



THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant

and

Respondent

Mr G Lewis

Abellio London Ltd

Held at London South

On 5 and 6 November 2018

**BEFORE: Employment Judge Siddall
Ms V Massiah
Ms E Thompson**

Representation

For the Claimant: In person

For the Respondent: Mr Shepherd, Counsel

RESERVED JUDGMENT

The decision of the tribunal is:-

1. The claim for unfair dismissal is well founded and it succeeds.
2. The claim for race discrimination is dismissed.

REASONS

1. This is a claim for unfair dismissal and race discrimination brought by the Claimant. He was summarily dismissed by the Respondent on 20 July 2017.
2. We have heard evidence from the Claimant himself and from Mr Nicholas Bowden and Mr Saju Joseph who gave evidence in his support. We were

handed a written statement for Mr Leonard Paval, a member of the public who did not attend the hearing and we therefore advised the Claimant that we could give little weight to it. We heard evidence from Mr Daniel Power, Mr Adebolu Ademiluyi and Mr Mark McGuinness on behalf of the Respondent. During the course of the hearing we had the advantage of viewing CCTV evidence of the incident which led to the Claimant's dismissal. We were provided with still photographs of this evidence to accompany the footage and we have also considered the agreed bundle of documents.

3. The facts we have found and the conclusions we have drawn from them are as follows:
4. The Claimant commenced employment with the Respondent as a bus driver on 28 April 2014. He had no prior disciplinary warnings prior to 2017.
5. On 15 June 2017 the Respondent received a complaint from a member of the public who alleged that the Claimant had 'cut him up' at a roundabout causing damage to his vehicle.
6. On 13 July 2017 an altercation took place between the Claimant and another bus driver, DP. The events unfolded as follows. It is not in dispute that the Claimant was driving towards the bus stand in Woking when he found his way blocked by the buses of Drivers DP and DR, who were carrying out a handover at the time. The Claimant beeped his horn. Driver DP got off his bus and started walking towards a relief vehicle which would take him back to the station. The Claimant drove past Driver DP and pulled up further along the road. He got off his bus and walked towards Driver DP. He is shown on the CCTV with his arms out wide. He walks up close to Driver DP. After about twenty seconds the Claimant starts walking back to his bus. He stands on the bus and points to Driver DP and appears to be saying something. Page 19 of the still photographs shows Driver DP then walking up to the open door of the Claimant's bus. The Claimant then gets off the bus again and walks up close to Driver DP. At this point the CCTV does not show the face or upper body of either person. Their bodies appear close together. Mr Power and Mr McGuinness formed the view that the Claimant had pushed Driver DP with his body although the Claimant denies this. Our view of the CCTV footage was that it was unclear at this point. After about ten seconds the Claimant returns to

- his bus. Driver DP is shown walking off in the other direction. The Claimant appears to be looking down the road towards Driver DP and saying something.
7. According to the evidence of Mr Saju Joseph who was the duty manager on the evening of 13 July 2017, he received a call from the Claimant asking for the name of the driver later identified as DP. The Claimant said that Driver DP had blocked his bus in and then swore at him on two occasions. He was asked if he wanted to report the matter and said that he did not.
 8. Later that evening Driver DP came into the depot and spoke to Mr Joseph. He said that he had an argument with the Claimant and would like to report it. Mr Joseph asked him to write his complaint down, and he dropped it into the office of Mr Daniel Power, Operations Manager.
 9. We accept Mr Joseph's evidence about the reports made to him on 13 July.
 10. DP said in his written complaint that the Claimant had sworn at him and 'sound the horn for very long time'. He said that 'he got out of the bus to confront me by swearing and pushing me to fight him'. He asked the Respondent to do something about the behaviour.
 11. The following day the Claimant was suspended. He alleges that although the letter of suspension was signed by another manager, that he was in fact suspended by Mr Power, and that this was part of a biased campaign against him by Mr Power. We think it more likely than not that Mr Power, as the senior manager to whom the report was addressed, was at least consulted before the decision to suspend was made even if he did not sign the suspension letter. We shall return later to the question of whether Mr Power was biased against the Claimant.
 12. An investigation was carried out by Mr Ademiluyi, acting staff manager. He viewed the CCTV footage and interviewed DR who had witnessed the incident. DR said that he 'heard lots of aggressive shouting' from the Claimant. Mr Ademiluyi carried out an investigation interview with the Claimant on 18 July 2017. They viewed CCTV evidence of both incidents together during this meeting (the driving incident on 15 June and altercation with Driver DP on 13 July). The CCTV footage has no sound.
 13. During the investigation meeting, the Claimant agreed that he had been at fault on the 15 June. In relation to events on 13 July, he provided his account of

