

THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: **Mr Robert Macfarlane.**
Represented by: Mr Andrew Castle
Respondent: **CT Plus Guernsey Limited**
Represented by: Ms Kate Parker
Tribunal Members: Mr Peter Woodward (Chairman)
Mrs Alison Girollet
Mr Darren Etasse

Hearing dates: **14 & 15 May 2018**

Decision of the Tribunal

On behalf of the Applicant, Mr Robert MacFarlane it was claimed that he had been unfairly dismissed within the meaning of the Employment Protection (Guernsey) Law, 1998, as amended.

The Respondent contested this claim. Having reviewed and duly considered all the evidence submitted and the representations of all parties to the hearing, whether specifically recorded in this judgment or not, the Tribunal finds on balance, the Respondent acted within a band of reasonableness and that the dismissal was fair. The complaint is dismissed.

Mr Peter Woodward
.....

6 July 2018
.....

Signature of the Chairman

Date

Any Notice of an Appeal should be sent to the Secretary to the Tribunal within a period of one month beginning on the date of this written decision.

The detailed reasons for the Tribunal's Decision (Form ET3A) are available on application to the Secretary to the Tribunal, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF.

Case No ED041/17

The Law referred to in this document is The Employment Protection (Guernsey) Law, 1998, as amended.

Extended Reasons

1. Introduction

1.1 The Applicant, Mr Robert MacFarlane was represented by Castle Defence.

The Applicant called the following witnesses:-

- Mr Robert Macfarlane
- Mr Lawrence Hlapane

By witness statement:

- Mr Vince Barrow
- Mr Philip Le Prevost

1.2 The Respondent was represented by Ms Kate Parker.

The Respondent called the following witnesses:

- Mr Kevin Jackman
- Mr Lee Murphy
- Mr Kevin Hart

The Tribunal requested a witness statement from Mr Bob Lanning.

1.3. At the outset of the hearing it was confirmed that:-

The agreed Effective Date of Termination (EDT) was 07 September 2017
The gross earnings were £16,315.74 for the six months prior to the EDT

1.4

The complaint is as follows:

1.4.1 Alleged unfair dismissal (Capability).

1.5 The Respondent, in his ET2, admitted the dismissal but claimed it was fair

2. Facts Found

2.1 The Applicant was employed in the role of Controller between 1 April 2012 and 7 September 2017.

2.2 The Applicant's initial employment contract of employment was dated 28 April 2012. The role was paid on an hourly basis. Section 9 of this contract stated:

"Your employment is conditional on you holding a valid permit to drive Public Service Vehicle (Omnibus D) (the PSV Licence) satisfying the requirements of the Road Traffic (Permits to drive public service vehicles) Ordinance 1986 (as amended) and The Public Transport Ordinance 1986 (as amended)".

2.3 The employment contract was signed by both parties, there was no reference to a job description and neither had one issued to the Applicant.

2.4 In 2015 the Respondent, having secured a new commercial agreement with the States of Guernsey, issued the Applicant with a new employment contract which changed the basis of his remuneration to that of a monthly paid salary.

2.5 The contract again stated that employment was conditional on holding, and continuing to hold a "PSV" licence. Section 5 of this contract stated:

"Job title and duties

5.1 You are employed by the Employer as a Controller and you will report to the local operations manager and/or any other person that the employer nominates as your line manager

5.2 The duties which your job entails are set out in the job description attached to this contract

5.3 Your job description may from time to time be amended by the employer and, in addition to the duties set out in the job description you may at any time be required to undertake additional or other duties as are reasonably necessary to meet the needs of the employers business"

The Respondent did not submit a job description in the bundle and did not contest the Applicant's evidence that he had never received such a document whilst in their employment.

The Respondent did not provide a signed copy of the Applicant's employment contract and the Applicant, despite requests to his employer, had not obtained a copy. However evidence offered by the Applicant, Mr Hlapane and Mr Hart, indicated that the Applicant knew the contents of this contract. The Applicant had worked under this contract for over a year and in 2016, together with Mr Hlapane, successfully contested a paragraph in this document that they deemed unfair.

