EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Gallon	**v**	**London Sovereign Buses London Sovereign Limited**

Heard at: Watford **On:** 26-27 January 2017

Before: Employment Judge Smail

Appearances:

For the Claimant: Mr G Sankey (CAB)
For the Respondent: Mr E Nuttman (Solicitor)

JUDGMENT having been sent to the parties on 31 January 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented on 22 December 2014 the claimant claimed unfair dismissal and wrongful dismissal on the basis of not having received notice pay. The proceedings have had a difficult history. The claimant won both claims before Employment Judge Manley on 23 June 2015. The respondent appealed, the appeal was allowed in part on 13 May 2016, the finding of unfair dismissal was set aside. The learned Employment Judge was said to have substituted her view of the facts and approached the question of Polkey reductions incorrectly. The wrongful dismissal claim ruling, however, was left undisturbed. The unfair dismissal claim was remitted as a whole to a new tribunal. That is me.

2. Mr Sankey submits I have to approach the matter with the finding that Employment Judge Manley made in respect of the wrongful dismissal claim undisturbed. That finding was that the claimant did not use his mobile phone as alleged. Only if I find that there was an unfair dismissal do I need to concern myself with that submission, in particular on the question of contributory fault. For the moment then, I do not need to consider Mr Sankey's submission further.

3. The claimant was employed by the respondent between 1991 and 8 October 2014. He was a bus driver, plainly a long serving one. He was dismissed ostensibly for gross misconduct, namely using a mobile phone while driving a bus.

The Law and Issues

4. The tribunal has had regard to s.98 of the Employment Rights Act 1996. By s.98(1) it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. A reason relating to the conduct of an employee is a potentially fair reason. By s.98(4) where the employer has fulfilled the requirement of ss.1, the determination of the question whether the dismissal is fair or unfair having regards the reasons shown by the employer:

    4.1 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
    4.2 shall be determined in accordance with equity and the substantial merits of the case.

5. This has been interpreted by the seminal case of British Home Stores v Burchell [1978] IRLR 379 EAT as involving the following questions:

    5.1 was there a genuine belief in misconduct;
    5.2 were there reasonable grounds for that belief;
    5.3 was there a fair investigation and procedure;
    5.4 was dismissal a reasonable sanction open to a reasonable employer?

6. I have reminded myself of the guidance in Sainsbury's Supermarkets v Hitt [2003] IRLR 23 Court of Appeal, that at all stages of the enquiry the Tribunal is not to substitute it's own view for what should have happened but judge the employer as against the standards of a reasonable employer, bearing in mind there may be a band of reasonable responses. This develops the guidance given in Iceland Frozen Foods v Jones [1982] IRLR 439 EAT to the effect that the starting point should always be the words of s.98(4) for themselves, that in applying this section an Employment Tribunal must consider the reasonableness of the employer's conduct not simply whether it, the Employment Tribunal, considers the dismissal to be fair. In judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, whilst another quite reasonably take another. A function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if the dismissal is outside the band it is unfair.

Findings of Fact

7. The general manager of the garage from which the claimant worked in Harrow was Amanda Molyneux, now Massingham. She made the following written report on 26 September 2014 and I quote:

> "Subject of report
> Driver using mobile phone. Whilst on duty driving between Harrow garage and Edgware garage I witnessed the above driver using a mobile phone. The driver was identified as Mr Steve Gallon. Having left Harrow garage, I was stationary in my car at the filter right lane in High Street Willesden outside McDonalds. I noticed that the H9 bus was proceeding forward but the driver was not looking ahead. He appeared to be distracted by something to the right of his seating position near the cab window. He did not have full control of the vehicle as his hand was also to the right hand side of his cab. Whilst I was still stationary at the red light the bus continued to proceed through the lights and passed straight passed me. At this time the driver was still distracted. When the bus was parallel to my car I witnessed the driver using a mobile phone. The mobile phone was laying on the control panel/ledge along the bottom of the cab window. The driver was touching the mobile phone as if he was texting. The driver is known to me as Mr Steve Gallon. At the time I did not note the vehicle detail as I was focused on the driver's actions, the vehicle detail etc was obtained from i-Bus when I arrived at Edgware garage. For CCTV purposes I was driving a red Mini and I was wearing my hi-vi vest."

