



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Mr A Jabbar

West Midlands Travel Limited
T/A National Express West Midlands

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham

ON 24, 25, 26 & 27 April 2017

EMPLOYMENT JUDGE Lloyd

Representation

For the claimant: Mr J Forrester, Solicitor

For the respondents: Mr N Newman, Solicitor

JUDGMENT

The unanimous judgment of the tribunal is:

- 1) The claimant was unfairly dismissed.
- 2) The claimant has not proven his claims of age and race discrimination under the Equality Act 2010; and we dismiss those claims.
- 3) A remedy hearing is listed for Wednesday 26 July 2017

REASONS

Background

1.1 The claimant was employed as a Bus Driver by the respondent and its predecessors from 1 January 1978 until 8 October 2015. On that date, he was dismissed. The reason given was gross misconduct.

1.2 On 23 February 2016, the claimant presented a claim form in which he alleged that his dismissal was unfair; and, that he was subject to direct unlawful discrimination on the grounds of age and/or race under s.13 Equality Act 2010 ("EqA"). The claimant was born on 4 July 1957; and will shortly be 60 years of age. The claimant is of Pakistani heritage and ethnicity. The respondent denies all the claims.

Primary issues

2.1 The facts of the misconduct alleged against the claimant are not in dispute; while in the course of his employment, on 20 September 2015, he drove a bus through a red light at King Street, Dudley. However, the claimant maintains that for the following reasons his dismissal was unfair;

2.2 The respondent's decision to dismiss him rather than to impose some lesser disciplinary sanction was too severe; and outside the range of reasonable responses.

2.3 The decision to dismiss him was inconsistent with decisions taken in cases involving other employees, who committed the same; similar; or more serious misconduct and yet were not dismissed.

2.4 The claimant goes on to allege however, that his conduct was not in fact the real reason for his dismissal. He contends that the allegation of misconduct is a ruse to conceal the true discriminatory reason, which he put in this way; namely,

2.4.1 He was a long-standing employee and a member of the respondent's final salary pension scheme (LGPS). The scheme was closed to new entrants in the early 1990s. His pension scheme membership was expensive to the respondent and he could be replaced by a less costly employee. He contends therefore that he was dismissed because of his age.

2.4.2 Further he is Pakistani. His case is that a white British employee would not have been dismissed for such a trivial breach of rules.

2.4.3 In relation to both the age and the race discrimination claims, the claimant alleges direct discrimination; and identifies Mr Dave Shiels (white British) as his comparator. Mr Shiels is not a member of the LGPS

Findings

3.1 The stage 1 investigating officer was Lee Stockton. Ms K Jukes-Rowe was the stage 2 dismissing officer. Ms TJ Tipper, was the stage 3, appeal officer. We heard evidence from Ms Jukes-Rowe and Ms Tipper, but not from Mr Stockton.

3.2 Our primary findings of fact are these.

3.3 The respondent dismissed the claimant for gross misconduct. Specifically, the respondent relied upon CCTV evidence of the claimant driving through a red traffic light at King Street, Dudley on 20 September 2015. The grounds relied upon by the respondent were that the claimant had committed a serious traffic violation which put himself and others at risk on health and safety grounds. It is common ground that the respondent's definitions of "gross misconduct" in its disciplinary code do not identify failure

to observe a red-light signal. The respondent therefore relies upon a failure by the claimant to comply with Health and Safety standards necessary for the protection of drivers, passengers, customers pedestrians and members of the public likely to be at risk.

3.4 The claimant has acknowledged in evidence that the respondent did not act unfairly in reviewing CCTV footage which was more extensive than that related to the specific complaint about the claimant's bus; made by a member of the public on 20 September 2015. That complaint related to something that had happened at 4.30pm. The complaint, by email stated:

"Registration Number, BX12 DBU, time, around 16:30, comments...I just want to report the driver of this bus. He was tailgating my car and attempting to overtake me (I was going at 30 mph) on 30mph speed limit road (Stourbridge Road A4101), in addition to this he was flashing lights and doing some gestures. It was highly inappropriate and rude and moreover, I think a safety risk to passengers and the other road users if he was attempting to speed. I could only note the registration number of the bus as I (sic) [he] drove past me."

3.5 The tribunal was shown the CCTV footage from the on-board camera on the claimant's bus. It did not in our conclusion corroborate the specific complaint. However, in accordance with the respondent's standard protocol and procedure a segment of the CCTV footage of approximately 10 minutes before and 10 minutes after the time of the alleged incident. The extra footage revealed the apparent skipping of a red light by the claimant at the pedestrian traffic lights in the bus lane at Kings Road in Dudley.

