



Case No. 2302778/2020

EMPLOYMENT TRIBUNALS

Claimant: L

Respondent: M Limited

Heard at: London South (By CVP) **On:** 7, 8, and 9 November 2022

Before: Employment Judge Self
Mrs S Dengate
Mr P Morcom

Appearances

For the Claimant: In Person

For Respondent: Mr R Bailey - Counsel

JUDGMENT

1. The Claim for unlawful deduction of wages is dismissed upon withdrawal.
2. The Claim for unfair dismissal is not well-founded and is dismissed
3. All Claims under the Equality Act 2010 for Direct Discrimination (Sex, Race and Marriage) are not well founded and are dismissed.
4. Upon the Tribunal considering that the Claimant's Claims had no reasonable prospect of success and/or the Claimant had been unreasonable in bringing the Claim and/or the manner in which it had been conducted, the Claimant shall pay £7,500 to the Respondent in respect of part of the Respondent's costs

WRITTEN REASONS

(AS REQUESTED BY THE CLAIMANT)

1. The Claimant was employed as a bus driver by the Respondent between 10 November 2017 and 20 April 2020. He was summarily dismissed for gross misconduct. ACAS Early Conciliation was between 27 May 2020 and 17 June 2020 and the Claim was issued on 4 July 2020.
2. On his original Claim Form the Claimant suggested that he was unfairly dismissed, discriminated against on the grounds of his Race and/or Disability and that he had been wrongfully dismissed. This case has had a tortuous path but added to those claims now are a claim for Sex Discrimination and Marriage Discrimination.
3. There was a claim for an unlawful deduction of wages in respect of monies deducted for a uniform but that claim was withdrawn on Day 2 of this hearing. At an earlier point the claim for Disability Discrimination was dismissed because of a finding by EJ Truscott KC that the Claimant was not a disabled person at the material time. That decision was appealed but that appeal has been rejected. The Claimant has appealed to the Court of Appeal but that has been rejected at the sift stage. It is not a matter before this Tribunal.
4. This claim involves disciplinary procedures applied to the Claimant which he claims were discriminatory and led to an unfair and discriminatory dismissal. The precise issue that was set out in EJ Truscott KC's order for the discriminations claims was:

“Did the respondent conduct the disciplinary hearings in a manner that it would not have done had the Claimant not had one or of a number of protected characteristics”

Nobody sought to amend that description of the discrimination issues in the case and it was agreed and proceeded with on the basis that the Claimant was treated less favourably than a hypothetical comparator taking into account the Claimant's race, sex and marital status.

5. The issues are not particularly precise but we are told and consider it likely having heard the Claim that it was left that way because of the Claimant's inability to be any more precise with EJ Truscott. That would be consistent with the absence of clarity this tribunal were met with when asking the Claimant to be specific in almost any regard.

The Law

6. For unfair dismissal the relevant statutory provisions are as follows. Under **section 94(1) Employment Rights Act 1996 (ERA)**

(1) An employee has the right not to be unfairly dismissed by his employer.

6. Under **section 98 ERA** so far as is relevant:

(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.

7. It is for the Respondent to demonstrate the principal reason for dismissal and in this claim the Respondent 's position was that it was for a conduct reason. **ASLEF v Brady [2006] IRLR 576**, held that the question is what was the real reason for the dismissal and that it is for the employer to prove. A potentially fair reason may be the pretext for dismissal in other circumstances, for example if the employer makes the misconduct as excuse to dismiss an employee in circumstances where he would not have treated others in a similar way then the reason will not be the misconduct at all since that is not what brought about the dismissal, even if the misconduct in fact merited dismissal. Once the employee has put in issue, with proper evidence, a basis for contending that the employer dismissed out of pique or antagonism, it is the employer to rebut this by showing that the principal reason is a statutory reason.

8. In this claim the Claimant did not at any time put forward any suggestion other than conduct as being the reason for his dismissal. In those circumstances and having looked at the Claim as a whole we are satisfied that the Respondent has demonstrated that the Claimant's conduct was the reason for the dismissal.

9. The Claimant's focus in this case was that his conduct did not merit dismissal, taking into account the mitigation that he had brought to the Respondent's attention. Further he contended that the process was flawed in that each of the decision makers were influenced by his race / sex / marital status to his detriment and so he did not receive a fair hearing. The precise flaws the Claimant alleged in the process over and above the over-arching position described were not clearly defined by the Claimant.
10. In considering a dismissal for misconduct the tribunal must have regard to the test in *BHS v Burchell* that "First, there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case"
11. The investigation needs to be a "reasonable" one. That means one that is reasonable in the context of an internal investigation into an allegation of misconduct and should be proportionate to both the issues under enquiry and to the resources and other obligations of those who take part. The rights of the individual need to be very much borne in mind but there are countervailing demands on time elsewhere which must also be balanced. From that investigation flows the reasonable grounds upon which the decision maker can found their belief as to the Claimant's conduct any level of sanction.
12. The Tribunal should not substitute its view for that of the employer. It is required to consider whether or not the decision to dismiss for the conduct alleged falls within a band of reasonable responses available to a reasonable employer taking into account all the circumstances of the case. The Tribunal must be alert to any procedural defects in the process which may give rise to a material unfairness to the Claimant. The Tribunal has the assistance of the relevant ACAS Guidance to assist them in assessing whether fair processes have been followed.

