

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4101664/2017

Held in Glasgow on 23, 24 and 25 October 2017

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Employment Judge: Robert Gall

Mr Z Rana

**Claimant
In Person**

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First Glasgow (No 1) Ltd

**Respondent
Represented by:
Ms E McIlroy -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the tribunal is that

1. The claim of unfair dismissal brought in terms of the Employment Rights Act
20 1996 is unsuccessful.
2. The claim in respect of payment for holidays accrued but untaken at time of
dismissal of the claimant by the respondents, this in terms of the Working
Time Regulations 1998, is unsuccessful.

As stated at the Hearing, in terms of Rule 62 of the Employment Tribunals
25 (Constitution and Rules of Procedure) Regulations 2013, written reasons will not
be provided unless they are asked for by any party at the Hearing itself or by
written request presented by any party within 14 days of the sending of the written
record of the decision. No request for written reasons was made at the Hearing.
The following sets out what was said, after adjournment, at the conclusion of the
30 Hearing. It is provided for the convenience of parties.

REASONS

1. This is a claim of unfair dismissal, together with a claim for holiday pay. There was a claim for wages said to have been unpaid to the claimant during the period of his suspension. That element of claim was however abandoned during the Hearing.
2. It also became clear from the response, Form ET3, and in the Hearing that monies otherwise due to Mr Rana have been deducted from payment made by the respondents to him. Those sums related to a failure by Mr Rana to return uniform and passes to the respondents. There was no claim before the Tribunal in relation to those elements. It is a matter which can be pursued elsewhere, in the Sheriff Court for example, if Mr rana feels it appropriate to do that. The respondents however confirmed during the Hearing that they would reimburse Mr Rana if he returned his uniform, Fob and passes. He said that he would now do that.
3. Mr Rana confirmed towards the conclusion of the Hearing that whilst he sought reinstatement when the claim was presented, he now sought compensation if successful.
4. I heard evidence from the Investigating officer, Denise Crossey, the Dismissing Officer, David Cameron, the Appeal Officer, Duncan Cameron and the claimant himself. A joint bundle of productions was lodged.
5. I do not propose to rehearse the facts. Those have been heard by me at the Hearing over the last two days.
6. Mr Rana was a bus driver. In brief, there was an incident on 22 February 2017. Verbal abuse had been directed towards Mr Rana by a passenger. Ultimately the passenger had assaulted Mr Rana resulting in a cut to Mr Ranas face. Mr Rana required four stitches. He suffered substantial blood loss. The incident was extremely unpleasant and must have been very upsetting.

7. Arising from the incident, Mr Rana was dismissed.
8. It seems counter intuitive on first consideration that Mr Rana was dismissed. Mr Rana was the victim. He had been assaulted and was injured yet he lost his job.
- 5 9. I can understand why Mr Rana thinks that this was an unfair dismissal in that circumstance.
10. Mr Rana's position was that he was leaving the bus to go to the toilet, that he then acted in self defence and that he sought to restrain the customer to await the arrival of the Police.
- 10 11. The respondents highlighted in the evidence that safety of staff was paramount from their point of view. Unfortunately abuse from members of the public to drivers is reasonably common. With that in mind, the respondents have installed assault screens. Those surround the driver/cab area. That area is known to be a safe area. Training is also given to
15 drivers. The main element of that is that they should retreat to or stay in the cab area if any issue arises.
12. Training was also given to drivers, including Mr Rana, in relation to the handling of confrontation. It is emphasised that there is to be no physical contact with passengers. There is a responsibility on the part of the driver
20 for his own safety and for safety of passengers and the public. The respondents also have a reputation to consider and staff are expected to have regard for that and to act so as not to damage or potentially damage the reputation of the respondents.
13. The applicable provisions and guidance are emphasised through training,
25 through notes on the notice board and through health and safety campaigns in the workplace. They are further emphasised in the driver's handbook and in policies such as the Health and Safety Policy. The consequences of breaches are explained in the Disciplinary Policy. There is also an Injury Prevention Guidance and information as to cab security.