8. The respondent had a policy of not tolerating use of a mobile phone by a driver when driving. The claimant was aware of this. The mobile phone policy as amended at 29 April 2014 read as follows:

> "The use of mobile phones whilst in charge of a vehicle is illegal. You are personally responsible and may face legal penalties of up to £2,500 or prosecution if caught. Company policy forbids the use of a mobile phone or even the wearing of a hands-free headset that could be used to make calls whilst driving. When in charge of your bus you cannot use your mobile phone even if it is on a hands-free setting. If you are caught using your mobile phone or just wearing a headset you will be subject to disciplinary action that may result in dismissal. Please drive safely, do not use your phone on the bus, do not wear any hands-free headsets on the bus."

9. Use of a mobile phone whilst driving the bus was cited as an example of gross misconduct/gross negligence which may lead to summary dismissal in the respondent's disciplinary procedure.

10. A fact-finding interview was held with Miss Molyneux on 30 September 2014. A series of essentially leading questions based on Miss Molyneux's statement were posed by a trainee manager, James Wright. The interview added nothing to the official's report and it has rightly been observed by Mr Sankey that the interview did not really test Miss Molyneux's evidence at all.

11. The claimant was also interviewed on 30 September 2014. He maintained he definitely did not text neither did he make a call. He said he left his phone on the ledge sometimes because he has too much in his jacket pocket, sometimes he has to move the phone as it may slip. He was aware of the company's policy against mobile phone use when driving and that it was against the law.

12. A disciplinary hearing was held by Nick Bolam, a risk manager on 7 October 2014. In the course of this the claimant maintained that he would not be able to see the phone without glasses. By this I take him to have meant that he was long-sighted and would not be able to see the detail on his phone without glasses. The claimant's representative submitted that if Miss

Molyneux may have seen the claimant move the phone on the ledge that is all that she saw and she was mistaken that this action represented texting. The claimant's 23 years' service were emphasized, as was the fact that he had good mystery reviews, that is to say a mystery passenger boards the bus and reports on the driving that customer has seen. The claimant obtained a perfect result some time prior to the date of dismissal. He also received a certificate for having no accidents in 2013. The clear implication of all of this is that, in the main, the claimant is a perfectly good bus driver.

13. There was an unfortunate feature to Mr Bolam's hearing when Mr Bolam himself seemed to accept that when driving a private car he would text. That admission by him was rightly criticised by the trade union representative as not being fitting to the disciplinary event, something also that was submitted to the appeal. In terms of his reasoning, though, Mr Bolam found that the claimant had used his mobile phone while driving. A key point to Mr Bolam was the length of time the mobile phone caused the claimant to be distracted. The claimant was witnessed being distracted by the phone as he was said to have waited stationary at the traffic light controlled junction. It was then reported that this distraction continued as he moved off from the junction. That did not signify a brief moment of the claimant simply moving the phone to a secure position, found Mr Bolam. That finding by Mr Bolam was also unsatisfactory because in fact Miss Molyneux had not purported to say that the bus was stationary at the traffic light. The bus had moved off from the bus some two bus lengths before the traffic light and had continued to move through the traffic light, was what Miss Molyneux saw. The speed the bus reached when passing her was something like 25mph, she speculated. So there was an error of detail in Mr Bolam's findings. He went on, Mr Bolam, that neither during the investigation nor at the disciplinary hearing, had there been any reason to question the validity of Miss Molyneux's witness statement.

14. In conclusion, based on the evidence available to him, including Miss Molyneux's report, the fact finding, the notes from the fact finding interview with the claimant and the claimant's statements at the hearing that day, he had decided that the charge of use of a mobile phone whilst driving was proven, he went on to say that as that was deemed to be gross misconduct he had no alternative other than to dismiss summarily the claimant from employment.

15. The claimant had mentioned in the course of the hearing that he would not be able to see the detail on the phone without glasses. Mr Bolam did not directly address that matter. On appeal the claimant raised a number of points in a statement that he handed in the course, or at the outset, of the appeal. Points made by him were:

    16.1 no CCTV evidence of him using a mobile phone whilst driving;
    16.2 no corroborative evidence;
    16.3 the bus was not being driving erratically at all. This would have been the case if he were distracted;
    16.4 he had full control of the bus;
    16.5 no mention of the fact that he needed glasses to read his phone device. Without them it would be a blur, he said.

16.6 he had instructed O2 to send him an itemised bill, this would show the phone was not being used.

