EMPLOYMENT TRIBUNALS

Claimant: Mr R Piggott

Respondent: Manchester Community Transport Limited

HELD AT: Manchester **ON:** 11 and 12 December 2017, and in chambers on 15 December 2017

BEFORE: Employment Judge Franey (sitting alone)

REPRESENTATION:

Claimant: Mr B Norman, Counsel
Respondent: Mr S Lewis, Counsel

JUDGMENT

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

REASONS

Introduction

1. By a claim form presented on 1 August 2017 the claimant complained that he had been unfairly dismissed on 16 May 2017 from his post as a bus driver The dismissal followed an incident on 3 May 2017 in which the claimant had been involved in a disagreement with a member of the public seeking to complain that he had failed to pick her up at an earlier stop ("the passenger"). The respondent had relied on video and audio CCTV footage from the cameras mounted on the bus. The claimant argued that the matter had not been reasonably investigated, that there were no reasonable grounds for concluding he was guilty of misconduct, and that the reliance on the CCTV footage was in breach of data protection law and his human rights. He also argued that dismissal was outside the band of reasonable responses.

2. By a response form filed on 1 September 2017 the respondent defended the claim, arguing that there was a fair dismissal for gross misconduct.

The Issues

3. The issues to be determined were agreed to be as follows:

(1) What was the reason or principal reason for dismissal? The claimant accepted that it was a reason which related to his conduct and therefore potentially fair.

(2) Was the dismissal fair or unfair applying the general test of fairness in section 98(4)?

4. It was also agreed that the remedy issues to be addressed in the main part of the hearing included whether there should be any reduction following the principle in **Polkey v A E Dayton Services Limited [1987] ICR 142**, any reduction by way of contributory fault, and any increase on the basis of an unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures.

Evidence

5. The parties had agreed a bundle of documents which ran to approximately 250 pages. Any reference in these reasons to page numbers is a reference to that bundle unless otherwise indicated. The 2016 driver handbook was added to the bundle by agreement at the outset of the hearing.

6. The respondent called three witnesses. Wayne Ridgway was the Duty Manager who received the initial complaint about the claimant and who sat on the disciplinary panel. Shonaz Commins was the Human Resources ("HR") Advisor from the respondent's external provider Direct Law and Personnel ("DLP") who chaired the panel which dismissed the claimant, and Steven Hayes was the Head of Operations and Compliance who rejected the appeal against dismissal. The claimant gave evidence himself but did not call any other witnesses.

Application to exclude audio recording

7. At the outset of the hearing the claimant made an application to exclude from the evidence the audio component of the CCTV footage, and the transcript of that audio which appeared in the bundle at pages 260 and 261. It was agreed that I would read the witness statements and documents save for the transcript before hearing and determining the application.

<u>Submissions</u>

8. Mr Norman said that the claimant had not been aware that there was audio recording as well as video recording on the bus, a breach of Part 8 of "In the Picture", the Information Commissioner's data protection code of practice for surveillance cameras and personal information (pages 163-206) ("the CCTV Code"). He relied on the principles considered by the Employment Appeal Tribunal in **Chairman and Governors of Amwell View School v Dogherty UKEAT/0243/06**. The audio evidence had been obtained in breach of article 8 of the European Convention on Human Rights (see paragraph 24 below). The claimant was on his personal mobile telephone to his wife during what was effectively a break in work

and had a reasonable expectation of privacy. It would be contrary to public policy to allow such evidence to be admitted.

9. In reply Mr Lewis opposed the application. There was a factual dispute about whether the claimant was aware of audio recording facilities. He had not had a reasonable expectation of privacy. Even if Article 8 was engaged, the balancing exercise should favour admissibility of the evidence given that the claimant was not engaged in a conversation with his wife about personal or intimate matters. More broadly, human rights issues could be addressed within the section 98(4) enquiry into fairness: **Turner v East Midlands Trains Limited [2013] ICR 525**. As to data protection, use of the audio was within Paragraph 3.1.7 of the Information Commissioner's Data Protection: Employment Practices Code ("the Employment Code"). Excluding this material would deprive the respondent of a fair hearing.

Decision

10. In deciding the application I bore in mind the Tribunal's power under rule 41 to regulate its own procedure, and that under that rule the Tribunal is not bound by any rules of law on admissibility in the courts. Nevertheless, the power to admit or to exclude evidence must be exercised in accordance with the overriding objective of dealing with a case fairly and justly under rule 2.

11. The starting point on admissibility is always relevance. The audio recording was plainly relevant to the issue of fairness. It was part of the factual material before the respondent's managers when the claimant was dismissed. Its contents formed the basis of one of the disciplinary allegations on page 41 and part of the reason for dismissal on page 68. There would need to be a good reason to exclude plainly relevant evidence.

12. I considered the human rights argument. Unlike the **Amwell School** case, this was not a situation where the claimant suggested that there would be a further breach of his human rights if the material were admitted into evidence. Mr Norman made clear that the relevant breach had already occurred in the collection and use of the audio recording in the disciplinary case. However, that was a disputed issue in the case. The purpose of the recording, the claimant's awareness of the fact there was audio recording, and whether he had a reasonable expectation of privacy at the time were all matters to be determined during the hearing.

13. As to data protection, both sides had arguments about different provisions in different Codes. Again I could not determine those issues until all the evidence had been heard.

14. I concluded it would be wrong to exclude the audio recording without having made a determination on such matters. I did not accept that the claimant's right to a fair hearing would be undermined by admission of the audio recording where (a) the notes of the disciplinary meetings recorded that he admitted using the phrase "Spanish bitch" about the passenger, and (b) any other prejudicial material in the audio recording could be disregarded by the Tribunal. In contrast, if the recording were ruled inadmissible but it turned out there was no infringement of article 8 or of data protection law or guidance in its use in the disciplinary process, the respondent would have been denied a fair trial since part of the factual evidence on which the

case against the claimant was based would have been (with hindsight) wrongly excluded. However, in giving oral judgment on this application I made clear that this was not a determination of those issues about data protection and human rights; they would be addressed within section 98(4) once the relevant facts had been determined.

