



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Mr E Kanyoro

Metroline West Limited

Held at: Watford

On: 8 February 2017

Before: Employment Judge Smail

Appearances

Claimant: Mr D Earl (FRU)

Respondent: Ms H Norris (Solicitor)

RESERVED JUDGMENT

The Claimant's claim of unfair dismissal is dismissed.

REASONS

1. By a claim form presented on 31 October 2016, the Claimant claims unfair dismissal. He was employed by the Respondent as a bus driver between 31 May 2011 and 4 August 2016 when he was dismissed ostensibly on the ground of gross misconduct.

The Law and Issues

2. The Tribunal has had regard to section 98 of the Employment Rights Act 1996. By section 98(1) it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. A reason relating to the conduct of an employee is a potentially fair reason. By section 98(4) where the employer has fulfilled the requirements of subsection (1), 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 (b) shall be determined in accordance with equity and the substantial merits of the case.

This has been interpreted by the seminal case of British Home Stores v Burchell [1978] IRLR 379 (EAT) as involving the following questions:

- (a) Was there a genuine belief in misconduct?
- (b) Were there reasonable grounds for that belief?
- (c) Was there a fair investigation and procedure?
- (d) Was dismissal a reasonable sanction open to a reasonable employer?

I have reminded myself of the guidance in Sainsbury's Supermarkets v Hitt [2003] IRLR 23 (CA) that at all stages of the enquiry the Tribunal is not to substitute its own view for what should have happened but judge the employer as against the standards of a reasonable employer, bearing in mind there may be a band of reasonable responses. This develops the guidance given in Iceland Frozen Foods v Jones [1982] IRLR 439 (EAT) to the effect that the starting point should always be the words of s. 98(4) themselves; that in applying this section an employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether they, the employment Tribunal, consider the dismissal to be fair. In judging the reasonableness of the employer's conduct an employment Tribunal must not substitute its decision as to what was the right course for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, whilst another quite reasonably take another. 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 is outside the band, it is unfair.

FINDINGS OF FACT ON THE ISSUES

3. There had been an unfortunate series of events leading up to the disciplinary hearing on 4 August 2016. A letter dated 20 July 2016 from the investigating manager, the Operations Manager Rodolfo Brusa, set out the allegations the Respondent was making against the Claimant, as follows:

- (a) Refusal of duty on 17 June 2016;
- (b) Bad attitude and demeanour towards TfL officials on 21 June and 13th of July 2016;
- (c) failing to comply with a TFL official instruction on 13 July 2016;
- (d) Endangering public safety by –

- moving off a bus stop whilst talking and with passengers on the platform;
- failing to drive to the required standards;
- repeatedly driving the bus towards a TFL official;
- and putting the company in disrepute;

all on 13 July 2016.

4. In respect of 17 June 2016, the allegation was that the Claimant had refused to comply with the instruction of a service controller to depart with his bus. The Claimant was alleging that he had three minutes stand time at Euston station; the controller was of opinion that the Claimant should depart believing the Claimant had waited three minutes. The Claimant got out of his bus, he stated he could not drive under the stress, and was sent into the garage to see the counter supervisor by the controller.
5. The allegation in respect of 21 June 2016 was made by one of TFL revenue protection officers (RPOs). All RPOs are employed by TFL to check tickets, travel cards and oyster cards for all London buses across the fleet, irrespective of the operating company. The allegation was that the Claimant had driven off from the Westminster Academy bus stop although he had been told by the RPO to wait so that a passenger could board. It was suggested that the Claimant shouted at the RPO that he didn't want her to talk to him; and she could book him instead. The Claimant told the RPO to get off his bus. This was repeated to a RPO inspector. The Claimant got out of his bus and switched off the engine. He refused to provide his log card to the RPO. The Claimant asked the RPO for her badge number. Further the Claimant refused to supply an inspector's ticket which is needed to check the passengers' tickets and oyster cards. The Claimant eventually drove off.
6. The Claimant provided his version of events in respect of both these incidents. Nonetheless, in respect of these incidents he was issued with a written warning at the disciplinary hearing on 4 August 2016. He was not dismissed for these matters. He was dismissed only for the events of 13 July 2016.
7. The result was confirmed by letter dated 5 August 2016 from Violetta Hollanda, the operations manager at Willesden Junction garage. She recorded the circumstances giving rise to his dismissal as follows:

'You failed to comply with the revenue official's instruction on 13 July 2016. You brought the company into disrepute by your behaviour in public and drove your bus towards a TFL official, who was clearly visible in front of your vehicle on 3 occasions and even made contact with her on one occasion. You compromised her safety with no justifiable reason to do so.