- 2.6 The Applicant had an accident at work on 26 November 2015 that resulted in serious back, ankle and other skeletal problems. The accident was reported to the Respondent and, in the ensuing 18 months, the Applicant had two operations on his ankle and a procedure on his spine.
- 2.7 Following his accident, the Applicant needed to manage on-going chronic pain by taking Tramadol initially and then in May 2017, Amitriptyline. The Respondent did not contest the Applicant's evidence that in 2016, he had informed his Line Manager, Mr Jackman, that he was taking medications to control his symptoms.
- 2.8 In 2016 and 2017, the Applicant drove passenger carrying buses on a number of occasions. In his statement, he informed the Tribunal *"I continued to do my job including the occasional driving of a bus because the most I ever needed to drive was for was 90 minutes or so which I cope with. I also avoided driving late night buses as that was when I took my drugs."*
- 2.9 In February 2017, the Applicant requested flexible working due to childcare issues and subsequently met with Kevin Jackman. As part of this meeting, the Applicant was requested to provide Mr Jackman with a list of his medications (Page 61) which he did. The subsequent letters from Mr Jackman and Mr Hart which turned the Applicant's flexible working request down, (Pages 62-64) made no mention of any drugs the Applicant was currently taking.
- 2.10 In May 2017, the Applicant gave Mr Jackman a letter relating to his medical condition (Page 65 refers). It detailed serious issues with the Applicant's health including a problem with his neck, back pain, right arm twitches and getting "electrical shocks" along his arm. The Applicant had also reported that at times his arm went completely numb and that he got hot pains that came and went at different times. The Consultant also noted that the Applicant had reduced right-sided handgrip power.

Having received a copy of this letter, Mr Jackman forwarded it to Mr Lee Murphy and recommended that the Applicant be referred to the Occupational Health Service.

- 2.11 On 4 August 2017, a formal Employee Referral to Occupational Health was completed signed by Mr Jackman and the Applicant. The overall concerns expressed by Respondent in this referral were *"Fitness for work"*, *"Having difficulty performing certain role specific tasks"*, and *"Mr Macfarlane would like advice regarding future medical choices"*. (Pages 79 & 80).

The Occupational Health Service responded on 10 August 2017 confirming that an appointment had been made with an Occupational Health Advisor for 14 August 2017. (Page 81 refers).

- 2.12 On 10 August 2017, the Applicant sent an email to Mr Jackman which stated *"I have had a bad day today I went to see a doctor who is not my normal doctor and he gave me the new dosage of drugs that the Neurologist from Southampton has prescribed."*

When I asked him if I could still do my job whilst taking this dosage the doctor told me I cannot even drive a scooter let alone a bus. He said he would write a letter to Lee and tell him I was not allowed to drive UFN until either the dosage went down or I had the operation."

- 2.13 On 11 August 2017, Mr Jackman sent an email to Mr Murphy informing him that the Applicant was signed off for a week and that the Applicant had been told he could not drive any vehicle whilst taking this increased dosage.
- 2.14 On 16 August 2017, a letter from the Applicant's GP stated that he had prescribed a reduction in the dose of medication but due to the sedating effect of the medication, the Applicant should take the dosage in the evening and should not drive after 10 PM. (Page 84 refers).
- 2.15 On 17 August 2017, the Applicant received written confirmation of an appointment with an Occupational Health Consultant on 18 August 2017. (Page 85 refers).
- 2.16 On 18 August 2017, the Applicant met the Occupational Health Consultant. The Consultant wrote to the Respondent that same day. In his letter, the Consultant summarised the Applicant's capability to perform his role.

