



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Leander  
**Respondent:** London Central Bus Company Limited  
**Heard at:** Ashford, Kent      **On:** 5 and 6 June 2017  
**Before:** Employment Judge Wallis  
**Members:** Mrs R Serpis  
Mr N Phillips

## Representation

**Claimant:** In person  
**Respondent:** Mr R Bailey, Counsel

# RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:-

1. The Claimant was not unfairly dismissed by the Respondent;
2. The claim of race discrimination was unsuccessful;
3. The claims therefore failed and were dismissed.

# REASONS

## Issues

1. By a claim form presented on 1 August 2015 the Claimant claimed unfair dismissal and race discrimination. Issues of admissibility and amendment in the race discrimination claim were decided at a Preliminary Hearing on 7 November 2016. The detailed reasons for those decisions have been sent to the parties by Employment Judge Elliott and are not repeated here.

2. The issues were agreed at that hearing and are replicated below:-

### **Unfair dismissal claim**

What was the reason for the dismissal? The Respondent asserts that it was a reason related to conduct which is a potentially fair reason for dismissal under section 98(2)(b) of the Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal. The Respondent's case is that the Claimant was dismissed in relation to an incident with a cyclist on 9 March 2016 which was reported to them by the police on 17 March 2016. The Claimant's case is the real reason for dismissal was an outstanding grievance against the dismissing officer.

Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds? The burden of proof is neutral here but it helps to know the Claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:

The investigating officer did not take it seriously, he was giggling and laughing and hitting the desk.

The Respondent should have obtained a copy of the cyclist's statement to the police

One of the investigating officers produced a document allegedly based on a conversation with the police which the Claimant says is fabricated.

The dismissing officer said to the Claimant's union representative that there as a 99% chance of the Claimant being dismissed.

The Claimant was denied access at the disciplinary hearing of seeing all 14 camera frames.

The appeal hearing was tainted by race discrimination as was the process.

Mr Mahon was tasked with finding out if the Claimant had an outstanding grievance and reported that there was not.

Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer? The Claimant was on a final written warning and he challenges the validity of that warning.

If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged.

Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? And/or to what extent and when?

### **Section 13: Direct discrimination because of race**

The Claimant relies on his colour of being black.

Has the Respondent subjected the Claimant to treatment falling within section 39 Equality Act, namely as set out in the Claimant's particulars of race discrimination filed with the tribunal on 31 October 2016.

Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies on hypothetical comparators.

If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

### **Remedies**

If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings and/or the award of interest.

### **Documents and evidence**

3. There was an agreed trial bundle and written statements from each of the witnesses who gave evidence. The Respondent also supplied a cast list and a chronology. During the course of the hearing the Claimant sought to introduce photographs and other recordings which had not been supplied to the Respondent and for which no transcript had been prepared. The Tribunal noted that the directions in the case management order were clear; the Claimant had been represented during the course of preparation for this hearing, and the trial bundle was an agreed trial bundle; the Tribunal decided that further documentation should not be permitted.
4. The Tribunal heard evidence from the Respondent first, at the preference of the Claimant. We heard from Mr Godfrey Junior, an assistant operating manager and the person who investigated the incident that led to the Claimant's dismissal; Mr Brian Goodger, also an assistant operating manager and the person who made a further enquiry about the incident; Mr Graham Johnson, general manager and the person who decided to dismiss the Claimant; and Miss Angela Ryder, general manager operations, and the person who considered the Claimant's appeal against dismissal.
5. The Tribunal also heard from the Claimant himself Mr Dexter Leander.

### **Findings of fact**

6. The Claimant had started working for the Respondent on 16 January 2006 as a bus driver. He drove a night bus on route N171. It was the Claimant's case that there were often incidents and problems on this route. After a number of what might be described as low level incidents, it appeared to the Respondent that the Claimant was not dealing with passenger issues in a way that calmed the situation.
7. In 2014 there were two incidents that were brought to the attention of the Respondent, one by the passenger and one by the Claimant himself. Those incidents were considered together at a disciplinary hearing. The Tribunal noted in the agreed bundle the relevant documentation in respect of that investigation and the disciplinary procedure itself. The Tribunal considered that a proper

procedure had been followed. It was the outcome of this disciplinary hearing, a final written warning, that the Claimant suggested was inappropriate. The Tribunal heard evidence from Mr Johnson about his decision in that matter. The Tribunal accepted his evidence that he would have dismissed the Claimant had he not been persuaded by the Claimant's trade union representative that the CCTV footage of the incident (involving alleged assaults on two women and an alleged assault of the Claimant by one of the women) more or less exonerated the Claimant. Mr Johnson decided to issue a final written warning and directed the Claimant to attend what he referred to as a "customer care course".

