

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No S/4105272/2016

Held at Glasgow on 20, 21, 22 & 23 March 2016

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Employment Judge: Frances Eccles

Mr C Nicolson

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**Claimant
Represented by:
Ms J Poole, Ms C Green,
and Mr G Jarrott –
University of Strathclyde
Law Clinic**

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East Dunbartonshire Council

**Respondents
Represented by:
Ms N Habib –
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the claimant was not unfairly dismissed by the respondents.

REASONS

BACKGROUND

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1. The claim was presented on 11 October 2016. The claimant claimed to have been unfairly dismissal by the respondents. The claim was resisted. The respondents while admitting dismissal, gave the reason for dismissal as gross misconduct and denied any unfairness. At the Hearing the Tribunal heard evidence for the respondents from Ms Lenora Meier, Primary Teacher, Ms Jill Carr, Head Teacher, Mr Paul Curran, Strategic Head for Neighbourhood Services, Ms Sharon Bradshaw, HR Business Partner and

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Mr Thomas Glen, Depute Chief Executive. The claimant gave evidence. The parties provided the Tribunal with a Joint Bundle of Productions.

2. The Tribunal announced its decision at the Hearing and gave its reasons orally. The respondents requested a written record of the decision.

5 **FINDINGS IN FACT**

3. The Tribunal found the following material facts to be admitted or proved; the respondents are a local authority. The claimant was employed by the respondents as a PCV Driver from 7 May 1996 to 7 June 2016 when he was summarily dismissed for gross misconduct. At the date of his dismissal the claimant was aged 51. His average weekly pay was £597 with an average weekly take home pay of £522. The claimant was a member of the respondents' Pension Scheme.

4. The claimant's job required him to transport children by bus to and from schools in the respondents' local authority area and to deliver lunches. His duties included driving children by bus to and from Baldernock Primary School, Balmore ("the school"). The school consists of at least two buildings – a portacabin and main building - located on either side of an access road which runs through the school grounds.

5. On the morning of 17 March 2016 the claimant drove a class of children and their Teacher Ms Lenora Meier from the school to gym classes at a neighbouring school. Ms Meier was relatively new to the school. Shortly after their return to the school Ms Meier left her classroom in the portacabin to collect something from her car. While walking towards her car she observed a man who appeared to be urinating between two cars parked beside a perimeter wall and in close proximity to the portacabin. The man was wearing the respondents' uniform and Ms Meier recognised him as the driver of the bus who had recently dropped her class off at the school. Having noticed Ms Meier, the man turned around and zipped up his trousers. Ms Meier was taken aback. She walked past the area of wall where the man had been standing and noticed that it was wet. Ms Meier

5 was concerned about what she had witnessed. She mentioned the incident to a colleague later that morning who recommended that she report the matter to the school's Head Teacher, Ms Jill Carr. Ms Meier reported the incident to Ms Carr over lunchtime. They went to view the area of the wall where Ms Meier had observed the man standing. The wall was still wet. It was a dry day. Ms Carr was satisfied Ms Meier had observed the school bus driver, who she believed to be the claimant, urinating against the wall and considered the incident to be sufficiently serious to report the matter to David McClelland, Team Leader in Transport. Mr McClelland informed Ms Carr that he would look into the matter.

6. Mr Paul Curran, Fleet Manager was appointed to investigate the incident as Fact Finding Officer in terms of the respondent's Discipline at Work Policy and Procedures. Mr Curran attended at the school on 24 March 2016 to interview Ms Meier and Ms Carr. Ms Meier described the incident – that she had observed the bus driver urinating against the wall and zipping up his trousers and that the wall where he had been standing was wet. Ms Carr confirmed that Ms Meier had reported the incident to her on 17 March 2016 and that they had both inspected the area where Ms Meier observed the driver urinating. Ms Carr confirmed that the ground and wall at the location identified by Ms Meier was wet. Ms Carr identified the driver on 17 March 2016 as the claimant.

7. As part of his investigation Mr Curran contacted Mr Michael Scullion, Driver Team Leader on 1 April 2016 who confirmed that the person driving the bus engaged on gym runs to and from the school on 17 March 2016 was the claimant. Ms Meier, Ms Carr and Mr Scullion signed copies of their interview notes with Mr Curran on 1 April 2016 (P10/60-64; P10/66-70 & P10/72-76).

8. As part of his investigation, Mr Curran invited the claimant to attend a fact finding meeting on 1 and 8 April 2016 (P8 & P9). The claimant was informed by Mr Curran that the purpose of the meeting was to establish the facts surrounding an allegation of a respondents' transport driver urinating in

public and on school premises on Thursday 17 March 2016. The claimant was advised by Mr Curran that he was entitled to be accompanied by an appropriate representative including a trade union representative. The claimant was not allocated any further duties involving the school.

