Case Number: 2200645/2021

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr D Uyanneh **v** **London United Busways Limited**

Heard at: London Central (by video) **On**: 27 and 28 April 2022

Before: Employment Judge E Burns

Representation

For the Claimant: In person
For the Respondent: Ms Flora Mewies, solicitor

JUDGMENT

The judgment of the Employment Tribunal is as follows:

(1) The Claimant's claims of automatic unfair dismissal pursuant to sections 100(1)(d) and (e) and 103A of the Employment Rights Act 1996 fail and are dismissed.

(2) The Claimant's claim of ordinary unfair dismissal succeeds.

(3) The Claimant's compensation for ordinary unfair dismissal will not be subject to a deduction for Polkey or contributory fault, but will, subject to the tribunal making a final remedy decision, be subject to a 15% reduction under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

(4) The Claimant's claim that he was subjected to a detriment under section 44(1)(d) and (e) of the Employment Rights Act 1996 succeeds for the period between 5 April and 9 June 2020.

(5) The Claimant's claim that he was subjected to a detriment under section 47B of the Employment Rights Act 1996 fails and is dismissed.

REASONS

THE ISSUES

1. This was a claim arising from the summary dismissal of the Claimant by the Respondent for gross misconduct on 2 October 2010.

2. Following a period of Acas early conciliation from 16 December to 18 January 2021, the Claimant presented a claim to the employment tribunal on 13 February 2021.

3. At the start of the hearing, we discussed the issues to be decided. The case had not previously been case managed. The Claimant said that he wished to proceed with claims of automatic unfair dismissal pursuant to sections 100 and/or 103A of the Employment Rights Act 1996 as well as ordinary unfair dismissal. He also said that he wished to pursue a claim that he had been subjected to two detriments pursuant to section 44 and/or 47B of the Employment Rights Act.

4. In relation to the detriments claims, the Respondent argued they had not been pleaded in the Claimant's Claim Form and so would need an amendment application. I agreed with this. It also said that it would not object to one of them proceeding as the witnesses who were present could address it in their evidence. However, the person who would give evidence in respect of the other allegation was not present and they would need to request a postponement in order to be able to deal with that allegation. Having heard what the Respondent had to say, the Claimant decided to proceed solely with the one detriment claim. As the Respondent did not object, I allowed his amendment application

5. The parties agreed that the hearing could be conducted by me sitting alone, even though a case involving a claim of detriments pursuant to sections 44 and/or 47B of the Employment Rights Act 1996 is normally heard by a tribunal panel of three.

6. The issues to be determined were therefore:

Health and Safety: Section 44 / Section 100 Employment Rights Act

5.1 Did the Claimant, in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, leave or while the danger persisted, refuse to return to his place of work?

5.2 Did the Claimant, in circumstances of danger which he reasonably believed to be serious and imminent, take appropriate steps, namely refuse to work, to protect himself or other persons from the danger?

Whether the steps the Claimant took were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

5.3 If the answer to either question is yes, did the Respondent subject the Claimant to the to the detriment of not paying him between April 2020 and the date of his dismissal on this ground?

5.4 If the answer to either question is yes, was this principal reason the Claimant was dismissed?

Protected Disclosures: Section 47B / Section 103A Employment Rights Act

5.5 Did the Claimant make the following disclosures:

(a) Towards the end of March, verbal disclosures to various employees of the Respondent who worked on the counters

(b) A verbal disclosure in a telephone call with Ms Biddle on or around 30 March 2020

(c) A written disclosure in a letter of 18 April 2020

(d) A verbal disclosure in a telephone call with Ms Biddle on around 15 July 2020

(e) A written disclosure in an email of 15 July 2020

(f) A written disclosure in an email of 11 August 2020

(g) A verbal disclosure in a meeting on 7 September

(h) A verbal disclosure in the disciplinary hearing held on 23 September

5.6 If so, in each case:

(a) Was there a disclosure of information?

(b) If so, did the Claimant believe that he was making the disclosure in the public interest?

(c) If so, was it reasonable for the Claimant to hold that belief?

(d) If so, did the Claimant believe that the disclosure tended to show that the health or safety of any individual has been, is being or is likely to be endangered?

(e) If so, was this belief reasonably held?

5.7 Was the Claimant subjected to a detriment on the ground he had made a protected disclosure?

5.8 Was the principal reason for the Claimant's dismissal because he had made a protected disclosure?

Section 98 Employment Rights Act 1996: Unfair dismissal

5.9 What was the principal reason for the Claimant's dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent asserts that it was a reason relating to the Claimant's conduct.

5.10 If there was a potentially fair reason for the dismissal, then in all the circumstances, did the Respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant?

In considering that question, the tribunal shall consider, amongst other things, whether the Respondent acted within the so-called 'band of reasonable responses.

Remedy Issues to be considered at the Liability Stage

5.11 If the dismissal was unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would have been fairly dismissed according to the principle in Polkey v AE Dayton Services Ltd [1987] UKHL 8?

5.12 Would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

5.13 Did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

5.14 Did either party unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase or reduce any award and by how much (up to a maximum of 25%)? At the liability stage, only a provisional decision can be made.

THE HEARING

7. The hearing was a remote hearing by video. From a technical perspective, there were a few minor connection difficulties from time to time. I monitored these carefully and paused the proceedings when required. The participants were told that it was an offence to record the proceedings.

8. The Claimant gave evidence.

9. For the Respondent I heard evidence from:

- Shelia Biddle, who for part of the relevant time was the Staff Manager at Stamford Brook Garage
- Kelly Rahman, General Manager at Stamford Brook Garage

10. There was an agreed trial bundle of 605 pages. In addition, I listened in chambers to a recording made of the Claimant's disciplinary hearing held on 23 September 2020.

11. I apologise to the parties for the length of time it has taken to deliver this reserved judgment to them.

FINDINGS OF FACT

12. Having considered all the evidence, I find the following facts on a balance of probabilities.

13. The parties will note that not all the matters that they told me about are recorded in the findings of fact. That is because I have limited them to points that are relevant to the legal issues.

Background

14. The Respondent operates public passenger transport routes under a contract with Transport for London.

15. The Claimant commenced employment with a company that previously held the contract with Transport for London on 27 February 2012 (61). He was employed as a bus driver, latterly on the 211 route. He transferred to become an employee of the Respondent at the Respondent's Stamford Brook Garage on Chiswick High Road when it took over the route on 2 November 2019.

16. The Claimant had driven the 211 route on the late rota for three to four years before the transfer took place. He was keen to remain on the route because this fitted in well with this lifestyle and childcare responsibilities for his daughter. He was pleased that he was able to continue when his employer changed and following the transfer had continued to drive the same route on the late rota. The Claimant had successfully obtained an Open University degree in his non-working time. More recently he had begun to undertake part time studies with a view to becoming a qualified electrician.

17. It is relevant to note that the Respondent had a Disciplinary & Attendance at Work Policy (the "Policy") (30 – 60) which contains a Disciplinary Procedure that identifies one of the possible outcomes of disciplinary action is summary dismissal. The Policy includes an inexhaustive list of examples of conduct considered to "*constitute gross misconduct or gross negligence or a fundamental breach of contract*" where summary dismissal would be applied (39). The Policy contains a section called "*Dealing with Unsatisfactory Attendance*" (53 – 55) that explains that poor attendance will be dealt with as a disciplinary matter, save in the case of long term sickness absence for which there is a separate procedure (56 – 57).

18. The Policy also contains a specific procedure dealing with situations where an employee is absent without authorisation. Under this procedure, the

Respondent writes to any employee who has been absent for more than three days without having made contact. The employee is told that if they fail to make contact within 7 calendar days, the Respondent will assume the employee no longer wishes to work for it and he or she will be dismissed with statutory notice (58)

Disciplinary Warning

19. The Claimant received a final disciplinary warning from the Respondent on 19 March 2020. The warning was given to him for two separate offences consisting of poor driving and vaping in his cab. A letter was sent to the Claimant confirming the warning which said that it would expire after a period of 24 months subject to his satisfactory performance being maintained.

The Pandemic

20. In late February and early March 2020, the Claimant became very concerned about the potential spread of Covid-19 to the UK. Because he had family links with Italy, he had followed the events that were taking place there closely and was very concerned about the impact of the Covid virus on his family members. At the time his daughter was living with her mother in a different part of London. He agreed with them that his daughter should be taken out of school and that he would not see her. He was also concerned about his father, who was at that time aged 79 and lived with him. The Claimant was 47.