The Tribunal notes specific sections of this letter as follows:-

"Mr McFarlane is a service controller. I understand as part of his role he occasionally also has to drive buses. He tells me this can vary between 10 minutes and one hour and 30 minutes per week. He also tells me that he has notified you in the past that he does not feel safe to drive a service vehicle but that he has been expected to drive regardless"

"Your referral suggests that you are fully aware that Mr McFarlane experiences problems with his neck out with his right arm. Mr McFarlane tells me he has provided you with a copy of the report from Dr Stefak dated third of May 2017 two thousand and seventeen 17 which outlines his arm symptoms in detail"

"Based on the information provided to me and my assessment today, Mr McFarlane is fit to continue in his current role provided adjustments can be made. In my opinion he is currently unfit to drive service vehicles and I have asked him to notify the Guernsey equivalent of the DVLA so that his current licenses can be considered. He has agreed to do that"

- 2.17 Also on 18 August 2017, Mr Jackman wrote to the Applicant stating that he had no option but to remove the Applicant from his role pending further information from Occupational Health. Mr Jackman included with his letter a copy of the Respondent's Capability Policy.(Pages 89 to 95 refer.)

2.18 On 25 August 2017, the Applicant was invited by Mr Murphy to a Capability hearing on 31 August 2017. In his letter Mr Murphy stated the purpose of the meeting was to:-

- Establish the employee's own assessment of their condition, whether there has been any improvement in his condition and how any treatment was going.
- Discuss any possible return to work (if this has been confirmed as an option by the occupational health advisor (GP)).
- Draw up, in agreement with the employee, a return to work programme with review dates in order to discuss progress (and amend if necessary); and
- Consider, and if possible agree, the next steps including a future review date.

2.19 On 31 August 2017, the States of the Guernsey Driver and Vehicle Licensing Authority ('DVLA') wrote to Mr McFarlane with a notice of revocation of his driving licences and his permits to drive a public service vehicle.

These revocations had an unlimited time frame and were by reason of the Applicant's health and his inability to meet the medical requirements associated with being a fit and proper person to hold such licenses.

2.20 On 1 September 2017, the Applicant (supported by Mr Lanning) attended a capability hearing with Mr Murphy'. A record of that meeting may be found at Pages 98 to 103 of the bundle. Mr Murphy informed the Applicant that the hearing that would be divided into two parts:

- Firstly to summarise the companies understanding of the Applicant's medical situation to date and how it currently stood; and
- To give the Applicant an opportunity to update the Company on his current situation and to provide any relevant information on-going and future condition.

On inspection of the record of the meeting, the Tribunal notes that on a significant number of occasions, the Respondent used "closed" questions rather than "open questions". Nevertheless, the Applicant was asked towards the end of the hearing if he had anything further to add, that had not already been covered by hearing or the Applicant's emailed statement.

2.21 On 5 September 2017, (ER2) the Applicant sent an email to Mr Murphy which stated *"my Doctor examined me and after he did he said I was unfit to work altogether and I would definitely not pass the medical (for a PSV) should I go ahead with it due to changes in my condition so there was no reason to conduct a medical"*

2.22 On 7 September 2017, the Respondent wrote to the Applicant dismissing him from his employment with the Company. (Pages 104 to 108). It is evident from this document that the major issue for Respondent was that it could not determine when the Applicant would be fit to return to work. The letter addressed multiple issues as follows:

- The on-going pain and restricted mobility of the Applicant's right ankle all thus reducing the Applicant's suitability to patrol the terminus area in a "customer service" capacity and his fitness to respond to emergency situations.
- On-going complications with the Applicant's right shoulder leading to a reduced grip of the Applicant's right hand. This affected his ability to carry out tasks like interior vehicle cleaning, exterior vehicle washing and the moving and fuelling of vehicles.
- On-going back-pain which restricts upper body mobility.
- On-going pain management and medication concerns, in particular the potential issues that he would have in dealing with late night shifts given the on-going need to take Amitriptyline and Tramadol.
- The revocation of his PSV licenses.
- The email of 5 September 2017 in which the Applicant advised the Respondent that his doctor had decided that the Applicant was not fit for work in any instance. As a result of his GP's assessment, the Applicant had not sought to complete the medical report required by the licensing authorities.

As there were no other suitable roles that the Applicant could undertake with the Respondent, the Applicant's employment was terminated with immediate effect.

Mr Murphy stated that the Applicant was able to appeal his decision in line with company procedures.