15. As a consequence I viewed four videos in open Tribunal. All four were from cameras mounted on the bus. The first two showed the view of the bus stop past which the claimant had driven without stopping. The second of those was the only clip without audio. The third video showed the passenger approaching the bus when it was parked up at Manchester Airport, and seeking to initiate a conversation with the claimant through his driver's window. The fourth was from the camera mounted behind the driver's seat and showed the passenger going around the front of the bus and trying to talk to the claimant through the bus doors. That final clip had the audio recording of the claimant on the telephone to his wife during the incident, the transcript of which appeared at pages 260-261.

Relevant Legal Principles

Unfair Dismissal

16. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

17. It was common ground here that the reason for dismissal related to the claimant's conduct. That is a potentially fair reason under section 98(2). The key provision was the test of fairness in section 98(4):

> **" (4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**

18. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in paragraphs 16-22 of **Turner** (see above). Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

19. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.** A fair investigation requires the

employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

20. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

21. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band did not extend to dismissal.

22. Indeed, the band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.** The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer.

23. In a case where an employer purports to dismiss for gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whether it acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

Human Rights

24. The Human Rights Act 1998 incorporates certain provisions of the European Convention on Human Rights into UK law. One of those provisions is Article 8 which reads as follows:

> **"1. Everyone has the right to respect for his private and family life, his home and his correspondence.**
>
> **2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others."**

25. The Court of Appeal considered the relationship between Article 8 and an unfair dismissal claim against a private employer in **X v Y [2004] IRLR 625**. The case concerned an employee dismissed for committing a sexual offence in a transport café lavatory to which the public had access. The Employment Tribunal is a public body obliged by section 3 of the 1998 Act to interpret legislation in a way compatible with Convention rights so far as it is possible to do so. Mummery LJ noted that a person's reasonable expectations of privacy may extend beyond the confines of the home and of private premises to a public space or context (paragraph

37). After a review of the law he suggested a structured approach for Tribunals to adopt (paragraph 63):

> **"(1) Do the circumstances of the dismissal fall within the ambit of one or more of the Articles of the Convention? If they do not, the Convention right is not engaged and need not be considered.**
>
> **(2) If they do, does the state have a positive obligation to secure enjoyment of the relevant Convention right between private persons? If it does not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer.**
>
> **(3) If it does, is the interference with the employee's Convention right by dismissal justified? If it is, proceed to (5) below.**
>
> **(4) If it is not, was there a permissible reason for the dismissal under the ERA, which does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it.**
>
> **(5) If there was, is the dismissal fair, tested by the provisions of s.98 of the ERA, reading and giving effect to them under s.3 of the HRA so as to be compatible with the Convention right?"**

Data Protection

26. The Data Protection Act 1998 sets out the "data protection principles" in Schedule 1 (see section 4(1)) and prescribes the conditions under which personal data may be processed in Schedules 2 and 3 (section 4(3)). Section 51(3) empowers the Information Commissioner to issue codes of practice for guidance as to good practice.

Relevant Findings of Fact

27. This section of the reasons sets out the broad chronology of events to put my decision into context. Any disputes of primary fact of importance will be resolved in the discussions and conclusions section.

The Respondent

28. The respondent is a not for profit community bus company and mutual society. Its background is in providing community transport services to the vulnerable and disadvantaged, but it also competes to win tenders from Transport for Greater Manchester ("TfGM") to run commercial bus services. According to the response form, it has approximately 113 employees. Three is a senior management team of three staff, including Mr Hayes as Head of Operations and Compliance, and a Duty Manager team of four staff including Mr Ridgway and Davina White. It has access to specialised HR advice through DLP.

Driver Handbook

29. The respondent periodically produces a driver handbook. It sets out the obligations of drivers. The 2016 version made it clear in Section 2 that the driver was

responsible for stopping to pick up passengers. The claimant signed to confirm receipt of the driver handbook on 26 January 2016 (page 177C).

30. Section 5 dealt with difficult passengers. It required the driver to try to stay calm, and to avoid any hostile, aggressive, verbal or physical response. It said that the driver must not raise his voice or show anger, and continued as follows:

> **"If someone is angry because of a problem about the service, even if this is out of your control, apologise on behalf of the company. Offer to take their complaint up with your line manager. Make a note of the passenger's details. If this is not suitable ensure the passenger is made aware of where and whom to make the complaint to."**

31. Section 15 of the handbook dealt with the use of mobile phones. It began as follows:

> **"The use of mobile phones whilst in charge of any company vehicle is illegal and strictly prohibited – including with ear pieces or hands free devices. If there is a case where a mobile phone has to be used then the driver should ensure the vehicle is parked in a safe place with handbrake engaged and the engine switched off."**

32. Section 19 of the document set out service and performance standards which the respondent was obliged to meet under its service level agreement with TfGM. One of the possible breaches was behaviour which resulted in customer complaints. Breaches could lead to financial penalties for the respondent. They also accrued points, and enough points could mean loss of the contract to provide the service.This was all made clear to drivers in the handbook.

33. Section 30 of the handbook dealt with CCTV. In its entirety it read as follows:

> **"Over 75% of our vehicles are now covered internally and externally with CCTV, during the remainder of this year it is envisaged the remainder of the fleet will have this system installed. These systems are there to protect you and the travelling public, and have the ability to continually record the vehicle movements and activities throughout the day. Our current hard drives enable us to record incidents for a period of seven days, after this time it will be taped over.**
>
> **<u>Sharing CCTV footage with other third parties</u>**
>
> **In very limited circumstances we may disclose information to other third parties. As with disclosures to the police, each request is dealt with on a case by case basis to ensure that any such disclosure is lawful and in accordance with the Data Protection Act.**
>
> **We may also disclose personal data if required to do so by law. The Data Protection Act allows us to do this where the request is supported by evidence of the relevant legislation which requires the disclosure, or a court order."**

<u>Disciplinary Policy</u>

34. The respondent also had a disciplinary policy which appeared at pages 92-98. Clause 3 dealt with investigations, but clause 3.1 made clear that there may be circumstances where there was no separate investigation meeting, only a disciplinary meeting.