what had happened. He said that Driver DP had told him to 'go fuck yourself'. He agreed that he might have sworn too during the conversation. At the end of the meeting Mr Ademiluyi told the Claimant that he would be called to a disciplinary hearing to face allegations of gross misconduct.

14. By a letter dated the same day, the Claimant was called to attend a disciplinary hearing on 20 July 2017. He was accused of:
 - a. Actions likely to threaten the health and safety of yourself, fellow employees, customers and members of the public;
 - b. Failure to achieve or maintain the required standard of performance through receiving a customer complaint;
 - c. Threatening, intimidating and violent behaviour towards a customer or colleague.
15. The Claimant was sent a copy of the documents relating to the investigation, which appear to have consisted of the minutes of the investigation meeting, the statement from Driver DR, the complaint from Driver DP, the customer complaint and log cards for the Claimant and Driver DR.
16. The disciplinary hearing was conducted by Mr Power. We have seen the notes of that meeting. The evidence of Mr Power is that he typed the minutes as the meeting went along. The Claimant alleges that the notes were entirely fabricated. We do not accept this assertion. The notes may not be a completely verbatim record of the meeting but there is nothing to suggest that they have been created after the event or that they do not reflect most of what was said at the meeting. The Claimant was not able to identify particular sections which he says were fabricated. During cross-examination he agreed that he had said some of the things that had been recorded. The allegation of fabrication is rejected.
17. During the meeting, Mr Power and the Claimant viewed the CCTV evidence of both incidents together.
18. In relation to the first incident on 15 June, the Claimant stated that he did not believe he had done anything wrong. He claimed that he could not remember what had happened, and denied that he had stated to Mr Ademiluyi that he had been in the wrong.

19. After viewing the CCTV of the second incident on 13 July, the Claimant stated that he believed that this showed that Driver DR was lying. He said he had left the bus and approached DP because he had told him to 'go f- yourself'.
20. The meeting re-convened on 21 July. Mr Power advised the Claimant that he would be issued with a final written warning in relation to the incident on 15 June. In relation to the incident on 13 July, he decided that this was gross misconduct and that there had been an irreparable breakdown of trust and confidence. The Claimant was summarily dismissed.
21. The outcome was confirmed in a letter dated 21 July 2017.
22. The Claimant appealed on 24 July stating that he had not received a fair and proper hearing. He stated that Mr Power had acted out of 'extreme bias'. He stated that he had been 'fast-tracked and sacked which is illegal'. The Claimant also lodged a grievance against Mr Power 'for bullying and bias'.
23. The appeal hearing was conducted by Mr McGuinness on 11 August 2017. The Claimant was provided with a full opportunity to set out the basis of his appeal. During the appeal, the Claimant mentioned that he had reported the altercation with Driver DP to Mr Joseph on 13 July. He stated that he believed that Mr Power was racist.
24. Following the meeting, Mr McGuinness decided to carry out further investigations. He interviewed Mr Power. At the beginning of that meeting he is recorded as saying 'I've adjourned Lewis appeal as have some questions, would like to speak to [DP] and Saju [Joseph] aswell, why [DP] not interviewed?' Mr Power replied that he had not been interviewed during the fact finding investigation and his statement 'confirmed with the footage, same with 'DR]'. Mr McGuinness put to Mr Power the allegation that he had been motivated by the Claimant's race, an assertion that Mr Power said he strongly denied.
25. Mr McGuinness then interviewed DR again. DR stated that he heard the Claimant 'shouting not talking in a very aggressive manner'. He could not hear the words used. He said that there had been 3-4 minutes shouting in the road, '[Claimant] was still screaming at him ..[DP] had enough and said something back and walked away'.