21. The Respondent began to formulate and implement plans to address the risks presented by Covid for its workforce. In the very early stages of the pandemic, the advice available about the impact of the virus was very speculative and unclear. Between 18 March 2020 and 2 October 2020, the Respondent issued the following guidance:

- Sick pay changes dated 18 March 2020 (69)
- Social distancing dated 19 March 2020 (74)
- An FAQ document which was first issued on 20 March 2020 (76) and then updated on 26 March 2020 (96), 2 April 2020 (106), 117 (118) 9 April 2020 (118), 146(147) 16 April (147), (166) (167) 14 May (167), 182 (183) 4 June 2020 (183), 224 (226) 16 September 2020 (226) , 263 (264) 2 October 2020 (264)
- Guidance on Self-isolation dated 20 March 2000 (85) and updated on 23 March 2020 (90)
- Key workers dated 20 March 2020(88)
- Staying at Home dated 25 March 2020 (92)
- A document called “What we will be doing differently” dated 25 March 2002 (93) – this explained that drivers cabs would be sealed and the seats nearest to the drivers on buses would be taped off the seats
- Facemasks and Gloves dated 25 March 2022 (94) – this document explained why the Respondent would not be supplying this equipment
- Annual leave dated 6 April 2020 (116)
- Furlough Scheme FAQs dated 15 April 2020 (129)

- Hardship Fund 22 April 2020 (163)
- Driver Cab Air Circulation Notice dated 15 May 2020 (180) – this explained that on 15 May 2020 the Respondent would begin the work of modifying air conditioning units on buses so that only clean air form outside was circulated within the cab, or alternatively they would be disabled. Drivers were also encouraged to keep the windows in their cans open to allow clean air into their workspace
- Safeguarding Measures During Covid-19 dated 2 July 2020 (199)
- Washable Facemasks 6 July 2020 (201)
- Exceeding current available capacity on buses 21 July 2020 (207)
- Guide on handling Individuals Refusing to Return to Work dated 31 July 2020 (208)
- Covid-19 Update dated 7 August 2020 (214)
- Test and Trace guidance dated 16 September 2020 (225)
- Face Coverings at Work dated 28 September 2020 (247) – this made wearing face masks compulsory in communal areas in garages
- Working From Home guidance dated 28 September 2020 (248)
- Guidance on Test and Trace dated 2 October 2020 (263)

22. Although the Respondent issued the guidance as bulletins to administration staff by email with advice and information about what it was doing, drivers such as the Claimant were not included in the email groups. The Respondent relied on putting up notices in the garage to provide information to the drivers. The Respondent had no mechanism to share information with drivers who were not attending work.

23. The Claimant was worried that the Respondent was not taking adequate steps to keep him and his fellow bus drivers safe. Although the Respondent was supplying hand sanitizer for the use of the drivers, its supplies were difficult to acquire at the start of the pandemic and there was insufficient product to go around. The Claimant found himself in a position where none was available to him. The Claimant was also concerned that the Respondent was not providing the drivers with masks. He started to wear masks that he bought for himself. Although the Respondent had introduced additional cleaning of buses overnight, the Claimant did not consider this was sufficient as he took over in the middle of the day on the late shift. He bought his own sanitizer and wipes with him to work so that he could clean the cab of his bus when he started his shift.

24. The Claimant says he reported his concerns about safety to the supervisors who worked on the counters and to whom he reported at the start and end of his shift. He could not recall precisely what he said.

25. On 23 March 2020, the UK Government announced a UK wide lockdown because of Covid-19 pandemic. Although the number of bus passengers had already been dropping, the announcement meant it dropped further. Transport for London revised its service provision as a result. Bus services did not stop altogether, however, as they were considered essential services to enable key workers to get to and from work. Bus drivers themselves were categorised as key workers.

26. The Claimant had been aware for some time that a change was planned to his bus route that would introduce front door opening in April 2020 (401 – 402). He was very concerned about this as he believed this would exacerbate the already high risk he associated with driving his bus. He asked if Transport for London were committed to making the change. When he was told that it was due to come in place on the following Monday, he decided that it was not safe for him to continue working. He finished his shift on 25 March 2020 and did not return to work subsequently. He advised the shift manager what he would be doing and why.

Contact Between the Claimant and Ms Biddle

27. The Claimant was not the only driver who felt unsafe continuing to work. Others were absent because they were isolating due to presenting with Covid symptoms or because of having had contact with someone presenting with Covid symptoms. Some had been advised to shield due to having underlying health conditions.

28. Ms Biddle, Staff Manager, had been absent from work between 8 to 22 March 2020 due to being on holiday in Italy and then having to isolate on her return. One of her responsibilities, when she returned to work on 23 March 2020, was to make contact with the absent drivers and find out their reasons for not being in work and check on their welfare.

29. Despite having a robust written policy for dealing with sickness absence and authorised absence, the Respondent did not apply it to any absent drivers at this time because the circumstances were exceptional.

30. Although no note of the conversation exists, Ms Biddle and the Claimant believe they first spoke to each other about the Claimant's absence on or around 30 March 2020. Ms Biddle rang the Claimant and the call lasted for over an hour. Prior to this, the only interaction they had had was at the time of the Claimant's induction when he transferred to the Respondent.

31. When giving evidence at the hearing, Ms Biddle and the Claimant agreed that during the call he had told her that he considered the Respondent was not doing enough to keep drivers safe. They also agreed that he had given her some examples of this, including referencing the lack of hand sanitiser and masks. He also told her this was the reason why he had decided to withdraw his labour and that there was some discussion about the steps the Respondent was taking to protect drivers. Ms Biddle did not out the Claimant under any pressure to return to work.

32. Where they differed was in relation to what the Claimant said about his family. Ms Biddle's recollection of the conversation was that the Claimant told her that he was staying away from work because he was concerned about keeping his daughter safe. This was why she referenced this in a subsequent letter she wrote to him dated 8 June 2020. The Claimant denied saying this. My finding is that the Claimant did not say this precisely. The Claimant is an eloquent, talkative man who is a very proud father. I find that he spoke about his daughter and her safety during the

call in general terms and that Ms Biddle assumed that his absence from work was connected to his daughter's safety even though he did not make this connection. In fact, the Claimant was concerned about his own safety and, even more so, that of his elderly father.

33. According to the Claimant's pay slip dated 9 April 2020, the Claimant's pay was stopped from the week commencing 5 April 2020 (343).

34. The next contact between Ms Biddle and the Claimant was around two weeks later. The Furlough Scheme, having been announced in outline on 20 March 2020, was due to be formally launched on 20 April 2020 and so she was contacting absent employees to tell them about it. Following the call, on 17 April 2020, she sent the Claimant an email with the internal email address the Respondent had set up to deal with internal applications. She did not send the Claimant any further details about the Scheme.

35. On 18 April 2020, the Claimant sent the following letter to the email address. He also copied in Ms Biddle:

"To whom it may concern.

I am writing to request to be furloughed due to safety concerns regarding the coronavirus.

Sadly I do not feel we are being adequately protected.

Given that this is a new virus, we have minimal knowledge about it. In this environment it is vital to maximise safety precautions otherwise people will die due to inadequate safety.

Sadly we are seeing the results of inadequate safety measures with bus drivers dieing. I am unprepared to risk this. I am not resigning and fully intend to return once the lock down is over.

I understand that the company has moved to ensure driver safety. I appreciate your efforts.

Due to the lack of testing we do not know how many people have the virus. We do not know if the enclosed environment on the bus is dangerous. We do not know if asymptomatic drivers are still at work.

I am not prepared to risk both my own and my family's health.

I ask you to furlough me and for this to be backdated to when I left due to my safety concerns.

If you would like to discuss this further with me please feel free to contact me whenever suits." (159)

36. The Claimant received a reply from the Respondent's Head of HR telling him that in order to qualify for Furlough payments he would need to provide evidence of an NHS Shield letter for himself or a family member and/or other medical evidence to support the fact that he or a family member was vulnerable. The Claimant visited his father's GP to seek to obtain such evidence, but was unable to do provide it because his father was fit and well. As he could not provide the medical evidence requested in the letter, the Claimant did not apply to receive furlough payments and continued to stay off work without pay. I note that, according to the Respondent's policy on furlough, the Claimant would appear to have qualified simply because of his father's age, but he was not aware of this at the time.

