



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S William  
**Respondent:** London General Transport Services Limited  
**Heard at:** London South Employment Tribunal  
by Cloud Video Platform  
**On:** 11 August 2022  
**Before:** Employment Judge Nash (Sitting alone)  
**Representation:**  
**For the Claimant:** Mr Iveke, Volunteer representative  
**For the Respondents:** Mr Bailey, Counsel

**JUDGMENT** having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. Following ACAS Early Conciliation from 16 July to 16 August 2021, the claimant presented his claim form on 16 September 2021.
2. There was a case management hearing on 9 May 2022 which refused the claimant's application to amend to include a claim of disability discrimination.

### The Hearing

3. At this hearing, the Tribunal heard from the claimant as his only witness. From the respondent, it heard from: -

Mr N Wijesinghe, the Accident Prevention Manager and Investigating Officer;  
Mr S Patel, the Garage General Manager who made the decision to dismiss;  
Ms A Ryder, who heard the appeal.

4. The Tribunal had sight of a bundle, which was agreed, to 221 pages. On the day, an extra document was added by consent being a record of an interview with the claimant's garage mentor on 5 August 2021.
5. The Tribunal had the benefit of video footage of the relevant incidents. Whilst it took some time to resolve the showing of the video at the hearing, in the event it was possible for the Tribunal to share its screen with the parties and to show the

relevant parts of the video. All parties confirmed that they were satisfied that they were able to see the footage fully.

### **The Claims**

6. There were two claims before the Tribunal: -
  - a. unfair dismissal under section 98 Employment Rights Act 1996; and
  - b. wrongful dismissal - Notice Pay.

### **The Issues**

7. At the beginning of the hearing, the Tribunal identified the issues.
8. There was a preliminary issue as to whether the correct employer had been identified and it was confirmed that The London General Transport Services Limited was the correct respondent.

#### Unfair Dismissal

9. The claimant accepted that the respondent had a potentially fair reason for dismissal -being conduct.
10. Did the respondent dismiss the claimant having a reasonable and genuine belief in the claimant's culpability following a reasonable investigation, the so-called "Burchell test"?
11. Did the respondent follow a fair procedure otherwise in dismissing the claimant? At the preliminary hearing, the claimant had been ordered to provide his particulars as to why he said that the investigation was unfair. In summary the claimant contended that
  - a. the cyclist involved in the incident which led to his dismissal had had other incidents with bus drivers and was malicious
  - b. other bus drivers had similar incidents and had been treated differently
  - c. a failure to investigate the training instructions that the claimant was given in respect of reversing
  - d. a failure to verify if the speed limiter in the claimant's bus was operating
  - e. The decision to dismiss was pre-judged (added at the hearing).
12. If the procedure was unfair, could and would the respondent have dismissed him fairly if it had followed a fair procedure, that is should there be a so-called Polkey deduction?
13. Sanction, that is, did the decision to dismiss come within a range of responses available to a reasonable employer in the circumstances?
14. To what if any extent had the claimant contributed to any unfair dismissal.

#### Wrongful Dismissal

15. The respondent accepted that the claimant was not paid his notice pay.

16. Did the incident with the cyclist amount to gross misconduct permitting the employer to dismiss without notice?

### **The Facts**

17. The respondent is a company operating a privatised London bus service under a contract with Transport for London. It is a very large company operating nearly a quarter of London buses.
18. The claimant started work on the first occasion for the respondent in about September 2010. However, he had left and re-joined the respondent's employment on a couple of occasions. At the time of dismissal, he had been in the respondent's employment continuously for just over two years. He was a bus driver based at the Putney Garage.

