THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr O Ajetomobi	**v**	**London Underground Limited**

Heard at: London Central **On**: 11, 12, 13 September 2017

Before: Employment Judge Russell

Members: Mrs J Griffiths
Mr R Maheswaran

Representation:

Claimant: Mr S Rahman, Counsel
Respondent: Mr T Adkin, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

The Claimant's claim fails and is dismissed

REASONS

1. Mr Ajetomobi has had long service with the Respondent Company, London Underground Limited as a Senior Customer Services Assistant and was employed from November 2001 until 22 November 2016 when he was summarily dismissed after some months on paid suspension from 26 April 2016 whilst the company went through a disciplinary process. He was charged with gross misconduct in that:-

    - On 27 March 2016, you failed to attend work and provided a reason for your non attendance, that when later questioned was found to be untrue.
    - On 1 April 2016, you reported sick at the return to work interview.
    - On 20 April you provided a self certificate in which you gave the address of residence at the time of sickness as your home address.
    - At a fact finding interview on 13 May, you admitted you had been abroad during this period.

- You were dishonest during the investigation into the above matter. At fact finding interviews on 25 and 26 April you gave false statements as to your travel abroad and your reason for not attending work on 27 March.
- The above conduct constitutes a serious breach of the implied term of mutual trust and confidence placed in you as a manager with London Underground.

2. The charges led to a CDI which is the Company Disciplinary Interview and dismissal by the Respondent Panel chaired by Ms Tracey Simms, Train Operations Manager. We heard evidence from her as well as from Jane Black, the Area Manager who was the Claimant's Line Manager and the Investigating Officer, and from Dale Smith, Performance Manager Stations, who dealt with the Claimant's appeal heard on 14 December . We heard from the Claimant as well and helpful submissions from the respective Counsel at the end of the hearing on liability with an agreement that to the extent that the case should go to remedies this would be dealt with at a separate hearing.

3. The claims before us were unfair dismissal sections 94/98 ERA 1996 , wrongful dismissal and direct race discrimination Section 13 of the EQA 2010. The Claimant did not wish to proceed and withdrew claims for indirect discrimination and automatic unfair dismissal under the ERA 1996 Section 104. The discrimination is said to primarily lie in the conduct and outcome of the disciplinary proceedings which resulted in what the Claimant regards as his unfair dismissal and because he was summarily dismissed, he is obviously claiming loss of notice as well, reflected in his wrongful dismissal complaint.

4. An amended List of Issues were helpfully set out by the Claimant's Counsel at the start of the hearing. Although these were not agreed by Mr Adkin Counsel for the Respondent, he did not object to the list and we will refer to this in our findings. In essence, the unfair dismissal claim requires us to determine the reason for dismissal and then in terms of fairness whether the Respondent followed its own procedure. We did consider the seven bullet points that where set out by way of issues here and I summarise these as follows:-

   (a) The fact that the Respondent did not conduct a fair return to work interview;
   (b) The fact finding was not clear to the Respondent;
   (c) The suspension for seven months whilst the disciplinary process continued was unreasonable;
   (d) It was inappropriate that his Line Manager was also the investigating officer;
   (e) There were errors in the way in which the CDI took place through Tracey Simms, including having discussions with the Claimant's Line Manager during one of the adjournments;
   (f) Mr Dale Smith should not have taken the appeal because he was the Line Manager for Jane Black, the Claimant's Line Manager and

therefore would have pre knowledge of the circumstances of the suspension;

(g) The company did not discuss matters with the Claimant in the timely manner which would have avoided all misunderstandings. The point being from the Claimant's understanding that the Respondent did not follow its own procedure and therefore the process was unfair.

