JJE

EMPLOYMENT TRIBUNALS

Claimant: **Mr C Whelan**

Respondent: **Blue Triangle Buses Limited**

Heard at: **East London Hearing Centre**

On: **17 August 2018**

Before: **Employment Judge Hallen (sitting alone)**

Representation

Claimant: In person

Respondent: I Maccabe, Counsel

JUDGMENT

The judgment of the tribunal is the claim for unfair dismissal is unfounded and is dismissed.

REASONS

Issues

1. The Claimant was a bus driver employed by the Respondent between 8 December 2008 and 9 February 2018, at which time he was dismissed by reason of gross misconduct.

2. In his Claim Form received by the Tribunal on 16 April 2018, he claimed that he was unfairly dismissed by the Respondent. The Respondent in its Response Form disputed that the Claimant was unfairly dismissed and cited that the dismissal was by reason of gross misconduct and that it was a fair dismissal.

3. The issues for the Tribunal was firstly to determine what the reason for dismissal was and whether it was by reason of conduct as asserted by the Respondent. Thereafter, the Tribunal had to ascertain whether the Respondent acted reasonably in all the circumstances in dismissing the Claimant and in particular:-

(i) Did the Respondent believe that the Claimant had committed the acts of conduct relied on;

(ii) Had the Respondent reasonable grounds for that belief;

(iii) Had the Respondent conducted such investigation as was reasonable in all the circumstances of the case;

(iv) Was dismissal within the range of reasonable responses open to a reasonable employer?

4. The Tribunal had an agreed bundle of documents in front of it. The Respondent also called the dismissing officer, Mr Nigel Wood and the appeal officer Ms Angela Ryder to give evidence. Both of these witnesses prepared written witness statements and were subject to cross examination. The Claimant attended in person having presented a short witness statement himself and he was also subject to cross examination.

Facts

5. The Claimant was employed as a bus driver by the Respondent from 8 December 2008 until his summary dismissal for gross misconduct on 9 February 2018 following a public complaint and breach of the Respondent's social media policy. The Claimant was based at the Respondent's River Road depot.

6. The Respondent operates bus services under contract to Transport for London (TFL) under the trading name of 'Go Ahead London' which has over 2300 buses and 7600 staff at various sites in London.

7. On 5 February 2018, a complaint was made by the cousin of a pedestrian injured in a road traffic collision involving a bus operated by another company, 'Stagecoach' to TFL and to the Respondent. CCTV footage of the incident was shared by the Claimant on his 'Facebook' social media page which was open to the public to view. The complaint by the cousin of the injured pedestrian stated that the injured pedestrian's family had pleaded with the Claimant to remove the footage but he had refused to do so and instead had gone out of his way to post a link of the clip onto other people's posts. The complaint made by the cousin was that the Claimant had bragged online about previously hitting two people with a bus and used the colloquial term "LOL" (laugh out loud) when referring to these incidents. The complainant identified the Claimant as one of the Respondent's drivers through social media. The complaint was in the bundle of documents at pages 63-64.

8. On 7 January 2018, John Canning (Reporting and Operating Manager for the Respondent) conducted a fact finding interview with the Claimant. Mr Canning explained to the Claimant that the interview was regarding a video and comments allegedly posted, or re-posted by the Claimant on a social media page namely 'Facebook'. The Claimant confirmed that he re-shared footage from somebody else and that he refused to move the post because he had done nothing wrong. He claimed that he had not broken the law or Facebook's policies. He stated that he had shared his views but his "LOL" comment was taken out of context. The Claimant reiterated that he would not remove the post and would only do so if the complainant had shown concern for the driver or if she could see his point of view regarding what would happen if one crossed the road without looking.

9. Mr Canning adjourned the fact finding interview and when it was reconvened, he read out the complaint that was made to TFL by the complainant and asked the Claimant whether this made any difference to his stance. The Claimant confirmed that it did not because he did not work for Stagecoach (the operator of the bus involved) but may have thought differently if the driver had worked for the Respondent.

10. Mr Canning concluded and confirmed to the Claimant at the fact finding interview that there was a disciplinary case to answer. The notes of the fact finding interview were at pages 69-71 of the bundle of documents.