### **The Incident and Investigation**

19. On 23 June 2021, the claimant submitted an incident report about an encounter with a cyclist, whilst driving his bus. He said that the cyclist had been blocking the lane and the claimant overtook him. The cyclist then caught up with the bus, kicked the bus, was abusive, and spat.
20. Mr Wijesinghe was the respondent's accident prevention manager who had experience of considering many such incidents. He considered the video footage of the incident. At the hearing, the Tribunal had sight of this footage. The respondent operates about thirteen cameras continuously on each bus. This provided comprehensive video footage from about thirteen different angles.
21. Having viewed the footage Mr Wijesinghe decided to suspend the claimant on the basis that he was potentially culpable of dangerous and reckless driving on three counts: -
  - a. the claimant had been seen exceeding the speed limit prior to the incident
  - b. the claimant had failed to follow the respondent's instructions not to reverse at Mortlake Bus Station unless covered by a banksman, and
  - c. the incident with the cyclist.
22. There was a fact-finding meeting between Mr Wijesinghe, the claimant and his Union Representative on 29 June 2021. The claimant was warned that there was a possibility of dismissal if the respondent found a case to answer.
23. The meeting viewed the video footage. The footage showed that the claimant overtook a cyclist by going into the opposite lane, which caused vehicles travelling the other way to break or change direction to avoid the on-coming bus. The claimant then deliberately stopped the bus at the kerb blocking the cyclist, who was forced to jump onto the kerb to avoid it. The claimant then drove away. The cyclist then caught up with the claimant. On the second occasion the cyclist caught up with the claimant bus, he kicked the bus including the bus doors which

bowed alarmingly. The cyclist also hit the window next to the driver and appeared to be remonstrating aggressively with the claimant. He then cycled off.

24. Transport for London forward to the respondent a complaint from a member of the public who described the claimant's driving during this incident as "atrocious and dreadful".
25. Mr Wijesinghe also saw that the footage showing the claimant travelling at about 28mph in a 20mph zone. This was not whilst the bus was serving the bus route. It was returning to the garage. When Mr Wijesinghe brought up the issue of speeding in the meeting, the claimant refused to answer questions and he asked Mr Wijesinghe if he was a police officer.
26. In respect of the speeding, Mr Wijesinghe had not checked whether the speed limiter device (ISA) on the claimant's bus, was working. The respondent had such speed limiters on a number of its buses. The respondent witnesses told the tribunal that a speed limiter does not work at all times - for instance when a GPS signal was not available. In any event, drivers are themselves responsible for keeping to the speed limit.
27. Mr Wijesinghe raised the claimant's having reversed his bus at Mortlake Bus Station without a banksman, contrary to the respondent's rules. (It was not disputed that these rules had been implemented following a fatality caused by a reversing bus).
28. The claimant refused to answer questions about reversing at Mortlake. This was one of two occasions when Mr Wijesinghe called a break in the meeting to permit the claimant to calm down. The claimant returned and said that he was allowed to reverse without a banksman at Mortlake and he had been told this by one of his mentors. He said that he could not remember their name. He later gave the name of the mentor as a Mr Howard.
29. Mr Wijesinghe decided to refer the claimant to a disciplinary hearing before the garage general manager on a driving standards charge.
30. On 1 July 2021, a publican submitted a witness report about the last part of the cyclist incident - when the cyclist caught up with the bus, kicked the bus doors, and shouted abusive comments. According to the witness, when he, the publican went to assist, the cyclist cycled off. The publican offered himself as a witness.
31. The Tribunal was satisfied that this related to the last part of the cyclist incident because the footage showed the cyclist kicking the doors and remonstrating with the claimant through the driver's window.

### **The Disciplinary Hearing**

32. The disciplinary hearing took place in front of Mr Patel, the Garage General Manager on 9 July 2021. The claimant was again accompanied by a Union Rep. The disciplinary hearing viewed the video footage.