Wrongful Dismissal

13. An employer faced with a repudiatory or fundamental breach by an employee can either affirm the contract and treat it as continuing or accept the repudiation and terminate the contract, which results in immediate, i.e., summary, dismissal.
14. The rule that only repudiatory breaches by employees will justify summary dismissal can be traced back to the Court of Appeal's decision in **Laws v London Chronicle (Indicator Newspapers) Ltd 1959 1 WLR 698, CA**. In that case Lord Justice Evershed, then Master of the Rolls, thought that in

order to amount to a repudiatory breach, the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract. Some more recent cases have expressed the threshold for repudiation by reference to the implied term of mutual trust and confidence. In **Briscoe v Lubrizol Ltd 2002 IRLR 607**, CA, the Court of Appeal approved the test set out in **Neary and anor v Dean of Westminster 1999 IRLR 288, Special Commissioner (Westminster Abbey)**, where Lord Jauncey asserted that the conduct ***'must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment'***. The Court of Appeal in **Briscoe** stressed that the employee's conduct should be viewed objectively, and so an employee can repudiate the contract even without an intention to do so.

15. The underlying legal test to be applied is not whether the employee's negligence or misconduct is worthy of the epithet 'gross', but whether it amounts to repudiation of the whole contract. This is a question of fact, and the courts have generally been hesitant to hand down hard and fast rules as to what amounts to conduct justifying summary dismissal. In determining whether an employee has repudiated the contract of employment, factors such as the nature of the employment and the employee's past conduct will be relevant.
16. A court or tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct. This is a different standard from that required of employers resisting a claim of unfair dismissal, where reasonable belief may suffice.

The Facts

17. Around 25 February 2020 N, an Accident Prevention Assistant with the Respondent became aware of an anonymous complaint from a member of the public. The note states that the complainant stated that there was a man and a woman at the back of the bus and the woman was ***"moaning and raising her voice"***. It was around 2230 on 25 February and the complainant did not want to look round as she was afraid and the individuals left the bus after about ten minutes. The complainant went on to say that she thought the ***"lady was not right as she looked distressed."*** The individuals were described as a white lady with a chubby build and a black male with glasses.
18. It is noteworthy that it would not be possible to identify the Claimant as being the person on the bus. Reasonably, in order to follow up the complaint N ordered the CCTV footage and then reviewed it on 2 March 2020. She

intended to forward it onto her manager O to review but failed to do so before she went off on her holiday. She finally sent it on 9 April stating that O should, in her view, watch the tape as it involved a bus driver from the depot for which he was responsible.

19. The footage was viewed and the Claimant was suspended on 14 April 2020 on account of the fact that the footage disclosed matters which may be gross misconduct. O asserted that the Claimant said to him **"I knew this would come back and bite me I thought the CCTV would be deleted by now"**. O was not challenged on his recollection of that and we find that the Claimant did make that statement.
20. In addition, the Claimant had reported a small accident which had damaged a wing mirror. Footage was reviewed of this incident and O asserts that the CCTV and stills showed the Claimant using his mobile phone in the cab whilst driving his bus. Both matters were to be discussed at a fact-finding hearing to be heard by the Claimant's line manager P on 20 April 2020.
21. P was an Operating Manager at the Claimant's bus depot. She had received an email from O explaining the delay in bringing the matter to her attention and simply explaining that one issue was of a sexual nature and the other was involving a mobile phone whilst driving.
22. P considered all the CCTV footage and the reports that had been made on the incidents. The Respondent's policy does not normally permit accompaniment at a fact-finding meeting, but as the situation was considered a serious one, a UNITE Union representative attended with the Claimant. This is an example of the Respondent understanding the potentially serious nature of the situation and seeking to provide support for the Claimant.
23. The notes of the meeting were not agreed by the Claimant and there are some parts that are disagreed with. The notes reveal that when the Claimant was asked what had happened the Claimant stated that he was kissing a woman at the back of the bus and then **"went down on her on the way to her house"**. The Claimant accepted that he had had sexual interactions with the woman on the bus. When asked why he had done it he stated that he was a bit confused as he had only had one Carlsberg at the pub. The Claimant stated that it was totally out of character for him and it was all a bit of a haze. The Claimant stated that he wished he had done it with his wife instead. It is not clear why he considered this to be a mitigating feature in the scheme of the disciplinary investigation.
24. The Claimant was offered the chance to see the CCTV footage but declined and gave his TU Rep a chance to view the footage. After the CCTV footage was viewed the Claimant was asked a few more questions. He asked how his situation was looking and whether P had taken into account the note from

the woman shown on CCTV with the Claimant which indicated that the incident was consensual. Shortly after the Claimant indicated that he did not feel well and left the meeting. He did not return. We are satisfied that the notes in the bundle are an accurate account of the meeting, the Claimant was unable to be specific about those matters which may have been incorrect.

