EMPLOYMENT TRIBUNALS

Claimant: **Mr Tony Shead**

Respondent: **Abellio London Limited**

Heard at: **London South Employment Tribunal hmstr**

On: **04.10.2023 & 30.11.2023**

Before: **Employment Judge Dyal**

Representation:

Claimant: 04.10.2023: Ms Emerson, Trade Union Representative
30.11.2023: did not attend and was not represented

Respondent: Mr Griffiths, Counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal fails;
2. The complaint of breach of contract fails;
3. The claims for wages and holiday pay succeed and that Respondent shall pay the Claimant the following sums:
    a. £566.20 in respect of a week's unpaid wages
    b. £452.96 in respect of 4 days accrued holiday

REASONS

Introduction

The issues

1. At the outset of the hearing on 4 October 2023 there was a discussion of the complaints and an identification of what they were. It was agreed that they were as follows:

    1.1. A complaint of unfair dismissal;
    1.2. A claim for one week of unpaid wages;
    1.3. A claim for 4 days of accrued holiday pay upon termination;
    1.4. A claim for breach of contract. We discussed what this claim was and Ms Emerson said that the breach of contract in issue was a breach of clause 32 of the Claimant's contract of employment. That deals with data protection. The breach was said to be the Respondent's use/processing of CCTV footage of the Claimant.

The hearing

2. *Format of hearing:*

    2.1. The hearing was scheduled to be by videolink but at the Claimant's request he was given permission to attend in person with his representative Ms Emerson. The Respondent attended by videolink. As noted below the Claimant did not attend and was not represented at the second tranche of the hearing on 30 November 2023.

3. *Documents before the tribunal*:

    3.1. Agreed bundle running to 285 pages (paginated to p270 but with additions interleaved)

    3.2. Witness statements:

    Claimant's side
    3.2.1. The Claimant;
    3.2.2. Ms Theresa Emerson;
    3.2.3. Mr Claudio Schia;

    Respondent's side
    3.2.4. Ms Leszczynska, Operations Manager;
    3.2.5. Ms Janet Cameron, Driver Manager.

    3.3. CCTV footage.

Application to postpone hearing of 4 October 2020

4. The hearing did not proceed entirely smoothly. On 4 October 2020, the Claimant's representative applied to postpone the hearing. The application had originally been made by email on 3 October 2020. I indicated in response to that, given the proximity of the final hearing, that I wanted to hear from the parties at the hearing.

5. At the hearing Ms Emerson made the application. The basis of it was that:

   5.1. The Claimant wanted a 2 day hearing;
   5.2. One of the witnesses, Mr Schia, was in Italy and it had not been appreciated until very recent correspondence with the tribunal that permission from the Republic of Italy would be required for him to give evidence remotely (and there was no such permission). The Claimant himself had been willing to pay for Mr Schia to attend in person but Ms Emerson had understood until the said correspondence he could join remotely;
   5.3. The Claimant wanted to call further witnesses: Ms Achief the appeals officer and a controller to give a "balanced view" of lost mileage (see below for what lost mileage is). No statements had been exchanged for these witnesses.

6. The Respondent opposed the application.

7. Having heard from the parties I briefly adjourned to consider the application. I decided to refuse it and I gave oral reasons for doing so at the time which I repeat here.

8. The background is important:

   8.1. The dismissal was in January 2021.
   8.2. The claim was presented in May 2021.
   8.3. The material events were a very long time ago.
   8.4. The trial was previously postponed in May 2023 on the Claimant's application by which stage it had already been long delayed.
   8.5. I accept part of reason for the delay prior to that was that the Respondent originally failed to enter a response. Default judgment was given and later it was revoked.
   8.6. Getting cases heard and avoiding delay weighs very heavily as factor. The London South Employment Tribunal is facing unprecedented pressure on the list and there are unprecedented delays in getting cases heard.

9. In terms of time estimate I was satisfied having regard to the issues and the weight of the evidence that the case could fairly proceed today with some reasonable timetabling, albeit that it might not be possible to give judgment.

10. With regard to Mr Schia's evidence:

    10.1. I could not allow Mr Schia to give oral evidence from Italy in light of the fact that there was no permission to do so from the Republic of Italy. I referred myself to the *Presidential Guidance: Taking Oral Evidence by Video or Telephone From Persons Located Abroad.* There was also no prospect of getting that permission for this hearing.

10.2. I had regard to Mr Schia's evidence, the nature and content of it, and was satisfied that the right course was for me to admit his evidence in writing, and to attach such weight as seemed proper. I was satisfied this could be done without unfairness. Mr Schia gave evidence about 3 comparators:

10.2.1. Teresa [not Ms Emerson]: her case had been very well telegraphed. It was referenced in the internal disciplinary process and raised in the claim form. There was documentary evidence in the bundle corroborating what Mr Schia said about her driving. It was not in dispute that Teresa was not dismissed. I could deal with that comparator fairly without hearing oral evidence from Mr Schia.

10.2.2. Two other comparators: the reliance on them was not foreshadowed. However, that aspect of his evidence was incapable of having a significant bearing on the claim. The two other comparators cases had circumstances which were plainly insufficiently similar to Mr Shead's to have a significant bearing on the case.

11. In short I did not think the Claimant would be materially prejudiced by Mr Schia not being called to give oral evidence and I did not think it would be unfair on the Respondent either for me to have regard to his written evidence.

12. In terms of the Claimant's desire to call other witnesses that was not a sound basis for a postponement. The case was very old and he had had a full and fair opportunity to call witnesses. It would be wrong to postpone in order to allow him to do so now.

13. All in all, the balance strongly favoured refusing the application.

14. On giving my oral reasons to the parties, Ms Emerson became angry and shouted at me. I needed to adjourn again to complete my pre-reading so I asked her and the Claimant (who was himself polite at all times) to leave the room. She continued shouting while I repeated the request to leave the room a number of times. She asked me on what basis a judge could sit alone in this case and I referred her to s.4 of the Employment Tribunals Act 1996. I took this to be a suggestion that the Claimant considered the case should be heard by a full tribunal. I took that into account, as well as the likelihood of there being factual disputes and the likelihood of an issue of law arising; I thought both were likely. However, I took the view that this nonetheless was a case which was perfectly well suited to being heard by an experienced judge sitting alone. Ms Emerson and the Claimant then left the room. Ms Emerson was composed and professional for the remainder of the hearing and I was grateful for that.

Timetabling, closing submissions and going part-heard

15. It was necessary to timetable the evidence to get through the hearing in a day. I asked the parties for their time estimates. Ms Emerson was reluctant to, and did not, give one. I could understand a lay-representative having difficulty in making an estimate. I asked how many questions said had. She said about 12 questions for each witness and that there may be some follow-up questions. It seemed to me half and hour per witness was reasonable on that basis and generally. This is

the amount I scheduled. Mr Griffiths asked for 30 mins – 1 hour for cross-examination of Ms Emerson and 1hr to 1.5 hours for Mr Shead. I decided that was too much and scheduled him 30 mins with each.