33. In respect of the Mortlake incident, the claimant said that, although an email may have been sent informing drivers of the new rule requiring a banksman when reversing, he had not received it and was on furlough. The respondent, however, stated that posters (a copy of which was in the bundle) were prominently displayed. Before the tribunal, the claimant accepted that he visited Mortlake regularly.
34. The claimant's representative told Mr Patel that the claimant was being disciplined because of race discrimination and because of his Trade Union activities. (Before the Tribunal, the claimant expanded this to say that he was recruited for a rival Union and was therefore unpopular.) The claimant had not mentioned any inconsistencies between the way he and other drivers were treated.
35. Mr Patel concluded that the claimant had been reckless. He had used his bus as a weapon to retaliate against the cyclist, who claimant felt was delaying him. Mr Patel concluded that the claimant did not understand that his actions were dangerous and accordingly, training would have no effect and there was no alternative to dismissal.
36. He summarily dismissed the claimant on 9 July 2021 which was confirmed by a letter of dismissal on 13 July 2021. This was a lengthy letter setting out the three incidents and referring to the video footage.
37. Before the Tribunal Mr Patel said that he did not view the reversing at Mortlake as gross misconduct but as misconduct. For him, the cyclist incident was the 'weightiest' incident when making his decision to dismiss.

### **The appeal**

38. The claimant was given the right of appeal. His appeal was heard by Ms Ryder, a General Manager of Operations together with Mr Johns, an Operating Manager on 4 August 2021. The claimant was again represented by his Union.
39. The appeal was a re-hearing rather than a review.
40. The claimant admitted reversing the bus at Mortlake contrary to procedure when there was a rule against this. The claimant agreed that he had been speeding and said that he thought that the bus had a limiter which prevented that.
41. The claimant's rep withdrew the allegation of race discrimination and relied on disparity of treatment with other drivers.
42. Following the appeal meeting, Mr Howard, the Mentor, was interviewed. He said that he did not remember telling the claimant that he could reverse without a banksman at Mortlake and did not think he would have done so as it was against the rules.
43. The panel upheld the decision to dismiss and sent an outcome letter on 11 August 2021 stating that the claimant had breached driving standards, had

committed poor and dangerous driving, and that he posed a risk to other road users. In the letter Ms Ryder stated that the claimant admitted that he knew of the reversing rule and the panel did not accept that the Mentor would have told him that he was permitted to reverse without a banksman.

44. Before the Tribunal, Ms Ryder said that she had taken the claimant's previous record into account when making her decision. There was no reference to this in the appeal minutes and she did not mention this in her statement. She relied on a document in the bundle, page 217-218 setting out "occurrences" on the claimant record, for instance customer complaints. Ms Ryder described this as a poor record. However, there were no warnings on the record.
45. Ms Ryder told the tribunal that the cyclist incident alone would have been sufficient to justify dismissal.

### **The Law**

46. The appropriate law is set out at section 98 of the Employment Rights Act 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—
    - ...
    - (b) relates to the conduct of the employee,
    - ...
  - (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
    - (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
    - (b) shall be determined in accordance with equity and the substantial merits of the case.
47. The law in respect of wrongful dismissal is as follows. The employer must show that the claimant was in fundamental breach of his contract of employment, permitting it to dismiss him without notice.

### **Submissions**

48. The respondent relied on written submissions and the claimant made brief oral submissions.

### **Applying the Law to the Facts**

#### **Unfair Dismissal**

49. The claimant, having accepted the respondent had a potentially fair reason for dismissal, the Tribunal went on to consider whether the dismissal was procedurally fair. It directed itself in line with *British Home Stores Ltd v Burchell* [1978] ICR 303, with the caveat that the burden of proof is now neutral.

A respondent must have carried out a reasonable investigation leading to a reasonable and genuine belief in the culpability of the claimant. The Tribunal may not substitute its view of what constitutes a reasonable belief or investigation for that of the employer. The question is, rather, whether the investigation or belief came within a range of reasonable investigations or beliefs available to the employer in the circumstances.

