Case Number : 1404902/2018

EMPLOYMENT TRIBUNALS

Claimant: **MR L WALKER**

Respondent: **RAPT DEV ASPIRE BOURNEMOUTH TRANSPORT LIMITED**

Heard at: **Southampton** **On: 15th and 16 July 2019**

Before: **Employment Judge Dawson**

Representation

Claimant: in person

Respondent: Mr Nuttman

JUDGMENT

1. The Claimant's claim of Unfair Dismissal is dismissed.
2. The Respondent's application for costs is dismissed.

REASONS

1. In this case the claimant represented himself and the respondent was represented by Mr Nuttman.
2. The claim is of unfair dismissal only and the claimant confirmed that he was not bringing any other claims before the tribunal.

Conduct of the Hearing

3. At the start of the hearing Mr Walker told me that he was suffering from toothache, a headache and a lack of sleep. I asked whether he wanted to go ahead with the hearing and he confirmed that he did. I told him that we would take breaks when he wanted to and the Tribunal did take regular breaks throughout the day.

4. At the outset of the hearing I also agreed a timetable with the parties whereby a specific period was agreed for cross-examination of witnesses, submissions and to allow the tribunal time to consider its decision. The parties were able to comply with the timetable with Mr Walker early needing only a little extra time to complete his cross examination of Mrs Marshall and I am grateful to them for their co-operation.

5. References in this udgment to page numbers are to the hearing bundle unless otherwise stated.

The issues

6. The respondent admits that it dismissed the claimant. It asserts that the reason was misconduct on the part of the claimant namely refusal to follow a lawful order. The claimant requires the respondent prove that was the reason for the dismissal.

7. In the circumstances the issues for me are;

    a. whether the person who made the decision to dismiss had a genuine belief in the misconduct alleged,

    b. whether that belief was based on reasonable grounds and

    c. whether it followed a reasonable investigation. The investigation does not need to be perfect but must be within a range of reasonable investigations. In this respect the claimant argues that the process was conducted with undue haste but takes no other points in relation to the investigation.

8. I must take into account the size and administrative resources of the respondent and whether the decision to dismiss was within the range of reasonable responses.

9. The respondent relies upon the decision in Polkey v Dayton Services [1987] 1 WLR 1147, asserting that even if I were to find the dismissal was procedurally unfair I should reduce the compensatory award to reflect the fact that a fair procedure would have been likely to result in the same outcome.

10. Further the respondent argues that if I were to find that the dismissal was unfair, I should also reduce compensation on the basis that the claimant contributed to his dismissal by his conduct or that it would be otherwise just and equitable to do so.

11. Given the way the hearing was conducted and some of the points put by Mr Walker in his cross-examination and his submissions it might be useful for me to clarify what the case is not about. The case is not about whether Mr Walker was a good bus driver, it is not about whether Mr Walker was conscientious in putting safety first. Both of those points might well be true. I apprehend that they are.

12. The case is also not about whether Mr Walker's manager, Mr Bowen, was in breach of the Equality Act 2010, as Mr Walker suggested in his closing submissions. The case is not pleaded on that basis and the hearing was not conducted on that basis. It is relevant for me to consider, and I do, whether the instruction which Mr Bowen gave Mr Walker on the day in question was a reasonable management instruction.

Findings of fact

13. The claimant has been employed by the respondent since 15 June 2015. He was employed as a bus driver.

14. A disciplinary procedure applied to his employment and stated, on its 1st page, that all employees were required to comply with reasonable and lawful instructions given by Supervisors and Managers.

15. In respect of written warnings, the procedure provides that a final written warning may be appealed and will be placed on a personnel file and expire after 12 months. The procedure also provides, at page 5, that formal disciplinary action short of dismissal will be held in abeyance pending the outcome of an appeal. There is no right to a 2nd appeal. The procedure also provides that if there is any other unsatisfactory conduct while a final written warning is in force, dismissal will be considered (page 32)

16. Gross misconduct is defined within the procedure as including failure to observe lawful and reasonable instructions relating to employment.

