EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr G Asonitis		Tower Transit Operations Limited

Heard at: London Central

On: 22, 23, 24, 27, 28, 29 January 2020

Before: Employment Judge Adkin
Mr R Pell
Mr J Carroll

Representations

For the Claimant: Mr J Neckles, Union representative
For the Respondent: Mr C Ludlow (Counsel)

JUDGMENT

The judgment of the Tribunal is that the Respondent did:

(a) Wrongfully dismiss the Claimant.

The following claims do not succeed and are dismissed

(b) Claim of unfair dismissal pursuant to section 98(4) Employment Rights Act 1996 ("ERA").
(c) Claim of automatic unfair dismissal pursuant to section 103A of ERA.

REASONS

1. By a claim presented on 20 December 2017 the claimant brings claims (as amended following an order of Employment Judge Snelson 2 May 2018 of unfair dismissal, automatic unfair dismissal (protected disclosures) and wrongful dismissal arising from his dismissal dated 15 September 2017.

The Issues

2. The issues as they relate to liability are as follows:

Unfair dismissal

1. What was the reason for dismissal? R maintains that the reason for dismissal was misconduct and was a reason that could be found to be fair pursuant to s.98 ERA 1996.

2. Has a fair procedure been followed?

3. Did R have a genuine belief in the misconduct of C?

4. Has there been a reasonable investigation?

5. Following that investigation, was R's belief that C committed the acts complained of based on reasonable grounds?

6. Was the dismissal within the reasonable range of responses open to R?

7. Was dismissal reasonable in all the circumstances of the case?

8. Did R act consistently in summarily dismissing C? C relies on Mr Qadeer Siddique as his comparator.

Wrongful dismissal

9. Did C commit an act of gross misconduct?

10. If so, was R entitled to terminate C's contract without notice?

Automatic unfair dismissal – s.103A ERA 1996

11. Did C make qualifying disclosures to R on the dates as set out in the parties' table of alleged protected disclosures?

12. If so, and in C's reasonable belief, did the disclosures tend to show that a person has failed, is failing or is likely to fail to comply with any legal obligation (s.47B(1)(b) ERA 1996) and/or that the health and safety of any individual has been or was likely to be endangered (s.47B(1)(d) ERA 1996)?

13. If so, and in C's reasonable belief, were the disclosures made in the public interest?

14. Was the reason or principal reason for C's dismissal on 29 March 2017 the making of any of the protected disclosures?

The Evidence

3. For the Claimant the Tribunal heard live evidence from:

   3.1. The Claimant himself;

   3.2. Mr A S Hanafi, who attended under a witness order;

   3.3. Mr A Jakupi, who attended under a witness order.

4. For the Respondent the Tribunal heard evidence from:

   4.1. Mr N Mason;

   4.2. Ms S Bates, dismissing manager;

   4.3. Mr V Dalzell, appeal manager.

5. The Tribunal was supplied with CCTV footage in a format that allowed review of the events of 8 August 2017 on the Claimant's bus from cameras in a variety of different positions. There is no audio. We spent some time watching various different angles and utilised a facility which enabled us to watch footage from various different cameras simultaneously.

Procedural matters

6. On the first day of this six day hearing, the parties expressed surprise that there was a single judge sitting alone, when both parties were expecting a panel of three, a point which had apparently been discussed during case management at a hearing with Employment Judge Snelson. Accordingly, after some housekeeping matters were dealt with the matter was adjourned overnight so that two non-legal members could be found. Despite the loss of a day and the parties concerns that in fact the matter required a seven day hearing, with the cooperation of the parties' representatives, we were able to conclude submissions by the morning of the sixth day.

Submissions

7. Both representatives produced written submissions, which they briefly supplemented orally. We have considered these submissions carefully. It has not been necessary to deal with every argument advanced. We have generally only dealt with those arguments which have a direct bearing on the agreed list of issues.

The Facts

8. On 9 October 2006 the Claimant commenced employment driving buses for CentreWest London Buses Ltd based at its Westbourne Park garage.

9. On 22 June 2013 the Claimant's contract transferred to the Respondent under TUPE from CentreWest London Buses.

10. The Claimant has raised numerous a variety of different incidents, complaints and grievances over his employment with the Respondent, which he contends are protected disclosures. These were presented by the parties in the form of a table which with references and the Respondent's comments. These alleged protected disclosures are referred to below as (e.g. Disclosure 1), etc for ease of references in our conclusions below.

11. (**Disclosure 1**) On 2 April 2014 the Claimant wrote to Paul Young (Depot General Manager) providing explanation as to why he was unable to drive a bus. He claimed it was unfit for service and believed it is his responsibility to report buses when they are unfit for service. It also contained a complaint about 'Jim' the engineer's attitude.

12. (**Disclosure 2**) On 15 January 2015 the Claimant wrote to Neil Mason (Route Performance Manager) raising a complaint against 'iBus Controller Davis' for bullying, harassment, intimidation and victimisation. He claimed that the Controller forced him to break Highway Code and Health & Safety by encouraging him to speed up.

13. On 12/13 March 2015 the Claimant submitted a grievance against ibus Controller Adem Jakupi alleging victimisation and harassment.

14. On 3 April 2015 Mr Jakupi submitted a grievance about Claimant.

15. (**Disclosure 3**) On 4 May 2015 the Claimant submitted an Incident report regarding a passenger seat near the wheelchair area being damaged. The Tribunal accepted the Claimant's oral evidence that this related to movement of the lower part of the seat which passengers would sit on.