- 2.23 On 8 September 2017, the Applicant submitted an appeal letter (Page 118 refers). The basis for his appeal was that the Applicant believed that the suspension of his category D licence and of his PSV permit would only be temporary. Also other members of staff who had lost parts, or all of their driving licences, had been treated differently (i.e. not dismissed).
- 2.24 On 13 September 2017, Mr Hart, who was to conduct the appeal hearing, confirmed that the hearing would take place on 18 September 2017 (a date to include for Mr Lanning's availability. (Page 120 refers). In his letter, Mr Hart stated that there were three possible outcomes from the appeal:
1. To reduce the sanction
 2. To quash the sanction
 3. To uphold the decision.
- 2.25 On 18 September 2017, the appeal hearing took place. (Pages 125 to 128 refer). The rationale for Mr Hart not upholding the Applicant's appeal was communicated on 22 September 2017. In his letter Mr Hart stated:

- That contrary to the Applicant's belief, his category D Driving Licence for a large passenger-carrying vehicle had been revoked not just suspended.
- At no point did any of the employees with whom the Applicant sought to compare with have a revocation of the category D licence. Short-term adjustments were made for these employees (as were some adjustments made for the Applicant in the past). However the revocation of his category D licence had no set timeframe.

Mr Hart did however provide that if, during the next 4 weeks (i.e. before 20 October 2017) the Applicant could provide a timescale when an operation might take place together with an estimate of any recovery time required, then if the timescale was reasonable, the sanction might be reduced to a final written warning.

- 2.26 On 20 October 2017, (Pages 135 to 136) Mr Hart wrote to the Applicant and quoted the medical advice which had submitted by the Applicant on 2 October 2017:-

"The spine neurosurgeon from UK will send me an appointment to go to see him or her, but as I have just been referred recently is most likely going to be some weeks away before I get an appointment and then further few weeks after that until I get any go ahead with surgery which will be even more weeks before the operation can be done. They are really quite packed wherever is the hospital is

I am currently awaiting a Spect/Ct of my ankle in Southampton which also requires surgery once again and that also will be weeks away"

As there had been no further information the decision to dismiss was confirmed.

3. Kevin Jackman

- 3.1 The witness read from a witness statement (Pages 141 to 142 in the bundle refer).
- 3.2 Mr Jackman has been employed by the Respondent since 1 June 2013 in the role of Assistant Operations Manager. His main duties are overseeing the day to day operations of the business including human resources, operations and engineering.
- 3.3 Mr Jackman described the scope of CT Plus activities in Guernsey as an employer of some 70 to 75 employees, of which approximately 60 are drivers. In addition to running the scheduled bus routes throughout the island, the Company also provides other services such as school buses.
- 3.4 When in February 2017, the Applicant had requested flexible working due to childcare issues, Mr Jackman had asked for the request to be put in writing. The request (Page 61 refers) was discussed with the Applicant on 22 February 2017. On 18 April 2017, Mr Jackman declined the request due to operational reasons (Page 62 refers). During this process, Mr Jackman requested a list of the medications being taken by the Applicant. In his letter to the Applicant, Mr Jackman stated that arrangements had

been made to cover the start of The Applicant's shifts on Tuesday 18 April 2017 and 19 April 2017 but after those dates, no concessions could be made to provide cover for his personal requests. Finally Mr Jackman also stated that if the Applicant had any questions in respect of his decision, then he should direct such enquiries to either Lee Murphy or Nicki Withe.

- 3.5 By August 2017, Mr Jackman became concerned over the level of medications being taken by the Applicant. In a telephone discussion on 10 August 2017, the Applicant had told him that the doctor had signed him off as too sick to attend work and that *"he should not be riding a bike let alone driving a bus"*.
- 3.6 On 18 August 2017, the Occupational Health assessment set out that the Applicant was currently unfit to drive service vehicles and that this must be reported to the DVLA. This assessment prompted Mr Jackman to suspend the Applicant from his duties on the grounds of capability.
- 3.7 Mr Jackman stated that in the short term, CT Plus could be flexible for example, with regard to patrolling the Terminal or making alternative arrangements for CCTV downloads. However the Applicant's future ability to perform his full role in the long term was clearly very questionable. Significant variations to role in the long term could not be accommodated.