16. In the event, I allowed Ms Emerson to go over her time allocation and she spent about 45 minutes cross-examining Ms Cameron, and an hour and 10 minutes cross-examining Ms Leszczynska. I was perhaps overly generous but I allowed this in order to give Ms Emerson leeway as a lay representative. Mr Griffiths was under an hour in total in his cross-examination though he spent the majority of it on the Claimant's evidence.

17. Later in the hearing, Ms Emerson asked to defer her closing submissions to another day. She explained that she is menopausal, that this affected her ability to "get her words out" and that she would prefer to make her submissions another day. The evidence did not finish until 16.20 and so I agreed to go-part heard. I asked the parties for their dates to avoid for the rest of October, November and December.

18. On 5 October 2023, the tribunal emailed the representatives to the email addresses on record and which it had routinely corresponded with them to. The email notified the parties that the hearing would resume on 30 November 2023. Ms Emerson's email was correctly typed out and it is the account that she regularly communicates with the tribunal from.

Resumed hearing: 30 November 2023

19. On 30 November 2023 the Claimant's representative applied to postpone at 09.55 am on the basis that she and the Claimant were unaware of the hearing until receipt of the tribunal's email of 29 November 2023 at 16.28 with CVP login details. Her email stated:

> *"It is impossible for either the claimant or myself to attend with such short notice, the claimant has a hospital appointment today at 10am, and we both work full time as bus drivers, in which we need to give our respective employers at least 7 days notice to arrange for a days leave from work."*

20. The Respondent opposed that application and submitted the claim should be dismissed pursuant to rule 47 or alternatively to proceed with hearing in the Claimant's absence.

21. I asked Mr Griffiths whether there was any correspondence between the parties between the last hearing and today that might shed further light on whether the Claimant and his representative did or did not know about today's hearing. There was not.

22. I decided it would be completely unjust, disproportionate and indeed irrational for me to dismiss the claim. I had heard all of the evidence and what was missing was closing submissions. At worst, from the Claimant's perspective the proper course would be for me to hear the Respondent's closing submissions and determine the claim on its merits based on the evidence I had heard and taking

into account his case which had been made very clear from the Particulars of Claim (which contains a lot of advocacy) onwards. A more difficult issue was whether I should take that course or postpone to another day.

23. Rule 30A of the ET rules makes provision in relation to postponements. In the circumstances of this application to postpone I could only allow the application if satisfied that there were exceptional circumstances. If there were I had a discretion to postpone.

24. The exceptional circumstances criterion is a 'serious hurdle' that is intended to discourage late adjournments (*Morton v Eastleigh CAB* [2020] EWCA Civ 386. In *Ameyaw v PwC Services Ltd*, Mathew Gullick QC sitting as a DJHC said at [53] *"…the definition of "exceptional circumstances" is not closed and that it is a question for the judgment of the Employment Tribunal in the individual case…."*

25. In *Pye v Queen Mary University of London EAT 0374/11*, Langstaff J said that the discretion to postpone must be exercised 'with due regard to reason, relevance and fairness', and subject to the overriding objective. The overriding objective is to deal with cases 'fairly and justly', which includes 'avoiding delay, so far as compatible with proper consideration of the issues' and 'saving expense'.

26. There is *Presidential Guidance: seeking a postponement of a hearing* to which I had regard.

27. Mr Griffiths pointed to a history in the case of the Claimant seeking postponements. The Claimant's representative did so on 14 May 2023 owing to the ill-health of the Claimant's parents; the hearing was postponed to 4 October 2023. An application was made again on 4 October 2023 as above.

28. The Respondent did not accept that the Claimant or his representative were unaware of today's hearing. The email of the tribunal of 5 October 2023 notifying them of it was correctly addressed to Ms Emerson's email account. Further, it was plain at the end of 4 October 2023 that the matter was going to be relisted and if it be the case that the email of 5 October 2023 was not received then it was incumbent on the Claimant/his representative to make inquiries. They did not do so.

29. I can confirm there is nothing on the file or on ECM (the tribunal's electronic case management system) recording any contact since 4 October 2023 from the Claimant's side. My clerk checked the tribunal's email inbox to see whether any relevant correspondence had been received but overlooked and not put on file. There was nothing.

30. On balance, I do not accept that the Claimant and his representative were unaware of today's hearing until the email of 29 November 2023. The email of 5 October 2023 was correctly addressed and there is no apparent reason why it would not have been received by Ms Emerson while other emails from the tribunal were.

31. Further, if it had not been received, given the passage now of almost two months since the previous hearing, it is fair to expect that the Claimant or his representative would have contacted the tribunal asking for the resumed hearing date. They knew that the hearing was to be relisted.

32. Further, this is the third occasion the final hearing has been listed and the third occasion on which the Claimant has sought postponement (albeit I accept the circumstances were different on the preceding occasions).

33. I note that the Claimant is said to have a hospital appointment today, however, the application is not put on the basis that he is medically unfit to attend. It is put simply on the basis that the Claimant is otherwise engaged at a hospital appointment and so is not able to attend. There is no information about the appointment beyond a start time of 10am, how long it is for, when it was scheduled, whether it could be moved etc. If an application had been made in good time to move today's hearing on the basis of an immoveable hospital appointment that would have been one thing. However, that is not the situation, the application was not made until 09.55am by which time the Respondent was in attendance and the hearing was about to begin.

34. Since I do not accept that the Claimant/his representative had short notice of the hearing and since it is not said the Claimant is medically unfit to attend and since I do not accept that there are exceptional circumstances within the meaning of rule 30A. I cannot therefore postpone.

35. I in any event consider that this is a case which must now be heard in the interests of justice and in accordance with the overriding objective. It is going very stale. It relates to a now historical dismissal. It was presented a very long time ago. The evidence has been heard and my recollection of it will fade if there is further delay which a postponement would necessarily occasion. There is no way this matter could now be heard this year if not heard today.

36. The tribunal is exceptionally busy and must allocate its scare resources fairly between cases. This is the day set aside for completion of the case. I re-read into the case in preparation for it. It would be wrong to waste that work and to take up yet more of the tribunal's time.

37. I made clear on 4 October that the parties could submit written submissions if they wanted to. Neither did so for today's hearing. I did consider whether to allow the Claimant additional time to enter written submissions on a later date. However, the very purpose of today's hearing was to hear closing submissions and then decide the case and deal with remedy if necessary. If I gave the Claimant time to prepare written submissions that would have wasted today. The parties would also have needed to have a chance to respond to each other's written submissions. In reality this would have amounted to a postponement.

38. Further, the Claimant's case has been made clear through the way it is pleaded and the way it has been presented to date. That mitigated the lack of closing submissions on his behalf.