16. (**Disclosure 4**) On 6 May 2015 the Claimant submitted an Incident report regarding a crack found on the nearside middle of a windscreen.

17. (**Disclosure 5**) On 22 May 2015 the Claimant wrote to Neil Mason raising grievance against Controller Okai regarding his behaviour on the Claimant reporting issue with fuel gauge. The circumstances were that a fuel gauge was flashing on the dashboard indicating that there was no fuel in the vehicle. A

subsequent vehicle would not start since the battery was drained. Claimant complains that the Controller took 17 minutes to respond to his call.

18. (**Disclosure 6**) On 29 May 2015 the Claimant wrote to Neil Mason raising grievance against Controller Okai – the allegation being that the Claimant had reported defects and claims Controller refused to give him a curtailment as he liked to punish him for following the Respondent's procedures.

19. On 19 June 2015 Neil Mason responded to the Claimant's grievance against Controller Okai.

20. On 21 June 2015 the Claimant wrote to Sonia Gentles seeking to appeal against grievance outcome letter of 19 June 2015.

21. (**Disclosure 7**) On 7 July 2015 the Claimant wrote to Christine Gayle (Operations Manager) complaining about Controller Okai. He reported problems with radio and his concerns about the Controller's behaviour.

22. On 7 July 2015 Hassan Raza (Staff Manager) wrote to the Claimant confirming he would be investigating grievance dated 7 July 2015 and meeting arranged for 14 July 2015.

23. (**Disclosure 8**) On 11 July 2015 the Claimant submitted an Incident report regarding a passenger shouting at him using foul language with the result that he contacted the iBus controller.

24. On 28 July 2015 Christine Gayle wrote to the Claimant regarding his appeal against grievance decision of 19 June 2015.

25. On 5 August 2015 Neil Mason wrote to the Claimant regarding grievance dated 22 May 2015 confirming that health and safety issues had been investigated and addressed.

26. (**Disclosure 9**) On 5 August 2015 the Claimant submitted an incident report regarding blocking vehicle and informed CentreComm and iBus.

27. On 6 August 2015 Hassan Raza wrote to the Claimant regarding grievance made on 7 July 2015.

28. (**Disclosure 10**) On 13 August 2015 the Claimant stated that he needed a toilet break to Ismail Khalid.

29. (**Disclosure 11**) On 13 August 2015 the Claimant reported a red light on the bus dashboard to iBus.

30. (**Disclosure 12**) On 13 August 2015 the Claimant reported a red light on dashboard to Rosa Pardo.

31. On 21 August 2015 the Claimant was instructed to attend fact finding interview on 1 September 2015 regarding the four official reports made on 13 August 2015.

32. On 2 October 2015 Transport for London wrote an email to the Respondent and bus operating companies confirming that there is no legal rule that prevents bus drivers letting passengers off between stops provided it is safe to do so.

33. (**Disclosure 13**) On 29 October 2015 the Claimant wrote to Christine Gayle complaining about harassment from iBus Controller Jason.

34. On 30 November 2015 a grievance hearing took place at which Ms Bates heard the Claimant's grievance dated 29 October 2015.

35. On 26 January 2016 Christine Gayle responded to the Claimant's appeal against grievance outcome letter of 6 August 2015.

36. On 9 February 2016 Ms Bates gave an outcome following the Claimant's grievance hearing on 30 November 2015 relating to his grievance of 29 October 2016. As part of that outcome letter she wrote as follows:

> "In addition I have agreed, in the interim, to be your first point of contact for any future matters arising. As discussed I would prefer a brief face to face meeting to relay your concerns rather than taking the trouble to compile lengthy emails and letters, which is something that I noted was discussed with you and the Operations Manager at Atlas Road last year, after you advised her how stressful this process was to you. I will then try to respond verbally at the soonest opportunity. I am aware you have tried to telephone me on two separate occasions and were unable to contact me. Please take advantage of my voicemail facility."

37. (**Disclosure 14**) on 15 April 2016 the Claimant emailed Neil Mason regarding issues with metal frame on protective panel around driver's cab not being securely installed. He stated that the area behind windscreen was dirty from previous installations and there were metal shavings, metal powder, and dust.

38. (**Disclosure 15**) on 14 May 2016 the Claimant was suspended for refusing to drive a bus. On this day there was suspension review meeting at which the Claimant's suspension lifted. During the course of that meeting he raised that the buses were not being cleaned and the dashboard was full of dust. This appeared to relate to matters raised on 15 April 2016.

39. (**Disclosure 15**) On 16 May 2016 the Claimant wrote to Helen Aska, Operating again raising the matter of metal debris, metal shavings and dust.

40. (**Disclosure 16**) Also on 16 May 2016 the Claimant wrote to Ms Aska in a separate letter alleging bullying by engineer Jim.

41. (**Disclosure 17**) On 24 May 2016 the Health & Safety Executive ("HSE") emailed the Claimant regarding his recent contact about health & safety issues and cleaning.

42. (**Disclosure 18**) On 24 May 2016 the Claimant stated verbally to Mr Faton Saiti: “please sub it or have it cleaned before I start my driving duties”. Again he was complaining about the state of the bus.

43. (**Disclosure 19**) 26 May 2016 the Claimant emailed HSE regarding 'same H&S issues' regarding cleaning & sends photos.

44. On 28 May 2016 the Claimant was again suspended for refusing to drive bus.

45. (**Disclosure 20**) 31 May 2016 the Claimant emailed HSE regarding 'I saw one more vehicle with metal shavings at the area behind the windscreen'.