26. Mr McGuinness said in evidence that he was not able to interview Driver DP as he was off sick around the time of the appeal. He did not interview Mr Joseph as he was on holiday. He stated that Mr Joseph was due back in work on 7 September 2017. We have noted the outcome letter which followed the appeal is dated 4 September 2017.
27. Mr McGuinness upheld the decisions to issue a final written warning and to dismiss the Claimant. In relation to the incident of 15 June he concluded that the Claimant had clearly been in the wrong and had forced the other driver into the kerb. He noted that DR had confirmed that the Claimant had behaved aggressively towards Driver DP and took the view that the CCTV evidence showed that the Claimant had pushed DP with his body.
28. On 1 December 2017 the Claimant lodged proceedings for unfair dismissal and race discrimination.
29. The Claimant asserts that Mr Power, on behalf of the Respondents, was deliberately trying to get rid of a number of drivers prior to the depot closing, to avoid the need to pay redundancy. He also stated that the Respondent was dismissing experienced drivers to recruit new drivers on a lower rate of pay. He believes that all the minutes of all the meetings held during the disciplinary process have been fabricated and that the statements of Drivers DP and DR have been altered.

Decision

Unfair Dismissal

30. We find that the reason for the dismissal was related to the Claimant's conduct. We do not accept the Claimant's argument that his dismissal was part of a drive to reduce the number of drivers in order to avoid redundancy payments. During the course of the hearing we heard evidence that the Respondent was short of drivers. Mr Nick Bowden gave evidence on behalf of the Claimant and said in his witness statement that the Respondent was paying a retention bonus to staff to get them to stay until the 1 September 2017. That is inconsistent with the assertion that there was a campaign to get rid of drivers by any means.

31. We find that the reason for terminating the Claimant's employment related to the incident on 13 July although we conclude that the customer complaint received on 15 June must have played some part. It seems strange that the Respondent did not take any action following receipt of the customer complaint, but suspended the Claimant immediately when the complaint arrived from Driver DP.
32. Misconduct is a potentially fair reason for dismissal. We go onto consider, in accordance with the case of **Burchell v British Home Stores** whether the Respondent had a genuine belief in the Claimant's misconduct; and if so whether this was based on reasonable grounds after reasonable investigation.
33. We accept that the Respondent had formed a genuine belief that the Claimant had acted improperly, both in relation to the driving incident in June and in relation to his altercation with Driver DP.
34. Was this belief based on reasonable grounds, and was the investigation reasonable?
35. It is difficult to understand why the Respondent did not interview Driver DP at any stage of the process. His written statement contains no detail of what he alleges the Claimant said to him. The CCTV evidence has no sound. The Claimant consistently stated that Driver DP had sworn at him on two occasions. It is true that his evidence about when this was said has not been consistent. At the investigation, he initially stated that Driver DP had said this while standing at the open doors of the Claimant's bus. Later in the meeting the Claimant changed his mind and said that Driver DP swore when the bus doors were closed. Nevertheless, if the Claimant was asserting that Driver DP had sworn at him during any stage of the encounter, this should have been investigated by the Respondent as it raises the question of whether there was any degree of provocation on the part of Driver DP.
36. The Respondent relies heavily upon the CCTV evidence and Mr Power and Mr McGuinness make it clear that they have concluded from the footage that the Claimant was entirely the aggressor during the altercation.
37. Having viewed the footage ourselves and had the benefit of the stills photographs, we are not satisfied that it was reasonable for the Respondent to draw this conclusion. We reiterate that as there is no sound accompanying the

footage we do not know what Driver DP and the Claimant are saying to each other.