5 9. Mr Curran met with and interviewed the claimant on 12 April 2016. The claimant was accompanied at the meeting by his trade union representative, Mr John Duffy. The claimant was unable to recall whether he was driving the bus on 17 March 2016. When asked whether he had been urinating against the wall outside the school he replied that he could not remember.
10 He said that he had no idea why somebody would say that he had been urinating. When asked whether he had been zipping up his trousers he replied that maybe he noticed his zip was down and he was just zipping it up. When asked why someone would say that he was zipping up his trousers he replied that "*maybe they just seen me doing this*". He denied
15 being able to recall urinating and when questioned, replied "*No. I don't know why I would have done it as I have used the toilet at the school*". The claimant was unable to identify anyone else in the area at the time of the alleged incident. He did not recall seeing a Teacher. He described the incident as "*quite a shock actually*". The claimant signed a record of his
20 interview with Mr Curran on 21 April 2016 (P10/78-82).

10. Following his meeting with the claimant, Mr Curran contacted Ms Meier for a further interview about the alleged incident. He met with Ms Meier on 25 April 2016 when she confirmed that the claimant was standing between two parked cars with his hands down and that when he saw her he turned
25 around, had a guilty expression and zipped up. Ms Meier was adamant that she had witnessed the driver of the bus, by now identified as the claimant, urinating against the wall. Ms Meier signed the record of her second interview with Mr Curran on 26 April 2016 (P10/84-86).

11. Mr Curran, in accordance with the respondent's Discipline at Work Policy and Procedures, prepared a report (P10/104-130) which he forwarded to Mr
30 Thomas Glen, Depute Chief Executive. Mr Curran's report (P10/104-130)

included the notes of interviews with Ms Meier, Ms Carr, Mr Scullion and the claimant (P10/60-64; P10/78-82; P10/66-70; P10/72-76 & P10/78-82).

12. Mr Glen, having considered Mr Curran's report (P10/104-130), was satisfied that disciplinary proceedings were appropriate. The claimant was notified by letter dated 13 May 2016 (P10/50) that in accordance with the respondents' Discipline at Work Policy he was required to attend a Disciplinary Hearing on 3 June 2016 to consider the allegation that on Thursday 17 March 2016 he urinated in public and on school premises. The claimant was provided with a copy of Mr Curran's fact finding report (P10/104-130). In his letter to the claimant (P10/50), Mr Glen highlighted that the Disciplinary Hearing could result in action being taken which could potentially include or lead to dismissal. The claimant was advised that the Hearing would be conducted by Mr Glen and Ms Sharon Bradshaw, HR Business Partner. The claimant was informed of his right to be accompanied at the Disciplinary Hearing in accordance with the respondent's Discipline at Work Policy. The date of the Disciplinary Hearing was arranged for 7 June 2016 to accommodate the availability of the claimant's trade union representative.

13. At the Disciplinary Hearing Mr Glen heard submissions from Mr Curran in support of his fact finding report (P10/104-130). Mr Curran confirmed that Ms Meier was convinced that she saw the claimant urinating. Mr Duffy who accompanied the claimant at the Disciplinary Hearing sought clarification that Ms Meier did not actually see the claimant urinating and that what she saw was him "*in the stance*". Mr Duffy confirmed that the claimant understood the seriousness of the allegation. He denied that the claimant would ever do the toilet outside. He referred to the claimant "*zipping up*" and suggested that Ms Meier had assumed that he had been urinating. The claimant confirmed that he did not remember noticing that his zip was down and going between the parked cars to sort it out. He stated that he definitely would not be urinating. Mr Glen referred to the claimant's length of service and exemplary service to date.

14. Having considered the fact finding report (P10/104-130), Mr Curran's submissions and the representations made by and on behalf of the claimant at the Disciplinary Hearing, Mr Glen concluded that the claimant was guilty of urinating in public at the location identified in the fact finding report (P10/104-130) against a perimeter wall of the school premises. Mr Glen was aware of and took into account the claimant's length of service and to date unblemished disciplinary record. He considered the claimant's conduct to be very serious. He considered that it fell far short of the behaviour to be expected of an employee of the respondents. Mr Glen was particularly concerned by the fact that the claimant was not only urinating in public but was urinating in close proximity to a classroom which he must have known was being used by primary school children. He considered the allegation to be very serious. In particular he considered the location, the proximity to the school, the statements of the Teachers, the staining on the wall and what he considered to be inconsistencies and lack of clarity in the claimant's statement in particular about pulling up his zip.
15. Mr Glen was not satisfied that a sanction less than dismissal was appropriate in the circumstances. He decided that the claimant should be dismissed for gross misconduct. The claimant was advised of Mr Glen's decision on 7 June 2016. The claimant was summarily dismissed. The claimant received written confirmation of Mr Glen's decision by letter dated 7 June 2016 (P10/56). The claimant was informed of his right to appeal against the decision. The claimant submitted an appeal against Mr Glen's decision on 16 June 2016 (P10/99-101). He identified his grounds for appeal as "*the action taken is unfair in the circumstances*". The claimant was represented by his trade union in the appeal proceedings. An Appeal Hearing took place before the respondent's Human Resources Appeal Board on 23 August 2016. The respondent's Appeal Board having considered submissions made by the claimant and his trade union representative and on behalf of management, decided not to uphold the Appeal.

