EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Justin Taylor	**v**	**Metroline Travel Ltd**

Heard at: Watford

On: 23 & 24 June 2022
23 July 2022-Chambers discussion

Before: Employment Judge Bedeau
Mrs Annie Brown
Dr Claire Whitehouse

Appearances

For the Claimant: Mr F Neckles, Union Representative
For the Respondent: Ms C Nicolaou, Consultant Solicitor

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal for a health and safety reason, section 100(1) Employment Rights Act 1996, is not well-founded and is dismissed.

2. The claim of unfair dismissal is well-founded but the claimant contributed to his dismissal by 20% affecting the basic and compensatory awards.

3. The case is listed for a remedy hearing on Wednesday 2 November 2022, if not settled.

REASONS

1. In the claim form presented to the Tribunal on 16 March 2021, the claimant, Mr Justin Taylor claims against the respondent unfair dismissal, wrongful dismissal and dismissal for health and safety reasons.

2. In the response presented to the Tribunal on 20 April 2021, the respondent avers that there were reasonable grounds for genuinely believing that the claimant was guilty of having failed to follow the respondent's policy on exiting the driver's cab and also he had engaged in a physical altercation

with another driver. A fair procedure was followed and dismissal fell within the range of reasonable responses. If dismissal was unfair the claimant had contributed to it and it should be reflected in the assessment of compensation.

The issues

3. Unfair dismissal

   3.1 In accordance with s.98 Employment Rights Act 1996, the respondent must first show the principal reason for the dismissal, that it fell within the category of reasons which are potentially fair in s.98(2) ERA 1996; or that the dismissal was for some other substantial reason.

   3.2 In addition, whether the respondent acted reasonably in dismissing the employee for that reason and whether the respondent followed a fair procedure. The burden here is neutral.

4. Automatic unfair dismissal s.100(1) ERA 1996

   4.1 "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason, (or, if more than one, the principal reason) for the dismissal is that being an employee at a place where there was no union representative or safety committee, or

   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 and safety.

   (e) Or 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 evidence

5. The claimant gave evidence and did not call any witnesses. On behalf of the respondent evidence was given by Mr Stuart McManus, Operations Manager, Potters Bar garage; and by Mr James Wright, General Manager, Willesden Junction.

6. In addition to the oral evidence, the parties adduced a joint bundle of documents comprising of 231 pages. The respondent produced in evidence a video recording of an altercation between the claimant and another driver. The claimant also produced a YouTube video recording of an altercation between an employee of the respondent and a member of the public.

Findings of fact

7. The respondent is a major London bus company with garages and routes around London and the Home Counties.

8. In its disciplinary policy it has agreed with the recognised trade unions, a non-exhaustive list of examples of gross misconduct. These include, amongst others, the following:

> "Failure to comply with, or breach of health and safety policies, procedures or regulations affecting the safety of other staff, the public, customers or company equipment;
>
> Violent, indecent or sexual behaviour – (including racial abuse or sexual harassment or harassment of any nature) assault or fighting for example assault upon an employee, customer or member of the public, threatening behaviour including verbal harassment." (pages 31-32 of the joint bundle)

9. The policy also provides that:

> "No disciplinary action will be taken against an employee until the case has been properly investigated. Where the employee admits the conduct, the investigation will be tailored appropriately."

10. In the policy in relation to the formal disciplinary procedure, the employee has the right to be accompanied by a recognised trade union representative or a workplace colleague. Their chosen companion has the right to: address the disciplinary hearing; to put the employee's case; sum up the case, and respond on the employee's behalf to any views expressed at the hearing. He or she may also confer with the employee during the hearing and should request an adjournment if necessary. The respondent will not permit the companion to answer questions on behalf of the employee or to address the hearing where the employee indicates that he/she does not wish this.

11. Paragraph 2.9 of the policy states the following:

> "Prior to any investigation or disciplinary hearing, copies of any available documents relevant to the issues, which would be considered during the hearing, will be made available to the Manager conducting the hearing and to the employee or his/her companion after consent is obtained. It is the employee's responsibility to make a copy of the paperwork available to their chosen companion and to give them adequate and accurate information about the allegation(s). CCTV footage will be made available under supervision and personal copies will not be provided unless providing a personal copy would not place Metroline in breach of data protection rules." (30)

12. In paragraphs 2.13 and 3.10, states:

> "2.13 Normally no employee will be dismissed for a first breach of discipline, except in the case of gross misconduct where dismissal without notice may occur, but only once the matter has been considered through the formal disciplinary process." (31)

> "3.10 "If at this stage new evidence is brought forward, it will be open to the manager considering the appeal to refer the matter back to the manager who held the disciplinary hearing to re-hear the case in light of the evidence concerned." (34)

13. The claimant commenced employment with the respondent on 16 July 2018, as a PCV Bus Driver, working full-time. He was assigned to the respondent's Potters Bar bus garage.

The incident on 6 November 2020

14. On 9 November 2020, he submitted a Vehicle Incident Report (VIR) in which he wrote the following regarding an incident that took place on 6 November 2020:

> "I drove on to TLSN [Turnpike Lane Station] approached the bay. There was a bus reversing so I waited and pulled up behind. I then noticed another bus in the middle of the yard. The driver was aggressively shouting. I signalled for him to drive around as I could not reverse. The driver appeared at my front doors of the bus abusing me threatening me he then stepped on to my bus with something in his hand invading my space pushing himself against me also threatening to take my life. I told him to leave my bus but he continued to abuse me. To protect myself I pushed him off the bus. When I got off the bus he then grabbed my arms to try to bite me. I called for assistance to get him away and was not supported." (58-61)

15. On 10 November 2020, Mr Stephen Harris, Managing Director, Metroline Ltd, received an email from Mr Dean Sullivan of Sullivan Buses regarding the incident on 6 November. Mr Sullivan wrote:

> "Steve,
>
> Chris Joseph our depot manager at SN has advised me about an incident at Turnpike Lane on Saturday evening when one of our drivers was assaulted by a driver of a Route 231 bus LK12 AVU. I would have sent this directly to PB, but don't know who your GM is these days. So perhaps you could send this to the relevant party.
>
> Anyway from the footage it seems a dispute took place over stand space. We have not yet had the opportunity to speak to the driver, so the following is from the CCTV. The bus station appeared busy with buses, so our driver appeared to be trying to park when your 231 drew up in the space. There appears to be some sort of discussion through the cab window resulting in our driving exiting the bus and approaching your vehicle. Our driver boards and is pushed off the vehicle.
>
> An altercation then takes place between both parties resulting in our driver sustaining a punch to the head and falling to the ground. A few bystanders intervened while others filmed the situation.
>
> Our driver reported the matter to the police (and the office here). Unfortunately your driver departed before the police arrived. He attended hospital for head injuries and

> was discharged a few hours later. He now has multiple bruises and is currently off work.
>
> Your driver is pictured second from left.
>
> Clearly our driver could have done a great deal to de-escalate the matter but obviously we don't want brawling in public places. I have saved the footage from our vehicle which captures most of the incident." (62)

16. Of note is that the Sullivan driver was not interviewed by Mr Sullivan prior to sending his email which was based on viewing the CCTV.

17. The claimant was suspended on 10 November 2020 by Ms Cleveland-Clarke, Senior Supervisor at Turnpike Lane bus station over the incident. The allegation being that he was involved in a physical altercation with another driver while on duty. The claimant was instructed to attend an investigation meeting at Potters Bar garage on Friday 13 November 2020 at 10am and report to Ms Justine May, Operations Manager, who would be conducting the investigation. He was advised to seek union representation. (63)

The investigation meeting

18. On the same day Ms May wrote to the claimant inviting him to attend the investigation meeting. The allegation being that,

> "On Saturday 6 November 2020 you left the cab of your vehicle – TE13 11 and entered into a physical altercation with a Sullivan's bus driver."

19. She attached with her letter a copy of the Vehicle Incident Report; the assault report dated 6 November 2020; CCTV reference PB10804; 282 duty card, driver's log card dated 6 November 2020; and suspension report by Mr Clark. He was advised to bring with him any evidence or information he would like Ms May to take into consideration. He was also advised of his right to be accompanied by a work colleague or trade union official. Such a person could only observe and/or take notes but was not permitted to ask questions or to address the meeting." (75-77)

20. The claimant was unable to get union representation as his representative was on furlough at the time of the scheduled investigation meeting. The claimant attended but did not want the meeting to go ahead in the absence of union representation. The meeting was, therefore, adjourned and rescheduled for 17 November 2020, at Potters Bar. (79)

21. The claimant was then able to to find alternative representation, Mr John Neckles, who emailed Ms May on 16 November 2020, to inform her that he had been instructed by the claimant on 15 November 2020, and requested "in the interests of justice" that the hearing be postponed as he would be unavailable to accompany the claimant. As an external representative he stated that he would be precluded from attending the claimant's place of work on Covid grounds. It would be prejudicial to the claimant's defence as

he, Mr Neckles, would not be in a position to view the available CCTV recordings and to provide the claimant with the necessary advice prior to answering any questions. He, therefore, requested that Ms May either allow him to attend in the company of the claimant, view the CCTV recordings at a more convenient date, or that he be provided with a copy of the same via email or post. (81)

22. On 16 November 2020, Ms May replied to the claimant, not to Mr Neckles, in response to Mr Neckles' request for a postponement, stating the following:

> "You have requested that the investigation meeting be rescheduled as your chosen representative is unavailable. I refer to s.6.1 of Metroline's Disciplinary Policy.
>
> Investigation (formerly known as a fact find) is an interview or series of interviews, conducted usually by a supervisor or manager, to establish the basic facts of an apparent breach of discipline. Employees attending an investigation hearing have the right to a companion (ie recognised Trade Union representative or workplace colleague) acting in a support or note-taking capacity only; the companion has no active function in the hearing. An investigation hearing will not be delayed due to the non-availability of a companion.
>
> As explained to you on Friday and reiterated in the schedule invite. In an investigation meeting a companion is present in an observation/note taking capacity only and is not permitted to ask questions on your behalf or address the meeting. The meeting has already been rescheduled once and I am not prepared to reschedule the meeting for a second time due to the non-availability of your representative.
>
> I would advise that you to make every effort to attend the meeting and bring to the meeting any evidence or information that you would like to be taken into consideration." (83)

23. Mr Neckles emailed Ms May on 17 November objecting to her decision to proceed with the investigation meeting knowing that he was unavailable to attend. He asserted that such a decision was in breach of the implied term of mutual trust and confidence and that should the claimant be dismissed the matter would be put before an Employment Tribunal. He further stated that the term placed on Mr Neckles amounted to less favourable treatment on grounds of the claimant's race and trade union membership. (85)

24. The meeting went ahead without Mr Neckles being present. Notes were taken and are in the joint bundle of documents. The claimant was asked whether he was content to proceed without a workplace colleague or trade union representative. His response was to say "Not really. You have not given me much choice."

25. During the investigation meeting the claimant was asked whether he was going to call the Go-Ahead Controller as a witness but declined to do so stating: "I did not want to with all this procedure and everything". He also produced a statement on his mobile phone to which a screenshot was taken. In the statement he wrote that due to the fact that his chosen companion/representative denied the opportunity to attend the claimant's

place of work to have access and to view the availability of the CCTV recording in order to advise him before answering any questions, he would not be answering questions during the investigation meeting for fear of prejudicing his defence until such time as Ms May complies with the request to give him access to highly relevant information. (93)

26. He complained about not having viewed the CCTV recordings prior to being questioned and was reluctant to answer any questions without viewing it. In substance, he gave an account of events which reinforced what he had written in his VIR. As he was reticent about answering some of the questions without viewing the CCTV recordings, he was eventually allowed to view the recordings. In relation to one recording, he said that it confirmed what he said occurred. Further questioning seemed to have upset him. At that point Ms May then told him the questions she was going to put to him but he did not comment. After a 17-minute adjournment Ms May returned. What she said is recorded:

> "In relation to the allegations that we have discussed today: based on your unwillingness to answer questions put to you and from what was observed on the CCTV (NAS reference BB10804) whereby it was observed you breaching and failing to adhere to company rules by exiting your cab and entering into a physical altercation with a Sullivan's bus driver at Turnpike Lane Station bus stand on 6 November 2020. I have decided that I will be forwarding this matter to a formal disciplinary hearing. The charges are as follows:
>
> Failure to adhere to company procedure by exiting the driver cabin of the vehicle that you were in charge of (TE13 11) on 6 November 2020.
>
> Entering into a physical altercation with a Sullivan's bus driver on 6 November 2020 at Turnpike Lane bus station, bus stand.
>
> You are currently suspended from duty and I have decided that I will not be lifting the suspension today. You will remain suspended until the disciplinary hearing.
>
> The hearing will take place at 11.00 hours on Monday 23 November 2020 at Potters Bar garage and will be chaired by Stuart McManus, Operations Manager.
>
> Invite letter to disciplinary issue." (88-91)

27. In the letter signed by Ms May, she repeated the allegations the claimant had to face and informed him that if the hearing manager decided his conduct amounted to gross misconduct or if he was subject to a live final written warning, one of the outcomes could be his dismissal with or without notice. The decision would not be taken until he had full opportunity to put forward his version of events and any mitigation. He was again reminded of his rights to be accompanied by a workplace colleague or trade union representative. If he was unable to attend, he would need to explain why, and provide an alternative date and time. Should he wish to have any witnesses attend to give evidence, he had to complete the appropriate section of the letter and return it to Ms May. (94-95)

28. The disciplinary hearing was rescheduled to take place on 24 November 2020 as the claimant's representative, Mr Neckles, was unable to attend on 23 November 2020.

29. Ms Joy West, Bus Driver, completed an Irregularity or Occurrence Report on 17 November 2020, at 12.37pm, referring to the incident between the claimant and the Sullivan driver. She wrote:

> "In response to the incident that took place between my colleague (Justin) and another driver from the 217 route. Whilst I was about to leave my stand, I looked in my left view mirror and saw that there was a fight, I immediately disembarked my bus and proceed towards the fight when I saw it was Justin and as mentioned, 217 driver. I immediately jumped in to part the two of them advising them of their jobs. I cannot swear of any physical damage that I saw inflicted on each other. I have no idea of how the fight started. But I can only say I have had my running with the 217 driver, but not to that degree, but I find his approach in general to be very arrogant and somewhat intimidating. It is just unfortunate that Justin had to experience it. After parting the fight, I left when the 217 driver was calling the police and Justin was standing on his bus. I left two minutes late which did not interrupt my service.
>
> Finally can I say that I did not witness any physical blows or punching, it was more grabbing of each other." (97-98)

30. We find that Ms West's statement was not before Ms May prior to the conclusion of the investigation meeting. The reason being that Ms West's statement is timed at 12:37, but the investigation meeting concluded at 12.06 on 17 November 2020.

<u>The disciplinary hearing</u>

31. The claimant had prior to the disciplinary hearing notice of the investigation meeting; the suspension report by Mr Clark; the email from the Sullivan's managing director; the claimant's duty card for Route 231; copy log card on 6 November 2020; CCTV reference 10804-20-BB; 15 x CCTV still images; and the occurrence report by Ms West.

32. He attended the disciplinary hearing in the company of Mr Neckles, his representative. It was conducted by Mr McManus. Notes were taken.

33. The claimant then gave a detailed account of the events on 6 November 2020 which was more detailed than what is contained in his VIR. He explained that he had not fully answered the questions put to him by Ms May during the investigation meeting as he did not feel, initially, that the procedure was followed. He admitted that he pulled into the vacant stand space unaware that the Sullivan's driver was attempting to manoeuvre his bus into that space. He stated that he was sitting in his cab minding his own business when the Sullivan's driver approached his bus and opened the doors, telling the claimant to move the bus saying that he was going to park there. As he, the claimant, could not hear the Sullivan's driver clearly, he opened his driver cab door and was spoke to him from inside the cab. At

that point he was not threatening. They were just having a conversation. The Sullivan driver appeared peeved.

34. The claimant was asked by Mr McManus what triggered the altercation, to which he replied by saying that it was possible that the Sullivan's driver realised that he was not going to move the bus. He was neither rude nor offensive toward him. He just told him that he was not reversing the bus whereupon the Sullivan's driver began to swear but he did not respond in kind. He denied getting out of the cab to confront the Sullivan's driver. He stated that there were no direct threats made towards him until the Sullivan's driver stepped on to the bus. Mr McManus asked what changed when the Sullivan's driver stepped on to the bus? The claimant replied that it was what the Sullivan driver said and his manner, and the way he forced himself upon him. At that point the claimant was already out of the cab. He was asked whether he had called Code Red for assistance, to which he replied in the negative. It was put to him that he did not feel threatened enough at that point to call for assistance. His reply was that he did not feel safe enough to turn his back on the Sullivan's driver once he had pushed him away and thought that the situation had been defused. He was asked how long was it before the Sullivan's driver returned to the front of the bus after he had pushed him away. He replied "almost instantly". He denied having a tendency to be bad tempered or confrontational and was not violent in nature. At that point it was decided that the CCTV should be viewed.

35. It is recorded from the CCTV the following:

"18:48:33 – Sullivan's driver seen approaching the front of the bus

18:48:37 – Sullivan's driver opens entrance doors using the emergency button

18:48:44 – Sullivan's driver seen at front doors – cab door of TE13 11 seen opening

18:48:59 – Sullivan's driver seen waving arms back and forth, JT seen stepping out of cab

18:49:02 – Discussion seen between two drivers and JT turns back towards the cab

18:49:14 – Sullivan's driver seen at front doors as JT appears to be collecting his belongings. JT then steps towards front doors.