38. We have noted that the Claimant and Driver DP have two confrontations during the course of the incident. We agree that the Claimant stops his bus, gets out and walks towards DP with his arms out. We accept that the Claimant was annoyed because his bus had been blocked. However there is no way of telling what was said during the first confrontation. During the disciplinary hearing, Mr Power notes that the Claimant asserted that Driver DP had sworn at him but this is not mentioned in the dismissal letter. After the first confrontation, the CCTV footage shows the Claimant walking away and getting back on his bus where he continues to point at Driver DP. If Driver DP had been very upset by the Claimant's aggression, we might have expected him to walk away at that point. In fact, the continuation of the footage shows him walking towards the open door of the bus. That leads to the Claimant getting off the bus again and walking up very close to Driver DP. At this point their upper bodies cannot be seen and we do not know what either the Claimant or Driver DP are saying. Nor do we know what made the Claimant get off the bus a second time and whether this was in response to anything said by Driver DP.
39. In these circumstances it was not reasonable for the Respondent to decide not to interview Driver DP. They could have asked him for more information about what exactly was said and done during the altercation, and put to him the Claimant's assertion that DP had sworn at him.
40. The second aspect of the investigation which has given us concern is the fact that at the appeal the Claimant raised the fact that he had reported the altercation to Mr Joseph on the evening of 13 July. Mr McGuinness initially accepted that this may be relevant, and expressed a wish to interview Mr Joseph. His evidence was that he decided not to do so because Mr Joseph was on holiday. Mr McGuinness stated that the Claimant was pushing him to get the appeal decision out, so he decided to issue it on 4 September, just three days before Mr Joseph was due to return. We do not accept Mr McGuinness' reasons for sending out the letter on that date. The Claimant did email the Respondent a number of times to check on the progress of the appeal but we do not accept that Mr McGuinness was under particular pressure

to issue it on that date. In an email on 1 September, HR had explained that investigations were ongoing and that Mr McGuinness was aiming to send the response out 'early next week' (ie from 4 September onwards). It would have been reasonable to wait another few days and speak to Mr Joseph before concluding the process.

41. The significance of what Mr Joseph would have been able to say, as demonstrated by the evidence to the tribunal, is that the Claimant reported that there had been an altercation even before Driver DP did. This contemporaneous evidence raises the possibility that there may have been fault on both sides, and that the Claimant may have been provoked by Driver DP into behaving as he did. We find that this possibility was not investigated sufficiently by the Respondent. We consider that Mr McGuinness was right to form a view that Driver DP and Mr Joseph should have been interviewed. It is unfortunate that his intentions were not carried through.
42. We do not accept the Claimant's assertion that the interview records have been entirely concocted. Having heard the evidence of the Respondent's witnesses, we do not think there is any basis for that allegation. We do note that the Claimant's conduct during the various meetings that took place were viewed very adversely by the Respondent. He made many allegations that witnesses were lying and his version of events changed on a number of occasions. The Respondent appeared to be frustrated by what the Claimant said during the meetings and this may have contributed to the Respondent's decision to curtail the appeal process.
43. Despite noting that, we conclude that the investigation into what happened was flawed in relation to the failure to interview Driver DP and Mr Joseph. This failure is significant as the Respondent failed to give any proper attention to the question of whether Driver DP had provoked the Claimant or had been at fault in any way himself.
44. We therefore find that the investigation was not reasonable and that renders the dismissal unfair.
45. In accordance with the case of **Polkey v AE Dayton Services** we must go on to consider what percentage chance there was that the Claimant would still have been dismissed, had a proper investigation been carried out.

