# EMPLOYMENT TRIBUNALS

**SITTING AT:** **LONDON SOUTH**

**BEFORE:** **EMPLOYMENT JUDGE F SPENCER**

**MEMBERS:** **MS O'TOOLE**
**MRS C WICKERSHAM**

**BETWEEN:** **MS W ONYEMA** **CLAIMANT**

AND

**ABELLIO LONDON LIMITED** **RESPONDENT**

**ON:** **26-28 FEBRUARY 2019**

**APPEARANCES**

**FOR THE CLAIMANT: MR J NECKLES, TRADE UNION REPRESENTATIVE**
**FOR THE RESPONDENT: MR. M SHEPHARD, COUNSEL**

## JUDGMENT

The judgment of the Tribunal is that

(i) The Claimant was not unfairly dismissed;
(ii) The Claimant's claims of direct race discrimination and harassment related to race are not well founded and are dismissed;
(iii) The Claimant's claim of direct sex discrimination is not well founded and is dismissed.

## REASONS

1. This is a case of unfair dismissal, direct sex discrimination and harassment related to race. The less favourable treatment/harassment relied on is the Claimant's dismissal. A claim for breach of contract (notice pay) has been withdrawn.

2. The issues were set out in a case management order made on 22 February 2018 and sent to the parties on 29th March 2018. The Claimant relies on her

husband Mr. Onyema as her comparator for the claim of both sex and race discrimination. The Claimant is white, Polish and female. Mr. Onyema's racial group is put as Black African. (A further comparator Mr. Rider is no longer relied on).

Evidence

3. The Tribunal had a bundle of documents which was agreed between the parties and a supplementary bundle of documents from the Claimant. For the Respondent we heard evidence from Mr. Campbell, the investigating officer, from Mr. Chadha, the dismissing officer and from Mr. Wilson who heard the 2nd level appeal. We did not hear from the appeal manager who has left the Respondent's employment and emigrated to New Zealand. We also heard from the Claimant.

Findings of relevant fact

4. The Claimant worked for the Respondent as a bus driver from January 2012 until her dismissal (with pay in lieu of notice) on 12th July 2017.

5. All bus drivers at the Respondent are required to carry out a "first use check" prior to a bus being taken out of the depot. The Respondent is required by the DVSA to ensure that these checks are carried out. The Claimant had been trained during her induction in how to complete such checks (35c). Further training was provided to the Claimant in July 2016. All employees are issued with a first use check handbook.

6. Each driver is given a form (the vehicle condition report form or VCR), which has to be completed every time a driver is taking over a bus. The VCR contains a list of the areas to check and what to check for. All safety critical defects must be recorded on the VCR and reported immediately to the engineer. All minor defects must be recorded on the VCR for repair. If no defects are found the driver records this and signs to confirm that they have done the checks. 10 minutes are allocated for first use checks at the start of each shift, and this allocation of time has been agreed with the union.

7. Memos regarding first use checks were circulated to drivers on 10 March 2017 and again on 18 May 2017. In the latter memo the Respondent announced a change to the way that tyre checks should be carried out by introducing a requirement for drivers to turn the wheel to the right before checking the tyres. The May memo also made it clear that failure to carry out a first use check was an act of gross misconduct and that a failure to do the check properly could also result in disciplinary action. The Claimant signed that she had read and understood the May memo on 14 June 2017 (78).

8. On 27th June the Claimant was observed while she carried out her first use check. The staff manager Mr. Stedman reported to Mr. Campbell that the Claimant had failed to check the tyres or the sensitive edge strip on the exit doors and that she had also either failed to notice or log some 9 other issues

on her VCR, including the emergency engine stop check, the rear door emergency buttons not working and the nearside headlight not working. These were set out in Mr. Stedman's email to Mr. Campbell. (83)

9. On 3rd July the Claimant was given a letter inviting her to a disciplinary hearing before Mr Campbell the same day and referred to the issue as one of potential gross misconduct. This was immediately queried by the Claimant's trade union representative. Mr. Campbell told the Claimant that that letter had been issued in error, that the interview was a fact-finding exercise only and that she would be provided with a new letter of invitation. A new letter invited her to a fact-finding interview with Mr. Campbell, staff manager and formally informed her that an investigation had begun into "failing to carry out a first use check correctly on 27 June 2017."

