EMPLOYMENT TRIBUNALS

Claimant: Mr. R. Asamoah

Respondent: South West Trains Limited

Heard at: **London South, Croydon**
On: **25 April 2017**

Before: **Employment Judge Sage**
Members: **Ms. M. Foster-Norman**
Ms. K. Heenan

Representation
Claimant: Mr. Apraku solicitor
Respondent: Ms Omeri of Counsel

JUDGMENT

The unanimous decision of the Tribunal is that:

1. The Claimant's claim for race discrimination, unfair dismissal and breach of contract are struck out because they have no reasonable prospect of success
2. The Claimant is ordered to pay to the Respondent their costs in the sum of £5,000.

REASONS

REQUESTED BY THE CLAIMANT

The Witnesses

The Tribunal heard from:
Mr. Rawat by witness order
Mr Hawkins the dismissal manager
Mr Fairbank the appeals manager

The issues

1. These were agreed in the preliminary hearing before Judge Corrigan on the 13 December 2016, the Claimant did not attend this hearing. The issues were at pages 34-40 which confirmed that the Claimant was

claiming unfair dismissal, wrongful dismissal and race discrimination (at the time of this hearing the Claimant's other claims referred to in the preliminary hearing, had been withdrawn). The notes from that hearing confirmed that the Tribunal hearing the case was to consider whether the claim for race discrimination was misconceived (page 36 of the bundle) to reflect the Respondent's case in their ET3 at paragraphs 25-6 (page 31 of the bundle) that the Claimant had shown no particulars of race discrimination and no discernible grounds could be identified from his ET1. The Claimant was on notice therefore that this was an issue that would be before the Tribunal.

2. The Claimant served his schedule of loss which stated under the heading "Race Discrimination Claim" that "**the Claimant is Black African originally from Ghana and the driver of the train, Mr Ian Rawat was an Asian from a different ethnic group**". The less favourable treatment was described as "**no sanction was brought against the driver but the Claimant was dismissed for gross misconduct, an allegation which could not be proved on the balance of probability required by every competent employer**".

Preliminary Issues

3. At the start of the Hearing, it was noted that Mr Rawat, the witness under a witness order, had not provided a statement, he was given time to write one while the Tribunal completed their reading of the statements. This was handed up to the Tribunal and the parties at 11.10.

4. The Claimant's representative asked for permission to show the CCTV evidence to the Tribunal. After some discussion, it was agreed that this would be seen by the Tribunal but it would be viewed during cross examination of the Respondent's witnesses. Considering the CCTV evidence in the context of the dismissal proceedings would assist the Tribunal to understand the Claimant's case and how he challenged the interpretation of this evidence when deciding to dismiss the Claimant. The Respondent had attended the hearing with several lap tops to enable the footage to be viewed.

5. Before the start of the evidence, the Judge disclosed that one of the witnesses for the Respondent (Mr Fairbank) appeared to be familiar, he appeared to be a person that often got on the same train and sat in the same carriage as her in the mornings. It was disclosed to all the parties that the Judge had never spoken to this person and did not know his name but in the spirit of openness, felt that this ought to be disclosed. The parties were given the opportunity to consider whether this should result in the Judge recusing herself. All parties agreed that the case could proceed and no concerns were raised.

The Conduct of the Hearing

6. The hearing proceeded at 11.20 and started with the witness order evidence of Mr Rawat, no questions were asked in cross examination and the Tribunal only had one question (about the B10 procedure followed by the Respondent).

7. Mr Hawkins the dismissal manager was called and the thrust of the cross examination was on whether the complaint by the customer (that led to the Claimant's dismissal) was authentic, the number of doors and coaches in the train, the fact that the Claimant denied the incident occurred (and said it didn't happen) and why the driver was not dismissed. It was also put in cross examination that the Claimant was "compelled" to apologise. The answers Mr Hawkins gave to these questions were detailed and entirely consistent with his statement and with the evidence in the bundle. No question were put to Mr Hawkins about the procedure he adopted and it was not put to him that the process was unfair or that there had been some substantive unfairness leading to the decision to dismiss.