14. Mr Rana had notification of those elements, even if in reality, as in the case of his contract of employment, he did not read the document or certainly did not read it in detail.
15. Mr Rana did however acknowledge that he knew of the requirement to use the cab as a safe place and an area to go to in the event of any issue.
16. Mr Rana was dismissed. The sole ground of his dismissal was what happened on 22 February, the events of that day and the actions of Mr Rana.
17. There was a reference in some correspondence to the incident being on 23 February. That was unfortunate. No confusion was caused however as to the incident which was being referred to and which was being discussed in any of the meetings. It would be better had the reference to 23 February not happened. The respondents should try to ensure that the correct date is referred to in the future.
18. Similarly there were some issues around the correspondence to Mr Rana. Some letters had been hand delivered to him. A letter was substantially delayed in getting to him, that being the letter regarding the appeal hearing date. Communication of that date had been given to the Union. Again however the respondents should consider, given Mr Rana's view on the hand delivery and the concern which he had as to the intimation of the appeal date in particular, the method of their delivery of communication to employees in this situation.
19. The respondents became aware of the incident on 22 February. Relevant forms were completed. An investigation was started. Ms Crossly was appointed the Investigation Officer.
20. Whilst the desirability of commencing the investigation and undertaking it when the incident is fresh in the mind of all involved, it is worth noting for the future Mr Rana's comments about the immediacy of the investigation in circumstances where he was coming to terms with the incident which had been a pretty violent assault and involved a nasty injury to him.

21. That said, I also noted from the evidence that Mr Rana had been able to provide details both for Form HS60 and to Ms Crossey.
22. Ms Crossey viewed the CCTV of the incident filmed from the bus. The CCTV footage was gone over with the claimant at the investigatory meeting.
5 The claimant was accompanied at that meeting by a trade union representative, Mr Hanlon.
23. Ms Crossey decided that there was sufficient concern such that a disciplinary hearing should be held.
24. There was an independent witness to the incident, an SPT Inspector. He was not spoken to as part of the investigatory or disciplinary stages. He was
10 spoken to however as part of the investigation arising from the appeal.
25. In my view it was appropriate that the SPT Inspector be spoken to. There was an issue as to Mr Rana chasing the passenger after the assault by the passenger. Mr Rana said that this was done in order to detain the
15 passenger. The CCTV footage led to the view on the part of the respondents that this was being done in anger by Mr Rana.
26. In looking at the procedural matters and the dismissal in general, the Tribunal is to look at the whole process. That therefore includes the stage of appeal.
- 20 27. The disciplinary hearing was held. Mr Rana was present with the union representative. Mr David Cameron was the decision maker. The CCTV footage was again viewed. Mr Rana and his companion, Mr Hanlon, were able to comment upon the situation and to explain their position. The decision taken was to dismiss the claimant.
- 25 28. An appeal was lodged by the claimant. He made three points in his letter. He referred to his length of service (almost 16 years) and loyalty. He said that he had left the cab as he did not believe that there was any danger. He wished to use the toilet. He also highlighted that the Inspector was an independent witness.

29. The appeal was heard by Duncan Cameron. The claimant was accompanied by Mr Hanlon and also by Mr Dowds who is the Union Convenor. The decision taken at appeal was not to uphold the appeal. The dismissal therefore stood.

5 30. Mr Rana's position at Tribunal was that the dismissal was unfair. He said that he had intended to leave the cab to use the toilet when there was no sign of an issue. He had been attacked. He had been pushed by the passenger. He had then been assaulted resulting in a cut to his face just below his eye. He had acted in self defence. He had tried to restrain the
10 passenger until the Police arrived. The dismissal was harsh given that he had almost 16 years of loyal and dedicated service. CCTV from the SPT cameras might be available to assist to establish what had happened. The Police had not charged Mr Rana. Another employee, David Hynd, had assaulted a passenger and had not been dismissed.

15 31. In relation to the last point, Mr Rana sought that the Tribunal order release of CCTV in relation to the incident involving Mr Hynd. The respondents opposed that.

32. Mr David Cameron had viewed the CCTV record of this incident. Ms Crossey had also viewed it as I understand it. Duncan Cameron was aware
20 of the incident involving Mr Hynd.

33. From their evidence, there had been no sign of an assault by Mr Hynd on the CCTV footage. Mr Rana accepted that the CCTV cameras did not cover the outside rear of the bus where any assault would have been likely to have occurred.

25 34. The basis for the view that there may have been an assault by Mr Hynd was in texts from Mr Hynd to the claimant sent on 23 February 2017. Those were only produced by Mr Rana on day one of this Tribunal Hearing. He said he had not produced them previously or at the internal hearings as he did not realise that Mr Hynd had retained his job.