10. The notes of that interview appear at page 85. At the interview the Claimant was shown the email from Mr. Stedman and the list of defects that she was said to have missed when doing her first use check. The notes record that the Claimant said that she disagreed with the first point but did not disagree with the rest. However, she also said that she had checked the headlights which were "working fully for me", that she had not found anything in relation to the side blinds, but that she had missed the fuel cap check. She said that Mr Stedman had been standing far away and that he should have helped her and not reported her.

11. Although the notes are not wholly clear we accept Mr. Campbell's evidence that at the investigatory interview the Claimant largely accepted that she had not carried out a full first use check. He was also concerned because 2 of the matters which Mr. Stedman had reported that the Claimant had failed to check were safety critical issues. These were the rear door emergency buttons not working and no emergency engine stop check.

12. As a result of the investigatory interview Mr. Campbell decided to refer the matter to a disciplinary.

13. On 5th July the Claimant was invited to a disciplinary meeting scheduled for 12 July 2017. The Claimant was told that she had a disciplinary case to answer in respect of allegations of gross misconduct namely:

    a. Serious breach of the company's health and safety procedures;
    b. Deliberate or grossly negligent contravention of the company rules of procedure;
    c. Action likely to threaten the health and safety of yourself, fellow employees, customers or member of the public."

    The Claimant was sent a copy of the investigation report from Mr. Stedman, her VCR, the notes of the fact find interview and the disciplinary policy and procedure.

14. The Claimant attended a disciplinary hearing accompanied by her trade union representative Mr. Ahmed. At the disciplinary hearing the Claimant

accepted that there was nothing in the notes of the interview that she did not agree with. At that hearing the Claimant failed to respond to or answer many of the questions which Mr Chadha put to her. When asked about the emergency stop button on the bus, she said that she had "had a look" but then appeared not to know where it was. She told Mr. Chadha that she completed her VCR as she did her checks.

15. The CCTV was reviewed during the hearing. We accept Mr. Chadha's evidence, (which was supported by the notes of the disciplinary hearing) that this showed the Claimant began her first use check at 6.22.27 undertaking an internal check of the bus, but did not check the instruments in her cab, the seats or the rear emergency window. The Claimant then left the bus 2 minutes later to conduct an external check which took 41 seconds. The CCTV showed that the Claimant did not have her VCR form with her as she undertook the checks, that she did not check the operator licence disc on the window, the windscreen wipers or the tyres.

16. The Claimant asked for the CCTV to be rewound at one stage and said that she had in fact checked the tyres – although we also accept Mr. Chadha's evidence that the footage showed that she did not check the nearside wheels.

17. At the hearing the Claimant's representative said that the Claimant was not denying that she had not done an adequate check and sought to suggest that the Claimant felt pressured or rushed.

18. During the adjournment Mr. Chadha reviewed the Claimant's personnel file which established that the Claimant had a first warning for misconduct issued on 29 September 2016 and a final written warning issued on 15 February 2017 to remain on her file for 12 months. He also established that the Claimant had signed in on time and that there was no time pressure on her to have completed her checks in 4 minutes.

19. Mr. Chadha decided to terminate the Claimant's employment. He concluded that the Claimant did not appear to dispute that she had failed to carry out a full and proper first use check and, in any event, on the evidence of the CCTV he was satisfied that she had failed to do so. As to the sanction, he considered that as she was on a final written warning, had not checked some safety critical issues (particularly the emergency doors and the exits), and had completed only about 35 to 40% of the required checks, the appropriate sanction was dismissal.

20. The Claimant appealed and appeal was heard by Mr. Lensink, the commercial director on 4th August. The grounds of her appeal were the severity of the award and breach of procedure, the latter point referring to the fact that she had been sent a letter on 3rd July which referred to a disciplinary hearing for gross misconduct. The Claimant was accompanied to the appeal by Mr. Ahmed. She did not at that stage raise issues of disparity of treatment or discrimination.

21. The outcome was sent to the Claimant on 7th September 2017 and her appeal was dismissed (112). Mr Lensink noted that the error made prior to the investigation interview had been corrected at once. He concluded that the safety check was an important safety matter, that the Claimant had a live final written warning on file, and that the decision to dismiss should stand.