39. On balance, even if I had a discretion to postpone I would not have done so.

Findings of fact

40. The tribunal made the following findings of fact on the balance of probabilities.

41. The Respondent is bus company. The Claimant was employed by the Respondent as a PCV bus driver from 6 May 2003 to his summary dismissal on 27 January 2021.

42. Clause 32 of the Claimant's contract of employment provided as follows:

> *Data Protection*
>
> *Use and Disclosure of Personal Data*
>
> *Personal data is data which relates to a living individual. By way of example (and without limiting its meaning in any way) it includes the name and address of staff, details of their next of kin and information relating to their performance at work. The Company processes personal data relating to its staff. All personal data processed is used in connection with the Company's or Group Company's businesses. The Company will not process personal data other than in connection with its business or the business of Group Companies.*
>
> *Sensitive Personal Data*
>
> *Some of the data processed by-the Company is sensitive personal data. -This would normally relate to the health of staff and their racial or ethnic origin but it may also include information relating to union membership or commission or alleged commission of criminal offences and proceedings for such offences. Data relating to the health of individual members of staff is processed for purposes relating to their health and safety or if necessary for the Company's or its Group Companies business. It will only be disclosed to persons other than the Company or Group Companies (or employees of either) on a confidential and limited basis, except that data relevant to your pension (including sensitive personal data) may be disclosed to those administering any pension fund of which you become or are or have been a member.*
>
> *Data relating to racial or ethnic origin is processed only in connection with seeking to ensure and monitor equality of opportunity. It will not be disclosed to persons other than the Company or Group Companies (or employees of either) save in connection with legal advice or proceedings or to regulatory bodies.*
>
> *Other Processing of Data*
>
> *Personal data may be processed in connection with a future proposal to sell or transfer the Company or a Group Company or all or part of their respective businesses. In such circumstances (which are not envisaged) the processing would be on a confidential and limited basis.*

The Company may transfer personal data outside the European Economic Area.

Consent to Processing

You consent to the Company and any Group Company processing personal data as set out above.

43. The Respondent had a suite of policies including a Data Protection Policy, On Bus CCTV policy and a disciplinary policy.

44. The On Bus CCTV policy sets out the purposes of the CCTV system / the use to which data recording on it may be put at section 5. The list includes this:

Workforce monitoring and maintaining general levels of performance, behaviour and standards by all staff and contractors working for or with Abellio London and to assist Managers and supervisors with their duties.

The bus CCTV system is not routinely downloaded or monitored with the footage only being sought, viewed and captured after a specific authorised request in line with section 5 of this policy.

45. The Respondent is contracted to provide bus services for TFL. In the sector, there is a concept of 'lost mileage'. Lost mileage occurs where for one reason or another a bus service is not provided as planned, for instance because of a breakdown, staff shortage or otherwise. Depending on the reason for the lost mileage and therefore the code, the Respondent may suffer financial penalties with TFL for the lost mileage. Clearly it is sometimes necessary to make inquiries to establish whether or not there was lost mileage.

46. On 30 November 2020, the Claimant was driving a bus route. There was a road traffic incident (which he was not involved in) that led to very lengthy delays with periods of stationary and slow moving traffic.

47. An issue of lost mileage in respect of the journey arose and a request was made to see CCTV footage to check whether the vehicle had been in service (see further below the detail of this).

48. The review happened on 8 December and it established there had been a full service. The CCTV footage reviewer, Mr Le Riche, noted that there were potential management issues in respect of the Claimant. He made a note on the system for a driver manager to review it.

49. On 18 and 19 December 2020, there was concern among the drivers about missing money from the drivers' Christmas Box.

50. On 22 December 2020, Mr Scott Passfield, Operations Manager, asked the Claimant to come to his office for a chat. The Claimant asked if it was an interview. I accept his evidence that Mr Passfield told him that it was not, and it

was just for a friendly chat. Mr Passfield said words to the effect of "*I hear you think I stole £900 of union money*". The Claimant responded that this is what the drivers thought as the Christmas gift to them had been stingy. Mr Passfield waved a receipt which the Claimant could not read but which he said showed what the money had been spent on. He then told the Claimant that he had viewed CCTV footage of 30 November 2020 and that it showed the Claimant using a mobile phone while on the bus. He suspended the Claimant and handed him a letter. The letter invited the Claimant to an investigation meeting which took place on 31 December 2020.

51. The investigation meeting was to consider the issue of "*use of a mobile phone whilst in control of a vehicle".*

52. At the investigation meeting the Claimant was shown CCTV footage of his shift on 30 November. He made a number of concessions to the effect that he had:

    52.1. made a telephone call while standing in the aisle of the bus, with cab door open, one leg in the cab and, so far as could be discerned, without turning the engine off (I find on the basis of the footage and the Claimant's response to it at this meeting that the engine was on). The bus was on the public highway at the time. It was not parked though it was in stationary traffic;
    52.2. stopped for some time with the bus doors open, with a gap between the bus and pavement big enough for, say a scooter, to pass through. He accepted this was not normal practice. It was dangerous because it encouraged passengers to enter the road to board the bus;
    52.3. driven with the bus doors open;
    52.4. written on a piece of paper on the steering wheel while he was driving the bus and it was moving (albeit slowly);
    52.5. driven one handed and driven one handed with paperwork in the other hand.

53. These matter were corroborated by the footage I have seen and I find them as facts.

54. On 31 December the Claimant was invited to a disciplinary hearing to take place on 4 January 2021 to answer the following charges:

    54.1. Use of a Mobile Phone or Device whilst being in control of a company vehicle;
    54.2. Gross Negligence - leaving the engine of the bus running whilst using a mobile phone;
    54.3. Serious Breach of Company Health and Safety Rules and procedure;
    54.4. Dangerous Driving;
    54.5. Action likely to threaten the Health and Safety of yourself, customers or members of the public.

55. On 31 December 2020, the Claimant raised a grievance. The essence of the grievance was that Mr Passfield had misrepresented the nature of the meeting he was to have with the Claimant on 22 December 2020 and that he had

unnecessarily viewed the CCTV footage in full in order to find something to sack the Claimant for.

56. The disciplinary hearing was rescheduled to 7 January 2020. At the hearing the Claimant's Union Representative, Mr Stockwell of Unite, said the Claimant was going to resign. Mr Stockwell confirmed this in writing later that day at 12.21 pm. The grievance was also withdrawn.

57. Also on 7 January 2020, after the disciplinary hearing, the Claimant went into Ms Cameron's office. There is a dispute about what happened:

    57.1. On the Claimant's evidence to the tribunal Ms Cameron asked him why he had resigned, told him that the various allegations would be put together and that she was sure the most he would get was a verbal or written warning. She told him that he should not have resigned. A colleague, Mr Ayeni, came into the room and did not say anything.
    57.2. On Ms Cameron's evidence to the tribunal, she and the Claimant had a friendly chat but she did not ask him why he had resigned nor tell him what the likely sanction would be or anything of that nature.

