EMPLOYMENT TRIBUNALS

Claimant: S Lee
v
Respondent: Abellio London Limited

Heard at: Watford
On: 12, 13 and 14 July 2023
Before: Employment Judge Anderson

Appearances
For the Claimant: In person
For the Respondent: W Griffiths (counsel)

JUDGMENT

1. The claimant's claim of unfair dismissal is dismissed.

2. The claimant's claim of wrongful dismissal is dismissed.

REASONS

Background

1. The claimant was employed by the respondent, a bus company, as a driver from 27 October 2014 until 10 June 2020 when he was summarily dismissed. The claimant's claim is that he was unfairly dismissed, and he also claims wrongful dismissal in that the dismissal was without notice. The respondent's case is that the claimant was fairly dismissed for a conduct reason. This claim was filed on 6 October 2020.

2. Sometime before April 2022 the claimant filed an application to amend his claim to include disability discrimination and wrongful dismissal. The claim filed on 6 October 2020 was a claim of unfair dismissal only. That application was heard by EJ Douse on 22 April 2022 and in a reserved judgment issued on 19 July 2022 the application to amend to include wrongful dismissal was allowed, and the application to amend to include disability discrimination was refused.

The Hearing

3. The parties filed a joint bundle of documents of 355 pages. I also received a clip of CCTV footage lasting about 20 seconds in duration. During the hearing the claimant showed a longer clip of footage from the same day, including the 20 seconds I had already seen, lasting about ten minutes. In addition, I received four witness statements. One each from the claimant and his witness Mr Black, two from the respondent's Mr Uppal and Ms Leszczynska. All four witnesses attended the hearing and gave evidence on oath.

4. No list of issues had been agreed between the parties and I set out to the claimant the list of legal issues that the tribunal would need to consider in order to reach a decision on his claim. The list as discussed with the claimant is set out below. The claimant said that his claim also included disability discrimination. I referred to the order from EJ Dowse and explained that the application to amend his claim to include discrimination had been refused. He said that he thought that decision was wrong and he wanted to explain why it was wrong. I confirmed with the claimant that he had not appealed the decision of EJ Dowse and told him I would not hear comments on that decision now. The claimant said that he needed to draw certain matters relevant to discrimination to my attention. I told him that he could do so by way of background but if I felt that the matters he was bringing to my attention could not have a bearing on the decision I had to make about unfair dismissal, I would bring this to his attention.

5. I was able to hand down oral judgment and reasons on the final day of the hearing. The claimant interrupted my oral judgment to tell me that I had a fact wrong. I addressed this with him at the end of the hearing. He said that I had referred to the appeal meeting being by telephone, and it was in person. I said that, as the fact of it being in person and not by telephone was simply a detail I had included in my fact finding and not relevant to any decision I then made, I would amend that in the written reasons. I have done so.

6. The claimant requested written reasons.

The Issues

7. The issues the tribunal will need to decide are:

   7.1. What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996? The respondent asserted that it was a reason relating to the claimant's conduct.

   7.2. If so, was the dismissal fair or unfair within section 98(4), and, in particular, did the respondent in all respects act within the band of reasonable responses? The claimant says it was unfair as the process was flawed, and the decision was not reasonable.

   7.3. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?, in particular, whether:

7.3.1. there were reasonable grounds for that belief;
7.3.2. at the time the belief was formed the respondent had carried out a reasonable investigation;
7.3.3. the respondent otherwise acted in a procedurally fair manner:
7.3.4. dismissal was within the range of reasonable responses.

Submissions

8. I have set out below a summary of the parties' submissions.

9. The claimant said that he had always recognised the severity of the issue, but an employer must consider all of the circumstances of a case including the employees personal circumstances and decisions taken by the employer in previous similar cases. He said that it had been falsely represented that he had failed to attend the first disciplinary hearing, and that false representation led to an implication that he lacked character and respect, as well as making it easier for Ms Leszczynska to hold a disciplinary meeting in his absence. He said that it was unfair that the meeting was chaired by someone who he had previously raised a grievance against and unfair that no account was taken of his wish to attend by conference call. He said no effort was made to contact him on the day of the disciplinary hearing and the meeting should have been re-arranged. The claimant said that Mr Uppal and Ms Leszczynska did not give sufficient consideration to imposing a lesser sanction than dismissal and that his mitigation was not taken into account. He said that the reason for summary dismissal was not proven and was not fair, the respondent did not undertake a fair and reasonable disciplinary process and it formed untrue findings of his guilt.