22. However, on 31st July 2017, just before the Claimant's first appeal hearing, the Claimant's husband Mr. Onyema had also attended a disciplinary hearing before Mr. Chadha regarding a failure to carry out an adequate first use check. At the time of the disciplinary hearing Mr. Onyema was also on a final written warning. That warning had been issued on 29th September 2016 and then extended by a further 12 months in April 2017, following a further disciplinary. The result of the July disciplinary hearing was that Mr. Chadha decided that Mr. Onyema should not be dismissed. His final written warning was extended (again) by a further 12 months.

23. Before the Claimant received the outcome of her appeal Mr Griffiths, of Unite, wrote to Mr. Wilson, the managing director of the Respondent to lodge a special appeal on behalf of the Claimant. A special appeal is a process which may be requested by a full-time trade union officer where the trade union considers that a serious injustice has occurred. It is usually considered on the papers.

24. In the Claimant's case Mr. Griffiths called into question the Respondent's consistency of treatment in relation to the sanction for incomplete first use checks, and referred to Mr. Onyema's case. Mr Griffiths suggested that the Claimant was being made an example of because she was a woman as women drivers were in a minority. (No suggestion was made by Mr. Griffiths that there was any discrimination because of the Claimant's race.)

25. Mr. Wilson called for the statistics of drivers, male and female, who had been disciplined specifically in relation to first use checks. The operations manager reported that between June and September 2017 the Respondent had taken some form of disciplinary action against 127 drivers, 10 of whom were female. This equated to 7.8%, and the female drivers represented 9.5% of the whole. (114) (During cross examination Mr. Wilson also told the Tribunal that of the 127, 7 drivers had been dismissed and the Claimant was the only female.)

26. Mr. Wilson considered the comparison between the Claimant and her husband and spoke to Mr. Chadha who had conducted the disciplinary hearing for both the Claimant and Mr. Onyema. Mr. Onyema had been asked to attend a disciplinary hearing about an incomplete first use check, specifically for (i) failing to turn the tyres and (ii) failing to check the rear lights. At the disciplinary hearing Mr. Chadha had only found (ii) to be substantiated. Mr. Chadha had not had access to the CCTV in that case and had accepted Mr. Onyema's word that he had checked the rear lights. In relation to (i), Mr Onyema had checked the tyres but had not turned the front wheels before doing so. This was a requirement which had been introduced

in May of that year. Mr. Chadha considered that this was a minor infringement of the first use check procedure, and that dismissal was not appropriate, notwithstanding the final written warning. (Mr Chadha also said that while he had been aware of the final written warning issued in 2017, he had not been able to access Mr Onyema's file and was not aware that this was itself an extension of an earlier final written warning issued in September 2016.)

27. Mr Wilson concluded that the statistics did not support discriminatory treatment of female drivers, that the Claimant's dismissal stood, and that Mr. Onyema was lucky not to have been dismissed.

The relevant law

Discrimination and harassment

28. Section 39 of the Equality Act 2010 prohibits an employer discriminating against its employees by dismissing them or subjecting them to any other detriment. Section 40 prohibits an employer from harassing its employees.

29. Section 13 defines direct discrimination as follows:-

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favorably than A treats or would treat others.

Race is a protected characteristic.

30. Section 26 defines harassment as follows

(1) A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect

31. The burden of proof is set out at Section 136. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of an adequate explanation,

that there has been a contravention of the Equality Act. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise. This approach to the burden of proof has recently been confirmed by the Court of appeal in *Ayodole v City Link and another 2107 EWCA Civ 1913.*

32. Section 23 of the Equality Act provides that "*On a comparison of cases for the purpose of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."* Para 3.2 of the EHRC Employment Code makes it clear that the circumstances of the Claimant and the comparator need not be identical in every way. "What matters is that the circumstances which are relevant to the Claimant's treatment are the same or nearly the same". In *Shamoon v Chief Constable of the RUC 2003 ICR 337* the House of Lords said that the circumstances relevant for a comparison include those that the alleged discriminator takes into account when deciding to treat the Claimant as it did.

Unfair dismissal

33. In a case of unfair dismissal, it is for the Respondent to show that the reason for the Claimant's dismissal is a potentially fair reason for dismissal within the terms of section 98(1). Misconduct is reason which may be found to be a potentially fair reason for dismissal.

34. If the Respondent can establish that the principal reason for the Claimant's dismissal was a genuine belief in the Claimant's misconduct, then the Tribunal will go on to consider whether the dismissal was fair or unfair within the terms of section 98(4). The answer to this question "depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case."