8. Mr Fairbank was then called to give evidence; he was the appeals manager. The Claimant's representative indicated that he had no questions to put to this witness as he said there were "**no flaws in the process"**. This was therefore the close of the Respondent's case.

9. The Tribunal were surprised that no questions had been put to either of the Respondent's witnesses about the Claimant's claim for race discrimination; and the Representative was questioned by the Tribunal as to why this was. He indicated that he would deal with it in closing submissions. The Claimant's Representative clarified that the Claimant was pursuing a claim for race discrimination. The Tribunal raised a concern that the details of the race claim had not been out to the Respondent's witnesses and no evidence had been presented in support of this claim. The Tribunal also noted that the Claimant's statement made no reference to his claim for race discrimination, although the Tribunal were taken to paragraphs 23 (and 24) of the statement which referred to Mr Rawat being shown leniency, but it was not stated that he was shown leniency because of race and no evidence to support this assertion. It was also noted by the Tribunal that the Claimant's witness statement made no criticism of the dismissal or appeals manager, it only appeared to criticise Mr Risk, the investigations manager who took no part in the decision to dismiss.

10. The Tribunal rose at 12.30 and asked the Claimant's representative to take instructions from his client as to how he wished to proceed in his claim for discrimination. It was also noted that the Claimant's representative had not shown the CCTV evidence to the Respondent's witnesses during his cross examination as requested to do by the Tribunal. It was suggested by the Tribunal that we would view this evidence on return from the lunch break.

11. The Tribunal returned at 1.30 and the CCTV was viewed. The images were also replicated by stills in the bundle at pages 128-259.

The Respondent's application to strike out

12. The Respondent then made an application to strike out the Claimant's claims pursuant to Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 which states "**At any stage of the proceedings, either of its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds (a) that it is scandalous or vexatious or**

has no reasonable prospect of success".

13. The Respondent made the application to strike out the claim for race discrimination on the grounds that the claim was not particularised and took the Tribunal to pages 14-15 of the bundle. The ET1 showed that the only reference to race discrimination was that the box on the form had been ticked. There was then a preliminary hearing before Judge Corrigan, the summary of which was on page 34 of the bundle; there had been no appearance by the Claimant. The Claimant must have had notification of the hearing and of the case management orders. The Claimant's statement made no reference to race discrimination. No questions were put to either of the Respondent's witnesses on race discrimination. It is vital for the Respondent to know the case it had to meet and in the case the Respondent had no opportunity to respond. It was submitted that the Claimant cannot meet the first test of Igen v Wong [2005] ICR 931 CA, there was no evidence of race in the pleadings or in the statement and the Claimant's representative has not sought to glean evidence of race. The burden of proof cannot be satisfied.

14. Respondent's counsel referred to the case of Anyanwu v South Bank Student's Union and another [2001] ICR 391 HL and stated that it does not apply in this case, we are well past the preliminary stage. In that case, it was held that there is a public interest in a case of discrimination proceeding to a full merits hearing, this is a full merits hearing. The only opportunity for the Claimant's case to be put to the Respondent has passed.

15. On the Claimant's claim for unfair dismissal, the Claimant's representative stated that he did not wish to cross examine the appeals manager because **"there were no flaws in the appeal process**". The Respondent referred the Tribunal to the case of Taylor v OCS [2006] ICR1602 CA which held that an Employment Tribunal must consider the disciplinary process as a whole; appeals are capable of overcoming any previous defects in the process. This must therefore amount to a concession by the Claimant that any defects in the process by Mr Hawkins must have been corrected in the appeal. If he wished to suggest that Mr Fairbanks merely copied his decision, it would amount to unfairness, but if that were the case he should have put it to Mr Fairbanks, but it was not put. He had no criticism of the process.

16. In pursuit of the claim for wrongful dismissal, not a single question was put to the Respondent about the claim for breach of contract. Because it is a claim for 'ordinary' breach of contract, the burden of proof is on the Claimant to show the breach. The Claimant's contract is on page 45 of the bundle and at page 51 it states that the Respondent can dismiss summarily for "a disciplinary offence", a grave disciplinary offence is not required. Paragraph 17 of the contract on page 52 also reinforces this as it enables the Respondent to dismiss without notice for "misconduct or negligence". The Claimant contends that the offence was not serious enough to amount to gross misconduct but the contract does not require gross misconduct to dismiss summarily.