50. The Tribunal firstly considered the investigation. The respondent had viewed the video footage which was comprehensive and covered the speeding and cyclist incidents from a considerable number of angles. The claimant had sight of the same footage and he did so at an early stage in the fact-finding investigation. The claimant was permitted a companion at the fact-find meeting.
51. The Tribunal considered the claimant's specific allegations about the unfairness of the investigation. Firstly, that the respondent did not investigate the allegation that the same cyclist had been involved in previous incidents with another bus driver or other bus drivers. The tribunal did not find that this took the investigation outside of the reasonable range for the following reasons.
52. The claimant provided no evidence that the cyclist had been involved in any other incidents with bus drivers. Further, even were it true, it would not be relevant to the incident under investigation - dangerous overtaking and forcing the cyclist onto the pavement.
53. Finally, the claimant's case about the cyclist's conduct was not coherent. It was not clear whether the claimant's case was that the cyclist had targeted the claimant personally. He told the Tribunal that he thought the cyclist had recognised him and had targeted him (the claimant). However, he also contended that the cyclist was, in effect, a troublemaker who had caused difficulties to a number of drivers in the area before. These two arguments did not sit well together.
54. The claimant's second point was that the respondent should have investigated whether its treatment of the claimant was inconsistent with its treatment of other drivers. This point was not raised by the claimant at the disciplinary or the investigation stage. The respondent was investigating the claimant's conduct, not that of other drivers. In the circumstances the Tribunal could not see how this could take the investigation outside of the reasonable range.
55. The third point was that the speed limiter, the ISA, was not checked. The Tribunal did not find that this was a relevant consideration. The Tribunal accepted the respondent's case that it must be the driver who is responsible for the speed of the vehicle. The Tribunal accepted that claimant as an experienced driver would know this. The Tribunal was not assisted by any evidence from either party or in the bundle going to the respondent's practice and procedure or rules about the ISA. However, the Tribunal took the view that as a matter of common sense a speed limiter can be no more than a tool and final responsibility must rest with the person in control of the vehicle, particularly a large public vehicle on the roads.

56. The fourth point was that the respondent had not investigated whether the claimant was trained on reversing. The Tribunal accepted that if he had been told of this new rule whilst on furlough - when employees were not supposed to be working - it might be understandable if he had missed this email. However, the claimant did not deny that the posters about the new rule were displayed at Mortlake. The claimant accepted that he worked at Mortlake between once a week and once a month for a considerable period. The rule had been implemented because of a fatality, an unusual and shocking event. The tribunal found that on the balance of probabilities, the claimant was aware of the rule and therefore any lack of training was not sufficient to take the investigation or decision outside of the reasonable range.
57. The Tribunal could find nothing remarkable about the investigation. The footage was watched. There was no suggestion that the footage was not complete and reliable or that it gave a misleading impression. The claimant was given a chance to view and make representations about it. The tribunal found that the investigation came within a reasonable range available to the employer in the circumstances.
58. Based on Mr Wijesinghe's and Mr Patel's evidence, the Tribunal accepted that they had a reasonable and genuine belief in the claimant's culpability. The evidence pointed to the claimant having been speeding. The claimant accepted that he had reversed without a banksman. The evidence showed that the claimant had driven to the curb, stopped his bus in front of the cyclist, forcing the cyclist to stop and jump off onto the curb to avoid the bus.
59. The Tribunal therefore found that the respondent had complied with the requirements set out in *Burchell* in that it had carried out a reasonable investigation leading to a reasonable and genuine belief in the claimant's culpability.
60. The tribunal went on to consider procedure more generally. Again, the issue is whether the respondent's procedure came within a range of procedures available to a reasonable employer in the circumstances. The question is not whether the tribunal would have carried out the procedure differently.
61. The Tribunal found that the respondent's procedure came within the reasonable range for the following reasons.
62. The procedure, in the view of the Tribunal, was unexceptional. Following a fact-finding meeting at which the claimant was represented and provided with the evidence, he was invited to a disciplinary hearing before a different decision maker. At the dismissal meeting he was accompanied by a Union Representative. He was given sight of investigatory documents and the footage. He and his union representative were allowed to make full representations at the disciplinary meeting.
63. Following the decision to dismiss, the claimant was afforded a full re-hearing before an independent appeal panel. The panel, after the hearing, investigated further matters raised by the claimant - whether the mentor had told the claimant

he could reverse at Mortlake without a banksman. However, the mentor denied this.

