EMPLOYMENT TRIBUNALS

Claimant: **Mr W Lake**

Respondent: **Arriva London North Limited**

Heard at: **East London Hearing Centre**

On: **24 – 25 June 2021**

Before: **Employment Judge Goodrich**

Members: **Ms A Berry**
Ms J Houzer

Representation

Claimant: Mr Jonathan Donovan (Consultant)

Respondent: Ms Lara Scott-Ellis (Counsel)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

The judgment of the Tribunal is that: -

The Claimant was unfairly dismissed, as further set out below.

The Claimant's complaint of disability discrimination succeeds, as further set out below.

Accordingly, if the parties are unable to settle remedy, a remedy hearing will take place on 4 October 2021, listed for one day from 10.00 a.m., to be conducted through Cloud Video Platform, reserved to the above Tribunal.

REASONS

Background and the Issues

1 The background to this hearing is as follows.

2 On 22 April 2019 the Claimant presented his Employment Tribunal claim. Prior to doing so he had obtained an ACAS Early Conciliation Certificate. The date of receipt by ACAS of Early Conciliation notification was 28 February 2019; and the certificate was issued on 28 March 2019.

3 The Claimant has made claims for unfair dismissal and disability discrimination.

4 The Claimant gave details of his claim in section 8.2 of his claim form. In summary, these were that he was employed as a bus driver by the Respondent for 8 years; that he developed epilepsy which caused his licence to drive a bus to be revoked; and that he was dismissed, rather than his employment continuing in a capacity that did not involve driving; or that medical retirement should have been considered.

5 The Respondent entered a response denying that the Claimant had been unfairly dismissed or subject to disability discrimination. In summary, their details described in their ET3 response included that the Claimant was unable to undertake his role as a bus driver because of the removal of his PCV licence; the Respondent had discussed various opportunities for alternative roles with the Claimant before reaching the decision to dismiss him; the reason for dismissing the Claimant was unambiguous; it had not been possible to secure alternative employment for him; that the procedures applied were not unfair nor discriminatory; and that, if the Respondent was under a duty to make reasonable adjustments none would have allowed him return to a job as a bus driver and that searches had been made for alternative employment that did not require the employee to hold a licence.

6 A Preliminary Hearing took place on 12 August 2019 where Case Management Orders were made. The case was listed, initially, to be heard in January 2020.

7 The hearing was adjourned on a number of occasions, for various reasons.

8 At the outset of the hearing the issues in the case were discussed with the parties. They had an agreed list of issues, to which the Judge suggested, and the parties agreed, that the Claimant's case was also that his dismissal was an act of disability discrimination. A copy of the agreed list of issues is attached to this judgment (to which it should be added, under the heading of unfair dismissal, that the Claimant contends and the Respondent disputes that the dismissal was an act of disability discrimination).

9 The Claimant, if successful in his case, seeks re-engagement with the Respondent.

10 The Respondent's alternative case, if the Claimant were found to be unfairly dismissed, was whether he would had been dismissed in any event if a fair procedure had

been followed (which the Tribunal also takes to mean similar considerations if his disability discrimination claim were to be successful, which are sometimes described as "Polkey" and "Chagger" deductions, after the guidance given in those cases). As the Claimant is seeking re-engagement if successful in his unfair dismissal complaint, this consideration would not be relevant to the issue of re-engagement. Nonetheless, the Tribunal asked the parties to address this question in evidence and closing submissions.

The Evidence

11 This hearing was conducted by Cloud Video Platform.

12 On behalf of the Claimant, the Tribunal heard evidence from the Claimant himself; and from Mr Neil Wiseman, a Human Resources professional who accompanied the Claimant to a number of meetings with the Respondent.

13 On behalf of the Respondent the Tribunal heard evidence from Mr Robert Hutchings, Managing Director for the Respondent; and from Ms Emma Bristow, who at the relevant times was the Operating Manager for the area in which the Claimant worked.

14 In addition, the Tribunal considered the documents to which it was referred in an agreed bundle of documents.

The Relevant Law

Unfair Dismissal

15 Section 98(1) Employment Rights Act 1996 provides that it is for the employer to show the principal reason for the employee's dismissal; and that it is for a permissible reason within the meaning of section 98(2). Amongst the reasons set out in section 98(2) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment (there is no dispute that the reason or principal reason for the Claimant's dismissal was a fair reason within the meaning of section 98(2)(d) Employment Rights Act 1996 ("ERA").

16 In dispute, however, is whether the requirements of section 98(4) ERA were fulfilled, for which the burden of proof is neutral. Section 98(4) ERA provides:

> "… The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) 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
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> (b) shall be determined in accordance with equity and the substantial merits of the case.

17 In considering whether a dismissal is fair or unfair within the meaning of section 98(4) ERA the function of the Employment Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair: If the dismissal falls outside the band, it is unfair.

18 In the case of an employee banned from driving, where having the requisite driving licence is an essential component of the job, a reasonable employer would be expected to take reasonable steps to consider alternative employment for the employee.

19 A dismissal which was unlawfully discriminatory will in all likelihood, although not inevitably, be an unfair dismissal.

20 When considering the fairness of a dismissal an Employment Tribunal will usually consider both the fairness of the procedures adopted by the employer and the fairness of the substantive decision to dismiss the employee. In both respects the band of reasonable responses test outlined above applies to the dismissal.

21 Section 20 Equality Act 2010 *("EqA")* provides that where a provision, criterion or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled, to take such steps as is reasonable to have to take to avoid that disadvantage. (In this case the provision criterion or practice, or "PCP", was agreed and, without any force and on instructions, it was disputed that the PCP placed the Claimant at a substantial disadvantage in comparison with persons who are not disabled).