37. From 11 May 2020 onwards the Respondent announced that it would be issuing three disposable face masks to each driver per shift. On 4 June 2020 the Government announced that the wearing of facemasks on public transport would become compulsory from 15 June 2020 in England. The Government also announced the opening of non-essential shops from 15 June 2020.

38. The Respondent's next attempt at contact with the Claimant was on 9 June 2020 (197). Ms Biddle rang him on his mobile, but the Claimant did not answer the call. She also sent him an email (197) attaching a letter (196) which said the following:

Absence from work since the 30th March 2020

You have been absent since 30th March 2020, during which time you have been carrying out no work for the Company.

As you are aware, you have not attended work due to the COVID19 pandemic as you did not want to put your daughter at risk, however you have at no time provided a shielding letter for your daughter to enable us to consider furloughing you. Due to the fact you have no valid reason to be away from work you must return.

As you will be aware, the working environment has changed considerably during this Pandemic, the additional measures we have introduced are:

- Enhanced cleaning with anti-viral product;
- Cab sealing (proof of cleaning)
- Cleaning standards checking (both manager and union)
- Hand sanitiser stations and individual issue;
- Sanitising wipes issued for mid-service cab touch-point cleaning;
- Face masks;
- Changes to air-conditioning (do not draw from internal air);
- Better social distancing in the workplace;
- Reduced capacities on vehicles;

A return to work date has been set for Saturday 13th June 2020, should you fail to attend on this day you will be required to attend an interview for a senior manager review. If for any reason you are unable to return to work, please contact myself immediately upon receipt of this letter.

We look forward to welcoming you back to work, If you have any questions or queries, then please do not hesitate to contact me.

39. Although the letter was sent to the Claimant's correct email address, my finding is that he did not realise it had been sent to him and missed the email. He did not deliberately ignore the call and email. Ms Biddle did not try and call him more than once.

40. At this time, Transport for London was working to try and resume a full bus service by 4 July 2020 and so the Respondent was trying to encourage absent bus drivers to return to work. This was why the letter asked the Claimant to return to work on 13 June 2020. Having not received the letter, the Claimant did not return to work that day.

41. Pubs, restaurants and hairdressers in England were allowed to reopen on 4 July 2020, but subject to strict social distancing rules. There was also a general push in England throughout July and August to encourage people to return to working from their workplaces rather than from home.

42. It took the Respondent a month before it contacted the Claimant about the fact that he had not returned to work on 13 June 2020.

43. Ms Biddle tried to call the Claimant on 13 July 2020 (204) and also wrote to him. Ms Biddle's cover email said:

"Morning Dennison I hope you are well. I sent this email back on the 9th June (please scroll down) and have had no response to this or phone calls made to you. You have failed to stay in contact to let us know when you may be returning to work, therefore I have started the companies absence procedures. The attached absence letter indicates for you to make contact with the garage as a matter of urgency so we can discuss your return to work. I have also noticed we do not have a next of kin for us to make sure you are fit and well. I will attempt to call you this week and send the letters attached by post." (202)

44. She attached the letter dated 8 June 2020 and an additional letter dated 13 July 2020 which said:

Unauthorised absence since 30th March 2020

Dear Dennison

I note that you have not attended work since 30th March 2020.

Please note under the Company's Attendance at Work Procedure if you are unable to attend work for any reason, you must contact the garage and inform us of your situation at least one hour prior to the commencement of your duty. In addition, you are required to submit a self-certificate or doctors medical certificate to cover all dates of non-attendance.

You have failed to comply with the Company procedure and are currently being held as absent without pay.

It may well be that there are reasons for your absence that we are not aware of. I would like you to contact me in the first instance, failing that a Manager at Stamford Brook Garage without delay, giving a satisfactory explanation for your absence. If you are unable to contact me yourself, please ask someone to contact me on your behalf, either by telephone, letter or email informing me of your situation.

I must advise you that if no contact is received within **seven days** of the date of this letter, it may be necessary to refer you to a **disciplinary hearing** which could result in the termination of your employment in accordance with the Company's Attendance at Work Procedure.

Ms Biddle concluded by strongly urging the Claimant to make contact at the first available opportunity (203).

45. The Claimant rang Ms Biddle and explained to her that he had not received the first letter. He said that he was still unsure about returning to work as he had some ongoing concerns and began to outline these. Ms Biddle asked him to put his concerns in writing, which he did in a letter dated 15 July 2022. The letter said the following:

> Hi Sheila
>
> Thanks for the email. I'm glad to see improvements have been made in regards to the safety of both passengers and staff. I am very much looking forward to discussing getting back to work but I would like the reasons for my absence to be clear to everyone. Having said that, it must be a safe environment for me to return to.
>
> We have often been told that safety is the number one priority of both TFL and the bus operating companies. For this reason, I was both shocked and saddened by the slow pace at which the safety of both drivers and customers was being protected.
>
> At the time I withdrew my labour, minimal safety improvements were in place in regards to the corona virus outbreak. Hand sanitizer, which ran out after one day and was not refilled, was there but I felt this was insufficient. The health and safety at work act clearly talks of the need for RPE when "an inhalation exposure risk remains after you have put in place other reasonable controls." I witnessed no such reasonable controls nor was adequate RPE given.
>
> The need to understand the amount of the hazardous substance in the work environment is also discussed by the health and safety at work act. Have such checks been made, and if so, is the data available for us to see? The fact that micro-organisms may be high risk, which is certainly the case here, is highlighted. We, as bus drivers, need to know this information in order to make an informed decision about our safety.
>
> In regards to RPE the health and safety at work act states that, when there is a risk of coming into contact with a biological agent, "you should always use equipment fitted with the highest efficiency filter possible to control exposure down to the lowest levels. Is this the case with the protection you are providing us?
>
> Finally, the employment rights act 1996, states we have the right to withhold our labour on safety grounds and suffer no detriment. This is what I have done but I have suffered detriment. This would appear to be a breach of the act.
>
> In regards to my return, there are two areas in which I still have issues:
>
> 1. Taking over the bus from an asymptomatic driver. This would lead to me working in a contaminated atmosphere.
> 2. Lunch breaks. Where can we have lunch in an uncontaminated area. If we have to travel to a place of safety is sufficient time being added to breaks to allow this?
>
> I look forward to your reply.

Contact Between the Claimant and Mr Grubb

46. Ms Biddle did not reply to the Claimant's letter. In August 2020, the Respondent undertook a restructuring exercise and Ms Biddle ceased to be employed as a Staff Manager. She returned to being a driver and had no further involvement with the Claimant. Instead, Daran Grubb, Transport Manager took over dealing with the case. The Respondent did not inform the Claimant of this change.

47. On 11 August 2020 the Claimant emailed Ms Biddle to chase a response to his letter (216). In this letter he said:

> Hi Sheila.
>
> I hope you are well.
>
> After our phone conversation, and corresponding email, I replied to you via email. I highlighted the safety concerns that lead to my departure from work and the issues I feel need to be addressed in order for me to return.
>
> I feel it is important that I should be confident in the knowledge that my safety is being fully protected and all relevant legaslation is being adhered to.
>
> We have been told many times that neither TFL, nor the bus operating companies, compromise on safety so I will follow these guidelines.
>
> Obviously I still fully intend to return to work. I would be grateful if you could address the issues highlighted in my previous email so that we can make this happen.

48. Mr Grubb responded to the email rather than Ms Biddle and asked the Claimant to forward the previous correspondence to him, which he did.

49. Mr Grubb replied to the Claimant on 3 September 2020 (222 – 223). He provided a detailed response to the Claimant's letter and sought to address the concerns the Claimant had raised. He also described some additional safety measures that the Respondent had put in place. Mr Grubb concluded the letter saying that the Respondent now required the Claimant to return to work on 7 September 2020. He explained that as far as the Respondent was concerned, the Claimant had been on authorised leave since 13 June 2020 as he had been refusing to return to work. He added, "*If you are still refusing to return to work, even though we believe we have followed all reasonable steps to support your return, please note that formal action may be taken against you, which may result in termination of your employment. I therefore hope that you will return to work in the date stated above."*

50. The letter concluded by telling the Claimant that he was required to:

> "*Please arrive at 08:00 [on 7 September] and ask for me at the allocations desk so I can conduct a return to work interview with you*." (223)

51. It is relevant to note that Mr Grubb did not speak to Ms Biddle about the circumstances of the Claimant's case before writing his letter to the Claimant. He relied purely on the information she had included in her previous correspondence to him.

