



EMPLOYMENT TRIBUNALS

Claimant

Mr M A Tingle

v

Respondent

Arriva Bus Company

Heard at: Leeds

On: 12 November 2018

Before:

Employment Judge Martin

Appearance:

For the Claimant: In person

For the Respondent: Mrs Royal (In house solicitor)

RESERVED JUDGMENT

The claimant's complaint of unfair dismissal is not well-founded and is hereby dismissed.

REASONS

Introduction

1. Mr Roger Bartlett, Operations Manager; Mr Paul Flanagan, General Manager; Mr Adam Stead, Engineering Manager and Mr Jonathon Woodhouse, Head of Operations all gave evidence on behalf of the Respondent.
2. The Claimant gave evidence on his own behalf. The Tribunal also considered written witness statements provided by Ms M Talbot; Mr M Bennett; K Allan; R Barden; C Stables; R Wood; and R Hedley, all drivers for the Respondent and former colleagues of the Claimant. At the outset of the hearing, it was acknowledged that the Claimant had sought a witness order for a number of those drivers. No order was made by the Tribunal. However, the Claimant was given the opportunity during the course of this hearing to indicate whether he wished for the Tribunal to order the attendance of any of those witnesses. He decided he did not wish to proceed in that manner. During the course of the hearing, the Tribunal asked the Respondent to try and arrange for one or a number of those witnesses to attend to give evidence, but ultimately it was not

possible in practical terms for any of them to be able to attend the hearing today.

3. The Tribunal was provided with an agreed bundle of documents marked Appendix 1.

The Law

4. The law which the Tribunal considered was as follows: -
 - 4.1. Section 98(1) of the Employment Rights Act 1996

‘In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show: -

 - (a) The reason (or if more than one, the principal reason) for the dismissal, and
 - (b) That it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held’
 - 4.2. Section 98(2) of the ERA 1996

‘a reason falls within this subsection if it: -

 - (c) relates to the conduct of the employee.’
 - 4.3. Section 98(4) ERA 1996

“...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”.
 - 4.4. The case of **British Home Stores Limited v Burchell 1978 IRLR 379** where the EAT held that in cases where an employee is dismissed for misconduct the Employment Tribunal has to consider three elements: -

Firstly, there must be established by the employer a belief that the employee has committed an act of misconduct.

Secondly, it must be shown that the employer had reasonable grounds upon which to sustain that belief.

Thirdly, that the employer had carried out as much investigation of the matter as was reasonable in all the circumstances of the case.

The issues

5. This was a case where the claimant was pursuing a claim of unfair dismissal. In that regard the Tribunal had to consider the following issues: -
 - 5.1. Did the respondent have a genuine belief that the claimant had committed an act of misconduct? Was that the reason for dismissal?
 - 5.2. Did the respondent have reasonable grounds to sustain that belief and was it based on a reasonable investigation?

- 5.3. Did the respondent follow a fair procedure? Was dismissal a reasonable response in the circumstances of the case?
- 5.4. Did the claimant contribute in any way to his dismissal and/or would the claimant have been fairly dismissed in any event, and if so, what was the chance of that happening?

Findings of fact

6. The Respondent is a transport provider. They operate a number of local bus services across the Yorkshire Region.
7. The Claimant was employed by the Respondent as a bus driver. He commenced employment with the Respondent in April 1999, having previously worked with them for a period of time. He was a long serving employee.
8. Drivers were required to undertake inspections of their vehicle and were also required to report any accidents as is noted at page 26 of the bundle.
9. The Respondent's disciplinary procedure is at pages 28 – 32 of the bundle.
10. The disciplinary procedure provides for an investigatory meeting where the employee will be informed of the allegations made against them; provided with sufficient information about the alleged misconduct and given copies of any written evidence and have supervised access to any CCTV. (page 28 of the bundle)
11. The procedure notes that, after making a decision on a disciplinary hearing, the Manager should take account of any live conduct and general record; length of service and explanations given by the employee and include any live conduct records for the same offence. (page 29 of the bundle)
12. The Respondent's disciplinary procedure, in line with most employers' disciplinary procedures, provided for a four stage process which included a verbal warning; written warning; final written warning; and then dismissal. The Respondent's policy also provided that the Respondent could consider alternatives to dismissal including demotion or loss of pay. (page 30 of the bundle)
13. The appeal process is set out at page 32 of the bundle and effectively allows two appeals against any disciplinary sanction.
14. The Claimant did not have an unblemished record.
15. The Claimant had been involved in a number of accidents over the last few years. In the last three years, he had been involved in ten accidents, eight of which were found to have been his fault, as is noted at page 40 of the bundle.
16. The Claimant's disciplinary record is at pages 41 – 42 of the bundle. It shows that the Claimant had been issued with a number of warnings over the years for various matters including incidents/accidents.
17. In February 2016, the Claimant was dismissed for an incident, following a number of earlier warnings for other incidents. That dismissal was overturned to a final written warning at the second appeal stage..
18. On 25 September 2017, the claimant was involved in another incident. He was issued with a final written warning in respect of that incident on 2 October 2017. Following an appeal that final written warning was reduced to a written warning a few weeks later.

