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EMPLOYMENT TRIBUNALS

Claimant: Mr Y Sissa
Respondent: Arriva London North Limited
Heard at: East London Hearing Centre
On: 23 January 2018
Before: Employment Judge Goodrich

Representation

Claimant: In person
Respondent: Mr Mark Noblet (Solicitor)

JUDGMENT

The judgment of the Employment Tribunal is that the Claimant's dismissal was not unfair. The complaint is dismissed.

REASONS

- 1 The background to this hearing is as follows.
- 2 The Claimant obtained an ACAS early conciliation certificate covering the period from 15 July 2017 to 31 July 2017.
- 3 The Claimant presented his Employment Tribunal claim on 2 October 2017.
- 4 The Claimant listed his dates of employment as being from 5 January 2009 to 3 July 2017.
- 5 In box 8.1 of his claim form the Claimant ticked that he was bringing a complaint of unfair dismissal.

6 In box 8.3 of his claim form the Claimant provided details of his claim. Amongst the main points were the following:

- 6.1 I was treated unfairly during my GDE hearing, I felt bullied and pressured to speak on the truth and how I felt.
- 6.2 I have been driving over 11 years as a bus driver and never have I felt that I would be spoken to in a horrible manner, despite the incident I would never expect a manager to speak and behave in such a way to their own staff.
- 6.3 The OM, rather than reviewing on my case and the CCTV footage and then questioning the incident, she intimidated me. I felt forced to accept the problem and blame it on myself.
- 6.4 There is no evidence or proof that I damaged the car, by punching it neither the complaint was proven with any evidence. She just personally assumed and blamed me. She also read the complaint from the parent/guardian of the driver and assumed it was the driver that was "threatened" rather than fully investigating it properly in a professional manner.
- 6.5 In the meeting the OM kept insisting that I told her in the fact finding meeting prior to the meeting that I am at fault, she had also told me I will lose my job, I was mentally upset and felt let down.
- 6.6 The CCTV footage shows me approaching the car not in an aggressive or threatening manner, even though I did admit coming out of the bus just to see the driver's face and make sure everything is alright and it does not show any other abuse.

7 The Respondent entered a response denying the claims.

8 Amongst the main points made in the ET3 response were the following:

- 8.1 The Claimant committed gross misconduct whilst driving his bus, after he left his cab whilst in service and acted in a threatening manner to a third party road user occasioning damage to the third party vehicle. The incident was reported to the Respondent by the third party's father.
- 8.2 Setting out their account of the processes that led to the Claimant's dismissal.
- 8.3 The dismissal was fair.
- 8.4 If, which was denied, a Tribunal finds that the dismissal was procedurally unfair the Respondent will rely on *Polkey v AE Dayton Services Ltd [1987] ICR 142* to argue that the Claimant would have been dismissed in any

event and to seek a reduction in any award for compensation.

8.5 Alternatively if, which was denied, the Tribunal finds the dismissal was unfair any compensation awarded should be reduced to reflect the Claimant's contributory conduct.

9 On receipt of the Claimant's claim form the case was listed for a one day hearing today, before a Judge sitting alone. Various Case Management Orders were made for preparing the case for hearing.

10 At 12.05pm on 13 December 2017 the Respondent's representative (Mr Noblet) applied for the claim to be struck on the grounds it had not been actively pursued and for non compliance with the Case Management Orders. Alternatively he requested a Preliminary Hearing to order a deposit.

11 Later that day (20.54) the Claimant sent an email to the Tribunal apologising for being late, explaining that this was due to stress he had been facing.

12 The Claimant's email also contained a statement that his manager had discriminated against him because of his colour and dismissed him from his job in an unfair manner.

13 The Tribunal refused the Respondent's application for a Preliminary Hearing; and sent the Claimant a leaflet giving sources of advice. No response was given to the Claimant's assertion that his dismissal was an act of race discrimination.

14 I asked the Claimant to clarify whether he was seeking to bring a complaint of race discrimination in addition to one of unfair dismissal.