7 September 2020 Meeting

52. The Claimant attended the Samford Bridge Garage as instructed at 08:00 on 7 September 2020 to meet with Mr Grubb. He did not attend in his uniform or come with a pack lunch as he believed that he was simply having a return to work meeting with Mr Grubb, during which they could discuss his residual concerns about safety. He had not been told that he

had been put on the driving rota and so he was not expecting to be required to drive that day. In any event, his normal shift did not begin until the early afternoon so in his mind he would not be required to drive until at least after lunch.

53. The Claimant was broadly satisfied with most of the answers that Mr Grubb had provided to him in his written response. He continued, however, to have two areas of concern as outlined in his letter of 15 July 2020.

54. The first area was asymptomatic drivers. The Claimant's understanding at this time was that the virus was airborne. In early September 2020, the Government's Track and Trace App had not been launched, but was known to be in the final stages of testing and its launch was imminent. It was launched on 24 September 2020. Testing at this time was only available for people who were symptomatic.

55. As the Claimant took over driving a bus mid-way through a day, he was required to get into a small sealed-off cab in which another driver had been breathing all morning. The Claimant was concerned that the driver might have the virus and be breathing it out, but because the driver was asymptomatic, he or she would not realise this. The Claimant was therefore concerned the cab he was entering would be full of air contaminated with the covid-virus.

56. The Claiamnt felt that Mr Grubb's letter had not addressed his concern about asymptomatic drivers. On this topic, Mr Grubb had said:

> As you are aware asymptomatic means, that, no symptoms are shown. Therefore
>
> a. Before buses go into service they undergo deep cleaning
> b. Once the bus is in service, it is the responsibility of the drivers to clean the surfaces before and after use with company provided bacterial wipes.

The Claimant had not been reassured by Mr Grubb's comments as they did not address his specific concern.

57. The second concern identified by the Claimant related to safe places to take breaks and the possibility of additional time for breaks. Mr Grubb had responded to this saying that the Respondent had risk assessed all rest areas and was satisfied that all actions required to make the areas safe had been taken. For this reason, additional break time would not be given.

Meeting on 7 September 2020

58. No notes exist of the meeting that took place on 7 September 2002. Mr Grubb was not present at the hearing to give evidence about what happened. However, it is possible to understand his version of events from the transcript and notes of the subsequent disciplinary hearing and the letter of dismissal.

59. According to Mr Grubb's version of events, at the meeting the Claimant refused to accept that he should be returning to work that day and due to his refusal and attitude, Mr Grubb asked him to leave the building pending a disciplinary hearing (239).

60. According to the Claimant's evidence, he did not refuse to return to work. When Mr Grubb asked him why he had not attended the meeting in his uniform, he had tried to explain that this was because he had thought that the meeting was simply a return to work meeting to discuss his residual concerns. Mr Grubb had not let him give this explanation, however, and instead, had asked him to go home and get his uniform and come back ready to work. The Claimant had responded that it would take a couple of hours to do this, to which. Mr Grubb reacted adversely. He then asked him to leave, effectively suspending him. Mr Grubb became angry and threatened to call the police.

61. I find that the Claimant's account is accurate. I found what the Claimant told the hearing when giving his evidence to be credible and entirely consistent with the recording of the way in which Mr Grubb reacted to the Claimant at the disciplinary hearing. It is also consistent with Ms Rahman's evidence who told me that she spoke briefly to Mr Grubb after the encounter and found to him to be agitated and upset.

62. The Claimant also confirmed when giving his evidence to the hearing that he was using buses to undertake travel at this time, but was being cautious when doing so. He would not, for example, get on a bus unless it was empty enough for him to be able to have plenty of space around him. He also explained that the reason he had predicted it would take him a couple hours to get home and back to work was because he needed to take a bus and there were road works on the route. In addition, he needed to organise making himself something to eat for lunch. Based on his explanation at the hearing, I find that although estimating the time at a couple of hours was generous, it was not an unreasonable estimation taking all the circumstances into account.

Disciplinary Hearing

63. Following the meeting, Mr Grubb invited the Claimant to attend a disciplinary hearing. A copy of the invitation letter was not included in the hearing bundle, but I understand that the charges were that the Claimant had failed to return to work on 13 June 2020 and again failed to return to work on 7 September 2020.

64. Between 7 September 2020 and the date of the disciplinary hearing (23 September 2020) the number of Covid cases began to increase. On 14 September, the Rule of Six was introduced in England.

65. On 21 September 2020, the Claimant's GP referred him for an X-ray of his back for severe lower back pain and sciatica (243).

66. On 22 September 2020, the Government reversed its advice to return to workplaces in England and again advised people to return to working from home where possible. It also introduced a 10 pm curfew for hospitality in England.

67. The Claimant attended the disciplinary hearing, which took place on 23 September 2020 unaccompanied. He covertly recorded the meeting, a transcript of which was contained in the bundle. Mr Grubb also typed a note of the meeting while it was taking place. The two records are largely consistent with each other. I note that Mr Grubb did not wear a mask at the meeting.

68. Mr Grubb opened the meeting by putting to the Claimant that he had refused to accept that he should be returning to work on 7 September 2020 and had displayed a poor attitude. The Claimant responded saying that he had at no point refused to return to work. He explained that he had previously raised concerns with Ms Biddle, which he had then forwarded to Mr Grubb. He said that he had wanted to speak to Mr Grubb about his written response, but had been unable to do so at the meeting on 7 September 2020 because of Mr Grubb's poor attitude. He explained that the reason he had attended the meeting on 7 September 2020 in his ordinary clothes rather than his unform was because he had thought it was a return to work interview and he did not usually star this shift until early afternoon.

69. Mr Grubb then asked the Claimant whether he was prepared to return to work the following day, 24 September 2020. The Claimant replied that he was, but it depended on whether his GP said he could as he had a back injury and needed an x-ray.

70. The Claimant said that he also wanted to have his concerns addressed. These concerns were:

- his ongoing concern about the contaminated atmosphere in the drivers concealed cab. He suggested that this would be addressed through the provision of a high quality mask; and

- he had raised the issue of employees being entitled to withdraw their labour for health and safety reasons, which is what he had done. He believed he had been subjected to a detriment (not being paid) as a result and said that Mr Grubb had failed to address this in his earlier letter.

71. Mr Grubb concluded the meeting by asking the Claimant to let him know what his GP said as soon as possible and that he would let him have his decision in writing in the next few days.

72. Mr Grubb did not ask the Claimant why he had not attended work on 13 June 2020. He did not tell the Claimant that he thought he had been dishonest about the length of time it would take him to get his uniform and be ready for work on 7 September 2020 and give him a chance to respond to this allegation.

73. The Claimant emailed a copy of the X-ray referral letter that he had obtained from his GP to Mr Grubb later that same day and said that he had an appointment with his GP two days later (242). He subsequently (on 25

September 2020) emailed Mr Grubb to say that his GP had signed him off as unfit to work for 4 weeks due to his back condition and provided a copy of the medical certificate (244-245).

74. Mr Grubb sent his decision letter to the Claimant on 2 October 2022. The slight delay was due to giving the Claimant 48 hours to review the notes of the disciplinary hearing. The Claimant responded to this opportunity by saying that 48 hours was insufficient and therefore Mr Grubb treated the notes as correct.

75. Mr Grubb's decision was that the Claimant would be dismissed with immediate effect, with his last day of service being 2 October 2022.