8. The Tribunal accepted that what Mr Johnson had overlooked was that the Claimant had attended a 'customer awareness and interactive skills' course in March 2014. Mr Johnson made his decision in October 2014 and therefore because the course was so recent the Claimant was not placed on another course. The Claimant suggested that he was waiting for a "customer care course" and disputed that a customer awareness course was the same thing. The Tribunal accepted the Respondent's evidence that Mr Johnson had used the term "customer care" loosely to indicate the customer awareness course run by the Respondent.
9. The final written warning was to stay on the Claimant's record for two years.
10. In August 2015 the Claimant reiterated a request to be removed from route N171 because of the number of incidents that he was encountering. The Respondent noted that there were few incidents reported on that route when other drivers were allocated to it, but nevertheless Mr Oliver, who was the operating manager at the relevant garage, invited the Claimant to a meeting on 10 November 2015 to discuss his request. In that invitation letter he explained that there were no slots available on other night rotas and therefore the Claimant could not be accommodated on another night bus. Mr Oliver noted that the Claimant had had a total of 14 incidents since December 2012 that had involved some type of assault on the Claimant. He said "this is considerably more than I would expect to see and I have serious concerns about your well being. I have asked in the past that you come to see me in person to discuss the many issues you bring to my attention from time to time and I am disappointed that to date you have not taken me up on my offer".
11. The meeting took place on 10 November 2015. The Claimant told the Tribunal that he was surprised that it turned into a fact finding interview. The notes of the meeting show that the request was discussed in respect of the rotas and Mr Oliver gave his decision that he was placing the Claimant on a day bus duty from the following day. He then went on to investigate two incidents that had been reported to him.
12. On 16 December 2015 the Claimant was reminded of his final written warning after a complaint from passengers who alleged that the bus doors had been closed upon them when boarding and alighting.
13. Mr Oliver had told the Claimant that he could appeal Mr Oliver's decision to Mr Johnson. The Claimant did this by letter of 14 December 2015. He suggested that he was being penalised for doing his job and ensuring that passengers obeyed the rules. When he reported incidents, he felt that he was investigated rather than the Respondent taking any action against the customers.

14. Mr Johnson replied by letter of 15 December 2015 to say that he had considered what the Claimant had said in the letter and had looked at the background. He said that he was satisfied that Mr Oliver had come to the correct decision. He noted the high number of complaints received about the Claimant from the public and he noted that the number of reports of incidents and accidents far exceeded any other driver working on night bus routes. He asked the Claimant to ask for assistance if he felt that he needed it and said “I continue to believe that you can be a valuable part of our team in the future and I will reconsider the decision to allow you to work on nights but only when you have demonstrated positive actions and results from working on day routes where there is a higher level of supervision”.
15. The letter ended by explaining that the Claimant had now exercised his right of appeal under the company disciplinary/grievance procedure and the decision was final.
16. The Claimant presented a grievance letter on 22 December 2015. He said that the grievance was in respect of Mr Johnson’s response to his appeal against the decision of Mr Oliver. He said that it was unfair to penalise him for following instructions and he noted that Mr Oliver had taken over three months to take action. He also complained that Mr Oliver and Mr Johnson had suggested that they did not know of the problems that he had encountered.
17. There was a dispute about whether or not Mr Oliver received that letter in or around December 2015. The Claimant had sent it recorded delivery on 24 December 2015 and the recorded delivery slip was signed by an illegible signature on behalf of the Respondent on 30 December 2015. However, the Tribunal noted that it did appear that it had not been received by Mr Oliver because when the Claimant wrote on 7 March 2016 asking for a response, Mr Oliver wrote to say that he had not received anything from him and asked for it to be re-sent. The Claimant re-sent his letter and Mr Farthing, the personnel manager responded on 31 March 2016. He explained that Mr Johnson had addressed the issue in some detail in his letter of 15 December 2015. He drew the Claimant’s attention to the fact that that was the final stage of the appeal process and he referred to a previous letter that Mr Farthing had sent the Claimant in February 2015 explaining that he had had a number of opportunities (in that particular case) to put his case and there were no further opportunities to explain. He ended “unless you have a new issue to raise I consider this matter is closed”.
18. The Claimant suggested to the Tribunal that his grievance was outstanding because he had not had a grievance meeting to consider it. The Tribunal noted that the grievance procedure is only referred to briefly in the Claimant’s contract of employment. However, in looking at the complaint that the Claimant had defined as a grievance, the Tribunal found that it was an attempt to present a further appeal against Mr Johnson’s decision. There was no further right of appeal. The contents of the Claimant’s complaint letter was not in itself a grievance, but a further appeal against Mr Johnson’s decision. Consequently, the Tribunal was satisfied that if that complaint letter could be described as a “grievance” it was in any event closed by Mr Farthing and his letter of 31 March 2016.
19. Meanwhile, there had been an incident on 9 March 2016 involving the Claimant driving bus 436 and a cyclist. The cyclist had complained to the police that he