15 The Claimant informed me that he was indeed seeking to bring both claims.

16 I asked the Claimant to clarify the complaints of race discrimination he was seeking to bring. He explained that he wished to bring the following claims:

16.1 He said that his manager, Emma Bristow spoke to him when he came off work sick after nearly two months of sickness absence. He stated that the conversation was about one month before the incident that led to his dismissal (as this took place on 20 May 2017, it appears to have been in the latter part of April 2017). The Claimant said that she had told him that she would make sure that he would get sacked for any reason. He stated that the reason she did this was because he is black.

16.2 His next complaint against Ms Bristow was that, at the disciplinary hearing, she forced him to accept something he did not do, again because he is black.

16.3 He stated that Mr Hale dismissed the Claimant because he is black.

16.4 He was making no allegation, against Mr Wykes, who conducted the appeal hearing and who had reinstated him after Ms Bristow's decision to dismiss him.

17 Mr Noblet opposed the Claimant's application to amend and I heard submissions for and against the application.

18 I notified the parties of the guidance given in the case of *Selkent Bus Co Ltd v Moore [1996] IRLR 662 EAT* and of the guidance given in that case namely:

18.1 In deciding whether to exercise its discretion to grant leave or amendment, of the Originating Application, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The relevant circumstances include the following.

18.2 The nature of the amendment, i.e. whether the amendment sought is a minor matter such as the correction of clerical and typing errors, the addition of factual details to existing allegations or the addition or substitution of other labels for facts already pleaded to, or, on the other hand, whether it is a substantial alteration making entirely new factual allegations which changed the basis of the existing claim.

18.3 The applicability of statutory time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions.

18.4 The timing and manner of the application. An application for amendment made close to a hearing date usually calls for an explanation as to why it is being made then and not earlier, particularly when the new facts alleged must be within the knowledge of the applicant at the time the Originating Application was presented.

19 The Claimant's submissions included the following:

19.1 English is not his first language. His first language is Swahili and he is of Somalian origins.

19.2 Although he had trade union representatives at his disciplinary hearings they did not provide any help.

19.3 He had looked up about bringing an Employment Tribunal claim on the internet.

19.4 He had written in December about race discrimination because he had thought about it and decided to do so because of going to the Romford Magistrate's Court. He clarified to me that his manager (Emma Bristow)

had told him that that is what would happen soon after 20 May 2017.

20 On behalf of the Respondent Mr Noblet's submissions included the following:

20.1 The claims were out of time.

20.2 The claim form was clear – the Claimant did not tick the race discrimination complaint although he had found out from the internet about bringing an Employment Tribunal claim.

20.3 At no point in the disciplinary process did the Claimant referred to race.

20.4 The allegation made this morning for the first time, against Mr Hale, was not mentioned to Mr Wykes during the appeal claim.

20.5 The race discrimination claim had no reasonable prospects of success.

21 Applying the guidance given in *Selkent* I decided to refuse the application to amend for the following reasons:

21.1 The application to amend was clearly a substantial amendment. In the Claimant's grounds of complaint he made no allegation that he had been racially discriminated against; and neither did he tick the box stating that he wished to bring a race discrimination complaint.

21.2 All of the allegations are out of time. The allegation that Ms Bristow's dismissal of the Claimant was discriminatory was made in the email dated 13 December. As this occurred on 5 June 2017 and allowing for about two weeks additional time provided by the "stop the clock" provisions of the ACAS early conciliation legislation the deadline for this would have been in early September. In treating 13 December as being the date of the application to amend it is over three months out of time. The complaint about Ms Bristow's alleged remark about a month earlier is more out of time. The disciplinary hearing before Mr Hale took place on 3 July 2017 and is between one and two months out of time.

21.3 The timing of the application is late, having been made at the hearing itself. I accept that the Claimant has difficulties of acting for himself and that he says he felt let down by the union and believed that they would represent him at this hearing. Nonetheless, the statutory time limits are meant to be obeyed.

21.4 Having read the minutes of the various disciplinary hearings no mention of race discrimination was made in any of them. The Claimant's assertion of race discrimination appears, therefore, to be an afterthought. If he believed at the time that race discrimination was a factor in the complaints he now cease to raise I would have expected him to have said so, alongside the other allegations he made.

