Case Number: 3300259/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Chin	v	Arriva London North Limited
Heard at: Watford		**On**: 13 & 14 June 2017

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: Mr David Welch, of Counsel

For the Respondent: Mr Mr Noblet, Solicitor

JUDGMENT

The claimant was dismissed unfairly.

REASONS

Introduction; the claim

1 In these proceedings the claimant claims that he was dismissed unfairly within the meaning of section 98(4) of the Employment Rights Act 1996 ("ERA 1996"). He was dismissed summarily on 13 October 2016. The reason given by the respondent for the dismissal was "gross misconduct". The claimant does not claim that he was dismissed wrongfully, i.e. he does not claim his notice pay.

The evidence

2 I heard oral evidence from Mr Michael O'Connor, Deputy Operating Manager of the respondent's Wood Green garage, and Mr Peter Mhagrh, a General Manager, on behalf of the respondent, and from the claimant on his own behalf. I was referred to and read documents in a joint bundle of documents. Having done so, I made the following findings of fact.

My findings of fact

3 The claimant was employed by the respondent from 7 January 2000 until 13 October 2016. He was at the time of his dismissal employed as a bus driver, driving the number 29 bus from Wood Green to Trafalgar Square and back. On 3 October 2016, the bus the claimant was driving hit a pedestrian.

4 The circumstances which gave rise to the claimant's dismissal were recorded on closed circuit television ("CCTV") cameras on the bus which he was driving. A copy of those recordings (there were four cameras, and the recordings of three of them were relevant) was put before me, and I watched the relevant recordings a number of times. They showed that the claimant was driving the bus along Euston Road at the point at which it joins Gower Street, near Euston Square underground station. The time was 12:44 or so. The day was clear, and visibility was good. A pedestrian, however, walked out onto the road without looking. She was on the right hand side of the road, and she walked out in the middle of the junction, i.e. between to sets of traffic lights, at the point at which the road was three lanes wide. There was no traffic coming the other way, the road being part of a one-way system at that point. The claimant's bus was in the middle lane and continued in the middle lane as it turned into Gower Street, and as it was in the middle of the turn, the pedestrian was hit by the side of the bus, just back from the front of the bus.

5 The camera recording the view straight ahead in front of the bus did not show the pedestrian to any extent. The other two relevant cameras, however, did record her presence and the accident. Most importantly, the camera inside the driver's cabin, looking to the right of the bus (camera A6), did show the pedestrian walking out. The time from when she walked off the pavement to the time when she was hit by the bus was about 3-4 seconds, if the camera was recording in real time.

6 The claimant simply did not see the pedestrian. He therefore neither braked nor swerved, and he did not sound the bus's horn to warn the pedestrian.

7 The respondent trains its drivers thoroughly, giving them 6-8 weeks' training at the start of their employment, including classroom-based training, leading to a qualification which is recognised by Transport for London. In addition, the respondent's drivers are expected to complete and maintain a Certificate of

Professional Competence, for which they receive 35 hours of training every five years.

8 Furthermore, the respondent draws its drivers' attention to the risks at various stages on the routes which they drive, and the drivers are given training on how to deal with blind spots with a view to ensuring that they approach potential hazards in a safe manner.

9 The respondent has a disciplinary policy of which it put a copy before me during the first day of the hearing, having not put one in the bundle before then. That policy has on page 4 a list of "Formal Awards". That list starts with a "Caution". Such a caution lasts, according to the policy document, for 2 years for "operating staff". The Claimant's disciplinary record of which a copy was in the bundle at page 114 showed that he had been given a caution for "Bus v Street Furniture", i.e. an accident in which his bus hit some street furniture, on 16 April 2014, and that while the bus which he had been driving had had some subsequent collisions, no formal action had subsequently been taken against him as a result.

10 During the hearing on 13 June 2017, without objection from Mr Welch on behalf of the claimant, further copies of documents from the claimant's disciplinary record were put before me. They showed that the claimant had received in addition cautions for (1) "adverse driving" in 2001, (2) a collision on 4 January 2010, and (3) a "driving standards collision" on 16 May 2012.