4. Lee Murphy

- 4.1 The witness read from a witness statement (Pages 143 to 146 in the bundle refer).
- 4.2 Mr Murphy has been employed by the Respondent since 6 August 2013 in the role of Operations Manager and is responsible for the daily operation of the scheduled bus services throughout the island.
- 4.3 Mr Murphy stated that the Applicant had been issued with a revised contract of employment changing him from hourly paid status to monthly salaried. This contract was dated 22 May 2015 and took effect on 1 June 2015. As the change to the pay arrangement had no major impact to the continuing role and duties of the Applicant, there had been no requirement for him to issue a further job description i.e. he'd relied on the issue of a job description to the Applicant in 2012 to describe the Applicant's role.

The Tribunal notes that the signed copy of this contract could not be produced to the Tribunal and the Applicant claimed he had never received a copy.

- 4.4 Mr. Murphy was notified by email on 16 June 2017 of the Consultant's letter in respect of the Applicant's health (referred to in 2.10) and Mr. Jackman's intention to refer the Applicant to the Occupational Health Service.
- 4.5 In early August 2018, Mr. Murphy notified the Applicant of additional services for some large-scale events around the island and that his services would be required.

Examples of such events are the Rocquaine Regatta and West and North Shows. Mr. Murphy informed the Tribunal that owing to exceptional demand on resources, salaried staff would normally be expected to assist by driving buses in such circumstances. The Applicant had responded back stating that he had childcare issues and that he was unable to drive during his regularly rostered shifts. In light of the Applicant's response, Mr. Murphy considered that an urgent referral to the Occupational Health service was required.

- 4.6 At the Applicant's capability hearing on 25 August 2017, it was Mr Murphy's opinion that the Applicant had already been informed as to the options that the employer might follow. Mr Murphy agreed that there had been a significant use of "closed" questions, however he believed that there had been sufficient opportunity through a number of "open" questions, for the Applicant to have added anything that he thought might be relevant.
- 4.7 Mr. Murphy had made the decision to terminate the Applicant's employment and, given the multiple issues detailed in the letter of dismissal, he believed it was a fair decision. His decision had also been influenced by the Applicant's refusal to consider the reasonable adjustments and alternatives that had been offered to him. The Applicant had told him that he was unable to perform "yard based" activities such as the interior and exterior cleaning of vehicles, or the shunting or fueling of vehicle. Further, the Applicant had also expressed concerns as to his entry and egress from vehicle cabs. The Applicant had informed him in July 2017 that he was unable to perform duties that required him to drive vehicles, or stand for long periods of time. Most fundamentally the Respondent had experience of suspensions of PSV licenses for fixed periods of time, either as a punishment or for the purposes of medical investigation. However an unlimited revocation of a license indicated to him that the Applicant might never be able to regain his PSV license unless the Applicant was able to provide evidence contrary to the terms that led to the revocation.

5. Kevin Hart

- 5.1 The witness read from a witness statement (Pages 147 to 148 in the bundle refer).
- 5.2 Mr Hart has been employed by the Respondent since 1 October 2012 in the role of Regional Director and is responsible for the pan island bus operations for CT Plus. His main duties provide for the overseeing of the day-to-day operations of the business including human resources, finance, operations and engineering.
- 5.3 Mr Hart confirmed that he would have met with the Applicant at the time of his change from an hourly paid to a monthly salaried contract. He saw no reason to re-issue a job description as there were no changes in the Applicant's responsibilities including the requirement to hold a PSV license.
- 5.4 Mr Hart heard the appeal against Mr Murphy's decision to dismiss. Mr Hart rejected each of the Applicant's grounds of appeal. (Refer to paragraph 2.25 "Facts Found").