58. In order to resolve this dispute I have had regard not only to the quality of the oral evidence I received but also the contemporaneous documents which show three particularly significant things:

    58.1. Firstly, when interviewed contemporaneously, Ms Cameron said she could not recall whether or not she had asked the Claimant why he resigned. Further, Mr Ayeni said when he was interviewed that both he and Ms Cameron asked the Claimant why he had resigned.
    58.2. Secondly, Mr Ayeni said that in response to the question 'why did you resign' the Claimant said that if he received a warning on one of the charges he may still be dismissed on another.
    58.3. Thirdly, the Claimant did not contemporaneously suggest that Ms Cameron had told him he would only get a warning, though he did say she gave him some hope having asked him why he resigned.

59. Doing my best I find on balance that Ms Cameron did ask the Claimant why he resigned. I find that she did not say to the Claimant that he would only get a warning but that she implied that he *may* not be dismissed. She did this by explaining in response to the Claimant's concern that he may receive a warning for one charge and then a dismissal for another, that the sanction for the charges would be considered in the round rather than individually for each charge and that he should not give up hope. That is as far as she went.

60. Later that evening, at 19.54, the Claimant emailed Mr Passfield retracting his resignation.

61. On 11 January 2021, the disciplinary hearing was rescheduled to 15 January 2021. The hearing went ahead on that date chaired by Ms Leszczynska with the Claimant now represented by Ms Emerson, an RMT Union Rep. The disciplinary hearing did not proceed very far. In essence, there was a discussion of what Ms

Cameron had said and it was decided that this would be treated as a grievance which would be dealt with prior to the disciplinary issues. It was also decided that the Claimant's first grievance referred to above would be reinstated. The Claimant was then interviewed about his grievances.

62. On 16 Juanary 2021, Ms Emerson posed a list of questions to Ms Leszczynska.

63. On 18 January 2021, Mr Frank Ayeni was interviewed.

64. On 25 January 2021, Ms Cameron as interviewed.

65. On 25 January 2021, Mr Passfield was interviewed.

66. On 27 January 2021, there was a further hearing with Ms Leszczynska, the Claimant again represented by Ms Emerson. At the outset of the hearing, I find that Ms Leszczynska essentially told the Claimant that she agreed Ms Cameron had asked why he resigned and had said not to give up hope. Her position was that this was misconduct on Ms Cameron's part and would be dealt with formally (I myself found it odd to characterise this as misconduct on Ms Cameron's part and note that the disciplinary charges which were brought against her were dismissed). Ms Leszczynska found that Mr Passfield had not been acting maliciously. She also answered the questions that had been posed by Ms Emerson by email.

67. The meeting then moved on to squarely deal with the disciplinary issues. Ms Emerson said that the CCTV footage should not have been viewed and should be excluded because it was a breach of internal policy and GDPR.

68. Ms Leszczynska took a break to consider the point and decided that the footage had properly been viewed for business purposes and that it should not be excluded. Ms Emerson argued with her over this decision.

69. Ms Leszczynska read the charges and asked the Claimant if he understood them. He said he did. She also said he had previously admitted them and he did not demur. Ms Emerson said the Claimant's work had not been up to his normal standard on the relevant day because his father had been about to undergo major surgery.

70. Ms Leszczynska put to the Claimant

> "*Tony you are a Facebook activist always giving out advice to Drivers. Never come to work if you feel fatigue or do not have a clear mind. Why did you not follow your own advice*?"

71. The Claimant responded that his father as in hospital, his uncle unwell and his wife worked on a Covid ward.

72. The Claimant was asked why he had used his mobile phone. In essence his answer was that he had been concerned he would go over his driving hours as the traffic had been stationary for a long time. He had also needed the toilet. So

he telephoned IBUS. Ms Leszczynska put to the Claimant that he had called Ibus but that he had also made another call which she suggested was to his wife. The claimant denied this.

73. Ms Leszczynska then said to the Claimant:

> *You did not pull to the kerb, you should have pulled into the kerb come out of the bus and then made the call. You are the person who is loud about it but failed to follow it*

74. Ms Leszczynska pointed out that a passenger had got on board and there had been no social distancing nor masking. The Claimant said safety was important to him.

75. It was put to the Claimant he had been driving with the log card in his hands. He did not answer this point directly. However, reference was made to the Claimant saving someone's life on 7 December and saving the company £60,000 in a court case.

76. Ms Emerson asked Ms Leszczynska to take into account the length and quality of the Claimant's service, his character, record, and his age. She also said that there had been another driver, Teresa at Battersea, with five issues, including speeding and one handed driving with 2 years service who was put on a written warning.

77. The Claimant was summarily dismissed at the end of the meeting. He was sent a dismissal letter dated 2 February. It found each charge proven. It said this:

> *"I considered alternatives to dismissal such as Final Written Warning, although decided that these were not appropriate because you have knowledge which you share with others but not to follow yourself."*

78. The letter of dismissal also set out in writing answers to the questions posed by Ms Emerson on 16 January 2021. The answers included this:

    78.1. The CCTV footage had been viewed in the first place because the GPS tracker on the Claimant's bus had been defective so did not send the relevant information. The footage was viewed to determine whether the bus had been in service and to code the mileage accordingly;
    78.2. The Claimant's bus was one of two investigated on that day for lost mileage;
    78.3. There was a delay in the CCTV analyst viewing the footage because the lost mileage analysts work a week in arrears;
    78.4. The footage was not further viewed until 22 December because despite the CCTV analyst making a note for Driver managers to view the footage none had done so, so the analyst raised the matter with Mr Passfield directly on realising this. Mr Passfield then viewed the footage;
    78.5. There was a delay of 22 days in suspending the Claimant because the Driver Managers were on holiday and there was no relief staff at the relevant times. The matter eventually was passed to Mr Scott to deal with;

78.6. Ms Leszczynska did not believe that the viewing of the footage / suspension was retribution for the Claimant raising the issue of misappropriation of the drivers' Christmas fund.

79. Having considered all of the evidence I accept that the above indeed explains why the footage was viewed and why there were some delays. I also accept that viewing the footage and suspending the Claimant/commencing/taking disciplinary action was not in any way because of the concern he raised about the drivers' Christmas fund. The balance of evidence supports this. I accept that, whether rightly or wrongly from a data protection perspective, the CCTV footage was viewed originally for the purpose stated and having been so viewed it is entirely unsurprising it led to suspension and a disciplinary process.

80. In coming to that conclusion I have not overlooked the answer Ms Emerson received to a FOI request she made of TFL on 2 March 2021. It states essentially that TFL do not use on board CCTV footage to investigate operating mileage. However, the questions are about the circumstances in which bus operating companies share CCTV footage with TFL and whether TFL itself use CCTV to investigate operating mileage. In this case, it appears that the footage was viewed by *the Respondent*. That is not the same thing as the Respondent sharing the footage with TFL nor TFL itself. But even if that is wrong and the footage was shared with TFL, although I see the discrepancy between that and the answer to the FOI, I nonetheless find that, rightly or wrongly, the Respondent did view the CCTV footage originally for the purpose of investigating potential lost mileage.