16. Furthermore, he made these points:

16.1 there were no public complaints about him using the phone at the time;
16.2 there were no incidents on the bus.
16.3 as a matter of history, he had had no needless accidents;
16.4 he had a good driving record;
16.5 he had two Safe Driving awards, very good driving assessments and was accident free, and;
16.6 he had a 23 year working history for the respondent.

17. It was mentioned in the appeal, and reliance was placed on the fact, that Mr Bolam had wrongly found that the bus had been stationary at the traffic lights. This was accepted by the appeal panel. They themselves looked at CCTV, they went to the scene of the incident to familiarise themselves with it and they accepted that Mr Bolam was wrong when he said the bus had been stationary.

18. It was submitted by the union representative, and this really became the central point on the appeal, that Miss Molyneux would not have had much time to make her observations and so the observations were unreliable. The claimant and his representative did not take up an offer to view the CCTV footage. It is fair to say that the CCTV footage would not have shown the claimant in the cab because there is an agreement with the unions that the camera is not focused on the driver. I accepted however that the CCTV footage would have shown the presence of Miss Molyneux's car vis-a-vis the bus.

19. The Appeal Panel made a finding on the longevity of the exposure. The Appeal Panel having viewed the CCTV footage on more than one occasion, also visited the scene of the incident, sat in the cab of a relevant bus and looked at the scenario from multiple points and angles to get an understanding of what could or could not have been seen clearly. Had you viewed the CCTV footage, they said, you would have noted the position of the witness car, the position of the bus vis a vis the car and the time span the bus was clearly visible to the car. This supports the general manager's statement of the longevity, clarity of her line of vision and angle. They went on to conclude:

> "We the Panel, having taken the time fully to review all the details of this case and taken the steps to physically attempt to recreate the incident as well as added as many different variances to the scenario, can find no reason to dispute the clear and precise report submitted by the witness. Although the CCTV footage did not cover the driver's cab area the footage provided us with the means to carry out our own investigation to validate to the best of our ability the details provided in the witness statement."

20. The Appeal Panel could find no breach of procedure or relevantly disputed evidence. Their decision was to reject the appeal. In terms of penalty they

expressly wrote that they were not disputing the claimant's length of service or record with the company, however they went on to say, this case was also about the law not only the company policy if a case were proven. So they did not quite say that they had no choice but to dismiss, as Mr Bolam had said. They did take into account length of service and the claimant's record but nonetheless considered the matter of such seriousness that they would dismiss.

21. Their reasoning was to focus upon the validity of the witness statement of Amanda Molyneux and to see if it seemed right. Mr Sankey has made some important points in submission to me in this case.

22.1 Firstly, he said that Miss Molyneux's statement was not tested. Well he is absolutely right that the fact finding interview performed by Mr Wright certainly did not test the evidence. Mr Sankey, before me, and I assume on the last occasion also, subjected Miss Molyneux to a substantial cross examination. That, of course, did not happen before in the course of the internal proceedings and this is a matter I asked questions about. It seems that there is provision for an employee and his representative to ask to cross examine the respondent witness. It seems therefore, and Mr Sankey does not dispute this, that a decision was made not to ask Miss Molyneux to be subjected to cross examination, and even if that was not a deliberate decision, no request was made by the claimant or his representative to cross examine her. That seems to me to be an important matter. There was opportunity for Miss Molyneux to be cross examined, that opportunity was not taken.

22.2 Secondly, Mr Sankey submits that if there was going to be a proper investigation, the respondent needed to get hold of the telephone records from O2. We have already noted that in his written statement to the appeal the claimant said he was in the process of getting hold of those records. However, he did not follow that up with a request that the matter be adjourned pending obtaining those records. The existence of those records and submitting them to the respondent was a matter under his control, not the respondent's control. I do, however, accept of course that those statements were relevant. We now have those statements as a matter of hindsight and they do show that at the relevant time the claimant did not send a text and the claimant did not make a telephone call. Plainly that is relevant information, but it is not exhaustive of the point because it would have been perfectly open to the claimant to use his phone otherwise than by sending a text or making a call. He could have received a call, received a text or looked at information on the phone, it is an i-Phone, the internet, whatever. So whilst the O2 documentation would have been relevant information, first of all it was under his control, second of all he did not ask for an adjournment, and lastly it does not dispose of the case against him wholly.