25. Having left the meeting the Claimant tendered his resignation at 1249 stating that his reason for resigning was that he **“felt like a change”**. It has been disclosed since that this was on the advice of his TU rep. On 20 April the Claimant was sent a letter from Q, the bus depot’s General Manager summarising what had taken place and stating that had it come to him it was highly likely that the claimant would have been dismissed for gross misconduct; that the situation would be notified to the Traffic Commissioner and that any reference applications from other bus companies under the Licence for London Scheme would not receive a favourable response.
26. The Claimant applied to retract his resignation and this, perhaps surprisingly, was accepted so long as he attended a fact find meeting. We are unable to make a conclusion one way or the other as to whether he had received the letter from Q before or after he retracted his resignation. The Claimant requested somebody outside his own garage to consider the matter and so R who was based in another bus depot stepped in.
27. The second fact find meeting was held on 27 April 2020 and again the Claimant was permitted to be accompanied and the Respondent arranged for a TU Rep based at the same depot as R to attend once the Claimant had requested accompaniment. The Claimant produced a written statement and R read it before starting the meeting.
28. In that statement the Claimant described how he had met the woman he was with on the bus and how he had been persuaded to go to the pub with her and at the pub they indulged in what is described as **“heavy petting”**. He described that on the bus later he did not really know what was going on. He accepted that he had performed oral sex on the bus with the woman and had sucked her breast. He had returned to the woman’s house where her husband was and some heavy petting had continued. For the first time the Claimant suggested he had been drugged. He suggested that he had underwear soiled with blood and the implication seems to be that he was sexually assaulted at the house. Strangely in those circumstances the Claimant took the couple a gift the following day and told R that he also felt able to go around to the property in order to get a letter from the woman in support of him. He ended the statement by saying that he was not embarrassed by the incident because whilst it may have been his body it was not his mind.

29. The letter which he presented from the woman on the bus was typed and addressed to “whom it may concern” and was not signed. The provenance this letter is by no means certain. In it, she explains that the Claimant was her normal bus driver when she went to and from work and that they had gone for a drink and that she asked him to perform an act on her “**not realising he was wearing a TFL jacket**” and she confirmed that the act was by mutual consent. Despite the question mark over the provenance of the letter R accepted what was written there and dealt with matters on the basis that the Claimant engaged in sexual relations with the consent of the other participant.
30. The Claimant was given a further opportunity to watch the CCTV footage but he declined. R watched the footage during an adjournment in the meeting. The video footage lasts for a period of 20 minutes from when the Claimant and the woman got on the bus until they left. The following things were observed by R from the recording:
- a) Immediately upon sitting down at the back of the top deck of the bus the Claimant had one hand around the woman’s shoulder and his other hand down the inside of her leggings;
 - b) The Claimant places his coat from the woman’s shoulders and over the top of her legs seemingly to try and conceal what is taking place and the Claimant replaces his hand inside her leggings;
 - c) At one point the Claimant stands up and gives the woman some change;
 - d) At a later point the Claimant lifts up the woman’s top and sucks on her breast whilst his hand remains inside the woman’s leggings masturbating her.
 - e) The Claimant then pulls down the woman’s leggings and pants and performs oral sex upon her;
 - f) The incident concludes with more kissing and breast sucking and R remarks that the two can be seen laughing and smiling towards the end of the journey.
31. R indicated to the Claimant that what he had seen was unacceptable behaviour. That is not controversial as the Claimant himself throughout the course of this hearing has described the conduct as “**disgusting**” and “**vile**”. The view that R took was that the Claimant, in a deliberate way to try and hide some of the sexual activity, used his jacket and that he had been pulling the leggings up and then down again and that he was laughing and smiling with the woman. From what he had seen R could see no sign that the Claimant was drugged or incapacitated at the time he conducted the sex acts on the bus.
32. R then went on to discuss the mobile phone incident which had come to the attention because the Claimant had himself reported a small accident where a wing mirror on the bus hit a tree causing damage to the glass in the mirror.

When reviewing the footage R saw that the Claimant reached for his phone from his jacket and then whilst the bus was moving was observed looking at the phone whilst seemingly looking for something. In fact, the Claimant accepted that he was looking for a picture of his children to show an irate customer. We were told that in every cab there is a note saying not to use a mobile phone in the cab and the Claimant had signed a letter acknowledging the same message. The contract of employment is quite clear in relation to the seriousness of holding a phone in the cab as well as there being a clear reference in a Rule book for PCV drivers. We accept that the message was well and consistently communicated and that all drivers would have been aware of the grave seriousness of using a phone in the cab and the likely consequences.