22 In Archibald v Fife Council (2004 IRLR 651 HL) it was held that a Claimant was placed at a substantial disadvantage in comparison with persons who are not disabled where her job description required her to be physically fit, which she was no longer able to meet, and that exposed her to a condition that if she was physically unable to do the job she was employed to do, she was liable to be dismissed. (By analogy, the Claimant, through having his bus driving licence removed because of developing epilepsy was no longer able to meet his job requirement to have a bus driving licence, which exposed him to a condition that if he was unable to do the job which he was employed to do, he was liable to be dismissed).

23 Both in respect of the reasonable adjustments provisions and discrimination arising from disability a Tribunal must have regard to the Equality and Human Rights Commission's ("ECHR") Code of Practice on Employment.

24 What is a reasonable step for an employer to take will depend on all the circumstances of each individual case. There is no onus on the disabled worker to suggest what arrangement should be made, although it is good practice for employers to ask. Effective and practicable arrangements for disabled workers that involve little or no cost or disruption are very likely to be reasonable for an employer to make; and costly adjustments may still be cost effective in overall terms, compared with the cost of recruiting and training a new member of staff.

25 In Section 6.28 of the Code of Practice, examples are given to steps which might be taken when deciding what is a reasonable step for an employer to have to take. These

include whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of such a step; the costs and other costs of making the adjustment and the extent of any disruption caused; the extent of the employer's financial or other resources; the availability to the employer of financial or other assistance to help make an adjustment (such as advice through access to work); and the type and size of the employer. The test is an objective one depending on the circumstances of each case. It was held in Archibald v Fife Council (above) that the duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination. They could include transferring without competitive interview a disabled employee from a post they can no longer do to a post which they can do, or moving the disabled person to a post at a slightly higher grade, or a sideways or downwards transfer.

26 In Wade v Sheffield Hallam University (2013) EQLR 951 EAT it was held that it is not reasonable to require an employer to disapply the essential requirements of a job. An adjustment of appointing the Claimant to a role for which he was not appointable was not reasonable.

27 When considering whether an adjustment is reasonable, it is sufficient for an Employment Tribunal to find that there would be a prospect of the adjustment removing the disabled person's disadvantage; it does not have to be satisfied that there is a "good" or "real" prospect of that occurring. There is, however, no separate and distinct duty of reasonable adjustment on an employer to consult the disabled employee about what adjustment can be made. The question is whether, objectively, the employer has complied with their obligations or not (even though it will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if they do not do so, because the employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that they have not made reasonable adjustments.

Discrimination Arising from Disability

28 Section 15 EQA provides:

> "(1) A person (a) discriminates against a disabled person (b) if –
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> (a) 'A' treats 'B' unfavourably because of something arising in consequence of 'B's' disability, and
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> (b) 'A' cannot show that the treatment is a proportionate means of achieving a legitimate aim." In this case there is no dispute that the Respondent had knowledge of the Claimant's disability.

29 Section 15 is focused on making allowances for disability, whereas the duty of reasonable adjustment is focused on affirmative action.

30 Section 5.21 of the ECHR Codes of Practice provides that if an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.

31 The burden of proof provisions contained in section 136 EQA apply in disability discrimination (although in this case no submissions were made on the burden of proof and the provisions were not determinative of our decision).

Findings of Fact

32 The Claimant, Mr Wayne Lake, was employed by the Respondent from 1 August 2011 until he was dismissed. The effective date of termination of his employment was 3 January 2019.

33 The Claimant was employed by the Respondent, Arriva London North Limited, as a bus driver.

34 The Respondent is a large employer. Although the Respondent's representatives did not fill in box 2.7 of the ET3 response form, Mr Hutchings was able to give at least the approximate numbers of the Respondent's employees.

35 The Respondent employs about 3,000 employees, mainly in North London.

36 Of these 3,000 employees, about 90% are bus drivers, either full-time or part-time. The other 10% are mainly managers, supervisors and engineers, together with a small Human Recourses Department and a few administrative roles.

37 The Respondent also has a sister company, Arriva London South.

38 The Depot at which the Claimant worked at the relevant times was at Grays. The Deputy Operating Manager at the Grays Bus Depot was Mr Vic Sabberton (also described as a "DOM"). The Operating Manager for the Grays Garage (and also the Barking Garage) was Ms Emma Bristow.

39 Whilst the Claimant was on holiday in August 2018, he suffered a collapse. On returning to the UK he was advised by his GP not to drive until investigations had been carried out.

40 Meanwhile, the Claimant was provided with a number of statements of fitness for work notes from his GP practice that covered the periods leading up to the termination of his employment on 3 January 2019.

41 The Claimant's initial discussion is about his sickness absence were with Mr Sabberton, the Deputy Operating Manager from Grays Garage.

42 There is a dispute between the parties as to whether the Claimant wrote to Mr Sabberton on 24 September 2018 in order to dispute whether he had agreed to proceed without union representation. Neither this letter the Claimant said he wrote, nor a letter dated 14 September 2018 the Claimant said that Mr Sabberton had written to him were in the bundle of documents provided to the Tribunal. We consider it unnecessary to make a finding of fact on this dispute, other than to record that the letter the Claimant said he wrote suggests that he was able and willing to respond to contents of letters he received from management on

points in the letter he disagreed with.

43 On 4 October 2018 there was a telephone discussion between Mr Sabberton and the Claimant, following which Mr Sabberton wrote a letter to the Claimant that day. At that point the Claimant had been informed by his doctor that he might have epilepsy and he was going to return to his GP for a second opinion to see whether he was fit to return to work.

44 On 19 October 2018 Ms Bristow held a meeting with the Claimant and Mr Wiseman.

45 Mr Wiseman is a relative of the Claimant and an experienced Human Resources Practitioner. He is not, and was not at the relevant times, an employee of the Respondent or a Trade Union Representative. The Respondent was not, therefore obliged, to allow him to attend the meeting; however, he was permitted to attend this and the subsequent two meetings with Ms Bristow.