35. Gross misconduct was addressed in clause 8. A non-exhaustive list of examples of gross misconduct appeared in clause 8.2 (page 97). The examples included the following:

- **"Bullying or physical violence.**
- **Negligence or carelessness, particularly if it leads to the company losing trust and confidence in you.**
- **Unlawful harassment or discrimination.**
- **Serious breaches of confidence.**
- **Conduct which breaches common decency or brings the company into disrepute."**

36. A list of matters that would normally be regarded as misconduct but not gross misconduct appeared in clause 8.3. The list included using obscene language or otherwise behaving offensively.

The Claimant

37. The claimant was first employed by the respondent as a driver in February 2014. He was an experienced passenger service vehicle driver of over 30 years.

38. In March 2014 he signed a contract of employment which appeared at pages 99-114. Clause 15 made clear that the respondent would provide a range of policies and procedures, and that the employee was responsible for ensuring that he was aware of and understood his obligations in those policies. Clause 24 introduced the disciplinary policy.

39. On 16 March 2014 the claimant received some training on driving a hybrid vehicle. He signed a note which appeared at page 115. That note said:

> **"The vehicle is fully equipped with CCTV and this may be accessed at any time by management. If you are involved in an incident press the 'CAMERA FAULT' button [as] this will isolate 15 minutes of footage either side of the button being pressed."**

40. The claimant's wife is disabled with a range of medical conditions and he is her primary carer. He would always phone her during his working day where possible to see how she was. He had received adjustments to his hours in the past from the company to reflect those caring responsibilities.

January 2017 Discipline Issue

41. In January 2017 the claimant was involved in a road traffic accident for which he received a disciplinary warning. No documents about this were produced by either side. It was the respondent's case that in the course of that hearing the claimant saw CCTV footage from the bus that he was driving, and that the footage contained audio as well as visual images. The claimant disputed this. I will return to this dispute in my conclusions.

3 May 2017

42. On 3 May 2017 the claimant was driving on a commercial bus route ending at the airport. The bus was equipped with CCTV but there were no signs on it to that effect.

43. He drove past a stop in Hale Barns, a few stops from the end of the route. There was a person at the bus stop but she did not put out her hand to hail the bus until he was passing. It was too late for him to stop to pick her up.

44. On arrival at the airport his passengers disembarked and the claimant had 13 minutes before he was due to leave on the return route. This was not break time but was known as a "layover". He parked in the appropriate bay and switched the engine off. He telephoned his wife from the cab.

45. Whilst the claimant was on his mobile telephone to his wife the woman he had passed at the bus stop in Hale Barns arrived at the airport bus station and came over to his bus to speak to him to complain about him not picking her up. He realised who she was and that she wanted to complain but declined to enter into a discussion because he was on the phone to his wife.

Complaint

46. The passenger later rang the respondent to complain. Mr Ridgway spoke to her on 4 May. He recorded some of what she said on a form headed "Summary of Findings" on page 40. The details were:

> **"Drove passed [sic] intending passenger going to the airport.**
>
> **Rude and verbally aggressive towards the passenger when she approached him at the airport.**
>
> **On mobile phone in cab."**

Investigation

47. Mr Ridgway asked his colleague, Davina White, to view the CCTV. She viewed the footage and listened to the audio. She told Mr Ridgway that there was sufficient evidence to proceed to a disciplinary hearing for gross misconduct. He completed the form, recording that the claimant had shown no concern for a customer he knew he had passed at the bus stop and that he had brought the company into disrepute. The form was completed on 4 May 2017.

Disciplinary Charges

48. By a letter of 5 May 2017 the claimant was invited to a disciplinary hearing. The letter was handed to him at work that day. He had not been aware of the complaint and had continued to work as normal. The letter came from Mrs Commins at DLP and set out six allegations which were said to be gross misconduct. The allegations were that the claimant:

> **"(1) Failed to carry out correctly, professionally, accurately or otherwise reasonable tasks and duties of your role;**

(2) Provided poor customer service;

(3) Used a mobile phone while in control of a company vehicle;

(4) Behaved and spoken in an unprofessional manner towards a customer;

(5) Made xenophobic and anti-intellectual[1] comments towards a customer;

(6) Potentially brought the company's reputation into disrepute."

49. The evidence was summarised: he had driven past an intending passenger going to the airport, had been rude and verbally aggressive towards her when she approached him at the airport, and that on the recording he could be heard using the phrase "Spanish bitch". He had also been using his mobile phone whilst the engine was running in the cab.

50. The letter said that the disciplinary policy was enclosed. It warned the claimant that the outcome could potentially be summary dismissal. In fact the policy was not enclosed but the claimant did not tell the respondent it was missing. He had been given a copy on previous occasions when being disciplined.

The CCTV Footage

51. The claimant had the opportunity to see the CCTV (including the audio) during the disciplinary hearing. The footage from the bus stop showed the member of the public standing there but she did not put out her hand as the bus approached. She only did so as the bus passed, too late for him to stop.

52. The footage from the airport showed that the claimant was talking to his wife on the speaker on his mobile phone when the passenger approached him by the driver's window, and he shut it. She walked round the front of the bus and he closed the door. There then occurred an exchange between them, during which the passenger took out her mobile phone and appeared to be photographing or filming the claimant. The claimant was on the telephone to his wife on the speaker of his mobile phone throughout this exchange, talking to her and to his wife. He remained seated in his cab. The passenger was standing outside the closed bus doors. She wanted to complain but he insisted in a loud voice several times that he was on the telephone. During their discussion he said a few times to the member of the public "You do that, you do that", referring to her intending to go and make a complaint. The video also showed that whilst saying that on two occasions he put his left hand out under the glass screen which separates passengers from the driver, and made a gesture towards her. Mr Ridgway and Mrs Commins had formed the view that he raised his middle finger in a commonly known obscene gesture[2].