17. The company driver's handbook deals with the carriage of dogs and states "Guide dogs for the Blind… are carried free of charge. Other dogs are carried provided that they are on a lead, kept with their owner and under control at all times, and they do not cause discomfort to other passengers. (Page 39).

18. The Public Service Vehicles (Conduct of Drivers, Inspectors, Conductors and Passengers) Regulations 1990 provides that a driver shall "take all reasonable precautions to ensure the safety of passengers who are on… the vehicle…" (regulation 5) and also provides that a passenger on a vehicle who has any animal "if requested to move it from the vehicle, by the driver… shall remove it" (regulation 6 (2)(b)). I have recited this regulation in the "fact finding" section of this judgment because the claimant says that he relied upon it in making the decisions which he did on the day in question.

19. In March 2016 an issue arose following a refusal by the claimant to take a dog on his bus. On 6 May 2016 Mrs Pinkney the Assistant Staff Manager wrote to the claimant stated "accompanied dogs, on a lead, that do not pose an

imminent danger to a passenger or a member of staff should be carried on our buses. However, a driver's discretion may be used if there is another dog on board the bus, if the dog is not on a lead or is behaving in an aggressive manner. All dogs should be under the control of the owner." (Page 87).

20. On 14 June 2017 the claimant was given a 1st written warning for delaying a service (page 89)

21. on 3 August 2018 the claimant was given a final written warning following an incident with a member of the travelling public on 7 June 2018. The complaint from the passenger appears at page 111 of the bundle and provides the basis for the claimant to be given a final written warning. If the respondent, as it did, concluded that the complaint was true it could not be said that the warning was inappropriate or excessive. It has not been suggested that the warning was given in bad faith.

22. The claimant appealed against that decision and the appeal was dismissed in a letter dated 31 August 2018 but which the claimant put to Mr Pannell he had received a few days before the incident which gives rise to these proceedings. The letter concluded "you have now exercised a right of appeal, and as such you do not have the right to appeal my decision. This decision is final." (p 135)

23. The claimant stated in evidence that he could have launched a grievance in respect of that decision but had not done so at the time of the incidents to which I turn or the disciplinary meetings.

24. In the meantime, the claimant had, on 15 August 2018, been sent on a Customer Care course to try and improve his behaviour when interacting with passengers.

25. On 31 August 2018 it was the Bournemouth air show. At approximately 17:51 on that day the claimant was driving a bus service number 6. A man attempted to board the bus with a dog. The dog was on a lead but the claimant took the view that it was a bull terrier type dog and "potentially dangerous looking" (page 136).

26. The claimant told the man that he could not board with the dog. There was a short altercation in which the man showed his ticket twice to the claimant and then went and sat down.

27. The claimant's evidence before me was that he accepted the dog was on a lead and not out of control and that there were no other dogs on the bus. However, his concern was that the dog looked like it could overpower its owner, who himself the claimant thought aggressive. Whilst there was not a problem at this stage of the journey the claimant was concerned that problems may develop into the journey.

28. The claimant refused to move his bus while the dog was on-board and called a supervisor. The supervisor came over and asked the passenger whether he would leave the bus and he refused. The supervisor did not find the dog was being aggressive.

29. Mr Bowen the transport manager was called. Initially he spoke to the claimant through the driver's window and then boarded the bus. At some point, it was not clear when, he asked the claimant whether the dog had growled, shown its teeth or barked and it is not disputed that the claimant replied in the negative.

30. Mr Bowen told the claimant that he thought the dog was not dangerous and instructed him to drive the bus. The claimant refused. According to Mr Bowen's statement at page 146 of the bundle he reiterated his instruction and made clear that if the claimant refused he would be suspended from duty. The claimant does not, substantially, dispute that.