had been boxed in between buses by the Claimant's bus. As he had ridden past the Claimant's bus he had struck the bus with his hand. Shortly thereafter, the Claimant had stopped his bus, which had overtaken the cyclist and by then was out of service as he had finished his shift, and had sought to continue the dispute with the cyclist.

20. The Tribunal found that the police alerted the Respondent to the complaint, without revealing details of the cyclist himself. As there had been a complaint from a member of the public passed on by the police, there was a fact finding interview held by Mr Junior with the Claimant on 23 March 2016. The Tribunal was able to read the notes of that fact finding interview and the parties showed the Tribunal excerpts from the CCTV cameras on board the bus showing the cyclist appearing to strike the bus, and later the bus stationary and the Claimant on foot having left the cab, apparently lunging from the back of the bus towards the cyclist as the cyclist cycled past the bus. The CCTV footage was viewed and discussed with the Claimant at the investigation.
21. The Claimant suggested that Mr Junior had laughed and giggled throughout the fact finding interview. There was no evidence to support the Claimant's allegations about this, and they were firmly denied by Mr Junior. Mr Junior produced a detailed report about the fact finding interview which he had clearly treated extremely seriously. The Claimant raised his suggestion that Mr Junior had giggled or laughed at the disciplinary hearing and at the appeal hearing and at both those meetings Mr Junior again denied that he had done so. On balance, the Tribunal found that Mr Junior had not giggled or laughed, but even if he had at any point, it was clear from his report that he had treated the matter seriously and had forwarded the matter for a disciplinary hearing.
22. Mr Goodger was the mentor for Mr Junior at this time and he decided that further information would be helpful from the police to see what the cyclist had said about the incident. He therefore telephoned the police officer named on the complaint. He was passed to another officer who was not present that day and so another (third) police officer gave Mr Goodger some details of the complaint. Mr Goodger wrote those up in a note which the Claimant said was fabricated. The Tribunal was satisfied that this was not a fabricated note and that Mr Goodger had in fact spoken to those police officers. The cyclist reported that he had been sandwiched between buses by the Claimant's bus and he had shouted at the bus and then the bus had overtaken him and braked sharply causing him to also break sharply. He said that the bus later stopped down the road and the Claimant came out from the bus shouting at the cyclist who swerved to get away from him. He considered that the driver had tried to throw a punch at him. There was no other traffic at the time so fortunately the cyclist was able to swerve and not collide with any other vehicle. The cyclist had stopped to take photos of the bus but they were apparently too dark to identify the details.
23. The Respondent noted that the Claimant had not put on the bus destination board "out of service" but had put "route one Canada Water". They considered that this was an attempt to disguise his identity.
24. The invitation to the disciplinary hearing referred to the allegation of showing "violent and indecent behaviour towards a member of the public who is a cyclist". It referred to the Claimant's right to be accompanied; it referred to the possibility of summary dismissal. It did not contain Mr Junior's report, because he handed the invitation to the Claimant at their meeting on a pro forma form. However, the

Tribunal was satisfied that the Claimant had seen the CCTV footage with Mr Junior and he had later seen his report.