Tthe issues went on to require the Employment Tribunal to consider whether the Respondent had a genuine belief in the Claimant's dishonesty based on a reasonable investigation bearing in mind the disparity of treatment of the Claimant when compared with other employees including those set up as a comparable employees, questioning the charges as set out and whether the charges had led to the Claimant's dismissal and the Respondent's failure to take the Claimant's outstanding performance and other mitigating factors into account leading to them failing to make a decision and apply a sanction within the band of reasonable responses. Obviously the wrongful dismissal case is determined on whether the Claimant was fairly dismissed for gross misconduct and the direct discrimination claim revolves essentially around the disciplinary process as well. In the list of issues the Claimant identifies the Respondent's alleged use of stereotypes that the Claimant is a British National of Nigerian Origin and there is in their submission disparity of treatment between him and other employees including comparators who were disciplined but suffered a lesser sanction or should have been disciplined by the Respondent as well as unfair treatment during the disciplinary process including the dismissal itself.

These are our findings.

Alternate Cover

5. There is a dispute as to the swapping of shifts policy. The Respondent says it should only happen by completing a mutual exchange of duty form. We find that it often happens informally and in practice without such formality and as the Claimant claims, the Respondent turned a blind eye to it happening. In any event the Claimant unilaterally organised a replacement Mr Maidment for shifts on the 27 March that he could not attend and it is perhaps understandable that he did given that he was not meant to be working between the 16th and 31st March other than this one day, a period exceeding 2 weeks. It is unclear whether Mr Maidment who was to take over his shift could or would have taken over the whole shift or just a part of it on the day in question 27 March and we make no finding on that. We do however find that neither Mr Maidment nor the Claimant or any other alternative for the Claimant worked on the 27th March and the reason that this became a problem other than operationally is due to the Claimant's failure to disclose the full reasons for the fact that neither he or an alternate could come into work on that day.

6. We also find that the Respondent took no action against Mr Maidment for agreeing to swap with the Claimant but this does not cause us any concern because it did not take any disciplinary action against the Claimant either and we note that it was not part of the gross misconduct charges that he had attempted to get an alternative without filling in the necessary form or forms. It is perhaps an area that London Underground wants to look at as there is some confusion as to how this works in practice as custom and practice is clearly at odds with the respondent's official policy even though , as the Claimant representative said , it could lead to concerns as to health and safety and knowing exactly who was doing what job on what day.

The Claimant's Sickness Dates and Visit to Africa

7. This is a very confusing part of this case but we find the Claimant went to Africa from 16 March until 5 April. We have no reason to believe that he was not sick himself on 24 to 26 March. He was meant to be working for the Respondent in London on 27 March but he continued to remain in Africa until 5 April whilst he recuperated from his illness. He then returned to the UK on 6 April when he took medical advice in London .From 7 - 10 April he was well enough to work but was on rest days and then came back into work on 11 April. He did not tell the Claimant that he had been in Africa at all. In respect of the period 27 March until 5 April he did not give them that information until 26 April. Mr Maidment who was going to give cover said that he told him on 20 March that he may not be able to give cover on 27 March and the Claimant attempted to get alternative cover but did not inform the Respondent through his Line Manager or otherwise of this fact and did not tell them of the fact that there was going to no cover until a text was sent to his manager, Jane Black on 27 March. We make no finding as to whether this text was sent by him or his brother as he claims, but the content of the text is obviously clear and unambiguous.
8. The Respondent did not know the facts as stated above but did probably know that the Claimant was in Africa from 16 March. They expected him back to work on 27 March, they did not know he had an alternate lined up, they did not know he was not coming into work on 27 March until the morning of that day , they did not know that the Claimant was sick and they thought the reason that he was not coming into work was that his child was ill. They thought the Claimant was back in the UK because he had given the impression that he was with his child in accident and emergency (and we find that his text of 27 March did give that impression) and the Claimant gave that as the only reason that he was not in work. This again suggested he was in the UK of course.

9. On 31 March they knew the Claimant was not coming into work on 1 April. On 3 April they knew he was not coming in on 4 April. Again they thought he was in the UK as he did not suggest he was not and he talked about checking with his GP and so we believe that this perpetuated the belief that he was still in the UK.