81. I accept Ms Emerson's point that it was *possible* to view the CCTV footage and determine that the bus was running without viewing the cameras that recorded inside the cab. That is because the footage can be viewed in a multi-camera format or by selecting particular cameras and not all of the cameras film inside the bus. However, I accept that while that is what Mr Le Riche could have done it is not what he did – which is just as well - hence he saw the remarkable things he did.

82. The written grievance outcome was given on 2 February 2021. The Claimant appealed the grievance outcome.

83. The Claimant was invited to meetings dealing with his grievance and disciplinary appeals on 3 March to take place on 10 March. These meetings were chaired by Ms Stephanie Achief.

84. The grievance appeal outcome was given by letter of 30 April 2020. The letter explained further why the CCTV footage had been viewed and why a block code was not simply used to answer the lost mileage query. I accept what it says is indeed a truthful further detail of the reason why the footage was viewed. The appeal was dismissed.

85. The appeal was dismissed by letter of 4 June 2021. Among many other things, the letter stated this:

On reviewing the five charges that were put before you, in previous cases for use of mobile phone and completing paperwork whilst the bus is in motion, the decision has been made to dismiss.

86. I accept that Ms Achief made inquiries checking for cases which had involved mobile phone use and completing paperwork with the bus in motion and the results were as stated.

87. The Claimant did not have an entirely clean disciplinary record. On his own account he had had a few disciplinary issues over the years although it is not in evidence precisely what, other than that he once knocked over a lamppost and bus-stop.

Comparators

88. In October 2017, another driver named Teresa, was assessed. In the assessment she drove at excess speed in a busy area, steered one handed and drank from a bottle, went through an amber traffic light and cut up a learner driver. She was not dismissed but received a warning. (There was mixed and confusing evidence about whether or not she even received a warning. I ultimately find she did based on Ms Leszczynska's written evidence and the representations that Ms Emerson made at the disciplinary stage to that effect).

89. I accept Mr Schia's evidence that some drivers have been sacked for driving through red lights but a particular driver, Ian, was not. I also accept his evidence that a drive, Lloyd, was sacked for failing to report an accident or incident on duty while some other drivers were not.

Wages and holiday

90. The Claimant did not address his claims for unpaid wages or for accrued holiday at all in his witness statement. Those matters were not addressed in any of the other witness statements nor in the bundle.

91. The Claimant was cross-examined. His evidence was that he was owed 4 days holiday pay and a week in hand of wages. He accepted that he had been paid about £400 since presenting his claim but he was himself unclear what that was for as it had simply appeared in his account with no payslip.

92. Counsel put to him various detailed particulars from payslips (that were in front of counsel) but not in the bundle and not in front of me or the Claimant. The Claimant was unable to give any meaningful evidence on the sums put to him as he simply did not know off the top of his head and without the payslips what counsel was referring to. The Claimant maintained, however, that he was owed a week of wages and 4 days holiday pay.

93. On balance, I think the Claimant's evidence is the best before me on these matters and limited as it was I accept it. I note that the Respondent did not lead any evidence when it easily could have. It presumably has the Claimant's payslips and holiday records but they are not in the bundle.

94. I am not able to say what the £400 paid to the Claimant was for because the Claimant did not know and there was no payslip referring to it. I do not think it would be safe to assume it was in discharge or partial discharge of the liability for the Claimant's week of wage or his accrued holiday. It could have been for anything.

Law

95. By s.94 Employment Rights Act 1996 there is a right not to be unfairly dismissed.

96. The 'reason' for dismissal is the factor operating on the decision-maker's mind which causes him/her to take the dismissal decision (***Croydon Health Services NHS Trust v Beatt*** [2017] ICR 1420). The net could be cast wider if the facts known to, or beliefs held by, the decision-maker had been manipulated by another person involved in the disciplinary process with an inadmissible motivation, where they held some responsibility for the investigation. That person could also have constructed an invented reason for dismissal to conceal a hidden reason (***Royal Mail Ltd v Jhuti*** [2020] All ER 257.)

97. There is a limited range of fair reasons for dismissal (s.98 ERA). Conduct is a potentially fair reason.

98. If there is a potentially fair reason for a dismissal, the fairness of the dismissal is assessed by applying the test at s.98 (4) ERA (the wording of which we have reminded myself of). The burden of proof is neutral.

99. In ***BHS v Burchell*** [1980] ICR 303, the EAT gave well known guidance as to the principal considerations when assessing the fairness of a dismissal purportedly by reason of conduct. There must be a genuine belief that the employee did the alleged misconduct, that must be the reason or principal reason for the dismissal, the belief must be a reasonable one, and one based upon a reasonable investigation.

100. However, the ***Burchell*** guidance is not comprehensive, and there are wider considerations to have regard to in many cases. For instance, wider considerations of procedural fairness and of course the severity of the sanction in light of factors such as the offence, the employee's record and mitigation.

101. In ***Iceland Frozen Foods v Jones*** [1982] IRLR 439, the EAT held that the tribunal must not simply consider whether it personally thinks that a dismissal was fair and must not substitute its decision as to the right course to adopt for that of the employer. The tribunal's proper function is to consider whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

102. The range of reasonable responses test applies to all aspects of dismissal. In ***Sainsbury's v Hitt*** [2003] IRLR 23, the Court of Appeal emphasised the importance of that test and that it applies to all aspects of dismissal, including the procedure adopted.

103. The fairness of a disciplinary process should be judged at its conclusion. It is possible for unfairness an early part of the process to be corrected at a later stage of the process, for instance, at the appeal stage. In any event not every aspect of unfairness will make a dismissal unfair overall. An assessment in the round is required in the manner stated in ***Taylor v OCS Group Ltd*** [2006] IRLR 613.

104. A finding of gross misconduct does not automatically justify dismissal as a matter of law (***Brito-Babapulle v Ealing Hospital NHS Trust*** *[2013] IRLR 854).* It is also necessary to consider other factors such as mitigation.