33. R, upon looking at the CCTV stated that the Claimant had hold of the telephone for 32 seconds whilst the bus was in motion and/or stopped in traffic. At the next stop the Claimant showed the picture on his phone to the passenger. The Claimant is noted to say that ***“he made a mistake and that he just wanted to show the passenger a picture of his children”***.
34. The conversation then moved back to the lewd act and R asked the Claimant whether his children were aware of his behaviour and suggested that if he acted in the same way then he would be ***“six foot under”***. The Claimant finally explained that both incidents had been mistakes that would not be repeated and suggested that something may have been slipped into his drink in relation to the sexual misconduct incident.
35. R considered what he had heard, seen and read, and directed that the matter should proceed to a disciplinary hearing on account of the lewd behaviour and the mobile phone but not in relation to the driving that caused the broken wing mirror, which was a normal driving incident.
36. We are quite satisfied that from a public safety perspective that any allegation of using a mobile phone whilst driving a bus is a very serious health and safety risk which needs to be carefully considered, whether it is used to make a phone call or scroll through pictures. The prohibition against using a mobile phone in the cab is set out extremely clearly and from the footage and the stills there was clearly a case to answer. A decision to move this matter on to a disciplinary hearing was not only within a band of reasonable responses but inevitable.
37. It seems equally clear that the decision that the lewd act would also need to be considered at a disciplinary hearing, also clearly fell within a band of reasonable responses. There was no doubt that the act had taken place over a reasonably long period of time on the bus and on a route that the Claimant normally drove. The Claimant was identifiable as an employee by his clothing and indeed had used his Company coat to try and conceal part of

what he was doing. A member of the public upon hearing the activity going on the back of the bus had stated that she felt afraid and had gone to the trouble of reporting it.

38. In the Claimant's own words, the acts were vile and disgusting taking into account where they were taking place. The Claimant had belatedly put up a potential defence that he was drugged and so was involuntarily intoxicated. R formed a view from seeing the video that that was not the case but it was a matter that the Claimant could develop at a later time when explaining his actions at the Disciplinary Hearing.
39. We are quite satisfied that the decision to put the Claimant forward for a disciplinary was not only within a band of reasonable responses but was in all reality inevitable. The Claimant had had opportunities to put forward his side of the story but there was clearly a case to answer at a Disciplinary Hearing. In fact, we are unable to conceive of any employer, faced with what was before them, who would not have considered there was a necessity to move to a disciplinary hearing.
40. We have considered the notes of both meetings and we accept that they are an accurate summary of the meetings. We acknowledge that they are not a verbatim account and it would have been better had the Claimant been asked to sign them off as accurate at the time but we are satisfied that they contain the important parts of the meetings. We do not accept that there is any evidence to show any of the individuals were rude, aggressive (micro or otherwise), dismissive or bullying when conducting those meetings. They all had a job to do and they did it in an appropriate and professional manner giving the Claimant every opportunity to explain his position. It is correct that they seemed shocked by what they saw on the video in relation to the lewd act and that they considered the same offensive, however that view did not differ from the Claimant's own stated position.
41. Further we are satisfied that the Respondent actually provided assistance to the Claimant which he was not strictly entitled. He was given permission to have a TU Rep at each meeting which was an additional form of potential support beyond that in the internal policy at fact finding meetings and remarkably when the Claimant resigned they accepted his retraction when they had no obligation to do so.
42. Whilst the Claimant kept telling us that R, P and O were racist and /or acted in a detrimental manner towards him because of his race, he provided no particulars at all despite the Tribunal actively seeking assistance from the Claimant to understand his case of how that antagonism to the Claimant's race manifested itself. The discrimination claims are all about the Claimant being treated less fairly and thus subjected to a detriment during the

disciplinary process on account of his race and other cited protected characteristics.

43. We are quite satisfied that married / single, male / female, black / white, it was inevitable that matters such as these were bound to move to a disciplinary hearing for further consideration and the Tribunal found the discrimination allegations in relation to this stage of the enquiry made by the Claimant to be vague, nebulous and wholly unsupported. The disciplinary process both in tone and form was as one would expect and the Claimant failed to disclose any specific complaint or incident that amounted to detrimental treatment that could possibly be linked to his protected characteristics. Accordingly, we unhesitatingly reject them on the information put before us. We are satisfied that the Claimant's motive for making these allegations are as a form of smoke screen and distraction away from his own acts, for which he is gravely embarrassed.
44. At the end of the meeting the Claimant was handed the form used within the Respondent to move matters forward and the Claimant signed that document to confirm that he was aware of the allegations against him. The Claimant was given the right to be accompanied by a TU Rep (which took place at all stages) and told that his disciplinary hearing would be dealt with on 30 April 2020. R was told that he should attend as a witness. The specific allegations that went forward were:
- a) While not on duty you acted inappropriately on a company vehicle by performing sex acts on a female;
 - b) Used your mobile phone while driving a vehicle.
45. We have considered the notes of the Disciplinary Meeting. The Claimant says little about the meeting in his witness statement, save that he hoped that S would be more reasonable and listen to reason and his mitigation but the meeting was "just the same". (Para 136). By that he seems to mean that S was judgmental. During the Claimant's oral evidence, and despite being given every opportunity to elaborate about what S and/or how his behaviour was improper, the Claimant failed to identify anything at all that was wrong with S's conduct. Again, he was unable to tell the tribunal anything that was said and done from which we could reasonably infer that race, sex or marriage had anything to do with the process so as to shift the burden of proof. Additionally, we note that the Claimant did not make any allegation of discrimination at the time at all in relation to the process to that date or in relation to what took place at that meeting.
46. Whilst the Claimant did not accept the minutes of the meeting he was not able to explain in what way they were defective save that "**they were not complete**". We accept that they were not a verbatim account but on the balance of probabilities we accept that they provide a reliable account of what