You have refused to admit that you have done anything wrong. Your actions amount to gross misconduct and warrant dismissal.'

8. The incident involved the same RPOs as on 21 June. The account given by the RPO at the disciplinary hearing was to this effect –

'I boarded the bus first and started to check the bus while my colleague asked for a ticket...My colleague told me that the driver had not given him an inspection ticket... The next thing was that my colleague told me that a passenger with a child on her arm sat down as she could not validate her ticket because the driver did not press the red button. As an inspector, my role is to ensure that all passengers validate their cards ... When I went to the front of the bus the driver was saying 'You 2 inspectors are always giving me trouble'. It was my colleague who was dealing with him so I left him dealing with the driver and did not get involved. I called CentreComm to get details of the garage from which the driver came. There was then shouting. My colleague informed the passengers to get off the bus because the bus was not going any further and started to transfer the passengers. CentreComm instructed me to hold the bus there. The driver at this point turned the engine off and stepped off the bus and he was not complying with my colleague's instruction.... Although the driver had been suspended, he decided to get back on the bus and continue with the service. My colleague said it was too late as the bus was out of service.... I went around in front of the bus and asked the driver to hold.... The driver was revving his engine like he wanted to come towards me. I held my hand up to stop him. It was a nerve-wracking situation. Someone came out of the shop and told him you will run her down. I told CentreComm I would have to step out of the way. The driver was shouting through the windscreen 'move out of the way'. I moved out of the way... As I stepped out of the way the driver just shot off.'

9. The operations manager had held a telephone conversation with a member of the public, Mr Christie. He offered his details to the RPOs. He did so he said because he saw a person's life being put in danger.
10. The incident was recorded on CCTV. There are multiple cameras in the bus showing the incident from different angles. Audio is not recorded. The CCTV was examined in the disciplinary hearing. I also saw it in the Tribunal.
11. The CCTV shows that the Claimant was animated and out of control. He sought to shut exit doors while passengers were trying to get off. After the passengers had left, he tried to call them back. You could see he was talking to the RPO in an animated fashion. The Respondent now concedes that the CCTV does not show the Claimant 'driving at' the female inspector. It does show him driving very slowly over a short distance towards her. She comes up to the driver's window and touches it,

indicating that he should stop. It shows him wanting to drive off when he was being told to stop.

12. The Claimant filed an incident report in respect of 13 July. He also gave an account to the investigation and the disciplinary hearing. The CCTV was viewed with him at the investigation and disciplinary meetings. The Claimant's essential position was that he was being bullied and harassed by the inspectors.
13. An appeal hearing was held by Bernie McWeeney, the Deputy Operations Director, on 22 August 2016. The outcome letter was dated 24 August 2016. His assessment of the facts was to the effect that the Claimant was fully aware of the procedure to be adopted when TfL officials board the bus. The Claimant closed the entrance doors suddenly and sped off with the official on the platform obstructing his view. At the next bus stop the official managed to obtain a ticket from the machine but a passenger boarded carrying a child and struggled to swipe her card as the machine was inactive. Once again the driver shut the entrance doors and sped off with the lady standing by the cab when he should have waited for her to secure herself. This compromised the safety of the passenger and her child, he said. At the next bus stop it was evident that the driver was refusing to drive the bus despite being instructed to continue. In Mr McWeeney's judgement the driver then committed some of the most serious safety risks he had ever witnessed. This included closing the doors on passengers as they alighted and attempting to drive off whilst they attempted to alight. The Claimant also moved forward with the TfL official directly in his path and available to be seen, putting her safety at risk
14. He expressed his view it was vital that the Respondent could trust its drivers. They were mainly unsupervised delivering a service to the public. Having confidence at all times was an essential part of the relationship, and in his judgment, this incident demonstrated that the Claimant presented a significant risk, with complete disregard for the safety of passengers and the TfL official. He concluded that the actions as described resulted in an irreparable breakdown of trust and confidence. The appeal panel, also comprising Dan Power, a garage manager, was satisfied that the sanction of summary dismissal was a reasonable response.
15. I have also been shown the disciplinary policy and procedure and those matters which are said to be examples of gross misconduct. In severe cases, it is said that an unreasonable refusal to follow an instruction issued by a manager or a supervisor can amount to gross misconduct. As can negligence where the safety of employees, passengers or other third parties is compromised.
16. In evidence the issue arose as to whether the RPOs have authority to give instructions to bus drivers. The only reference in the TfL handbook for bus drivers, a little red book ironically called The Big Red Book, relates to