Mr Murphy also addressed the issue that the invitation to the original hearing did not mention the possibility of termination. Mr Hart referred the Applicant to the section of the Company's capability procedure which stated that if an Occupational Health practitioner indicated that the employee's health would not improve sufficiently in order to resume normal duty in the foreseeable future, then the meeting would be held under "section 3" of the process which includes for the possibility of termination of employment.

- 5.5 Having considered the issues raised by the Applicant, Mr Hart thought it was only fair to give the Applicant sufficient time to establish when an operation could take place and gain some estimate as to how long the recovery period might be. He therefore gave the Applicant 4 weeks to obtain advice from his medical advisors. In his letter to the Applicant, Mr Hart confirmed to the Applicant that if the medical advice confirmed that the Applicant could have the necessary operations and be back to work within a reasonable time frame, then the sanction would be reduced from dismissal to a Final Written Warning.

6. Bob Lanning (written statement only)

- 6.1 A witness statement was included in the bundle. (Page 149 refers).
- 6.2 Mr. Lanning is the Regional Officer for the Unite Union. Mr Lanning accompanied the Applicant to the capability meeting on 1 September 2017.
- 6.2 In his statement, Mr. Lanning informed the Tribunal that as the letter inviting the Applicant to the capability meeting did not state there was any risk to his ongoing employment, he believed the meeting would just be a discussion as to the Applicant's current medical condition and a prognosis of a return to work. He was therefore very surprised at the conclusion of the meeting when Mr. Murphy terminated the Applicant's employment. This decision was far in excess of his expectations as a Unite officer and he would have expected at the very least, that if there was the risk of termination of employment as a potential outcome, it should have been included in the letter inviting the Applicant to the meeting.
- 6.3 Mr. Lanning noted that Mr. Hart had conducted a rehearing as part of the appeal process. Mr Lanning conceded that the outcome and conclusion of the appeal was likely to be the same as in his words "*we were unable to provide a return to work time frame*"

7. Robert MacFarlane

- 7.1 The Applicant read from a witness statement (Pages 150 to 153 in the bundle refer).
- 7.2 The Applicant had an accident at work on 26 November 2015 that resulted in serious back, ankle and other skeletal problems. The accident was reported to the

Respondent, and in the ensuing 18 months, the Applicant had undergone two operations on his ankle and a procedure on his spine.

- 7.3 The Applicant had ensured that his employer was kept aware of his on-going condition with copies of medical reports and the related drug regime. In particular in May 2017, he gave the Respondent a copy of a letter from a medical consultant. (Page 65 refers).
- 7.4 The Applicant stated that the duties he undertook were mostly related to ensuring that services ran smoothly and on time on a day-to-day basis. He would monitor the drivers to ensure they met their scheduled duties and he would deal with any breakdowns. If any drivers went sick, he would arrange cover. The Applicant stated that only on very rare occasions did he drove a service bus himself, either because he wanted some overtime or to help out at specific events like the West Show. However, as such events were few and far between, they only amounted to a small percentage of his work.
- 7.5 In a somewhat contradictory paragraph within his statement, he informed the Tribunal that he did occasionally drive buses – but as he did not need to drive buses for more than 90 minutes at any one time, he could cope with that. He did however avoid driving late night buses, as that was when he took his drugs. The Applicant thought his employer was well aware of this fact and it did not cause any problems until later in 2017, when Mr Murphy started to put pressure on him to drive buses, especially for show services.
- 7.6 The Applicant stated that he made every attempt to keep the Respondent informed as to the extent of his medical problems and of the medication that he was required to take in order that he could work.
- 7.7 The Applicant was totally surprised and very concerned when on the 18 August 2017, he received a letter from Mr Jackman suspending him from duty and indicating that a capability hearing would be held. The Applicant believed the only constraint to working was due to his medication.
- 7.8 The invite of the Applicant to attend a capability hearing did not mention or indicate any risk to his on-going employment. The Applicant said that if he had known that his job was at stake, he may well have acted differently. However, he was convinced that despite the medication issues, he could still perform approximately 95% of the required role.
- 7.9 The Applicant was absolutely devastated by both how the meeting was conducted as well as the outcome of the capability hearing. Much of it was conducted with the use of “closed” questions and it was his belief, that his Category D licence / PSV license had only been suspended. The Applicant immediately appealed this decision.
- 7.10 The Applicant was aware of other drivers who also had had their licences suspended or revoked. The Applicant believed that he had been treated differently from these other employees, all of which had been assigned alternative duties until they were able to drive public service buses again.