76. In his letter, Mr Grubb said that the reason for the Claimant's dismissal was that the Claimant had "*on two occasions 13/06/20 and 07/09/2020 refused to return to work which is **Gross Misconduc**t. Even though all of the safety concerns that you had were explained to you in my letter I sent you on 03/09/2020. You have also given false statements on the time that it would take you to go home and get your uniform and return to your place of work." (260)*

77. By way of evidence for this conclusion, Mr Grubb set out the following (259):

> All of your concerns about your safety when returning to work were addressed in this letter I sent to on the 03/09/2020.
> These are the safety steps the company has taken for all of its drivers.
> You refused to accept these measures and you also refused at our meeting on the 07/09/2020 to return to work. You did not attend on the 07/09/2020 in your uniform and when I asked you why you had not attended the return to work interview in your uniform, you stated that the letter I had sent you was in your opinion about a return to work date and not about you returning to work.
> The letter clearly stated that you were to return to work 07/09/2020 at 08:00. It also states **that formal action may be taken against you, which may result in termination of your employment. I therefore hope that you will return to work on the date stated above.** You therefore failed to return to work ignoring what the letter had stated to you
> This statement is clear but during this meeting you refused to accept that you had to return to work I gave you the opportunity to go home and get your uniform so that you could return to work, you refused to do this as you stated it would take you at least three hours to go home and get changed into your uniform your and return to work.
> Your home address which we have on file is W12 9JA I have searched this distance on google maps and it is one point six miles away. This distance could have been walked in approximately twenty seven minutes. Your statement of a three hour round trip is therefore false. Even allowing for you to do this journey by car at the time of the interview google maps states this is an eight minute journey, and a bus ride would have been fifteen minutes.
> It is clear that you had no intention of returning to work. By giving a false statement of a three hour round trip
> Your attitude at this meeting was extremely negative and dismissive and due to your poor behaviour I had to ask you to leave the building.
> I also gave you the opportunity to return to work during our Disciplinary meeting on the 23/09/2020 you could not confirm that you were willing to return but that you had to see your doctor for a back injury.

Appeal

78. The Claimant exercised his right to appeal by sending a letter to Ms Rahman on 12 October 2022. Although this was outside the time limit of 7

days specified, the Respondent nevertheless decided to procced with the appeal.

79. In his appeal letter, the Claimant said the following:

"At no point have I refused to return to work as stated by Mr Grubb. In fact, I contracted the company on numerous occasions to arrange my return.

I did not state it would take 3 hours for me to be ready for work. This is a false allegation.

I did highlight safety issues. This I am obligated to do by the Health and Safety at Work Act." (281)

80. The Claimant was invited to attend an appeal hearing in person with Ms Rahman on 4 November 2020. On 2 November 2022, the UK Government announced a further national lockdown in England. The Claimant wrote to Ms Rahman by email that day to say that he would not be able to attend the appeal because of the lockdown. Ms Rahman replied to the Claimant's email the following day to say that as the lockdown was not due to commence until 5 November 2020 the appeal hearing would proceed. She also sought to reassure the Claimant by telling him that she had a well ventilated large meeting room in which they could be socially distanced. The Claimant cannot recall receiving this email although he accepts that it was sent to him. He did not attend the appeal hearing because he continued to believe, erroneously, that it was scheduled to take place during the lockdown.

81. Ms Rahman proceeded to consider the appeal in the Claimant's absence. She spoke to Mr Grubb about his decision making process, but did not speak to Ms Biddle. She sent the Claimant a detailed letter giving reasons why she was rejecting his appeal and upholding the dismissal on 6 November 2020 (290 – 293).

82. It is relevant to note that in the letter she reaches the following conclusions:

- All the correspondence between the Claimant and the Respondent was initiated by the Respondent and none of it had been initiated by him. This was not accurate.

- Between them Ms Biddle and Mr Grubb had addressed all of the safety concerns raised by the Claimant and had given him clear and detailed responses. In my judgment this was not accurate. Neither Ms Biddle nor Mr Grubb had adequately addressed the Claimant's concern about having to get into a contaminated cab.

- He ought to have attended the return work interview in his uniform because he was required to spend the day undertaking refresher training

- He had not mentioned that he had a back injury or provided medical evidence of it prior to the disciplinary hearing

- She considered that the Claimant had made a falsely stated that it would take him three hours to go home to get ready for work on 7 September 2020. She said in her letter:

  "*Whilst there is no recorded minutes from the conversation between Daren and yourself you clearly had no intention of returning to work that day, and I have no reason to distrust my Traffic Manager."*

- She acknowledged that he had raised concerns and that many other employees of the Respondent had done the same

Additional Relevant Evidence

83. During the period when the Claimant was employed but not paid by the Respondent, he survived financially mainly by using his credit card and building up debts. He was able to continue his studies on-line during term time once his college had got this set up. As things began to open up during the summer of 2020, he occasionally accompanied a friend of his who was a qualified electrician on jobs. He earned a small amount from doing this, but the main benefit to him was the learning experience. He has subsequently qualified as an electrician.

84. The Claimant gave evidence that he heard 'on the grapevine' rumours about bus drivers being at greater risk from Covid-19 throughout the time that he was absent. The Claimant included several press articles in the bundle which contained news stories about how bus drivers in London were being impacted by the pandemic. Only one of these was written during the relevant period with which the case is concerned.

85. That article was dated 27 July 2020 and referred to a report commissioned by Transport for London which had found that male London bus drivers aged 20 to 65 were 3.5 times more likely to die from Covid-19 between March and May then men in other occupations across England and Wales. The article records the report's author, Sir Michael Marmout, director of the UCL Institute of Health Equity as saying: "*Driving a bus, coach or taxi is among the frontline occupations associated with increased risk of death form Covid-19. Because London was an early centre of the pandemic, it is likely that the increased risk among London bus drivers is associated with exposure*." According to the report, in addition to being at increased risk due to their jobs, bus drivers were also more at risk "*because of ….. their underlying health, as many had high blood pressure. They were [also] more likely to live in the boroughs worst hit by the virus and many were from black and Asian minority ethnic (BAME) groups*." (405 - 408)

86. The Claimant also included an extract from a discussion that took place in the London Assembly on 18 March 2021. Although the discussion post-dates the relevant period, it records the answers given by Sadiq Khan, Mayor of London, to the question: "*Based on Tfl and ONS data, why do*

London bus drivers have twice the Covid death rate per 100,000 of the most dangerous occupations nationally and twice the rate of bus drivers nationally?" The discussion looks back at the situation for bus drivers since the start of the pandemic and refers to the same Transport for London commissioned research.

THE LAW

Detriments and Automatic Unfair Dismissal

87. Section 44 of the Employment Rights Act 1996 gives an employee the right not to be subjected to a detriment where the employee has taken certain steps to protect himself in dangerous situations. The relevant sub-sections for the purposes of this case were amended with effect from 31 May 2021. The sections that were in force at the relevant time for the purposes of this case said the following:

> *(1) "An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—*
>
> *(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or*
>
> *(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.*
>
> *(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time."*

88. The term "detriment" is not defined in the Employment Rights Act 1996 and tribunals have therefore looked to the meaning of detriment established by discrimination case law. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 it was held that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work.

89. Section 100 of the Employment Rights Act 1996 has similar provisions protecting employees from dismissal.

90. Judicial consideration has been given to these sections in various cases. The focus of such cases has been on what constitutes a 'reasonable belief' and 'serious imminent danger' and how tribunals should determine whether the steps taken by an employee are appropriate. Essentially each case turns upon its own facts, but the tests incorporate a requirement to

identify the Claimant's subjective belief and then to examine whether it was objectively reasonable for him to hold that belief.

91. Section 47B ERA 1996 gives an employee the right not to be subjected to a detriment on the ground that he has made a protected disclosure. Further information about the legal test as to what constitutes a protected disclosure is set out below.

92. Section 103A of the Employment Rights Act 1996 provides that **"***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*".

Causation

93. Even where a Claimant can show detriment, a Claimant will not succeed in a case pursued under sections 44/100 or sections 47B/103A unless he can show a causal link between his protected status by virtue of section 44 or protected disclosure and the treatment by the Respondent that led to the detriment. If there is another reason why the Respondent treated the Claimant in the way it did, the claim will not succeed. An example is found in the case of *Bolton School v Evans* [2007] IRLR 140, CA twhere it was held that the employee was dismissed because of his misconduct and not because he had made a protected disclosure.

94. Section 47B of the Employment Rights Act 1996 will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of a whistleblower (*NHS Manchester v Fecitt and others* [2012] IRLR 64, CA). Section 103A requires the protected disclosure to be "the principal reason" for the dismissal. In both cases, an enquiry into what facts or beliefs caused the decision-maker to act is necessary. I consider the same tests arise for cases pursued under both section 44 and 100 of the Employment Rights Act 1996.

