EMPLOYMENT TRIBUNALS

Claimant: **Mr. B. Bajrami**

Respondent: **London Central Bus Company Ltd**

Heard at: **London South via CVP**

On 11 and 12 December 2023. In chambers, 20 December 2023

Before: **Employment Judge T.R. Smith**

Mr. C. Rogers

Ms. R. Serpis

Representation

Claimant: **Dr. Fields (counsel)**

Respondent: **Mr. Mc Cabe (counsel)**

RESERVED JUDGMENT

The claimant's complaint of unfair dismissal is not well founded and is dismissed.

The claimant complaint of direct race discrimination is dismissed on withdrawal.

The claimant's complaint of direct religious discrimination is dismissed on withdrawal.

The claimant's complaint of harassment on the grounds of race is not well founded and is dismissed.

The claimant's complaint of harassment on the grounds of religion is not well founded and is dismissed.

The issues

The issues this tribunal were required to determine were set out in the order of Employment Judge Corrigan dated 12 May 2023. They are reproduced, below: –

"Unfair dismissal

1.1 What was the reason or principal reason for dismissal?

The respondent says the reason was conduct. The tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct. Whilst the claimant accepts there was a conduct issue, he argues the reason he was dismissed, rather than issued with a lesser penalty, was his race and/or religion. He therefore does not accept that conduct was the reason for his dismissal.

1.2 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? The tribunal will usually decide, in particular, whether:

1.2.1 there were reasonable grounds for that belief;

1.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

1.2.3 the respondent otherwise acted in a procedurally fair manner;

1.2.4 dismissal was within the range of reasonable responses.

The claimant argues the dismissal is unfair for the following

reasons:

1.2.4.1 the respondent decided to dismiss the claimant based on allegations from the other driver that were unsupported by the evidence that the claimant had behaved in a threatening manner and was high on drugs;

1.2.4.2 The respondent labelled the claimant's actions an act of terrorism and … claimed that others would see it like that despite clear evidence on CCTV that pedestrians were not affected by it;

1.2.4.3 The dismissal was not within the range of reasonable responses and the penalty was excessive;

1.2.4.4 The penalty was excessive as it was influenced by race and religious discrimination; and

1.2.4.5 Insufficient weight was given to the claimant's length of service and his particular personal circumstances and

the impact dismissal would have on those. (sic)

3. Direct religious discrimination (Equality Act 2010 section 13)

3.1 The claimant is Muslim. The comparator is non-Muslim.

3.2 Did the respondent do the following things:

3.2.1 Deem the claimant's actions, an act of terrorism;

3.2.2 Question why the dismissal would be devastating for the claimant and his family including asking if the claimant "if you went to the "hole in the wall" on Friday and there was no money, what would you do"?

3.2.3 Dismiss the claimant?

3.2.4 Smirk whilst dismissing the claimant?

3.3 Was that less favourable treatment?

The tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who he says was treated better than he was.

3.4 If so, was it because of religion?

This complaint was withdrawn at the start of submissions.

4. Direct race discrimination (Equality Act 2010 section 13

4.1 The claimant is white British of Albanian ethnic origin. His comparator is someone who is white British of English/Anglo-Saxon origin.

4.2 Did the respondent do the following things:

4.2.1 Deem the claimant's actions an act of terrorism;

4.2.2 Question why the dismissal would be devastating for the claimant and his family

including asking if the claimant "if you went to the "hole in the wall" on Friday and there was no money, what would you do"?

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4.2.4 Smirk whilst dismissing the claimant?

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If there was nobody in the same circumstances as the claimant, the tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who he says was treated better than he was.

4.4 If so, was it because of race?

This complaint was withdrawn at the start of submissions.

5. Harassment related to race (Equality Act 2010 section 26)

5.1 Did the respondent do the following things:

5.1.1 Deem the claimant's actions an act of terrorism;

5.1.2 Question why the dismissal would be devastating for the claimant and his family including asking if the claimant "if you went to the "hole in the wall" on Friday and there was no money, what would you do"?

5.1.3 Smirk whilst dismissing the claimant?

5.2 If so, was that unwanted conduct?

5.3 Did it relate to race?

5.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5.5 If not, did it have that effect? The tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

6. Harassment related to religion (Equality Act 2010 section 26)

6.1 Did the respondent do the following things:

6.1.1 Deem the claimant's actions an act of terrorism;

6.1.2 Question why the dismissal would be devastating for the claimant and his family including asking if the claimant "if you went to the "hole in the wall" on Friday and there was no money, what would you do"?

6.1.3 Smirk whilst dismissing the claimant?

6.2 If so, was that unwanted conduct?

6.3 Did it relate to religion?

6.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

1.Employment Judge Corrigan had also identified that contribution, the Polkey question, and whether section 207A of Trade Union and Labour Relations Act 1992 was engaged, were also questions for the tribunal to determine.

2.At the start of the hearing this tribunal made it clear that it would address the above issues when determining liability but would not, due to insufficient time allocated to the case, determine remedy, which would be addressed, if necessary, at a later date.

Documentation

3.The tribunal had before it a bundle which totaled 144 pages.

4.A reference in this judgement to a page number is a reference to the bundle.

5.The evidence for the claimant was set out in two witness statements: –

- the first from the claimant himself which was undated
- the second from Mr. J Black, a trade union representative of the Workers of England Union, which was again undated.

6.The evidence for the respondent was set out in two witness statements: –

- the first from Mr. D. Barker, General manager
- the second from Mrs. A Ryder, General manager (operations)

7.There was a video recording available of the incident referred to in this judgement.