- 7.11 In his appeal hearing, the Applicant also raised the issue that prior to the capability hearing (which had resulted in the termination of his employment), he had no idea prior to the meeting that his job was at stake.
- 7.12 The Applicant did his best to find out more information on potential hospital operations / procedures during late September and early October but advice from the Medical Specialist Group was that there could be no clarity of timescale until medical specialists had made their assessment in the UK. There would then be many weeks before decisions were made and there could be further delays before any operation was scheduled.

8. Lawrence Hlapane

- 8.1 Mr Hlapane has been employed by the Respondent as a Controller since 1 April 2012.
- 8.2 Although the witness did not have a current job description, his day-to-day work involved the following activities:
- Allocation of drivers to routes and staff rostering.
 - Dealing with customer complaints
 - Monitoring the cashing in process at the end of driver shifts
 - Using the VHF radio to monitor bus timekeeping
 - Dealing with breakdowns
 - Dealing with anything that impacts on the smooth running of the bus service
- 8.3 The witness stated that he was only very rarely called upon to drive a service bus and even then, there would be other alternatives to provide cover as there were spare drivers to take over if someone was ill. He did not consider that he needed a bus PSV license to do his job.
- 8.4 The witness said that he was never required to wash or clean buses or in any other way become involved in their maintenance or upkeep.
- 8.5 Mr Hlapane stated that although controllers do not have rostered breaks, he did not have to be on his feet all day and much of what he did could be achieved at a desk or sitting down. Even when he was out and about at the terminus in Town, he was able to sit down whenever he needed to.
- 8.6 The witness said that following the issuing of a revised contract of employment in 2015, he, together with the Applicant, had common cause to persuade the Respondent that there was an error in the contract. The witness recalled discussing the issue and his copy of the contract with the Applicant (his contract being the same to that of the Applicant).

9. Vince Barrow (written statement only)

- 9.1 Mr. Barrow is a bus driver who has been employed by the Respondent for about 4 ½ years.
- 9.2 In October 2016, Mr Barrow had a transient ischemic attack or mini stroke. He was advised by the medical authorities not to drive and his PSV license was revoked by the environment department. He was unable to drive buses for 12 months from the date of diagnosis.
- 9.3 To his knowledge, the Respondent had a history of keeping people on when they lost their PSV license. In the case of himself, he was found other work such as cleaning and fueling the buses as well as kiosk work and route training for new drivers.
- 9.4 It was his view that in the long-term, it is preferable for a Controller to have a bus PSV license, but in the short-term and with the Company's help, it was not a necessity.

10. Philip Le Prevost (written statement only)

- 10.1 Mr. Le Prevost is currently employed by the Respondent as a lead driver.
- 10.2 The majority of his job is patrolling the Town bus terminus and sorting out any problems that disrupt the bus service. He also shunts buses around bus stands and holding areas. Occasionally he has to drive a service bus. This happens when two or more drivers have notified sick days and occurs on average about three times a month.
- 10.3 During the latter part of 2015 and into 2016, he had three medical conditions that resulted in him not being able drive. The net effect of these conditions was that he was not allowed to drive buses for an approximate period of six months. He was able to do all his other duties except the driving. The Respondent was aware of all of the details surrounding his medical situation and work limitations yet retained him in employment.
- 10.4 His license had been revoked due to his health conditions and he was able to resume driving until he was passed fit by the Environment Department. The Respondent was aware of this situation.