18:49:24 – Sullivan's driver steps on to platform of bus and appears to put right hand in right jacket pocket.

18:49:26 – JT pushes Sullivan's driver off platform on to road.

18:49:30 – Sullivan's driver returns to front of bus and JT is seen to punch him in the right side of head with his left hand and then lunges at him from the platform.

18:49:31 – Physical altercation then takes place, continuing until 18:50:33 with both parties engaged in physical confrontation.

18:50:35 – Sullivan's driver seen collecting his shoes and what appears to be a log card from the floor.

SM – What was the purpose of you pushing him off the bus?

JT – I feared for my safety, I did not want to be hit with anything.

SM – Did you see if he had anything in his hand?

JT – I have already said,

SM – Having seen the CCTV is there anything that you wish to say?

JT – I don't know."

36. The claimant was asked why did he punch the Sullivan's driver in the head. He responded by saying that he did not punch him in the head, the Sullivan driver had pulled him off the bus. The claimant said that the police had not been in touch with him. He denied bringing the respondent into disrepute because the incident occurred in a public place. He did not answer in response to the question from Mr McManus as to what he would do differently in the future. He stated that he had not seen the Sullivan's driver before and had not had any issues with any other drivers. Mr McManus was watching the video on the monitor, he would then stop it at certain points, turn it to show stills to the claimant, asking him to confirm what he Mr McManus, thought was happening. The claimant expressed regret that the incident occurred but that he was not the instigator of it, and in was not in his character to behave in that way. When asked whether he had anything else to say, he replied by saying:

> "I come to work to perform my duty to perform my duty to the best of my ability. I am sorry it had to happen but it was not instigated by me. It is not in my character to behave in this way. It is not something I imagine happening at work. We are professionals in uniform. I initially did the best I could do by reasoning with the driver."

37. Mr Neckles then put questions to the claimant after which there was a 37-minute adjournment at the claimant's request before submissions.

38. During Mr Neckles' submissions he went through the test in British Home Stores v Burchell. He said that what gave rise to the investigation was the email from Mr Sullivan. It was vague, omitted relevant information. It did not state the alleged punch to the Sullivan's driver's head either inside the bus or outside and was not supported by any CCTV evidence.

39. Mr Neckles further submitted that the investigation was flawed. The investigation officer failed to request the attendance of the Sullivan's driver to participate in the investigation, either by attendance or by written questions. The direct evidence in relation to the incident came from the claimant and was supported by CCTV evidence. The investigating officer failed to request a copy of any police investigation or decision, and failed to

realise that the police had dropped their investigation because they saw the Sullivan's driver as being at fault by provoking the incident as he aggressively approached the claimant. He further submitted that the investigating officer failed to realise that the complaint from Mr Sulllivan was hearsay in the absence of a direct complaint from the Sullivan's driver. Enquiries had to be made as to why the Sullivan driver had not submitted a written complaint, and why he was not able to attend an investigation hearing. Mr Neckles further submitted that the email of 10 November in the absence of a written complaint from the Sullivan's driver, signified that there may be a breach of the Data Protection Act by the Sullivan bus company on the grounds that CCTV information could not be accessed without permission to do so. He further stated that the investigating officer failed to have regard to the witness statement of Ms Joy West prior to referring the matter to a disciplinary hearing. Her statement gave the impression that the Sullivan's driver had behavioural issues. The investigating officer did not act in good faith. She limited her investigation to the CCTV information and the VIR as well as the assault report submitted. She also denied the claimant access to relevant CCTV recordings before responding to her questions. Ms May was both the allegation maker and the investigation officer. She should have allowed Mr Neckles, his representative, to accompany him at the investigation meeting. The reckless failure on the part of Ms May to act and carry out a full, proper and reasonable investigation with regard to the allegations contained in the email of 10 November 2020, did cause Mr McManus, the disciplinary officer, to perform a dual role in carrying out an investigation through his questions which she herself ought to have carried out and failed to do so and in conducting the disciplinary hearing.

40. Having regard to all of the matters raised, Mr Neckles submitted that the claimant should not be dismissed, instead, if there was to be a disciplinary penalty, to consider receive either a written warning or a final written warning.

41. There was then an adjournment after which Mr McManus gave his decision. He concluded that there was a case to answer and that the allegations were substantiated. The conduct was serious constituting gross misconduct. He had taken into account the claimant's length of service and that he had no live disciplinary sanctions. He then gave his decision to the claimant and to Mr Neckles. In his findings he stated that there was no doubt in his mind that there was a physical altercation between the claimant and the Sullivan driver. Although the complaint may have come through the director of the company rather than the driver, nonetheless the complaint was received. The two allegations were self-explanatory and proven. The claimant had exited the cab of the bus when he knew he should have remained where he was at the time taking into account the volatility of the situation. He, therefore, put himself "into the situation". He knew that he should not have exited the cab in a hostile or confrontational situation with the driver shouting and abusing him. Further, he entered into a physical confrontation with the driver whom was injured. On the CCTV footage it looked as though he had punched the other driver on the side of the head which was

corroborated in the complaint. Even though the Sullivan driver had boarded the bus and appeared to pull him off the bus, his response appeared disproportionate and the level of violence used was unnecessary, not what Mr McManus would deem as self-defence. What was noticeable was that of all those present it was only Ms West who attempted to intervene. There was no excuse for his conduct. There was no place for such conduct within the company. The respondent's disciplinary process was not about proving beyond a reasonable doubt but on the balance of probabilities.