10. This led to the Respondent understandably putting the 27th March 2017 down as a day where he took time off for dependent leave. This was confirmed to the Claimant at the return to work interview on 20 April.

Return to Work (RTW) Meetings 20, 25-26 April

11. The Claimant criticised the Respondent for both meetings of 20 April and 25 April. Reflecting questions arising out of the RTW on 20 April. We find that the RTW meetings did take place and accept Jane Black's evidence to this effect. The usual practice was to have the RTW meetings at work and it was fair to have done so and it was fair for Jane Black to take this as his Line Manager. It was reasonable that this only took place on and from 20 April given that the Claimant was on sick leave until 11 April and then on night shifts after that. The Claimant signed documents related to the RTW dated 25 April and there was no persuasive evidence from the Claimant to suggest that either meeting was not a proper RTW even if he did believe that he was too busy and perhaps too ill to be focused on the discussion. There were in fact two RTW forms completed, one in respect of the 27th March absence and one in respect of the period 1st – 6th April.

12. We find that Jane Smith did ensure that they would not be disturbed, even though the Claimant was at work and we believe that in respect of this meeting and the later meetings, that if there had been an emergency or something requiring him to break off from the meeting that this would have happened. He should have been focused on the meetings and the first one was not simply a box ticking exercise. He did on 20th April mislead the company in a number of respects. The self certification form was inaccurately completed, he gave a UK address even though he was asked for his address at the time of the sickness and he should have then explained that he was in Nigeria. The Claimant would have been well familiar with this form and even if the Claimant's representative was right in suggesting that it was not a very reasonable question to ask, it is clearly stated on the form and unequivocally so and he should have complied with it. In addition on the RTW interview form for 27 March, he gave inaccurate information when confirming that his reason for non attendance was because he took time off for his sick child on that day when in fact he can never have been in work because he was in Africa and in any event he was personally ill.

13. Ms Smith again travelled to Bayswater where the first meeting took place on 20 April when she came to see him for follow up questions on 25 April. This was reasonable given the IT Report that she received later on 20 April and after the first RTW had taken place on the afternoon of 20 April. It suggested that the Claimant's explanation at that time was inaccurate, and according to the minutes of the 25th April, he said he was intending to come back for the 27th March workday (which is clearly not right)and that he would have come back but for his son's illness (which is clearly incorrect as well). And we find in the absence of any dissuadable evidence to the contrary from the Claimant , who gave very inconsistent and uncertain evidence on this, that Jane Black's notes of the 25th April, even if the Claimant had not seen them

at the time, are broadly accurate just as the Claimant confirms that the notes that she took as an addendum to that for 26 April were broadly accurate as well.

14. It shows, as the Respondent claims, a consistent pattern of dishonest behaviour. We do not know why the Claimant was not more forthcoming and honest at this time, but it was understandable why the Respondent was confused and concerned. We do not find that the follow up meeting of 25 April was of formal fact finding and we agree with the Respondent that if the Claimant had given a satisfactory explanation this could have been dealt with informally. The Claimant says that he did not know that Jane Black was taking notes, but we do not accept that either as he must have seen her doing so. She was in the same room as him. It highlights that he was aware of the formality of the occasion even if it was not a formal fact finding. The Claimant was upset at questions asked of him and did not think that the 27th March should still have been an issue, particularly given that he took unpaid dependence leave and not sickness leave which he would have been paid for, but the questions of him were reasonable given the confusion caused by the Claimant not the Respondent .And we find that the Claimant continued to be untruthful and did not admit the full facts of the situation post his return from Africa , for whatever reason.

Untruthfulness

15. The Claimant claims that he had given full disclosure of the true position on 26 April and we broadly accept this is the case, but that the Respondent points out , and distinguishes his case from others, partly on these grounds, that he was dishonest before 26 April and this lack of honesty continued after the 26th April. The point being that although the Claimant should have been wholly honest as to when he returned to the UK even to the extent that there might have been a genuine misunderstanding through the text messages whilst he was in Africa , he failed to cooperate with the process going forward. Also it was only after (through the use of his Ipad which he did not think would alert the company to the fact that he was in Nigeria) that he was questioned by the Respondent as to his whereabouts and he decided to “come clean” at all.