31. In his closing submissions to me, the claimant stated that the decision he made on that day was with a view to preserving and maintaining a safe space for his bus and he stood by that decision as a matter of integrity and principle. He also told me that he knew that his job was on the line and he had to choose between taking what he considered to be a significant risk in transporting the dog and being held responsible or not doing what he was told to and losing his job.

32. Having refused to move the bus the claimant was suspended and a new driver took the bus forward. I have been shown a CCTV picture which the claimant says shows the bus nearing the end of its journey and which shows the passenger seated with the dog lying at his feet.

33. On 3 September 2018 an investigatory interview took place. The claimant stated that even if the dog was being controlled "these animals are extremely dangerous because they are unpredictable." (Page 138)

34. On the same day the claimant was instructed to attend a disciplinary hearing on 5 September for "alleged gross misconduct for failing to carry out a reasonable instruction from a manager which was to carry a passenger with a dog." A copy of the occurrence report and investigation notes were enclosed with that instruction and it was stated that CCTV would be available. (Page 137).

35. The claimant attended the disciplinary meeting, with his trade union representative, and the CCTV footage was reviewed. The disciplinary officer, Mrs Marshall, considered that whilst the dog had sniffed at a couple of passengers none of them appeared frightened or uncomfortable and for most of time that it took to resolve the issue the dog was laid on the floor and the owner was sat quietly waiting. The claimant was asked whether he would do the same in the same situation and stated that if the circumstances regarding a dangerous dog were to repeat themselves he would make the same decision again.

36. Mrs Marshall concluded that the combination of the claimant having refused to follow the instruction of Mr Bowen and his statement that he could not say yes or no as to whether he would follow a reasonable instruction in the future but in the same situation he would make the same decision again meant that she could not return the claimant to his normal driving duties and she found the

charge against him substantiated. Her witness statement makes reference to a delay to the service of over an hour. In evidence she could not substantiate that assertion but there was no reference to that consideration in the dismissal meeting or the letter of dismissal and I do not think that it formed part of the decision to dismiss.

37. Mrs Marshall noted that the claimant had been trained on company expectations in respect of dogs when he was going through his induction process. She considered what she considered to be the claimant's relatively short service and poor record including his 1st written warning and final written warning and the fact that the claimant had attended a customer care course on 15 August 2018 to try and improve his behaviours when interacting with passengers.

38. She concluded that summary dismissal was the correct decision.

39. The claimant appealed against that decision. Whilst his appeal was based on 2 grounds, severity of the award and disputed evidence, (p148) at the appeal the claimant stated that he wished to withdraw his ground of appeal of breach of procedure and simply focus on the question of severity of punishment. At the appeal hearing, on the advice of his trade union representative, he stated that he had made the wrong decision. He stated that he had had a week off to think and realised that he needed to do better, focus, follow instructions and take instructions from management. Before me the claimant confirmed that he only said those things because he was told to by the trade union and regretted having done so.

40. Based on those matters the appeal officer, Mr Pannell held that the singular offence on 31 August was insufficient grounds for summary dismissal but did warrant a warning. However, because the claimant was already on a final written warning, the additional warning which this conduct warranted could then lead to dismissal. Taking account of the claimant's history and his apparent inability to learn from his past mistakes Mr Pannell took the view that the final incident meant he should be dismissed on the basis of his warnings, but with notice. That is the sanction which was imposed on the claimant

The Law

41. Section 98 Employment Rights Act 1996 provides that it is for the Respondent to show the reason for dismissal and that it is a potentially fair reason.

42. Section 98(4) states that "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- 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 shall be determined in accordance with equity and the substantial merits of the case".