42. Mr McManus continued, by saying that although the police were not in contact with the claimant, they did contact the respondent requesting his details. He noted that the claimant had not reported the incident to the police and that the police had not been in contact with him. He cited the provision in the employee handbook on the definition of bullying and harassment which included physical and unnecessary touching, gestures or assault. Physical abuse and violent conduct was considered a gross misconduct offence for which one possible outcome was summary dismissal. He did not condone the claimant's behaviour and would not tolerate it in the workplace. He concluded that the claimant was provoked but the use of the word victim was maybe inappropriate. He took into account his length of service and previous disciplinary record when determining the appropriate sanction. He then said:

> "However, Mr Taylor's reaction to any provocation was disproportionate and excessive. Had he stopped once the Sullivan's driver had been removed from his vehicle, or acted in accordance with his own training and ensured he was securely in his cab before calling Code Red, the matter would be very different. He did not stop. He continued to pursue the Sullivan's driver and to behave in a violent and confrontational manner towards him. No amount of provocation can excuse these actions. A decision by the police not to charge either man is not determinative of the outcome in disciplinary proceedings. Their decision is based on the public interest in prosecution and the realistic prospect of a conviction. They had a higher standard of proof. I have to be satisfied on the balance of probabilities that the conduct alleged occurred and, if so, whether it is reasonable to dismiss, taking into account previous similar fact cases and the disciplinary policy, amongst other things."

43. He further stated that Ms May was entitled to amend the allegations against the claimant if, on viewing the CCTV, she considered it appropriate to do so. She was not the decision maker, judge and jury in the case. She had to decide whether to forward the matter to a disciplinary hearing.

44. He concluded that as a result of the claimant breaching the respondent's disciplinary policy, and the diversity and inclusion policy, he would be summarily dismissed in accordance with section 2.15 of the respondent's disciplinary procedure which states:

> "Matters that the company views as gross misconduct include but are not limited to: violent, indecent or sexual behaviour – including racial abuse or sexual harassment or harassment of any nature) assault or fighting eg assault upon an employee, customer or member of the public, threatening behaviour including verbal harassment."

45. The decision was the claimant would not be entitled to pay in lieu of notice and that his last day of work was on that day, Wednesday 25 November 2020. The outcome letter was to be issued by email and sent by first class post. (105-120)

46. The letter confirming the dismissal is dated 25 November 2020, signed by Mr McManus and addressed to the claimant. It repeats much of what was said to the claimant at the hearing. (121-122)

The appeal

47. On 26 November 2020, Mr Neckles sent a notice of appeal to Mr McManus. The grounds covered disputed evidence; breaches of natural justice; and breach of procedure/contract; breaches of s.13 and s.27 Equality Act 2010; bias; disparity of treatment; and that the penalty was too harsh. (124-125)

48. The appeal hearing was held on Thursday 14 January 2021, and chaired by Mr James Robert Wright, Garage Manager, Willesden Junction; and by Ms Yvonne Dawson, Garage Manager, West Perivale. Notes were taken at the hearing. The claimant attended. Mr Neckles was also present as his representative. It was conducted mostly by Webex platform taking into account the prevalence of Covid-19 pandemic.

49. Mr Neckles submitted that breach of procedure involved Ms May setting out the allegations when there was no official complaint from the Sullivan's driver. The claimant had the right to see the CCTV recordings referrable to him. At the outset of the investigation meeting Ms May asked him whether he was happy to proceed without a companion. His response was to say not really. She had given him no choice. Reference by her to a companion at an investigation meeting is only there in an observatory role, was not in accordance with the ACAS Code of Practice. Further, the claimant had been discriminated against on grounds of his race during the investigation. There was a failure to provide a report and to give a rational reason for forwarding the case to a disciplinary hearing. The investigation had been conducted unfairly. Neither the Go Ahead supervisor nor the Sullivan's driver were questioned or even asked to submit statements as part of the investigation. Nothing was mentioned about the level of provocation involved and how quickly the matter escalated. There was no evidence to support the allegation of leaving the cab of the bus that directly linked to the situation that followed. There was no procedure, written or otherwise, that prevented him from doing so.

50. In relation to the severity of the sanction, Mr Neckles argued that it was too severe taking into account all the evidence. The claimant was acting in self-defence and if there should be a sanction, it should only be either a written warning, or a final written warning at the most.

51. As regards disparity of treatment, he stated that he was aware of an Operations Manager who was dismissed and reinstated on appeal for being involved in what was alleged to be a similar altercation and that if the

claimant was not reinstated it amounted to discrimination and was wholly unfair.

52. Mr Neckles then submitted that the claimant's treatment was because of his race and that he had been victimised.

53. There was an adjournment of the appeal meeting. Upon reconvening, Ms Dawson gave the decision of the panel which was to dismiss the appeal and to uphold the decision to dismiss the claimant. In arriving at their conclusion, she stated that there were areas of the investigation which, in hindsight, could have been done better, such as, obtaining statements from potential witnesses, however, there was little evidence that could have been gathered that was not already available from the CCTV images, which give an accurate and unbiased account of the events which had taken place. They, therefore, had no bearing on the decision made at either the investigation meeting to forward the case to a disciplinary hearing or at the disciplinary hearing itself in which the charges were found proven. (140-147)

54. The appeal was confirmed in an email letter dated 20 January 2021, signed and sent by Ms Dawson. (148-149)

55. In the course of his evidence Mr Wright told the Tribunal that he and Ms Dawson, had watched the CCTV footage and could see the claimant punch the Sullivan's driver on the side of his head and then lunged at him. He asked the claimant if he had anything to say having watched the footage and he replied, "I don't know". There was a significant disparity in height with the claimant being taller than the Sullivan's driver. Mr Wright said that he took into account all the evidence before him including internal policies in the Employment Handbook and, in particular, the CCTV footage which showed, unequivocally, that the claimant had exited his cab and assaulted the Sullivan's driver. Although he had been provoked and felt he may have been in danger, the steps he took went far beyond what could have been reasonable. He should have followed the correct procedure and called for assistance without leaving his cab.

<u>iBus</u>

56. We find that on board every bus there is a system that links the driver to iBus. This is a London-wide method of communication and tracking that is used across the entire fleet of buses in the capital of which there are around 8,000. iBus is operated by Transport for London, "TfL". If the driver signals Code Red, the call goes through to NMCC, the emergency command and control centre, also used for all London buses and like iBus, is managed by TfL. NMCC will send the police or ambulance if they are needed to a particular incident. A driver is supposed to call Code Red if there is a fight on the bus or if a passenger becomes confrontational, or the bus is vandalised or involved in a collision.