46 As there are some disputes as to what was said at this meeting and the subsequent meetings between Ms Bristow, the Claimant and Mr Wiseman, we make the following findings and observations.

47 Although Ms Bristow made notes of each of the meetings on 19 October, 23 November and 3 January 2019 (the meeting at which she dismissed the Claimant) she destroyed her notes of all three meetings. Instead, she sent the Claimant letters at which she summarised what she considered to be the main points discussed at the meetings. It is surprising to the Tribunal that Ms Bristow destroyed her notes. We would have expected, in particular, for her to have retained at least her notes of the meeting at which she decided to dismiss the Claimant.

48 By the time of the meeting on 19 October the Claimant had received a diagnosis of epilepsy. The Claimant notified Ms Bristow that the DVLA had advised him that a likely outcome of his diagnosis of epilepsy would be that his car licence would be revoked for one year and his PCV licence for 10 years after being medication free. There is a dispute between the parties as to whether any discussions on re-employing the Claimant to a different role happened by way of an after thought at the end of the meeting; or during the course of the meeting. The Tribunal finds that there were some discussions about alternative employment that did take place during the course of the meeting as this appears more consistent with the way the letter dated 19 October was structured. Unsurprisingly after the length of time it has taken the Claimant's case to get to the Employment Tribunal (over 2½ years from the date of this meeting) the Claimant's and Ms Bristow's recollections have faded somewhat.

49 At the time of the meeting Ms Bristow had not undertaken a search of current vacancies with the Respondent; and there was no discussion about any specific vacancies that the Claimant might be suitable for.

50 Instead, Ms Bristow sent to the Claimant with her letter dated 19 October 2018 a copy of the current alternative employment list. She notified the Claimant that she had also printed and included the advertisements for garage supervisor, schedules compiler, delegated examiner and driving instructor – classroom. She notified him that if he wished to apply for any of these, he would need to apply via the manner stated on the advert which would include submitting a CV and covering letter. She notified him that if he would like information on that

or any other roles to contact her or Mr Sabberton.

51 Ms Bristow also notified the Claimant in her letter that should the DVLA revoke his licence they would look at the possibilities of alternative work or light duty work on a short-term basis if available and appropriate. If this was unsuccessful, she stated, they would be faced with dismissal on medical grounds, although that would be their last option.

52 At this stage of the Respondent's processes, Ms Bristow was proceeding on the basis of a possible ill-health dismissal. The Respondent has guidelines for managers for dealing with long-term sickness absence. The information contained in the guidelines includes the following points:

52.1 Where termination of employment on medical grounds is a possible outcome, the manager must discuss the possibility of alternative work with the employee at an early stage.

52.2 The discussion should cover the employee's interest in the type of alternative work that he/she would wish to be considered for.

52.3 Managers should conduct a search for suitable alternative work; and the Personnel Office advise on any existing vacancies on a particular date, with the manager making a file note of these. This would include vacancies which had closed but where the selection process has not been completed.

52.4 The manager should then discuss with the employee what vacancies if any are available and keep a note of those in which the employee is interested, or not. For those in which the employee expresses an interest there should be a proper discussion, for which there should be a note, which should cover such issues as rates of pay, location, suitability, any qualifications required etc.

52.5 The medical suitability of the employee to carry out the duties of any job offered should be assessed by the company doctor.

52.6 The manager's conclusions must be discussed with the employee and, subject to any further representations from the employee, these conclusions, including any date for a return to work, must be confirmed to the employee in writing.

53 The guidelines on long-term sickness absence also had a section on disability. These provide that, when dealing with an employee who may be disabled all the steps in these guidelines should be followed, with the following additions, all of which are about finding an alternative to dismissal. There is also a statement that consideration must be given as to whether or not there are any reasonable adjustments which may be made to the employee's working environment to facilitate a return to work. Guidelines go on to record that it must be recorded that reasonable adjustments were considered even if it appears that no such adjustments are possible.

54 We note that the guidelines refer to adjustments to facilitate a return to *work* (the Tribunal's emphasis) rather than a return to the employees' job.

55 The Respondent has a diversity policy, which forms part of the bundle of documents for the Tribunal. From looking at the policy it gives the appearance of not having been updated for well over 10 years, which is surprising to the Tribunal for an organisation of the Respondent's size. For example, references are made to the Sex Discrimination Act 1975, the Race Relations Act, the Disability Discrimination Act 1995 and the Equal Pay Act 1970, rather than the 2010 Equality Act. References are made to awards of compensation made during 2002, which suggest that the policy has not been reviewed or amended for nearly twenty years.

56 At no stage of the dismissal procedure was the Claimant provided either with a copy of the Manager's Guidelines on dealing with long-term sickness absence or the Respondent's diversity policy. This also caused the Tribunal some concern, and Ms Bristow notified the Tribunal, in answer to a question from one of the lay members, that it was not standard procedure to send an employee a copy of such policies, but that an employee subject to disciplinary proceedings would be sent the relevant policies.

57 Both in the meeting on 19 October 2018 and the subsequent meeting of 23 November to which we refer, Ms Bristow makes reference to the Claimant saying that there was nothing she could do to help his return to work. Although it is disputed whether the Claimant in fact said this there is no dispute that the Claimant received the letters, so was in a position to challenge the statements had he disagreed with them. Although the Tribunal bares in mind that the Claimant was having to come to terms with a life changing condition and the likely loss of his career as a bus driver, these references indicate to the Tribunal that he could reasonably have been expected to do more to actively seek alternative employment.

58 The Claimant did, however, take some steps to find alternative employment. After getting the list of vacancies from Ms Bristow he telephoned Ms Bristow. She was on holiday. He, therefore, telephoned Mr Erskine, who handles recruitment for the Respondent. He telephoned Mr Erskine about the vacancies. He did not, however, notify Mr Erskine about his condition of being diagnosed with epilepsy.