10. Mr Griffiths, for the respondent, said that the incident had been brought to the respondent's attention by a member of the public. The CCTV footage shows him running a red light and he could have stopped but did not. Mr Griffiths said that the reasons given by the claimant for his actions showed him to be casting about for excuses and referred to how the reasons given had changed throughout the disciplinary process. He said that the claimant had not confirmed that he wanted to attend the disciplinary hearing by telephone, and it was reasonable in the circumstances to proceed in his absence. Mr Griffiths said that it had not been put to Ms Leszczynska that her reasoning was infected by an incident between Ms Leszczynska and the claimant two years previously. He said that consideration had been given to all relevant factors raised by the claimant and the appeal process was curative of any defects in the disciplinary process, if the tribunal found the process defective, which the respondent denied. He said in terms of wrongful dismissal that the claimant's conduct was sufficient to undermine the trust and confidence of the respondent in the claimant. If the tribunal found that the process was unfair then the evidence of the CCTV footage was enough to warrant a Polkey deduction in damages of 100%.

Findings of Facts

11. The claimant was employed by the respondent, a bus company, as a driver from 27 October 2014.

12. On 6 February 2020 a member of the public contacted the respondent by Twitter to state that they had seen bus 8867 driving through a red traffic light that day. The respondent checked the rota and determined that the claimant was driving that bus at the relevant time.

13. Satinder Uppal, Driver Manager, and manager for the bus route on which the incident took place, held a fact finding meeting with the claimant on 11 February 2020 after viewing CCTV of the incident. He questioned the claimant about driving through a red light, driving over the speed limit, and driving with only one hand on the steering wheel. The claimant said in the meeting that he did not remember the incident. After watching the CCTV he said that he did not see the amber traffic light; he said that he was not 100% sure of slowing down for the lights or the bus stop just past it, he was tired, the speed limit on the road had recently changed and that he drove one handed to give his shoulder a rest as he had previously had operations on his shoulder. The minutes of the meeting were in the bundle. The claimant had declined to sign them. When questioned by Mr Griffiths he confirmed that he did not have a dispute with the contents of the minutes and I find that they are a true record of the meeting. The claimant was suspended at the end of that meeting. The claimant said in his witness statement and a number of times in the hearing that he suffered from chronic fatigue syndrome, he also said that Mr Uppal had identified in the fact finding meeting that he suffered from chronic fatigue syndrome. He did not, and there was no evidence in the bundle that I was taken to, including in the various medical and occupational health reports, that stated that the claimant suffers from this illness, or did at the time of the incident. Nor was I taken to any evidence that the claimant suffers from a shoulder injury which led him to resting his hand at times, or that he had notified the claimant of this injury before 6 February 2020.

14. *CCTV evidence* - I was provided with a short video clip of about 20 seconds in duration as part of the evidence. The clip shows two camera angles from the driver's cab. One shows the road ahead, the other looks down on the driver from above and shows both the claimant and the steering wheel. In that clip an amber traffic light is visible which then turns to red. The speed at which the claimant is driving changes throughout the clip, reaching a top speed of 22.99 mph. There is a 20 mile per hour speed limit sign painted on the road which the claimant drives over. The claimant is slowing down at the time he passes the red light. I find that he was slowing down to stop at the bus stop after the traffic lights and not because he had seen the traffic lights or was trying to stop for the traffic lights. Towards the end of the clip while the vehicle is still moving, the claimant rests one hand on his leg.

15. The claimant had a longer CCTV clip which he played in the hearing. It was approximately ten minutes long and included the 20 second clip I had already received. The longer clip showed that there were two other occasions in that ten minute period when the claimant was driving with one hand on the steering wheel.