8.Mr. Mc Cabe did not consider it was necessary for the tribunal to view the video. Dr Fields asked the tribunal to do so, but only two short extracts. The first was in respect of camera one from 17.01.50 to 17.02.50 and the second was from camera 11 for the same time period. The tribunal watched the video in the presence of all parties.

9.Still photographs from the video were also before the tribunal, in the bundle.

10.The tribunal has only made findings of fact necessary to address the agreed issues. It has not sought to address each and every factual dispute.

The preliminary issue.

11.A preliminary issue arose as to whether the tribunal should have regard to the claimant's record set out at pages 114 to 115 in the bundle. The document constituted a record of disciplinary matters, complaints, accidents and issues of concern.

12.The tribunal gave oral reasons why it considered it should be admitted.

13.In summary the document was both relevant to the issues it had to determine and necessary for disposing of the proceedings fairly because the claimant raised his work record in mitigation at his appeal hearing, and it was on that basis that Mrs. Ryder made reference to the record in her outcome letter and in her witness statement.

14.Whether, and to what extent, Mrs. Ryder should have considered the record was a salient matter to be addressed in cross examination, but it was not, in itself, determinative of the question of admissibility.

15.As the document had been disclosed late the tribunal permitted the claimant to give supplemental evidence as to the record.

Findings of fact

16.The tribunal made the following findings of fact.

17.The claimant commenced employment with the respondent on 08 April 2008.

18.His employment continued until he was summarily dismissed on 06 December

2021.

19.The claimant identifies of Albanian heritage and of the Muslim faith.

20.The claimant worked for the respondent as a bus driver based at its Peckham garage.

21.The respondent is a bus operator, employing approximately 8000 staff operating from various sites within London.

22.The respondent operates a system, known to the claimant, of what are known as spare drivers. These are drivers who are available at each depot to cover a route if an employee was unable to attend work due to illness, fell ill at work or if a vehicle broke down/was involved in an accident and a replacement was required.

23.The claimant had been issued with written particulars at the start of his employment (66 to 76).

24.PCV drivers are issued with a rulebook (a relevant extract was at pages 120 to 121). They are required to follow the rule book. The tribunal will return to the rulebook, later in its judgement.

25.The claimant also had access to the respondent's disciplinary policy and procedure (122 to 144).

26.Two sections are worthy of comment.

27.Section 10 provided *"where gross misconduct is suspected, it may be appropriate to suspend the employee…" (126)*

28.Section 11 gave examples of gross misconduct. One example was: – *"failure to observe rules and regulations designed to ensure the safety of other members of staff or members of the general public, or driving a company vehicle in a reckless or dangerous manner" (*126)

29.The matter that ultimately led to the claimant's dismissal occurred on 22 November 2021.

30.Another bus driver ("X"), based at the New Cross depot was driving a bus designated EH 283 on route172.

31.At just after 5 pm, in the rush-hour, and when daylight had ended, X saw another bus, designated EH 67, on route 363, mounting the pavement on his nearside in order

to undertake him.

32.EH 67 was the bus driven by the claimant.

33.The incident occurred on the New Kent Road towards the Elephant and Castle.

34.Details of the incident were set out more fully by X in an incident report (81). X alleged that the claimant told him to move his bus and the claimant also threatened him.

35.The claimant and X did not know each other. There was no history of disagreement between the two. There was no reason therefore, for X to have any form of grudge against the claimant.

36.The matter came to the attention of Mr. Skeet who carried out an investigation.

37.CCTV was in operation and the footage was viewed by the Mr. Skeet.

38.It is proper to record the claimant and subsequently Mr. Black, Mr. Barker and Mrs. Ryder all had the opportunity of viewing the CCTV.

39.In the light of what Mr. Skeet had seen he decided to interview the claimant and a formal fact-finding interview was undertaken on 23 November 2021 in accordance with the respondent's disciplinary procedure.

40.Notes were taken (84 to 87). Although in cross examination the claimant said he strongly disagreed with the accuracy of the notes, the tribunal found they were accurate because: -

- firstly, they were contemporaneous and
- secondly, at a subsequent disciplinary meeting both the claimant and his trade union representative, Mr. Black accepted them as accurate. (95).

41.The incident report was read over to the claimant and the CCTV viewed.

42.The claimant alleged that X had cut him up and therefore he tried to go round his vehicle on X's nearside.

43.There was no suggestion that the claimant was running late.

44.The claimant accepted that he *"yelled"* at X but denied threatening him. He accepted he told X that his behavior was disgraceful.

45.He denied there been any collision and Mr. Skeet, having previously examined the

claimant's bus, accepted that explanation.

46.Mr Skeet specifically raised with the claimant whether there was any health issue that might have impacted on his ability to drive safely on that day. Whilst the claimant said he was stressed at the time he accepted he was fit to drive. He said his health was *"normal".* The only medication he had taken recently was for a headache.

47.He agreed that approximately two months previously, due to a family bereavement when he felt he was unfit to drive he'd been given time off. The claimant therefore knew that if he was unwell time off would be favourably considered.

48.At no stage, at the start of the shift, during the shift, or the end of the shift did the claimant report to the respondent that he was unfit to drive.

49.The claimant was shown stills of his vehicle driving on the pavement in the vicinity of pedestrians. One still showed almost the whole of the bus on the pavement, extremely close to a pedestrian walking in the opposite direction. (89).

50.The claimant could not explain why he did not wait behind X at the bus stop. His explanation was *"I wasn't thinking straight because… X… cut me off and I was upset with him".*

51.The claimant accepted that he had not undertaken a safe manoeuvre.

52.The claimant further accepted that, after the incident, both buses went to the next stop whereupon the claimant got out and ran to X's bus and further remonstrated with him.