46. We have concluded that if the Respondent had interviewed Driver DP and Mr Joseph, there is a possibility that the Claimant's behaviour may have been seen in a very different light. If the Respondent had concluded that there had been provocation, that Driver DP had sworn at the Claimant and that both were at fault, it is possible that a lesser sanction than dismissal might have been applied.
47. Having noted that we also take account of the fact that the Claimant had told Mr Power and other managers that Driver DP had sworn at him, and this had not affected their decision to dismiss. It is also possible that Driver DP would have denied swearing or doing anything to provoke the Claimant. We have noted that the Respondent formed the clear view, having viewed the CCTV, that the Claimant had acted aggressively towards Driver DP. Having seen the footage ourselves, we are not satisfied that the CCTV entirely supports the Respondent's conclusion that the Claimant was the sole aggressor, or that it supports the conclusion of Mr Power and Mr McGuinness that the Claimant pushed Driver DP with his body. We do however accept that it was reasonable for the Respondent to accept, on the basis of Driver DR's statement, that the Claimant had been shouting. We also accept that the Respondent was reasonable to conclude from the CCTV evidence that the Claimant got off the bus to confront Driver DP. The Claimant himself, during the investigation interview, agreed that he might have sworn during the altercation with Driver DP. In summary there was sufficient evidence to enable the Respondent to reach a conclusion that the Claimant had conducted himself inappropriately with his colleague. As a result there was a reasonable chance that the Respondent would still have decided to dismiss the Claimant even if it was shown that there had been provocation. Taking all the evidence into account we put this chance at fifty per cent. The Claimant's compensatory award will therefore be reduced by this amount.
48. Did the Claimant contribute to his own dismissal? It follows from what we have said above that we find it more likely than not that the Claimant shouted at Driver DP, swore during the conversation and stopped his bus and got off in order to confront him about the fact that Driver DP's bus had blocked him in. Although the aspect of possible provocation was never explored, we agree that

the Claimant responded inappropriately to what had happened. We have decided that it is appropriate to make a further reduction of ten per cent to reflect the Claimant's conduct.

49. Race Discrimination

- 50.** We note that the Claimant alleges that there was a difference in treatment between the Claimant and Driver DP. The Claimant considered that Driver DP should have been suspended at the same time as himself.
- 51.** The difference in circumstances between the Claimant and his comparator is that the Driver DP had made a complaint about the Claimant's conduct. The Claimant alerted Mr Joseph to what had happened but, when asked, he declined to make a complaint against Driver P. If he had done so, an investigation into the conduct of both members of staff may have commenced and the outcome might have been very different. As the Claimant did not bring a complaint, we conclude that the Claimant has not demonstrated that he was less favourably treated in terms of his suspension and being subjected to a disciplinary process.
- 52.** We have also gone on to consider whether the Respondent discriminated against the Claimant by failing to investigate Driver DP's conduct once the Claimant had raised this in the course of their investigation. We have made it clear above that we consider that the Respondent should have at the very least interviewed Driver DP. This may have led to disciplinary action against him. Having heard the evidence of Mr Power, however, we accept that he decided that it was not necessary to interview Driver DP because he felt that the written statement was supported by the CCTV footage. Although we have found that as a result the investigation was inadequate, we find that there is no evidence that Mr Power was motivated by the Claimant's race. The Claimant has asserted that Mr Power in particular was racist and was biased in the way in which he conducted the process. He suggests that Mr Power orchestrated his suspension, with a view to getting rid of him and that he fabricated meeting notes.

- 53.** The Claimant has produced no evidence to demonstrate that Mr Power's treatment of him was affected in any way by his race. In his witness statement, the Claimant barely refers to his claim for race discrimination. The only reference we have found to Mr Power is on page 19 of the statement when he reports that he told his union representative that Mr Power was 'a racist he's going to fire me anyway'. There is no evidence in the statement to back up this assertion. We note that this statement is inconsistent with the Claimant's allegation that Mr Power was in the process of sacking drivers in order to avoid the need to make them redundant. The Claimant is not able to point to the way in which he states that minutes have been fabricated.
- 54.** We conclude that the claim for race discrimination is not made out and it does not succeed.
- 55.** As the unfair dismissal claim has succeeded, there will be a remedy hearing which has been listed for **10am on Wednesday 13 March 2019** at the Employment Tribunal, Montague Court, London Road Croydon CR0 2RF.

Employment Judge Siddall
Date: 13 December 2018.

Date sent to parties on: 02 January 2019