16. Mr Uppal decided that disciplinary action was warranted and on 17 February 2020 he notified the claimant that a disciplinary hearing would take place on 20 February. The allegations were:
    - *Dangerous driving — Travelling through a red light at traffic lights prior to St Leonards Bus Stop on 06/02/2020*
    - *Unsatisfactory driving standards — CCTV footage confirms one handed driving prior to the traffic light incident and speeding above the 20mph speed limit on the Uxbridge Road on 06/02/2020*

17. The claimant was advised in the letter that an outcome may be dismissal, that he had the right to be accompanied at the hearing, and that if he did not attend, it would be held in his absence. There were a number of other disciplinary hearing invitations issued before the hearing took place on 10 June 2020, and each invitation contained this information.

18. The claimant did not attend the hearing on 20 February 2020. Both Mr Uppal and Ms Leszczynska said in their witness statements that the claimant 'failed to attend' the hearing. The claimant pointed out in oral evidence that he was on annual leave on 20 February, so the hearing was re-arranged. He pointed to a record of his duties in February 2020 included in the bundle which showed he was on leave on 20 February 2020. I find that the hearing did not take place on 20 February 2020 because the claimant was on annual leave and that the respondent's witnesses were incorrect when they said that the claimant failed to attend.

19. The disciplinary hearing was rescheduled for 25 February 2020. The claimant submitted a fit note dated 21 February 2020 for the period 21 February 2020 to 5 March 2020 giving the condition as 'stress related problem'. The meeting on 25 February 2020 did not take place due to the claimant's ill health.

20. The claimant remained on sickness absence until his dismissal on 10 June 2020. Mr Uppal held a welfare meeting with him on 27 February 2020 in which the claimant said that he was suffering from a stress-related illness which had arisen as a result of the disciplinary process. The claimant was referred to occupational therapy.

21. An occupational health report dated 17 March 2020 confirmed that the claimant was not fit to work as his condition would fall into the DVLA category of severe depression and his licence was likely to be revoked until he was recovered for six months. Mr Uppal invited the claimant on 18 March 2020 to a welfare meeting on 24 March 2020. The occupational health doctor confirmed, in response to a query from the respondent on 19 March 2020, that the claimant was fit to attend a disciplinary hearing.

22. The claimant contracted Covid 19 and was unable to attend the welfare meeting on 24 March 2020. A meeting was held by telephone on 8 April 2020. A further welfare meeting took place on 22 April and a further referral to occupational health was made. An occupational health report on 24 April

2020 noted that the claimant was recovering from Covid 19 and should soon be able to return to work.

23. In response to a further enquiry from the respondent, the occupational health doctor confirmed on 14 May 2020 that on reviewing their reports there was no reason to consider the claimant unfit to attend a disciplinary hearing.

24. The claimant was invited to a disciplinary hearing on 21 May 2020. He sent to the respondent a letter from his GP, dated 20 May 2020, in which the GP stated, '*I have advised him to refrain from work or attending any meetings which can exacerbate his mental health symptoms and make his mental health worse.'*

25. The claimant was referred again to occupational health by Mr Uppal and had a telephone consultation on 27 May 2020. The occupational health doctor advised the respondent that while a disciplinary hearing might cause short term exacerbation of the claimant's symptoms, in the long term it would be beneficial to address the matters so he could move forward with his recovery. On 29 May 2020 the claimant's wife sent an email to Mr Uppal, attaching a fit note valid until 31 July 2020 and stated in the email that the claimant would not be able to attend any meeting before the fit note expired.

26. A further welfare meeting was scheduled for 1 June 2020 at 1pm. Mr Uppal states in his witness statement that the claimant failed to attend. The claimant's wife sent an email to Mr Uppal at 11:22 stating that he was too unwell to have a telephone appointment, but she could take the call and provide an update. I find that as an explanation was provided before the meeting as to why the claimant could not attend and his wife offered to provide information the respondent required, the claimant did not fail to attend the meeting. The meeting was rescheduled to the 2 June 2020. On 2 June 2020 the claimant emailed Mr Uppal to say his condition had worsened and his wife was acting on his behalf. He said that he did not agree with the conclusion of the occupational health doctor as important factors were not taken into account. The claimant stated, in an email dated 6 June 2020, that he did not receive a call from Mr Uppal on 2 June 2020.