19. A few weeks after the incident on 25 September 2017, the Claimant was involved in another incident on 8 October 2017. It appears that he got angry after a car cut him up at the traffic lights. The accident report completed by him for that incident is at page 49 of the bundle. In that report, the Claimant says that, after standing at the traffic lights for approximately 10 minutes indicating to turn left, a car came down the side of him and cut him up. He then said anger then took over and he should have just let it go but he refused to do so.
20. The claimant was issued with a final written warning on 31 October 2017 in relation to that incident. That warning was to remain in force for a period of 12 months.
21. The letter to the Claimant confirming that warning is at pages 55 – 56 of the bundle. In the letter the Claimant is warned that a failure to improve his incident record may result in further disciplinary action, which could lead to his dismissal.
22. The Claimant appealed against that final written warning. At the appeal hearing, he admitted the offence, but appealed against the severity of the penalty. His appeal was not upheld. The Respondent concluded that the Claimant had been at fault in relation to that incident and that the incident could have been avoided.
23. In evidence before the Tribunal, the Claimant acknowledged that he had received training and support from the Respondent following a number of the incidents in which he had been involved, although he said that one training session was cut short. Details of the support and training given to the Claimant are set out at page 141 of the bundle. It was not disputed by the Claimant.
24. The Claimant did not exercise his second right of appeal in relation to that final written warning.
25. It appears that there were some problems with the gearbox and retarder on one of the Respondent's fleet of buses, namely the 1510.
26. The Tribunal has been provided with a number of defect cards which show that a number of drivers reported these defects during the period from the beginning to the end of March 2018, as is noted at pages 72 – 102 of the bundle.
27. The Claimant has produced witness statements from a number of other drivers. In evidence, he said that there could have been many more statements. It appears that the Respondent was contacted by the trade union. As a result, the Claimant was prevented him from collecting any more signatures. The witness statements are at pages 158 – 165 of the bundle. They are all in identical form. In the witness statements the driver was asked a question. The question was 'Have you in the past four years whilst driving any fleet numbered 1500 S buses had the experience of when braking did the brakes jam on causing the vehicle to jolt the passengers forwards? If so please sign'. Each of the drivers who have signed is noted at pages 158 – 165 of the bundle. The Tribunal notes that, in the defect cards referred to above, there is no record of the Claimant or any of the persons who provided witness statements as at pages 158 – 165 of the bundle, reporting any fault with the gearbox or retarder which could have an impact on the braking system. Indeed, two of the drivers indicated that there was no apparent defect. Mr Hedley on 21 March 2018, as is noted at page 92 of the bundle, and Mr Bennett after the incident in question as is noted at page 102 of the bundle.