105. ***Hadjioannou v Coral Casinos Ltd*** *[1981] IRLR 352* the EAT gave guidance on comparison with others in unfair dismissal claims:

> 24 In resisting the appeal, counsel for the respondents, Mr Tabachnik, has submitted that an argument by a dismissed employee based upon disparity can only be relevant in limited circumstances. He suggests that, in broad terms, there are only three sets of circumstances in which such an argument may be relevant to a decision by an Industrial Tribunal under s.57 of the Act of 1978. Firstly, it may be relevant if there is evidence that employees have been led by an employer to believe that certain categories of conduct will be either overlooked, or at least will be not dealt with by the sanction of dismissal. Secondly, there may be cases in which evidence about decisions made in relation to other cases supports an inference that the purported reason stated by the employers is not the real or genuine reason for a dismissal. Mr Tabachnik illustrates that situation by the argument advanced in the present case on behalf of the appellant, that the general manager was determined to get rid of him and merely used the evidence about the incidents with customers as an occasion or excuse for dismissing him. If that had been the case, the Industrial Tribunal would have reached a different conclusion on the appellant's complaint but they considered the submissions about it and rejected them. Thirdly, Mr Tabachnik concedes that evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances.
>
> 25 We accept that analysis by counsel for the respondents of the potential relevance of arguments based on disparity. We should add, however, as counsel has urged upon us, that Industrial Tribunals would be wise to scrutinize arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a Tribunal may be led away from a proper consideration of the issues raised by s.57(3) of the Act of 1978. The emphasis in that section is upon the particular circumstances of the individual employee's case. It

would be most regrettable if Tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems and, in particular, issues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained, and we hope that nothing that we say in the course of our judgment will encourage employers or Tribunals to think that a tariff approach to industrial misconduct is appropriate. One has only to consider for a moment the dangers of the tariff approach in other spheres of the law to realise how inappropriate it would be to import it into this particular legislation.

106. In *Paul v East Surrey District Health Authority [1995] IRLR 305*. Beldam LJ said this:

> *I would endorse the guidance that ultimately the question for the employer is whether in the particular case dismissal is a reasonable response to the misconduct proved. If the employer has an established policy applied for similar misconduct, it would not be fair to change the policy without warning. If the employer has no established policy but has on other occasions dealt differently with misconduct properly regarded as similar, fairness demands that he should consider whether in all the circumstances, including the degree of misconduct proved, more serious disciplinary action is justified.*
>
> *An employer is entitled to take into account not only the nature of the conduct and the surrounding facts but also any mitigating personal circumstances affecting the employee concerned. The attitude of the employee to his conduct may be a relevant factor in deciding whether a repetition is likely. Thus an employee who admits that conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely. I mention this because I consider that if the industrial tribunal in this case had had regard to these factors they would not have regarded the actions of the employers in Mrs Rice's case as disparate or have said that Mr Verling's misconduct should have been treated just as seriously, if not more seriously, than Mr Paul's.'*

107. By s.207 TULR(C)A the tribunal is required to have regard to *Acas Code of Practice on disciplinary and grievance procedures* in a case of this kind since many of its provisions are relevant. It sets out some well known basic principles of fairness in disciplinary and grievance processes. Giving an employee a right of appeal and determining the appeal are features of this code.

Data protection

108. The Claimant's representative places great weight on *Doolan v Data Protection Commissioner* [2020] IEHC 90. This is a decision of the High Court of Ireland. As such it is a persuasive authority at most. It is a decision that there was a breach of Irish data protection legislation. It is not a decision about unfair

dismissal. In very short, the decision was that the employer had lawfully processed CCTV footage for the purpose of security (in accordance with its internal policy) but had unlawfully further processed the footage by using it in an employee's disciplinary proceedings for taking unauthorised breaks.

109. The Data Protection Act 1998 was in force at the relevant times and gives effect to GDPR. The principles are at s.85 – 91.

Discussion and conclusions

Unfair dismissal

110. I find that the reason for the dismissal was 'conduct', in particular Ms Leszczynska's belief that the disciplinary charges were well founded. In particular and quoting from the letter of dismissal

> *Use of a Mobile Phone or Device whilst being in control of a company vehicle – that day you were contacting the iBus controller on numerous occasions and you have used your mobile phone. At 15:21 you rang the iBus controller purely to give him advice on how to manage your change over within the traffic. You did not mention anything about your driving hours. The call took 42 seconds. After that you were observed moving the bus forward and making another phone call which was not to the iBus controller. You said to me that you did not have any other record on your phone but it was clear on the CCTV footage that you have made another call. You made both calls whilst the engine was running and whilst you were standing in the cab door.*
>
> *You have not secured the bus or pulled in to a safe place. Despite you were in the bus stop markings, you did not pull up to the kerb, switch off the engine, secure the bus and make the phone call.*
>
> *Serious Breach of Company Health and Safety Rules and procedures – we could see that you were driving with the doors open while moving the bus in traffic. You were talking to another driver like you claimed and you have not closed the door before moving forward in busy area.*
>
> *Dangerous Driving - one handed driving was noticed during the footage as well as distraction caused by you completing paperwork whilst in motion*
>
> *Action likely to threaten the Health and Safety of yourself, customers or members of the public – you were driving with log card and VCR on steering wheel. Allowing the customer to board the bus while not parked correctly on the bus stop. Not keeping social distance while the customer board the bus.*

111. There is an overwhelming case that this was the reason for the dismissal:

    111.1. The content of the letter of dismissal;
    111.2. Ms Leszczynska's evidence which was tested under cross-examination;

111.3. The inherent probabilities: given the nature of the Claimant's job and the nature of the misconduct shown on the CCTV footage and admitted at the investigation hearing, dismissal is not a surprising outcome.

111.4. There is only a very thin case that there was an ulterior reason for the dismissal, namely that Mr Passfield was offended by a suggestion that he had misappropriated funds. I do not accept that this had any role to play in initiating the disciplinary process or the turns it took thereafter. It is far more likely that matters took their course simply because of what the CCTV footage revealed. This included the Claimant driving a double decker bus (albeit slowly) while writing on a piece of paper.

111.5. I do not accept that the treatment of other drivers infers that there was an ulterior reason for the Claimant's dismissal. The circumstances of the poor driving in those cases was materially different such that I do not think an inference falls to be drawn. I discuss this further below. In any event, I am satisfied that even if the circumstances were the same, the fact is that Ms Leszczynska considered the Claimant's case on its merits and dismissed him because she believed dismissal to be the appropriate sanction in light of the misconduct she found.

Reasonable belief based on a reasonable investigation

112. There are some specific challenges to the investigation to which I will turn shortly. Putting those to one side for the moment in my view there was a reasonable belief in the misconduct and it was one that was based upon a reasonable investigation:

112.1. At the investigation hearing with Ms Cameron the Claimant essentially admitted to the gist of the disciplinary charges;

112.2. Most of what was alleged was visible on the CCTV footage or could otherwise reasonably be inferred;

112.3. The Claimant was given a reasonable opportunity to understand the case he had to meet and to state his case in respect of it;

112.4. Questions were posed during the course of the internal process by Ms Emerson and they were investigated and answered;

112.5. The Claimant was permitted to withdraw his resignation;

112.6. The Claimant's grievances were investigated and dealt with prior to the decision being taken to dismiss and his grievance appeal was dealt with prior to the decision to dismiss his appeal.

113. Turning to the specific challenges.

Delay in suspension of the Claimant

114. There was a delay in suspending the Claimant but that did not render the process unfair in any way. It did not hamper his defence in any way. Further there was a reasonable explanation for it as set out above.