27. Mr Uppal decided to proceed with rescheduling the disciplinary hearing. On 4 June 2020 it was scheduled for 9 June 2020 and changed again on 8 June 2020 to 10 June 2020 at 3pm due to the claimant's representative being unavailable on 9 June 2020.

28. On 8 June the Mr Uppal invited the claimant to a welfare meeting to take place on 9 June 2020. This was rescheduled to the morning of 10 June 2020 and was not completed due to technical issues.

29. Originally the disciplinary hearing had been due to take place at the depot from which the claimant worked. The invitation for the 21 May 2020 specified the Twickenham depot. Mr Uppal explained, as did Ms Leszczynska, in oral evidence, that usually the operations manager of the relevant depot would carry out a disciplinary hearing, but the claimant's line manager was absent. Ms Leszczynska, an operations manager from a neighbouring depot, was

asked to conduct the hearing. The claimant said in oral evidence that he had asked Mr Uppal why it had been moved to Twickenham. It is clear from an email undated but indexed as 5 June 2020 that he had been told previous to this date that it was because the operations manager (Ms Faley) at his depot was on leave. He asks in that email again why the hearing is in Twickenham, enquiring if Ms Faley was still on leave.

30. There is a further email in the bundle, undated but indexed as 5 June 2020. The text is as follows:

> *Dear Mr Uppal,*
> *I did not receive the welfare appointment call on Tuesday 2nd June 2020, as scheduled.*
> *As you are already know, my Doctor have determined and advised me to refrain from work or attending any meetings which can exacerbate my mental health symptoms that can make my conditions worse.*
> *I will make an effort to attend and participate in a limited capacity of the meeting via video call.*
> *I did not fail to attend the meeting on Thursday 21st May 2020, it was you that decided to reconsider your position.*
> *Please send all the CCTV footage from the date and time of the allegations of gross misconduct.*
>
> *Your Sincerely,*
>
> *Selwyn Lee*

31. The claimant had a complete copy of the email at the hearing, and it was agreed that the date of the email was 6 June 2020. The relevance of this email is that the claimant stated in oral evidence that this showed that he had notified the respondent that he intended to attend the disciplinary hearing on (then 9 June 2020 and later rescheduled to 10 June) by video call. Mr Griffiths, for the respondent, put it to him that he was here referring to the rescheduled welfare meeting – due to take place on 9 June 2020. There are many undated emails in the bundle, and it is difficult to make sense or order of them. Some are clearly indexed with the wrong date. However, there is an invitation to the disciplinary hearing on 9 June 2020 which is dated 4 June 2020, and there is an invitation to the welfare meeting on 9 June 2020 dated 8 June 2020. On the basis of that evidence I find that the claimant is referring in his email of 6 June 2020 to attending the disciplinary hearing by video call.

32. On 8 June 2020 the claimant sent to Mr Uppal a copy of a grievance he had raised against Marta Leszczynska in 2018. Ms Leszczynska and the claimant agreed that in 2018 she had told him in a meeting that his attitude to the note taker in that meeting was sexist, and as a result he had raised a grievance about her. Ms Leszczynska said she was interviewed about it and heard nothing further. The claimant said he never received an outcome. I accept both of their accounts as outlined above. I make no findings about what actually happened in the meeting complained of. At this point the claimant had not been told that Ms Leszczynska would be the hearing manager but

had concluded she would be, as the hearing was to be held in Twickenham where she was the operations manager.

33. Ms Leszczynska's evidence was that she had been told by Mr Uppal that the claimant had been on sick leave since 20 February and that was why the hearing had been delayed but that occupational health had given advice that the hearing could go ahead. She had nothing to do with scheduling the hearings other than to provide her availability to Mr Uppal. The only document she saw relating to the claimant's health was the occupational health report of 27 May 2020. Her understanding was that the claimant was attending in person as that is what Mr Uppal had told her.