<u>The Claimant's response to the application</u>

17. The Claimant's response was to oppose the application. He stated that the particulars of the race claim appeared in the schedule of loss (at page 43) see above at paragraph 2. The Claimant wished to proceed with the claim for race discrimination in the interests of justice and that "it should proceed on the grounds of colour".

18. In response to the Respondent's application to strike out the unfair dismissal claim he stated that the appeal process was 'optional' and stated that he did not think Mr Fairbanks would say anything different as he was "following the position of the two other managers". He felt it was "better not to repeat the same questions" by putting them to Mr Fairbanks.

19. In response to the Respondent's application to strike out the claim for breach of contract, he stated that "**it was breached, it was terminated, it was breached because the offence was not committed**".

The Respondent responded to the Claimant's submissions as follows;

20. Evan assuming that the schedule of loss amounted to evidence, all that gets the Claimant to is a difference of race and a difference in treatment, assuming that it is. Madarassy v Nomura International PLC [2007] ICR 867 CA says that a difference in race and a difference in treatment is not enough. By not putting questions to Mr Fairbanks one would have thought that he was withdrawing the claim for race discrimination. On the issue of Mr Fairbanks only obeying orders, he was more senior. The Claimant's ground of appeal to Mr Fairbanks was only on the severity of sanction (see page 291 of the bundle); that has two consequences, because no questions have been put to Mr Fairbanks in cross examination means that there is no challenge to the severity of the sanction, which must also undermine the Claimant's claim for breach of contract on that same basis.

21. The Claimant never challenged at the appeal stage of the process the facts relied upon by the dismissal manager, he did not say that it didn't happen. If the Claimant's case is that Mr Fairbanks had 'rubber stamped' the decision of Mr Hawkins that ought to have been put to him

The unanimous decision of the Tribunal is as follows;

22. The Tribunal acknowledge that it is rarely appropriate to strike out a claim part way through a hearing and before all the evidence is heard but we have concluded that this is one of the rare cases where it is appropriate to do so. We conclude therefore that the Respondent's application to strike out the Claimant's claim succeeds for the following reasons.

23. The race claim pursued by the Claimant in this Tribunal was not supported by any evidence, there was no details in the ET1 (save for ticking the box), there was no reference to the race claim in the Claimant's statement and no questions were put to the Respondent's witnesses in pursuit of this claim. The Claimant had been on notice that the Respondent identified this claim as 'misconceived' as this had been stated in the ET3 and at the preliminary hearing stage. It was incumbent on the Claimant to provide sufficient evidence to support this claim and to put the case to the Respondent's witnesses for them to respond. The burden of

proof is on the Claimant to show facts from which a Tribunal could conclude, in the absence of an explanation, that the Respondent committed an unlawful act of discrimination. A difference in race and a difference in treatment is not enough to shift the burden of proof of the Respondent, it must be shown that the less favourable treatment was committed on the grounds of race. There have been no facts presented to the Respondent's witnesses to suggest less favourable treatment because of race.

24. The only evidence in the bundle where race is mentioned is in the schedule of loss, which only points to a difference in race and a difference in treatment and under the test in Madarassy this is insufficient to move the burden of proof. This document was not put to the Respondent's witnesses for them to respond and it was not referred to in the Claimant's witness statement. There has been no evidence put before the Tribunal or before the Respondent's witnesses of the reason for the alleged less favourable treatment, the appropriateness of the comparator or of reason why it is stated that the dismissal was because of the protected characteristic of race. From the evidence before the Tribunal it was doubtful that Mr Rawat would be an appropriate comparator due to the material differences that existed (they performed different roles, the comparator was subject to different procedures and the Claimant was the subject of an existing warning on his file).

25. The Claimant's claim for race discrimination has not been pleaded and has not been put to the Respondent and there is no evidence before the Tribunal to support the claim; it is for this reason that we conclude that his claim cannot succeed. We conclude that this case be struck out as it has no reasonable prospect of success.