was said at the meeting. The Claimant could have called any of his Trade Union representatives to attest to any deficiencies, even if his Trade Union decided not to support his case by way of representation. If they did not wish to attend, he could have sought a witness order. The Claimant has brought no witnesses in support.

47. The notes of the meeting disclose the following general points:

- a) The Claimant and his representative were given every opportunity to make whatever representations they wanted and were given the opportunity to ask questions of both O and R.
- b) The TU rep and S viewed the footage of the lewd act and they saw the footage of the mobile phone incident.
- c) The allegations against the Claimant were quite clear and the Claimant was permitted to place the same into context and provide his account.
- d) The Claimant was given a chance to summarise his case at the end.

48. Specifically, the meeting started with S outlining the charges. The Claimant was accompanied by a TU Rep of his choice who spoke and asked questions during the hearing. The Claimant chose not to ask R any questions and nor did the TU Rep. In those circumstances there was no challenge to R's account / interpretation of what had taken place on the back seat of the bus and we feel that we are able to accept his description of the sexual acts on the bus. We were not asked to view the footage by either party and we considered that in the absence of any challenge to Mr R's recording of it during the fact find there was no added benefit in us doing so.

49. The context to the mobile phone was said to be that the Claimant's bus hit a pot hole which caused a buggy to fall over on the bus and the mother attending the buggy became verbally abusive (including racist abuse) to the Claimant. For reasons which the Tribunal confess to finding difficult to comprehend the Claimant considered that the best way to react in those circumstances was to get his mobile phone out whilst driving the bus, all be it at quite low speed, and scroll through his phone in order to bring up two pictures of his own children to show the irate passenger. The meetings note show that he said, "**this is not good but sometimes rules are meant to be broken.**" The Claimant asserted that he was a professional driver, he assessed the situation and deemed it safe. He went onto suggest that he had had a bad time since he had been raped and that affected his performance. There was no medical evidence in support of this nor any indication as to why it would have been a mitigation for his actions whilst driving a bus.

50. In essence the Claimant's position was that he accepted (as did his TU Rep) that he had used his phone in the cab whilst moving but that because it was safe on his assessment and because of the context the incident should not

be deemed gross misconduct, although it was a breach of the clear Rules laid down by the Respondent. Further the Respondent needed to take into account that at that time he was suffering from the trauma of being raped and that affected his performance.

51. At this hearing the Claimant sought to excuse his conduct in a number of different ways which do not appear to have been mentioned at the time. He mentioned that there is now an employer fitted mobile phone type device in the cab but we are satisfied that that device is used only to report issues and not make calls or show pictures to passengers and also if used whilst moving would also be a misconduct issue and it had been made quite clear to staff that was the case. At times at the hearing the Claimant sought to suggest he had not used his phone at all but that was wholly contradictory to that which he had said on occasions before.
52. Finally, the Claimant sought to persuade us that his actions were wholly reasonable in the context of what was going on. The Tribunal has no hesitation in rejecting that. Objectively using his mobile phone to bring up pictures of his children to pacify an abusive passenger whilst driving a bus does not seem to be an option that would excuse using a mobile telephone whilst driving a bus full of people. The Tribunal can see no reason why a reasonable employer would see any mitigation flowing from that explanation whatsoever.
53. Whilst the Claimant claims he fully risk assessed the situation and considered it was safe he would still have been aware that it went against the many very clear instructions that he had been given about mobile phones being used in the cab, whether for making calls or other purposes. The Tribunal can see the sense in having such policies in place from a public safety perspective and can fully understand why there is very little (if any) tolerance in this area. It is a reasonable way to enforce and to try and eliminate such a potentially dangerous practice.
54. Further the Claimant's reasoning is contradictory. The first part of his reasoning was that he made a professional decision based on his years of driving that scrolling down his phone looking for pictures whilst driving a bus was a reasonable and proportionate response to the circumstances before him. Further he maintained that at this hearing. On the other hand, he is asking the Tribunal to accept that his capability / capacity was hampered by the trauma and he should not be held responsible for his actions. With respect, he cannot have it both ways.
55. The Claimant's evidence was unsatisfactory in many ways. We have sought to give him allowance for being a litigant in person and not always initially fully understanding what was required, but the Claimant consistently refused to follow directions to answer the questions put to him. The Claimant's case

was at many points contradictory and we were left with the impression of an individual who was doggedly refusing to take any responsibility for his own actions, liberally casting blame and allegations on others when the responsibility for his dismissal lay with himself and his own actions.