64. The tribunal noted that the appeal panel had considered the claimant's record when making its decision. The tribunal found that this did not take the appeal procedure outside of the reasonable range for the following reasons. The tribunal accepted the respondent's evidence that the incident with the cyclist was the crucial reason for its decision. This was a serious matter. The claimant had no warnings. The tribunal found that the claimant's record had little if any impact on the decision to uphold the dismissal. It was, simply, a relatively trivial matter compared to the disciplinary charges.
65. The claimant's final argument that the dismissal was procedurally unfair was that it was pre-judged. The Tribunal did not accept this for the following reasons.
66. The claimant's argument that the decision was pre-judged was inconsistent and confused. At one time, he contended that the incident with the cyclist was in effect a "set up", in that the cyclist had deliberately provoked him. This in the view of the Tribunal was unlikely – it would have been a very dangerous thing to do. In the event, the claimant's conduct forced the cyclist to jump off his bicycle onto the kerb to avoid the bus. He had to do so in a dangerous place as there was a post box in the way on the pavement.
67. Further, there was nothing in the comprehensive footage indicating that the cyclist had provoked the claimant in any serious way. He had originally been cycling in the cycle lane on the left and then moved to the middle of the lane when the cycle lane had ended. As the respondent pointed out, whilst this had the effect of slowing down the bus, it was not inappropriate on the cyclist's part. There was no audio on the footage, and it was possible that the cyclist had shouted at the claimant to stop driving so close behind him. However, such behaviour is far from unusual on London roads and does not, in the view of the tribunal, constitute material provocation, particularly to a professional driver of a large and potentially dangerous vehicle.
68. Nevertheless, if the cyclist had deliberately provoked the claimant, this did not suggest that the respondent's decision was pre-judged. The tribunal understood the claimant to have claimed that there was a link between the respondent and the cyclist. He said, "I think they know the cyclist... there is someone behind the cyclist." He also alleged that the customer complaint to Transport for London was fabricated. There was no evidence to support these contentions with the tribunal found inherently unlikely.
69. Further the claimant's case as to why the respondent was targeting him was not consistent. He originally said that it was racial discrimination and then because of Union activity. However, he then dropped this argument at the appeal stage and did not pursue it in his ET1. However, at the hearing, he then said again that he was targeted because of his union activities.
70. In addition, the claimant accepted that there was a shortage of bus drivers in London and therefore it was not in the respondent's interest to target drivers with whom they were otherwise satisfied.

71. Accordingly, the Tribunal found that the dismissal was procedurally fair and went on to consider sanction.
72. In deciding whether the sanction of dismissal was reasonable, a Tribunal may not substitute its view of what constitutes a fair sanction for that of the employer. The question for the Tribunal is whether the decision to dismiss came within the range of responses available to a reasonable employer in the circumstances.
73. The Tribunal considered the three charges in turn.
74. Firstly, the speeding point. The claimant's evidence was that the speed limit at the material time was 30mph and so he was not speeding when driving at about 28 mph. However, when it was put to him that there was no evidence of this and the video clearly showed "20mph" painted on the road, he then accepted that the limit was 20mph.
75. The claimant also said before the Tribunal that it was not possible to keep checking the speed limit. However, in the view of the tribunal this is one of the things all drivers must do. This is not less but more important for those driving large public vehicles on the roads.
76. The Tribunal accepted that there is pressure on bus drivers to keep to timetables and this creates tension for drivers between speeding and keeping to a timetable. However, this was not relevant as the speeding occurred when the claimant was not driving a route but returning after finishing his route.
77. Nevertheless, in the view of the Tribunal the speeding incident was not enough to bring the decision to dismiss within the reasonable range.
78. The Tribunal went on to consider the speeding together with reversing at Mortlake. The Tribunal accepted that the rules at Mortlake appeared to put drivers in a potentially difficult position. According to the respondent, if a driver had to reverse – perhaps through no fault of their own - they would have to find a member of the station staff or call IBUS. IBUS is a central service for buses who, it was not disputed, would be likely to be slow to respond. Further, there was no evidence before the tribunal that IBUS would be able to help with reversing – they were not on site. This could cause delays which would be in tension with the need for drivers to stick to the timetable. There was likely to be pressure on drivers to "get things done" in such situations.
79. Further, the poster displayed at Mortlake stated, "*Buses should not reverse without a banksman*". The instruction was clear, but it did not state that failure to comply was a disciplinary offence.
80. The tribunal accepted that the respondent had a real and genuine need to manage reversing at Mortlake. This was because there had been a fatality relatively recently. In the view of the Tribunal, this was a matter that the respondent could not but take extremely seriously.