59 There is a dispute between the parties as to what the Claimant was informed by Mr Erskine, to which we will return later. The Claimant was, however, disappointed at Mr Erskine's response to his enquiries.

60 By letter dated 6 November 2018, the Claimant was notified that his lorry/bus and car/motorcycle licence would be revoked from 7 November 2018. He was notified that the DVLA would only be able to consider a re-application from him for a group 2 (lorry or bus) driving licence when he could meet the requirements of being 5 years free from the isolated seizure; not having taken any anti-epileptic medication during the 5 year period; and that he would then be subject to satisfactory medical reports.

61 The meeting took place on 23 November 2018 between Ms Bristow, the Claimant and Mr Wiseman. Once again, the notes Ms Bristow took at the meeting were subsequently destroyed, although she did summarise in her letter of 23 November 2018, what she considered to be the main points in the meeting.

62 By the time of the meeting dated 23 November 2018 Ms Bristow had sought advice from the Respondent's HR Department, in the course of which they advised her to consider dismissal on the grounds of statutory restriction (i.e. having his licence to drive a bus

removed), rather than ill health sickness absence. Nevertheless, Ms Bristow accepted in cross-examination that the ill health guidelines did apply, and her opinion was that she followed them.

63 In her letter to the Claimant dated 23 November 2018 Ms Bristow recorded that the Claimant had enquired about a few of the positions and that one of these had been filled. The Tribunal notes that according to the managers guidelines, set out above, Ms Bristow should have had a proper discussion for which there should be a note that would cover such issues as rate of pay, location, suitability and qualifications required. Nor did Ms Bristow record in her letter, as required under the management guidelines, that it must be recorded that reasonable adjustments were considered even if it appears that no such adjustments are possible.

64 In her letter dated 23 November, Ms Bristow notified the Claimant that if no suitable alternative employment was made available, a decision might be made to dismiss him on the grounds of statutory restriction. She notified him that this was something that might be discussed at their next meeting. She also sent the Claimant a list of Arriva's vacancies. The Claimant requested a list of the vacancies for the entirety of Arriva UK Bus, and Ms Bristow enclosed vacancies for Arriva nationally, namely other "sister" companies of the Respondent. The Claimant expressed interest in vacancies received from the list supplied to him following the meeting on 19 October, together with proactively asking for their vacancies nationally. These actions indicate to the Tribunal that, although the Claimant could have done more to actively press for alternative employment, he was taking some steps and expressing some interest in alternative employment.

65 Ms Bristow notified the Claimant that, if he would like some of the advertisements from these positions, they could be found on the Arriva Website or he could email her. He was notified in the letter that if he informed her of any applications he made, she could then advise the relevant parties of his situation.

66 The Claimant was not, however, notified in her letter of any adjustments that might be made in the Respondent's recruitment processes to facilitate him obtaining alternative employment such as prior notification of impending vacancies, offering an interview before external candidates were considered, seeking a CV or skills audit with him or other such steps to help facilitate his return to work. The Claimant felt, fairly or unfairly, that Ms Bristow was not interested in finding alternative employment for him and was leaving the onus of doing so on him alone.

67 Exactly what, if any, preferential treatment the Respondent would usually give for applicants at risk of redundancy or disabled was not made entirely clear to the Tribunal. In answer to questions from the Judge, Mr Hutchings stated that he believed the Respondent had a ring-fencing system before external advertisements which would have supported him for an interview but not for a particular role. Ms Bristow stated, in answer to a question from the Judge as to whether if the Claimant had applied for a job he would get an interview, that if he applied for a job he should let her know, that she would contact the manager, but that she did not recall whether she explicitly said that she would push him through for an interview, but that she understood that he understood that. She was unable to say whether it was the Respondent's policy for that to occur. As no such policy appears in the documents supplied to us, the Tribunal is unsure whether this was the case, although it may have been a practice to do so, having in mind what Mr Hutchings and Ms Bristow said.

68 By letter dated 19 December 2018 Ms Bristow wrote to the Claimant to ask him to attend a meeting on 3 January 2019. She notified him that, as by law he could not fulfil his role as a bus driver, if no suitable alternative employment is available, a decision might be made to dismiss him on the grounds of statutory restriction.

69 On 3 January 2019 Ms Bristow conducted a meeting to consider whether the Claimant should be dismissed. The Claimant attended with, once again, Mr Wiseman as his companion.

70 Once again, as referred to above, no notes were retained of a meeting.

71 At the time of the meeting on 3 January 2019 the Claimant had not made an application for any of the post for which he had been sent vacancies and there were none on that list for which he considered he would be suitable.

72 The outcome of the meeting was that the Claimant was dismissed on grounds of statutory restriction and two letters were sent to the Claimant by Ms Bristow, both dated 3 January 2019, to confirm his dismissal.

73 The Claimant was dismissed with pay in lieu of notice, the effective date of termination being with immediate effect, i.e. 3 January 2019. Ms Bristow's explanation for dismissing the Claimant with immediate effect, rather than allowing him to serve his period of notice and to continue to look for possible vacancies during this period was that she was continuing to have to cover his shifts with overtime and could not replace staff until there was a vacancy. She did, however, give him no encouragement or support to continue to look for vacancies pending the hearing of any appeal he might make.

74 The Claimant submitted an appeal against dismissal, by letter dated 16 January 2019. Amongst the points made in his grounds of appeal included the following:

74.1 He was not adequately and appropriately supported by Arriva to source and secure suitable alternative employment and reasonable adjustments were not made.

74.2 Throughout the meetings that took place he was given very limited information on roles that were available; and Ms Bristow had informed him that potential roles were open to both internal and external applicants and that if interested he would need to apply like everyone else.