11. The Claimant was instructed to attend a disciplinary hearing to address the charges against him namely

a) breaching the Respondent's social media policy by re-posting a video on 'Facebook' of a pedestrian incident which caused upset to a relative of that pedestrian and;

b) the complaint made to the Respondent and its clients TFL about that post.

The written instruction to the Claimant confirmed that he could be accompanied to the disciplinary meeting by a trade union representative. He was also advised that the allegations were deemed serious and that if either or both of the allegations were proved, this could amount to gross misconduct and that a potential outcome was summary dismissal. The Claimant was suspended on full pay. The invitation and charges were at page 85 of the bundle of documents.

12. The disciplinary hearing was conducted by Nigel Wood (General Manager) on 9 February 2018 with Mr John Canning in attendance. The Claimant clarified comments he had made at the fact finding interview. He confirmed that anyone could view his Facebook posts and that they could make comments on that post (even if not shared with them). He queried how the complainant knew he was a bus driver at the Respondent's River Road depot as his view was that there was no evidence showing this. John Canning stated that this was not clear but that evidence had been supplied to the Respondent by TFL and the email identified the Claimant as a driver for the Respondent. At the Tribunal hearing, the Claimant asserted that his Facebook page did not specify where he worked. However, the Tribunal found that the complainant was advised by TFL that the Claimant worked at River Road depot for the Respondent and in any event, the complainant could have made her own investigations to find out where the Claimant did work. Regardless of this, the Tribunal found that nothing of relevance turned on this point. The typed notes of the disciplinary hearing on 9 February 2018 were at pages 86-89 of the bundle of documents.

13. The complaint received by TFL and the Respondent was in relation to a post on the Claimant's personal Facebook page regarding a pedestrian that was injured in a road traffic collision. The post shared CCTV footage of the incident and was open to the public to view as there were no privacy settings preventing those who were not friends of the Claimant from seeing the posting. The complaint from a relative of the injured pedestrian stated that the injured pedestrian's family had seen the post and pleaded with Mr Whelan to remove the footage but he had refused to do so and instead had gone out of his way to post a link of the clip on other people's posts. The complaint also commented that Mr Whelan had bragged online about previously hitting two people with a bus and used the

term 'LOL' (laugh out loud) when referring to these incidents. The Claimant was referred in cross examination in particular to page 81 of the bundle of documents, where he confirmed that on two occasions he had run over pedestrians in Ilford and Upton Park using the phrase 'LOL'. The Claimant admitted that this was his posting. He was also referred to another posting on the same page where he says *"I put EM in hospital. That's what they get for running in front of buses, LOL. In both cases, cleared by the old bill*". The Claimant confirmed that he made this posting although he said in cross examination that this was not a controversial comment.

14. During the disciplinary hearing, Mr Wood went through the Facebook posts with the Claimant. He asked Mr Whelan why he had hidden the post from view if he believed he had a right to post these comments and whether he had changed his view. Mr Whelan initially stated that he was waiting for the outcome of the hearing before deciding whether to remove the post but then confirmed he was going to delete it after the disciplinary hearing. Mr Wood then took the Claimant through the email from the complainant to obtain his views. In response to the request from the injured pedestrian's family to remove the post because it caused offence to them, the Claimant confirmed that he had not removed the posting and that the complainant's family could have scrolled past the video if it caused them offence. In respect of the comments that he made on the Facebook page about having previously injured members of the public, the Claimant confirmed that he was not responsible for what other people might say. Asked about using the term 'LOL' and being cleared by the "*old bill*" the Claimant said that this was taken out of context and was said to his friends privately. Asked about whether his post had caused much mental anguish to the injured pedestrian and her family, the Claimant answered that it was *"laying it on a bit thick".*