28. On the day of the first incident, which occurred on 23 March 2018, no apparent defect with the bus was noted by the driver. The vehicle passed its MOT on 9 March 2018 and no faults were recorded after that date.
29. Mr Stead in evidence to the Tribunal said that engineers tested the fault each time that it was reported, but could not discern a fault at the time of testing. Mr Stead did however say that a fault was detected by an engineer on 20 March. As a result, the Respondent arranged for a gearbox specialist to repair the fault on 21 March 2018. He said that no defects were reported after that time.
30. The claimant was involved in another incident on 23 March 2018. A passenger suffered an injured finger when the Claimant braked.
31. The Claimant's report of the incident is at page 118 of the bundle. He said that when he was pulling away from St Michael's Church in Wakefield he had to brake harsh to avoid collision with a car that had just stopped. The Claimant did not indicate in the report that there was a fault with the brake, the retarder, or the gearbox.
32. The Claimant did not report the incident that day or report any fault with the bus. He says that he reported the incident later that evening when he returned home.
33. The Claimant was involved in another incident on 26 March 2018, when he was driving a different bus which was not a 1510. He clipped a traffic light and damaged the wing mirror of the bus, when he was taking a corner.
34. The Claimant was invited to a disciplinary hearing regarding both incidents. In advance of the hearing he was provided with copies of the incident reports completed by him. He was also given an opportunity to view the CCTV footage of both incidents. The letter inviting him to the disciplinary hearing is at pages 123 – 124 of the bundle. He was warned that as he had a current final written warning and that one of the outcomes of the disciplinary hearing could be the termination of his employment.
35. The disciplinary hearing was conducted by Mr Bartlett. The Claimant attended and was represented by his trade union representative.
36. At the disciplinary hearing the Claimant was warned that dismissal could be an outcome as he was on a final written warning for a similar incident.
37. The notes of the disciplinary hearing are at pages 130 – 132 of the bundle.
38. At the disciplinary hearing, the Claimant admitted that he was at fault for the second incident. He said that other drivers had clipped that post. He said that he was not in the right frame of mind because of the earlier incident. (page 131 of the bundle)
39. The Claimant viewed the CCTV footage at the disciplinary hearing and went through the first incident. He denied that it was his fault. He admitted that he did not report the incident until he got home. He said that the fault was with the bus and that the brake grabbed, which was why the bus jerked when he braked.
40. In evidence to the Tribunal, Mr Bartlett said that he discussed the issue of the potential fault with Mr Stead, the Engineering Manager. He was told by Mr Stead that the fault had been fixed before the incident. An email was sent by Mr Stead to Mr Bartlett confirming that, as is noted at page 133 of the bundle.

41. Mr Bartlett said that he viewed the CCTV footage. In evidence he said that he thought that the fault was the Claimant's. He said that he thought the Claimant braked harshly to avoid a collision with the car, as he had not seen the car in time.
42. The Respondent dismissed the Claimant for misconduct with notice. It was noted that he was on a final written warning and then subsequently involved in two further incidents. The Claimant was given a right of appeal.
43. The Respondent wrote to the Claimant on 4 April 2018 to confirm his dismissal, as is noted at page 134 – 135 of the bundle.
44. The Claimant appealed against the decision. The Respondent says that the appeal was on the grounds of the severity of the penalty. The Claimant did not dispute that in his evidence.
45. The first appeal hearing took place before Mr Flanagan on 9 April 2018. The Claimant was represented by his trade union representative. The notes of the appeal hearing are at pages 136 – 142 of the bundle.
46. At the appeal hearing, the Claimant admitted that he was at fault for the second accident, but said that the first one was not his fault and was because of a fault with the brakes. The issue of the brakes was discussed at the appeal hearing.
47. The CCTV of the incident was viewed.
48. Mr Flanagan said in evidence to the Tribunal that he investigated the matter of the alleged fault regarding the brakes with the Engineering Manager. He said he was told that there was not fault with the brakes at the time of the incident and that any problems had been rectified.
49. In evidence before the Tribunal and indeed in the appeal hearing, Mr Flanagan indicated that he had viewed the CCTV footage. He believed from viewing that footage that the fault in the first incident was that of the Claimant. He said the Claimant had braked too heavily. He had not expected the car and therefore had to stop as the car joined the traffic. Mr Flanagan therefore concluded that the Claimant was at fault with regard to both incidents.
50. Mr Flanagan said in evidence that he then considered whether the Claimant should be given another chance. He noted the Claimant's disciplinary record over the previous four years; the training and support which had been given to the Claimant over that period, as is noted at pages 140 – 141 of the bundle. He concluded that he still had a concern whether the Claimant could maintain a safe driving record.
51. Mr Flanagan, having reached that conclusion, decided to uphold the decision to dismiss.
52. On 9 April 2018 the Respondent wrote to the Claimant to confirm that his appeal against dismissal was refused and his dismissal was upheld, as is noted at page 143 – 144 of the bundle.
53. The Claimant exercised his second right of appeal.
54. A further appeal hearing was heard before Mr Woodhouse on 3 May 2018.
55. Before the appeal hearing the Claimant obtained witness statements from a number of the drivers, namely those at pages 158 - 165 of the bundle, in relation to the apparent fault on the bus. In evidence to the Tribunal, the