Statement by Mr Christophi, Roadside Controller, Go-Ahead

57. A statement was obtained from Mr Christophi, Go-Ahead London, Roadside Controller, in relation to the incident. He stated that the Sullivan's driver was talking to the claimant when it quickly escalated with the Sullivan driver grabbing hold of the claimant and the claimant was attempting to push him away but the Sullivan's driver was still holding on. They then both exited the bus. The Sullivan's driver continued to hold the claimant with the claimant trying to push him away. It continued until a female driver came and managed to split them up. The Sullivan driver then approached him, Mr Christophi, and asked, "Did you see what happened?" to which Mr Christophi responded by saying, "But you're the one who started it".

58. Mr Christophi then wrote:

> "Following this, the 231 driver involved tried to walk away from the 217 driver, but the 217 driver kept on following him whilst on the phone to the police. The 231 driver kept trying to tell him to leave him alone, but the 217 driver persisted on following him despite myself even telling him to stop following the 231 driver. Shortly afterwards the 231 driver walked away from the scene with the 217 driver remaining waiting for the police to attend.
>
> Quickly afterwards the police arrived, and I directed them to the 217 vehicle whose driver was inside. They then asked me what I saw and I explained to them what I witnessed as stated above." (178)

YouYube video-Mr Goerge Loughlin

59. The Tribunal was shown a YouTube video recording taken at one of the respondent's depots. It shows three of the respondent's employees in high visibility vests. One person is seen shoving and pushing a member of the public out of the depot. On one occasion an employee, referred to as Mr Loughlin, Operations Manager, grabs hold of the person's left hand from the back, pushes it up the person's back and forcibly ejecting him from the premises. The incident occurred on Willesden Bus Station premises. Mr Loughlin was dismissed following that incident. On appeal he showed remorse but believed that he was behaving in the manner shown on the video for the right reasons. The member of the public was inebriated at the time and he posed a significant danger to himself and others. It was acknowledged that Mr Loughlin had overstepped the mark and should have waited for the police to arrive rather than taking action himself.

60. This incident was brought to the attention of the appeal panel but was distinguished from the claimant's case. The claimant did not appear, according to Mr Wright, to be genuinely remorseful and was intent on portraying himself as the victim, whereas, Mr Loughlin showed remorse. (189-231)

Viewing the recording of the events at the front of the bus on 6 November 2020

61. The Tribunal viewed the CCTV recording of the events at the front of the bus and outside. The recording was taken from the internal camera/s on the bus.

62. The claimant was invited by the Tribunal to us through what was depicted on the video. In going through the recording he told the Tribunal that during the evening he was feeling vulnerable. The first video would have shown him driving into the bay and two buses trying to reverse into the bay. To the left of his bus was the Sullivan driver's bus. He referred to his duty card that stated that he was due to arrive at Turnpike Lane at 18:49 that evening. He knew that he had to get the train at Turnpike Lane to Potters Bar. He said that he was writing up his log card when the Sullivan driver opened the door. He thought it was safe to open his cab door and speak with the other driver. The Sullivan driver asked him to reverse, but he said he could not. After the claimant picked up his card, the Sullivan's driver then stepped on to the bus platform at the front of the bus. From his close proximity to him, he, the claimant, pushed the Sullivan's bus driver, as the other driver had something in his hand. This could not be seen from the camera which showed the front of the bus but could be seen from the camera in the cabin.

63. At the time he pushed the Sullivan driver, he stated he did not know it was a mobile phone in the Sullivan's driver's hand. He only became aware of it when the video was paused by Mr McManus during the disciplinary hearing and at that stage he could see the Sullivan driver's hand and what looked like a mobile phone. He knew that there was something in the Sullivan driver's hand and was in fear of being hurt by a knife. He stated that once he switched off the bus the Sullivan driver's tone changed as he realised that he, the claimant, was not going to move the bus.

64. He was asked by a member of the Tribunal why did he not get back into his cab. His response was that it was the first time he did that duty and was pushed for time. He never had a duty where he had to travel so far between stations. He had to get back to the other depot in order to have a break. To do so he had to travel by train. Also, after he had pushed the Sullivan's driver from the platform of the bus, he felt he did not have sufficient time to return safely to his cab should the Sullivan's bus driver approach again in an aggressive manner while his back was towards him.

65. The Tribunal took the view that the claimant was clear and candid in his account of events by reference to what was depicted in the CCTV recording. He said that he was completing his log when he was interrupted by the Sullivan's driver opening the doors to the bus. The Sullivan's driver became agitated when he, that is the claimant, switched the engine off realising that the claimant was not going to move the bus out of the parking area. The Sullivan's driver put his hand in his pocket and he, the claimant, genuinely feared for his safety. It was only at that stage when he pushed the Sullivan's driver.

66. We had difficulty in coming to the view that there was evidence depicted in the recording of the claimant punching the Sullivan's driver. Certainly, Ms May, who had viewed the recordings, did not observe the Sullivan's driver being punched by the claimant. After pushing the Sullivan's driver back off the bus and that driver grabbing hold of the claimant's clothing, together they exited the bus.

67. During the evidence Mr Neckles did neither cross-examined nor in-chief, examined, or called evidence relevant to dismissing the claimant for a health and safety reason.

Submissions

68. We have taken into account the submissions by Mr Neckles on behalf of the claimant and by Ms Nicolaou, on behalf of the respondent, as well as the authorities they have made reference to. We do not propose to repeat their submissions herein having regard to Rule 62(5) Employment Tribunals (Constitutional Rules of Procedure) Regulations 2013, as amended.

The law

69. Section 100 Employment Rights Act 1996, "ERA 1996", provides,

> **"Health and safety cases.**
>
> (1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—
>
> (a)having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,
>
> (b)being a representative of workers on matters of health and safety at work or member of a safety committee—
>
> (i)in accordance with arrangements established under or by virtue of any enactment, or
>
> (ii)by reason of being acknowledged as such by the employer,
>
> the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,
>
> (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,

(d)in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(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.