15. Mr Wood adjourned the hearing to review the evidence and after a short adjournment he gave his decision to the Claimant. This was contained at page 89 of the bundle of documents. Mr Wood noted that the Claimant's account on Facebook was not private which meant that members of the public could share, comment on and see that the post had not been deleted. He considered the matter to be classed as harassment given the Claimant had been advised of the distress that the post had caused to the victims family and his refusal to remove the post causing further distress. Mr Wood considered the Claimant's actions to be deliberate from the moment he was asked to remove the post. He went on to state that Mr Whelan's post had resulted in him being identified as an employee of the Respondent and therefore had undermined the public's confidence in the Respondent and had brought the company into disrepute. Mr Wood confirmed that there was clear evidence that the Claimant's behaviour had given rise to the complaint from the persons affected by his post, namely the injured pedestrian and the relative that wrote the complaint to the Respondent and TFL, who the Respondent considered to be its main customer. As a consequence he found that the charges were proven and constituted gross misconduct. Mr Wood considered other less severe penalties open to him than dismissal but considered that the Claimant's conduct amounted to serious misconduct warranting summary dismissal. He notified the Claimant in writing by letter dated 14 February 2018 of his dismissal and this letter was at page 94 of the bundle of documents.

16. The Claimant appealed against his dismissal on the basis that the penalty imposed was too severe. The ground of appeal was at page 91 of the bundle of documents.

17. The appeal hearing was arranged for 15 March 2018 and was heard by a panel chaired by Angela Ryder, General Operations Manager for the Respondent. The notes

from the appeal hearing were at pages 96-101 of the bundle of documents. At the start of the hearing, the Claimant confirmed his appeal was on grounds of the severity of the penalty. During the course of the appeal, the Claimant expressed contrition in respect of what had happened, expressed that he was apologetic and that if he could take everything back he would. He also confirmed that he would be prepared to apologise to the injured pedestrian and the complainant if he could do so. At the Tribunal hearing he agreed that five weeks had elapsed since his dismissal and the appeal hearing and that he did not apologise during this time. He accepted that he could have posted an apology on Facebook but did not do so. In cross examination, he also confirmed that his apology and contrition expressed at the appeal hearing was due to the advice of his union, albeit at the date of the Tribunal hearing he accepted that this was a tactical decision on his part. Although he felt some sympathy for the injured pedestrian and/or the complainant, he confirmed at the Tribunal hearing that he was not fully contrite or apologetic.

18. In any event, at the appeal hearing chaired by Ms. Ryder, the Claimant asked for another opportunity, for the dismissal to be rescinded and for him to be reinstated. Ms Ryder adjourned the hearing and after considering the matter, reconvened giving the Claimant a verbal adjudication on the appeal. Whilst she understood that the Claimant was now sorry for his actions, she could not get away from the fact that his behaviour was wrong and had caused upset to the complainant and her family. Furthermore, she could not disregard the fact that the Claimant had refused to remove the post having been asked to do so by the complainant. She confirmed that it was his actions on being asked to remove the post by the complainant that had led to the complaint being made. The Claimant was identifiable as an employee of the Respondent and had portrayed the company in a poor light. This in her view was a clear breach of the company's social media policy which was contained at pages 61-62 of the bundle of documents.

19. The policy itself confirmed that the Respondent took its reputation and that of its customers, suppliers and staff seriously and would take action against any employee in breach of the policy. In addition, at page 47 of the bundle of documents was an extract of the Respondent's disciplinary procedure which confirmed that employees should exercise caution and avoid posting anything in connection with their employment that could be deemed offensive in any way or which could bring the company into disrepute. It confirmed that any entries made on the internet inside or outside the workplace may constitute gross misconduct leading to dismissal. The Tribunal found that at the relevant time, these policies applied to the Claimant and that he was aware of them.

20. At the appeal, Ms Ryder considered a lesser sanction given the expression of contrition by the Claimant. However, having considered the Claimant's record and the fact that he had been disciplined in 2016 for posting inappropriate comments online and bringing the company into disrepute for which he received a final written warning, it was clear that he had chosen to disregard this previous warning. She was concerned that if she rescinded the dismissal, an incident of this nature would happen again. After weighing up all the evidence, she decided to dismiss the appeal.

Law

21. Section 98(1) ERA provides that it is for the employer to show the reason or principal reason for dismissal of the employee and 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. If the Respondent fails to do so the dismissal will be unfair.