26. We conclude that the same is true of the Claimant's claims for unfair dismissal and breach of contract. The Claimant did not seek to challenge any of the Appeal Manager's evidence telling the Tribunal that the reason for this was that there were no flaws in the process. The Claimant only appealed on the issue of severity we therefore conclude that the appeal had overcome any failures in the investigation and dismissal process. At the appeal stage the Claimant did not challenge the sufficiency of the investigation, the evidence relied upon by the dismissal manager or the fairness of the process itself. Also, notably absent was any reference to race discrimination. We conclude on the evidence before us and from the manner in which the case has been pursued on behalf of the Claimant in this Tribunal, that his claim for unfair dismissal cannot succeed and his claim will be struck out.

27. Turning to the final claim of breach of contract, it is for the Claimant to show that there was a breach of contract, the Respondent has taken the Tribunal to the contractual terms and it makes provision for the contract to be terminated on the grounds of misconduct, there is no need to show gross misconduct. The Claimant's appeal was on the sole ground that he should be given a second chance; he apologised for his actions. It was accepted by his union representative at the appeal hearing that some sanction was appropriate. The evidence before the Tribunal that the Claimant was subject to a live warning and at the appeal stage it was submitted that a lesser sanction would be appropriate. The evidence

reflected that the Claimant had accepted a disciplinary sanction and that fact alone entitled the Respondent, under the terms of the employment contract, to dismiss without notice on the grounds of conduct. This claim therefore has no prospects of success and will be struck out.

28. After the decision was read out, the Claimant's representative indicated that he wished to appeal. The Tribunal undertook to provide written reasons.

The Respondent's application for Costs

29. The Respondent then applied for costs pursuant to rules 76 and 80 (wasted costs), the application was pursued on the basis that the Claimant acted unreasonably in the bringing of the proceedings or in conducting the proceedings or alternatively that the Claimant's claims had no reasonable prospect of success. It was submitted that all three claims were doomed to fail and for reasons which were within the Claimant's knowledge. In respect of the race discrimination claim, the burden of proof was on the Claimant (Igen v Wong), he had knowledge of the facts and he did not set them out in his claim or in his statement. What he did raise, was not capable of shifting the burden of proof. The height of his case was in the schedule of loss. He would know that it had no reasonable prospect and it was doomed to fail but he persisted and put it to the Tribunal at the cost to the Tribunal service of convening a full Tribunal.

30. In the unfair dismissal claim the Claimant knew he had no challenge to Mr Fairbank's evidence, he knew he would put no questions to him therefore it was unreasonable to pursue the claim when he knew he was not tackling the issues in the case.

31. In the breach of contract claim, the Claimant did not challenge the fact of the offences taking place, he merely challenges the severity of the sanction. he cannot have a claim for breach of contract as the contract allows for dismissal for an act of misconduct. Even if I am wrong that the Claimant can claim in respect of the severity of the sanction, no questions were put to Mr Fairbanks, this was well within the Claimant's knowledge in advance of this hearing.

32. For all of the above reasons, the Respondent claims that the Claimant's claims had no reasonable prospect of success.

33. The Claimant may blame his representative but if the Claimant wishes to waive privilege a wasted costs order can be made against the Representative. If the Claimant waives privilege, it must be shown that the Representative acted in an unreasonable way in the manner that he advised the Claimant or the way in which he conducted the case today.

34. An alternative basis for a wasted costs order is put on the basis that even if the unreasonable conduct occurred after the costs were incurred, the Respondent should not have to pay these costs. The Respondent will say that the unreasonableness happened at the outset, all the matters that arose from the strike out was within the representative's knowledge from the beginning but even if it occurred later, that does not mean that the Respondent cannot recover their costs. This claim should have been withdrawn.

35. The Respondent handed up a schedule of costs and reminded the Tribunal that it may consider the Claimant's ability to pay (referring to the case of Arrowsmith v Nottingham Trent University [2012] ICR 159 CA). They indicated that this was a matter for Summary assessment as it was well below the statutory cap. The Respondent stated that their costs were reasonable.