Protected Disclosures

95. Section 47B(1) of the Employment Rights Act 1996 says:

"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

96. According to section 43A "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

97. Section 43B(1) says "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) that a criminal offence has been committed, is being committed or is likely to be committed,
(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 a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

Disclosure of Information

98. There must be a disclosure of information. In *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38, the EAT held that to be protected a disclosure must involve disclosing information, and not simply voicing a concern or raising an allegation.

99. The court of appeal has subsequently cautioned tribunals against treating the categories of "information" and "allegation" as mutually exclusive in the case of *Kilraine v London Borough of Wandsw*orth [2018] EWCA Civ 1436. At paragraphs 30 -31, Sales LJ says:

"*I agree with the fundamental point …….. that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. …….Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. ……*

On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision."

100. He goes on to say at paragraph 35:

"*In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection [43B](1).*"

Reasonable Belief

101. It is irrelevant whether or not it is true that a relevant failure has occurred, is occurring or is likely to occur (*Darnton v University of Surrey* 2003 [ICR] 615, EAT; *Babula v Waltham Forest College* [2007] ICR 1026, CA).

102. The test is whether the Claimant reasonably believes the information shows this. The requirement for reasonable belief requires the tribunal to identify what the Claimant believed and to consider whether it was objectively reasonable for the Claimant to hold that belief, in light of the particular circumstances including the Claimant's level of knowledge. (*Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4, EAT).

Public Interest Test

103. The leading case dealing with when the public interest test is met is *Chesterton Chesterton Global Ltd & Anor v Nurmohamed & Anor* [2017] EWCA Civ 979. The Court of Appeal confirmed that where a disclosure relates to a breach of the worker's own contract of employment, or some other matter under section 43B(1) where the interest in question is personal in character, there may be features of the case that make it reasonable to regard the disclosure as being in the public interest as well as in the personal interest of the worker.

Burden of Proof and Reason for Dismissal

104. According to Cairns LJ in *Abernethy v Mott, Hay & Anderson* [1974] ICR 323:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

This requires the Tribunal to consider the mental processes of the person who made the decision.

105. In an "ordinary" unfair dismissal where the employee has been employed for two years and no automatically unfair reason is asserted, the burden lies on the employer to show what the reason or principal reason was, and that it was a potentially fair reason under section 98(2). Once that is done there is no obligation on either party to prove fairness/unfairness.

106. If the Claimant asserts an automatically unfair reason but has two years of continuous employment in any event, the Tribunal should adopt the approach approved by the Court of Appeal in *Kuzel v Roche Products Limited* [2008] ICR 799. The proper approach is set out in paragraph 30 of that decision and requires the tribunal to ask itself the following questions:

92.1 Has the Claimant shown that there is a real issue as to whether the reason put forward by the employers, gross misconduct, was not the true reason? Has he raised some doubt as to that reason by advancing the automatic reason?

92.2 If so, have the employers proved their reason for dismissal?

92.3 If not, have the employers disproved the automatic reason advanced by the Claimant?

92.4 If not, dismissal is for the automatic reason.

107. In answering those questions, it follows:

93.1 that failure by the employers to prove the potentially fair reason relied on does not automatically result in a finding of unfair dismissal under the automatic section;

93.2 however, rejection of the employers' reason coupled with the Claimant having raised a prima facie case that the reason is an automatic reason entitles the tribunal to infer that the automatic reason is the true reason for dismissal, but

93.3 it remains open to the employers to satisfy the tribunal that the automatic reason was not the reason or principal reason for dismissal, even if the real reason as found by the tribunal is not that advanced by the employers.

93.4 It is not at any stage for the Claimant (with qualifying service) to prove the automatic reason.

Remedy Issues at Liability Stage

108. Where a Claimant succeeds on liability, he may be entitled to compensation. The amount of any compensation is determined at a remedy hearing, but at the liability stage, the tribunal should make certain decisions based on the evidence it has heard, that are relevant to remedy. When making these decisions, the tribunal should consider the overall impact on the likely compensation so as to avoid any double penalisation.

Polkey Principle

109. In accordance with the principle established in *Polkey v AE Dayton Services Ltd* [1988] ICR 142 if I find the dismissal to be unfair, I am required to consider the possibility (in terms of a percentage chance) that this Respondent would have been in a position to fairly dismiss the Claimant. This also includes considering *when* a fair dismissal would have been able to take place *(Mining Supplies (Longwall) Ltd v Baker* [1988] ICR 676 and *Robertson v Magnet Ltd (Retail Division)* [1993] IRLR 512).

Contributory Fault

110. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

111. Section 122(2) provides as follows:

"Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further

reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

112. Section 123(6) then provides that:

"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

Unfair Dismissal

113. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

114. Under s98(4) '*… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case*.'

115. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4) of the Employment Rights Act 1996. However, tribunals have been given guidance by the EAT in *British Home Stores v Burchell* [1978] IRLR 379 with regard to how to approach cases of misconduct.

116. There are three stages:

(a) did the Respondent genuinely believe the Claimant was guilty of the alleged misconduct?

(b) did it hold that belief on reasonable grounds?

(c) did it carry out a proper and adequate investigation?

117. Finally, tribunals must decide whether it was reasonable for the respondents to dismiss the Claimant for that reason in all the circumstances of the case.

118. In considering this case I have reminded myself that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for me to substitute my own decision.

119. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies

as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23, CA)

120. When considering the question of the employer's reasonableness, Tribunals must take into account the disciplinary process as a whole, including the appeal stage. (*Taylor v OCS Group Limited* [2006] EWCA Civ 702)

121. In reaching a decision, I must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

Failure to follow Acas Code of Practice on Disciplinary and Grievance Procedures.

122. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, enables an employment tribunal to adjust the compensatory award for an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance procedures. It says:

"If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) the employer has failed to comply with that Code in relation to that matter, and
(c) that failure was unreasonable,
the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%"

123. I note that tribunals have suggested a lower award should be made in circumstances where, due to the value of other compensation, the ACAS uplift would itself amount to a sizeable sum (*Michalak v Mid-Yorkshire Hospitals NHS Trust and others ET/1810815/08* applying *Wardle v Credit Agricole Corporate and Investment Bank [2011] IRLR 604*). For this reason, it would not be appropriate for me to reach a final decision on any Acas uplift or reduction until a remedy hearing. It is permissible, however, to make a provisional finding based on the evidence heard at the liability hearing.

ANALYSIS AND CONCLUSIONS

Protected Disclosures

124. I first considered whether the Claimant made any protected disclosures. I decided that he did.

125. The first purported disclosures were made while he was still at work, on at least one, if not more than one occasion, at the end of March 2020. He informed the supervisors to whom he had to report at the start and end of his shifts, that the supply of hand sanitizer had run out. Although the Claimant cannot recall precisely who he spoke to or the words he used, this had the requisite requirement of being a disclosure of information. The Claimant believed that the lack of hand sanitizer created a health and safety risk to him and his colleagues. This was a reasonable belief for him to hold at this time, based on what was known about the Covid-19 virus.

126. The Claimant says that he considered it to be his duty to raise health and safety concerns with the Respondent under the Health and Safety Act 1974. Given that this was his motivation, I am satisfied that he believed that he was raising the issue in the public interest and that it was objectively reasonable for him to hold this belief. This is the case with all the other purported disclosures that he made.

127. The next purported disclosure relied upon by the Claimant was made in the telephone call with Ms Biddle on or around 30 March 2020. Again, although we do not know precisely what was said during the call, I am satisfied that the Claimant spoke about the lack of hand sanitizer with Ms Biddle and, given the length of the call, raised with her the concerns he had about the Respondent not issuing masks to drivers and implementing the move to front loading of buses. Raising such concerns involved the disclosing of factual information to Ms Biddle which the Claimant believed showed that the health and safety of drivers and their families was being endangered. It was, in my judgment, reasonable for him to hold that belief at the relevant time.

128. His next purported disclosure was his letter of 18 April 2020. The letter largely expresses concerns and records his position. It also includes the following paragraph.