56. We are quite satisfied that there was a more than adequate investigation into the mobile phone incident and indeed it was all on CCTV. Even taking into account the Claimant's account of what was going on around him, there was simply no adequate mitigation for his actions. He was in breach of a matter he had been told was totally banned on many occasions. He knew that potentially it was an act of gross misconduct and that the potential and indeed likely outcome was summary dismissal. S had viewed the footage and had a genuine belief on reasonable grounds of the Claimant's guilt. We are satisfied that S did consider whether dismissal was the correct sanction and his conclusion that it was reasonable in all the circumstances of the cases fell within the band of reasonable responses. Indeed, it is very difficult to conceive of any other outcome that he could have come to on the facts before him and we are satisfied that the decision to dismiss was within a band of reasonable responses.
57. So far as the lewd acts are concerned the Claimant asserted at the meeting that he had been drugged via a drink. Having said that he went on to identify the point at which he was drugged as being when he was back at the woman's house when the woman's husband spiked his coffee. If that was the case and it was the point put forward by the Husband then any spiking of his drink was after the incidents on the bus. That evidence is not supportive of him being involuntarily intoxicated on the bus. The Claimant has said various contradictory things at various times and at best he can be said to be putting forward contradictory evidence as to when the drug (if the drug) was administered.
58. It should be remembered that what took place at the house (the alleged rape) does not have any direct bearing on what the Respondent had to consider as it took place in a private dwelling and not in public view. The Respondent was concerned only with what had taken place on the bus.
59. S had before him clear evidence that the Claimant and another had performed sexual acts on the back seat of a bus with other passengers on the top deck and that one passenger was afraid by what had taken place and complained. Whilst undertaking the acts the Claimant had either on or in close proximity his work coat which identified him as an employee of the Respondent. Further it was the route that he normally drove and so there was a realistic possibility that he could have been recognised by passengers. We add that while there was no evidence that he actually was, there was a risk of that. The Claimant was expected to deal with members of the public on a daily basis.

60. The Claimant latterly defended his actions by putting forward the defence of involuntary intoxication. The following matters seem pertinent:

- a) Firstly, as identified above his position was inconsistent. The drugging issue was not raised with police until after he had been suspended although we accept that this is by no means definitive as many victims of alleged rape do not report immediately.
- b) Taking a gift round to the alleged rapist the following day and then seeking a statement in support from somebody who has sexually assaulted you does seem to be unusual conduct in the circumstances.
- c) The Claimant has no evidence at all to support his claim that he was drugged or indeed that he was raped or assaulted, save for his bald assertion. There is no toxicology or other forensics. At the internal hearing and at this hearing the Claimant has not identified any evidence that would support a link between being drugged and his actions on the bus. He has not identified or produced anything that would suggest that any drug was responsible for his active participation in sexual acts on the bus.
- d) The fact find saw the Claimant laughing and smiling with the Claimant and could see no obvious signs that the claimant was drugged. Whilst that was a lay view, at no point did the Claimant point out any specific thing said or done that could lead to that conclusion that he was drugged..
- e) His initial and instant reaction was that he “thought this would come back and bite (him)”.

61. The facts of the incident itself cannot be gainsaid. There is clear evidence on CCTV. The Claimant has asserted that it would not be reasonable to condemn his participation in that matter because he was the victim of involuntary intoxication. He has provided no evidence save for his assertion of that being so and indeed at the meeting asserted that he was not drugged until after the bus incident. On the balance of probabilities, the Respondent found the Claimant’s actions on the bus were entirely voluntary and that it was entirely reasonable for the Respondent to come to that conclusion i.e., that there was no exculpatory evidence in that regard. The Claimant has failed to demonstrate at any point that his actions were caused by drugs. Whilst we acknowledge that we cannot exclude that possibility completely, the evidence for it is scant in the extreme. We find that the Claimant initially thought he had got away with his actions hence his comment to O about the CCTV having expired, he then thought he could get round the situation by his accomplice saying it was consensual (if indeed that statement is actually genuine). We find that the Claimant sought to avoid the scrutiny on his activities by trying to put the blame on others by saying he had been drugged.

