THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Mr A Adetogun		**Cordant Cleaning Limited**

Held at LONDON SOUTH **On 25 March 2019**

BEFORE: Employment Judge Siddall (Sitting Alone)

Representation

For the Claimant: **Mr N Egbayela**

For the Respondent: **Mrs J Letts**

JUDGMENT

The decision of the tribunal is that the claim for unfair dismissal is not well founded and it does not succeed.

REASONS

1. The Claimant claims that he was unfairly dismissed by the Respondent on 17 April 2018. I heard evidence from the Claimant himself and from Mr Steven Chisnall, Key Account Manager on behalf of the Respondent. The Claimant also produced a written witness statement from KM. KM did not attend the

tribunal hearing and I explained to the Claimant that I had to give less weight to the statement as a result.

2. Unfortunately the Claimant had not produced a witness statement for himself, in breach of the tribunal's case management orders. It appears that he did not understand the need to do so. Mrs Letts indicated that she would accept the Claimant giving evidence without a statement. That is how we proceeded. After the Claimant had been sworn, I asked him some questions to clarify his evidence about what happened. Mrs Letts cross-examined him and Mr Egbayela was given the chance to re-examine him.

3. The facts I have found and the conclusions I have drawn from the evidence of both parties is as follows.

4. The Respondent runs a professional cleaning service and one area of their business is cleaning buses. The Claimant started employment as a Shunter on 23 September 2013. He worked in the garage of a bus company called Go Ahead.

5. The Respondent has a number of operational instructions and safety briefings which members of staff must follow. Page 39A of the bundle contains a list of 'critical safety' instructions which include: 'Never operate a mobile communication device whilst driving. It is against the law'; and 'ear phones must not be worn whilst operating a vehicle or moving around the garage on foot'. On page 39G, a list of instructions regarding Vehicle Operations states that staff must 'never operate a mobile communication in the bus it's against garage rules'.

6. The Respondent produced a number of sheets showing that safety briefings had been issued to the Claimant and that he had signed for them.

7. It is not in dispute that on 9 March 2018 the Claimant suffered an injury at work when a colleague rear-ended the vehicle he was sitting in. In his ET1 form the Claimant named this colleague as KJ. The Respondent stated in evidence that they did not employ anyone by that name. During oral evidence the Claimant

produced an additional document which suggested the colleague may be called Mr JKA.

8. In the early hours of 13 June 2018 the Claimant had to move a bus that was parked in the garage as there was a queue of buses waiting to be refuelled.

9. The Claimant says and I accept that just before he moved the bus, he took a call on his mobile phone from one of the engineers. He put his earpiece into his ear. Once the call had finished he got onto the bus.

10. As the Claimant was moving the bus, he hit an iron bar.

11. The Claimant says and I accept that he tried to report the incident that same night. The Supervisor and Site Manager had already left the site, and so the Claimant spoke to a contract engineer who was in the office. They could not find the relevant incident report form. He completed the relevant forms later and I have seen his statement of fact dated 22 March 2018 (which the Claimant read out as the page had not photocopied well).

12. The Respondent carried out its usual investigation following an incident of this type. The Claimant was interviewed on 3 April. He acknowledged that he knew that earphones could not be used. In relation to the safety briefings he stated that the forms are brought for staff to sign and because they are busy they usually just sign the form without reading the documentation.

13. Following that meeting, disciplinary action was recommended.

14. The letter inviting the Claimant to attend a disciplinary hearing stated that he would face allegations of 'failure to report an accident and using earpiece while driving the bus and having a collision'.

15. A disciplinary hearing was called for 13 April but re-arranged to 17 April when it was realised that the Claimant was on annual leave. The hearing was conducted by Mr Chisnall.

16. During the hearing, Mr Chisnall and the Claimant viewed the CCTV evidence of the incident. The notes of the hearing record that the CCTV showed that the Claimant entered the bus wearing the ear piece; he picked up his mobile phone; he then started to move the bus one-handed, holding his phone.

17. Mr Chisnall stopped the CCTV and asked the Claimant for his response to what he had seen. The notes record that the Claimant made no comment. Mr Chisnall expressed the view that this was 'one of the worst cases of not following the company rules and endangering people's lives that SC had ever seen'. During the meeting the Claimant said that he was sorry and that it would not happen again.