74.3 Although it had been stated that she would actively support an employee to transition into suitable roles that could be performed, no support was given. It was the employer who was in a position to know about potential alternative roles that might be planned or emerging, ahead of them being advertised, and he should not be placed in sole responsibility for identifying a role and determining whether or not it was suitable, with or without adjustments, and then apply as though he was an external applicant.

74.4 The employer had consistently failed to make him aware of all vacancies on a regular basis so that opportunities were missed and the only support offered to

him was to 'write a letter', 'have a word with the hiring manager if I identified a role I wished to apply for'.

74.5 He objected to the outcome of dismissal on grounds of statutory restriction, being put in place of his original reason for dismissal.

74.6 He sought withdrawal of the dismissal, prompt attention to identify a suitable alternative post, or he would seek compensation.

75 The Claimant's appeal against dismissal was conducted by Mr Rob Hutchings, Area Manager for the Respondent at that time, now the Respondent's Managing Director. An HR business partner was there as notetaker. The Claimant was present and, after some dispute about whether Mr Wiseman should attend, he was permitted to attend as the Claimant's companion.

76 In the course of the meeting the Claimant and Mr Wiseman elaborated on his grounds of appeal.

77 At the end of the meeting Mr Hutchings notified the Claimant and Mr Wiseman that they needed more time to review the facts and deliver a decision.

78 Following the appeal hearing Mr Hutchings contacted Ms Bristow and Mr Erskine.

79 Mr Hutchings wished to contact Ms Bristow to explore the Claimant's complaints about whether Ms Bristow had explained that he would automatically be pushed through to interview whether he met the essential criteria or not, which was a step the Respondent usually took to give preferential treatment in the application process.

80 Mr Hutchings also wanted to explore with Mr Erskine the allegations the Claimant made about having been treated dismissively by him when the Claimant telephoned Mr Erskine to enquire about the job vacancies suggested by Ms Bristow.

81 Although Mr Hutchings made the further enquiries, he did not contact the Claimant to notify him of the outcome of his enquiries with Ms Bristow or Mr Erskine before reaching his decision on the appeal. As regard Mr Erskine, Mr Wiseman had complained at the appeal that he was told by Mr Erskine that if he (the Claimant) was applying for the managerial role that unless he had managerial experience there was no point in applying.

82 In Mr Hutchings' email to Mr Erskine dated 5 February 2019 there is a conflict between Mr Hutchings stating in the email that the Claimant had explained that he was a driver who recently contracted epilepsy, whereas no such reference as far as the Tribunal is aware was made in the notes of the appeal hearing; and the Claimant stated in cross-examination that he did not tell Mr Erskine that he had epilepsy.

83 Be that as it may, Mr Erskine's response to Mr Hutchings was that he could not recall speaking with Mr Lake, but that he would have passed on the same advice he gave to all drivers looking to move in a DOM position which was to apply for the role. Mr Hutchings regarded the information provided by Mr Erskine as being more reliable than the Claimant's account of events.

84 By letter dated 6 February 2019 Mr Hutchings notified the Claimant that he had upheld the decision to dismiss the Claimant, setting out his reasons for doing so.

Closing Submissions

85 Both representatives gave oral closing submissions.

86 Ms Scott-Ellis's submissions on behalf of the Respondent included the following points:

86.1 The dispute in the Claimant's unfair dismissal case centred on alternative vacancies.

86.2 Proper consideration had been given to this, but nothing suitable had arisen, setting out the findings of fact she invited the Tribunal to make in support of this proposition.

86.3 Submissions as to why the Respondent's witnesses' evidence should be preferred on points in dispute between the parties. Reasonable efforts were made, and the Claimant's dismissal was fair.

86.4 Although it was not best practice on Mr Hutchings part to conduct further enquiries after the appeal hearing and not get back to the Claimant, it would have made no difference.

86.5 If the Tribunal were to find this or other procedural failings, pursuant to the Polkey case, it would have made no difference.

87 In relation to the disability discrimination complaint she would not repeat points already made.

87.1 As regard discrimination arising from disability the Respondent had legitimate aims, particularly health and safety considerations and legality.

87.2 The dismissal was also proportionate. Alternative employment was sought but within the Claimant's skills and experience there was no suitable alternative role without significant travel and re-training.

87.3 This case was distinguishable from that of Archibald v Fife and akin to that of Khan v Royal Mail.

87.4 As regards reasonable adjustments her instructions were that the Respondent disputed that the provision criterion or practice (PCP) that the Claimant had a category D1 Driving Licence was a PCP which put the Claimant at a substantial disadvantage in comparison with persons who were not disabled (although she did not seek to dispute the Judge's indication that this was a point without merit as the Claimant satisfactorily fulfilled his role as a bus driver until his diagnosis of epilepsy and would have continued to do so if he had not lost his licence

because of epilepsy).

87.5 Referring to the case of Wade v Sheffield Hallam.

88 On behalf of the Claimant Mr Donovan's submissions included the following points:

88.1 Setting a context of the Claimant developing epilepsy and not being in a happy place during the dismissal procedures.

88.2 As regards unfair dismissal the Respondent did not do enough, giving his reasons for that and making submissions as to the findings of fact he invited the Tribunal to make.

88.3 Setting out submissions in support of the Claimant's disability discrimination complaints for why the Respondent had not done enough to proactively help the Claimant find alternative employment.

Conclusions

89 Essentially, each sides' cases revolve around the same question – in the context of what the Claimant did or did not do to secure himself alternative employment with the Respondent, did the Respondent take the steps it reasonably could have been expected to take to enable, or seek to enable, the Claimant to obtain alternative employment rather than be dismissed?

90 Although the Claimant is bringing three different types of claim, for which there are different statutory provisions and different guidance given in case law, broadly the considerations in answering the question above are similar.