43. ASLEF v Brady [2006] IRLR 576, held that the question is what was the real reason for the dismissal and that it is for the employer to prove. A potentially fair reason may be the pretext for dismissal in other circumstances, for example if the employer makes the misconduct as excuse to dismiss an employee in circumstances where he would not have treated others in a similar way then the reason will not be the misconduct at all since that is not what brought about the dismissal, even if the misconduct in fact merited dismissal. Once the employee has put in issue with proper evidence a basis the contending that the employer dismissed out of pique or antagonism, it is the employer to rebut this by showing that the principal reason is a statutory reason

Misconduct

44. In considering a dismissal for misconduct the tribunal must have regard to the test in *BHS v Burchell* that "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 his mind reasonable grounds upon which to sustain that belief. And, third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case"

Procedural Fairness

45. The ACAS Code of Practice and Disciplinary and Grievance Procedures provides that if there is a disciplinary case to answer the employee should be notified of this in writing. The notification should give details the time and venue for the disciplinary meeting and advise employee their right to be accompanied at the meeting. It does not require a statement of the possible outcome of the meeting, although often letters do state, if it is the case, that dismissal is a potential outcome.

46. The Code also states that it would normally be appropriate to provide copies of any written evidence with the notification.

47. In *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 the Court of Appeal held that the range of reasonable responses test (or to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision

The Effect of Previous Warnings

48. In Wincanton Group plc v Stone [2013] IRLR 178 the EAT gave guidance in respect of high tribunal should approach warnings. It stated, at paragraph 37, "If a tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently. Where the earlier warning is valid, then:

(1) The tribunal should take into account the fact of that warning.

(2) A tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. This case is one in which the internal appeal procedures were exhausted, but an employment tribunal was to consider the underlying principles appropriate to the warning. An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be expected to take account of that fact too, and a tribunal is entitled to give that such weight as it sees appropriate.

(3) It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category of warning would have been appropriate, unless the tribunal is satisfied as to the invalidity of the warning.

(4) It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore tribunal should be alert to give proper value to all those matters.

(5) Nor is it wrong for a tribunal to take account of the employers' treatment of similar matters relating to others in the employer's employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of circumstances of the sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.

(6) A tribunal must always remember that it is the employer's act that is to be considered in the light of s.98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur.

Conclusions

49. I find that the reason for the claimant’s dismissal in the mind of Mrs Marshall was his refusal to follow the order given to him by Mr Bowen on the day in question. There was no other factor operating upon her mind.

50. Further there were reasonable grounds for her to have that belief. The factual matters were not substantially in dispute. Whilst it is possible that if the instruction by Mr Bowen had been given in bad faith it would not have amounted to a reasonable or lawful order, that is not the version of events which Mr Walker gave to Mrs Marshall at the disciplinary meeting. Moreover, given the factual background, it would have been difficult to show that the instruction given in this case was unreasonable or unlawful even if there was a background of animosity from Mr Bowen.

51. Mrs Marshall was able to look at the CCTV footage and conclude that the dog did not present a risk and that Mr Bowen was entitled to come to the same conclusion. Therefore, there was nothing wrong with the instruction which he gave. Thus, I conclude that there were reasonable grounds for Mrs Marshall's belief that the claimant had refused to comply with a reasonable and lawful order.

52. In this respect the question for me is not whether I think the claimant behaved reasonably or unreasonably, whilst I appreciate the fact that the claimant believed he was in a dilemma as to whether to proceed with an unacceptable risk from the dog or obey his line manager, as a matter of fact the evidence suggests that the dog did not present a risk. It is not an uncommon situation that employees think that their line managers are making the wrong decision. That does not enable them to refuse to comply with that decision.

53. There was a sufficient investigation in this case. The claimant was aware of the evidence against him, he was invited to a meeting, he had the opportunity to present any evidence he wanted to. The claimant was given a right of appeal. The fact that the disciplinary process was conducted briskly does not, of itself mean that the process was unfair and in this case, it was not.

54. There was no reason why Mrs Marshall should not take account of the fact of the final written warning, there is no evidence that it was given in bad faith it was not manifestly inappropriate or otherwise wrong.

55. In my judgment the decision to dismiss was not outside the band of reasonable responses. Indeed, I have come to the conclusion that it was not particularly surprising in all of circumstances.