53.It is not necessary for the tribunal to make any findings as to the claimant's alleged threatening behavior towards X as this was not an allegation that was levelled against him in the subsequent disciplinary proceedings.

54.When put to him, the claimant accepted he did not consider that the weight of his bus could damage pipes or cables under the pavement or as he drove on and off the pavement, he could have damaged the panels of the bus.

55.Following an adjournment Mr. Skeet considered the matter was so serious that in accordance with the respondent's policy it should be referred to the garage general manager for a determination.

56.In the intervening period the claimant was placed on suspension. He therefore

knew from both the referral and suspension the incident was regarded by the respondent as being extremely serious.

57.The claimant was summoned to a disciplinary hearing, ultimately held on 06 December 2021 (94).

58.The claimant had some familiarity with the respondent's disciplinary procedure as he been subject to previous disciplinary penalties. None had been appealed.

59.The notice convening the hearing stated of the nature of the alleged offence to be *"breach of rule 28 – driving standards"* and a brief description of the alleged offence recorded *"driving the bus onto the nearside pavement in order to pass the bus in front whilst in service".*

60.Rule 28 of the PCV driving standards reads: -

You must drive your bus in a correct and proper manner, consistent with maximum passenger safety and comfort, with due regard to other road users, cyclists and pedestrians and according to the road and traffic conditions… you must comply with all relevant legislation and observe, where applicable provisions of the Highway code".

61.The notice also stated *"your attention is drawn to the company's policy and procedures on discipline which sets out the disciplinary awards that may be imposed, up to and including summary dismissal, depending on the seriousness of the offence"*

Disciplinary hearing 06 December 2021

62.Present at the disciplinary hearing, on the staff side, was the claimant and Mr. Black. Mr. D. Barker was the determining officer and Mr. Skeet, as the investigating officer presented the management statement of case.

63.Mr. Barker was extremely experienced in handling disciplinary matters. Mr. Black could recall appearing in front of him on at least 25 occasions. Mr. Black himself was an experienced trade union official with 12 to 13 years experience.

64.At the time of the disciplinary hearing the claimant had no active disciplinary warnings on his record.

65.In his evidence in chief Mr. Black stated that he knew the allegation against the claimant was a gross misconduct charge (paragraph 2).

66.Initially in cross examination the claimant accepted he considered it was likely he

would be dismissed (that is his conduct was potentially gross misconduct) but it is also proper to indicate he then resiled on that answer. The tribunal's conclusion was the initial spur of the moment response, given by the claimant, coupled with the opinion of his trade representative, which it considered would have been shared with the claimant, was such that the claimant well knew that he could face dismissal for gross misconduct.

67.The claimant conceded in cross examination that when he went into the disciplinary hearing there was nothing new and nothing was raised that he did not expect.

68.Again, notes were taken of the meeting and the tribunal regarded those notes as being accurate (95 to 97). They were not challenged.

69.Mr. Barker asked both the claimant and Mr. Black whether they had any questions for Mr. Skeet after he had presented the management statement of case and notes of the investigative meeting. Neither did.

70.The claimant apologised for his behavior. He accepted that, having seen the CCTV, he had not appreciated that he had driven his bus so it occupied almost the entire width of the pedestrian pavement. The tribunal found the respondent was entitled to conclude the claimant was not in full control of his bus.

71.Before the tribunal the claimant accepted that the way he had driven could have resulted in someone being injured or killed. He expected a final written warning.

72.It is appropriate to record verbatim one aspect of the notes. Mr. Barker asked the claimant *"what do you think the three or four pedestrians on the pavement thought when they saw a double-decker bus coming towards them? In this day and age of terrorism, did you consider that, or were you so angry you did not think of anything other than remonstrating with the other driver"*

73.Mr. Barker did not know the claimant was a follower of the Muslim faith at the time he took the decision to dismiss the claimant. Nor did he know he was an ethnic Albanian.

74.Mr. Barker did not, as the claimant later asserted in cross examination, call him a terrorist or accuse the claimant of an act of terrorism, as set out in the list of issues. The note of the disciplinary hearing accurately recorded what he had been said.

75.The tribunal reached this view for the following reasons.

- Firstly, the note was contemporaneous and therefore most likely to accurately reflect what was said.
- Secondly both the claimant and Mr. Black did not dispute the notes of the disciplinary hearing at the appeal. It is right, however to record at the appeal they did orally assert Mr. Barker had referred to the claimant as a terrorist. The tribunal considered it extremely surprising that if the alleged comment had been made that it did not feature in the grounds of appeal. This was a factor that further favoured Mr. Barker's account.
- Thirdly neither Mr. Black or the claimant challenged Mr. Barker on his supposed comment at the disciplinary hearing, as the tribunal would have expected
- Fourthly Mr. Black, in cross examination, accepted that in his statement he had not alleged that Mr. Barker accused the claimant of being a terrorist, as the claimant asserted. This was a very surprising omission from his evidence in chief, if, as the claimant asserted, he had been called a terrorist.
- Fifthly the tribunal found Mr. Barker's evidence on this point more cogent and compelling and was consistent with the contemporaneous record.

76.The claimant's response when asked about driving along a pavement at rush hour was he didn't realise what he done, it was a one-off offence and that he could not deny what has happened.

77.The claimant was asked to note that it appeared that at least one pedestrian or passenger filmed the incident and did he consider how that might impact upon the reputation of the respondent? He made no meaningful response other then to apologise. The tribunal had an opportunity of reviewing the CCTV and could clearly see that a passenger on X's bus was shocked by what was happening from his expression and his body posture. The fact another person decided to film the incident on their mobile phone also suggested the incident was exceptional.