91 The Tribunal, therefore, makes the following observations, applicable to each of the Claimant's claims.

92 From the Claimant's perspective, the context for the processes that led to his dismissal were these. The Claimant was a man in his mid-30s, with a family, who had been working for the Respondent as a bus driver for between 7 and 8 years. He discovered, in quick succession, that he has developed the condition of epilepsy, leading to his bus driving licence not only being removed, but facing no prospect of regaining it for at least 5 years. In quick succession he was notified by the DVLA of the loss of his licence (by letter dated 6 November 2018); and he was dismissed (on 3 January 2019). From his first meeting with Ms Bristow on 19 October 2018, after he had spoken with the DVLA and was notified that he would probably have his license removed, to the effective date of termination of his employment was a period of approximately 11 weeks.

93 From the Respondent's perspective, the context for the Claimant's dismissal was the very real commercial pressures they faced. Their agreements with their Trade Unions require sickness absence to be covered by overtime, rather than agency staff. Where they fail to fulfil the requirements of their contracts on the various bus services they run, such as failing to fulfil their timetables for buses, they faced fines. These considerations put pressure on the Respondent not to let sickness absence drag on.

94 The Tribunal has in mind the need to balance each parties' context and considerations.

95 The Tribunal also has in mind that, unlike a bus driver who has lost their driving licence through some fault on their part, such as a drink/driving offence, the Claimant was an employee of reasonably long standing with an unblemished record or service, losing his licence through no fault on his part.

96 As part of a counter balance to the Respondent going through its dismissal procedures quicker than some other employers might have done, because of the commercial considerations we have outlined above, it was also important that they, to coin an expression, "got their ducks in a row", by doing the things they needed to do promptly.

Unfair Dismissal

97 In the circumstances, including the size and administrative resources of the employer, did the employer act reasonably or unreasonably in treating the loss of the employee's bus driver's license as a sufficient reason for dismissing him, in accordance with equity and the substantial merits of the case?

98 Did the procedures adopted by the Respondent, and the substantive decision to dismiss, fall within the band of reasonable responses which a reasonable employer might have adopted? In this case the questions are inter-related in the sense that, until the Respondent had followed procedures falling within the band, the substantive decision to dismiss would be unlikely to be reasonable.

99 The Respondent's procedures followed the kinds of steps that were once indicated as the minimum steps to be taken in the repealed statutory dismissal procedures. Although the grounds for possible dismissal changed from medical, or ill health dismissal, to dismissal on grounds that he could not continue to work in the position he held without contravention of a statutory restriction; the Claimant was notified of the change in Ms Bristow's letter dated 23 November 2018 and in the letters asking him to attend a meeting at which he might be dismissed and in the dismissal outcome letter. We, therefore, make no criticism of the change of potential grounds for dismissal (which was one of the Claimant's complaints in his ET1 form). There was a hearing at which the Claimant was given the opportunity to argue for being retained, rather than dismissed. In one sense the Respondent went beyond what they were required to do, by allowing Mr Wiseman to attend the dismissal processes although he was not a work colleague or Trade Union Representative. The Claimant was notified of his right to appeal and an appeal hearing did indeed take place. All these are points in the Respondent's favour.

100 The Claimant's dismissal did, however, fall outside the band of reasonable responses a reasonable employer might have adopted including because:

100.1 Although the Respondent has accepted that at the relevant times the Claimant was both disabled and they had the necessary statutory knowledge of his disability, at no point did they supply him with a copy of the policies and guidelines which were relevant to his disability. They did not provide him with their diversity policy. Although it was not clear to the Tribunal whether the

guidelines for managers dealing with long-term sickness absence were a policy of the Respondent, or guidelines for good practice on the managers part, they did have a section on disability, and a reasonable employer of the Respondent's size dealing with the Claimant's unexpected circumstances, could reasonably be expected to provide them to him.

100.2 Nor did the Respondent spell out to the Claimant, in Ms Bristow's letters to him of 19 October 2018 and 23 November 2018, what their policies for disabled employees were and what steps would be taken to adjust their recruitment policies for any alternative positions he might apply for.

100.3 These were important omissions, particularly in the context of the Claimant having to come to terms with the condition of epilepsy and learning that he might be dismissed in quick succession. They, understandably, led to the Claimant having the impression that Ms Bristow was going through the motions of seeking to re-deploy him, rather than having any genuine intention to seek to make sure it happened.

100.4 We have given consideration to the Claimant being dismissed with pay in lieu of notice, rather than being given the statutory minimum notice of 7 weeks, which would have given him further time to seek alternative employment. We are puzzled by paying lieu of notice being provided in that the Claimant's appointment form provided in the Tribunal's bundle of documents, in which his terms of employment are set out, make no mention of pay in lieu of notice on dismissal, so far as we are aware. As, however, the Claimant's contract of employment on this point was not addressed at the hearing, we assume for these purposes that the Respondent was entitled to dismiss with pay in lieu of notice. Assuming, therefore, this to be the case, and in the context of the Respondent needing to be in a position to replace the Claimant with a new recruitment, a reasonable employer would nonetheless have encouraged the Claimant in the letter of dismissal, or following receipt of the Claimant's letter of appeal, to keep looking actively for vacancies pending the appeal and to reassure him that appropriate support would be given should he make an application. The Respondent failed to do this.

100.5 At the Claimant's appeal, he or his companion made assertions about things that Ms Bristow and Mr Erskine had done or not done. Mr Hutchings, appropriately enough, wished to undertake further investigations following the hearing. Having done so, he failed to communicate what his further investigations had revealed (either by reconvening the appeal hearing, or at least setting out what had taken place and inviting a written response) before reaching his decision as to the outcome of the appeal and notifying the Claimant of his decision (as, rightly, accepted to be a failing on their part)- see closing submissions of the Respondent above).