Claimant said that he was asked to stop collecting signatures by the Respondent. However, in evidence the Respondent indicated that the suggestion to stop the petition came from the trade union representatives, because they were concerned that, drivers signed that petition they could face disciplinary action, if they had not been reporting faults with the buses. The Respondent therefore said that a request was made by the trade union to management to ask for the petition to be stopped. The Claimant therefore stopped collecting signatures.

56. Although the Claimant had obtained a number of statements prior to the appeal hearing, he did not produce those statements at the second appeal hearing. He said in evidence to the Tribunal that he was told by his trade union representative not to do so.
57. The Claimant did however also obtain a witness statement from a passenger on the bus in relation to the first incident. That statement is at page 114 of the bundle. In the statement the passenger said that she did not see what happened for the claimant to brake.
58. Mr Woodhouse also viewed the CCTV footage. He upheld the decision to dismiss the claimant.

Submissions

59. The Respondent's representative submitted that the Claimant had been dismissed for misconduct. She submitted that the dismissal was fair and that the Respondent had a reasonable belief that the Claimant had committed an act of misconduct. She said the Respondent had viewed the CCTV footage and reached their conclusions from that footage. She also submitted that the Claimant had admitted to one of the incidents.
60. The Respondent's representative submitted that dismissal was a reasonable response in the circumstances. She stated that the Claimant was already on a current final written warning for a similar offence. In the alternative, she submitted if, but denied it was the case, there was a procedural defect, that the claimant would have been fairly dismissed in any event and that he had contributed 100% to his dismissal.
61. The Claimant submitted that the dismissal was unfair. He referred to his long service record.

Conclusions

62. The Claimant was dismissed for misconduct in relation to two further incidents which caused damage to a passenger and/or damage to a vehicle, which incidents the Respondent found to have been caused by the Claimant.
63. Misconduct is a fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.
64. This Tribunal finds that the Respondent did undertake a reasonable investigation into the incidents. They viewed the accident reports completed by the Claimant as well as the CCTV footage of both incidents. They also investigated the issue regarding an alleged fault with the braking system with their Engineering Manager. Furthermore they gave the Claimant the opportunity to provide his account of both incidents.

65. The Tribunal finds that the Respondent had reasonable grounds to believe that the Claimant had committed an act of misconduct. They had reasonable grounds to conclude that both incidents were the Claimant's fault. The Claimant admitted that he was at fault in relation to the second incident. The Respondent concluded that the first incident was also the Claimant's fault This was after investigating with their Engineering Manager that there was no fault with the brakes and after viewing the CCTV footage of the incident.
66. This Tribunal considers that a fair procedure was followed. The Claimant does not specifically contest any issue with regard to the procedure adopted. He was given the opportunity to present his case at the disciplinary hearing where he was represented by the trade union. He was also given two rights of appeal, where he was again represented by his trade union representative..
67. This Tribunal considers that dismissal was a reasonable response in the circumstances of this case. The Claimant had a current live written warning for a similar incident which had been given to him in October 2017. He had been given warnings with regard to similar types of incidents which led to that final written warning.
68. Further, the Claimant's record over the previous three years show that he was given a number of warnings and actually dismissed two years earlier for similar types of incidents.
69. The Respondents, as the Claimant acknowledged, provided him with training and support, but he still continued to be involved in incidents of this nature.
70. For those reasons this Tribunal considers that the Claimant's dismissal was fair.
71. Accordingly, the Claimant's complaint of unfair dismissal is hereby dismissed.

Employment Judge Martin

Date: 30th November 2018