25. The Claimant went on sick leave on 30 March 2016 with depression and produced a medical certificate. The Respondent organised a visit to the Respondent's occupational health doctor who confirmed that the Claimant was fit to attend a disciplinary hearing. The disciplinary hearing was re-arranged for 8 April 2016.
26. The Claimant was represented there by his trade union. There was no objection from him or his representative at that time to Mr Johnson considering the matter because of the alleged outstanding grievance. The Tribunal has dealt with that matter above. The Tribunal noted the Claimant's evidence, repeated on a couple of occasions, that Mr Johnson was a good man, and an honest man.
27. Having seen the notes of that meeting, the Tribunal found that there was a clear and full opportunity for the Claimant to put his points to Mr Johnson. Everyone present at that meeting viewed the CCTV. Mr Junior attended in order to explain why he had referred the matter to a disciplinary meeting and to operate the CCTV. The Tribunal noted that it was only at this stage the Claimant suggested that the cyclist had used the "N word" to him. At all times the Claimant's version was that the cyclist had referred to him as a "black \*\*\*\*".
28. After an adjournment to consider the matter Mr Johnson announced that he believed that the Claimant had shown violent behaviour towards the cyclist, that those actions were unacceptable, and that even if the Claimant had not had a final written warning the case on its own merits was gross misconduct and he was summarily dismissed.
29. The right to appeal that decision was explained.
30. The Claimant appealed on the basis of "severity of award. Procedures". He requested copies of the disciplinary minutes and it was not clear to the Tribunal when and if he received those. Pausing there, the Tribunal had some concern that the Respondent's procedures, although not unreasonable, could be improved by sending relevant documents to persons called to a disciplinary hearing before the hearing took place, by letter which set out which documents were enclosed. That would avoid any arguments about what had been disclosed to the employee.
31. The appeal meeting took place on 4 May 2016. Mr Junior again attended to show the CCTV footage and to be questioned by the Claimant. The Claimant was represented again by his trade union. The appeal panel comprised Miss Ryder and Mr Mahon. Mr Mahon had previously heard appeals but was about to retire and Miss Ryder was to take his place. She had experience of sitting as a side member on appeal panels. This time was her first time chairing an appeal panel. Mr Mahon was there as the side member in order to support her. The Tribunal found that Miss Ryder was a credible and straightforward witness who was quite clear about the reason for her decision. We noted that the chairman of the appeals panel had a casting vote where there was any dispute.
32. In response to the Claimant's suggestions that the appeal hearing had been unfair because Mr Mahon had influenced Miss Ryder, she denied that and we found that he had not done so. We found that she was entirely able to make her own decision and that she had done so on the evidence before her.

33. The Tribunal found that from the oral evidence and having seen the minutes of the meeting that the Claimant had every opportunity to put his case. It was difficult to understand, from what the Claimant said, when he had received the documentation for the appeal hearing. When he was questioning Miss Ryder he said he had had the documents some 20 minutes before the appeal hearing. In his evidence he said that he had had them two hours into the meeting. We found that there was no evidence that his representative had complained that he had not had the documents in good time to prepare and neither did the representative or the Claimant ask for any further time to prepare before the meeting went ahead. The Tribunal found that the Claimant or his representative had the documents in time to participate fully in the appeal hearing.
34. It was clear to the Tribunal from the minutes that the Claimant was difficult at that hearing. For example, he had to be told on a number of occasions to put his telephone away and in fact his own representative had to tell him to do so.
35. The appeal meeting was covertly recorded by the Claimant, including the panel's private deliberations, and at the Preliminary Hearing it was decided that the recording was admissible. In particular, the Tribunal's attention was drawn by the Claimant to the covert recording of the panel's deliberations.
36. The Tribunal noted that when he was giving evidence to the appeal panel, the Claimant said that he did not get upset by racial abuse, he had lived in New York and abuse was "like the wind" to him. This was in contrast to what he had said at the disciplinary hearing, where he had said that he was upset and annoyed by the racial abuse from the cyclist and simply wanted to get to the garage and then go home.
37. The covert recording shows that when the panel were discussing this point in private, Mr Mahon said, quoting the Claimant " 'I was in New York and saying sorry is only wind'. I was tempted to say to him you are only a little black \*\*\*\* aren't you. And he is lunging at the cyclist there".
38. The Tribunal noted that the allegation of race discrimination was a serious one and that reading those words could, at first blush, appear to indicate that Mr Mahon was expressing an opinion about the Claimant. However, the Tribunal noted that at that point the panel were looking at the CCTV footage or the photographs of that footage and the Tribunal found that Miss Ryder's evidence was very clear that Mr Mahon was suggesting that the Claimant had been upset by what had been said to him by the cyclist, that Mr Mahon was expressing disbelief that racial slurs were "like the wind" to the Claimant, and that Mr Mahon's view was that because he had been upset by the cyclist, the Claimant left the bus, waited for the cyclist to cycle past, and lunged towards the cyclist as he passed the bus. Mr Mahon's reference to the racial slur was him suggesting that he was tempted to say those words to the Claimant himself to see what reaction he would get, because he did not believe that the Claimant would not be upset by them.
39. The Tribunal spent some time considering this as it was a serious allegation and Mr Mahon was not at the Tribunal in order to tell us himself. However, on balance, we accepted Miss Ryder's clear and persuasive evidence that this was the context of that statement.
40. Miss Ryder decided to uphold the dismissal and Mr Mahon supported her decision on that.