(2)For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3)Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them."

70. Section 98(1) Employment Rights Act 1996 ("ERA"), provides that it is for the employer to show what was the reason for dismissing the employee. Dismissal on grounds of conduct is a potentially fair reason, s.98(2)(b). Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

"Where the employer has fulfilled the requirements of subsection (1), and 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 employees 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."

71. In the case of British Homes Stores v Burchell [1980] ICR 303, the EAT's judgment was approved in the Court of Appeal case of Weddel & Co Ltd v Tepper [1980] ICR 286. The following has to be established:

    a. First, whether the respondent had a genuine belief that the misconduct that each employee was alleged to have committed had occurred and had been perpetrated by that employee,

    b. Second whether that genuine belief was based on reasonable grounds,

    c. Third, whether a reasonable investigation had been carried out,

72. Finally, in the event that the above are established, was the decision to dismiss reasonable in all the circumstances of the case. Was the decision to dismiss within the band of reasonable responses?

73. The charge against the employee must be precisely framed Strouthos v London Underground [2004] IRLR 636.

74. Even if gross misconduct is found, summary dismissal does not automatically follow. The employer must consider the question of what is a reasonable sanction in the circumstances Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854.

75. The Tribunal must consider whether the employer had acted in a manner a reasonable employer might have acted, Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT. The assessment of reasonableness under section 98(4) is thus a matter in respect of which there is no formal burden of proof. It is a matter of assessment for the Tribunal.

76. It is not the role of the Tribunal to put itself in the position of the reasonable employer, Sheffield Health and Social Care NHS Trust v Crabtree UKEAT/0331/09/ZT, and London Ambulance Service NHS Trust v Small 2009 EWCA Civ 220. In the Crabtree case, His Honour Judge Peter Clark, held that the question "Did the employer have a genuine belief in the misconduct alleged?" goes to the reason for the dismissal and that the burden of showing a potentially fair reason rests with the employer. Reasonable grounds for the belief based on a reasonable investigation, go to the question of reasonableness under s.98(4) ERA 1996. See also Secretary of State v Lown [2016] IRLR 22, a judgment of the EAT.

77. The range of reasonable responses test applies to the investigation as it does to the decision to dismiss for misconduct, Sainsbury's supermarket Ltd v Hitt [2003] ICR 111 CA.

78. In the case of Taylor v OCS Group Ltd [2006] ICR 1602 CA, it was held that what matters is not whether the appeal was by way of a rehearing or review but whether the disciplinary process was overall fair.

79. The seriousness of the conduct is a matter for the employer, Tayeh v Barchester Healthcare Ltd [2013] IRLR 387 CA.

80. The Court of Appeal acknowledged that employment tribunals are entitled to find whether dismissal was outside the range of reasonable responses without being accused of placing itself in the position of being the reasonable employer or of adopting a substitution mindset. In Bowater-v-Northwest London Hospitals NHS Trust [2011] IRLR 331, a case where the claimant, a senior staff nurse who assisted in restraining a patient who was suffering from an epileptic seizure by sitting astride him to enable the doctor to administer an injection, had said, "It's been a few months since I have been in this position with a man underneath me" was the subject of disciplinary proceedings six weeks later. She was dismissed for, firstly, using an inappropriate and unacceptable method or restraint and, secondly, for the comment made. The employment tribunal found, by a majority, that her dismissal was unfair. The EAT disagreed. The Court of Appeal, overturned the EAT judgment, see the judgment of Stanley Burnton LJ, paragraph 13. See also Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677, in which the Court of Appeal held that the tribunal is required to consider section 98(4) ERA 1996, when considering the fairness of the dismissal.

81. The level of inquiry the employer is required to conduct into the employee's alleged misconduct will depend on the particular circumstances including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee. "At the one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.", Wood J, President of the EAT, ILEA v Gravett [1988] IRLR 497.

82. In relation to disparate or inconsistent treatment, in the case of Hadjionnou v Coral Casinos Ltd [1981] IRLR 352, a judgment of the Employment Appeal Tribunal, it was held that where decisions are made by the employer in truly parallel circumstances indicate that it was not reasonable to dismiss, the decision to dismiss the claimant would not be regarded as fair. There must be close similarities between the claimant's case and the comparable case. This judgment was subsequently endorsed by the Court of Appeal in Paul v East Surrey District Health Authority [1995] IRLR 305. See also the judgment in Newbound.

Conclusion

Dismissal for a health and safety reason

83. As regards automatic unfair dismissal, s.100(1), the claimant does not rely on health and safety either during his investigation meeting, disciplinary hearing or the appeal hearing. Initially at the start of the hearing, he told us that he was fearful for his health and safety which had been compromised because of Covid-19 when he was confronted by the Sullivan's driver, but this was not pursued by him or his representative during the hearing. We

were unable because of the lack of evidence, to make findings of fact upon which she could conclude, on the balance of probabilities, that the reason or the principal reason for his dismissal, was due to health and safety in accordance with s.100(1). Accordingly, this claim is not well- founded and is dismissed.

Unfair dismissal

84. In relation to the unfair dismissal claim, having regard to the test to be applied in the case of Burchell, we have come to the conclusion that the investigation was flawed in the following ways.

85. Firstly, the respondent did not provide the CCTV footage on which it relied to either the claimant or the claimant's representative before the investigation meeting. The respondent's disciplinary policy and procedure, paragraph 2.9, states:

> "CCTV footage will be made available under supervision…"

86. Secondly, Ms West's, Bus Driver, working for the respondent, her statement was not available to the investigation meeting according to the notes of the meeting but was dated the same day, 17 November 2020. It is unclear why this document was not given to Ms May on the day shortly after the meeting.

87. Thirdly, Ms May did not request statements from the Sullivan's driver, the Go-Ahead Garage Controller, or request CCTV recordings from Sullivan buses.

88. Fourthly, the evidence of a hospital admission by the Sullivan's bus driver or medical report appears not to have been requested by the investigating officer. There is no evidence of the report of the incident the Sullivan's bus driver made to the police.