100.6 The Claimant's dismissal was, therefore, unfair.

100.7 Additionally, for reasons set out further below the dismissal was an act of disability discrimination and also unfair because of that.

Reasonable Adjustments

101 Did the Respondent take such steps as were reasonable to take to avoid the disadvantage caused to the Claimant of not being permitted to perform his job as a bus driver because he had developed the disability of epilepsy?

102 The Tribunal recognises that searching for alternative employment is a two-way process on both the employer and employee's part. As indicated in our findings of fact above, the Claimant did not at times help himself as much as he could and perhaps should have done in how he went about gaining alternative employment. On their part, however, the Respondent failed to make adjustments that would have encouraged and supported the Claimant in his efforts to find alternative employment. In particular, as set out above, they failed to provide him with the policies and guidelines for dealing with a disabled employee which would have helped the Claimant gain a better understanding of what steps the Respondent would make to adjust its recruitment practices; nor did they set these out in Ms Bristow's letters to him. Nor in these letters did they follow their management guidelines. For example, the statement in the guidelines require that the manager must record that reasonable adjustments were considered even if it appears that no such adjustments are possible. At the meeting on 23 November, although Ms Bristow made a general reference to the Claimant having expressed an interest in vacancies, she did not record what those jobs were, although, as the jobs, we understand, were no longer vacant, this would have made little difference.

103 The kinds of reasonable adjustments an employer in these circumstances could reasonably have been expected to make would have been to have, from early on in the processes that led to the Claimant's dismissal, to have had some kind of skills audit as to what the Claimant's skills and experience might have equipped him for jobs of the Respondent, to have given some consideration of what reasonable adjustments might be made, such as training, in order to perform the role, if such roles became available, whether he would be given prior consideration for any role he might have the skills to perform, such as being interviewed before other internal or external candidates, and to have notified him in writing of what they would do to support him finding alternative employment. In his oral evidence Mr Hutchings criticised the Claimant for not making more effort himself to find alternative employment. To some extent this was unfair, in the light of the Respondent's failings. These failings caused the Claimant, with justification, to feel that his employer was not interested in helping him find alternative employment.

104 None of the above steps would have been difficult, or expensive, to carry out. They would have both helped the Claimant in knowing where he stood in getting active support to find alternative employment, to have more information as to what jobs he might realistically apply for and what support he would get if he did, and as a better basis for further discussion.

105 At the time the Respondent should have been making these adjustments, at or shortly after the meetings on 19 October and 23 November 2019, the Respondent did not know whether such steps would be effective. As it transpires it appears highly unlikely that they would have been nevertheless, the Tribunal regards this issue as being appropriate to similar considerations as those set out in the guidance given in the *Polkey* case (and, in the *Chagger* case, it being made clear that similar considerations apply in discrimination cases) for the Claimant's unfair dismissal claim, rather than removing the need to make any reasonable adjustments.

106 The claim for reasonable adjustments, therefore, succeeds.

Discrimination Arising from Disability

107 It is accepted by the Respondent that the Claimant was treated unfavourably, by being dismissed; and that the dismissal was because of something arising out of his disability, namely that his bus driver's license was removed because of his diagnosis of epilepsy.

108 Has the Respondent shown that the treatment of the Claimant, his dismissal, was a proportionate means of achieving a legitimate aim?

109 There is no doubt that the Respondent had a legitimate aim in dismissing the Claimant. Not only would it have been a criminal offence on both the part of the Claimant and the Respondent to allow the Claimant to continue as a bus driver, but it would have also been a risk to health and safety.

110 As indicated above, similar considerations apply for whether the dismissal was proportionate as to whether reasonable adjustments were made and whether the dismissal was fair. As indicated in the ECHR's Code of Practice, where there has been a failure to make a reasonable adjustment, which would prevent or minimise the unfavourable treatment, it is very difficult for the employer to show that the treatment was objectively justified.

111 In order for it to have been proportionate to have dismissed the Claimant before alternative employment had come, or might have become, available, the Respondent needed to have carried out the steps we have outlined above that they have failed to do.

112 The Claimant's discrimination arising from disability claim, therefore succeeds.

113 As indicated in paragraph 105 above, consideration of what would have happened if proportionate steps had been taken can be considered, if appropriate (if re-engagement is not ordered) in accordance with the guidance given in the *Chagger* case.

Next Steps

114 The Claimant seeks re-engagement.

115 The Tribunal would like to give the parties a reasonable opportunity to seek to settle remedy. We would expect this to include some of the kinds of steps to be taken we have indicated above. For example, it might be helpful for the Claimant to meet someone appropriate from the Respondent to conduct a discussion as to the kinds of jobs within the Respondent's workforce that he might be suitable for, with or without adjustments, should one become available. We understand that the Claimant has regained his car driving licence, which may extend the areas in which he would be available to travel.

116 Should the parties not be able to resolve re-engagement or alternatively financial remedy themselves, we list the case for hearing for 1 day (on Ms Scott-Ellis' time estimate) on 4 October 2021.

117 In case it may be helpful we give the parties an indication of whether we consider the Claimant would or might have been fairly dismissed had fair procedures been followed. It is, of course, always difficult to know what would have happened had steps that did not take place had taken place. The Tribunal's initial view, however, is that it is highly likely that the Claimant would have been dismissed had fair procedures been followed and there had not been disability discrimination, in view of the vast majority of available jobs requiring a bus driving licence.

118 As regards injury to feelings, the Tribunal has not heard evidence on the extent of the Claimant's injury to feelings, although Mr Wiseman indicated in his oral evidence to the Tribunal that at some points in the meetings he attended, the Claimant's feelings ran high.