16. Since his dismissal the claimant has undertaken casual work on behalf of a friend for which he has received payment of around £2,000. He has not been in receipt of any state benefits. He has applied for a variety of jobs. He was offered a driving job in Oban but for family reasons was unable to accept the offer of employment.

DISCUSSION & DELIBERATIONS

17. The claimant had the right not to be unfairly dismissed by the respondents in terms of Section 94 of the Employment Rights Act 1996 (“ERA 1996”). Dismissal was admitted by the respondents. It was therefore for the respondents to show the reason for dismissal. It was the respondents’ position that the reason for the claimant’s dismissal was alleged misconduct of urinating in public and on school premises on 17 March 2016. The claimant denied the alleged misconduct throughout the disciplinary process but did not suggest that there was some other reason for his dismissal. In all the circumstances the Tribunal was satisfied that the reason for the claimant’s dismissal related to his alleged misconduct of urinating in public on school premises.

18. Conduct is a potentially fair reason for dismissal in terms of Section 98(2) (b) of ERA 1996. The Tribunal must therefore go on to determine the question of whether the dismissal was fair or unfair having regard to the reason of conduct. In terms of Section 98(4) of ERA 1996 this will depend on whether in the circumstances (including the size and administrative resources of their undertaking) the respondents acted reasonably or unreasonably in treating the claimant’s conduct as a sufficient reason for dismissing him. This must be determined in accordance with equity and the substantial merits of the case.

19. When considering whether the respondents acted reasonably or unreasonably in a case where the reason is conduct related, the Tribunal has regard to the guidance provided in the case of **British Home Store Limited v Burchell 1980 ICR 303**. This case sets out the 3 stage test to be

5 applied when considering whether the respondents acted reasonably in a
conduct related dismissal. As identified by both parties in their respective
submissions, this will involve the Tribunal firstly considering whether the
respondents genuinely believed that the claimant committed the act of
alleged misconduct. Secondly, the Tribunal must be satisfied that the
respondents had reasonable grounds upon which to sustain that belief and
thirdly the Tribunal must be satisfied that at the stage at which the
respondents concluded that the claimant was guilty of the alleged
misconduct that they had carried out as much investigation into the matter
10 as was reasonable in the circumstances.

20. In this case, the Tribunal was satisfied that Mr Glen, the Dismissing Officer,
believed that the claimant was guilty of urinating in public at the location
identified by Ms Meier. While the Tribunal had some concerns about the
location of the alleged incident being described as "*on school premises*", it
15 was not persuaded that this was sufficient to find that Mr Glen believed that
the claimant was guilty of an offence other than that for which he was
dismissed. The Tribunal was satisfied that Mr Glen genuinely believed that
the claimant was guilty of urinating in public and more importantly of
urinating against the perimeter wall of a primary school and in close
20 proximity to a classroom. The Tribunal did not understand the claimant to be
arguing that Mr Glen did not hold this belief.

21. Did Mr Glen have reasonable grounds upon which to sustain his belief? The
Tribunal was satisfied that in this case he did. The Tribunal was satisfied
that Mr Curran's investigation into the alleged misconduct was sufficiently
25 thorough. He interviewed Ms Meier within a relatively short period of time
after the alleged incident and also Ms Carr to whom Ms Meier had spoken
on the same day as the incident and who had inspected the area of wall
where Ms Meier claimed to have seen the claimant urinating. The Tribunal
could find no reason why either witness should be disbelieved. There were
30 no reasons advanced as to why Ms Meier would lie about the incident or be
motivated to implicate the claimant in such conduct. Her evidence that she
was able to identify the claimant without any difficulty having only just been

driven by him to the school and dropped off was convincing. The Tribunal did not agree with the claimant's submission that Ms Meier would struggle to identify him because she was relatively new to the school. The Tribunal was also not persuaded that Ms Meier's inability in cross examination to recall the claimant driving her class to an Easter service undermined the reliability of her evidence in relation to identifying him on the day of the incident. The Tribunal was satisfied that Mr Glen was entitled to take into account the inconsistencies in the claimant's representations before the Disciplinary Hearing. It was unclear whether the claimant was suggesting that he was not the person whom Ms Meier saw urinating or that she had misinterpreted the situation when she saw him zipping up his trousers. Either way, the Tribunal was satisfied that Mr Glen was entitled to conclude from all the evidence before him that the claimant was guilty of urinating in public at the location identified by Ms Meier