18. At the end of the meeting Mr Chisnall advised that the Claimant would be dismissed with immediate effect for not following the company's procedures, breaking health and safety rules and endangering other site staff's lives. This was confirmed in a letter dated 26 April 2018.

19. The Claimant appealed by letter dated 19 April 2018. An appeal hearing was arranged for 16 May but was postponed at the Claimant's request. It was re-arranged for 25 May, but a further postponement was asked for as the Claimant's trade union rep was not available. It was re-arranged for 7 June. The Claimant again advised he could not attend. The Respondent wrote to him to advise that if he did not attend, the appeal would be dealt with in his absence. The Claimant did not go to the hearing. It appears that the Respondent then treated the appeal as having been abandoned as no appeal decision has been produced.

Decision

20. The first question for me to address is the reason for the Claimant's dismissal. The Respondent asserts that he was dismissed for alleged misconduct. The Claimant does not suggest any alternative reason. I accept that misconduct was the reason.

21. The employment tribunal does not have to apply the same test that would operate in a criminal court, ie whether it is satisfied about what happened 'beyond reasonable doubt'. Nor do I have to be satisfied, as suggested by Mr Egbayela, that a 'common law offence' had been commited by the Claimant. In an unfair dismissal claim involving alleged misconduct, the test set out in the case of ***British Home Stores v Burchell*** must be applied. The questions are: did the employer have a genuine belief, based on reasonable grounds and following a reasonable investigation, that the alleged misconduct had taken place? And if so, was dismissal within the reasonable range of responses open to the employer?

22. I accept that after viewing the CCTV footage, Mr Chisnall formed a genuine belief that the Claimant was responsible for a serious breach of health and safety rules. I note that in his witness statement, Mr Chisnall says that he was 'honestly shocked' by what he saw. This is consistent with the notes of the disciplinary hearing, where he states that it was one of the worst cases of not following company rules and endangering lives that he had seen.

23. Was Mr Chisnall's view about the seriousness of what he had seen based on reasonable grounds, and after reasonable investigation?

24. I note that the Claimant provided his account of what had happened on an incident report form, and he also had the opportunity to describe the incident at an investigation meeting.

25. At the disciplinary hearing, Mr Chisnall set out his interpretation of what he had seen on the CCTV and gave the Claimant the chance to comment. I note that the Claimant made no comment at that time.

26. During his oral evidence the Claimant stated that he had his earpiece in, but was not using his mobile phone. He denied that he had his mobile phone in his hand, and stated that he had simply placed in on the dashboard.

27. Unfortunately the Claimant did not put this version of what happened to Mr Chisnall at the time. I have not had the benefit of seeing the CCTV evidence,

which I am told is no longer available. Mr Chisnall told me that he was not able to conclude whether or not the Claimant had been on the phone at the time of the accident. However his concern was that the CCTV showed that the Claimant was trying to manoeuvre the bus one-handed and that this was a breach of health and safety procedures.

28. In the light of the Claimant's failure to dispute what Mr Chisnall was saying at the disciplinary hearing, I accept his evidence of what the CCTV showed, as recorded in the meeting notes: that the Claimant had kept his earpiece in and was moving the bus, holding his mobile phone in one hand. Even if he was not speaking on the phone, I accept that Mr Chisnall had reached a reasonable conclusion on the evidence that the Claimant was operating the bus in a dangerous manner.

29. I therefore find that the Respondent had carried out a proper investigation and had reasonable grounds for concluding that the Claimant had breached health and safety rules.

30. Turning to the allegation that the Claimant had failed to report the accident appropriately, I accept the Claimant's evidence that there was no manager on site to report it to on the night in question, and that he did provide details of what had happened and complete the relevant forms within a reasonable period. I note that in the dismissal confirmation letter dated 26 April Mr Chisnall does not appear to make a finding that the Claimant had committed a serious breach of the rules in that regard.