3.6 It was against that background that the claimant attended the fact-finding interview with Lee Stockton on 1 October 2015. The claimant did not engage with the interview to his best advantage. Mr Stockton, having interviewed the claimant and showed him the CCTV evidence, made a recommendation for a stage 2 disciplinary hearing. He had spoken with Mrs Kerry Jukes-Rowe (KJ-R) to confirm her availability to chair the hearing. It was convened on 8 October 2015.

3.7 KJ-R decided to dismiss the claimant summarily on the grounds of the gross misconduct of the traffic light infringement. The claimant appealed the decision. On 20 October, Mrs Toni Tipper (TT) confirmed the claimant's dismissal on the grounds of his gross misconduct in skipping the red light.

3.8 We find that the claimant is a man, who because of his culture and upbringing does not engage to his best advantage with a formal process. English is not his first language; and he is unfamiliar with the formality of an investigative or disciplinary process. We think that due account was not taken of those obstacles for him in conducting the investigative and disciplinary process. We do not find that to be race or age discrimination *per se* but we do conclude it amounted to an unfairness to the claimant in the assessment of whether and how he should be disciplined for the error he admitted he had made on 20 September 2015.

3.9 The claimant is a bus driver of exemplary record. That as such has not been disputed by the respondent. He has worked for the respondent without any disciplinary taint for some 37 years. He has been free of any accident or driving penalty for some 32 years. What he did on 20 September was – and we accept it was – a 5 second momentary lapse of concentration on his part; by a driver who sits in the cab facing the unpredictable environment of busy City roads 8 to 10 hours each day. In his evidence to this tribunal the claimant does acknowledge that his skipping the red light could not be described as trivial. It was a traffic offence. However, though not trivial in the claimant's own mind he saw it in terms of relative severity; and it was an offence for which other people had been disciplined with a warning only; admittedly a final warning. Given his record in terms of length of service and his proven skill as a bus driver, he considered that the penalty of dismissal was disproportionate.

3.10 Considering the totality of the evidence we find that his summary dismissal in those circumstances was disproportionate; and it was outside the range of reasonable responses. We therefore find his dismissal to have been unfair.

3.11 As for his discrimination claims, we deal firstly with his age claim. That is grounded in his contention that he was dismissed because he was an older, long-serving employee who was still a member of the LGPS pension scheme. He was expensive to the respondent comparative to other, younger non-LGPS members. However, we believe KJ-R and TT when they say in evidence that the claimant's membership of the LGPS was never part of the dismissal decision landscape in any shape or form. We conclude that the claimant does not establish any *prima facie* case of age discrimination for the purposes of s.136 EqA.

3.12 Similarly, in relation to his Pakistani race, we find no evidence and can draw no inference of any correlation between his race and the decision to dismiss him. Again s.136 EqA is not satisfied; even to shift the burden of proof to the respondent.

3.13 Neither the age nor race claims are proven and we intend to dismiss both EqA claims.

Law; application to facts

4.1 It is common ground that an employee's misconduct is a potentially fair reason for dismissal, but if an employer has concluded that misconduct has occurred, it then must consider whether dismissal for that misconduct is a reasonable sanction.

4.2 Judicial guidance regarding the meaning and application of s.98(4) of the Employment Rights Act 1996 in the context of misconduct dismissals is well settled. The main principles are these;

(a) In assessing the reasonableness of the decision to dismiss, the tribunal has to consider the decision against the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views. It must consider whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee.

(b) That is not the same as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.

(c) The tribunal must not substitute its own view as to whether or not they think that the dismissal was fair for that of the employer.

4.3 On one level, the guidance contains an inherent contradiction: the "band of reasonable responses" is conceptually indistinguishable from a perversity test. The two **are** different, but it is unclear **how** they differ.

4.4 In Tayeh v Barchester Healthcare Limited [2013] EWCA Civ 29 the Court of Appeal was expressly asked to clarify the difference. Rimer LJ (giving the leading judgment, with which Pill and Hughes LLJs agreed) acknowledged the problem. At paragraph 50: -

"Whilst the guidance in Post Office v Foley excludes any need for a tribunal to find that an employer's decision to dismiss was perverse before it can conclude that dismissal was unreasonable, I admit to some difficulty in understanding the nature of that guidance. If the tribunal's application of the band of reasonable responses approach informs it that dismissal in the particular case fell outside the band of reasonable responses that might be adopted by the hypothetical reasonable employer, that would appear to be equivalent to a conclusion that dismissal was a decision that, on the facts, no reasonable employer could have made. That would be akin to a finding of perversity. That said, I accept that the guidance in Foley, binding upon this court, is to the effect that appeals to concepts of perversity are out of place in the consideration of the reasonableness or otherwise of the dismissal: the approach that has to be applied is simply that of the 'band of reasonable responses.'