35. I was satisfied that the only issue, although this was an important one, in relation to Mr Hynd was whether he had assaulted passengers. The other elements of his behaviour, for example in leaving the cab, going outside to the rear of the bus to restart the bus and then returning to the bus were satisfactorily explained as not being an issue for the respondents. Mr Hynd had left the cab on the footing that there was no apparent danger and in order to restart the bus in circumstances where the bus was protruding into a busy expressway and had passengers on board. There was a real risk of collision had Mr Hynd not sought to start the bus and to move it away from its then location.
36. I accepted the evidence of David Cameron and of Ms Crossey that there was no sign on the CCTV of any assault by Mr Hynd. I had no reason to think that they would not have tackled Mr Hynd about it and put disciplinary proceedings in hand had there been any evidence of an assault by him. The texts present a slightly puzzling picture. There is the potential, as the respondent said, that they may have been sent by way of bravado in the aftermath of the incident. It may have been a “*you should see the other guy*” type of comment.
37. In these circumstances, I refused the application to view the CCTV footage in respect of Mr Hynd. It seemed to me to be something of a fishing exercise. The application was made on two occasions by Mr Rana as I had said when refusing it on each occasion that it could be renewed if it was felt that circumstances warranted that.
38. The dismissal was said to be due to misconduct. The route to be followed by the Tribunal in that circumstance is set out in Section 98 of the Employment Rights Act 1996. The provisions in the statute are clarified by the case of ***British Home Stores Ltd v Burchell [1980] ICR 303 (“Burchell”)***.
39. The Tribunal must bear in mind that it is not its role to determine whether the dismissal was fair or unfair by looking to its own view of fairness. The dismissal is unfair if it lies outwith the band of reasonable responses of a reasonable employer.

40. The first task for me was to determine the reason for dismissal.

41. I was satisfied that the reason for dismissal was conduct. No alternative reason was advanced. There was no challenge to that being the reason for dismissal.

5 42. Conduct is a potentially fair reason for dismissal.

43. I then turned to look at fairness of the dismissal. *Burchell* provides guidance in that area.

44. I firstly considered whether there was a genuine belief on the part of the respondents in my view that the conduct had occurred. I was satisfied that
10 the respondents held that genuine belief.

45. I then considered whether that belief, when formed, was based on reasonable grounds. The answer to this point ties in with whether there was a reasonable investigation carried out as the material produced from a reasonable investigation essentially provides the ground to be assessed in
15 considering if there are reasonable grounds for the belief held.

46. I was satisfied that there were reasonable grounds for the belief.

47. Various elements were not disputed. It was not disputed that the customer had been the first to commit any physical interaction. He had pushed Mr Rana. It was not disputed that Mr Rana had pushed the customer after this.
20 It was not disputed that Mr Rana had then been assaulted by the customer. He had been left with a cut area below his eye and with significant blood loss. It was not disputed that Mr Rana had then chased after the customer, had caught him and that there was contact as they met up. The nature of that contact was disputed by Mr Rana. It was not disputed that Mr Rana had left his cab. The reason given for that by Mr Rana was not accepted by
25 the respondents. It was not disputed that when the customer pushed Mr Rana Mr Rana was back on the bus and had the opportunity to close the doors of the bus. It was not disputed that Mr Rana had almost 16 years of service.

48. I was satisfied that the respondents were entitled to take the view which they did of Mr Rana's initial interaction with the customer. This was that Mr Rana was not intending to go to the toilet. There had been, on the evidence I heard, an element of confrontation in the exchange between Mr Rana and the customer. That was not however key to the dismissal.
49. There had been a decision made by Mr Rana to leave his cab. There had been no significant sign of any issue at that stage although the customer had sworn at Mr Rana. That occurrence ought to have been the trigger for or opportunity to go back to the cab for Mr Rana. Mr Rana did not do that.
50. The situation then moved on to the area outside the bus. It was appreciated that Mr Rana was trying to involve the SPT Inspector. The customer pushed Mr Rana back into the bus. That was a further opportunity for Mr Rana to use the cab area or the bus itself as a safe area by closing the doors. Mr Rana however pushed the customer back. The assault on Mr Rana then occurred.
51. Mr Rana did not leave the scene at that point. He ran after the customer and there was some physical contact between them. The customer managed to remove himself from that and to leave.
52. All of this occurred at the bus depot where members of the travelling public were close by.
53. As to the nature of Mr Rana's chase of the customer, the respondents had, at time of the appeal hearing, the statement of the SPT Inspector as to Mr Rana being aggressive towards the customer and the opinion of the Inspector that Mr Rana was trying to assault the customer. The Inspector and another individual had pulled Mr Rana and the customer apart.
54. At the appeal, Mr Dowds said that the "*red mist*" came down with Mr Rana after the assault and that he tried to capture and restrain the passenger. He referred to three members of the public as having pulled the driver off the passenger.

55. In addition, at appeal Duncan Cameron said to Mr Rana that his concern was that Mr Rana had squared up to the customer saying “*you lost control*”. Mr Dowds replied. He said “*I agree 100%.*” He asks that the respondents look at the case on compassionate grounds.

5 56. My conclusion was that there were reasonable grounds for the belief which the respondents had that the claimant had been guilty of misconduct.