35. In cases of misconduct employers are not required to ascertain beyond reasonable doubt that the employee is guilty of the misconduct charged. However, the employer must establish its belief in that misconduct on reasonable grounds and after reasonable investigation and conclude on the basis of that investigation that dismissal is justified (*British Home Stores v Burchell* [1980] ICR 303.) The Claimant must also be given a fair hearing.

36. In *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, [2009] IRLR 563, [2009] ALL ER (D) 179 the Court of Appeal reaffirmed that in unfair dismissal claims, the function of a tribunal is to review the fairness of the employer's decision, not to substitute its own view for that of the employer. The issue is whether the decision to dismiss fell within the band of reasonable responses for an employer to take with regard to the misconduct in question. However, it is not the case that nothing short of a perverse decision to dismiss can be unfair within the section, simply that the process of considering the reasonableness of the decision to dismiss must be considered by reference to the objective standards of the hypothetical

reasonable employer and not by reference to the tribunal's own subjective views of what it would have done in the circumstances. (see *Post Office v Foley* 2000 IRLR 827). The band of reasonable responses test applies as much when considering the reasonableness of the employer's investigation as it does to the decision to dismiss (*Sainsbury's Supermarkets Ltd v Hitt* 2003 IRLR 23.)

Conclusions
Discrimination and harassment

37. It is the Claimant case that she was less favourably treated than (i) Mr. Onyema and (ii) a hypothetical employee and that this was because of her sex or her race.

38. In relation to Mr Onyema, we do not accept that he is a proper comparator. The circumstances which persuaded Mr Chadha to dismiss the Claimant, but not Mr. Onyema, were materially different. Mr. Onyema had done 95% of the first use checks whereas the Claimant had done 35% to 40%. The offence for which Mr. Onyema was sanctioned related only to a failure to turn the wheels of the bus when checking the tyres, a requirement that had been introduced some three months previously, and was not a safety critical failure. The Claimant had spent only 41 seconds on the external checks and more importantly she missed two safety critical features. As Mr Chadha said there is a scale in the gravity of the failures, and Mr Oynema's failures were significantly less serious than those of the Claimant. We find that this is a material difference in the circumstances of the Claimant and that of her comparator, so that there was in fact no less favourable treatment.

39. In any event, even of it could be said that the circumstances were not materially different, and that there was less favourable treatment, we are satisfied that the reason for the difference in treatment was neither the fact that the Claimant was Polish or white, nor the fact that she was female. It was that the Claimant's failures were more serious that her husband's. We are satisfied that it was these critical distinctions between the 2 cases which led Mr. Chadha to dismiss the Claimant and not to dismiss Mr. Onyema. We would go further and say that it might have been unfair to dismiss Mr. Onyema for such a small breach notwithstanding the final written warning and his previous disciplinary history.

40. At the special appeal the Claimant's representative asked for statistical evidence of the sanctions given to male and female drivers in relation to the first use check. Statistical evidence may establish a discernible pattern in the treatment of a particular group and, if that pattern demonstrates that one particular group has statistically been less favourably treated than another, this may give rise to an inference of discrimination.

41. Mr. Wilson established that a smaller proportion of women drivers had been disciplined in relation to first use checks than the proportion of women drivers in the workforce. That is not a statistic which tends to support an

inference of discrimination because of sex. At the hearing, Mr. Wilson also told us that of the 127 drivers who had been disciplined, 7 had been dismissed and that the Claimant was the only female. Again, this is not evidence which would tend to support an inference that women were being less favourably treated in relation to first use checks than male drivers.

42. There was no other material from which we could infer that a hypothetical male or non Polish driver would have been treated any differently in comparable circumstances. The claim of direct sex or race discrimination is not well founded.

43. Mr. Neckles also complains that the Claimant was harassed within the meaning of section 26 of the Equality Act when she was dismissed and that this related to her Polish nationality. Firstly, as we have said, we do not accept that the Claimant's dismissal was related to her race or nationality. Secondly, conduct which amounts to a proper and reasonable application of a disciplinary process and a fair non-discriminatory dismissal (see below) cannot properly be said to amount to conduct which meets the definition of harassment under section 26.