62. We are satisfied that the incident for the reasons given above has sufficient nexus with his job for the activity to be subject to a work sanction. We note that any indecent behaviour is cited as a potential act of gross misconduct in the Respondent's disciplinary policy.
63. We are satisfied that the matter was adequately investigated. The CCTV was clear and it was for the Claimant to provide evidence that supported his involuntary intoxication defence. We accept that S had a genuine belief on reasonable grounds of the Claimant's guilt after that investigation. We have considered the process and consider that it was fair and complied in full with the ACAS Code of Conduct and in particular the Claimant was given every opportunity to challenge others and to put forward his case. We are quite satisfied that the decision to dismiss fell within a reasonable band of responses and once again we consider that it is hard to countenance any other outcome on the evidence provided. There was certainly no acceptance by the Claimant of the gravity of what he had done and his protestations could give the Respondent no confidence that he would not use a mobile phone whilst in motion again if he deemed it correct.
64. At the end of the hearing when S was giving his decision he stated that he did not accept the Claimant's defence. It was well within the band of reasonable responses not to do so, in reality, the Claimant had provided nothing of substance to back it up.
65. The Claimant appealed on the grounds of the severity of the penalty being too harsh and breach of procedure. It was heard by T on 13 May. Again, the Claimant was accompanied (although the Claimant sent the TU rep away at the start of the meeting). We have the notes from that meeting which the Claimant did not agree with but was unable to tell us what was wrong with them. We accept the notes are not verbatim but are an accurate record of the salient points.
66. At the appeal the Claimant questioned for the first time data protection issues. It seems to the Tribunal that this was yet another example of the Claimant trying to avoid the reality of his actions. The Claimant also stated for the first time that his mind was elsewhere because "someone had just died". The view the Tribunal takes again is this is an example of an individual effectively making excuses in order to avoid what he knows are the likely consequences of his actions. In the meeting the Claimant stated that he had "foolishly got his phone out" and that he used it whilst driving but then sought to excuse those actions. The lewd act was gone through in detail but the claimant failed to provide any evidence as to the voluntary intoxication.
67. Notwithstanding the paucity of the evidence in defence of the lewd act T did not make a decision on that particular matter. Instead, he focussed on the mobile phone and concluded that there was no mitigation at all for that

offence. That was a perfectly reasonable conclusion to come to on the basis of the Claimant's admissions and the lack of any supportive evidence. For T that was enough to confirm the dismissal. That was a reasonable decision to take in all the circumstances and in light of the evidence not only did it fall within a band of reasonable responses, it would be difficult to see how an alternative conclusion could be made on the information before him.

68. Having taken that view he did not make any final determination one way or the other on the lewd act. Whilst we believe that he could and should have done, the appeal was dismissed on the mobile phone alone which meant that there remained an act of gross misconduct and so the appeal failed, without needing any final conclusions on the lewd act.

69. The Claimant has made wholesale broad allegations against those who dealt with the discipline matters. We have no doubt that there was a certain level of incredulity and repulsion at the Claimant's conduct on the bus but that is hardly surprising in all the circumstances. However, we are quite satisfied that matters were conducted fairly and reasonably and that the Claimant had ample opportunity to put his side. When he did it was inconsistent and was unsupported by any cogent evidence.

70. We have absolutely no hesitation in concluding that this was a fair dismissal and the claim of unfair dismissal is rejected.

71. The Claim of Wrongful Dismissal is rejected. The Tribunal are quite satisfied that the facts are made out in respect of the mobile phone and the lewd acts that either of them would meet the words of Lord Jauncey cited above and summary dismissal was entirely appropriate. There was no basis for considering the acts anything other than gross misconduct and no basis for considering that any sanction other than dismissal was appropriate

72. On the List of Issues, the discrimination claim is described as follows:

“The Respondent conducted the disciplinary process in a manner that it would not have done had the Claimant not had one of a number of protected characteristics”.

73. The Claimant was never able to move beyond vague allegations of race discrimination i.e., simply suggesting that managers were racist without any reason or example as to why that would be. There was no suggestion of any racist language during the meetings or indeed anything from which we could infer that race was indeed an issue. The Claim had absolutely nothing to support it at all beyond the Claimant effectively saying that **“I disagree with what they have done and as they are white and I am black it must be because of my race”**. It is another example of the Claimant failing to take responsibility for his own actions by ascribing career threatening allegations against his managers, without any evidential basis at all.