46. On 2 June 2016 the Claimant failed to attend a suspension review meeting.

47. On 2 June 2016 the Claimant was instructed to attend a fact finding interview regarding his refusals to drive busses on 14 May and 28 May 2016.

48. (**Disclosure 21**) On 6 June 16 the Claimant sent a grievance by letter to Ms Aska alleging that he was been 'bullied by same Controller'.

49. On 8 June 2016 the Claimant’s suspension was lifted.

50. (**Disclosure 22**) 12 June 2016 the Claimant submitted Incident report regarding seeing male passenger shouting and abusing another passenger and the Claimant called police.

51. (**Disclosure 23**) On 29 June 2016 the Claimant raised a grievance by letter with Ms Aska alleging he was being bullied, victimised and ‘profiled’ by Controller ‘Peter’ and Engineer 'John'.

52. (**Disclosure 24**) On 14 July 2016 the Claimant informed Scott O’Neill verbally that he was having problems with his seat belt and alleged that it was compromising his health and safety. On 15 July 2016 Mr O’Neill responded to the Claimant’s seat belt problem referring to an inspection that he and the Claimant had carried out the previous day and providing some recommendations for the safe use of the seat belt.

53. (**Disclosure 25**) On 19 July 2016 the Claimant submitted an incident report regarding the panel on bottom of staircase found smashed / vandalised with sharp edges and informed iBus that it was out of service.

54. (**Disclosure 26**) On 7 October 2016 the Claimant submitted an incident report regarding sharp edge in driver’s cab and his torn trousers.

55. On 30.January 2017 the Claimant emailed Ms Aska with a grievance dated 25 January 2017 against Controller ‘Peter’.

56. On 30 January 2017 Ms Aska emailed the Claimant acknowledging grievance, informing him will commence investigation and will arrange meeting when he is fit to resume work.

57. On 2 May 2016 the Claimant resumed his work after long-term sickness.

58. On 20 June 2017 the Claimant sent a letter to Tayo Fanibi regarding his grievance against Helen Aska.

59. On 22 June 2017 the Claimant submitted another grievance, this time against Ibus Controller 'Peter'.

60. On 23 June 2017 Ms Aleksandra Prawucka wrote to the Claimant confirming receipt of grievances dated 6 June 16, 30 January 17, and 22 June 2017 and inviting the Claimant to meet with her on 29 June 2017.

61. (**Disclosure 27**) 13 July 2017 the Claimant submitted an incident report regarding finding damage / vandalism on the rear near side top deck internal panel and informed iBus.

62. (**Disclosure 28**) On 4 August 2017 the Claimant submitted an incident report regarding finding crack on top deck window screen and informed iBus and took the bus out of service.

Alleged conspiracy to get rid of the Claimant

63. Both of the Claimant's witnesses, Mr Hanafi and Mr Japuti, gave evidence to the effect that there was a conspiracy within the Respondent to get rid of the Claimant due to the financial cost of him raising so many problems. They alleged that the Claimant's complaints lead to 'lost mileage' which caused Transport for London ("TfL") to financially penalise the Respondent.

64. Mr Japuti's witness statement stated that Mr Dalzell, the Head of Operations was asking subordinates to keep an eye on the Claimant and find anything that could be reported on. This suggested that senior managers were actively looking for a way of getting rid of the Claimant. It became clear during his oral evidence however that the concerns about the Claimant were held by team of operational controllers who had to deal with him, including Mr Japuti himself. This is also substantiated by various incidents documented in the agreed bundle which controllers demonstrated a scepticism about the Claimant's repeated reports of technical problems.

65. The Respondent's witnesses, in particular Mr Mason and Mr Dalzell denied that there was any sort of conspiracy at all. In respect of the cost of 'lost mileage', they explained that the Claimant's witnesses were overstating the importance of this for three reasons. First, the Respondent inevitably lost mileage every year and budgeted for this. Second, the Claimant was not the only driver to raise technical problems with buses. Thirdly, not all of the problems raised by the Claimant would lead to a financial penalty. We considered the 'iBus Mileage Cause Code Summary for Mileage Performance Reporting' document effective from 28.7.14 (added to page 206A of the agreed bundle). This assigns 30 separate codes for reasons for loss mileage. Nineteen of these codes are "deductible" leading to a financial penalty, e.g. absence, sickness, no serviceable bus, defective wheelchair ramp, staff error. Eleven of these codes are "non-deductible" and do not lead to a penalty, e.g. traffic congestion, incident, disaster, anti-social behaviour, road closed.

66. The Tribunal formed the impression from Mr Japuti's oral evidence that the most that senior managers had done was to suggest that such concerns about the Claimant as were being raised by the controllers needed to be documented before action could be taken. We did not find that Mr Dalzell or other senior managers were actively looking for matters that could be reported in relation to the Claimant.

8 August 2017 incident & investigation

67. On 8 August 2017 there was an incident between a passenger (the "Complainant") and the Claimant at around 23:30 in an otherwise empty bus.

68. On 10 August 2017 the Complainant passenger attended the Respondent's garage to make complaint regarding the incident on 8 August 2017. Specifically he alleged that:

    68.1. He informed the driver when he got on the bus that he would only be going one stop but he carried on past.

    68.2. When the driver said "excuse me I told you I wanted to get of[f] there" the driver verbally abused him.

    68.3. As the driver got off the bus the Claimant called him a "Muslim cunt" repeatedly.

    68.4. The Claimant was identified by the Complainant's description of the route and a physical description of the Claimant. It was never in dispute that the Complainant was talking about the Claimant, since it was possible to view the whole incident on CCTV footage, albeit without any audio.