78.On behalf of the claimant Mr. Black submitted that there was no threatening behaviour, it was frustration at its worst and added that the other driver was responsible if anything appeared upon social media, because he took so long to move his vehicle.

79.The claimant emphasised he was the sole family breadwinner, his father had died

a few months earlier and his mothetr was ill..

80.Having adjourned and reviewed the evidence Mr. Barker dismissed the claimant.

81.He recorded the reasons for his decision (97). This was a contemporaneous document and the tribunal considered it gave an accurate insight into his decision-making process. He regarded the claimant's act as reckless and dangerous and couldn't imagine what members of the public would have thought seeing a double deck bus coming towards them on a pavement. He advised the claimant of his right of appeal.

82.The tribunal noted that the finding of gross misconduct was based solely on the basis of the claimants driving standards.

The appeal

83.By an email dated 06 December 2021 (101) the claimant appealed the decision to dismiss him.

84.The ground of appeal was limited to the severity of the penalty. Save for penalty none of the substanive or procdural matters that were raised before the tribunal featured. There was no suggestion of any form of harassment by Mr Barker.

85.The claimant considered insufficient weight was given to his assurances that they would be no repetition of similar behaviour, and his personal circumstances were not taken into account in any meaningful manner.

86.He did not dispute any of Mr Barker's findings of fact.

87.An appeal hearing was arranged for 15 December 2021.

88.The appeal was chaired by Mrs. A Ryder, general manager, (operations) supported by Ms. K. Bilinska , accident prevention supervisor.

89..Mrs Ryder was hugely experienced and estimated, over her long career, she had been involved in up to 500 disciplinary and appeal hearings.

90.The claimant attended, supported by Mr. Black. Mr. Skeet represented management.

91.A notetaker, Ms. Martin was also present.

92.Mrs. Ryder did not know, at the time of the appeal, that the claimant was a follower

of the Muslim faith.

93.The tribunal had access to the notes of the appeal (103 to 109). Again the tribunal regarded the notes as accurate and they were not challenged.

94.Mr. Black explained at the appeal that there been no contact between the two buses and that a suggestion of any threats being made was *"exaggerated"* As the tribunal have already recorded the threat aspect was never pursued by the respondent.

95.The appeal panel looked at the CCTV from both buses.

96.Mr. Black stated at the appeal *"Derek Barker viewed it as an act of terrorism, which really upset* [the claimant]*… He was only doing 2 or 3 mph.*

97.Mr. Black suggested that a fair decision would have been a final written warning. Before the tribunal, he himself accepted the claimant had made a bad decision to undertake, and should have waited behind X's bus..

98.The disciplinary panel determined, having viewed the CCTV evidence, that no reasonable explanation had been given by the claimant for his behaviour and his driving endangered pedestrians and it was not acceptable in any circumstances.

99.This was a deliberate act, and not a mistake as the claimant alleged, because the claimant believed, wrongly, that he had been cut up by X.

100.Mrs Ryder refered to the claimants record and noted he been involved in five accidents, 14 December 2017, 28 September 2019, 03 December 2019 ,01 December 2020 17 December 2020. She was able to view further details, other than those set out at 114/115 from her computer when she adjoiurned to make her decision. She also noted the frequrent advice given to the claimant and spent disciplinary warnings.

101.The tribunal was satisfied that Mrs Ryder looked at this documentation because the claimant contended he had a good driving record. She had already reached a provisional view that gross misconduct was the appropiate penalty but considered the record to see whether the claimant's record was such that she could reasonably impose a lesser penaty.

102.After Mrs Rydall announced her decision there was some argument with the claimant as to the decision and he made a general allegation that others had done worse but had not been sacked. He did not give Mrs Rydall names. He had never

raised this before.

103.It was never put either to Mr Barker or Mrs Ryder either in the internal proceedings or in cross examination that any of their acts or omissions were because of or connected with the claimants Albanian heritage or Muslim religion.

104.It appears the claimant did then consider writing to the respondent's chief executive to ask for his case to be considered. Whilst a draft email was before the tribunal (112) there was no evidence this was ever sent.

105.There was no right of further appeal from Mrs Ryders decision under the respondent's disciplinary policy.

Submissions

106.The tribunal means no disrespect to either counsel by not repeating their submissions in full. Mr McCann made oral submissions and Dr. Fields, both oral and written submissions.

107.The mere fact each and every submission has not been mentioned does not mean the tribunal did not give it due weight.

108.The tribunal should briefly mention the specific authorities it was taken too.

Mr McCann

109.Mr McCann made reference to 2 cases:-

Harrow London Borough Council -v- Cunningham and

Wincanton PLC -v-Atkinson UKEAT/0040/11

Dr Fields

110.Dr. Fields took the tribunal to:-

British Home Stores Ltd -v- Birchell 1978 IRLR 379,

Iceland Frozen Foods Ltd -v- Jones 1982 IRLR 439,

Sainsbury's Supermarkets Ltd -v- Hitt 2003 ITLR 23,

Foley -v- The Post Office 2001 1 All ER 550,

A -v- B 2003 IRLR 405,

Salford Royal NHS Foundation Trust -v- Roldam 2010 IRLR 721, Adama -v-

Partnerships in Care UKEAT/0047/14 ,

Post Office -v- Fennell 1981 IRLR 221,

Neary -v- Dean of Westminster 1999 IRLR 288,

Lock -v- Cardiff Railway Co Ltd 1998 IRLR 358,

Stoker -v- Lancashire County Council 1992 IRLR 75,

Blundell -v- Christie Hospital NHS Trust 1995 UKEAT /496/94,

Byrne -v- BOC Ltd 1992 IRLR 505, and

Spurling -v- Bradshaw 1956 EWCA Civ 3

Discussion

Unfair dismissal.