11 A report of the incident of 3 October 2016 was made by a London Transport Board ("LTB") official, and a report of the incident was made by an employee of the respondent. The latter recorded a statement made by a following Metroline bus driver which (see page 105) was in these terms:

> "The woman walked onto the side of the bus, while the bus was turning right from A400. The female pedestrian fell underneath the bus. She rolled over to escape. Driver stopped straight away."

12 The claimant was suspended immediately, as was the norm for the respondent in situations such as this. On 6 October 2016, there was a review of that suspension. It was carried out by Mr M Gardner, at Wood Green garage. Mr Gardner was the garage's "Operating Manager". Mr O'Connor was present at the meeting, but he did not take part in it. He did, however, see the CCTV footage which Mr Gardner viewed. The claimant's trade union representative, Mr G Michael, was present, and he watched the CCTV footage also. The claimant was at that time traumatised by the accident, and looked only at the footage taken from the camera which looked straight ahead only.

13 As Mr Gardner recorded in the record of the meeting (at page 109a):

> "The CCTV showed our bus traveling at normal speed as it approached the right hand bend, holding the middle lane."

14 It was decided by Mr Gardner that the claimant's suspension should be continued as he "did not feel confident in putting him back to work at this stage".

15 The claimant was then called to a disciplinary interview on 13 October 2016. The allegation was "Failing to work satisfactorily to the standard of performance required as per rule 4b from the statement of policy on discipline in relation to an avoidable collision on 3rd October 2016".

16 Paragraph 3.6 of the disciplinary procedure stated this:

> "An employee will not normally be dismissed for a first breach of discipline, except in the case of gross misconduct or negligence (when the penalty may be dismissal without notice) as defined in Section 7 of the Policy on Discipline."

17 Section 7 was at pages 75-76. The only relevant part of that section was paragraph (a), which, together with the relevant words preceding it, was in these terms:

> 'Dismissal without notice may occur in the event of gross misconduct or negligence, but only after the matter has been considered through the formal disciplinary machinery. It is not possible to give a comprehensive definition of behaviour which would be regarded as "gross misconduct or negligence" but the following may be taken as examples:
>
> (a) failure to observe rules affecting the safety of other staff or of the public, including a breach of the policy on mobile phones and earpieces'.

18 Mr O'Connor conducted the disciplinary hearing of 13 October 2016. There were notes of the hearing at pages 120-123. The claimant was represented by Mr Michael. Mr O'Connor did not accept that the reports of what had occurred on 3 October 2016, including that of the LTB official, were relevant, because he (Mr O'Connor) had what he saw as the best evidence available, namely the CCTV footage of the accident. The hearing lasted for approximately four hours. It was the claimant's case that the pedestrian had been in what was as far as the driver of that kind of bus was concerned a "blind spot".

19 Mr O'Connor concluded (at page 122) that the accident of 3 October "was avoidable and in some aspects negligent". He then recorded:

> "I noted that Michael Chin had 17 years' service and whilst this was a long period of time, an expectation would be that Michael Chin would have more of an awareness of the blind spots and how to navigate them safely."

20 Mr O'Connor then considered the content of the claimant's "performance record" and noted that "whilst there were no live cautions there was a history of awards for avoidable collisions alongside an adverse driving observation in the last twelve months". The only potential justification for the latter assertion was the document at page 119a. It recorded only one shortcoming, namely a failure to maintain adequate clearance on one occasion. The rest of the assessment was completely positive. As stated above, Mr O'Connor decided that the claimant should be dismissed for "gross misconduct". That was not stated in the notes at pages 120-123, where the most serious finding was stated at the bottom of page 122 in these terms: "not only was incident avoidable but also negligent". The statement that the claimant was dismissed for "gross misconduct" was made only in the letter at pages 126-127, where the reason for the claimant's dismissal was stated in these terms:

> "The reason for your summary dismissal was that it was found in a disciplinary hearing that your behaviour was seen to be a breach of section 4b of the Arriva London statement of policy for failing to work satisfactorily to the standard of performance required.
>
> I believe that this conduct amounts to gross misconduct."