22. The Tribunal was satisfied that when Mr Glen found that the claimant was guilty of the alleged misconduct that he had in his mind reasonable grounds upon which to sustain that belief. This was after Mr Curran had carried out as much investigation into the matter as was reasonable in the circumstances. The Tribunal was not persuaded that there were any other employees or witnesses that the respondents should have interviewed during the fact finding process. As part of his investigation Mr Curran made enquiries of the Fleet Manager about which employee was allocated to drive the children to the school on the day in question. This supports the respondents' position that no assumptions were made by Mr Curran that it was the claimant. Ms Meier was also re-interviewed for clarification. The Tribunal noted the claimant's submission that Ms Meier was more adamant about her recollection of events when giving her second statement. The Tribunal did not agree with the claimant however that Ms Meier's certainty about what she saw, notwithstanding the passage of time, undermined her credibility overall.

23. As regards the Appeal Hearing, on balance the Tribunal was not persuaded that the statement lodged with the Tribunal (P19) had in fact been submitted

to the Appeal Board on the claimant's behalf. In any event the Tribunal was not persuaded that it contained grounds upon which the Appeal Board would have been obliged to overturn Mr Glen's decision to dismiss the claimant.

24. When deciding whether the dismissal was fair or unfair the Tribunal must also consider the procedure followed by the respondents. The claimant was informed in advance of his interview for the fact finding process of the allegation against him. The claimant was represented throughout the process. The claimant was provided with the fact finding report (P10/104-130) well in advance of the Disciplinary Hearing. In these circumstances the Tribunal was not persuaded that if his trade union was only able to offer him 30 minutes of their time before the Hearing that the respondents acted unfairly in relation to the timing of the Disciplinary Hearing. There was no evidence before the Tribunal that the respondents would not have re-arranged the Disciplinary Hearing if such an application had been made by the claimant. There was no suggestion that the claimant and his representative were not allowed the opportunity to challenge the allegation made against the claimant at the Disciplinary Hearing. The claimant was allowed the right of appeal. The Tribunal was satisfied that in these circumstances the procedure followed by the respondents was reasonable. The claimant gave evidence that he was unable to read his interview note (P10/78-82) because he did not have his spectacles with him. The Tribunal was not persuaded that this was the case or that it would in any event have caused the claimant sufficient prejudice to undermine the reasonableness of the respondents' procedure in particular given that he was represented throughout the process.

25. As the Tribunal was satisfied that the respondents were entitled to conclude that the claimant was guilty of the alleged misconduct, it went on to consider whether the claimant's misconduct was a sufficient reason for dismissing him. In terms of the case of **Iceland Frozen Foods Ltd v Jones 1983 ICR 17** the Tribunal must consider whether the dismissal falls within the band of

reasonable responses. The band of reasonable responses is one within which one employer might reasonably take one view and dismiss an employee and another quite reasonably take a different view and not dismiss an employee for the same act of misconduct. In this case there were no mitigating circumstances advanced in relation to the alleged incident as the claimant denied having committed the act of misconduct. Likewise there was no contrition on the part of the claimant that could be taken into account by the respondents when considering the sanction. At the Disciplinary Hearing Mr Duffy, on the claimant's behalf, acknowledged the serious nature of the allegation against him. The Tribunal was persuaded that in all the circumstances the respondents were entitled to treat the claimant's conduct as sufficiently serious to summarily dismiss him. The Tribunal took into account that the claimant was not suspended from work. It was not in dispute that he was removed from duties involving the school and there was no material delay between concluding the fact finding investigation and calling the claimant to a Disciplinary Hearing. The claimant's evidence that he was told by his Line Manager that it "*would blow over*" was not put to the respondents' witnesses and there was no evidence that the claimants' Line Manager had any authority in relation to whether or not the claimant should remain in the respondents' employment.

26. The claimant was found to have committed an act of misconduct which he acknowledged was serious. He was found to have been urinating in a public place. Aggravating factors were identified as the claimant urinating on the perimeter wall of a school and in close proximity to a classroom which he must have known was occupied by primary school children having only recently dropped children off at the school. The Tribunal was satisfied that the respondents were aware of the claimant's length of service and his unblemished disciplinary record - they were referred to by Mr Glen at the Disciplinary Hearing. In all the circumstances the respondents were entitled to conclude that the claimant's conduct was a sufficient reason for dismissing him.

CONCLUSION

27. The respondents having acted reasonably in treating the claimant's conduct as a sufficient reason for dismissing him, the Tribunal concluded that the claimant was not unfairly dismissed.

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Employment Judge Frances Eccles
Date of Judgment: 23 March 2017
Entered in register: 24 March 2017
and copied to parties

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