16. The Claimant suggests that he was truthful during the disciplinary process and cooperative but in the CDI he effectively refused to give information as to his son’s illness, he claimed that he did not need to contact London Underground while on leave, he said that he was not aware of the policy for reporting sick and it was up to the Claimant if he was to report sick.He called the meeting on 26 April “informal” and asked for it to be set to one side, he denied the legitimacy of the RTW of 20 April and the meeting of 25 April that followed it and at the appeal he was still talking about his son’s illness as the reason for not coming in to work. Most of these statements were obviously not truthful. He was reluctant to offer information as to his son’s illness which whilst understandable and we do have obvious empathy for that, did not help the process and he sought a number of adjournments before answering straightforward questions.

17. We find that he was inconsistent in the way that he dealt with matters and whilst he was certainly not helped by his Union Representation he did not help himself either and must take, unfortunately ,considerable responsibility for the fact that the disciplinary proceedings then spiralled out of control as far as he was concerned. If there is any challenge to the disciplinary note and amended minutes other than where already accepted by the Claimant , we prefer the Respondent's version of these partly due to the fact that the Claimant could not, even when pressed, give a cogent and plausible explanation for a different content/version of events.

Suspension and Disciplinary Process

18. As far as the Claimant's List of Issues is concerned, their focus is on the Respondent's practice and procedure.We find that in many cases he is referring to the Transport for London procedure, rather than the London Underground Policy which we find was applicable as made clear by the TFL Policy itself. We have dealt with the return to work interview above and the findings made deal with issues (a) and (b) on the amended List of Issues summarised in paragraph 4 of these reasons and in respect of the Respondent's procedure. As far as issue (c) is concerned which relates to the suspension, we do not find that there is any justification to suggest this was unreasonable and it was not a matter (as identified by the Respondent's Counsel) that was put to the Respondent's witnesses or a cause or complaint at the time. The Claimant was paid during this period and there were genuine reasons for the subsequent moratorium.

19. We find in respect of issue (d), that it was not inappropriate for Ms Black to be the investigating officer, even though she was his Line Manager, this is in accordance with the LUL policy and as far as Ms Black being talked to during the CDI we think this was legitimate too, Ms Simms only went back to her for clarification as the investigation officer, this was not a fishing expedition as claimed and it was not about new evidence. The Respondent said that it had no need to reconvene and as result there was no need to provide information (on this post meeting discussion) to the Claimant.

20. Mr Smith was quite at liberty to deal with the appeal. He is clearly very experienced manager and we are satisfied that he did not have any specific knowledge beyond the fact of the Claimant's suspension as to the events leading up to the suspension and dismissal of the Claimant .

21. The Claimant did indeed own up to what he regards as misunderstandings on 26 April, but it was simply too late. We accept that his inconsistency leading up to that admission led to having a case to answer and the suspension arose from his admissions on 26 April which in turn led to disciplinary process. The investigation correctly followed the suspension and the CDI and appeal followed that . We find that the Respondent did in all material respects follow their policy and guidelines and in particular we do not find that the meetings of 26 April were fact finding. Such meetings did not happen until after the suspension in May.

Severity of Sanction

22. The range of disciplinary sanctions available to the Respondent are set out in the LUL policy .Final written warning, reduction in grade, suspended dismissal, summary dismissal. The Claimant claims he would have responded to a warning and did not need to be dismissed and this may be right, but the dismissal officer regarded the gross misconduct charges as proven. The Claimant criticises the fact that the charges were not amended at all, but we find that they were fairly stated and in summary they reflect a breach of trust and confidence in the Claimant and the Respondent's finding that the dishonestly was serious enough to warrant immediate dismissal. This is not a matter that we can interfere with, it is not for the Employment Tribunal to substitute its own view of the Respondent's actions if they are shown to be within the band of reasonable responses and we think that they were in this instance primarily because (as stated by the Respondent's Counsel) there was persistent dishonesty. We also accept that mitigation was taken into account, including the Claimant's previous good performance and sickness record and conduct. Why he acted as he did we are at a loss to know as this case certainly gained an unfortunate momentum of its own due to his conduct and to his obvious and severe prejudice.