11. Conclusion

- 11.1 The issues presented by this complaint were complex. The Respondent did not conduct themselves in accord with their own procedures, and the Applicant's medical condition was also very complex and challenging. The lack of any clear prospect for the Applicant to perform his role as a driver in the foreseeable future, or to perform other work related tasks, weighed heavily in the decision that was finally made.
- 11.2 Despite the lack of a job description, the Tribunal is persuaded that the Applicant knew from the outset of his employment that continued possession of a PSV license was a

specific and explicit requirement of his contract of employment. The Applicant endeavored to persuade the Tribunal that he knew little of his employment contract, however the joint grievance by himself and Mr. Hlapane in relation to a contractual matter in 2015 would seem to confirm that he knew the details of what was contained in his contract.

- 11.3 The number of hours or trips required by the Applicant in charge of Public Service Vehicles was not specified by the Respondent, but it remained an explicit contractual requirement. Whether he drove a bus once a year or once a day, the nature of the role was such that the Applicant might reasonably be called upon to drive a bus as part of his contracted role at any time.
- 11.4 The Applicant's evidence is somewhat contradictory as to the amount he drove scheduled bus services or performed "yard duties" and the records produced by the Respondent as to who drove which bus were brought into question by the practice of drivers apparently at times using the log in codes of their colleagues.
- 11.5 Mr. Jackman and Mr. Murphy were aware of the Applicant's condition following his accident in 2015. No major concerns arose in 2016, however in 2017 the situation changed.
- 11.6 The referral to the Occupational Health Service and the Applicant's subsequent medical report after assessment was very concerning for both the Respondent and the Applicant. It also led to an immediate referral to the DVLA.
- 11.7 The DVLA decided that they had no choice other than the revocation of the Applicant's licenses and PSV permit. From their communication of 31 August 2017, it was evident that they would need considerable further and positive medical evidence to reverse their decision.
- 11.8 The Tribunal is very critical of the meeting which resulted subsequently in the Applicant's dismissal. The lack of prior warning that the meeting could potentially result in a dismissal was fundamentally wrong. The meeting was further compromised by the extensive use of closed questions. In summary it was not held in accordance with the Company's own procedure or natural justice.
- 11.9 The Tribunal notes that during 2017, the Applicant seemed to reinforce his own lack of capability in a number of communications to his employer. In particular the email of 5 September 2017 sent by the Applicant and which included the bleak diagnosis of his GP, would clearly have contributed to the decision by the Respondent to dismiss the Applicant.
- 11.10 The Tribunal notes a significant disagreement between the Applicant and the Respondent as to what duties the Applicant could perform. Mr. Barrow and Mr. Le Prevost both stated that during the periods of their PSV license revocation, they were able to carry out other duties for the Respondent. It is evident from the very detailed analysis of the Applicant's physical constraints (as contained in the dismissal letter 7

September 2017) that the Respondent believed there were many duties that the Applicant could not fulfill.

- 11.11 It is the opinion of this Tribunal that the very poor capability process was counterbalanced by the offer from Mr. Hart to provide a period of grace for 4 weeks, so that the Applicant could try to provide some concrete information as to how his medical problems might be resolved, and within what kind of time frame. The Tribunal believes that it was a genuine offer by the Respondent and should the time scales not be unreasonable to the Respondent, the dismissal would be rescinded and substituted with a final written warning.
- 11.12 The Applicant, believing that he would be unable to obtain such information, requested that the period of 4 weeks be foreshortened so he could receive his end of employment payments immediately in order to pay bills. (Page 129 refers).
- 11.13 Despite all the complexities of the evidence that has been heard and contained in the “bundle”, the fundamental issue is that it is no matter as to whether the Applicant drove a bus once a year or once a day, the nature of the role was such that the Applicant might reasonably be called upon to drive a bus as part of his contracted role at any time. His contract was clear and explicit as to this requirement. It was not unreasonable for the Respondent to assume that given the gravity and complexity of his medical issues the prospect of him ever re-qualifying for his PSV license within any reasonable timescale was questionable.

12. Decision

The Tribunal has determined that the initial very poor capability process that was followed was rectified to a large extent by the appeal. On balance, the Tribunal finds that in the circumstances, the Respondent acted within a band of reasonableness and that the dismissal was fair.

Mr Peter Woodward

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Signature of the Chairman

6 July 2018

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Date