69. On 15 August 2017 the Claimant was suspended.

70. On 17 August 2017 the Claimant attended a suspension review with Igone Ugaldebere, accompanied by a union representative Mark Harding (RMT), at which suspension was confirmed and continued.

71. On 24 August 2017 the Respondent's investigating manager Aleksandra Prawucka tried to contact the Complainant by telephone about the incident, but was unable to speak to him.

72. On 25 August 2017 the Claimant attended a fact finding interview with Mr Prawucka. This was postponed until 1 September 2017 due to query by Mark Harding regarding the Respondent's CCTV policy. In short Mr Harding disputed on the Claimant's behalf that the Respondent had the power under its policies to consider CCTV footage.

73. Also on 25 August 2017 the Complainant passenger returned Mr Prawucka's telephone call. Further details obtained from him were set out:

    73.1. "As I was crossing the road, I heard the shouting: fucking Muslim/bloody Muslim. I saw the bus driver shouting toward me those words through the open window. He stuck his body through the window."

73.2. "When I got on the bus I noticed that he had a beard and I thought that he was a Muslim and I said to him *salah malkim*. I may have offended him when I think about it now but at the time he never said anything."

74. On 1 September 2017 the Claimant attended a reconvened fact finding interview with Mr Prawucka, accompanied by Mr Harding. The Claimant, apparently on advice, refused to watched the CCTV footage. With the benefit of hindsight at a later stage the Claimant came to the view that this was not good advice. During the course of this meeting the Claimant said:

74.1. The Complainant did not talk to the Claimant when he got on the bus.

74.2. At the second stop the Complainant started ringing the bell.

74.3. The Claimant told the Complainant "I can't stop here for safety reasons".

74.4. The Complainant said "I hope you die of heart attack you fat cunt".

74.5. He had not informed the ibus controllers, not had he called code red [MEANING], not had he filled in a VIR form (vehicle incident report).

74.6. He had however put notes in a VDC card and put this in his bag. He was unable to produce this note at any stage.

74.7. He had put the assault alarm on as he felt threatened and he didn't know how the Complainant was going to react.

74.8. He claimed that he shouted out of the window that the Police was [*sic*] on its way.

75. When the Claimant was questioned about the fact that he had not put in a report given that he usually reports all incidents, his union representative contended on his behalf that a lot of the things he reports are ignored, which he nodded his agreement to.

76. On 1 September 2017 a letter was sent to the Claimant set out charges:

76.1. "1. Alleged abusive behaviour – making inappropriate comments towards a member of the public on 8th August 2017, amounting to religious/racist discrimination.

76.2. 2. Unsatisfactory conduct – failing to stop resulting in a customer complaint dated 10th August 2017"

77. The letter informed him of potential outcomes and instructing him to attend disciplinary hearing on 11 September 2017.

Disciplinary officer's knowledge of protected disclosures

78. Miss Sue Bates was appointed to hear the Claimant's disciplinary. She commenced working as a Staff Manager in March 2015 and became Operations Manager in June 2016

79. We accepted her evidence that she not aware of all of the disclosures relied upon by the Claimant. She had been aware of disclosure 27 in 15 July 2016 relating to a smashed panel caused by vandalism and she had been aware of the the Claimant raising the shavings on the upper deck, which was raised several times in the period April-June 2016.

80. We also accepted Ms Bates' evidence that she communicated well with the Claimant prior to the disciplinary matters and that she had been a sympathetic ear to his concerns, not all of which were health and safety related. She felt that most of the health and safety concerns he raised were justified.

Disciplinary hearing

81. On 14 September 2017 the Claimant attended disciplinary hearing chaired by Miss Sue Bates and accompanied by Alan Jeyes (RMT).

82. At start of hearing the Claimant handed Ms Bates a subject access request letter.

83. The Claimant again declined the opportunity to view the CCTV footage.

84. At the conclusion of this meeting a decision was made to summarily dismiss the Claimant for making inappropriate comments to a passenger amounting to racial / religious discrimination.

85. The decision to dismiss the Claimant was confirmed by a letter dated 15 September 2017. The grounds for dismissal contained in this letter were:

    85.1. The Complainant took the time two days after the incident to come into the depot in person to make a statement of complaint.

    85.2. The Complainant returned the investigator's phone call to give a detailed interview.

    85.3. The Complainant was apparently prepared to attend the disciplinary hearing but in fact did not as he was on holiday in Morocco.

    85.4. The Claimant had shouted something at the Complainant when he could have driven off and it made little sense to tell him that the Police were coming given that the latter was walking away.

    85.5. The Claimant had failed to report the incident which made Ms Bates suspicious that he did not want the CCTV footage retrieved.

    85.6. Ultimately she accepted the Complainant's version of events that a remark was made about his religion.

86. Ms Bates acknowledged that the complainant did not appear in the CCTV footage to talk to the Claimant when he got on the bus, although suggests that he might have said something as he walked down the bus aisle.

Appeal

87. In an email dated 17 September 2017 the Claimant appealed the decision to dismiss him on the grounds (i) severity of sentence; (ii) breach of procedures and (iii) any new evidence he may have.

88. On 18 September 2017 Acas received Early Conciliation notification.

89. On 3 October 2017 an Acas EC Certificate was issued.

90. On 16 October 2017 an appeal hearing was convened before Mr Vince Dalzell and Mr Kieran McDonnell. This hearing was reconvened on 17 October. The Claimant accompanied by his RMT representative Mr Harding. He watched the CCTV footage for the first time.