81. Nevertheless, the Tribunal, did not accept that the reversing incident, taken together with the speeding were sufficiently serious to bring dismissal within the reasonable range of responses. The respondent witnesses themselves saw the cyclist incident as the crucial point.
82. The Tribunal accepted that the cyclist incident was different. The decision maker, Mr Patel, had viewed the footage and concluded that the claimant, in effect, used his bus to push the cyclist onto the pavement. This was consistent with the notably comprehensive footage which the Tribunal saw.
83. The claimant further did not accept that he had done anything wrong. He said that he stopped the bus in front of the cyclist because the cyclist had hit the bus. However, the footage was inconsistent with this, and showed that the cyclist had not come into contact with the bus before the claimant stopped the bus. Even if Mr Patel was incorrect and the claimant did not use his bus as a weapon, even if he may not have intended to retaliate or intimidate, it was obviously a very risky manoeuvre.
84. Because of the seriousness of the cyclist incident and the fact that the claimant did not accept he was at fault or should behave differently in future, the Tribunal found that dismissal came within the reasonable range of responses. The Tribunal was bolstered in its view by the fact that three experienced managers all independently considered that the cyclist incident amounted to gross misconduct.
85. Accordingly, the claimant was fairly dismissed.

#### Wrongful dismissal

86. In wrongful dismissal, the issues are different. The tribunal must consider whether the claimant committed a fundamental breach. A fundamental breach is a breach which goes to the root of the relationship between employer and employee and permits the innocent contracting party to treat themselves as released from the terms of the contract, that is permitting the respondent to dismiss without notice. The burden of proof is upon the respondent as the party alleging a breach of contract. The respondent relied only on the cycling incident as amounting to gross misconduct.
87. To put it another way, the Tribunal had to determine not whether the respondent's views were reasonable, but what actually happened and how serious it was. The tribunal found the video footage was of great value.
88. The claimant's case before the employer and before the Tribunal was that he stopped the bus - forcing the cyclist to the kerb - to 'stop and see the situation'. He wanted to see what was going on because, 'I heard a bang'. However, the footage showed that the bus stopped before the cyclist made any contact with the bus. After the cyclist had been forced onto the pavement, the cyclist later kicked and punched the bus, but not before. Before the bus stopped, one camera showed that the cyclist had both hands on his handlebars and there was no contact between him and the bus.

89. As there was no contact, before the bus stopped, the tribunal found that the reason that the claimant drove the bus to the kerb and stopped was to, in effect, pincer the cyclist. This was a potentially very dangerous manoeuvre.
90. The claimant's attempts to justify his conduct were outlandish. He tried to suggest that that the respondent knew the cyclist and/or that there was someone "behind" (that is, manipulating) the cyclist. He also thought that the complaint from a member of the public to Transport for London was fabricated.
91. The tribunal found that the respondent had discharged the burden upon it of showing that the claimant fundamentally breached his contract of employment by committing gross misconduct over the cyclist incident. It was very risky driving. The tribunal found that the claimant had driven his bus in an aggressive manner, in effect forcing the cyclist onto the pavement in a dangerous place. He showed no insight and believed that he had behaved appropriately. Even if the cyclist had shouted at him before the claimant stopped the bus, this cannot justify a dangerous manoeuvre. The cyclist's later entirely unacceptable behaviour of kicking the door and - it appeared - attempting to intimidate the claimant was not relevant to the fact that the claimant had already committed a fundamental breach of contract.
92. As the claimant was in fundamental breach, the respondent was released from its duties under the contract and its dismissal without notice was lawful.
93. Accordingly, the claim for notice pay was dismissed.

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Employment Judge Nash  
Date: 20 September 2022

Sent to the parties on  
Date: 21 September 2022