57. I was also satisfied that the investigation was reasonable. It was important that the Inspector was spoken to. He was spoken to prior to the appeal decision. It would have been better if he had been spoken to at an earlier stage. He was however spoken to before the final decision was reached. The CCTV footage was viewed. It was made available to Mr Rana and viewed with him. He had ample opportunity to put forward any aspects or facts which were relevant from his point of view.

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58. I appreciate that the respondents took a different view to that of Mr Rana of how and why things had happened. I concluded that they were entitled on the information which they had, the evidence and statements which they had obtained, to reach that view.

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59. The decision made was to dismiss Mr Rana. The reasons for this decision being reached were as follows. He had left his cab in circumstances where there was a risk of confrontation in that the passenger had sworn at him. There had been an element of confrontation in the interaction then between the passenger and Mr Rana. Mr Rana had not then taken opportunities to return to the cab or the bus when those opportunities had occurred. He had made physical contact with the customer both when pushing him and when interacting with him after chasing the passenger following upon the injury to Mr Rana. There was risk of reputational damage to the respondents.

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60. The incident was clearly a serious one. I am conscious that Mr Rana was injured and that this was a serious assault. Mr Rana’s actions however were in breach of the training and safety requirements of using the cab as a defence mechanism. He did have opportunities to defuse the situation by

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going to his cab or to the bus. He pushed the customer albeit after provocation. He chased the customer after the customer had attacked him.

5 61. Both David and Duncan Cameron were aware of, and in evidence I accepted, took account of the length of service of Mr Rana. Both were aware of the extent of the assault and of the provocation of Mr Rana by the customer. I was satisfied that they weighed these elements in their decision.

10 62. There was no CCTV footage obtained from SPT during the process. That entity is however a third party organisation. The footage might potentially not have been released. The respondents had information from their own CCTV footage, Mr Rana's statement and that of the SPT Inspector however.

63. In assessing the decision, I also kept in mind that there had been training and campaigns run by the respondents in relation to confrontation and use of the cab.

15 64. I was satisfied that the decision to dismiss lay within the band of reasonable responses of a reasonable employer.

65. I recognised that there were no criminal charges brought against Mr Rana. That does not however mean that it was outwith the band to dismiss him.

20 66. There was physical contact between Mr Rana and the customer. Mr Rana left and remained away from the cab when he ought not to have done that. Mr Rana acknowledged that at the appeal saying, when asked what he would have done differently, "*I should have got back into the cab and waited on assistance.*"

25 67. Mr Rana had substantial loyal service to the respondents. That was considered together with the fact that Mr Rana had been assaulted. The respondents were clear that the assault on Mr Rana was entirely unacceptable.

68. The other elements to be considered by me was that of Mr Rana's position that there was inconsistency of treatment. He referred to Mr Hynd. In my

view the position of Mr Hynd was different. I accepted that there was no evidence of assault by Mr Hynd. It is difficult to know quite what to make of the texts which he sent to the claimant. Even if it is true that Mr Hynd assaulted the passenger or passengers, that was not something that the respondents were aware of from the CCTV images. There is no suggestion that if they had been aware of it they would not have proceeded with disciplinary action and potential dismissal of Mr Hynd. There was no reason suggested as to why there might have been different treatment of Mr Hynd and Mr Rana.

10 69. In all these circumstances, applying the statute and guidance in case law, I was satisfied that in law the dismissal was fair in terms of the Employment Rights Act 1996.

15 70. I realised that Mr Rana has been through a very difficult time with his father's death and his mother's health issues. Loss of employment is always difficult, especially when injury has been suffered during the course of the incident, particularly as this was a serious injury. It is to Mr Rana's credit that he has obtained alternative employment. I was satisfied that he had made all reasonable efforts to mitigate his loss.

20 71. I was also satisfied that grounds existed to categorise the conduct in question as gross misconduct warranting summary dismissal.

25 72. In relation to holiday pay, I heard evidence from the respondents of the payments made. Those were calculated on the basis of Mr Rana's pro-rata entitlement for the part of the holiday year worked to date of his dismissal. In fact the respondents said that they had made an overpayment to Mr Rana.

73. Mr Rana had no evidence to offer as to the holidays taken or as to any alternative sum which might be due to him.

74. The onus is on Mr Rana to establish his case in this regard.

75. Given the absence of counter evidence from Mr Rana I could not be satisfied that there were any sums remaining due to him in respect of holiday pay. That element of claim is also therefore unsuccessful.

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10 Employment Judge: Robert Gall
Date of Judgment: 27 October 2017
Entered in register: 02 November 2017
and copied to parties

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