91. During the appeal hearing the Claimant raised for the first time that the reason he had looked out of the window what that he had heard something punched against the bus which sounded metal.

92. The Claimant's third ground of appeal was in reality an attack on the credibility of the Complainant. It was said on behalf of the Claimant that:

    92.1. The CCTV footage showed that there was no initial conversation when the Complainant got on the bus.

    92.2. How would the Claimant know that the Complainant was Muslim?

93. A document was presented with colleagues' signatures indicating that they did not consider that the Claimant was racist.

94. On 25 October 2017 the Claimant was informed by letter that his appeal had been dismissed.

95. On 20 December 2017 the claim presented his ET1 claim to the Tribunal.

The Law

96. The law on dismissal for misconduct is set out in the well-known case of *Burchell v BHS* [1978] ICR 303 in which the following guidance was given:

> "What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the grounds of misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all,

> there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances of the case."

97. In the Court of Appeal decision in the case of *British Leyland (UK) Ltd v Swift* [1981] IRLR 91, CA Lord Denning MR stated in relation to the sanction of dismissal:

> "The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view".

98. *Iceland Frozen Foods v Jones* [1982] IRLR 439 confirmed that a Tribunal should not substitute its own view as to the right course of action and that the test for unfair dismissal is a 'band of reasonable responses'. *Sainbury's v Hitt* [2003] IRLR 23 confirmed that the 'band of reasonable responses' test applies to the procedure followed by an employer as well as the substantive decision to dismiss.

99. ACAS Guidance stresses that employers should keep an open mind when carrying out an investigation: their task is to look for evidence that supports as well as weakens the employee's case.

100. In respect of the claim of *wrongful dismissal*, the following principles apply:

100.1. A claim of wrongful dismissal requires the Tribunal to consider whether a claimant was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract.

100.2. The underlying legal test to be applied by courts and tribunals is not whether the employee's negligence or misconduct is worthy of the epithet 'gross', but whether it amounts to repudiation of the whole contract.

100.3. A court or tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct (IDS Brief).

101. Of relevance to the claim of *automatically unfair dismissal due to protected disclosures* section 43B of the Employment Rights Act 1996 ("ERA") provides

> "43B Disclosures qualifying for protection.

> (1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) …
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that the health or safety of any individual has been, is being or is likely to be endangered

102. The threshold for establishing reasonable belief in 'public interest' is not particularly difficult to satisfy in view of authority on this point (e.g. *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening)* 2018 ICR 731, CA). In that case the 'public interest' was engaged by N's concern about other employees employed by CGL rather than the public more broadly.

103. Section 103A ERA provides:

> 103A Protected disclosure.
>
> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure

104. In *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55, SC the Supreme Court dealt with a situation in which an dismissing manager dismissed J in good faith, when unaware of the fact that J's line manager had invented performance concerns, motivated by J's earlier protected disclosure. Lord Reid's judgment was that the Tribunal should penetrate the invention when considering whether the sole or principal reason for the dismissal was the disclosure.

CONCLUSIONS

105. Mr Neckles drew our attention to the The Vehicle Drivers (Certificates of Professional Competence) Regulations 2007 and European Directive 2003/59/EC in support of his submission that the distinction between bus driver and bus operator was important. His contention was that the designation 'bus operator' lead to a greater likelihood of personal liability on the part of the Claimant and this had a bearing on the way that the question of whether the Claimant failed to stop should be treated.

106. The Tribunal did not consider find that these points had bearing on the case for two reasons. First, the failure to stop charge was a minor misconduct matter and was not the reason for dismissal, as Ms Bates confirmed in her oral evidence.

Second, the relevant legal authorities are those set on in the section of our reasons dealing with law above.

1. What was the reason for dismissal? R maintains that the reason for dismissal was misconduct and was a reason that could be found to be fair pursuant to s.98 ERA 1996.

107. The Tribunal finds that the reason for dismissal was the Claimant's conduct, specifically his conduct on 8 August 2017.

2. Has a fair procedure been followed?

108. Mr Neckles submitted on behalf of the Claimant that Ms Prawucka the investigating manager was "judge in her own cause". He explained that he meant that she was both an allegation maker and investigator. We have considered the notes of the fact finding interview on 25 August 2017 and the investigation. We do not consider that Ms Prawucka was a witness in this case. We do not consider that there is a good argument that she could not be the investigator.

109. Mr Neckles submits that the charge of making inappropriate comments amounting to 'religious/racist discrimination' was improperly framed. In this respect he relies on *Strouthos v London Underground Ltd* [2004] EWCA Civ 402; [2004] IRLR 636 in which the Court of Appeal held that a charge against an employee should be precisely framed and that the circumstances in which it is permissible to go beyond that charge in a decision to take disciplinary action are very limited. In that case a finding of dishonesty went outside of the charge. The Court of Appeal found that an Employment Tribunal was entitled to find that this made the dismissal unfair.

110. We agree that the language which was alleged to have been used by the Claimant only amounted to religious discrimination. It does not contain a racial element. This is not a situation analogous to *Strouthos*, however. The finding of religious discrimination falls within the parameters of the charge.

111. We do not consider however that this made any difference to the procedure, nor to the substantive conclusions reached in this case. The actual words alleged to have been used by the Claimant were clear at the material stages during the disciplinary process. It was clear that this was the allegation that he needed to answer. We do not see that the use of a catch all phrase 'religious/racist discrimination' caused any unfairness to the Claimant during the investigation nor to the outcome. Religious discrimination was in itself potentially a gross misconduct matter.