34. From this point I heard two conflicting accounts from Ms Leszczynska and Mr Black (the claimant's representative) about their communications on 10 June 2020. Ms Leszczynska said that she knew Mr Black, that the meeting was scheduled for 3pm and the claimant did not arrive, she called Mr Black and told him that she intended to continue. She asked him if he wanted to view the CCTV, he said, 'do what you need to do' and she carried on with the hearing. She said that when she spoke to Mr Black, he did not say that the claimant would be attending by video and she had been informed that the claimant was attending in person as he had not requested a set up for a video call. She spoke to Mr Uppal who said he had not received any communications from the Claimant. He did not tell her that he had received an email from the claimant stating that he objected to her appointment as the hearing manager. She was not aware of that at all until preparing for this tribunal hearing. She called the claimant, and his phone was switched off. She therefore went on to consider the evidence and make a decision sometime after 4pm. This was because on her understanding the claimant's hearing had been rescheduled many times, and he had been deemed fit to attend by occupational health. In her witness statement Ms Leszczynska sets out the following chronology: she called Mr Black to tell him the claimant had not attended, and she would proceed; she then considered the evidence and made her decision; she called Mr Black to tell him of her decision. Although the claimant said, whilst cross examining Ms Leszczynska, that this was not true, it was not put to her specifically that any part of the chronology set out in the witness statement was wrong, she was not challenged on when and how often she spoke to Mr Black. She was not asked whether she agreed with Mr Black' statement that he had told her that the claimant thought he was attending by video. The claimant was on notice of Ms Leszczynska's chronology of the 10 June 2020 as her witness statement is dated 11 April 2023.

35. Mr Black said that he had no involvement with the organisation of the meeting, but it was at the time of the pandemic and many meetings were by video. He believed that the claimant was attending by video. If one of his clients was attending a meeting in person, then he would attend in person too. His evidence was that he had spoken to Ms Leszczynska earlier in the day and she had said the client was attending in person. He (Mr Black) had said 'I don't think he knows that' and she said 'he does'. Mr Black said that when Ms Leszczynska called him in the afternoon his understanding was that she had already made her decision and was telling him that the meeting had gone

ahead in the claimant's absence. He said the phone call where she asked him about whether he viewed the CCTV happened much earlier in the day. In his witness statement there is no mention of a second call where Ms Leszczynska said that she was going ahead, or had gone ahead, in the claimant's absence and he states that 'Mr Lee discovered that the meeting had been held in absentia …at 21:30'

36. Mr Black said that he did not know if he had contacted the claimant after he spoke to Ms Leszczynska and she said she had gone ahead with the hearing. He said that he could not remember but he believed that he would have done. He said he did not know if he could not get hold of him. He could not recall any conversation. The claimant said that he waited and waited after 3pm then presumed that the meeting was not going ahead because of his email to Mr Uppal protesting about Ms Leszczynska being the hearing manager. He did not see the email from HR at 15.04 because he was in a bad way and was not looking at his emails. He did not check until 9.30. He did not reference any other events on 10 June 2023 in his witness statement other than his emails about Ms Leszczynska with Mr Uppal and Ms Philips.

37. At On 10 June 2020 at 13:53 the claimant emailed Mr Uppal to say that he did not agree to Ms Leszczynska being the hearing manager. Anne Philips of the respondent's HR replied at 15:04 that Ms Leszczynska had been suitable to conduct the hearing.

38. As noted above the claimant did not attend the hearing and Ms Leszczynska made a decision in his absence. She decided to dismiss the claimant summarily for gross misconduct. She said that the CCTV footage confirmed that:

> '…*you drove through the red light being in control of bus 8867 prior to St Leonards Road Bus Stop. The incident occurred on the route E7 as the bus was travelling towards Ealing Broadway.*
> *CCTV footage also confirmed that you were driving above the speed limits on Uxbridge Road and driving one handed on that day.'*

39. Ms Leszczynska said she had considered whether to impose a lesser sanction but had decided this was not appropriate because:

> *'…you have not taken any action to slow down before the traffic lights and you had more than 5 seconds to apply the brake and stop before the traffic lights which had already changed to red. During the viewing of the CCTV footage, I could see that you demonstrated poor observation and poor planning which is unacceptable for a professional driver. You also failed to adhere to the speed limits on that road.'*

40. The respondent has a disciplinary policy which includes a list of potential actions which it considers to be gross misconduct. That list includes the following actions: '*Dangerous driving e.g. excessive speeding, red light offences'.* It is noted in the policy that the list is not exhaustive.