111.The tribunal applied the folowing law in reaching its judgement.

112. Sections 98 (1), 98 (2) and 98 (4) of the Employment Rights Act 1996 ("ERA 96") provide as follows: –

"98 (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 either it is 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.

98 (2) – a reason falls within this subsection if it…….

(b) relates to the conduct of the employee.

98 (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 the whether in the circumstances (including the size and the 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."

113.The tribunal had regard to the guidance given in **British Home Stores Ltd -v- Burchall 1978 IRLR 379** and at paragraphs 13 to 15 in **Sheffield Health and Social Care NHS Foundation Trust -v- Crabtree UKEAT 0331/09/ZT**.

114.The approach to fairness is the standard of a reasonable employer at all three of the **Burchell** stages:- **Sainsbury's Supermarket-v- Hitt 2002 EWCA CIV 1588**.

115.The tribunal reminded itself of the guidance given in **Iceland Frozen Foods Ltd -v- James 1992 IRLR 439**: –

"The authorities establish that in law the correct approach for an employment tribunal to adopt in answering the question posed by section 98 (4) is as follows……

(1) the starting point should always be the words of section 98 (4) themselves.

(2) in applying this section an employment tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the employment tribunal) consider the dismissal to be fair.

(3) in judging the reasonableness of the employer's conduct an employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take and , another quite reasonably take another.

(5) the approach of the employment tribunal, as an industrial jury, is to determine whether the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses in which a reasonable employer might have adopted. If a dismissal falls within the band the dismissal is fair….. if the dismissal falls outside the band it is unfair."

116.In summary the tribunal must ask itself: –

- Was there a genuine belief in the alleged misconduct?
- Were there reasonable grounds to sustain that belief?
- Was there a fair investigation and procedure?

- Was dismissal a reasonable sanction open to a reasonable employer?

117.Where there is an appeal process and the appeal proceeds by way of review and not a rehearing there is no rule that any earlier unfairness can only be cured by means of a rehearing. The tribunal must examine the fairness of the disciplinary procedure as a whole at the conclusion of the internal proceedings, including any appeal:-**Taylor -v- OCS Group Ltd 2006 ICR 1602**

118.Gross misconduct occurs when there is a fundamental breach of the contract of the employment. The focus must be on the damage to the relationship between the parties and it must strike at the root of the contract of employment. If the contract of employment sets out examples of gross misconduct which the employer would consider sufficient to merit summary dismissal, even if that conduct may not necessarily amount to gross misconduct, it probably should be classed by the tribunal as gross misconduct.

119.Not every act of gross misconduct however, necessary merits dismissal, and the employer should first of all consider penalties other than dismissal and should not automatically assume that dismissal is the appropriate penalty **Brito-Babapulle -v-Ealing Hospitals NHS Trust [2013] IRLR 854.**

Application

120.The first question the tribunal had to determine was whether the respondent has established that the reason or principal reason for the dismissal of the claimant was his conduct.

121.The burden on the respondent at this stage is not particularly high. As was explained in In **Abernethy – v – Mott, Hay and Anderson 1974 IRLR213** a reason for dismissal is a set of facts known to the employer or beliefs held by him which would cause him to dismiss the employee.

122.As Mr Barker did not know the claimant was of the Muslim faith or an ethnic Albanian this can have had nothing to with his decision to dismiss. The reason or principal reason in his mind was the claimant's conduct. The tribunal is supported in this finding by the fact that it was conduct that was the reason for the investigation, it was conduct that was the reason for the disciplinary hearing and the appeal related to the severity of the penalty in respect of conduct. All the correspondence was

consistent with Mr Barker's evidence that it as the conduct of the claimant that led to his dismissal.

123.In submissions Dr. Fields conceded that conduct was the reason or principal reason for the dismissal of the claimant.

124.Thus the respondent has surmounted the first hurdle. The tribunal then turned to the section 98 (4) question of which there is no burden on either party.

The section 98(4) question.

125.The tribunal then turned to address criticisms raised in terms of the fairness or otherwise of the dismissal.

126.A whole myriad of allegations of unfairness, in addition to those set out in the agreed issues was raised by Dr Fields, but given Mr McCann made no specific objection the tribunal determined it would address the principal additional allegations.

Reasonable belief and a reasonable investigation

127.These are two separate and distinct limbs but it is convenient to deal with them together.

128.The tribunal began by reminding itself that the extent and thoroughness of an investigation was dependent upon what admissions and denials were made by an employee.

129.The greater the dispute of fact, the greater the breadth and depth of an investigation required by the employer to satisfy a tribunal that the investigation was reasonable. Sight must not be lost that here, the factual basis of the allegation was admitted, and the respondent had the undisputed video evidence before it at all stages.

130.The tribunal does not demur from principles set out in **Salford Royal NHS Foundation Trust and Roldan 2010 EWCA Civ 522** and **A -v- B [2003] IRLR 405** quoted to it by Dr. Fields but the facts of this case make it wholly distinguishable.

131.Here the claimant's liberty to remain in this country, his ability to work for another bus company was not impaired. He was not subject to criminal allegations.

132.The tribunal noted that in the agreed list of issues the only allegation relating to

the investigation was that the respondent *"decided to dismiss the claimant based on allegations from the other driver that were unsupported by the evidence that the claimant had behaved in a threatening manner and was high on drugs".* As the tribunal has already found that was not the basis of the decision to dismiss.

133.Dr. Fields submitted the investigation was inadequate because the respondent did not investigate whether ill-health may have explained the claimant's behaviour.