21 The claimant appealed against that decision "on the grounds of [d]isputed evidence". Mr Mhagrh together with another General Manager heard that appeal on 19 October 2016. There were in the bundle at page 129 notes of which the claimant had not before making this claim been given a copy. The notes showed that the decision to dismiss the appeal was based on the proposition that the claimant had committed gross misconduct. The notes showed also that the panel had concluded that the claimant "should have seen" the pedestrian. The relevant part of the notes was in these terms:

> "The evidence clearly showed the pedestrian on the kerb and then subsequently on the ground in front of the bus. The pedestrian was there to be seen in the panel's view and the driver should have seen her. For whatever reason, this was not the case and the accident happened. Based on the evidence that the panel had there was no plausible explanation for the driver to hit the pedestrian."

22 It was submitted to me that because Mr O'Connor had attended the meeting of 6 October 2016 to which I refer in paragraph 12 above and seen the CCTV footage then, he had made up his mind before the hearing of 13 October 2016, i.e. that the claimant should be dismissed. I concluded that Mr O'Connor had not in fact made up his mind in advance of that hearing.

The relevant law

The reason for the dismissal

23 It is for the employer in a claim of unfair dismissal to prove the reason (or if more than one, the principal reason) for the dismissal: section 98(1) of the ERA 1996. Only certain reasons are capable of being fair. They include (see section 98(2)) "capability" and "conduct".

24 There is no definition in the ERA 1996 of "gross misconduct". The significance of conduct being properly regarded as "gross misconduct" is that it is so clearly conduct for which an employee could be dismissed that it would be within the range of reasonable responses of a reasonable employer to dismiss the employee for it even though the employee had not formally been warned in advance that he or she might be dismissed for it.

25 The question whether or not a dismissal was fair is not to be determined by the tribunal on the basis of what the tribunal would have done in the circumstances. Rather, the question is whether or not it was within the range of reasonable responses of a reasonable employer to dismiss the employee in the circumstances for the reason for which the employee was in fact dismissed.

26 There is a helpful discussion in paragraphs AII[522]-[522.04] of *Harvey on Industrial Relations and Employment Law* ("*Harvey*") about the relevance from the point of view of both the law of contract and the law of unfair dismissal of the definition in a contract of employment of "gross misconduct". In the following paragraphs, namely [522.05]-[522.07] there is a helpful discussion about the possibility lawfully (as far as the law of contract is concerned) of dismissing an employee summarily for simple (as opposed to gross) negligence. In the latter passage, reference is made to the decision of the Court of Appeal in *Adesokan v Sainsbury's Supermarkets Ltd* [2017] IRLR 346, which was a claim concerning only the law of contract. In paragraph 24 of the judgment of Pill LJ with which David Richards and Longmore LJJ agreed, this was said:

> "The determination of the question whether the misconduct falls within the category of gross misconduct warranting summary dismissal involves an evaluation of the primary facts and an exercise of judgment. The primary facts in this case are not in dispute. It is now well established that where that is the case, when determining whether the judge was wrong in reaching his decision, this court ought not to interfere unless satisfied that the decision of the judge lies outside the bounds on which reasonable disagreement is possible: *see Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577 per Clarke LJ paragraphs 16–17; *Datec Electronics Holdings Ltd v United Parcels Services Ltd* [2007] 1 WLR 1325 per Lord Mance

> pp.1347–1349; and *R (on the application of Sky Blue Sports and Leisure Ltd) v Coventry City Council* [2016] EWCA Civ 453, [2016] All ER (D) 120 (May), paragraph 12 per Tomlinson LJ. It is not a question of this court simply asking whether it would have held the misconduct to be gross. Having said that, in my judgment the parameters available to a judge in a case of this kind are limited; it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or undermine the employer's policies constitutes such a grave act of misconduct as to justify summary dismissal."