41. In oral evidence Ms Leszczynska said that her decision was made entirely and only on the evidence before her on 10 June 2020. This was in response to a re-examination question from Mr Griffiths. The claimant did not put to Ms Leszczynska that her decision was made whilst holding in mind her alleged grudge against the claimant.

42. I make the following findings about the events of 10 June 2020:

    42.1 The claimant told the respondent on 6 June 2020 that he intended to attend the hearing by video.
    42.2 Mr Uppal took no action on this matter and either he or HR told Ms Ms Leszczynska that the claimant was attending in person.
    42.3 The claimant was available to attend the meeting and did not do so as he was not called by Ms Leszczynska at 3pm and assumed the meeting had been cancelled because of his objection to Ms Leszczynska conducting it.
    42.4 Ms Leszczynska was not told that the claimant objected to her conducting the disciplinary hearing.
    42.5 Ms Leszczynska made a decision to continue with the hearing based on the information she had been provided with, which was that the claimant's hearing had been re-scheduled many times, occupational health deemed him fit to attend, he was due to attend in person and he had not done so, he had not contacted the respondent that day to say that he could not attend.
    42.6 Ms Leszczynska made a decision to dismiss the claimant based only on the evidence that had been provided to her. I do not find that there is any evidence of bias or a grudge which tainted the decision.

43. The claimant appealed against the dismissal decision in an email dated 16 June 2020, raising the following points of appeal:

> *I disagree with the way how the disciplinary hearing was held and the severity of the award.*
>
> *I wasn't allowed to provide my own new evidence that I felt should have been considered.*
>
> *I wasn't allowed to provide any mitigation towards the allegations.*
>
> *I have been unfairly treated and there has been a breach of procedures.*
>
> *All the facts of the allegations have not been understood and no assistance have been offered to me.*
>
> *I have been unfairly dismissed from the company.*

44. An appeal hearing was held at the Walworth depot on 26 August 2020. Stephanie Achief, Employee Relations Manager, was appointed as the appeal manager. The claimant attended the hearing with his trade union

representative, Jim Black. The claimant was given an opportunity to put his case, assisted by Mr Black. The claimant's case was: that the speed limit on the road that day was 30 mph and not 20 mph; that he had a shoulder injury which was why he sometimes drove one-handed and the importance attached to one-handed driving was a recent concern of the respondent; he had come to learn since the incident that he had a cataract; the claimant was tired; Ms Leszczynska held a grudge against him; and, process had not been followed when Ms Leszczynska decided to go ahead in his absence.

45. After the hearing Ms Achief carried out investigations with the claimant's GP and optician regarding the points he had raised about having an eye condition. She also, as is evidenced in the appeal outcome letter, made some enquiries about the speed limit on St Leonard's Road on the day of the incident.

46. On 14 October 2020 Ms Achief set out her decision in a letter to the claimant. Ms Achief addressed all of the points raised by the claimant and decided to uphold the decision to dismiss him.

47. Copies of the meeting minutes of 26 August were included with that decision letter. In evidence, the claimant said that the minutes were inaccurate and disputed a number of the paragraphs therein. He said he had not raised this with the respondent as he had been told that was the end of the process. He said that everything in the minutes was false and when asked if he meant that none of it was said, his answer was 'not like that'. He was taken to a particular paragraph recording a conversation about one handed driving which starts with the sentence 'JB replied that no one had ever mentioned it in context and that it was only within the last 18 months that there has been increased attention on one handed driving.' The claimant said that Mr Black did not say that sentence. Mr Griffiths put it to him that it was an odd thing to make up and he replied that it was not policy to send minutes out with a decision, they should provide them soon after the meeting.

48. Mr Black was asked by Mr Griffiths where he disagreed with the minutes. Mr Black said that there were omissions from the minutes, particularly that they did not include a point he had made about speed limits and Transport for London guidance on the inaccuracy of speedometers. I noted that in his witness statement he said the minutes of the meeting of 10 June 2020 were inaccurate, but he made no comment about the minutes from 26 August 2020. Ms Achief did not take part in the hearing. The respondent said that she left the business in 2021.