53. The incident came to an end when the passenger walked away. As she walked away from the front of the bus the audio recorded the claimant telling his wife that the passenger was a "Spanish bitch".

[1] The meaning of "anti-intellectual" in this context was not clearly explained.
[2] Having seen it again during my hearing they accepted that the gesture being made could not be identified on the video.

Disciplinary Hearing 10 May 2017

54. The disciplinary hearing occurred on 10 May 2017. Mrs Commins had prepared a pre-printed form running to 23 pages which had some script for her to use and some predetermined questions with space for the answers to be written in by hand. That record consitiuted the notes of the hearing (pages 43-65). Mr Ridgway was the other panel member. The claimant was accompanied by his colleague, David Foster.

55. The allegations were summarised for the claimant in the disciplinary hearing and then he was asked the prepared questions. On occasion he was asked follow up questions by Mrs Commins or Mr Ridgway.

56. He made clear that he had carried out his duties properly, and that the customer had "showed no arm" at the bus stop. He had noticed her because he realised when she arrived at the airport that it had only taken her five more minutes to get there.

57. He did not agree that he was rude and aggressive to the customer. He said he had been justified in closing the window and the doors on the member of the public because he was talking to his wife at the time. He emphasised that he was the primary carer for his wife and she had to come first. The "Spanish bitch" comment was made to his wife not to the passenger. He was not xenophobic or "anti-intellectual". He had been talking to the passenger in a louder voice because it was through the glass of the bus doors. He emphasised he had been on the phone with the engine switched off. The CCTV recorded the engine starting only a few seconds before the call ended

58. However, the claimant acknowledged that his behaviour had not been acceptable (page 51) and said he could have dealt with it better and would have done on a different day. He had been suffering from a chest infection and it all got on top of him.

59. Page 57 contained the prepared question:

> **"Do you understand that you have brought the company's reputation into disrepute? If no, why?"**

60. The notes recorded the claimant initially responding by saying he did not think so but after a brief adjournment he said that his companion had explained the question to him on and he wanted to change his answer. He said:

> **"Yes I do agree that I have brought it into disrepute. I could have used better etiquette and [I] apologise to MCT and all parties. She could also have used better etiquette and I hope in the future I don't have a recurrence."**

61. The claimant confirmed that the CCTV was an accurate record of what happened on the day, but he raised a query as to whether personal conversations should be edited out of the CCTV. He explained what he would have done differently with hindsight. He emphasised that he had a record clean of complaints of this sort in his three years and three months of employment.

Dismissal 16 May 2017

62. No decision was made on the day. The decision was confirmed in a letter of 16 May at pages 66-69. The letter repeated the six allegations and summarised the evidence. It recorded some of the material discussed at the disciplinary hearing. In the section headed "Findings" the following appeared:

> **"The role of the panel is to address the evidence in favour of the allegations and the evidence against the allegations. The panel weigh up this information. In this case there were** [sic] **more evidence submitted in favour of the allegations; therefore, it has been decided that the weight and severity of the evidence is greater in favour of the allegations than against.**
>
> **On this basis the company has, after taking advice from DLP, have** [sic] **decided to dismiss you for gross misconduct. The reason for this is because we the panel have found as a fact that you have seen the customer walking towards the edge of the road to catch the bus when she had seen you approaching. You then did not stop and continued to drive. The CCTV evidence proves you were fully aware this customer was at the previous bus stop before the airport stop. The CCTV evidence as well as your admittance of this in the hearing shows you behaved and spoke in an unprofessional manner, as well as made xenophobic and anti-intellectual comments towards this customer. As the customer has complained this has also brought the company's reputation into disrepute.**
>
> **You was** [sic] **stationary on the bus when you was on the phone to your wife, however at this time you were still representing the company and on duty not an official break. You have requested the company look into whether it is acceptable not to blur out personal conversations on their CCTV recordings. We can confirm as you were on duty at the time you made the phone call and are fully aware CCTV is in operation. It is your responsibility if you would like phone calls you make to be private to exit the bus.**
>
> **Therefore the allegations of failing to carry out correctly, professionally, accurately or otherwise reasonable tasks and duties of your role, providing poor customer service, behaving and speaking in an unprofessional manner towards a customer, making xenophobic and anti-intellectual comments towards a customer, as well as bringing the company's reputation into disrepute and breaching the trust and confidence, these allegations are upheld."**

63. The letter ended by confirming summary dismissal and the right of appeal.

64. Although not mentioned in the hearing notes or the dismissal letter, Mrs Commins said in evidence that she had taken into account a previous occasion when the claimant had behaved aggressively in a disciplinary hearing before her colleague Ms Shaw. That had contributed to her view that the claimant might well behave in a similar way in future.

Appeal

65. The claimant appealed by a brief email of 17 May 2017 at page 70. He was asked to provide further grounds, which he did the same day at page 71. His grounds of appeal were put as follows:

> **"The grounds I wish to appeal my dismissal are**
>
> **(1) I don't believe I spoke in an unprofessional manner.**

> **(2) I didn't provide poor customer service; the lady in question had her back to me** [as] **proven on CCTV footage.**
>
> **(3) The use of my mobile phone, no engine was running, I was on layover stand.**
>
> **(4) I didn't treat the customer with xenophobic comments.**
>
> **(5) I explained to the customer I was on the phone at the moment."**

66. The appeal hearing was conducted by Steve Hayes and Adam Moxon of DLP. It took place on 8 June 2017. The notes appeared at pages 74-78. They were in a similar format: pre-printed questions with space for the claimant's answers to be written in by hand. He was accompanied again by Dave Foster.