112. We consider that a fair procedure was followed.

3. Did R have a genuine belief in the misconduct of C?

113. We accepted the evidence of Ms Bates that she believed in the Claimant's misconduct.

4. Has there been a reasonable investigation?

114. We have considered the fact finding process, the interviews of the Claimant and Complainant, the review of the CCTV footage offered to the Claimant (notwithstanding that he declined this) and the disciplinary hearing held by a separate manager. The Claimant was represented by union representatives at both the fact finding interview and the disciplinary hearing.

115. We consider this was a reasonable investigation.

5. Following that investigation, was R's belief that C committed the acts complained of based on reasonable grounds?

116. The Tribunal queried with Ms Bates how she dealt with the CCTV footage which appears to undermine the evidence of the Complainant that he requested only one stop and gave a Muslim greeting when he got on the bus. This for us was a somewhat troubling aspect of the case. She explained that based on her personal experience as a driver, passengers do continue talking to a driver as they walk up the bus. It is fair to say that there is a period after the Complainant passes the cab where it is more difficult to see him on the CCTV footage.

117. The grounds for dismissal are set out above, contained in the letter dated 15 September 2017.

118. We accept that it was open to Ms Bates to draw an inference from the failure of the Claimant to file an incident report following the events on 8 August that there was something about the incident he wished to hide. It is quite clear from the other evidence in the case that it had hitherto been the practice of the Claimant to document assiduously even minor incidents and problems which had occurred when he was driving a bus. She was entitled to find that it was significant that he did not report an allegation that the Complainant said "I hope you die from a heart attack you fat cunt". The contention that his report and grievances were not taken seriously was unsustainable. The bundle contains a whole series of documented responses to the Claimant's concerns.

119. Ultimately, we consider that it was open to Ms Bates to prefer the evidence of the Complainant to that of the Claimant.

6. Was the dismissal within the reasonable range of responses open to R?

120. We consider that it did fall within the range of reasonable responses to dismiss based on the Respondent's finding that abusive language had been directed at a passenger relating to his religion. This is a serious matter.

7. Was dismissal reasonable in all the circumstances of the case?

121. We consider that dismissal was reasonable in the circumstances of the case.

8. Did R act consistently in summarily dismissing C? C relies on Mr Qadeer Siddique as his comparator.

122. We have considered the authorities of *Post Office v Fennell* [1981] IRLR 221 and *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352, together with other legal authorities relevant to the question of inconsistency referred to the Respondent's closing written argument.

123. Mr Neckles realistically accepted during his closing submission that the circumstances of the comparators are different to the Claimant's.

124. Mr Siddique was given a verbal warning for telling a passenger, who was a fellow Muslim, of the need to be honest as a Muslim when stating the age of her child when boarding a bus. He apologised to the passenger. The circumstances are not comparable.

125. Mr Iqbal received a final written warning for making a remark about the work ethics of a particular group of people. He did not deny making the statement. He stated did not realise that it was racist in nature. When this was explained he was extremely remorseful. The circumstances are not comparable.

126. Mr Anter received a final written warning when he raised his hand to prevent a youth spitting through the assault screen at him, slightly injuring the youth's lip. The circumstances are not comparable.

Wrongful dismissal

9. Did C commit an act of gross misconduct?

127. Was the Claimant guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract? This is different test to considering whether the dismissing manager had reasonable grounds, which we have dealt with above.

128. The Tribunal has not found, on the balance of probabilities that the Claimant did use language which amounted to religious discrimination or abuse, for the following reasons:

    128.1. We have not heard live evidence from the Complainant.

    128.2. The Claimant has given evidence to the Tribunal in which he denied making reference to the Complainant being Muslim.

    128.3. There is no audio on the CCTV footage.

    128.4. At the point that the Claimant is alleged to have made remarks out of the window his face is facing away from the camera. It is not possible to see his lips moving or the expression on his face.

128.5. We find on the balance of probabilities that the Complainant did not make any comment to the Claimant when he boarded the bus. We find that he did not tell the Claimant that he was only going one stop when he boarded and that he did not give a Muslim greeting. These are both important aspects of the Complainant's story and we consider that his evidence these points is unreliable.

129. We find that although the Claimant and Complainant had a testy exchange of words, which we infer from the Complainant's expression and body language just after he disembarked the bus we are not satisfied on the balance of probabilities that this contained religious abuse.

130. We are not satisfied on the balance of probabilities that the Claimant committed a repudiatory breach of contract.

10. If so, was R entitled to terminate C's contract without notice?

131. In view of our finding, the Respondent was not entitled to terminate the Claimant's contract without notice.

Automatic unfair dismissal – s.103A ERA 1996

132. We have dealt with issues 11, 12 and 13 together.

11. Did C make qualifying disclosures to R on the dates as set out in the parties' table of alleged protected disclosures?

12. If so, and in C's reasonable belief, did the disclosures tend to show that a person has failed, is failing or is likely to fail to comply with any legal obligation (s.47B(1)(b) ERA 1996) and/or that the health and safety of any individual has been or was likely to be endangered (s.47B(1)(d) ERA 1996)?

13. If so, and in C's reasonable belief, were the disclosures made in the public interest?

133. The Tribunal examined each of the alleged protected disclosures carefully, in the light of the Claimant's oral evidence on each.

134. In the case of quite a number of the alleged protected disclosures the Respondent offered no submissions at all through Counsel. While we did not treat this as an an admission, in the view of the Tribunal this was a realistic position given that a number of the disclosures plainly fell within section 43B.