Comparables

23. As far as comparables are concerned none are on all fours with the Claimant's case. The ones that he particularly relies on , and we have read the summary of all of them and accept that the Respondent did take these into account, were comparators A and B. A was in a lower grade and was honest at the first opportunity that he could be and he was also incidentally a black African and not British white male who the Claimant generally claims would have been treated more favourably than him. Comparator B had left his post without permission, but there were mitigating circumstances and the position was even less comparable than Comparator A. Comparator B was guilty of sexual assault and this was not dishonesty. He was a senior employee who was not dismissed and there may be issues to do with the victim's testimony that led to this. We do accept that the Respondent may have been given a less severe sanction to the Claimant and we also believe on the evidence that we have that Comparator B was treated far too favourably. However, we do not all the information and more specifically we do not find that the panel dismissing the Claimant did so because of any prejudice towards him or wished to treat him less favourably than any other member of staff, nor do we think that they were unreasonable as explained above.

24. Looking at the comparators only tells part of the story and one decision maker may determine the position differently in cases which turn on the facts. In this case we accept the Respondent took the comparables into account itself, more than many employers would do and having considered the Hajiarmu v Coles case, referred to by the Claimant, we do not think that the Claimant's behaviour would have been overlooked in respect of any

other employee. The Respondent came to the genuine and honest belief after a full investigation that the Claimant's dishonesty warranted summary dismissal and we find the dismissal fair as a result.

25. The Claimant has not been served well by his Union as mentioned above . For instance, the apparent advice that he should not apologise for misleading the Respondent. But as the Claimant says he obtained no financial advantage by his behaviour, he would not have been disciplined for the swap in responsibilities, he would have been paid for 27 March if he had taken it as a sickness and he could have taken it as holiday. So it is all deeply unfortunate that this situation has arisen, especially given his long unblemished service. The respondent is not without blame e.g. it had such a confusing policy on alternates. But the main fault is that of the Claimant.

Discrimination

26. Initially the claim against the company was also against Jane Black and Tracey Simms, which claims were then dropped, they are the two women who he feels treated him less favourably because of race, although obviously his allegations were also directed against the Respondent as a whole. However, it accepted that there were no specific complaints against either them other than in the context of the disciplinary process and we find that the disciplinary process was essentially fair as detailed above. Neither of these witnesses nor Mr Smith were asked questions as to suggest or show the unfavourable treatment of the Claimant was on the grounds of his race and when asked he continued to say that it was about the totality of the process, rather than giving any cogent specific examples as to why he should have been picked upon for reasons of race or at all despite the claims of the Claimant's representative.

27. He was not disciplined for taking domestic leave he was disciplined for dishonesty, as set out in the gross misconduct charges in more detail. We accept the Respondent's submissions that there was insufficient evidence even from a prima facie case that could suggest an act of discrimination had occurred. We find no material difference in treatment in the comparables as explained above. We recognise it is often difficult to identify discrimination, but this is a straightforward conduct case. No actual or hypothetical comparator is shown where the Respondent would have acted differently and there is no evidence that any of those involved were influenced by e.g. the fact that the Claimant was Nigerian or any other reason than the one given by the respondent and the race discrimination also fails. The wrongful dismissal case must fail because we find that summary dismissal was justified.

28. The respondent wished to make an application for costs after hearing our oral judgment and reasons. We indicated that if so they should do so in writing in due course and a separate hearing would be listed but that the Tribunal would need to be persuaded this was an approportionate case for such an application and at present we were not .

Employment Judge Russell

Dated: 10 October 2017