where a driver suspects a passenger may be avoiding paying a fare. The instruction is to let the RPI know when he or she gets on the bus. I am satisfied, however, that the custom and practice is that the RPI can give instructions to the driver when boarding the bus. If the Claimant thought that the RPO's did not have the authority, he could have checked with the lbus intercom system and a relevant manager.

17. Mr Earl on behalf of the Claimant challenges the adequacy of the investigation. He says that the Respondent made no efforts to contact any of the passengers on the bus. They failed to call the lbus controller who did talk to the Claimant. The Claimant, it seems to me, could have called that controller, if important. The Respondent failed to consider the allegations of bullying and harassment raised by the Claimant, it was submitted. They failed, it is said, to test the conflicting evidence, and to consider whether the statement from Mr Christie was fabricated with view to collusion with the RPO's. It is said that the Respondent failed to examine in detail the CCTV for 21 June and 12 July. 12 July is relevant according to the Claimant because the inspectors boarded his bus the day before.
18. In my judgment, these criticisms do not show that there was a failure to hold a reasonable investigation. The account of one of the RPO's was taken at the disciplinary hearing. The Claimant had full opportunity to say what he wanted. The sequence of events, however, is clear from the CCTV images. It is abundantly clear that the Claimant lost control of his actions and failed to comply with instructions from the RPOs.

CONCLUSIONS

19. A belief in misconduct was the reason for dismissal. There were reasonable grounds for concluding that the misconduct took the form of repeated failures to comply with instructions from the RPO's and further, and fundamentally, total loss of self-control leading to erratic behaviour both in respect of passengers and the RPO's. Whilst there was no injury, and it could not be said that the Claimant drove at the female RPO standing in the road ahead, his loss of control was sufficient for the Respondent reasonably to lose all trust and confidence in him as a safe driver. They had reasonable grounds to conclude he was driving negligently risking safety.
20. There was a fair and reasonable investigation, following a fair and reasonable procedure. The Claimant had ample opportunity to state his case. He knew exactly what the RPO's was saying. The fundamental point here however is that there was CCTV which although not capturing the audio, nonetheless recorded the events from multiple relevant angles. It was possible to determine with accuracy what happened.
21. An important argument was raised by the Claimant during the hearing before me that the RPOs did not have the authority to give him

instructions. The little red book which is paradoxically entitled the Big Red Book, which is the handbook supplied by TfL for all bus drivers irrespective of their employing company does not expressly say that RPOs have the authority to give instruction to drivers. However, it seems plain to me that this is the custom and practice. In so far as the Claimant thought he could ignore what he was being told by them, he should have checked this with the lbus intercom system and contact a relevant manager. He would have been told that he had to comply with their instructions.

22. Whilst it is certainly right that the Claimant did not drive the bus at the RPO stood in the road in front of him, but instead was moving slowly forward because he was keen to drive off, it was nonetheless reasonable for the Respondent to dismiss the Claimant. The complete loss of self-control demonstrated by the CCTV was sufficient for them to conclude that they had no trust and confidence in his ability safely to drive the bus. This was so even if he had a broadly good record for the period of employment. Even if the Claimant felt he was being bullied and harassed by the RPO's, there could be no excuse for the manner in which he reacted to that belief. The loss of control evident on the CCTV was reasonably regarded as compromising safety.
23. Even if I had been able to find unreasonableness in the manner in which the Respondent has handled this matter, or in respect of its decisions about it, I would nonetheless have found a very substantial contributory fault on the part of the Claimant reflecting his complete loss of control shown on the CCTV. It would have been at least 80%.
24. However, the dismissal was not unfair.

Employment Judge Smail

South East Region

Date: 5 June 2017_____

Judgment sent to the parties on