67. The notes recorded the claimant was happy not to view the CCTV footage again before that discussion. The claimant was asked to summarise his case on each of the allegations. He reiterated what he had said in the disciplinary hearing. As to the comments made to the customer, he said:

> **"I called her a 'Spanish bitch' under my breath. The doors and windows were shut and out of earshot. She hasn't complained about the comments. She didn't hear it. It is only what has been heard on CCTV. Like I said in my first disciplinary I am not xenophobic. My wife is part Jewish and son's partner part Lithuanian and I have a mixed race niece."**

68. At the end of the hearing the claimant explained that he was sorry for what had happened and sorry that it was seen on CCTV.

69. The decision of the appeal panel was conveyed by a letter of 12 June 2017 at pages 89-91. The letter recorded the allegations, the disciplinary outcome and what had been said at the appeal hearing. The panel upheld the decision to dismiss the claimant for gross misconduct. The letter said:

> **"During the hearing the panel found you showed no remorse and only offered an apology when mentioned by Steven Hayes stating you were 'sorry it got seen on CCTV'.**
>
> **The panel also note that no new or additional evidence was provided during the appeal hearing than what was raised or addressed during the disciplinary hearing."**

Submissions

70. At the conclusion of the evidence each representative made an oral submission.

Claimant's Submission

71. Mr Norman began by addressing the six allegations against the claimant. Allegation 1 concerned his failure to stop at the bus stop and could not possibly amount to gross misconduct. Allegation 3 related to use of his mobile phone and Mrs Commins had said that it was not part of the reason for dismissal.

72. As for allegation 5 concerning the "Spanish bitch" comment, Mrs Commins had acknowledged that it was not within earshot of the customer and therefore it

merited a final written warning at best. It had not in any event been directed "towards" the customer but rather said about her to his wife.

73. That left the core of the case: allegations 2, 4 and 6, which all related to the dealing with the customer when she came to the bus to complain. The key point here was the damage to the company's reputation, since without that it could not reasonably be viewed as gross misconduct. The allegation was of a potential damage to reputation whereas the policy concerned only actual damage. Whether there had been damage to the company's reputation had not been investigated at all. There was no proper record of the complaint made by the customer or record of how she felt about it, and therefore no reasonable grounds for the conclusion that the company had been brought into disrepute.

74. Mr Norman then moved to the sanction overall and submitted that it was outside the band of reasonable responses. He relied on a number of points which he said taken together showed that the respondent had not approached matters in a fair and objective way.

75. First was the treatment of the audio recording. The claimant raised a concern in the disciplinary hearing but there was no evidence as to how that was considered prior to the decision to dismiss him. I was invited to conclude that the claimant had not been aware there was an audio recording. His evidence was that there was no audio on the previous occasions when CCTV was used in a disciplinary hearing. He had had a reasonable expectation of privacy because the windows and doors had been closed and he was alone in the bus in a closed environment in a private discussion with his wife. The "Spanish bitch" comment should have been disregarded because it was made in a private conversation.

76. Second was the use of pre-typed questions which presented the case against him as an accepted fact. It showed that the matter had already been decided.

77. Third was the failure to explore what the claimant said in the hearing. The extent of his apologies was not properly considered. No consideration was given to the fact he explained that he would act differently next time.

78. Fourth was that Mrs Commins had held his conduct in a previous disciplinary hearing against him without telling him of that. The respondent's assertion that previous disciplinary matters had not been taken into account was false.

79. Fifth was that the CCTV did not show him swearing with his hand gesture. It was not simply a mistake by Mr Ridgway and Mrs Commins. It was only in today's hearing that they had conceded that the tape showed no such thing. It showed that the respondent's witnesses had made their mind up against the claimant and denied him a fair hearing.

80. Sixth was that the six allegations were not examples of gross misconduct from the policy. There was no reference to the policy at all in the hearing. It looked as though the respondent had decided that they wanted to dismiss the claimant and then found a way to do it. The inclusion of the mobile phone matter as potentially gross misconduct was unwarranted. It could never have been gross misconduct

given that the CCTV showed that he turned his bus engine on only a few seconds before the end of the mobile call.

81. Seventh was the failure to consider the mitigation offered by the claimant in relation to his own and his wife's health. There was no consideration of alternatives to dismissal and the managers proceeded direct to dismissal once gross misconduct had been established. The claimant had been driving every working day for over three years without any previous complaints. There was no likelihood of repetition because he had explained how he would deal with it differently next time. Although he had explained in today's hearing that he did not in truth agree that the company had been brought into disrepute, that did not undermine the value of his acceptance in the disciplinary hearing that he was at fault and should behave differently.

82. In relation to remedy issues, Mr Norman accepted that there was no unreasonable breach of the ACAS Code which would go to remedy, although the Code remained relevant to fairness. He submitted that there was no prospect of the claimant being fairly dismissed given the evidence against him, and although he accepted that some reduction for contributory fault would be appropriate it should not exceed 20%.

Respondent's Submission

83. Mr Lewis emphasised as the main point of his submission that whatever the technical arguments raised by the claimant, the fact was that this was a classic case of gross misconduct going right to the heart of the employment relationship. The way the claimant had treated the customer who came to his cab to complain was appalling and unacceptable and it warranted dismissal in the eyes of any reasonable employer. He was the face of the company and its interaction with customers, which was particularly important for a community transport organisation. The words he used, the tenure and volume with which he spoke, the aggression in his manner, the bullying tone, the fact he shut the window and closed the door amounted to deliberate and wilful disregard of proper customer relations. Everything else was really a red herring.

84. The mitigation he offered relating to his own chest infection and his wife fell far short of being sufficient, particularly given that the telephone call to his wife showed no signs of her being upset or in distress. The conversation between them had been an everyday chat.

85. It was within the band of reasonable responses to take into account the potential impact of his conduct on the company's reputation (**Wincanton PLC v Atkinson EAT 0040/11**) and there had been a reasonable investigation because it was all there to see and hear on the CCTV footage.