The Claimant's response to the application for costs

36. The Claimant was given an opportunity to speak to his Legal Representative to decide whether he wished to waive privilege and to give evidence to show that his representative acted in an unreasonable manner in the conduct of the proceedings or in the advice given. The parties were given 15 minutes. On their return, it was confirmed that the Claimant was not waiving privilege, the submissions proceeded on the basis of a costs order under rule 76. It was submitted that they were disappointed with the ruling (to strike out the claim) as the Claimant wasn't given a chance to put his message across. The representative said he acted on the information and expected the Tribunal to comment on the CCTV and the Claimant "**wasn't allowed to give evidence**". He then stated that "**the reason I did not ask Mr Fairbanks any questions as I did not wish to waste the resources of the Tribunal**". It was then submitted that the Tribunal **"would not allow expert evidence on the CCTV footage**".

The Tribunal's decision on costs

37. The Tribunal considered the Respondent's application for costs and the Claimant's responses and it was concluded that this is a case where costs should be awarded. The way in which the claim has been pursued and the conduct of the case has been unreasonable for all the reasons stated above. Although the Representative in response referred to the refusal of a postponement to allow expert evidence to be produced on the CCTV footage relied upon by the Respondent, this application was refused by Regional Judge Hildebrand on the 24 April 2017 because it was unclear how the evidence would assist in a case of unfair dismissal. This was further evidence of unreasonable conduct in the manner in which proceedings were conducted, the Claimant applying for a postponement two days before the case was due to commence.
38. It was also noted that the reason the Claiamnt's representative gave for failing to ask Mr Fairbank any questions changed, firstly it was because there were no flaws in the process (above at paragraph 8), then it was because he did not wish to repeat the same questions (paragraph 18) and then in response to this costs application it was because he did not wish to waste the Tribunal's resources (paragraph 36). The Tribunal felt that the inconsistency of these submissions underlined the poor quality of representation in this case, this was a case that had been inadequately prepared. The Tribunal conclude that this a case where costs should be awarded.

Evidence on ability to pay.

39. The Tribunal heard evidence from the Claimant about his ability to pay, we heard that he was presently on Universal Credit (of £967 per month) and he was presently signed off sick after having a stroke. He paid £600 a month rent and has a mobile phone on contract paying about £15 per

month. He had no other income. He told the Tribunal that he had paid his solicitor £1800 and owed them £200. He confirmed that he accepted all the blame for the case and did not wish to waive privilege but intended to seek independent legal advice, when he has the money to do it.

40. After hearing evidence about quantum, the Respondent addressed the Tribunal saying that the Tribunal was not obliged to limit the amount of costs to what the Claimant can afford to pay on his present resources, the Tribunal can consider what he can pay in the future. The Respondent also submitted that the Tribunal should not dismiss the application for wasted costs as the Claimant indicated his intention to seek legal advice. The Respondent also referred to the comment made by the Representative that he "acted on information received" from the Claimant which sounded like a waiver of privilege. The Respondent did not know if it was agreed that the Clamant should take the blame and that he should present himself as a man of limited means. If the Tribunal find that the Claimant should pay all the costs the Claimant can then pursue wasted costs against his representative. The Respondent submitted that the Tribunal should not limit any award to any less than the amount set down in the schedule of costs.

41. The Claimant's response to the application for costs was that they needed a detailed assessment and that the costs claimed were excessive for a two-day hearing. The Claimant asked the Tribunal to exercise discretion and to give "a reasonable amount".

The Tribunal's decision on the amount of costs.

42. The Unanimous decision of the Tribunal was that the Respondent's application for costs of £14,783 was excessive for a two-day case of this complexity. The Tribunal felt that it was excessive for the Respondent to claim for Counsel and a partner and trainee to attend the Hearing, these costs would not be allowed and their total costs would be reduced by £3,500. Also, it noted that work carried out on documents was stated to be £7958, this work was carried out by the Senior Solicitor with conduct of the case; these charges were felt to be disproportionate and were reduced to £4,000. We conclude that the reasonable costs were in the region of £7,500 however taking into account the Claimant's ability to pay we award to the Respondent their reasonable costs in the sum of £5,000.

43. On the issue of a wasted costs application against the Claimant's representative, the Tribunal gave the parties 43 days to indicate whether an application for wasted costs is to be pursued by the Claimant against his representative (which may require the representative to repay any costs already paid).

Employment Judge **Sage**
Date: 27 April 2017.