22. If the Tribunal decides that the reason for dismissal of the employee is a reason falling within Section 98(1) or (2) ERA it will consider whether the dismissal was fair or unfair within the meaning of Section 98(4) ERA. The burden of proof in considering Section 98(4) is neutral.

23. Section 98(4) ERA provides:-

> "the determination of the question whether the dismissal is fair or unfair (having regards 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."

24. In the case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT**, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band it is unfair.

25. In the case of **Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23CA**, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer and the sanction, or penalty of the dismissal.

26. The Tribunal should not substitute its own factual findings about events giving rise to the dismissal for those of the dismissing officer (**London Ambulance NHS Trust v Small [2009] IRLR 563**).

27. In the case of **British Home Stores v Burchell [1978] IRLR 379 EAT**, guidance was given that, in a case where an employee is dismissed because the employer suspects or believed that he has committed an act of misconduct, in determining whether the dismissal was unfair, an Employment Tribunal has to decide whether the employer who discharged the employee on the grounds of misconduct in question and obtained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. This involved three elements. First, there must be established by the employer the fact of that belief, that the employer did believe it. Second, it must be shown that the employer had in its mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage on which he formed that belief on those ground, must have carried out as much investigation into the matter as was reasonable in all of the circumstances of the case.

Conclusion

28. The Tribunal found that the reason for dismissal was misconduct contrary to the Respondent's disciplinary procedure contained at page 47 of the bundle of documents which confirmed "*employees must exercise caution and avoid posting anything in connection with their employment that could be deemed offensive in any way, or which could bring the company into disrepute*". Any entries made on the internet inside or outside the workplace were covered by the disciplinary procedure and it was clear at page 47 that if allegations were found proven it could constitute gross misconduct leading to summary dismissal. In addition, the Respondent had a social media policy contained at pages 61-62 of the bundle of documents which stated *"while the company does not wish to intrude into the personal lives of employees, it takes its reputation and that of its customers, suppliers and staff very seriously and will take action against any employee in breach of this policy even outside working time and when they are using external media (Facebook)".* The employees of the Respondent were warned at page 62 of the potential consequences of a breach of the social media policy if allegations were found proven and warned that dismissal for gross misconduct could follow. In addition, at page 42 of the bundle of documents, examples of gross misconduct were stated to be " *serious breach of an employees' duty of trust and confidence to the company"* and *"abusive behaviour towards passengers, staff and members of the general public".* The Tribunal found that there was sufficient evidence for the Respondent in this case, to show that gross misconduct was the reason for dismissal and specifically, the Claimant's posting of the video on his Facebook page accompanied by the comments made by him at page 81 of the bundle of documents. Furthermore, the Claimant refused to take down the offending video and his comments, even though he was asked to do so by the aggrieved member of the public namely the cousin of the injured pedestrian. This led to a complaint from the cousin which damaged the reputation of the Respondent with its principle client, TFL.

29. With regard to the fairness of the dismissal, the Tribunal noted that the facts of this case were not really in dispute. The Claimant admitted that he had posted the video as well as the offensive comments online and that he had refused to remove them. It was only at the appeal hearing that he showed contrition and apologised but at the Tribunal hearing, the Claimant agreed in cross examination that the apology was only made on the advice of his trade union representative and was not "*truly heartfelt*". In addition, he agreed that although he was prepared to apologise for the distress he had caused the family of the injured pedestrian, he in fact did not post a Facebook apology, even though there was a gap of five weeks between the dismissal and the appeal hearing. This in the Tribunals mind supported the Claimant's own admission at the hearing that he was not truly apologetic.

30. The Tribunal were satisfied that the requirements of the 'Birchell' test had been satisfied namely that the Respondent had a genuine belief in the guilt of the Claimant based upon a reasonable investigation. It considered what the Claimant had to say at a properly constituted fact finding investigation, disciplinary hearing and appeal hearing and considered his points in a reasonable manner.

31. The Tribunal was conscious that it could not substitute its own views but nonetheless, was in agreement that dismissal for gross misconduct was within a band of reasonable penalties open to a reasonable employer. As a consequence, the Claimant's claim for unfair dismissal was dismissed.

Employment Judge Hallen

24 August 2018