49. The claimant did not raise with the respondent any concerns about Ms Achief conducting the appeal hearing or the way in which she conducted it. He confirmed to Mr Griffiths in oral evidence that at the appeal hearing he had the opportunity to say everything that he wanted to say at the disciplinary hearing and was given the chance to make his case fully. Mr Black did not say that there were inaccuracies in the minutes, but that they did not include all the points he had raised. The minutes begin with the line *'These notes record the salient comments and facts raised at the meeting. They are not a verbatim record of the meeting'*.

50. Notwithstanding Ms Achief's absence, I find that the minutes are a non-exhaustive summary of the matters raised at the hearing and I do not accept that the respondent included comments made by either the claimant or his representative which they did not make.

Law, Decision and Reasons

Unfair Dismissal

51. The question I need to answer is whether the dismissal was fair or unfair. This is a two-stage process. The first stage is for the respondent to show a potentially fair reason for dismissal, and secondly if that is achieved, the question then arises whether dismissal is fair or unfair.

52. *Section 98 of the Employment Rights Act 1996* identifies a number of potentially fair reasons for dismissal which include at *s98(2)(b)* the conduct of the employee. I am satisfied on the evidence that the Claimant was dismissed for conduct.

53. I did not understand the claimant to be putting forward to this tribunal an argument that he was dismissed for anything other than misconduct however I note that he raised in the appeal to Ms Achief that Ms Leszczynska held a grudge against him. For the avoidance of doubt, it is my decision that there was no evidence before me that Ms Leszczynska held a grudge against the claimant on 10 June 2020 which tainted her decision, and as noted above, I find that her decision to dismiss was based only on the evidence before her on that day.

54. The second stage as set out at *s98(4) of the Employment Rights Act 1996* is to consider whether the dismissal was fair or unfair, having regard to the reason shown by the employer and 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.

55. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions *in Burchell 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827*. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer *(Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563).*

56. In relation to the first part of the Burchell test I am satisfied that the respondent had a genuine belief in the claimant's misconduct. The claimant drove his bus through a red light. He was observed to do this by a member of the public who reported it, and CCTV footage, which I viewed in the hearing, shows the claimant driving through a red light. Red light offences are specifically flagged in the respondent's disciplinary policy as an example of gross misconduct.

57. I must then consider whether the respondent's genuine belief in the claimant's misconduct was based on reasonable grounds and after carrying out a reasonable investigation.

58. I find that the conduct, breadth and outcome of the fact finding meeting were reasonable. The evidence was put to the claimant and after considering his responses Mr Uppal decided on the evidence, that disciplinary action was warranted as potential acts of gross misconduct had been identified. Due to the seriousness of the allegations, particularly the red traffic light offence, I find it was reasonable to move to formal action rather than pursue an informal process as suggested by the claimant.

59. There then followed a period of four months during which Mr Uppal sought to organise a disciplinary hearing but none was held until 10 June 2020 due to the claimant's ill health. In the list of complaints of procedural unfairness set out by the claimant in his witness statement he refers to Mr Uppal's failure to address his health conditions. On the claimant's own evidence his stress related illness began after the meeting on 11 February 2020 rather than being a cause of his actions on 6 February 2020. There is, in any event, evidence of extensive welfare input from Mr Uppal during that four month period. Furthermore, the reason for the delay in holding the hearing was because the respondent took account of the claimant's health problems. Finally, on this subject, I note that whether the respondent complied with its own welfare and attendance policies is not a matter relevant to whether a decision to dismiss on conduct grounds was fair or unfair.

60. The claimant referred many times in the hearing to the accusations made by the respondent's witnesses that he had failed to attend a disciplinary hearing on 20 February 2020 and 21 May 2020. I have set out my findings on that above and I agree with the claimant that he did not fail to attend those meetings. However, the fact is that the hearing did not go ahead on those days and was rescheduled by the respondent to a later date. There is no unfairness or unreasonableness in the process in this respect.

61. The respondent considered evidence from the claimant's GP on 20 May 2020 and sought further information from its own specialist occupational health provider. I find that it was not unreasonable for it to rely on the report of 27 May 2020 which recommended that the hearing proceed. No submissions were made by the claimant that there was a reason for the respondent to prefer the GP letter over the occupational health report.

