individual who was not dismissed for a similar incident but who was white. He would not name them though and had provided no advance information of this person to the respondent or the Tribunal. The respondent witnesses said they were unaware of who the person was and could only think of another black employee who had had a similar incident and not been dismissed. For the purposes of our decision we have therefore used a hypothetical comparator as set out in the pleadings.

Harassment – s26 Equality Act 2010

67. (1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…..

(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

(5)The relevant protected characteristics are—

- race;

Conclusions and discussion

Direct Race Discrimination

73. Relying upon our factual findings above we conclude as follows regarding the incidents relied upon by the claimant as less favourable treatment:

A) ***Requiring the Claimant to continue working considering his health condition without any risk assessment in the middle of pandemic;***
We were provided with no evidence to suggest that the respondent required the claimant to continue working despite knowing about his shielding covid status. We have found that the respondent did not know about the claimant's shielding status and that the claimant did nothing to bring this to the respondents' attention. This treatment did not therefore occur.
If the Claimant is in fact relying upon a different health condition he did not set this out to the Tribunal in any way.

B) ***Requiring the Claimant to return to front line work in a pandemic without any effort to prevent the risk to his health that the work may cause;***
Firstly we repeat the point above with regards to the respondent's knowledge in respect of the claimant's Covid status. A Covid 19 risk assessment was carried out by the respondent the day before the incident. By the time of the claimant's shift the following day, they had not had time to implement the changes in what was a very fast moving situation. We accept that no additional measures were required for drivers by the government in any event at this time.
If the claimant is instead referring to his return to work from sick leave without a return to work meeting, we deal with that below.

C) ***Suspending the Claimant from work without risk assessment or care of any injury from the accident or effect of Covid-19 rather than send him to the OT or redeploy him;***
The claimant was suspended from work but it was not clear on what basis the claimant asserted to us that a risk assessment ought to have been carried out. He did not require medical attention at the scene or thereafter and has provided no evidence that he was hurt in any way. We have accepted he may have been in shock but we do not accept that this would require a risk assessment prior to suspension. No suggestion was put to the respondent witnesses that he could or should have been redeployed. It is not clear to what end the OT referral was intended.

D) Requiring the Claimant to continue working without any return from sickness meeting
We accept that the claimant was required to return to work without a return to work meeting.

E) Requiring the Claimant to continue to work in breach of health and safety;
It is not clear what health and safety legislation was breached by asking the claimant to continue working. That was not put by the claimant to the respondent witnesses and was not evidenced to us the Tribunal. We have found that the respondent was not obliged, at the time, to supply their workers with PPE or take any other steps save for social distancing.

F) Requiring the Claimant to work in an unsafe environment;
It is not clear how the claimant says that the workplace was unsafe at this time. We again repeat that the respondent did not have knowledge of the claimant's shielding status at that time. The risk assessment provided to the Tribunal did flag issues of catching covid but as described above it had only been done the day before the incident and

the situation at the time was fast moving. We also note that the requirement to continue working (unless you provided a shielding letter) was applied to all drivers regardless of race.

G) ***Refusal to allow the Claimant's companion of his own choice at the hearing/appeal;***

We do not accept that the claimant was refused his own choice of representative at any stage of the process.

H) ***Refusal to provide the Claimant with the company disciplinary policy/procedure before and during the process;***

We do not accept that there was a refusal to provide the claimant with the policies or procedures as he did not ask for them and it was reasonable for the respondent to conclude that he knew the process because he was represented at all times by his union and he confirmed that he understood the process at the outset of the disciplinary meeting. AT no point prior to these tribunal proceedings did the claimant raise the fact that he or his union representative were unsure of what the policies or procedures were in respect of his suspension, disciplinary or appeal. At each stage the process and next steps were explained to the claimant verbally and, apart from at the point of suspension, were confirmed in writing.

I) ***Refusal to allow the Claimant time to prepare to put his case;***

We would normally be concerned where evidence is only provided on the morning of the disciplinary hearing. Nevertheless we note that there was very little in the way of paperwork to be considered and at the outset of the meeting, Mr Barker asked the claimant and his union representative whether they needed more time and they said no. We believe that had they needed more time they could have asked for it and it would have been agreed to. The claimant has not put forward what he would have done or said differently had he had more time.