89. There does not appear to be any acknowledgement by the respondent that the claimant could be leaving the cab of the bus because he was at the end of his shift and needed to travel from Turnpike Lane to Potters Bar.

90. The disciplinary hearing was flawed, in that, firstly, it did not rectify the flaws of the investigation by requesting witness statements or evidence or request CCTV footage from the Sullivan's buses. Secondly, Mr McManus, felt that Ms West's evidence did not add anything to either the investigation or to the disciplinary hearing relying on the fact that Ms West's observations were limited and through her rear view mirror. They did not question her at all about what she had seen before, during and after the incident. Thirdly, there was almost total reliance on CCTV footage for evidence, plus the email from the director of Sullivan buses, to the director of the respondent, and the claimant's incident report. Based on the notes from the disciplinary hearing and the claimant's evidence, it appears that the hearing was conducted in a manner that whatever the claimant had to say was either not taken into account or given little weight which contributed to his disengagement from the process. This was clearly demonstrated by Mr McManus playing the

CCTV recording, stopping the footage at key points, turning the monitor round to show stills to the claimant, asking the claimant to confirm what he, Mr McManus, thought was happening. He did not, in an open-minded manner, give the claimant the opportunity to explain his version of the incident as the claimant did during the Tribunal hearing. In any event, this is something that should have been established during the investigation. This was very important as Mr McManus believed that the claimant had punched the Sullivan's bus driver.

91. Fourthly, the appeal hearing did not rectify the flaws in the investigation or in the disciplinary hearing. This was despite Mr Wright, in his witness statement, at paragraph 7, stating:

> "We considered all the evidence and we agreed that to a certain degree, there could have been more done in the investigation, in terms of obtaining witness statements or reports and questioning those witnesses."

92. Fifthly, the respondent's disciplinary policy and procedure, paragraph 3.10, states:

> "If at this stage new evidence is brought forward, it will be open to the manager considering the appeal to refer the matter back to the manager who held the disciplinary hearing to re-hear the case in light of the evidence concerned."

93. The appeal hearing managers were aware of new evidence in the form of a witness statement that Go Ahead Garage Controller, Mr Christophi and Ms West's report but chose not to refer the matter back to the disciplinary manager.

94. Sixthly, the claimant cited as a comparator during his appeal, the case of Mr George Loughlin, the incident at Willesden Garage. After viewing the YouTube footage of this incident, the Tribunal was of the view that the Loughlin incident is worse than the incident as shown on the CCTV footage of the claimant's interaction with the Sullivan bus driver. Our reasons for taking this view are as follows:

94.1 In the Loughlin incident, Mr Loughlin shoved or pushed the inebriated customer or passenger a number of times. During one of these times, he grabbed the man by the top of his arms and partially spun him around resulting in him falling to the ground. Towards the end of the incident, Mr Loughlin pushed the man's left arm up behind his back and forcibly ejected him from the premises. In the claimant's case, he pushed the Sullivan's bus driver off the platform of his bus when he feared for his physical safety as the driver had something in his hand. The subsequent scuffle outside the bus, as far as it was captured by the CCTV, shown to the Tribunal, appeared to be a combination of the Sullivan's bus driver holding on to the front of the claimant's clothing and the claimant trying to contain him in a bear hug. The claimant did not show sustained aggression towards the Sullivan's bus driver whereas Mr Loughlin did show aggression through a number of acts towards the inebriated man.

94.2 The Loughlin incident took place in daylight in the yard of the garage in full view of members of the public passing by on the pavement outside the yard. The claimant's interaction with the Sullivan's driver took place in the evening, within an undercover garage in which, according to the claimant's evidence, the public were not permitted or present. The Tribunal takes the view that the Loughlin incident was more likely to do greater damage to the respondent's reputation.

94.3 The Loughlin incident involved three employees of the respondent who stood around the inebriated man, whereas the incident involving the claimant, involved two people only, namely the claimant and the Sullivan driver.

94.4 In the claimant's case it was the Sullivan's driver who committed the first aggressive act by stepping on to the platform of the claimant's bus and invading his personal space, while appearing to reach into his pocket with his right hand and being in an agitated state. This was, in the Tribunal's view, a provocative act on his part. In relation to the YouTube video it would appear that Mr Loughlin committed the first aggressive act and followed this up with other aggressive behaviours.

94.5 During the disciplinary hearing the claimant expressed regret that the incident took place, but that he did not instigate it. Further, it was not in his character to behave in that way. He, therefore, expressed some remorse which was not taken into account or if it was taken into account, was not accorded the weight it deserved.

94.6 In contrast, Mr Loughlin expressed remorse for his aggressive behaviour towards the inebriated man, which he accepted, during the appeal hearing, he had initiated. He was asking to be reinstated to his employment with the respondent. He was, subsequently, re-employed.

95. For the above reasons we have come to the conclusion that the claimant's dismissal was substantively unfair.

Conduct and contribution

96. In relation to whether or not the claimant contributed by his conduct to his dismissal, we take the view that he did but to a limited extent. He should not have engaged in a heated exchange, no matter how calm his own manner, nor how focussed he was on getting to the next depot, before the Sullivan driver stepped on to the bus. It was clear that the Sullivan's driver adopted an aggressive manner, and at that stage the claimant should have called Code Red as there was a gap of around 48 seconds from the Sullivan driver opening the front doors to him stepping on to the platform of the bus. It was clear that he was in an agitated state as he felt that the claimant had taken his parking space. There was considerable provocation and the claimant feared for his physical safety the second the Sullivan driver put his hand in his pocket as he did not know whether or not the Sullivan's driver had a knife in his pocket. We have taken conduct and contribution into account and will reduced both the basic and compensatory awards by 20%.

97. The case is listed for a remedy hearing on 2 November 2022, if not settled beforehand.

_____
Employment Judge Bedeau

Date: 3 October 2022

Sent to the parties on:

3 October 2022

For the Tribunal Office