21.5 I have considered prejudice. The prejudice to the Respondent if I were to grant leave to amend would be considerable. They would have to prepare anew for another Tribunal hearing. Ms Bristow is not a witness for this hearing, so they would need to call her as a witness and would need to provide an additional witness statement for Mr Hale. The case could not be heard today and would have to be adjourned, probably for a two day hearing. They would have wasted costs time which, as the Claimant says that he is unemployed, they might well not recover.

21.6 The Claimant could potentially suffer disadvantage if being deprived of what might be a successful claim. In view, however, of my view that the race element of the claim appears to have been an afterthought on the Claimant's part, I have doubts about whether such a claim does have reasonable prospects of success. The Claimant is also able, if leave is refused, to proceed with his unfair dismissal claim which is what this hearing was listed for.

22 Thereafter, I clarified with the parties the issues in the case. They are as follows:

22.1 The Respondent accepts that the Claimant's case is in time and no jurisdictional issues arise and he is entitled to bring an unfair dismissal claim.

22.2 The Respondent contends that the reason or principal reason for the Claimant's dismissal was on grounds of conduct, namely that the Respondent says that the Claimant committed gross misconduct whilst driving his bus, after he left his cab whilst in service and acted in a threatening manner to a third party road user occasioning damage to the third party's vehicle.

22.3 The Claimant, disputes that this was the reason or principal reason for his dismissal.

22.4 The parties dispute whether the dismissal was fair within the meaning of section 98(4) Employment Rights Act 1996.

22.5 The Respondent would contend, if the dismissal were held to be procedurally unfair, that the Claimant would or might have been dismissed if fair procedures had been followed.

22.6 The Respondent would also contend that, if the dismissal were held to be unfair, the Claimant caused or contributed to his dismissal.

The Relevant Law

23 Section 98(1) ERA provides that it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

24 One of the reasons within section 98(2) ERA is a reason that relates to the conduct of the employee.

25 The burden of proof in showing the reason or principal reason for dismissal is on the employer. If the employer fails to show a reason falling within section 98(1) or (2) ERA the dismissal is unfair.

26 Section 98(4) ERA provides:

“... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) 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

(b) shall be determined in accordance with equity and the substantial merits of the case.”

27 The burden of proof when considering section 98(4) ERA is neutral.

28 Guidance has been given that the function of the Employment Tribunal is to consider whether the employer’s decision to dismiss the employee fell within the band of reasonable responses a reasonable employer might have adopted. If it does, the dismissal is fair. If it is not, the dismissal is unfair.

29 There have been many cases giving guidance on the approach to be taken by Tribunals when considering the fairness or unfairness of dismissals on grounds of conduct. A Tribunal needs to consider whether the employer who dismissed the employee entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. The employer must establish the fact of that belief- that the employer did believe it. It must be shown that the employer had in their mind reasonable grounds on which to sustain that belief. The employer at the stage of forming 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.

30 A Tribunal will take into account, where it considers it relevant, the ACAS Code of Practice on disciplinary and grievance procedures.

The Evidence

31 On behalf of the Respondent I heard evidence from Mr Alan Hale, Operations Manager for the Respondent at their Dartford Bus Garage. I also heard evidence from Mr Graham Wykes, General Manager of the Respondent in charge of the Dartford and Grays Bus Garages and Barking Bus Garage.

32 On behalf of the Claimant I heard evidence from the Claimant himself.

33 I considered the documents referred to me in the bundle of documents for the Tribunal.

Findings of Fact

34 I set out below the findings of fact I consider relevant and necessary to make the decisions I am required to make. I do not seek to set out every detail provided to me, or to make findings on each detail on which the parties may be in dispute. I have, however, considered all the evidence provided to me, at the time of dictating this judgment it was fresh on my mind and I have borne it all in mind.

35 The Claimant, Mr Yusuf Sissa, was employed by the Respondent from 5 January 2009 to 3 July 2017. By the time of his dismissal, therefore, he was an employee of reasonably long standing, having over 8 years continuous employment with the Respondent. He was employed by the Respondent as a bus driver.

36 Until the dates that gave rise to the Claimant's dismissal he had, so far as I was made aware, no previous disciplinary record.

37 As the Claimant has made reference for the first time today to Ms Bristow threatening the Claimant with dismissal when he returned from sickness absence about one month before the incident giving rise to his dismissal, I make no finding as to whether or not such a complaint was made. Ms Bristow was not a witness for this hearing and the Respondent had no reason to investigate an allegation only made today.