27 As I say above, that passage concerns the law of contract and not the law of unfair dismissal. However, one of the cases referred to in paragraph AII[522.03] is that of *Worrell v Hootenanny Brixton Ltd*, UKEAT/0381/13/SM, which concerned both the law of contract and the law of unfair dismissal. The summary of the case which precedes the transcript starts in this way:

> "As explained at paras 111 and 112 of the judgment in *Sandwell and West Birmingham Hospitals NHS Trust v Mrs A Westwood* [2009] UKEAT 0032/09/172 gross misconduct might take one of two forms, deliberate misconduct or gross negligence: but that possible alternative does not justify an Employment Tribunal not making any factual finding as to conduct on the basis that it must be one form of gross misconduct if it is not the other, which is how the matter was approached by the Employment Tribunal in the instant case. Such an approach is erroneous."

28 Paragraph AII[522.07] of *Harvey* is also highly illuminating. It is in these terms:

> "What, however, about an act of simple negligence as understood in the law of tort? The assumption might be that that would not be sufficient, being instead a textbook example in the modern law of unfair dismissal of the need for warnings and any eventual dismissal being with notice. However, that assumption could well be difficult to maintain in one particular type of case – what about an act of simple negligence (possibly a one-off, momentary failure) which led to catastrophic damage, injuries or deaths? An obvious example would be momentary negligence by a train driver leading to a major rail crash causing deaths. In one old case (*Savage v British India Steam Navigation Co Ltd* (1930) 46 TLR 294) it was said that in a negligence case the emphasis should be on the nature and seriousness [o]f the negligent act, not on the consequences, because to do otherwise would be to misuse hindsight and could be unfair on the individual employee because the extent of the damage could be fortuitous and unforeseeable. Arguably, this is entirely logical but is it the way it would work in practice? If the damage was extreme and newsworthy, the employer could be under considerable pressure to be seen to take steps commensurate with the damage and to make sure that 'heads

> roll' (or, as it might alternatively be put, to ensure that there is a scapegoat). Unfortunately, the ACAS guide is ambiguous on this; its reference to 'serious negligence' could attach the seriousness to either the act or the consequences. The case law is little more help. One of very few cases to mention the issue is *Jackson v Invicta Plastics Ltd* [1987] BCLC 329, QBD in which Pain J held wrongful the summary dismissal of a chief executive for inter alia incompetence in some of his business decisions which had incurred losses. The case did not raise the act/consequences problem and, moreover, arguably incompetence is not exactly the same as negligence. However, the judge (a notable employment lawyer of his day) did comment that, while summary dismissal for incompetence (and so arguably for negligence proper?) could not be ruled out, the general trend of the common law has been to make it increasingly unlikely on the facts, the more so since the inception of the law of unfair dismissal: 'The employer would have to show that [the employee's] continued employment would be quite impractical because of the harm he was likely to do to the company'. Helpful though this is in the absence of any other authority, it would not resolve the most difficult case, namely a one-off catastrophic act of momentary negligence by an employee who is never likely to repeat it."

29 While it is not determinative, it is of interest that in *Hagen v ICI* [2002] IRLR 31, Elias J said in paragraph 311 in relation to a statement that he had found to be a negligent misstatement which was claimed to be breach of the implied term of trust and confidence (a breach of that term in itself justifying a summary dismissal):

> "However, in my judgment there is no liability for this misrepresentation in the action pleaded in contract. It is impossible to say that there was in the circumstances a breakdown of trust and confidence arising from the negligence of ICI. There was no wanton negligence bordering on recklessness or gross indifference."

The relevance of expired warnings

30 The relevance of an expired warning has been the subject of some case law, most notably *Diosynth Ltd v Thomson* [2006] IRLR 284 and *Airbus UK Ltd v Webb* [2008] IRLR 309. In paragraph DI[1541] of *Harvey*, this is said:

> "The outcome of the decisions in *Diosynth Ltd v Thomson* [2006] IRLR 284 and *Airbus UK Ltd v Webb* [2008] ECWA Civ 49, [2008] IRLR 309 (see below) is that it may be reasonable for employers to rely on misconduct that is the subject of an expired warning to justify dismissal if the subsequent misconduct, which is the reason (or principal reason) for dismissal itself, justifies dismissal but not to tip the balance if the subsequent misconduct does not itself justify dismissal. It may in particular be reasonable if the employer is

considering not just the particular lapsed warning per se, but as part of the employee's overall disciplinary record over time."