62. I find that it was unreasonable for the respondent to proceed with the disciplinary hearing on 10 June 2020. I do not find that Ms Leszczynska's decision to proceed was unreasonable. I found her to be a convincing witness and I accept that she went ahead that day because she had been told that the claimant had failed to attend a hearing on previous occasions, he was fit to go ahead according to occupational health, and that he did not contact the respondent that day to say he would not attend. However, I have found that the claimant did tell the respondent he wanted to attend by video call, and in my view, although that response was to the meeting invitation for 9 June 2020 the respondent should have expected that it would stand for a meeting re-arranged to the next day. Furthermore, he had raised, albeit at the last minute, a complaint about the hearing manager, and was not advised until after the meeting had begun that his complaint was not accepted which led him to believe, in receiving no phone call at 3pm, that the meeting was not taking place. It may have been a mistake that the respondent failed to understand from the email of 6 June 2020 that the claimant intended to attend by video, it does not appear to have been a mistake that Ms Leszczynska was not told that the claimant had a concern about her conducting the meeting, which knowledge may have led her to pursue a different course of action. These actions, or failures to act, on the part of the respondent were unreasonable, and for this reason it was unreasonable to conduct the hearing in the claimant's absence.

63. The claimant had the opportunity to, and did, appeal the decision. The purpose of an appeal is to address any concerns that an employee may have about the disciplinary hearing stage of the process. In my view the appeal hearing did just that. The claimant had the opportunity to put his case, he had a representative with him to assist and make points for him, the appeal manager made further enquiries after the meeting in relation to arguments raised by the claimant. She addressed all of the points raised in his appeal letter and the hearing in the letter of 14 October 2020. The claimant complains that Ms Achief refused to look into the matter of his grievance against Ms Leszczynska and this was evidence of a failure by the respondent to adhere to its grievance policy. This has no bearing on the reasonableness of the disciplinary process.

64. I find on the evidence provided that the investigation and disciplinary process was reasonable. Defects at the disciplinary hearing stage were corrected at the appeal stage.

65. I must then consider whether the decision to dismiss was within the range of reasonable responses. As set out above it is immaterial how the tribunal would have handled events, the test is simply whether a reasonable employer could have reached the decision to dismiss on the particular facts. The claimant says that the sanction was too harsh and that his mitigation was not taken into account. The CCTV shows the claimant running a red light, and, shortly before that, driving over the speed limit. Those are offences listed in the respondent's disciplinary policy as being examples of gross misconduct. The respondent is a bus company. The claimant is a professional bus driver. Ms Leszczynska explicitly considered whether a lesser sanction was

warranted and concluded it was not. Ms Achief heard and considered all of the claimant's mitigation. No evidence was presented to the respondent that the claimant was suffering from an illness on 6 February 2020 that would have impaired his driving skills. I find that the decision of the respondent, a bus company, to dismiss, on the facts before it, was one open to a reasonable employer on those facts.

66. I therefore conclude that the dismissal of the claimant by the respondent on 10 June 2020 was fair, and the claimant's claim of unfair dismissal is dismissed.

Wrongful dismissal

67. In a claim of wrongful dismissal, the reasonableness of the respondent's actions is irrelevant. The question for the tribunal is whether the respondent has breached the contract of employment. As set out by the EAT in *Enable Care and Home Support Ltd v Pearson EAT 0366/09* the question for the tribunal in a misconduct dismissal is: 'Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract?'

68. The claimant did not address the tribunal on this matter. Mr Griffiths, for the respondent, said that there was no breach of contract and the claimant's actions on 6 February 2020 must have been sufficient to undermine the respondent's trust and confidence in the claimant.

69. I have found above that the decision to dismiss the claimant was within the range of reasonable responses. I find also that those actions on 6 February 2020 were of a sufficiently serious nature that the respondent did not breach the contract of employment in treating those actions as a reason to end the contract by summarily dismissing the claimant.

70. The claimant's claim of wrongful dismissal is dismissed.

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Employment Judge Anderson

Date: 28 July 2023

Sent to the parties on: .29 August 2023.

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For the Tribunal Office