86. As to the use of the audio, Mr Lewis submitted that the claimant had not had any reasonable expectation of privacy. I was invited to find that the claimant had been aware that there would be audio recordings, he was on a bus during work time and the customer came over to the cab. However, even if there was a reasonable expectation of privacy any interference with that was proportionate and justified. The Employment Code showed that it could be appropriate to examine such footage if it was in the interests of the claimant, such as where it could potentially clear his

name. What was discovered could not then reasonably have been ignored. I was referred to the decision of the EAT in **McGowan v Scottish Water [2005] IRLR 167**. The claimant's proposition that the respondent should simply have ignored what was on the audio part of the recording was untenable.

87. As to remedy issues, Mr Lewis submitted that this was a case where there was no significant breach of the ACAS Code, where even if the dismissal was found to be procedurally unfair there should be a 100% **Polkey** reduction because a fair dismissal was inevitable, and where there should also be a 100% reduction to both the basic and compensatory award on account of contributory fault.

88. I reserved my judgment after submissions. I was due to deliberate in chambers on 22 December 2017 but was able to bring this date forward to 15 December 2015 after another case settled.

Discussion and Conclusions

Introduction

89. I considered it appropriate first to deal with the sole dispute of primary fact, which was whether the claimant had been aware of the audio component to the CCTV recording facility on the respondent's buses. The human rights and data protection issues would fall for consideration within the overall exercise of assessing fairness under section 98(4).

Knowledge of audio recording

90. The CCTV code read as follows in clause 5 of section 8:

> **"You should make it clear to data subjects that audio recording is taking place, over and above any visual recording which is already occurring."**

91. The respondent was in breach of this provision. Neither the driver handbook nor the training record from March 2014 made any reference to audio recording.

92. Nevertheless Mr Commins asserted that in the January 2017 disciplinary hearing following the bus collision the claimant and the disciplinary panel had watched some CCTV footage which had an audio component. She said that in the audio the claimant could be heard swearing as the bus approached the collision. The claimant said this was not correct, and that he had been swearing to himself during that hearing as he watched the footage. Mr Hayes also said in oral evidence that he had disciplined the claimant some eighteen months to two years earlier using video and audio footage.

93. The respondent did not produce any documentation from either of those disciplinary hearings, and nor did the dismissal letter make this point to the claimant after he raised his concern in the hearing. Equally, however, the claimant did not raise this point in the disciplinary hearing or in his grounds of appeal. On balance, however, I accepted the claimant's account. It seemed to me unlikely that he would have used the phrase "Spanish bitch" had he known that what he said to his wife was being recorded. I therefore found as a fact that he was not aware that the CCTV system on his bus provided both audio and visual recording.

Reason for dismissal

94. Although it was accepted by the claimant that the reason for dismissal related to his conduct, it was still important to identify precisely what that reason was. Six allegations of gross misconduct were pursued.

95. The allegation about use of a mobile phone did not feature in the dismissal letter. I discounted it. Further, the failure to stop at the bus stop in Hale Barns was plainly a relatively minor matter. Despite the wording of the dismissal letter, which did not distinguish between the individual allegations in terms of which were gross misconduct and which were not, I found that this did not contributed to the gross misconduct finding. Mrs Commins confirmed that in her oral evidence.

96. The reason for dismissal was therefore the interaction between the claimant and the passenger at the airport as revealed by the CCTV. The facts in the mind of the decision makers at dismissal and appeal included the fact that the claimant referred to the customer as a "Spanish bitch" as she walked away. There was also a belief that by his actions the claimant had brought the company into disrepute and a belief that the company could no longer trust him to do his job properly.

Fairness – Burchell test – genuine belief

97. I was satisfied that at both the dismissal and the appeal stage the managers genuinely believed the claimant was guilty of disciplinary misconduct. The contrary was not suggested by Mr Norman.

Fairness – Burchell test – reasonable grounds

98. It was convenient to consider the human rights and data protection issues at this stage in the consideration of fairness. Dismissal took into account the audio recording of events at the airport. This Tribunal is a public authority, and by section 6 of the Human Rights Act 1998 it is unlawful for the Tribunal to act in a way which is incompatible with a Convention right. That reinforces the obligation under section 3 of the same Act to read and to give effect to primary legislation in way which is compatible with the Convention rights, so far as it is possible to do so. Because the respondent was not a public authority the issue was not whether the respondent breached any Article 8 rights in its reliance on the audio recording; rather the issue was whether a finding by this Tribunal that reliance on the audio recording was within the band of reasonable responses would be incompatible with the claimant's rights under Article 8. In that way I was required to take account of the claimant's right to respect for his private and family life in deciding whether the dismissal was unfair.

99. Applying the approach suggested by Mummery LJ in paragraph 63 of **X v Y**, the first question was whether the circumstances of the dismissal fell within the ambit of article 8. I concluded that the claimant did have a reasonable expectation of privacy in his telephone call to his wife. Although he was in a public place (a bus station) and at work, and not on a break from working time, it was still reasonable to expect that he could have a private discussion with his wife. He was on an inactive "layover" period; he was the only person on the bus and he was using his own mobile telephone rather than a work telephone. He was sitting in the cab which is an area to which only he had access. He did not know that there was audio recording

(see paragraph 93 above) and it was reasonable to expect that the CCTV on the bus provided video images only. In those circumstances there was a reasonable expectation of privacy when he began the telephone call.

100. Article 8 is one of those articles where the State has a positive obligation to secure enjoyment of the relevant Convention right between private persons. The authorities to that effect were discussed by Mummery LJ in paragraphs 40 and 41 of **X v Y**. Accordingly it was necessary to consider whether the interference with the claimant's Convention right by dismissal was justified.

101. Both parties in submissions addressed this on the basis that the question was whether it was justified for the respondent to use the audio recording in the disciplinary process. That involved considerations arising out of the Data Protection Codes (see below). The suggestion in the claim form that the audio recording was in breach of the Data Protection Act 1998 itself was not pursued.