74. The sex claim appeared to be based upon a suggestion that the rape allegation would have been taken more seriously had it been a female employee. Firstly, the rape incident was outside the scope of what took place on the bus and so was not of central importance. We have already explained the paucity of the evidence in relation to the drugging matter and we are quite sure that the claimant's gender was not an issue in any of the determinations. Whilst the specific point was not put to any of the Respondent's witnesses, we are satisfied that at all stages the Claimant's allegations were treated and ultimately dismissed on their merits and male or female that would have been the case. We are unable to discern any basis for suggesting that a female employee who drove a bus whilst using a mobile phone and also conducted herself in a similar sexual manner to the Claimant would have been treated any differently at all.
75. The marriage claim appeared to be that the Claimant was treated less favourably because he had not been faithful to his wife. It was the Claimant who brought his wife into matters when he explained her peripheral role in the factual background. We are satisfied that the Claimant was not less favourably treated because he was married. It did not affect the mobile phone matter at all and the lewd acts would have been considered gross misconduct whatever the marital status and would have been investigated in exactly the same way.
76. Indeed, the disciplinary policy was conducted in accordance with the respondent's own policy and the ACAS Code of Conduct and we reject any allegation of less favourable treatment on account of any of his protected characteristics.
77. At the end of the hearing the Respondent made an application for Counsel's costs of the final hearing. The Claim was put on the basis that the Claim never had any reasonable prospects of success. Alternatively, it was brought because the Claimant had acted unreasonably in the manner in which the Claim had been conducted, in that a costs warning letter setting out the perceived weaknesses in the Claim had been sent to the Claimant on 25 April 2022. The applications were therefore under Rule 76 (1) (a) and / or (b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1.
78. The application itself was straightforward. The Claimant pursued a case which was genuinely hopeless and which he could not reasonably have expected to win. The Claimant was well aware of the misconduct with which he had been disciplined and there was not the slightest chance that there was ever going to be a finding that the decision to dismiss fell outside a band of reasonable responses. The Claimant put forward varying explanations without any evidence to substantiate them. The Respondent relied upon the findings we had made in the oral Judgment that had been given in support.
79. Further or in the alternative, the Respondent asserted that the Claimant's conduct in pursuing this case was unreasonable especially after the flaws in the claim had been pointed out unambiguously to the Claimant in the costs

warning letter on 25 April 2022. It was accepted that costs would not automatically follow such a letter, but where the Claimant's claim was as weak as the Claimant's was and where the consequences are pointed out in clear terms, it follows, said the Respondent, the continued conduct of the litigation is unreasonable and should attract a costs order taking into account the facts of this case.

80. In response the Claimant stated that the Respondent was a large company and so would be able to simply write off their expenses. The Claimant reiterated that point more than once, but he had no further response in respect of any of the submissions made. He stated that the application was merely a tactic to ***"make a black person suffer further"***. The Claimant stated somewhat belatedly that he had not received the costs warning letter but we are satisfied it was sent to the email address he has consistently used and so we do not accept that representation.
81. The Claimant was asked to put forward representations about the rest of the Respondent's costs submissions but did not offer anything at all. Save for the matters in the previous paragraph the Claimant offered nothing.
82. Pursuant to Rule 84 of the Tribunal Rules in deciding whether to make a costs order and if so in what amount an Employment Tribunal may have regard to the paying party's means. The Tribunal asked some questions of the Claimant in this regard and the Claimant disclosed that he was working as a bus driver elsewhere in the same city. He was earning approximately £300 per week but that he was currently on sickness absence. We were told that the Claimant owned his own house but the mortgage was in arrears and there was no equity in the property. The Claimant refused to answer any other queries that the tribunal raised about his means despite clearly being told that adverse inferences may be taken by his reluctance to engage. The Claimant decided to leave the hearing prior to the costs' application being adjudicated upon.
83. The Tribunal were satisfied that the Claimant's claims had no reasonable prospects of success from the outset. The misconduct alleged was serious in respect of both the sexual act on the bus and the mobile phone use. The Claimant's representations were inconsistent and provided no mitigation whatsoever. He remained to the end doggedly blaming everybody apart from himself, showed little real remorse or understanding as to why his conduct was a legitimate concern for the Respondent. The process followed was as per ACAS guidelines and the Claimant was given every opportunity to challenge matters. We are satisfied that the unfair dismissal, wrongful dismissal and the discrimination claims had no reasonable prospects of success. The latter went no further than a bare assertion wholly unsupported by any cogent evidence from which the burden of proof could shift.
84. Further we accept that, at the very latest, from the costs warning letter the Claimant's pursuit of this Claim constituted unreasonable conduct. It should have been clear to the Claimant from the start but it certainly should have been when it was spelled out to him in the costs warning letter. It should be

noted that the Claimant's only defence to the costs' application was that they were a big company and so could write it off. We disagree. The Respondent is entitled to make a costs application if they so wish and wasted costs directed at this litigation results in a lower profit and potentially feeds into impacts which other employees and the rest of society may have to pay. The Claimant made no representations about the merits of the claim or his conduct of the litigation.

85. We note that a costs order is discretionary i.e., even though we have found that the grounds are made out for a costs order, we are still not obliged to make a costs order. The Claimant has put forward nothing and we ourselves can think of no reason why we should exercise our discretion and not award a costs order in this case. The Respondent seeks £7,500 which is attributable to counsel's costs for trial only. The application could have been for much more and we consider that £7,500 is an appropriate sum for the Claimant to pay. We do not have great faith that the Claimant was candid in his assessment of his means and indeed decided to offer nothing more at a certain point.

Employment Judge Self

16 January 2023