134.The tribunal rejected Dr Fields submission.

135.The claimant had reported to work and by so doing had indicated he considered he was fit to drive. At no stage during his shift did he contact the respondent's control room to say he was unfit and ask for a relief driver. The only medication he was taking was for a headache. He was not subject to any recommendation of an occupational health physician or GP as to a limitation on his duties.

136.He has asked for some time off a few months earlier because he was distressed following the death of his father. It was granted.

137.The respondent as a professional driver had a responsibility to determine whether he was fit to do his job unless incapability was clearly evident to the employer. Here it was not.

138.He told Mr. Skeet that his heath was *"normal"* when Mr. Skeet proactively raised the subject of his health as a possible explanation for his behavior. Whilst he mentioned personal and family pressures at the disciplinary and appeal hearing he produced no medical evidence to suggest his behavior was attributable to ill health.

139.Whilst Dr. Fields took the tribunal to the decision in **Daley -v-Vodafone Automotive Ltd UKEAT/0146/20** the tribunal did not consider that assisted his argument, given the facts as found in that case. In **Daley** the claimant was suffering from severe depression and had done so for a number of years and told his employer he was taking strong doses of sertraline and the symptoms of his illness were directly relevant to the allegations against him. The case of the **Governing Body of Hastingsbury School -v-Clarke UKEAT /0373/07**, also quoted by Dr. Fields did not assist given the material factual differences. In that case the respondent recognised there was a health issue and referred the employee to occupational health but then dismissed prior to receiving the report.

140.A further criticism made by Dr. Fields of the adequacy of the investigation was, what he submitted, was the simple acceptance of X's account without challange.

141.Again the tribunal could not accept that submission. There was no such blind acceptance.

142.There were three principal limbs to the account of X.

- firstly that he thought the claimant's bus had hit his bus,
- secondly the attempt to undertake, and
- thirdly the comments made to him .

143.The respondent did check the claimant's bus for damage and could find no evidence of a collision and that allegation was never pursued against him.

144.The respondent had the claimant's own admission as regards undertaking and the CCTV evidence.

145.The threatening behaviour was not pursued against the claimant.

146.Thus the level of investigation was reasonable.It was not necessary to investigate matters that were not pursued against him.

147.The tribunal turned to Dr. Fields next point. The tribunal was not persuaded that Mrs Ryder should have investigated the claimant's comment on inequality of treatment (i.e. his treatment compared with other drivers) after the appeal had been concluded .The claimant could and should have raised the issue earlier, but did not. His comment lacked any specific information such as names that would have allowed Mrs Ryder to investigate and to consider whether she needed to revisit her decision. In the particular circumstances the respondent acted reasonably in not investigating further.

148.Dr. Fields submitted that Mrs Ryder should be investigated the comment Mr. Barker made in respect of terrorism. However the tribunal again had to reject that submission. Mrs Ryder had the notes of the disciplinary hearing. They were not disputed. There was not a hint in the letter of appeal of any form of discriminatory behaviour by Mr. Barker. Mrs Ryder explained that she read the notes of the disciplinary hearing and did not see any comment directed against the claimant, Albanians or Muslims but rather that in the light of events that occurred at places

such as London Bridge how members of the public may well have been fearful if they saw a bus driving on a pavement. It was a criticism of the claimant's driving style not the claimant's race or ethnic origin. The tribunal found that evidence convincing. She was entitled to come to that conclusion. A reasonable employer acting reasonably would not be required to investigate further.

149.It was submitted that the respondent should have investigated the claimant's concern that X had cut him up. The tribunal rejected that submission.

- Firstly Mr Barker thought from what the claimant said that was no longer pursued and he had reasonable grounds for that belief. At the disciplinary hearing he asked:-

  "Having viewed the incident a number of times, would you agree that [X] does not "cut you up" and in fact carries out a perfectly normal manoeuvre?

  To which the claimant replied:-

  "On reflection and seeing that a number of times, I can only apologise for my actions".

- Secondly Mr Barker, having viewed the video was entitled to reasonably conclude that the bus driven by X undertook a perfectly normal manoeuvre by indicating and pulling away from the bus stop.

150.In any event rule 28 requires a driver to have regard to the provisions of the Highway code and one provision provides for giving priority to buses pulling away from bus stops, as X was doing. The tribunal did not consider that another reasonable employer, acting reasonably would not have taken the same stance as the respondent did.

151.Having dealt with the above specific objections, the tribunal considered that Mr. Barker had, at the time of his decision to dismiss, reasonable grounds to believe the claimant was guilty of misconduct, based on the claimant's admissions and the CCTV evidence and that a reasonable investigation had been undertaken

A fair procedure?

152.Dr Fields made a number of challenges to the procedure undertaken by the respondent, which are again absent from the list of issues. The tribunal sought to address each matter in turn.

153.Dr. Fields alleged that the procedure applies to the claimant was unfair because Mrs Ryder reviewed the claimant's record without placing the same before the claimant, prior to rejecting his appeal.

154.Given that Mrs Ryder had reached her decision on the appeal and was merely reviewing the record to see whether, as the claimant contended he had a good driving record which in turn might justify a lesser penalty, the tribunal found there was no unfairness. The tribunal accepted Mrs Ryder's evidence that the claimant did not have a good driving record. In the circumstances she was entitled to consider that relatively little weight should be given by way of mitigation to the claimant 's assertion as to his driving record. She was not utilising the record to justify the dismissal itself, merely looking at a matter which the claimant had raised to see whether she could find any grounds, at all, to avoid dismissal The tribunal concluded that a reasonable employer acting reasonably could have acted in the same manner as the respondent.