135. In summary we found that some of these disclosures were protected disclosures falling within section 43B ERA and others were not.

136. We found that the following <u>were</u> protected disclosures:

136.1. (**Disclosure 3**) 4 May 2015 – we considered that raising the matter of a passenger seat, the lower part of which could move was a protected disclosure. We found that the Claimant had a reasonable belief that this disclosure related to health and safety and was raised in the public interest, since this potentially affected the safety of members of the public who were passengers.

136.2. (**Disclosure 4**) 6 May 2015 – crack in windscreen. While at the lower end of the scale of 'endangerment', we found that the Claimant had a reasonable belief that this disclosure related to health and safety and it was raised in the public interest.

136.3. (**Disclosure 7**) 7 July 2015 – while this is a continuation of the Claimant's dispute with Controller Okie (disclosure 6, discussed below), there are also references to the microphone not working and Mr Okie not wearing hi viz whilst walking around the yard. We find that these are realistically at the lower end of "endangerment", nevertheless they are expressly raised as being breaches of health and safety regulations. Having considered the Claimant's evidence on these points we find that he had a reasonable belief in the health and safety aspect to these concerns, and they were raised in the public interest albeit that there may also have been ulterior motivation at play.

136.4. (**Disclosure 14**) 15 April 2016 the content of this complaint related to screws being loose and metal "shavings" or "swarf" left over from drilling, metal powder and dust. This was clearly, as acknowledged by one of the Respondent's witnesses Mr Mason, a potential health and safety concern. We find that this was raised in the public interest. The Claimant had concerns about other drivers other than himself.

136.5. (**Disclosure 15**) 16 May 2016 this was a continuation of the matters raised in disclosure 14, this time being raised in a suspension review meeting. This was a protected disclosure.

136.6. (**Disclosure 16**) 16 May 2016 this was a continuation of the matters raised in disclosure 14 and 15, this time being raised in a grievance letter. This was a protected disclosure.

136.7. (**Disclosure 17**) 24 May 2016 this was a continuation of the matters raised in disclosure 14, 15 and 16, this time being raised with the Health & Safety Executive. This was a protected disclosure falling into section 43F.

136.8. (**Disclosure 20**) 31 May 2016 this was a continuation of the matters raised in disclosure 14, 15 and 16, this time being raised with the Health & Safety Executive. This was a protected disclosure falling into section 43F.

136.9. (**Disclosure 21**) 6 June 2016 this was a continuation of the matters raised in disclosure 14 and 15, this time being raised in a grievance letter. This was a protected disclosure.

136.10. (**Disclosure 23A**) 29 June 2016 while this was in part the Claimant raising a grievance about the way he had been treated, we accept that the Claimant had a reasonable belief that the bus mirror's arm was bent inwards and that he couldn't shut the window was a health and safety matter. He explained in his oral evidence that he couldn't see the off-side of his vehicle. We consider that it was in the public interest as this would potentially affect the safety of others.

136.11. (**Disclosure 26**) 7 October 2016 we found that the Claimant had a reasonable belief that this disclosure about a sharp edge in the driver's cab related to health and safety and it was raised in the public interest given that it would potentially affect other drivers.

136.12. (**Disclosure 28**) 4 August 2017 we found that the Claimant had a reasonable belief that this disclosure about a sharp edge related to health and safety and it was raised in the public interest given that it would potentially affect passengers.

137. We found that the following were <u>not</u> protected disclosures:

137.1. (**Disclosure 1**) 2 April 2014 – the Claimant conceded in cross examination that the "blinds" (i.e. the displays showing the destination of the bus) were not health and safety related. The reference to a fault on the driver's seat is not one that identifiably related to health and safety but in any event this is merely background to the central thrust of the complaint which is about engineer Jim's sarcasm. We do not consider that the health and safety nor the public interest requirements are satisfied.

137.2. (**Disclosure 2**) 15 January 2015 – notwithstanding the content of this complaint that Gary Davis the controller was pushing him to drive faster, the Claimant admitted during cross examination that he did not believe that Mr Davis was pushing him to driver faster. Accordingly we are not satisfied that the Claimant had a reasonable belief in the health and safety element.

137.3. (**Disclosure 5**) 22 May 2015 – we considered that running out of fuel or a dead battery might in a different context, such as a remote area in very cold weather, amount to a health and safety concern given the risk of passengers being stranded. Given the actual context of urban bus routes, however, in our assessment Mr Asonitis did not reasonably believe that anyone's health and safety would be endangered as a result of these matters.

137.4. (**Disclosure 6**) 29 May 2015 this three page grievance was in our assessment about the poor relationship between the Claimant and Controller Ismail Okie. It is clear from the content of the grievance that the Claimant recognised that Mr Okie was frustrated with the Claimant's approach of seeking to have buses taken out of service (i.e. curtailment) for minor problems which other drivers would simply note in the log but continue driving. We do not find that the Claimant had a reasonable belief that the health and safety of the public was being endangered, nor that this was being raised in the public interest.

137.5. (**Disclosure 8**) 11 July 2015 – while the Tribunal acknowledges that being subject to the abusive language by a customer was plainly unpleasant experience for the Claimant we do not consider that this had the necessary elements of being raised in the public interest and tending to show that the health and safety of a person was or had been (or was likely to be) endangered. This is a routine documentation of an unpleasant occurrence, as required by the Respondent's ordinary processes.

137.6. (**Disclosure 9**) 5 August 2015 – report regarding vehicle blocking - we do not consider that this had the necessary elements of being raised in the public interest and tending to show that the health and safety of a person was or had been endangered. This is a routine documentation of an incident that seems of little consequence.