J) ***Failing to have a return from sickness meeting with the Claimant before requiring him to return to frontline role which would have shown/prove that he is an extremely vulnerable person who should be shielded under the government guideline rather than deployed to frontline role***;

We have accepted that there was no return to work meeting when the claimant returned from sick leave due to chest pains. However the claimant has not produced evidence to suggest that he would have raised his shielding status at this meeting as, by his own evidence to this Tribunal, he thought that the respondent already knew about the letter and were ignoring it. This is based on his explanation for not raising it at any of the other meetings. In any event we have found that he had not notified them of his shielding status at the relevant time.

74. Where we have found that the incidents relied upon actually occurred in some form (e.g. a failure to have return to work meeting after sickness), the claimant has not discharged the burden of proof to say that these issues occurred because of race. In evidence and submissions the claimant provided no arguments that the claimant had been treated less favourably than a hypothetical comparator would have been treated in the same circumstances.

75. The claimant did not establish facts from which we could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. There was no set of circumstances from which we could infer or even consider that the respondent's approach to return to work meetings was caused by race. There must be something more than just difference in treatment and in this case the claimant hasn't even made submissions that there was a difference in treatment between him and any hypothetical comparator. There has just been an assertion that had he been white he would have been treated differently but no explanation as to how or why he makes that assertion.

76. We know that in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. However we have simply been provided no evidence that we could infer any discrimination may have been possible.

77. Even if we are wrong and the burden ought to have shifted, we have found that the respondent has provided a non-discriminatory reason for their approach to sickness return meetings namely their rotas and the often clashing working hours of managers and drivers. We accepted that this was correct and that the claimant had worked relatively few shifts, mainly during times when the managers were not in the office at the same time as him.

78. We therefore do not uphold the claimant's claim for direct race discrimination.

Harassment

79. The sole act relied upon as being an act of harassment was the claimant's suspension. It was not in dispute that the claimant was suspended. We accept that this may have been unwanted conduct. However we also accept that where serious incidents such as this occur, it is the respondent's normal procedure to suspend drivers pending a fact finding meeting and then any disciplinary process that follows. We accept that such a policy is applied universally where an accident of this nature occurs.

80. The claimant provided no evidence to suggest that his suspension was related to his race nor did he provide any evidence that anything that occurred during the suspension process could be related to race. We accept the respondent's explanation that the reason for his suspension was the seriousness of his poor driving and the subsequent crash which the claimant has not disputed occurred. He has not shown that the reason or manner of the suspension was related to race.

81. We do not uphold the claimant's claim for racial harassment.

Section 44 Claim

82. The claimant's case regarding this element of the claim was confused and confusing. We have relied upon the Further and Better and Particulars of claim and the agreed list of issues which confirm that the claimant was on relying on paragraphs 44(1) C and E. The further and better particulars appear to suggest

that the way that the claimant brought concerns about health and safety to the attention of the respondent was by going off sick. Given that he went off sick and had returned to work before the incident and this was due to muscular chest pains (which he has confirmed had nothing to do with the incident) it is difficult to see the premise of his case and how it fits within s44 ERA.

83. He appears to be suggesting that as a result of going off sick, he was then treated badly. Going off sick does not, in our view fit within either subsection C) or E) of s44. It is not clear, nor was it explained, how going off sick constituted bringing to the employer's attention, circumstances which he reasonably believed were harmful or potentially harmful to his health and safety. It is also not clear nor was it explained how going off sick was, in circumstances of danger, the claimant taking appropriate steps to protect himself or others.

84. The detriment he relies upon was that he was required to return to work but he voluntarily returned to work after his sick note expired and presumably after he had recovered from the muscular chest pains or at least was better enough to be at work. We do not therefore see that he was 'required' to return to work when he ought not to have been. He returned when his fit/sick note expired.

85. However we also think (though we're not sure because it was not made clear by the claimant's representative) that the claimant was perhaps putting the case that by submitting the NHS letter dated 21 March he was raising concerns about his health and safety. We still have concerns as to whether this would in fact fit within either s44 C) or E). Nevertheless, we have found that he did not submit that letter and therefore he has no basis on which to bring a claim for detriment under s44 relating to this letter.

86. In the List of Issues at page 110n of the bundle there also appear to be questions under a heading of 'Health and Safety' which the respondent disputes we have jurisdiction to consider. The claimant's representative confirmed at the outset of the hearing that any Health and Safety claim was limited to a s44 claim. We accept that there is no free standing claim under any other legislation that could determine any of the questions outlined at numbers 10-14 of the List of Issues. The claimant's representative made no such submissions or representations before us in any event.