155.Dr. Fields contended that there was a procedural breach in that the claimant was not told prior to the disciplinary hearing that the offence was one of gross misconduct.

156.He quoted from paragraph 9 of the ACAS Code of Practice 1, Code of Practice on Disciplinary and Grievance Procedures (2015) ("The ACAS code") which emphasises an employee must have sufficient information about the alleged misconduct and possible consequences in order to know the case the employee has to meet.

157.The respondents own policy (126) states *"in cases where an employee is accused of behaviour which may amount to gross misconduct they will be advised at the earliest possible time of the nature of the complaint against them and the possibility of dismissal without notice*".[Tribunal emphasis]

158.He did not need to be explicitly told either under the ACAS code or the respondents own procedure that the offence itself was definitively one of gross misconduct.

159.The tribunal is satisfied that the DP1(91) contained sufficient succinct information to meet both the requirements of the ACAS code and the respondent's own policy. It told him the place of the alleged offence, the allegation, namely a breach of rule 28 – driving standards, a brief description of the incident and stated that a disciplinary penalty could be imposed up to including summary dismissal.

160.The fact the claimant had been suspended was such that the claimant must have known from the respondent's disciplinary policy that dismissal was a real possibility coupled with the views of Mr Black.

161.The tribunal expressly rejected the submission of Dr. Fields, that the wording on the DP1 (098) should have been in red letters with a red hand pointing to it in order to give sufficient notice to the claimant relying on **Spurling Ltd -v- Bradshaw [1956] EWCA Civ 3.** This was an old none employment case, dealing with negligence and exemption clauses. The tribunal did not find it assisted the claimant.

162.Dr. Fields took the tribunal to the judgement in **Lock -v- Cardiff Railway company Ltd 1998 IRLR 358 and Byrne -v- BOC 1992 [1992] IRLR 505** but the tribunal do not consider that case assisted this claimant either. The claimant well knew from the respondent's disciplinary policy of examples which might result in a dismissal for gross misconduct. He was dismissed for one of those reasons. The claimant knew expressly, following the dismissal hearing, that his actions were regarded as *"dangerous or reckless"* so if the tribunal were wrong the claimant knew of the position prior to his appeal. The fairness of the dismissal must be judged at the conclusion of the internal disciplinary proceedings and it was fair.

Was it gross misconduct?

163.Dr. Fields is right just because an act or omission is unsafe does not automatically mean it is gross misconduct. The employer's disciplinary procedure and its classification of gross misconduct, the act or omission, the sector in which the incident occurred and its potential consequences are all relevant factors

164.The respondent's disciplinary policy, set out examples of possible gross misconduct and specifically stated that gross misconduct could encompass *"failure to observe rules and regulations designed to ensure the safety of other members of staff or members of the general public or driving of company vehicle in a reckless or dangerous manner"*

165.Dr. Fields submitted that this was in no way comparable with other examples of gross misconduct given such as theft. The tribunal rejected that submission. The respondent's principal objective was the safe transportation of the public and having regard to the safety of other road users, and pedestrians. It was entitled to frame its disciplinary code in a manner that co-incided with its principle aims.

166.The tribunal considered driving on the pavement on a main thoroughfare in London occupied by pedestrians at rush hour, when it was dark has the capability of amounting to driving a vehicle in a reckless or dangerous manner. The tribunal did not consider Dr. Fields submission that the respondent would be insured made the classification of the claimant's conduct any less reasonable.

167.The tribunal considered that another reasonable employer in the same sector could reasonably classify reckless or dangerous driving as an example of gross misconduct.

Penalty

168.The respondent found the claimant had breached rule 28. His driving being dangerous and/or reckless. He never challenged that finding. An indicative penalty given in the respondent's disciplinary handbook for such a matter was gross misconduct.

169.Whilst the claimant had over14 years service this was known to both Mr. Barker and Mrs Rydal.

170.The tribunal accepted the length of service can be a factor that should be properly weighed up by a reasonable employer but in a case of gross misconduct it carries little weight as a proven act of gross misconduct goes to the root of the contract of employment.

171.Both Mr Barker and Ms Rydal were aware of the claimant's personal circumstances. Indeed part of the claimant's harassment complaint relates to the questioning about his personal circumstances. Both Mr Barker and Ms Rydal well knew, given their lengthy experience that the effect of the termination of employment was likely to have a significant and serious effect on any employee.

172.Whilst no injury was caused that did not render the dismissal unfair .The claimant himself accepted before the tribunal that a person could have been

seriously injured or killed. The tribunal considered that a reasonable employer acting reasonably was entitled to conclude, even at a low speed, driving on a pavement occupied by pedestrians at rush-hour was dangerous and reckless driving. As the CCTV evidence showed there were at least four pedestrians in close vicinity, one with his back to the bus, who may not have been aware of its presence, and one in front of the bus who is looking to his left and therefore may not have seen it.

173.The claimant could not explain the reason why he behaved as he did. In the circumstances the tribunal considered the respondent was entitled to take into account that he could have no reassurance that a similar incident would not occur in the future.

174.The fact nobody was killed or injured was in the tribunal's judgement beside the point. The respondent was entitled to take into account the potential consequences that could arise from the claimant's actions. The tribunal are reinforced in that conclusion having regard to paragraph 27 of the judgement of the Honourable Mr Justice Sibler in **Wincanton PLC -v- Atkinson UKEAT/0040/11.** Whilst the tribunal accepted the point of Dr. Fields that cases are frequently fact specific the tribunal found the principal enunciated by the EAT was one of general application.