102. On this issue I took into account that from the moment he was approached by the passenger seeking to make a complaint, the claimant was no longer engaged in an activity that was solely private and personal. He was interacting with a member of the public on behalf of the respondent. In a sense he was the face of the organisation. It seemed to me that from that moment he could not reasonably expect his interactions to be private. He could have ended the call to his wife. His discussion with her was not of an urgent or sensitive nature. They were discussing their dog, Max. It was his choice to continue his discussion with his wife at the same time as interacting with the customer.

103. Accordingly, in so far as the audio recording was a record of his interaction with the passenger, I concluded that it was justified for the respondent to rely on it in the disciplinary proceedings. To do so was in accordance with the Employment Code. The driver handbook section 30 said that the CCTV was there to protect the driver and the travelling public. Using it to investigate a complaint made by a member of the travelling public about treatment by a driver was within that purpose.

104. Even if that were not the case, however, in my judgment Mr Lewis was right to submit that the personal information could still be used in accordance with clause 3.1.7 if the Employment Code. Firstly, it was clearly in the claimant's interest for the complaint to be investigated by consulting the audio recording to see if the complaint was well-founded. Secondly, what that audio recording revealed (see below) was activity that no employer could reasonably be expected to ignore.

105. In my judgment this approach extended not simply to the interaction with the customer but to the “Spanish bitch” comment made to the claimant's wife just after the interaction with the passenger. The respondent was entitled to consider the audio recording of the whole incident involving the passenger. Once that comment was heard it could not reasonably be ignored. At best it was evidence of the claimant's state of mind during that incident. At worst it could have been a comment which was discriminatory on the grounds of nationality and sex which was directed at the customer and which could have amounted to a breach of the Equality Act 2010 by the claimant exposing the respondent to legal liability. I acknowledged, of course, that it was ultimately accepted that the comment was not said to or heard by the customer.

106. Interpreting section 98 in a way compatible with the claimant's rights under Article 8, therefore, I concluded that the use of the audio recording by the respondent was within the band of reasonable responses even though the claimant did not know that audio was being recorded.

107. It followed that the CCTV visual and audio footage provided reasonable grounds for the conclusion that the claimant had behaved and spoken in an unprofessional manner towards a customer. It was entirely reasonably for managers to form the view that the way he spoke to her was wholly unacceptable. Section 5 of the driver handbook made plain what was expected of drivers in that situation: to avoid any aggressive verbal response, to refrain from raising the voice or showing anger, and to apologise on behalf of the company and offer to take the complaint up with the line manager. The respondent could reasonably conclude that the claimant did none of this. By closing the window and the bus doors on the passenger, by continuing to speak to his wife on a personal call even though he was at work, and by the volume and tone of his voice when addressing the passenger he behaved in a way which could reasonably be viewed as rude and aggressive. It was completely contrary to what the respondent reasonably expected of its drivers in that situation.

108. I concluded, however, that there were no reasonable grounds to consider that the claimant had made an obscene gesture with his hand. The CCTV could not reasonably be viewed in that light. However, that was not something which featured in the disciplinary hearing, the dismissal letter or the appeal. The claimant did not know that this was a view which managers had taken, and I was satisfied that it made no difference to the decision.

109. That left the question of disrepute. Mr Norman argued strongly that there were no reasonable grounds for reaching this conclusion because there was no evidence about what the customer thought of the company. He suggested that would depend in part upon how she was told her complaint had been handled. In my judgment that submission missed the point. The managers were reasonably entitled to conclude that at the moment she complained about the claimant's behaviour, the reputation of the company had been reduced in the eyes of that customer. Her complaint was about a relatively minor matter: he had not stopped to pick her up. However, that simple complaint was one which managers were entitled to think could easily have been resolved at the time by politeness, courtesy and an apology – just as advised by the driver handbook. Instead the claimant made the situation a great deal worse by his inappropriate, rude and aggressive reaction. There were reasonable grounds for concluding that his behaviour brought the company into disrepute with the passenger.

110. Overall, therefore, I was satisfied that there were reasonable grounds for the conclusion that the claimant was guilty of allegations 2, 4 and 6. There were no reasonable grounds for the conclusion that he made xenophobic comments towards a customer: the “Spanish bitch” comment was plainly made to his wife about the customer and was not heard by the customer.

Fairness – Burchell test – reasonable investigation

111. I explained above the reasons for my conclusion that it was reasonable for the respondent to rely on the audio recording.

112. Mr Norman criticised the move to a disciplinary hearing before the claimant had been interviewed about the matter. In my judgment that was within the band of reasonable responses. The evidence was there on the CCTV. There were no more facts to investigate. Paragraph 5 of the ACAS Code of Practice recognises that some cases will not require an investigatory meeting before a disciplinary hearing. So did the respondent's own policy: clause 3.1 on page 97.

113. Mr Norman was also critical of the absence of any further record of the complaint. That point had some force. It was surprising that the complaint details were not more carefully recorded. In a case where there was a dispute of fact between the driver and the passenger, that might lead to fundamental unfairness. In this case, however, there was no factual dispute. The CCTV footage showed all the relevant interaction. It was reasonable not to get more details from the person bringing the complaint.

114. That was also true of the question of disrepute for the company. Managers were entitled to draw the inference that the company had been brought into disrepute without specifically asking the passenger that question.

115. Overall the investigation of this matter fell within the band of reasonable responses.

Fairness – Procedural fairness

116. The fact that the claimant was not provided with a copy of the disciplinary policy for this hearing did not create any unfairness. The respondent was not aware it had inadvertently been omitted from the letter. The claimant had been provided with it in January 2017 anyway. He never asked for a further copy.

117. The use of prepared questions in the disciplinary and appeal hearings was in my judgment within the band of reasonable responses. It was a sensible way of structuring the hearing. Follow up questions were asked.

118. More pertinent was the suggestion that the wording of these questions showed that the disciplinary panel had already made up its mind. I acknowledged that some of the questions appeared to be phrased in that way. For example, question 10 on page 55 was:

> **"Do you understand you have breached the company's driver handbook and the law?"**

119. However, I concluded that this reflected the essential reality of the evidence provided by the CCTV. That question related to use of the mobile phone whilst the engine was running. That was a breach of the driver handbook, albeit a minor technical matter in the end. Taken as a whole the disciplinary invitation letter and the questions prepared for the disciplinary hearing showed an awareness that these were allegations and that no decision had already been made. Any perception to the contrary was a reflection of the very strong case against the claimant once the CCTV audio content had been considered.