<u>Unfair dismissal</u>

Reason for dismissal

87. We accept that this was a dismissal for conduct, namely the claimant's uncontested poor driving on 27 March 2020. Conduct is a potentially fair reason for dismissal.

Procedure

88. We find that there were no significant procedural irregularities in the process followed that when viewed overall mean that the procedure was unfair. We note that the claimant was only provided with the evidence on the morning of his disciplinary hearing which in many circumstances may not be fair. However in this

instance we have found that this did not disadvantage the claimant given the small amount of evidence to consider and the fact that he was told he could have more time but chose not to take it and confirmed that he and his representative had had enough time to watch the CCTV, read the accident report and the notes of the fact finding meeting. It has not been suggested since then either in the appeal or this Tribunal that had he had more time the claimant would have said or done anything differently.

89. We do not accept that there were flaws in providing the claimant with access to policies and procedures or that he was not able to arrange his own representation for the relevant meetings. He was accompanied at every meeting, he was given an opportunity at every meeting to make representations and those representations such as they were, were considered. The claimant was given the right of appeal and an appeal hearing was convened even though he appealed out of time under the respondent's appeals procedure. We therefore find that procedurally the dismissal process was fair and in accordance with the ACAS code.

Investigation

90. We find that Mr Connolly's investigation was reasonable in all the circumstances. It has not been suggested to us what else Mr Connolly ought to have done or considered beyond the fact that the nation was at the beginning of lockdown. Mr Connolly came to the scene of the accident, spoke to the claimant and reviewed the CCTV footage. We conclude that the fact that the country was in lockdown was in fact irrelevant to the situation at hand, was not raised by the claimant as an issue and that any failure to do consider it in these circumstances does not render the investigation unreasonable.

91. It is hard to see how Mr Connolly could have factored the lockdown backdrop into this investigation in a way that would have informed Mr Barker's decision differently.

Decision

92. We conclude that substantively the decision to dismiss the claimant was within the range of reasonable responses for an employer in all the circumstances because:
    i. There was a reasonable investigation upon which Mr Barker based his decision
    ii. There were no procedural errors
    iii. There was no breach of the ACAS code in that the claimant was able to put his case and consider the evidence and he was allowed to be represented at each stage
    iv. The claimant at no point argued that he had not driven in a dangerous manner as evidenced by the CCTV footage. His only argument was to ask for leniency. We accept that it was reasonable for MR Woods to treat this as a conduct matter rather than a capability matter because of the significant and sustained poor driving by the claimant on the day in question which contrasted with his recent good driving record.

v. We accept that driving in this unsafe manner was comprehensively in breach of the claimant's fundamental obligation to drive safely as set out in Rule 28 of their driver's rule book. He had significantly breached this rule by driving badly for approximately 20 minutes – this was not a short lapse or simply a case of expensive damage following a relatively benign breach. This was both extensive damage preceded by an extended period of poor driving in breach of Rule 28.

vi. Mr Barker considered the claimant's longevity of service, his clean record and whether there was an alternative to dismissal in all the circumstances.

vii. We do not believe that the fact that this happened on day 4 of the national lockdown provided any mitigating circumstances and the claimant did not put that forward at any stage of the process in any event. Therefore any failure of the respondent to consider this was we conclude, reasonable.

93. It is not for us to substitute our decision for the respondent's. We consider that based on the above the respondent reached a decision within the range of reasonable responses for an employer in all the circumstances.

94. We do not think it was unreasonable for Mr Wood to uphold Mr Barker's decision to dismiss. The fact that he considered that the claimant would have passed a driving test if he needed to did not undermine the reasonableness of the decision to dismiss.

95. The claimant's claim for unfair dismissal is not upheld.

<u>Wrongful Dismissal</u>

96. The claimant has accepted that he drove badly on 27 March 2021. He has at no point disputed that. We accept that he was aware of the requirement for him to drive in accordance with Rule 28 (and the Highway Code) and he did not do so. We conclude that the severity of his rule breaking did amount to a fundamental breach of his contractual obligation to the respondent and therefore his summary dismissal was not in breach of contract.

Employment Judge Webster

Date: 31 March 2022