38 The Respondent has, according to its ET3 response, 3,320 employees, of which 453 worked at the place of which the Claimant worked. It is, therefore, a large employer.

39 On or about 31 May 2017 the Respondent received a complaint about the conduct of a bus driver who, subsequent investigation showed, was the Claimant. The main grounds of the complaint included the following:

- 39.1 The complaint was made by the father of the driver. He described his daughter as being 20 years old and having just passed her driving test.
- 39.2 He described the place where he described the incident as having taken place.
- 39.3 He complained about the customer service responding to his complaint at a speed that did not match the seriousness warranted by it; and stated that the incident had been reported to the police.
- 39.4 He then stated "I am totally astounded whereby a middle aged six foot male bus driver can come off a bus with passengers riding on board, threaten a young female who happens to also be a new driver, ending with your driver punching and damaging her vehicle to the driver's door. Judging from the damage done the driver used a great deal of force he was either holding keys in his hand or wears a protruding ring on his hand".

- 39.5 He went on to state that his daughter may have accidentally undercut the bus, or done something not to his liking, but that her car had the appropriate plates indicating that she is a new driver and he was amazed that someone that drives a public bus would act in such a manner.
- 39.6 He went on to state that he wondered that had his daughter not locked her vehicle doors and wound up her window whether we would be dealing with a case of actual bodily harm instead of criminal damage and threatening behaviour. He described the incident as being a driver with a “mad max mentality”, leaving a bus full of passengers to carry out a road rage event on a public highway.
- 39.7 He stated that his daughter was clearly shaken for four - five hours after the incident, that the criminal damage being done to her car needed to be rectified, and that he and his daughter had filed a police report.
- 39.8 He complained about having made four telephone calls to their customer service department and receiving no help from the department.

40 The complaint was referred to Ms Bristow, the Claimant’s manager and manager of the bus depot where the Claimant worked. She viewed the CCTV footage, the bus having CCTV cameras on board. She decided to suspend the Claimant and invited him to a disciplinary hearing on 5 June 2017.

41 The letter requiring the Claimant to attend a disciplinary hearing informed him that the charge against him was the public complaint dated 20 May 2017 alleging threatening behaviour. Enclosed with the letter was a copy of the public complaint, the driver performance record, the company disciplinary policy, copy of suspension review notes (to be posted separately). The Claimant was notified that the live CCTV footage might be viewed as part of the hearing. He was notified that the possible outcome of the disciplinary hearing might be summary dismissal; and that he was entitled to be accompanied by a trade union representative.

42 The disciplinary hearing took place on 5 June 2017, conducted by Ms Bristow. The Claimant was accompanied by a trade union representative, Mr Fernandes.

43 I was provided with the minutes of the disciplinary hearing on 5 June 2017 and subsequent disciplinary hearings, including appeal hearings, as to which I will refer later in this judgment. The Claimant complained in the course of being cross-examined that the minutes of all the hearings were false. When taken to specific points of the disciplinary hearings, he did accept, however, that he did say some of the things referred to in the disciplinary minutes.

44 I do not accept the Claimant’s assertion that the minutes of the disciplinary and appeal hearings were false. They were not a verbatim record of everything that was said and there may be a few inaccuracies. Substantially, however, I find them to be a correct record of what was said. I so find because it is convenient for the Claimant to dispute parts of the minutes at the disciplinary hearing which are inconvenient to him. The minutes set out accurately, the Claimant accepted when cross examined, parts that the

Claimant agrees he said. They are lengthy and detailed minutes taken by a minute taker, rather than the person leading the disciplinary hearing. Nor did the Claimant or his union representatives complained at the time that the minutes were inaccurate. Although the Claimant has complained about his union representation, Mr Fernandes, who accompanied the Claimant to the two disciplinary hearings at which he was dismissed, made a written complaint against Ms Bristow, as referred to later below.

45 During the course of the disciplinary hearing Ms Bristow read out to the Claimant the member of the public's complaint against him; and asked the Claimant to explain in his words what had happened. She asked him why he left the bus unattended to speak to the third party driver; to which the Claimant responded that he wanted to have a look at the driver in case he needed to provide a description of the driver in the event of a claim; and also explained that he had mounted the kerb and his passengers were shaken up after the incident so there was a possibility of a claim being made in the future.