120. There was, however, one matter which was a significant procedural flaw. Mrs Commins confirmed that one of the matters she took into account was that the claimant had previously behaved in an aggressive manner to a colleague in an

earlier disciplinary hearing. The claimant was never told that this was being considered or given a chance to put his side of the case on that issue. That was unfair and an employer acting reasonably would have let him know this was a factor. As he was unaware of it he could not challenge it on appeal.

121. The question was whether viewed overall this took the procedure outside the band of reasonable responses. It was appropriate to consider this when determining the fairness of the sanction since it was a point taken into account at that stage.

Fairness – Burchell test – summary

122. Save for the outstanding point about the reliance on the claimant's behaviour at an earlier disciplinary hearing, it seemed to me that the respondent had met all aspects of the **Burchell** test. In particular there were reasonable grounds for the conclusion that the claimant was guilty of disciplinary misconduct in relation to allegations 2, 4 and 6, and that conclusion was reached after an investigation that was reasonable in all the circumstances, including reliance on the audio recording.

Fairness – sanction

123. That left the final question: was the decision to dismiss the claimant rather than impose a lesser disciplinary punishment within the band of reasonable responses? This had to be viewed as if it were a dismissal for gross misconduct following a first disciplinary offence, since the respondent expressly discounted the effect of the outstanding warning in making the decision to dismiss the claimant. As the case law establishes, there are really two questions to be determined. The first is whether it was within the band of reasonable responses to characterise the actions as gross misconduct. The second is whether it was reasonable then to decide that dismissal should ensue. It is at the second stage that questions of mitigation are more likely to be relevant.

124. Mr Norman emphasised that the respondent had not referred to the disciplinary policy in the hearing or the dismissal letter, and that the allegations did not fall within the examples of gross misconduct. They appeared at page 97. Mr Norman relied in part on the fact that the charge was of conduct which "potentially" brought the company's reputation into disrepute, whereas the example of gross misconduct was actual disrepute. In my view that point was misconceived. The actual finding (dismissal letter page 68) was that his actions had brought the company into disrepute. For the reasons set out above this was a reasonable conclusion. More broadly, any difference between the wording of the allegations and the examples of gross misconduct given in the policy appeared to me to be a minor matter. There were a number of examples of gross misconduct which could reasonably be viewed as being evidenced in the claimant's actions. Most obviously he had not obeyed the management instruction set out in the driver handbook about how to deal with a passenger who wishes to complain.

125. In any event the policy sought only to give examples. It was reasonable to conclude that by his actions the claimant had seriously undermined the respondent's trust and confidence in him to represent the company properly in his dealings with members of the public. He had made a bad situation far worse by reacting in a

wholly inappropriate way to a passenger wishing to complain. It was reasonable to regard that as gross misconduct.

126. The second question was whether dismissal was a reasonable sanction. Managers listened to what the claimant said about the circumstances of the day. He was suffering from a chest infection and not feeling well. He was on the telephone to his wife at the time. I was satisfied that these matters had been taken into account even though they did not expressly appear in either the dismissal or the appeal outcome letters.

127. In my judgment it was reasonable to view these matters as not mitigating sufficiently to mean that dismissal should be avoided. Although the claimant was ill, he had not reported sick that day but had come into work as usual. Further, an important factor in the decision to dismiss was the conclusion that the claimant could not be trusted to behave in the correct way in a similar situation in future. That view was formed on the basis of two different matters.

128. The first was the claimant's approach to this matter in the disciplinary and appeal hearings. In the disciplinary hearing he denied having been rude and aggressive towards the passenger (page 49). He made clear that he cared about his wife more than a passenger, yet at the moment he was approached by the passenger he and his wife were having a trivial chat rather than discussing anything urgent or important. The claimant's recognition that his behaviour was not acceptable was something that came only after discussion rather than being a ready acceptance on his part. He accepted the disrepute issue only after a consultation with his representative, and it was only at that stage that he first offered an apology. It was reasonable for managers to conclude that this was done in an effort to get the best result at the hearing, rather than because it represented his genuine views. That was also a view reasonably reached by Mr Hayes on appeal. One of the grounds of appeal was that the claimant had not behaved in an unprofessional way. That was contrary to an acceptance that he had acted wrongly. Mr Hayes explained in his oral evidence that he did not believe the claimant when the claimant said he was sorry in his hearing. He was reasonably influenced by the fact that at one point the claimant said he was sorry it had been caught on CCTV. That suggested he regretted being caught, not regretted his actions. The respondent was therefore entitled to treat with some doubt the claimant's assertion that he would behave differently next time.

129. The second was the reliance by Mrs Commins on the earlier disciplinary matter involving her colleague. The claimant was not aware this was being considered. He should have been told of that so he could have his say. However, looked at in the overall context of this case I was satisfied there was no material unfairness, since there were reasonable grounds for moving to dismissal even without reliance on that earlier matter. I was satisfied it made no difference to the decision Mrs Commins took. In any event it played no part in the thinking of Mr Hayes because he was completely unaware of it. In that sense this procedural defect was "cured" on appeal.

130. Overall, therefore, I concluded that dismissal was a fair sanction. It was reasonable to regard the actions of the claimant at the airport as amounting to gross misconduct and warranting dismissal despite mitigating factors. The failure to tell him of one matter which was taken into consideration at dismissal (though not at the

appeal) did not create unfairness in the overall dismissal given the incontrovertible evidence of wholly unacceptable behaviour found on the CCTV footage.

131. The decision to dismiss was within the band of reasonable responses and the unfair dismissal complaint failed.

Employment Judge Franey

22 December 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
3 January 2018

FOR THE TRIBUNAL OFFICE