22.3 Thirdly, there is the matter of the glasses. It is certainly right that this was mentioned before Mr Bolam. It was mentioned also in the claimant's written statement to the appeal. But having scanned the

Minutes of the appeal, this argument was not developed by the claimant or his representative. They did not develop the submission that it was simply physically impossible for the claimant to derive any sense from his telephone from the position where it was on the ledge. If, really, the claimant is so long-sighted that it is the case that he could really see nothing of value from his phone, then again, that is evidence in his control. It was for him and his representative to follow this point through on appeal and, if necessary, adduce evidence from, for example, an optician. The point, as I say, was not followed through on appeal and personally I have the impression that this argument was really floated rather than pursued. And, of course, the real problem that the claimant had was that his phone was there on the ledge. It seems to me open to the respondent to reject his account that it was simply there for convenience sake, rather than there for the possibility of being used. The fact that the phone was there and the fact that he accepts that he was seen touching the phone, although he says just moving it, but nonetheless the fact that the phone was there and he was seen touching it does corroborate what Miss Molyneux said.

Conclusions

22. The fundamental aspect of this case is that the respondent relied upon the report of Miss Molyneux and I have to stand back and consider whether that was reasonable. Miss Molyneux was the manager of this garage. She saw one of her buses coming towards her as she was stationary turning right. She took an interest in what the driver was doing. She had that driver in her view for what is now accepted as 10 seconds. She saw, she says, that he was distracted for that length of time and as the bus pulled up next to her she could see that the source of that distraction was him using the phone and she confirms that it was not simply touching but there was finger movement too, hence as if texting. Now, I have stood back from that and just thought to myself how likely is it that a manager of a bus garage would make such an allegation unless there was reason to make the allegation. It is very difficult to see why, unless there was some undue malice from Miss Molyneux to one of her drivers, that she would make such an allegation. No malice has sensibly been established in this case. Yes, some 10 years prior to this incident Miss Molyneux had dismissed the claimant for alleged fraud associated with handling money, as bus drivers then used to do, but that decision had been overturned on appeal, she had accepted it and it was 10 years previously. There is no credible motive for Miss Molyneux to make up what she saw. She had the claimant and his bus in view for sufficient time to make an allegation credibly.

23. In my judgment, even bearing in mind that such a decision could have severe career implications for the claimant, the cogency of the witness statement was sufficient for the respondent to rely upon it. It is simply implausible to my mind that Miss Molyneux would make such an allegation unless she had reason to make it. I acknowledge that this all very unfortunate. The claimant had long service and was a good bus driver, save for this incident. He is now providing services to another bus company, so in so far as he is a good bus driver, then it is the respondent's loss. But, if there is going to be what amounts to a zero tolerance of drivers

using their phone, and there is no real challenge to that as a policy, then this was reasonably regarded as gross misconduct. Mr Bolam was wrong to say that he had no choice but to dismiss, there is always a choice not to dismiss, but that position was cured, in my judgment, on appeal where the Appeal Panel did consider alternatives. However, because this is of such importance to the company, the appeal panel also chose to dismiss. It is simply not open to me, in my judgment, to say that this position is unreasonable.

24. I note that the traffic commissioners some months down the line have stated that there is no reason, in their view, to report the claimant to the Secretary of State as being unsuited to driving buses. I do not have the reasoning that they adopted, be that as it may. There was no obligation on the respondent to await the Traffic Commissioners' determination which was some months down the line. It was on 20 April 2015 that the Traffic Commissioners sent their decision. Of course it is pleasing that the claimant is free to continue his profession elsewhere but that does not have any impact, it seems to me, on the decision this respondent took.

25. Looking at all the evidence, I cannot find that any decision was taken by the respondent which was outside the band of reasonable responses. As I say, it all comes down to Miss Molyneux's statement. Why would she make that statement unless she had reason to do so? The reason for dismissal was misconduct. There were reasonable grounds for the belief. There had been a reasonable investigation following a fair procedure. Dismissal was a sanction open to a reasonable employer.

26. Accordingly, I find that I am not able to hold that this dismissal was unfair and the claim for unfair dismissal fails.

27. I am told that the respondent is yet to pay the notice payment ordered by Employment Judge Manley. I will order that the outstanding balance of £3,260.00 be paid within 14 days.

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Employment Judge Smail

Date: 28 February 2017

Judgment sent to the parties on

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For the Tribunal office