56. The appeal process was fair and independent, to some extent exemplified by the slight lessening of sanction.

57. In those circumstances this claim fails.

Costs

58. The respondent has made an application for costs. At the end of his application, I asked Mr Nuttman whether there were any relevant authorities which I should consider and he said that there were not. I therefore referred myself to the following extract from Harvey:

> In other words, there is an initial two-stage process involved in making a costs order: (a) there must be a finding that the statutory threshold under r 76(1)(a) or (b) has been met, and (b) if it has, the tribunal must then consider whether it is appropriate to make an order in all the circumstances, ie in the exercise of its discretion (see Ayoola v St Christopher's Fellowship UKEAT/0508/13 (6 June 2014, unreported) at paras 17-18; Robinson v Hall Gregory Recruitment Ltd [2014] IRLR 761, EAT, at para 15). It is only when these two stages have been completed that the tribunal may proceed to the third stage, which is to consider the amount of the award payable under SI 2013/1237 Sch 1 r 78 (see Haydar v Pennine Acute NHS Trust UKEAT/0141/17 (12 December 2017, unreported), at para 25).

59. I also considered the decision of the Court of Appeal in *Yerrakalva v Barnsley* [2012] IRLR 78 paragraph 7 "As costs are in the discretion of the ET, appeals on costs alone rarely succeed in the EAT or in this court. The ET's power to order costs is more sparingly exercised and is more circumscribed by the ET's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the ET costs orders are the exception rather than the rule. In most cases the ET does not make any order for costs."

60. I observe that the claimant has conducted the case before me in a careful and measured way but I also note that the application is not based on unreasonable behaviour but whether the claim had any reasonable prospects of success.

61. One of the issues in the case was that the claimant put the respondent to proof as to the reason for the dismissal. It was not unreasonable for the claimant to do that and, in any event, the burden of proof is on the respondent to prove the reason for the dismissal.

62. One part of the respondent’s evidence was unsatisfactory and caused me to have some concerns about the credibility of the respondent's witnesses

63. In paragraph 34 of Mrs Marshall's witness statement she stated "in context, the CCTV showed the delay caused to the bus was over an hour. Passengers were inconvenienced and our reputation undoubtedly damaged."

64. Mr Pannell wrote, in paragraph 31 of his statement, "Mr Walker disrupted our service by over 1 hour (as shown on the CCTV) and inconvenienced passengers. This will have impacted on our reputation.

65. The claimant was concerned about that evidence during the Hearing since he did not consider the delay had been anything like that great. When he asked both witnesses about that evidence they could not give any explanation as to why they had said the delay was over an hour except, in the case of one of them, that they had been told that.

66. That evidence cannot have been accurate when considering the stills from the CCTV footage at page 136a and 136b of the bundle. They show that the

passenger with the dog boarded at 17:53 and at the point when the bus was near to the end of its journey the time was 18:33. Thus the delay cannot possibly have been more than 40 minutes.

67. In the course of his submission on costs Mr Nuttman argued that evidence was irrelevant because it had not formed part of the decision to dismiss. I accept that the delay did not form part of the reason for dismissal and therefore did not deal with it in substance in my judgment on liability, but it is concerning that both witnesses get the same point wrong in such similar terms.

68. The point is not irrelevant to the application for costs.

69. On 12 April 2019 the respondent sent a costs warning letter to the claimant. As part of its argument as to why the claimant should abandon his claim, the respondent wrote "these events caused a significant delay to the journey."

70. In circumstances where the claimant did not believe that there had been much delay, a statement such as that, which he had very good grounds for believing was false, was bound to give him an impression that his dismissal was based on inaccurate evidence and so unfair.

71. In my judgment this case did not have no reasonable prospect of success. The claimant was entitled to come to the tribunal and ask the respondent to prove the reason for his dismissal and in the circumstances the case did not have no reasonable prospect of success and the application is dismissed.

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Employment Judge Dawson

Date: 17th July 2019

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Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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