175.The tribunal was not persuaded that **Adama -v- Partnerships in care Ltd UKEAT/0047/14** assisted the claimant as that was a decision that rested solely on the fact that the employment tribunal had failed to consider and give reasons as to whether the dismissal was fair in all the circumstances.

176.The tribunal did not find that the penalty of dismissal was outside the band of responses of a reasonable employer in the passenger transport industry.

Other matters

177.Dr. Fields presented to the tribunal the judgement in **Blundell -v- Christie Hospital NHS Trust 1996 ICR 347** but the tribunal did not find it assisted the claimant. It is true that at the end of his appeal the claimant asked if he could appeal further and was told he could always write a letter to the managing director. However there was no evidence this was done. All the tribunal had before it was a draft letter. The claimant had no right of any further appeal in accordance with the respondent's disciplinary procedure. All the claimant was entitled to was a disciplinary hearing and then an appeal. He received his entitlement. In **Blundell,**

the employer failed to exercise its discretion in accordance with the disciplinary procedure. For similar reasons the tribunal did not find that the judgement in **Stoker -v-Lancashire County Council 1992 IRLR 75** assisted the claimant.

Contributory conduct.

178.If the tribunal was wrong on its primary finding that the claimant's dismissal was fair it then went on to examine the issue of contribution.

179.Section 123 (6) ERA 96 states that *"[W] here the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the….. compensatory award by such proportion as it considers just and equitable having regard to that finding."*

180.A reduction for contributory conduct is appropriate according to the Court of Appeal in **Nelson-v- BBC (2) 1980 ICR 110** when three factors are satisfied namely: –

- The relevant action must be culpable or blameworthy
- It must have caused or contributed to the dismissal. (This does not require that the action of the employee to be the sole or principal or operative course of the dismissal: – **Polentarutti -v- Autokraft Limited 1991 IRLR 457).**
- It must be just and equitable to reduce the award by proportion specified

181.If the tribunal is wrong it would have found that the claimant caused or contributed to his dismissal as to 100%.

182.The claimant engaged in admitted culpable conduct which was known to the respondent prior to dismissal and it was for that reason, and that reason alone, that he was dismissed and a 100% reduction would be just and equitable in the circumstances of this case.

Polkey

183.The tribunal has not found any procedural or substantive errors in the respondent's handling of the disciplinary proceedings involving the claimant. It follows therefore that it is not called upon to consider whether or not a Polkey adjustment should be made.

Trade Union and Labour relations (Consolidation) act 1992

184.Section 207A (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides: –

"(2) if, in the case of proceedings to which this section applies, it appears to the employment tribunal that-

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%".

185.For the reasons already outlined by the tribunal the claimant has not demonstrated that the respondent breached paragraph 9 of The ACAS Code of Procedure One: disciplinary and grievance procedures (2015). It follows therefore that there can be no adjustment under section 207A as it was not engaged.

Harassment

186.The tribunal began by reminding itself of the relevant law.

"(1) A person (A) harasses another (B) if—

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

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

(i) violating B's dignity, or

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

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

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect. Section 26 of the EQA 2010 defines harassment as follows:

187.In **Richmond Pharmacology Limited v Dhaliwal 2009 IRLR 366** Underhill P set out three essential elements of a harassment claim namely:

- Did the respondent engage in unwanted conduct?
- Did the conduct have either (a) the purpose or (b) the effect of either (i) violating the claimant's dignity or (ii) creating an offensive environment?
- Was the conduct related to a relevant protected characteristic?

188.This test was clarified and extended in the case of **Pemberton v Inwood 2008 EWCA Civ 564** where the court added that when considering where the conduct had the prescribed effect the tribunal must take into account the following factors:

" In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the prescribed effects under sub paragraph (1)(b), a tribunal must consider both…..whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and ….whether it is reasonable for the conduct to be regarded as having that effect (the objective question). It must also…take into account all the other circumstances-subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

189.The tribunal is required to make a number of specific findings as regards the conduct of Mr. Barker as it is relevant to the issues.

190.For the reasons already given the tribunal did not find that Mr Barker accused the claimant of an act of terrorism. The tribunal found that Mr. Barker was not, as the claimant suggested accusing him of being a terrorist. Nor was he accusing the claimant of embarking on a terrorist act.

191.The factual matrix is therefore not established of an act of harassment. Mr Barker did not know of the claimants protected characteristics and therefore any comment

attributed to him could not be related to those protected characteristics.

192.The tribunal did accept that Mr Barker asked questions as to the claimant's personal circumstances. Mr Barker's uncontradicted evidence was that he asked the same question to any employee who potentially face dismissal for gross misconduct. Mr. Black said a number of questions were asked about the claimant's personal life which led him to believe clemency was being considered.He saw nothing wrong with the questioning. The claimant in cross examination did not suggest the questions were harassing, merely *"not professional".* The claimant has not shown that the questioning had the purpose or effect of violating the claimants dignity (a grave word which must not be taken lightly) or creating an intimidating, hostile, degrading humiliating or offensive enviroment. The factual matrix is therefore not established of an act of harassment. In the alternative as Mr Barker did not know of the claimants protected characteristics any comment attributed to him could not be related to those protected characteristics..

193.The tribunal was not satisfied that Mr Barker smirked at the claimant when dismissing him. It was never raised by the claimant or Mr Black at the time. It did not feature in the grounds of appeal. It was not a specific allegation made against Mr Barker in the statement of Mr Black. The incident was denied by Mr Barker. On balance the allegation was not established. Even if Mr Barker had smirked at the claimant it was not conduct related to any of the claimants protected characteristics.

194. It follows the allegation sof harassment are not made out.

Employment Judge **T.R.Smith**

Date 21 December 2023