115. Mr Passfield did mislead the Claimant as to the purpose of the meeting at which he was suspended. He told him it was going to be just a chat knowing that he

was going to suspend the Claimant. He should not have done that. However, I do not think that rendered the investigation, disciplinary process of the dismissal unfair. It was poor practice but it ultimately did not affect the fairness of the proceedings. For instance, it had no bearing on the Claimant's ability to answer the disciplinary charges.

Ms Cameron's conversation with the Claimant

116. I do not see how Ms Cameron asking the Claimant why he resigned or giving him hope he might not be dismissed makes the dismissal unfair. It was completely up to the Claimant whether he resigned or not. Ms Cameron did not tell him what the outcome of the disciplinary process would be and indeed she did not know. If the Claimant became unhappy that he had withdrawn his resignation based on this conversation he could simply have resigned again.

Breach of data protection

117. It is said that using the CCTV footage was a breach of GDPR/DPA:

    117.1. That there was no lawful basis to obtain the CCTV footage for the purpose of lost mileage so it was unlawful to use it in the disciplinary process;
    117.2. The Respondent's internal documents do not state that CCTV footage can be used in disciplinary proceedings. There is a comment in *Doolan* to the effect that one would expect there to be such a provision where the employer makes such use of CCTV footage.

118. The *On Bus CCTV Policy* provides that CCTV footage will be used for the purposes of:

> *Workforce monitoring and maintaining general levels of performance, behaviour and standards by all staff and contractors working for or with Abellio London and to assist Managers and supervisors with their duties.*

119. The Claimant points out that this does not include investigating lost mileage. The Respondent contends that it does. In this case the dismissal was nothing to do with lost mileage. That was mere background. An investigation into that is how the Claimant's poor driving and associated conduct came to light. However, the real issue is whether there was some breach of data protection whether in internal policy or law in using the CCTV footage in the way the Respondent did for the purposes of the disciplinary process.

120. In my view using the CCTV footage in the disciplinary process falls squarely within the provision of the policy set out immediately above. It is plain from that provision that the footage may be used in disciplinary proceedings since that is one of the most obvious ways in which CCTV footage would assist in maintaining performance and behavioural standards by staff. I do not accept, then, that in using the CCTV footage in the way it did in the disciplinary proceedings was a breach of internal policy.

121. I also do not accept that it was in breach of the Data Protection Act 2018/GDPR. The case to the contrary is set out at paragraph 6 of the Particulars of Claim. I reject that case:

121.1. Lawful, fair and transparent. It was lawful: the processing was necessary for the purposes of a legitimate interest pursued by the controller (Respondent), i.e., to maintain behavioural standards in its workforce. It was fair and transparent: it was known that there was CCTV and the policy stated the uses to which the footage would be put and this included maintaining behaviour standards. That obviously included using the footage in disciplinary proceedings;

121.2. Specified, explicit and legitimate and processed in a manner compatible with purpose for which collected. The CCTV policy specified and was explicit (see above) that it permitted the footage to be used for the purposes maintaining behaviour standards and again that obviously included using it in disciplinary proceedings. There were appropriate safeguards in place as explained in the CCTV policy and the Data Protection Policy.

121.3. The personal data was adequate, relevant and not excessive in relation to the purpose for which it was processed. The footage was of the Claimant in the bus including in the cab. It was relevant and not excessive to film this for the purpose of maintaining behaviour standards.

121.4. Personal data must be kept for no longer than is necessary: there is no evidence the data was kept longer than necessary. It was reviewed within a matter of days of the incident and thereafter it needed to be kept to be reviewed by a driver manager. Staff absences meant this did not happen as quickly as usual but happened fair quickly. Thereafter it needed to be further kept for the disciplinary and then legal processes.

121.5. Processed in a secure manner. There is no evidence that it was not and this has not formed part of the Claimant's actual case.

122. Having expressed those views I wish to make clear that in fact my view is that the resolution of the unfair dismissal claim does not actually turn on whether gathering/relying on the CCTV footage was or was not a breach of data protection legislation.

123. It must be remembered that the matter I am considering is whether the Respondent acted fairly within the meaning of s.98(4) Employment Rights Act 1996. This statutory provision does not somehow incorporate all other law like data protection legislation. In other words, it does not follow as a matter of course that if the employer is in breach of another legal provision a dismissal is necessarily unfair. Although no doubt that is a relevant factor to take into account.

124. In this case, *even if* there was a breach of data protection law in respect of the CCTV footage, I do not accept that it was outside the band of reasonable responses for the Respondent to rely on it in the disciplinary process nor for the Claimant to be dismissed based upon it.

125. The footage revealed some extraordinary conduct on the Claimant's part that was a matter of public safety. A moving double decker bus is an incredibly potent force, it can easily be a lethal force, and it is essential as a matter of public safety

that the driver gives it his/her undivided attention. The footage shows among other deeply concerning things the Claimant moving the bus on the public highway while completing some paperwork on the steering wheel. That was dangerous and I simply do not accept that if the footage was obtained in breach of data protection law that the reasonable employer would therefore have ignored it or have taken a more lenient approach to the disciplinary process. Data protection is important but it is not the only important thing. Making sure that bus drivers drive safely and taking disciplinary action against them if they very culpably fail to do so is important too.

126. Proportion must also be maintained. Not all breaches of data protection are the same. Some can be incredibly serious and invasive. If there was a breach here, it was not in that category. It is not as if the CCTV footage was of anything particularly private. It was footage of the Claimant driving a bus as part of his duties, on the public highway in full view of everyone. He was fully clothed. He was not doing anything of an intimate or inherently embarrassing nature: he was driving, reading/completing paper work, talking on his telephone.

127. In the circumstances, whether there was a breach of the data protection legislation in this case or not, it was well inside the range of reasonable responses for the Respondent to use and rely on the CCTV footage in the way it did in the disciplinary process. On the one hand the data protection breach *if* there was one (and I do not accept there was) was at the minor end of the scale while on the other, the conduct shown on the CCTV footage was egregious and cried out, including as a matter of public safety, for disciplinary action to be taken.

128. I can well see that there may be cases in which a data protection breach is so serious that it renders a dismissal unfair. This was not that case if indeed what the Respondent did amounted to a breach.

Failure to take into account the Claimant's mitigation

129. The Claimant's mitigation was essentially his long service, a clean disciplinary record, personal issues going on at the time of the events in question.

130. As to the Claimant's personal difficulties I am satisfied that Ms Leszczynska took this matter into account and permissibly did not regard them as providing substantial mitigation. She said this in the letter of dismissal:

> *Your Union Representative said that everything which would be asked about is subject to the same answer; that you were not in the right frame of mind on that day due to your personal issues.*
> *You were offered counselling before that day and you declined. You admitted that Janet Cameron Driver Manager was helping you whilst you were going through a difficult time and you were more concerned about the company mileage and duty coverage than your own health and others.*
> *Your union representative said you were not in full control of your emotions and your mental state without knowing the extent of the matter.*
> *You admitted to me that more than a year ago you were going through similar personal issues and at that time you requested time off from me for getting*

better as you felt you could be dangerous to drive. At that time you acknowledged and judged your mental state very well therefore it is very hard to believe that at this point you have not done anything to take time off from work or acknowledge your issues.