Unfair dismissal

44. In this case we find that the Respondent dismissed the Claimant for conduct, namely her failure to carry out a proper first use check. This is a potentially fair reason for dismissal. The issue for the Tribunal was whether dismissal was fair or unfair within the terms of section 98(4) of the Employment Rights Act 1996.

45. We are satisfied that the Respondent had a genuine belief that the Claimant had failed to carry out a proper first use check and had missed safety critical features. We are satisfied that they arrived at their belief on reasonable grounds and after reasonable investigation. The Respondent had the report from Mr. Stedman, the Claimant's completed VCR, the CCTV evidence and the Claimant's own admissions.

46. Mr. Neckles raises two procedural issues. First, he says that the initial letter inviting the Claimant to a fact-finding interview referred to having to attend a disciplinary for gross misconduct. We consider that this did not affect the overall fairness of the process. Mr Ahmed raised this with Mr. Campbell immediately and the Claimant was told before the fact-finding interview that the letter was an error and that a new letter would be issued.

47. Secondly Mr Neckles says that the letter inviting the Claimant to the fact-finding interview referred to an investigation into "failing to carry out a first use check correctly". This was different to the charges set out in the notice of disciplinary hearing (see paragraph 13 above). He says that this meant that the Claimant did not know the case she had to answer, that the Claimant could not advance her defence, and that it meant that the investigation was unfair and unreasonable, as "no information was collected at the fact finding interview about the charges that were made at the disciplinary hearing" .

48. This is also not a good point. The purpose of the fact-finding interview was to establish the facts. At that stage there were no "charges" against the Claimant. The charges were made as a result of the facts found at the interview. If we were to be critical, we would say that the actual charges, which were simply lifted out of the Respondent's Disciplinary Policy, did not state the actual conduct which was said to amount to breaches of Policy and Procedure. Despite this, the important point is that it is clear that at all stages the Claimant knew in fact what the issues were, and that the conduct she was required to answer for was her failure to carry out a satisfactory first use check. She was given the evidence on which a decision was being made and viewed the CCTV.

49. We are satisfied that the Claimant had a fair hearing and a chance to state her case.

50. A major part of the Claimant's case related to inconsistency of treatment. Mr. Neckles says that the Claimant's dismissal was unfair. She was dismissed, Mr. Onyema was not. He also submits that the Respondent could not have fairly dismissed the Claimant without having researched the sanctions given to all the other drivers who had been disciplined for failure to carry out first use checks. He submits this was the only way to ensure consistency of treatment. In this case there had been 127 such drivers in the preceding 3 months.

51. Arguments which rely on inconsistency of the penalty applied can only really be relevant where the circumstances in both cases are truly parallel. As we have said circumstances in this case were not truly parallel. Mr. Onyema had checked the tyres but had failed to turn the wheels. The Claimant's failures were significantly more serious. This was not a case where the circumstances were like those in Newbound v Thames Water Utilities 2105 IRLR 734 (referred to by Mr. Neckles) where both employees were involved in the same incident.

52. Nor can we accept Mr Neckles proposition that a reasonable investigation requires research into all previous disciplinaries for similar offences. As set out above the band of reasonable responses test also applies to the sufficiency of the investigation.

53. Mr. Neckles suggests that "a breach is a breach is a breach" to support his case that the Claimant and Mr Onyema should have been treated in the same way. That too is a proposition which cannot be accepted. Employers must look at each case on its merits. The law requires them to look at all the circumstances before determining whether the conduct in question is a sufficient reason for dismissal. Applying the approach which Mr. Neckles seems to suggest would be wholly unfair.

54. In *Hadjiannou v Coral Casinos* the EAT suggested that arguments on consistency can only be relevant in 3 circumstances. First where there is evidence that employees had been led to believe certain categories of

conduct will be overlooked or dealt with in a particular fashion. Secondly, where evidence from other cases support a conclusion that the purported reason for dismissal was not the real or genuine reason for dismissal and thirdly in truly parallel circumstances. None of those apply in this case.

55. The issue therefore was whether the dismissal was within the band of reasonable responses for an employer to take having regard to all the circumstances. We are satisfied that it was. The Respondent had made it very clear that they took such breaches seriously, the Claimant had signed to say that she understood, she had been adequately trained and was on a final written warning.

56. The dismissal was not unfair.

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Employment Judge F Spencer

Date 29th March 2019