4.5 The Court of Appeal has expressly rejected the perversity test. The result is a compromise: the "band of reasonable responses". The difficulties inherent in that compromise are disguised and mitigated by the fact that a tribunal's finding as to whether a decision was outside the band of reasonable responses is a finding of fact, or a value-judgment akin to a finding of fact (see Tayeh, para. 53).

4.6 It might be thought that this has worked satisfactorily enough in practice in the 30 years or so since Iceland Frozen Foods Ltd. v. Jones [1983] 1CR 17. Indeed, Mr Forrester so observed in his submissions. But that is to overlook the issues that lay behind the Haddon v. Van den Bergh Foods Ltd [1999] ICR 1150 controversy – a controversy resolved at Court of Appeal level by Foley v. Post Office [2000] ICR 1283.

4.7 The tribunal has had to address the issue of just how wide is the band of reasonable responses for misconduct dismissals; with specific reference to the evidence in the present case. In *Newbound v Thames Water Utilities Ltd* [2015] EWCA Civ 677, the Court of Appeal restored an Employment Tribunal's decision that the claimant was unfairly dismissed for a breach of his employer's health and safety procedures.

4.8 Although an employer's decision to dismiss must only be within a band of reasonable responses to be fair, that band is limited. In particular, dismissals for misconduct are likely to be outside the band of reasonable responses where there is a disparity in treatment between employees and where the rules relied upon have not been sufficiently well publicised.

4.9 Mr. Newbound, like the claimant had long service; 34 years in his case. In summer 2011, Mr. Newbound was assigned to an annual inspection of a sewer in East London. Whilst on site, Mr. Newbound discussed with a contractor and a colleague (Mr Andrews) whether they needed breathing apparatus. Following a gas test, they took the view that they did not. This subsequently came to Mr. Newbound's manager's attention.

4.10 Following an investigation and disciplinary procedure, Mr. Newbound was summarily dismissed for gross misconduct. However, Mr. Andrews (the colleague) received only a written warning on the basis that he was less experienced and it was felt that he had shown more remorse.

4.11 The Employment Tribunal decided that the dismissal was unfair. However, on appeal, the Employment Appeal Tribunal overturned that decision, finding that the Employment Tribunal had incorrectly imposed its own view of the seriousness of the misconduct (rather than applying the band of reasonable responses test).

4.12 On further appeal to the Court of Appeal, the Employment Tribunal's original finding of unfair dismissal was restored. The Court of Appeal emphasised that it was for the Employment Tribunal to determine the facts of the case; and its decision, based on those facts, should only be overturned where there is an error of law or that decision is perverse. In reviewing the Employment Tribunal's decision, the Court of Appeal paid particular attention to Mr. Newbound's long service, and the considerable discretion given to him in how he carried out his work. In light of these facts, the Court of Appeal was satisfied that the Employment Tribunal had applied the correct test and was entitled to conclude that dismissal was not within the band of reasonable responses open to Thames Water. This was particularly so given the disparity in treatment between Mr. Newbound and Mr. Andrews.

4.13 The band of reasonable responses is not infinitely wide. The assessment of whether a dismissal falls within that band is also to be determined in accordance with equity and the substantial merits of the case, which the Employment Tribunal had done.

4.14 An employer's latitude, to decide whether dismissal is appropriate where there have been breaches of health and safety rules, will only go so far. Also, the importance of consistent treatment in relation to the same incident as well as similar incidents in the past cannot be over-stressed.

4.15 This tribunal also considered the case of *Brito-Babapulle v Ealing Hospital NHS Trust*, UKEAT/0358/12/BA. (14/06/13). The employment tribunal had stated that "*once gross misconduct is found, dismissal must always fall within the range of reasonable responses*". On appeal, the Employment Appeal Tribunal found that this was unsustainable, and dismissal will not always be a fair sanction for gross misconduct. For this reason, the case was sent back to the tribunal for it to consider whether or not dismissal was a reasonable response in the particular circumstances.

4.16 The *Brito-Babapulle* case has not changed the law, but it is a reminder that dismissing for gross misconduct will not always be fair. An employer must consider all the circumstances of the case before deciding on an appropriate sanction, and must be able to demonstrate that they have done so. All situations should be assessed on their own merits and this must include a consideration of any mitigating circumstances relating to the employee, including, the employee's explanation of the conduct. Here we find that it was a momentary lapse of concentration. Further, any mitigating circumstances advanced by the employee; here, the claimant said he was worried about his wife and he had been diagnosed with diabetes. Both he and his wife were taking medication.