131. I do not accept that Ms Leszczynska considered the length or quality of the Claimant's service prior to determining the sanction. She does not say she did in either the letter of dismissal or her witness statement or otherwise her witness evidence.

132. However, I do accept that these matters were properly considered at the appeal stage and that it corrected the unfairness. Ms Achief said this in the appeal outcome:

I have also taken into consideration your previous record and noted that although not similar to the gross misconduct charges of this case, there are other conducts for unsatisfactory driving standards and performance issues on your file which was managed through the disciplinary process and a result you were issued with a sanction or suitable advice. I have also considered your length of service of 18 years, however the charges put before you breached company policy and in cases with similar charges or charge the decision has been made to dismiss.

Claimant's Facebook posts

133. As noted, in the disciplinary hearing a rather odd point was made by Ms Leszczynska about the Claimant's Facebook posts.

134. The Claimant makes two points about these:

134.1. Firstly that, unfairly, the Claimant was not given a copy of the posts;
134.2. Secondly, that they ought not to have added materially to the case for dismissal.

135. In the letter of dismissal Ms Leszczynska said this:

You are famous among the drivers for your Facebook posts with advice and messages regarding safety on the road. You are the person who is quick to give advice not to use the mobile phone while driving and posting it often on company Facebook Page. Therefore, it was disappointing to see you contradicting your own advice.

136. Later in the letter she said this:

I considered alternatives to dismissal such as Final Written Warning, although decided that these were not appropriate because you have knowledge which you share with others but not to follow yourself.

137. I asked Ms Leszczynska to explain what she meant by this when she gave her evidence. Essentially her answer was that the Claimant had been a mentor for new

starters and knew all about safety but had not practiced what he preached to others. The key point was that he knew what he was supposed to do very well but chose not to do it. I accept that is what she meant.

138. Ultimately I take the view that the references to being a Facebook activist/guru were a rather rude and were unhelpful, but that the real point was that the Claimant knew the rules very well and nonetheless broke them. It was not in dispute that the Claimant knew the rules perfectly well and indeed that had been established at the investigation stage. I do not therefore think that fairness required the Facebook posts to be specifically gathered and put to the Claimant. They were very much ancillary to the material and operative point.

Comparison with others

139. The Claimant compares his treatment with that of another colleague, Teresa. The documents show that there was some very poor driving in her case and I accept that she as not dismissed. However, I do not accept that her case is truly comparable to the Claimant's. In my view that Claimant's conduct on the impugned day was both different and worse. In terms of his driving, he was actually driving the vehicle (albeit it a low speed) while completing paperwork on the steering wheel. That was on another level of culpability in my view. Further, he was using his mobile phone while in charge of the vehicle with the engine running (albeit stationary and with just one foot in the cab). The Respondent was particularly sensitive to improper mobile phone use by drivers and I think that it was entirely open to it to be so. I therefore do not accept that Teresa is a relevant comparator. I also do not accept that if it be the case as Mr Schia says, that Teresa was not dismissed because there was a delay in suspending her that it would follow that it was unfair dismiss the Claimant after the delay in suspending him. The delay in his case is well explained. Further, or alternatively, it would be wrong to hamstring the Respondent with a rule that it cannot dismiss employees where there is a relatively short delay in suspension because at some point in the past an employee was not dismissed because there had been such a delay. That would simply be an unreasonable fetter on its ability to run its business, an aspect of which includes ensuring that it's drivers maintain safe standards of driving in the interests of public safety.

140. I note that Mr Schia's statement refers to a driver who was not sacked having driven through a red light. Even if that is true, it is poor driving, but there are all sorts of different kinds and levels of poor driving and I do not accept that his case is on all four's with or sufficiently similar to draw a relevant comparison with the Claimant's case. Likewise even if it is true, in accordance with his evidence, that there were drivers who failed to report accidents/incidents and were not sacked, no relevant comparison falls to be made with the Claimant. The circumstances of his case were simply too different.

141. I also accept that at the appeal stage a check was made to see how other cases in which there had been an issue over improper mobile phone use and completing paperwork with the bus in motion was made. The finding was as stated: *on reviewing the five charges that were put before you, in previous cases for use of mobile phone completing paperwork whilst the bus is in motion, the decision has*

been made to dismiss.

142. The cases of bus drivers being sacked/not sacked for running red lights being sacked/not sacked for not reporting accidents/incidents are immaterial. The are too different on their facts to what happened in the Claimant's case. The Respondent is a bus company.

143. There is an almost infinite range of ways in which a bus driver might driver well/badly and good and bad driving will happen every day. It is important that the Respondent is not hamstrung in the way it manages bad driving by reference to other instances of bad driving that are not on all fours with the case to hand. If it were otherwise it would be denuded of the ability to run its business properly.

Sanction

144. In all the circumstances of the case in my view the sanction of dismissal was well within the band of reasonable responses. The misconduct identified was really serious (it speaks for itself) and, notwithstanding the Claimant's length of service and the fact he did not have similar past offences or any live warnings, justified dismissal.

Breach of contract

145. I not accept that there was a breach of clause 32 of the Claimant's contract of employment. It permitted use of personal data "in connection with its [the Respondent's] business or the business of Group Companies". That is very broad.

146. In my view it is plain and obvious that the use of the Claimant's data (the CCTV footage) was done in connection with the Respondent's business. Initially it was to investigate a potential lost mileage issue. Subsequently to investigate potential disciplinary issues. Those were both clearly in connection with the Respondent's business.

147. I note that although a claim for notice pay was not identified by Ms Emerson at the outset of the hearing when discussing what the breach of contract claim was, wrongful dismissal is referred to in the Particulars of Claim. For completeness then, I state my view that the Claimant was not wrongfully dismissed.

148. I find as a fact that the Claimant was driving a double decker bus on the public highway whilst completing paperwork on the steering wheel. He was driving slowly but his attention was divided and that was grossly unsafe. Even at low speed a bus is a potent and potentially lethal weapon if it collides with a pedestrian. In my view that alone was a breach of the implied term of trust and confidence. It a complete anathema to public safety and there was no reasonable or proper cause for it. It was sufficiently serious to breach the implied term.

Wages and holiday pay

149. On the basis of the Claimant's evidence I find that there was an unauthorised deduction from his wages in respect of one week's pay which was owing on termination and 4 days of holiday pay.

150. Using the figures for a week's pay in the schedule of loss I award these sums gross (I anticipate it will be necessary for the Respondent to make deductions at source though that is not a matter for me):

150.1. Week's wages: £566.20;
150.2. Four days holiday pay: £452.96

_____

Employment Judge Dyal

_____

Date 30 November 2023