31. Was it reasonable for the Respondent to dismiss the Claimant for the way in which he had been driving the bus?

32. Mr Egbayela says that it was not. He points out that there was no-one around when the collision occurred, and that no-one was injured. He suggests that the Claimant could have been dealt with by a warning, suspension, or a period of re-training.

33. Second, he argues that the Respondent acted inconsistently in dismissing the Claimant when it allowed the driver who had injured the Claimant in a collision on 9 June to go on working.

34. In relation to the first point, I note Mr Chisnall's evidence that it is not the costs of repair that are looked at, nor the question of whether anyone was hurt, in deciding whether a driver should be disciplined. He stated that every incident is investigated, but not every incident leads to a disciplinary process. I accept that he was genuinely shocked by what he viewed on the CCTV and took into account not only what actually happened but what could have happened. I accept that he reached a genuine view that the Claimant had breached health and safety rules and had put his own safety and that of others at risk. I note his conclusion that 'I could not accept that behaviour in one of our garages'.

35. It is not for me to substitute my own view, and decide whether or not I would have dismissed the Claimant in these circumstances. The question is whether the decision to dismiss was one of the options that was reasonably open to the Respondent on the basis of the evidence, and I find that it was. Mr Chisnall is an experienced transport manager. I accept that when staff are operating in a garage with moving vehicles, health and safety is paramount. I find that he made a reasonable decision that the Claimant's employment could not continue.

36. The second point relates to whether the Claimant has been treated fairly when compared to other members of staff involved in accidents. The Claimant points to the case of the colleague who caused a collision that injured him, but who has not been dismissed. I can understand that the Claimant may feel aggrieved about this.

37. If an employee can show that the circumstances affecting himself and a different member of staff were truly parallel, that may lead to a finding of unfair dismissal if he is treated more harshly than the other. Unfortunately I am not able to reach a conclusion that this is the situation here.

38. First, the Claimant did not raise the case of KJ during the disciplinary hearing and so the Respondent did not have the chance to investigate his allegation before deciding to dismiss him.

39. Second, in his application to the tribunal, the Claimant mentioned that he had been treated differently to an employee with the initials KJ.

40. Mr Chisnall noted in his witness statement that the Respondent had searched for an employee by that name but had been unable to trace them. The matter is further confused by the fact that during the course of the hearing, the Claimant produced a document which stated that the persons' initials may be JKA, not KJ. The Respondent's assertion that they could not identify the person referred to is perhaps a little disingenuous; the Claimant makes it clear on his ET1 form that he is talking about the member of staff driving the bus that collided with the Claimant's bus soon before the incident on 13 June. I conclude that the Respondent could have identified that member of staff concerned with a little more effort.

41. If the Claimant had raised the question of consistent treatment during his disciplinary hearing, or at his appeal (if he had attended), I accept that the Respondent would have been under a duty to investigate the circumstances relating to the other member of staff and consider whether it was treating the Claimant consistently and fairly. Unfortunately the Claimant only raised it during the course of the tribunal proceedings, and then in circumstances where the identity of the other person is in doubt to some degree. Nor has sufficient information been provided for me to conclude that the circumstances relating to the Claimant were truly parallel with those relating to KJ. Mr Chisnall has made it clear that a decision to commence disciplinary action is not dependent upon the amount of damage caused or whether a person has been injured, but upon the actions of the driver concerned. When asked, Mr Chisnall confirmed that he was not aware of the previous incident and could not comment on what had happened. My conclusion is that there is insufficient evidence in front of me to allow me to conclude that the Claimant has been treated unfairly.

42. The final point I will make relates to the appeal. The Claimant had been offered two dates for an appeal hearing. When he advised that he could not attend a third date, the Respondent told him that if he did not attend they would deal with his appeal in his absence and make a decision. No decision was ever issued. The Claimant might have had an expectation that if he did not turn up that his appeal would be dealt with in writing. He has not made that case before me today, and overall I find that the process followed by the Respondent was not unfair. The Claimant did not set out any grounds of appeal and nor did he pursue it by turning up to making the points that he wanted the Respondent to consider. In all the circumstances I find that the failure to issue an appea decision does not make the dismissal unfair.

43. The claim for dismissal therefore fails.

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Employment Judge Siddall
Date: 25 March 2019