119 As a general yardstick the Tribunal would be inclined to place injury to feelings for dismissal as being around the top point of the bottom band of the Vento guidelines current at the time of dismissal/bottom point of the middle band. In addition, interest would need to be added pursuant to the Employment Tribunal's (interest in discrimination awards) Regulations 1996.

Employment Judge Goodrich
Date: 4 August 2021

AGREED LIST OF ISSUES

1. Unfair dismissal:

The parties agree that the Claimant was dismissed because, pursuant to s.98 (2) (d) of the Employment Rights Act 1996 ("the ERA"), the Claimant could not continue to work in the

position which he held without contravention (either on his part or that of his employer) of a duty or restriction imposed by or under an enactment – in this case the Claimant was not allowed to lawfully drive a bus following the revocation of the Claimant's category D1/Group 2 PCV bus driving licence. The parties agree that this was the reason for dismissal and that it was a fair reason for dismissal in the absence of any other potential role which fell within the Claimant's capability. However, the Tribunal is asked to decide whether the dismissal was in contravention of s.98 (4) of the ERA. In making that assessment, the Tribunal will need to consider whether the dismissal was fair or unfair (having regard to the agreed reason for dismissal outlined above):

1.1. in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating the statutory restriction as a sufficient reason for dismissing the Claimant;

1.2. in accordance with equity and the substantial merits of the case including:

1.1.1. whether the Respondent followed a fair procedure;

1.1.2. whether the Respondent gave reasonable consideration to whether alternative work could be found for the Claimant, thus potentially avoiding the need for dismissal; and/or

1.1.3. whether dismissal was within the band of reasonable responses for an employer in these circumstances.

1.3. In the event that procedural errors are identified, the Tribunal is asked to consider whether the Claimant would have been fairly dismissed in any event if a fairer procedure had been followed (Polkey)?

2. Discrimination

The Claimant has received a medical diagnosis of Epilepsy. The Respondent accepts that, due to the Claimant's need to take medication to manage his epilepsy, the condition amounts to an impairment which met the statutory definition of disability as set out in Section 6 of the Equality Act 2010 (EqA) at all relevant times. The Claimant relies upon his disability as a protected characteristic.

The Claimant is no longer pursuing a claim of direct discrimination contrary to Section 13 of the Equality Act 2010 ("the EqA 2010").

2.1. Discrimination Arising

Did the Respondent treat the Claimant unfavourably because of something arising in consequence of the Claimant's disability contrary to section 15 of the EqA 2010?

The unfavourable act in this case was the dismissal of the Claimant. The parties agree that the Claimant was dismissed because he lost his driver's licence and that this was something that arose in consequence of his disability. It is also accepted that the Respondent knew at the relevant time that the Claimant was disabled. The Respondent asserts, however, that dismissal was a proportionate means of achieving a legitimate aim of:

2.1.1. Health and safety concerns – not being able to allow someone who is known to be unfit to drive to continue to operate a vehicle putting himself, the Respondent's service users and members of the public more generally at significant risk of harm - the Claimant accepts this as a potential legitimate aim but asks the Tribunal to consider whether choosing to dismiss the Claimant rather than offer him an alternative role is a proportionate means of ensuring safety and legal compliance;

2.1.2. Legality – not being able to allow someone who is legally unable to drive (having had their PCV licence revoked) to continue to do so;

2.1.3. Service Delivery – the need to have sufficient staff in place to meet contractual commitments and to deliver services to the public without incurring disproportionate and unreasonable cost;

2.1.4. Balanced and Fair Recruitment – not putting the Claimant into a role that he didn't have the skills or experience to performance and/or not engaging in positive discrimination to the detriment and disadvantage of other employees, potentially with other protected characteristics, by giving preferential treatment to the Claimant.

3. Reasonable Adjustments

The Claimant asserts that, by virtue of s.20 of the EqA the Respondent was obliged to make, or at least consider, reasonable adjustments for him. The parties agree that the need to have a category D1 driving license was a provision, criterion or practice (PCP) of the Respondent.

3.1. The Tribunal will need to decide whether this was a PCP which put the Claimant at a substantial disadvantage in comparison with persons who are not disabled.

3.2. The Claimant asserts that it was and that the disadvantage caused by this PCP could have been alleviated if the Respondent had met its obligations to consider alternative roles and/or had supported the Claimant in a more meaningful way in his search for alternative roles.

3.3. The Respondent asserts that;

3.3.1. Relevant adjustments were made – ie that efforts were made to source an alternative role for the Claimant;

3.3.2. The additional adjustments suggested (including ensuring a safe workplace in the event that the Claimant had a seizure, and avoiding lone working, and provision of any time off needed to attend medical appointments) would not have alleviated the substantial disadvantage allegedly caused because they could only be relevant (and therefore reasonable) adjustments if an alternative vacancy had been available/found.

4. Remedy

4.1. If any of the Claimant's unfair dismissal claim succeeds, should the Claimant be reengaged?

The parties agree that, due to the Claimant's lack of a category D1/group 2 pcv licence, he could not legally perform his role as a bus driver and therefore reinstatement is not practicable. However, the Respondent asserts that before re-engagement can be considered, the Claimant would need to identify a role (and a legal entity within the Arriva Group) that he would like to be re-engaged to so that the Respondent can consider the practicality of any such re-engagement.

4.2. If the Tribunal accepts that re-engagement is not practicable, should any compensation awarded be reduced:

4.2.1. to reflect the Claimant's ability (or inability due to ill health) to work during 2019?

4.2.2. To reflect any failure by the Claimant to take reasonable steps to mitigate his loss?

4.2.3. To reflect the chance that the Claimant would have been fairly dismissed in any event if a fairer procedure had been followed (Polkey)?

4.3. If the Claimant's discrimination claim succeeds, is the Claimant entitled to claim an Injury to Feelings Award and if so, within which Vento Band?