46 Ms Bristow had a further discussion about this and stated that she would have expected this to be reported via an incident report and asked him why he had not reported this incident at the garage, to which the Claimant responded that it did not occur to him at the time. Ms Bristow complained that instead of following the correct procedure he had left the bus running with the cab door open and attended with passengers on board, leaving his passengers, the public and a bus in a very vulnerable situation.

47 Ms Bristow asked for the Claimant's explanation for what had then taken place and as to whether the Claimant had punched the car. According to Ms Bristow, after initially denying that he had, the Claimant admitted that he had punched the car. According to the minutes of the meeting he then gave his explanation for doing so.

48 The Claimant was shown the moving CCTV footage of the incident.

49 The outcome of the disciplinary hearing conducted by Ms Bristow was that the Claimant was dismissed at the end of the disciplinary hearing. Verbal reasons were given for the dismissal.

50 Ms Bristow wrote a letter, dated 5 June 2017, confirming the Claimant's dismissal. She stated that the reason for his summary dismissal was a public letter alleging threatening behaviour towards the third party car after leaving his bus unattended on 20 May 2017. She notified the Claimant of his right to appeal.

51 The Claimant appealed against his dismissal, the grounds of appeal given being "disputed evidence and severity of award".

52 Mr Wykes wrote to the Claimant notifying him of the date for the appeal on 26 June 2017. He notified the Claimant that the convener for Unite the union would be made available to represent him.

53 The Claimant's union representative for the disciplinary hearing, Mr Fernandes, had written, in the document dated 3 June 2017, to complain about the behaviour of Ms Bristow. So far as I was made aware, this letter was not provided at the disciplinary hearing before Ms Bristow nor before Mr Hale, although Mr Fernandes was present at

both hearings.

54 Mr Fernandes letter of complaint against Ms Bristow included complaints that she had used bullying tactics towards the Claimant. He complained that she had forced him to accept the charge of threatening the car driver and that there was no evidence to prove that he damaged the car by punching it. He stated that the complainant alleged that the incident took place in Woolwich Manor Way whilst really it was in Lodge Avenue; and although the complainant claimed that the driver had a plate a new driver displayed, the evidence did not prove that, nor had the police contacted Mr Sissa who should be applauded for having avoided a collision. He complained that during the disciplinary hearing the manager had bullied Mr Sissa by saying he would lose his job and that she was abusing her status to bully and force him to accept something that he clearly did not do.

55 The Claimant stated, whilst giving evidence, that the letter from Mr Fernandes was drafted jointly by the Claimant himself and Mr Fernandes.

56 The Claimant also wrote to the Respondent's Human Resources department, by letter dated 9 June 2017, complaining of having received bullying treatment from Ms Bristow and of her having predetermined the outcome of the disciplinary hearing.

57 The Claimant's appeal was before a panel consisting of Mr Wykes and Ms Lowrey. The Claimant was represented by the union convener, Mr Mhatre.

58 Mr Mhatre complained that there had been a breach of procedure because Ms Bristow had been suspended by her after she was informed of public complaint and she should not have conducted the disciplinary hearing. He complained that this was a breach of company policy.

59 Mr Wykes asked Mr Mhatre if he would like to continue with the appeal or to have the case reheard; to which Mr Mhatre requested, after discussion the matter with the Claimant, that they would like the case reheard by another operating manager.

60 The Claimant was reinstated by the Respondent, pending his rearranged disciplinary hearing being re-arranged before a different manager. A new disciplinary hearing was arranged on 3 July 2017. The individual conducting the disciplinary hearing was Mr Hale, Operations Manager at a different bus garage to the one where the Claimant worked.

61 In answer to questions from me, Mr Wykes accepted that Ms Bristow's dismissal of the Claimant was done in a manner that was contrary to the company policy by having her suspend the Claimant and conduct a disciplinary investigation and subsequently conduct a disciplinary hearing where the Claimant was dismissed. He accepted that her dismissal of the Claimant was procedurally unfair. This was why, he explained, he reinstated the Claimant and convened a new disciplinary hearing.