137.7. (**Disclosure 10**) 13 August 2015 – the Claimant sending a text to request a toilet break we accept was correctly characterised by Mr Ludlow for the Respondent in cross examination as "normal self care". We do not consider that this had the necessary elements of being raised in the public interest and tending to show that the health and safety of a person was or had been endangered.

137.8. (**Disclosures 11 & 12**) 13 August 2015 – this was merely a routine call to a controller. We do not consider that this had the necessary elements of being raised in the public interest and tending to show that the health and safety of a person was or had been (or was likely to be) endangered.

137.9. (**Disclosure 13**) 29 October 2015 this complaint was about the alleged poor attitude of Controller Jason and destination blinds which the Claimant accepted are not safety critical. We do not find that the Claimant had a reasonable belief that the health and safety of the public was being endangered, nor that this was being raised in the public interest.

137.10. (**Disclosure 19**) 26 May 2016 the email we have considered appears to be a general complaint about a reduction in the number of cleaners. We are not satisfied based on the evidence that we received that the Claimant had a reasonable belief that the health and safety of the public was being endangered, nor that this was being raised in the public interest.

137.11. (**Disclosure 22**) 12 June 2016 we do not consider that this had the necessary element of the Claimant reasonably believing that it was being raised in the public interest. This was a case of the Claimant documenting an incident of an abusive passenger. The incident may have been unpleasant, but this was routine documentation of an one-off incident.

137.12. (**Disclosure 23A**) (undated, page 115A-B of the agreed bundle) while we consider that the Claimant had a reasonable belief that this disclosure related to his own health and safety, we do not find that this had the necessary element of him believing that it was being raised in the public interest. This was a matter that was personal to him.

137.13. (**Disclosure 24**) 15 July 2016 this alleged protected disclosure appears to relate to the comfort of the Claimant's seat belt. While we found that there is a (somewhat tenuous) health and safety element here we do not consider that the Claimant can have had a reasonable belief that this was raised in the public interest.

137.14. (**Disclosure 27**) 13 July 2017 there is a lack of specific information about the nature of the damage from which we could find that the Claimant had a reasonable belief in the health and safety and public interest elements.

138. Finally, (**Disclosure 18**) 24 May 2016 we have not received evidence on this alleged protected disclosure. The Claimant has not satisfied the burden on him to establish this as a protected disclosure.

14. Was the reason or principal reason for C's dismissal on 29 March 2017 the making of any of the protected disclosures?

139. Some of the controllers who had to interact with the Claimant during the course of their duties thought that he was a nuisance for raising a serious of comparatively minor technical problems with buses that other drivers might have ignored. One of the Claimant's own witnesses Mr Japuti was candid that he personally had thought that the Claimant was lazy and deliberately raising problems to achieve a 'curtailment' i.e. to avoid having to drive the whole of a route. We infer that other Controllers felt that the Claimant raised too many concerns.

140. The Tribunal did not consider that the instant case was analogous to *Jhuti*, however. There has been no suggestion that the passenger complaint about the incident on 8 August 2017 was as a result of a contrivance of managers or other employees with an agenda to get rid of the Claimant. On the contrary, it is clear that this was an exogenous event which arose entirely independently of employees of the Respondent. The substance of the complaint was on the face of it serious enough to require investigation and was, if true, potentially gross misconduct.

141. The evidence of Ms Bates was that she was personally only aware of two of the disclosures relied upon by the Claimant. This evidence was not challenged by the Claimant's representative. It seems that one of the two 'disclosures' she was aware of, namely metal shavings, was the subject of several separate disclosures during the period April-June 2016. We conclude that she was aware of these and the grievance raised on 30 November 2015 as well as the disclosure raised 15 July 2016. It seems likely that she had formed the impression that the Claimant raised more concerns and complaints than a typical driver. Nevertheless they did appear to have a good relationship of sorts. She was a sympathetic ear. We found no evidence of antipathy on the part of Ms Bates toward the Claimant, nor of any pressure brought to bear on her by anyone leading to her decision to dismiss.

142. We accept Ms Bates' evidence that she was not aware of any conspiracy by the Respondent to get rid of the Claimant. We accept her evidence that she was not aware of instructions to keep an eye on the Claimant.

143. We find that Ms Bates was not influenced by the disclosures she was aware of in her decision to dismiss.

144. We find that the principal reason for the Claimant's dismissal was conduct on 8 August 2017. Based on the findings that we find Ms Bates reasonably made, it was entirely unsurprisingly that she found that the Claimant was guilty of gross misconduct.

Remedy

145. The only element of the Claimant's claim that succeeds is the claim for wrongful dismissal.

146. The Tribunal has not heard submissions on remedy.

147. We make the following observations. The Claimant had worked for 10 full years at the date of dismissal. His contract provides for one week's notice for each full year of service. Calculation of damages therefore ought to be a straightforward matter. The Tribunal would be very surprised indeed if a remedy hearing is necessary.

Order

148. The Tribunal makes the following order:

148.1. The parties are to write in jointly within 14 days of the date that these written reasons are sent out confirming whether or not a remedy hearing is required.

148.2. In the event that the parties are requesting a remedy hearing, the parties should provide a short statement explaining why a remedy hearing is necessary, a time estimate for the hearing and a jointly agreed list of dates to avoid.

_____

Employment Judge Adkin

Date14 Feb 2020

WRITTEN REASONS SENT TO THE PARTIES ON

18/02/2020

.....

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.