## Submissions

41. The Tribunal decided to hear the Respondent's submissions first so that the Claimant could respond to them if he wished. Mr Bailey referred to the claims being made and the evidence that we had heard.
42. The Claimant said that he did not need any further time to consider his closing submissions. He pointed out that Mr Mahon had retired in September 2016 and had not been reprimanded by Miss Ryder about his comment. He said that there had been a prolonged campaign of bullying against him by managers and there had been acute bias. He said that he had adhered to his own principles and had given evidence by telling the truth.

## The law

43. Section 13 of the Equality Act 2010 deals with direct discrimination and provides that A discriminates against B if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
44. Section 23 refers to comparators and says that there must be no material difference between the circumstances relating to each case. The circumstances include a person's abilities if the protected characteristic is disability.
45. The burden of proof in respect of these provisions is contained in section 136. That provides that if there are facts from which the court could decide, in the absence of any other explanation, that A contravened the provision concerned, the court must hold that the contravention occurred. However, it also provides that that provision does not apply if A shows that A did not contravene the provision. It is therefore for the Claimant to prove facts from which the Tribunal could, apart from the relevant section, conclude in the absence of an adequate explanation that the Respondent has committed a discriminatory act. If the Claimant does that, the Tribunal shall uphold the complaint unless the Respondent proves that he did not commit that act.
46. It is recognised that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in Igen Ltd v Wong and Others [2005] IRLR 258, confirmed by the Court of Appeal in the case of Madarassy v Nomura International PLC [2007] IRLR 246.
47. Section 98 of the Employment Rights Act 1996 provides that it is for the employer to show the reason for the dismissal. It must be a reason falling within subsection (2) or some other substantial reason which justifies the dismissal of an employee holding the position which the employee held.
48. In this case, the reason relied upon by the Respondent is conduct. In the case of **British Home Stores v Burchell [1978] IRLR 379** it was decided that the test was whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. The employer must establish that they did believe that the misconduct had occurred; (see **Post Office v Foley**; **Boys and Girls Welfare Society v McDonald**). As far as the other two limbs of the test are concerned, these go to the question of reasonableness under section 98(4) of the Act (see **Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09**). So, the burden of proof

is neutral in respect of the second and third questions laid down in **Burchell** namely whether there were reasonable grounds for the belief and whether there was a reasonable investigation.

49. In **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23** it was held that the range of reasonable responses test 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.
  
50. In order to decide whether the dismissal is fair or unfair, having regard to the reason shown by the employer, the Tribunal must consider 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 that question shall be determined in accordance with equity and the substantial merits of the case (section 98(4)). It is quite clear from decisions such as that in **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** that the Tribunal must consider the reasonableness of the employer's conduct, not simply whether they, the Tribunal, consider the dismissal to be fair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. It is recognised that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another. The function of the Tribunal therefore is to decide whether in the particular circumstances of the case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. Quite simply, if the dismissal falls within that band, then the dismissal is fair; if the dismissal falls outside that band, it is unfair. That decision was subsequently approved by the Court of Appeal in **Post Office v Foley [2000] IRLR 827**. It was emphasised that the process must always be conducted by reference to the objective standards of the hypothetical reasonable employer, and not by reference to the Tribunal's own subjective view of what they in fact would have done as an employer in the same circumstances.

## Conclusions

51. Having made the findings of fact set out above, we returned to the issues in the case in order to draw these conclusions, having regard to the relevant law.
  