62 At the disciplinary hearing before Mr Hale the Claimant was represented by Mr Fernandes who, as referred to above, was the trade union representative for the Claimant before the hearing with Ms Bristow.

63 Mr Hale, as had Ms Bristow, read out the member of public's complaint against the Claimant. He explained to the Claimant that the allegations against him were that he was intimidating, threatening, had punched the vehicle causing damage to the third party's vehicle; and he asked the Claimant for his comments on the allegations.

64 The Claimant denied that he had threatened or caused damage to the vehicle.

65 When asked why he had got out of the bus, the Claimant explained that he wanted to see whether the driver was okay and not having a medical issue such as a heart attack but that she had drove off as the lights had changed.

66 Mr Hale asked the Claimant why he had left the bus and asked the Claimant whether he had leaned towards the third party's vehicle, to which the Claimant responded that he had not.

67 The Claimant was shown the CCTV footage of the incident. As he had been shown it during the disciplinary hearing with Ms Bristow he and his union representative were seeing the footage for the second time.

68 In the course of viewing the CCTV footage Mr Hale challenged the Claimant's account of events, namely that the car had pulled away before he had reached it. Mr Hale also challenged the Claimant's denial that he had punched the car and stated that, according to the CCTV footage, he was by the car for eight seconds. He also notified the Claimant that he had been given a picture of the dent on the car that had been sent by the third party and showed this to Mr Fernandes and the Claimant. The Claimant accepted that he had left the cab of a bus unattended.

69 The Claimant explained that he believed that the complaint was fabricated and submitted with the intention of getting him dismissed explaining that all he did was to leave the vehicle to ensure that the driver of the third party vehicle was okay.

70 After adjourning the case to consider his decision Mr Hale reconvened the meeting to notify the Claimant and his union representative of his decision. The disciplinary hearing, including adjournments one of which was for about twenty minutes for Mr Hale to consider his decision, lasted for two hours. Mr Hale, in reply to a question from me, stated that he had looked at the Claimant's personnel file and was aware that he had a good disciplinary record prior to this incident.

71 Mr Hale's decision was to dismiss the Claimant. He gave his verbal reasons for doing so. These included that:

71.1 There had been an altercation and that, on his own admission, he had left the cab of his vehicle. Although he stated that this was to check on the driver to see whether she had a heart attack, he then stated that he had leant in towards the car and it had driven off, and later changed his statement to say that he leant in to the vehicle for a period of time.

71.2 His (Mr Hale's) belief was that he left the vehicle to speak to the driver following the near miss that had previously occurred, but leaning towards

the vehicle constituted aggressive behaviour and both these occurrences could be seen on CCTV.

71.3 Although not seen on CCTV the complaint of damaging the complainant's daughter's car was clearly corroborated by the CCTV images and it was likely he did indeed punch the car as described in the complaint.

71.4 By his own admission he left the vehicle running (presumably by that Mr Hale meant with its engine running) and unattended with passengers on board on a public highway, which was an offence in law, and had taken place in front of members of the travelling public and had brought the company into disrepute. He had approached the female driver in an aggressive and intimidating way causing distress to her and damage to her vehicle, constituting gross misconduct.

72 Mr Hale wrote a letter to confirm the dismissal. The reason given was gross misconduct on the following grounds:

72.1 Aggressive behaviour.

72.2 Bringing the company into disrepute.

72.3 Damage to a third party vehicle.

72.4 Leaving a vehicle unattended on the public highway with the engine running.

73 The Claimant appealed against his dismissal on the grounds of "disputed evidence".

74 The disciplinary appeal was heard by Mr Wykes and Ms Lowrey on 11 July 2017. The Claimant was represented by Mr Mhatre.

75 Among the grounds of appeal of the Claimant were that:

75.1 The Claimant's union representative explained that he understood that he should not have vacated his vehicle but to be dismissed for this appeared severe.

75.2 He disputed the charge of threatening behaviour.

75.3 He asked why there was a charge only of public complaint, whereas there were three other charges listed on the dismissal letter.

76 Ms Lowrey responded that the charges that were listed came from the contents of the complaint according to which Mr Mhatre explained that the company policy stated that all the charges should be listed individually. In response Mr Wykes explained that the charges came from the public complaint and that threatening behaviour would cover the

charges. Mr Mhatre explained that they were not disputing that Mr Sissa had left his vehicle unattended but that they were appealing on the severity.