> *"Due to the lack of testing we do not know how many people have the virus. We do not know if the enclosed environment on the bus is dangerous. We do not know if asymptomatic drivers are still at work."*

This paragraph contains sufficient factual content to lead me to conclude that it qualifies as a disclosure for the purposes of section 43B(1)(d). The Claimant believed that the lack of knowledge he was pointing out existed meant that health and safety was being endangered. In my judgment, this was a reasonable belief for him to hold at the relevant time.

129. The next purported disclosures were made in a telephone call with Ms Biddle on or around 15 July 2020 and the subsequent email of the same

date which the Claimant sent to her. The context of the email was that it put in writing what he had said to Ms Biddle over the phone and so the content of the two forms of communications was largely the same. I have therefore focussed on the letter.

130. The letter repeats the assertion that hand sanitizer had run out. Given that I have found this assertion constituted a protected disclosure when he made it earlier, it follows that repeating it must also be a protected disclosure. The rest of the letter, however, does not contain any further disclosures. It highlights a number of aspects of legislation and asks a number of questions rather than constitute a disclosure of factual information.

131. The next purported disclosure, the letter of 11 August 2020 does not constitute protected disclosure. It is similar to the bulk of the email of 15 July 2022 in that the Claimant is stating his position rather than disclosing information which has factual content.

132. My factual finding of what was said at the meeting of 7 September 2020 between Mr Grubb and the Claimant was that they did not discuss the Claimant's health and safety concerns. Instead, the discussion jumped straight to Mr Grubb asking why the Claimant had not attended in his unform so he could go back to work straight away and the Claimant saying he would take him a couple of hours to get ready. I do not therefore consider there was sufficient opportunity for the Claimant to have outlined his concerns in such a way that he would have made any protected disclosures.

133. In contrast, the notes and recording of the disciplinary hearing held on 23 September 2020 show that the Claimant did have an opportunity to describe his residual concern about getting into a sealed cab after an asymptomatic had been in it and say that he considered this gave rise to a health and safety concern. This was a disclosure of information which the Claimant believed showed that health and safety was being endangered. It was reasonable in my view for him to hold this view.

134. My conclusion therefore was that some (5.5 (a), (b), (c), (d), (e) and (h)), but not all of the Claimant's purported disclosures were protected disclosures.

Health and Safety

135. I next considered whether the circumstances of the Claimant's case met the requirements in sections 44/100(1)(d) or 44/100(1)(e).

136. The Claimant took the decision to, as he put it, to withdraw his labour, on 25 March 2020 because he believed the Respondent was not taking adequate steps to protect the safety of bus drivers due to the Covid-19 pandemic. His concern was in part for his own safety, but was also for the safety of his father who lived with him at the time.

137. Following the announcement of the lockdown, the Claimant believed that the pandemic was creating a dangerous and unsafe working environment for himself, his colleagues and their families. He had, however, continued to report to work. There he found that although the Respondent was putting measures in place designed to protect drivers, he did not feel these were adequate. The trigger for him to decide to withdraw his labour was when he was told that the move to front door opening on his route would be implemented as planned. In his mind, this increased the risk further and he believed this would put him and his father in serious and imminent danger.

138. In my judgment, this was a reasonable belief for the Claimant to hold on 25 March 2020. The Claimant had watched what had happened with the spread of the Covid-19 pandemic in Italy and was aware of the death rate there. His belief that the Respondent was not putting in adequate safety measures was based on his own experience of there being insufficient hand-sanitizer available and the fact that the Respondent was not supplying masks. He was not a party to the detailed information the Respondent had begun to produce and circulate by email about the pandemic, because he did not have a company email account. He asked about the front door opening and was told it was taking place. I therefore find that the circumstances in sections 44/100 (1)(d) and (e) were made out as at 25 March 2020.

139. I am satisfied that the Claimant remained absent up until 7 September 2020 because he continued to have safety concerns. He did not stay away from working as a bus driver because he wanted to focus on his studies or get work experience as an electrician. Although he did these things while he was absent, this was not what motivated him to be remain absent. He had begun his studies prior to the pandemic and had arranged his life to be able to work and study part time at the same time. This was the reason he had wanted to stay driving the same route when he transferred to the Respondent. He had previously managed to study for a degree while working part-time thereby demonstrating that he was as well able to manage part-time study and work.

140. By 7 September 2020, the Claimant's position had changed significantly. He was prepared to return to work at this time. Although he had not been sent any of the detailed information the Respondent had produced about the measures it was taking, the Respondent had provided him with summary information. In addition, by this date, the initial lockdown had been mostly lifted.

141. The Claimant had explained that he had two residual concerns in his letter dated 15 July 2020. The lunch break concern had been addressed in Mr Grubb's letter and I consider the Claimant had effectively accepted the response he had been given. He did not raise this as a concern in the disciplinary hearing or as part of his appeal.

142. This just left his concern about getting into a sealed drivers cab after an asymptomatic, but Covid positive driver had been in it. This had not been

adequately addressed by the Respondent in the relevant correspondence. It was a legitimate safety concern and one which the Claimant had anticipated discussing with Mr Grubb during the meeting on 7 September 2020 before getting back into a bus.

143. In my judgement, had Mr Grubb used the meeting on 7 September 2020 as an opportunity to discuss the Claimant's residual concerns and not confronted the Claimant about the fact that he had turned up not wearing his uniform, the Claimant would have returned to work later that day, or possibly the following day. When giving his evidence, the Claimant explained that although he had a residual concern, he was minded to return to work, subject to having the opportunity to discuss that concern. He was in debt and needed the income.

144. My finding is that the primary reason that he did not return to work was not his residual concern, but was instead because Mr Grubb sent him home and effectively suspended him, following the discussion about how long it would take him to return home and change into his uniform and be ready for work.

Dismissal

Reason for the Dismissal

145. Mr Grubb was responsible for the decision to dismiss the Claimant, but did not attend the tribunal hearing to explain his mental processes. I have therefore had to infer what they were based on the evidence that was presented to me.

146. The reasons given by Mr Grubb in his letter of dismissal can be summarised as follows

- The Claimant had failed to attend work on 13 June 2020. Mr Grubb appears to have deemed this to be an unjustified refusal to return to work

- During the meeting on 7 September 2020, the Claimant had refused to accept that the letter he had been sent on 4 September 2022 required him to return to work at 8 am on 7 September 2020. Mr Grubb deemed that this constituted a refusal to return to work.

- The Claimant provided a false statement that it would take him at least three hours to go home and get changed into his uniform and return to work. Mr Grubb appears to have interpreted this as a clear indication that the Claimant had no intention of returning to work as well as him being dishonest.

- The Claimant was unable to confirm that he was willing to return to work on 24 September 2020.

147. I have already found that the Claimant's position as at 7 September 2020 was that he was prepared to return to work. It therefore follows that he no longer believed, on that date, that driving a bus would put him or his father in serious and imminent danger. The reason for dismissal cannot be that he was refusing work for health and safety reasons because he was not as at 7 September 2020.

148. In my judgment, Mr Grubb would not have ended up dismissing the Claimant if the Claimant had said during the disciplinary hearing that he was able to start work on 24 September 2020. This leads me to conclude that the reason for the dismissal was not because the Claimant had made previous protected disclosures or had previously withdrawn his labour for health and safety reasons. These matters were not in Mr Grubb's mind.

149. What was in Mr Grubb's mind was a belief that the Claimant was more generally refusing to return to work and using various excuses to avoid doing so. Mr Grubb deemed that behaviour to constitute gross misconduct.

150. I am therefore satisfied that the Respondent has proved that its reason for dismissing the Claimant was not one of the automatic unfair reasons he replies upon, but a reason related to the Claimant's conduct.

Was the Dismissal Fair?

151. Having found that the Claimant's dismissal was not automatically unfair, I next considered whether the dismissal was fair, taking into account all the circumstances, applying the Burchell test and when considered through the lens of the reasonable range of responses test. My conclusion was that the claimant was unfairly dismissed for the following reasons.

152. I find that Mr Grubb did hold a genuine belief that the Claimant was guilty of misconduct, but that his belief was not reasonably held. There are a number of reasons for this finding.

153. My primary reason for finding in the Claimant's favour is that I do not consider that a reasonable employer would have reached the same conclusion as Mr Grubb. Mr Grubb's conclusion was that the Claimant's failure to attend the meeting in his uniform, combined with him saying that it would take him a couple of hours to return home to change demonstrated an "*extremely negative and dismissive attitude*" such that he was not prepared to return to work and therefore guilty of misconduct. This was outside the range of reasonable responses.