52. We concluded that the reason for dismissal was conduct. We could not accept the Claimant's suggestion that the real reason for dismissal was that there was an outstanding grievance against Mr Johnson. That matter had been dealt with by Mr Farthing before the disciplinary hearing. We considered that there was no evidence to suggest that Mr Johnson had decided to dismiss the Claimant because the Claimant could not accept the decision that he be taken off the night bus route. Indeed, the Claimant himself had described Mr Johnson as an honest man and a fair and good man.
  
53. We concluded that Mr Johnson had a genuine belief that the misconduct had taken place and that was based on reasonable grounds following a reasonable investigation. Indeed, the Tribunal concluded that the CCTV footage was clear

that the cyclist had struck the bus and that later the Claimant appeared to have waited for the cyclist and lunged towards him as he cycled past the stationary vehicle.

54. The Claimant had set out a number of matters about what he said was the unfairness of the dismissal. The Tribunal concluded as follows:-
- 54.1. Mr Junior did take the matter extremely seriously and did not giggle and laugh and hit the desk during the fact finding interview;
  - 54.2. The Respondent would not have been able to obtain a copy of the cyclist's statement to the police if the police were not prepared to release it and Mr Goodger confirmed that the police were not prepared to do that and the Tribunal could understand why that might be;
  - 54.3. The Tribunal concluded that Mr Goodger's note of his conversation with the police was not a fabrication and that he had had that conversation with those officers;
  - 54.4. The Tribunal concluded that Mr Johnson had not told the Claimant's union representative that there was a 99% chance of the Claimant being dismissed. Mr Johnson confirmed that the trade union representative had spoken privately to Mr Johnson before the disciplinary meeting began. Mr Johnson had denied in evidence that he had made such a statement. He confirmed that the representative had asked him about the chance of dismissal and he had declined to comment. The representative was enquiring whether the Claimant should resign and Mr Johnson had considered that a matter for the Claimant himself;
  - 54.5. The Claimant was not denied access to all of the relevant CCTV footage and he could not explain why he needed to see footage from all 14 cameras on the bus;
  - 54.6. The appeal hearing was not tainted by race discrimination;
  - 54.7. Mr Mahon was quite right when he made an enquiry about any outstanding grievance and then reported back to Miss Ryder that there was no outstanding grievance.
55. The Tribunal concluded that the procedure followed was fair and that the Claimant had been given every opportunity to put his case together with his representative. The Claimant challenged the validity of the final written warning and the Tribunal referred to the findings set out above. The Tribunal concluded that a reasonable employer could reasonably have dismissed a driver who had acted in the way that the Claimant had acted, which had been caught on film.
56. Turning to the claim of race discrimination, the Tribunal concluded that the Claimant was not treated less favourably than a hypothetical white bus driver, with a final written warning, who had been caught on film behaving as the Claimant had behaved. In particular, the Claimant referred to his particulars of claim and the Tribunal concluded as follows:-
- 56.1. Mr Mahon did not have a hostile and aggressive attitude towards the Claimant at the appeal meeting. From some of the wording in the minutes it appeared to the Tribunal that Mr Mahon was forthright but he was not hostile or aggressive. The Claimant himself was being difficult throughout that meeting;

- 56.2. The particulars refer to Mr Mahon's decision that the Claimant was guilty of the misconduct but the Tribunal concluded that it was Miss Ryder's decision which was supported by Mr Mahon, and that the Claimant's race did not enter into their considerations;
- 56.3. The Tribunal could find no evidence that Mr Mahon attempted to influence Miss Ryder about the decision;
- 56.4. There was no failure by Miss Ryder to correct and reprimand Mr Mahon because the Tribunal had accepted her evidence about the context of his remark.
57. For all of those reasons the claims are unsuccessful and they are dismissed.
58. As mentioned above, the only recommendation that the Tribunal would give to the Respondent is to ensure that documentation is sent to employees before meetings take place and that the covering letter explains which documents are being sent, to avoid disputes in the future. In this case, there were not many documents that were relevant, the Claimant has seen the CCTV footage, which was the most important evidence before the Respondent and the Claimant's representative did not at any stage complain that they had insufficient time to consider the evidence, so if there was any failure to provide documents in a timely manner it made no difference to fairness in this particular case.
59. Another point that the Respondent may wish to consider is to allow employees copies of any disciplinary minutes so that they may comment upon them even though such comments cannot be agreed.

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**Employment Judge Wallis**

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Date 4 July 2017