77 On request of the union the CCTV footage was viewed.

78 The Claimant was asked why he felt the need to speak to the driver after the incident, with the Claimant explaining that he wanted to go and see if the driver was okay; and that he wanted to recognise the driver so that if he needed to provide a description he would be able to do this. He was asked if he had submitted a report when he got back to the garage and explained that he had not.

79 The Claimant denied touching the car; and stated that he did not see the 'P' plates displayed.

80 There were further discussion about the incident and Mr Mhatre explained that he did not believe dismissal to be fair and that a final caution should be the outcome. The Claimant was challenged by Mr Wykes as to his reasons for going up to the third party vehicle; and the Claimant apologised for his actions and explained that he really needed his job back.

81 In reply to questions asked by me, Mr Wykes stated that he has overturned some decisions of managers when he has carried out appeals, sometimes to their annoyance.

82 After an adjournment the appeal panel gave their decision and gave its reasons for deciding that they considered the hearing to be fair, that Mr Sissa's explanations of his behaviour as being non-aggressive did not stand up and the panel felt that the decision to summarily dismiss was correct.

83 Mr Wykes sent a letter dated 11 July 2017 to confirm the outcome of the panel decision.

Closing Submissions

84 Both Mr Noblet and the Claimant gave oral submissions.

85 Mr Noblet submissions included that the Claimant's evidence to the various disciplinary hearings had been inconsistent, that the decision to dismiss was reasonable, coming from an independent public complaint corroborated by CCTV evidence. Ms Bristow's decision had been overturned and the Claimant reinstated. There had been an appeal at which CCTV was considered again. The procedures and the decision to dismiss had been fair. If, contrary to the Respondent's case it had been unfair they relied on the *Polkey* case and on contributory fault.

86 The Claimant's oral submissions included that his dismissal was unfair because of the actions of Emma Bristow. Mr Hale and Mr Wykes had listened to Ms Bristow because of her decision. She had been the instigator to make sure that he lost his job and they had followed her lead.

Conclusions

87 I first considered what was the reason or principal reason for the Claimant's dismissal. Was it conduct, as asserted by the Respondent and disputed by the Claimant? In considering this issue, I have also considered whether the employer did believe the Claimant to have committed the misconduct of which he was accused.

88 I find and conclude that the Respondent did believe that the Claimant had committed the misconduct alleged against him. The complaint made against the Claimant was not initiated by anyone within the Respondent's workforce. It was a serious complaint, including threatening and violent behaviour. The Respondent had to investigate it. Having heard the evidence of Mr Hale and Mr Wykes I have no doubt that they did believe the Claimant to have done what was alleged against him. Some of what was alleged was indeed admitted by the Claimant, such as that he got out of a bus, with passengers on the bus and left the bus unattended and the engine on whilst going to the driver of the car.

89 I find and conclude, therefore, that the reason or principal reason for the Claimant's dismissal was conduct. The Respondent, therefore, has complied with the requirement to show that the reason for dismissal was a permissible reason within the meaning of section 98(1) and (2) ERA.

90 Was the dismissal in the circumstances, including the size and administrative resources of the Respondent, one where the employer acted reasonably or unreasonably as treating it as a sufficient reason for dismissing the employee?

91 I have a duty to consider, where relevant, the ACAS Code of Practice on disciplinary procedures. There is nothing to suggest that the ACAS Code has not been followed. There was an investigation, there was a disciplinary hearing at which the Claimant and his union representative had the opportunity to make representations and there was an appeal hearing which, likewise, the Claimant and his representative had the opportunity to make representations.

92 Compliance with the guidance given in the ACAS Code is not necessarily sufficient for a dismissal to be fair. I have considered both the procedures adopted by the Respondent in dismissing the Claimant and the sanction, or punishment, of dismissal.

93 I conclude that the Respondent had reasonable grounds on which to believe the Claimant to have committed the misconduct alleged against him. The father of the driver of the car in the incident concerned had never met the Claimant before and nor had his daughter. It was reasonable for the managers concerned to take the complaint seriously and to consider the Claimant's responses carefully and to be critical or sceptical of his explanations, particularly where they appeared to be inconsistent with his initial responses. Both Mr Hale and Mr Wykes listened to what was said at the disciplinary hearing and appeal by the Claimant and his union representatives in response to the allegations against the Claimant.