The possibility of taking into account the fact that the employee was dismissed for "gross misconduct"

31 In *Graham v Secretary of State for Work and Pensions* [2012] IRLR 759, the Court of Appeal held that it was open to an employment tribunal to conclude that it was outside the range of reasonable responses of a reasonable employer to characterise conduct as "gross misconduct".

Discussion and conclusions

32 The respondent's disciplinary policy refers in section 7 to "gross misconduct or negligence". That is ambiguous. Its natural meaning to someone familiar with the law of employment would be "gross misconduct or gross negligence". In any event, if it was intended to refer to simple negligence, then in my view it was unreasonable at least without much more explanation (about which I express no conclusion, as it is not necessary to do so). Simple negligence can take many forms and occur against a range of factual backgrounds.

33 The claimant was subject to no current warning about the standard of his driving.

34 The decision of Mr O'Connor was at worst that the claimant had been "negligent". The first part of his reasoning was in fact in my view a more true reflection of that reasoning, namely, as set out in paragraph 19 above, that the claimant's driving was "in some aspects negligent".

35 There was in fact no need for the respondent to warn drivers to avoid gross negligence. Any gross negligence would justify a driver's dismissal, and any reasonable driver would know that.

36 Simple negligence is capable of being classified for the purposes of section 98(1) and (2) of the ERA 1996 as "capability" rather than "conduct". However, I do not see this case as turning on the proper classification for the purposes of the law of unfair dismissal of simple negligence.

37 I see the consequences of any negligent conduct as capable of being relevant to the reasonableness of a decision to dismiss, especially where, as here, negligence is capable of leading to a loss of life. (In fact, unexpectedly, the pedestrian's injuries, which were not in themselves life-threatening, led to her death in hospital.)

38 However, accidents do happen. The pedestrian here had been negligent in walking into the road without looking to see what traffic there was. The claimant might have been able to take avoiding action, or avoided the

accident by sounding the bus's horn, but he did not do so. That was because he had simply not seen the pedestrian. What he did was not at all wilful, and it was not in breach of any specific rule of the respondent of the sort envisaged by section 7(a) of the respondent's "Policy on Discipline".

39 Taking into account the claimant's disciplinary history when deciding whether he should be dismissed was in my view not in itself outside the range of reasonable responses of a reasonable employer, given the importance to the public of the safe driving of passenger vehicles.

40 However, whether or not negligence is gross for the purposes of the law of unfair dismissal should in my view not be determined by reference to the consequences of the negligence.

41 In my judgment, it was here outside the range of reasonable responses of a reasonable employer to characterise what the claimant did on 3 October 2016 as "gross misconduct". It was either "conduct" or "capability" within the meaning of section 98(2) of the ERA 1996, but whatever it was, it was unfair to dismiss the claimant for it, given the absence of a warning that simple negligence could result in dismissal.

42 I did not think that it was outside the range of reasonable responses of a reasonable employer to take into consideration only the CCTV footage and not the reports of e.g. the LTB official. Nor, contrary to the submissions of Mr Welch, did I think that Mr Chin's length of service made it unreasonable to dismiss him in the circumstances.

43 Nevertheless, for the reason given in paragraph 41 above, I concluded that the claimant was dismissed unfairly.

44 While it was not relevant to the question of the fairness of the claimant's dismissal, when considering the factual situation before coming to the conclusion that the claimant was dismissed unfairly, I arrived at the view that if the claimant's inadvertence had resulted in damage to property rather than the injury to the pedestrian which actually happened, then he would probably not have been dismissed.

Remedy

45 After I had announced my above decision and reasons, the parties reached agreement as to the sum that the respondent should pay to the claimant in satisfaction of the respondent's liability to the claimant by reason of that decision in the light of those reasons. That sum is confidential to the parties, and is to be paid by a date agreed by the parties. That being so, there is no need for any further order.

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Employment Judge

Date: ……19 June 2017……..

Sent to the parties on: .....

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For the Tribunal Office