4.17 Again, length of service certainly cannot be ignored. The claimant was probably one of the longest serving bus drivers in the respondent's employment, with 37 years' service. He had been accident free for at least 32 years. Conversely his lapse of judgment in travelling through the red light spanned 5 seconds. His driving record with the respondent was documented as exemplary as was his disciplinary record as far as we can judge. The respondent has certainly not challenged that.

4.18 The claimant was very well respected by his colleagues including his managers. His claim to have had strong personal friendships with KJ-R and Lee Stockton have not been challenged. Equally, he knew TT very well over a period of some 20 years. They must have known the claimant as well as anyone. Yet, KJ-R and TT say they could not trust him to drive a bus again; for fear he might jump a red light. That is a conclusion that is unsustainable and falls nowhere within a range of reasonable responses.

4.19 Moreover, we were referred to a collection of some 44 comparators advanced by the respondent. In summary, it showed 31 employees lost their job, and 13 employees were either reinstated or were given a lesser penalty than dismissal. We think it is improbable that all of those dismissed were guilty only of driving through a red light without any other factor to support a dismissal. In addition, we looked at Tab 38 of the comparator bundle which was cited specifically by the respondent. That was Employment Judge Tucker's Deposit Order of 11 March 2014, in the case of "RA" against the

respondent. Paragraph 5 of the Order was illuminating indeed in the context of comparison. However, what Mr Newman appeared reluctant to dwell on in the Order was the last two sentences of paragraph 5; namely,

“There is evidence that the respondent took into account the claimant’s driving record and factors relevant to his specific case. I noted that the claimant (RA) did not have a clean driving record as there had been previous incidents where action short of dismissal had been taken.”

4.20 Mr Shiel is the most pertinent comparator; and he is also the most disturbing in relation to the treatment meted out to the claimant. They committed the same offence at virtually the same time and they were disciplined only two weeks apart; Mr Shiel after the claimant. Mr Shiel caused injury. The claimant’s error caused no-one injury. Yet, Mr Shiel is given a final written warning – by KJ-R - while the claimant is dismissed by KJ-R and his dismissal is upheld on appeal, by TT.

4.21 Regardless of the level of misconduct, it is always necessary to consider whether a lesser sanction than dismissal would be more appropriate. For example, would a final written warning coupled with an additional training course have dealt with the problem satisfactorily? KJ-R and TT gave entirely inadequate consideration to the prospect of a warning; final or otherwise. It was wholly unsatisfactory to apply what we say is a false logic that if you allow the claimant to drive a bus again there is always a risk that he would repeat the offence. KJ-R had no difficulty in letting off Mr Shiel with a final written warning; and his mistake had actually caused injury to a passenger. Given those comparative facts it is unsustainable for the respondent to argue that it cannot risk putting the claimant – in truth one of their best drivers – back on the road again, for fear that he will commit the same red light error again.

4.22 Less obvious factors might also affect the decision on whether or not it would be reasonable to dismiss; for example, the effect of dismissal on the particular employee. That was found to be potentially relevant in *Brito-Babapulle*. The present claimant, inevitably was to be put in a very precarious position by his dismissal; as a driver approaching retirement age who had spent the larger part of his working life in the respondent’s employment. To add to that, he now faced the job market with a stain on his previously exemplary record.

4.23 There is a need to look at every case on its merits both as to the conduct itself and then any mitigating factors, which may include the individual employee’s position.

Conclusion

5.1 For all these reasons, we conclude that this is one of those (relatively unusual) cases where – and without substituting our subjective view – the respondent’s decision to dismiss the claimant for his acknowledged serious

misconduct is markedly disproportionate to the circumstances of the transgression and the factors germane to the disciplinary sanction.

5.2 For those reasons we conclude that the claimant's dismissal was unfair.

5.3 However, at the same time, and having regard to our findings, we conclude on the evidence that the claims of age and race discrimination under the EqA are not proven; and we thus dismiss them.

Remedy

6.1 The claimant seeks compensation by way of remedy for unfair dismissal. Both sides have requested that the remedy hearing be deferred to a later date. There may be a prospect of a negotiated settlement.

6.2 We have granted the adjournment of the remedy hearing and we have listed it for Wednesday 26 July, commencing at 10.00am at the Birmingham ET Hearing Centre.

6.3 The parties must come fully prepared to address remedy in evidence and submissions. All further relevant documents bundles for remedy shall be deposited with the tribunal clerk by 9.30am on the morning of the hearing.

Employment Judge Lloyd
1 June 2017

Sent to the parties

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For the Tribunal