94 The Respondent also conducted as much investigation as was reasonable. It was not suggested that the complainant or his daughter attend the disciplinary hearing and it is

unlikely for it to have been practicable for them to have done so. The CCTV footage was viewed on three occasions and the managers took into account both the Claimant's account of events and those of the complainant.

95 I have considered the procedures adopted by the Respondent. Did they fall within the band of reasonable responses a reasonable employer might have adopted?

96 Had Mr Wykes not overturned Ms Bristow's decision and reconvened a disciplinary hearing before a different manager I would probably have concluded that the dismissal was unfair. The Respondent is a large employer and can be expected to follow its own policies; and Mr Wykes accepted (correctly) that Ms Bristow conducting a disciplinary investigation and disciplinary hearing was unfair.

97 As, however, the Claimant was reinstated and a new disciplinary hearing convened I have considered the fairness of the disciplinary processes as a whole. Were they tainted, as the Claimant stated, by Ms Bristow's actions? I concluded that they were not. Although Mr Hale, although he knew Ms Bristow, was a manager at a different depot from her and I was satisfied from listening to his evidence that he was making up his own mind about the allegations against the Claimant. In reinstating the Claimant and having the new disciplinary hearing conducted by a different manager to Ms Bristow, the appeal panel was doing what the Claimant and his union representative had asked for. Neither the Claimant nor Mr Fernades complained to Mr Hale that he should not be conducting the disciplinary hearing. Nor do I believe that Mr Wykes was making his decision because of Ms Bristow. He had overturned her decision. I accepted his evidence, referred to in my findings of fact above, that he has overturned some decisions of managers when conducting appeals, sometimes to their annoyance.

98 Did the procedures adopted by the Respondent fall within the band of reasonable responses a reasonable employer might have adopted? I have concluded that they did including because:

98.1 I have some concerns about Mr Hale's disciplinary dismissal letter giving reasons that expanded on, or differed from, that of the letter requiring him to attend the disciplinary hearing before Ms Bristow. It would have been better, rather than referring generically to the letter of complaint against him, to have listed in order all the disciplinary charges put forward by Mr Hale in his reasons for dismissal. Nevertheless, Ms Bristow had gone through the management concerns that gave rise to her letter of dismissal, as did Mr Hale in the disciplinary hearing before him. By the time the Claimant had his trade union representative attended the hearing before Mr Hale they had already seen the CCTV footage and were well aware of the allegations being made against him.

98.2 The disciplinary hearing itself lasted in all for two hours and there was ample opportunity for the Claimant and his trade union representative to set out his case. The appeal hearing also had a detailed discussion of events, where the Claimant put forward his side of events and the CCTV footage was viewed once again.

98.3 Viewing the disciplinary processes as a whole I concluded that, although

less than ideal, they lay within the band of reasonable responses a reasonable employer might have adopted.

99 Did the sanction or penalty of dismissing the Claimant fall within the band of reasonable responses a reasonable employer might have adopted? I have concluded that they did because:

- 99.1 The Claimant was a long standing employee with a good disciplinary record. Dismissing him for a first appearance does appear possibly to be harsh.
- 99.2 The Claimant's managers did, however, have reasonable grounds for believing, after as much investigation as was reasonable, that he had committed gross misconduct. They believed that he had punched the car of a young woman, causing damage to it. They also believed, on reasonable grounds, of the other elements of the decision to dismiss. Aggressive and violent behaviour is clearly capable of constituting gross misconduct.
- 99.3 I accept Mr Hale's evidence that he had viewed the Claimant's personnel file and his record before reaching his decision.
- 99.4 Although, therefore, some reasonable employers might have given the Claimant a final warning in view of his long unblemished service the decision to dismiss lay within the band of reasonable responses.

100 In view of my decision above it is not necessary for me to decide whether or not the Claimant did do all the actions that were alleged against him.

101 The Claimant's unfair dismissal claim therefore fails and is dismissed.

Employment Judge Goodrich

27 February 2018