154. The Claimant's explanation as to why he had attended the meeting in his normal clothes was not only plausible, but reasonable in the circumstances. He was expecting there to be a return to work interview to discuss his residual concerns before he was required to drive. He was also a late driver so he was not expecting to be asked to drive on the morning of 7 September 2002.

155. In my judgment, a reasonable employer acting within the range of reasonable responses would have accepted that the letter of 4 September

2020 was ambiguous and given the Claimant the benefit of the doubt. I also consider a reasonable employer acting in the range of reasonable responses would have wanted to ensure that it had properly understood and addressed the Claimant's legitimate residual safety concerns rather than focus on why he had attended the meeting in his ordinary clothes.

156. The circumstances were that the Claimant had not been in work for nearly six months, during which there had been long periods of time when there had been no contact between him and the Respondent, in relation to which the Respondent appeared to be content with his ongoing absence. In addition, the Claimant had explained his reasons for being absent in writing in letters which also indicated that he was keen to return to work, but had residual safety concerns. There had been a degree of publicity about London bus drivers being at higher levels of risk and it was entirely reasonable for him to be concerned, particularly given that he was living with his elderly father.

157. Another reason for my conclusion is that I consider it was a procedural error for Mr Grubb to conduct the disciplinary hearing. He was the key witness to the Claimant's alleged misconduct on 7 September 2020 and was therefore not in a position to consider the alleged misconduct with fresh eyes at the disciplinary hearing. Previous involvement of the decision maker at the dismissal stage does not necessarily lead to an unfair dismissal, but in this case it did. Mr Grubb was responsible for writing the letter of 4 September 2020 and for the engagement with the Claimant on 7 September 2020. In my judgment, this meant he was unable to stand back from those two things and take an objective view of them.

158. I also identified some further procedural errors made by Mr Grubb.

159. Mr Grubb made no attempt to investigate why the Claimant had not attended work on 13 June 2002. This included not even asking the Claimant why he had not reported for work that day and giving him a chance to offer an explanation. Mr Grubb did not check the position with Ms Biddle before proceeding to deem the Claimant to have deliberately not attended on 13 June 2020. It is noteworthy that the Respondent failed to take any action for a month after 13 June 2020 which suggests that it did not consider the Claimant's failure to report to work on that day to be a priority matter.

160. Mr Grubb did not give the Claimant an opportunity to comment at the disciplinary hearing on the investigations he undertook into how long he believed the Claimant would have taken to get home to change into his uniform. Procedural fairness required that he should have put the allegation that he had made a false statement to the Claimant and given him a chance to respond.

161. Finally, Mr Grubb's letter of dismissal does not explain why he treated the Claimant's certified sickness absence relating to his back as further evidence of the Claimant's misconduct. He appears to have treated the

Claimant's back condition as disingenuous, without any obvious justification.

162. I have considered the extent to which the appeal conducted by Ms Rahman remedied the unfairness of Mr Grubb's dismissal. It is not surprising that it did not because the Claimant failed to attend the appeal hearing and so did not give her a chance to better understand his position. I have taken this into account in relation to the remedy issues.

163. My conclusion therefore is that the Claimant's dismissal was unfair.

Additional Conclusions Relevant to the Dismissal

164. Having reached the conclusion that the Claimant's dismissal was unfair, I have considered whether the Respondent was in a position to fairly dismissal the Claimant pursuant to the *Polkey* principle.

165. The Respondent argued that, even if the Claimant's conduct didn't amount to gross misconduct the Respondent would have been in a position to fairly dismiss him on 23 September 2020 as he had a live final warning as at this date. I do not agree. I do not consider the Claimant behaved in a blameworthy way that would have justified a further disciplinary warning amounting to dismissal. My decision is that there should be no *Polkey* reduction made on this basis.

166. In addition, there should be no *Polkey* reduction arising from the Claimant's back condition. My finding is that the Claimant was prepared to return to work in September 2020 and would have done so, were it not for his back injury. He was signed off for a period of 4 weeks to 18 October 2020, but has not sought to argue that he would have been absent for any longer than this as a result of his back problem.

167. With regard to contributory fault, having said that I do not find the Claimant to be guilty of any blameworthy conduct, it follows that I also conlcude that no reduction should be made to the Claimant's basic or compensatory award should be made. Although he was at fault in failing to attend the appeal hearing, I have taken this into account when determining the Acas adjustment and to take this into consideration twice would be double counting.

168. In relation to the Claimant's failure to attend the appeal, this was, on his own evidence, his fault entirely and not justified. I consider that it is just and equitable to reduce the Claimant's compensation by 15% to reflect this failure.

Detriment

169. Finally, I considered whether the Claimant was subjected to a detriment because he had made protected disclosures or met the conditions in sections 44(1)(d) and (e).

170. The Claimant's case was that the detriment he was subjected to was not being paid from the week commencing 5 April 2020 to his termination date.

171. In fact, from 7 September 2020 to his date of dismissal, I found, as a matter of fact, that the Respondent had effectively suspended the Claimant on 7 September 2020. It ought to have paid him in full in accordance with its policy on suspension between 7 September and his termination date. The reason for not doing this was not because the Claimant had previously made protected disclosures or had previously withheld his labour. Instead, it was because Mr Grubb did not convert him from being absent without authorisation to being suspended on the Respondent's payroll. The Claimant's detriment claim for this period therefore does not succeed. The Claimant did not bring a general breach of contract or unauthorised deductions of wages claim and so I have no jurisdiction to make any award of compensation for this period, albeit he is clearly due to be paid for this time.

172. I am satisfied that the reason the Respondent did not pay the Claimant for the period from 5 April to 6 September 2020 was not because he had made protected disclosures. It was because the Claimant was not making himself available for work. However, if the Claimant was doing this in the circumstances envisaged in sections 44(1)(d) or (e), I consider he is entitled to be paid. The right for an employee who takes action to protect himself or others from danger to be protected from suffering a detriment does not, in my judgment, only apply to protect him or her from future recrimination by his or her employer. It is intended to ensure that an employee who acts to protect himself does not suffer financially as a result of so acting. In my judgment, therefore the Claimant is entitled to be paid his wages for the period where he was not working, but only where the conditions set out in either section 44(1)(d) or (e) were met.

173. I have already indicated that I consider the conditions in both 44(1)(d) and (e) were met at the time the Claimant decided not to go into work. At that time, the Claimant genuinely believed that driving a bus would put himself and his father in serious and imminent danger and in my judgment, it was objectively reasonable for him to do so, based on the information available to him about Covid-19 and the safety measures being taken by the Respondent.

174. I do not, however, consider it was objectively reasonable for him to continue to hold this belief for the entire period up to 7 September 2020.

175. At the time he first left work, the national lockdown was in its infancy and a great deal was uncertain as to the degree of risk from coronavirus. It was known however, that the highest risk was for older people and those with underlying health conditions. The Claimant was not in a high risk group, but he lived with his father who was in such a group because of his age. At the time, the Respondent was beginning to put safety measures in place, but was making slow progress. By the time Ms Biddle wrote to the Claimant on 9 June 2020, however, the situation was different. The lockdown was in the process of being lifted, albeit that high risk groups

were still being advised to shield. In addition, the Respondent had implemented key changes that improved driver safety significantly.

176. In my judgment, by this time, although driving a bus continued to carry a high risk, the serious and imminent danger that had existed had been abated. This conclusion is reinforced by the report undertaken into London bus drivers which indicated that the highest level of deaths occurred at the beginning of the lockdown.

177. The Claimant did not appreciate he had been sent the letter of 9 June 2020 and so he was unaware of the steps that had been taken. However, in assessing the Claimant's reasonable belief, I have to take into account the facilities and advice available to the Claimant. It was open to the Claimant to make enquiries of his employer at any time. He could also have visited his workplace to see for himself. In my judgment, because, additional information was available to him, it ceased to be objectively reasonable for him to continue to believe that by driving a bus he would be putting himself or his father in serious and imminent danger.

178. My conclusion is therefore that the detriment of not being paid lasted for the period from 5 April to 9 June 2020.

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Employment Judge E Burns
10 November 2022

Sent to the parties on:

...10/11/2022

For the Tribunals Office