



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE K ANDREWS
sitting alone

BETWEEN:

Mr A McKay

Claimant

and

Network Rail Infrastructure Ltd

Respondent

ON: 13 March 2019

Appearances:

For the Claimant: In person

For the Respondent: Mr O Holloway, Counsel

REASONS
for the Judgment dated 13 March 2019
provided at the claimant's request

1. In this matter the claimant complains that on 12 January 2018 he was unfairly dismissed. The respondent admits the dismissal and says that the reason for it was the claimant's gross misconduct.

Evidence

2. For the respondent I heard evidence from:
 - a. Mr T Wilson, line manager and investigation manager;
 - b. Mr T Shear-Smith, Local Operations Manager; and
 - c. Mr H Margetts, Operations Manager.
3. I also watched CCTV footage of an incident at 08.30 on 5 December 2017 at the relevant level crossing.

4. I heard evidence from the claimant and considered an agreed bundle of documents.

Relevant Law

5. By section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by his or her employer.
6. As the claimant's dismissal is admitted by the respondent it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2). If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.
7. In this case the respondent relies upon conduct and therefore the Tribunal must consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient reason for dismissing him.
8. In that exercise, the Tribunal is guided by the principles set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379, affirmed by the Court of Appeal in *Post Office v Foley* [2000] ICR 1283. Accordingly the Tribunal will consider whether the respondent by the standards of a reasonable employer:
 - a. genuinely believed the claimant was guilty of misconduct;
 - b. had reasonable grounds on which to sustain that belief; and
 - c. at the stage at which it formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

Any evidence that emerges during the course of any internal appeal against dismissal will be relevant in that exercise but otherwise material not before the employer at the relevant time is irrelevant.

9. Further, the Tribunal must assess – again by the standards of a reasonable employer - whether the respondent's decision to dismiss was within the band of reasonable responses to the claimant's conduct which a reasonable employer could adopt (*Iceland Frozen Foods v Jones* [1983] ICR 17 and *Graham v S of S for Work & Pensions* [2012] IRLR 759, CA). The band of reasonable responses test also applies to whether the respondent's investigation was reasonable (*Sainsbury's Supermarkets v Hitt* [2003] IRLR 23).
10. When considering the procedure used by the respondent, the Tribunal's task is to consider the fairness of the whole of the disciplinary process. Any deficiencies in the process will be considered as part of the determination of whether the overall process was fair (*OCS Group Ltd v Taylor* [2006] ICR 1602). The Tribunal will also take account of the ACAS Code of Practice on Disciplinary and Grievance procedures.

11. In coming to these decisions, the Tribunal must not substitute its own view for that of the respondent but to consider the respondent's decision and whether it acted reasonably by the standards of a reasonable employer.

Findings of Fact

12. Having assessed all the evidence, both oral and written, I find on the balance of probabilities the following to be the relevant facts.
13. The claimant commenced employment as a crossing keeper with the respondent on 9 May 2005. He was based at the crossing box at Whyteleafe South station from where he operated level crossings at Whyteleafe and Whyteleafe South stations via CCTV monitoring. When a train approaches the crossing the keeper receives an alert. It is then their responsibility to operate the warning lights and lower the barriers (or booms) to prevent cars and pedestrians from entering the crossing. When the crossing keeper is satisfied the crossing is clear he or she can then clear the relevant signal allowing the approaching train to proceed over the crossing. Once the train has passed, the barriers are raised automatically. Crossing barriers are designed to fall off rather than bend if they are struck. Accordingly if barriers are struck they need to be checked to ensure that they will still work correctly.
14. For obvious reasons level crossings are a particularly dangerous part of the railway infrastructure and carry a high risk of injury and/or death if they are not operated correctly. The respondent therefore views the crossing keeper role as being safety critical and one that requires a high level of trust.
15. Crossing keepers are subject to the respondent's general signalling regulations (GSR) which require any accident or unusual incident to be reported to operations control who coordinate responses to anything abnormal that happens on the railway. On 27 November 2017 the claimant had signed to acknowledge receipt of a copy of those regulations.
16. On 5 December 2017 the claimant was on duty. At 10.01 a member of the public reported to the respondent that she had been driving a light blue Volkswagen Golf estate across the crossing at about 08.30 and that the barrier on the other side of the road had come down and damaged the side of her car.
17. Operations control telephoned the claimant more or less immediately and asked whether there had been an incident at around 08.30 where a boom had hit a car. The claimant said that there had and described what had happened which broadly matched the incident captured on CCTV that I watched.
18. Mr Wilson, as the claimant's line manager and having responsibility for day to day performance of the local operations team, was contacted and asked to speak to the claimant. He attended that day at the relevant crossing box and spoke to the claimant. During that discussion the claimant indicated that there had been an incident. Again his account broadly matched what

I saw on the CCTV footage and he said that he bumped the car with the boom to teach it a lesson. As requested by Mr Wilson he then wrote and signed a statement of his account of an incident at 08.30 as follows:

'This morning at 08.30... I was putting the barriers down when a car came onto the xing when the traffic was queueing back. The car sat on the xing as the barriers were coming down as he edged forward to clear the xing I bumped the back of his car with the boom to teach him a lesson not to go on the crossing when the lights are flashing and the alarms are sounding'

19. Mr Wilson spoke to a senior manager for advice on 6 December 2017 and was advised that the matter needed to be investigated and the claimant suspended. Mr Wilson returned to the crossing box and informed the claimant of his suspension on the same day. The claimant was also formally informed of his suspension in writing.
20. Mr Wilson obtained the driver's initial complaint, a copy of the occurrence of book (a notebook used by crossing keepers to record shift times as well as any noteworthy events during the shift), the claimant's fatigue index score (which showed he was not under significant fatigue on the day in question) and a recording of the call between operations control and the claimant (which he typed up). He also obtained the CCTV footage (captured at 08.29.30) which showed a light coloured estate car being hit on its rear side by the barrier. It also showed that the car followed the route on to the crossing that the claimant had described to Mr Wilson in their conversation on the day.
21. Mr Wilson concluded that a formal investigation meeting was appropriate. He wrote to the claimant on 12 December requiring him to attend an interview on 14 December. The claimant was informed that the allegation being investigated was that on 5 December he struck a vehicle at Whyteleafe CCTV level crossing with the barrier and subsequently stated that he did so in order to teach him a lesson. This was then broken down into three sub-allegations:
 - a. intentionally and purposefully operating a barrier so that it struck a member of the public's vehicle;
 - b. failing to report this incident to control and failing to detail the incident in the occurrence book; and
 - c. bringing the company into disrepute by his actions towards a member of the public resulting in a complaint.The claimant was informed of his right to be accompanied at interview. He was also informed that these allegations were potentially gross misconduct which may lead to formal disciplinary action including dismissal.
22. At the investigation meeting the claimant was accompanied by his union representative. He was offered the opportunity to watch the CCTV footage but declined. During the meeting the claimant gave a description of the incident that in some respects was different to that captured on CCTV.
23. Following the meeting Mr Wilson wrote a disciplinary investigation report concluding that the matter should proceed to formal action due to breach of section 16.1 of the GSR. He identified that there were some points of

contention and that this was potential gross misconduct. This was based upon Mr Wilson's conclusion that there was a reasonable case that the claimant had deliberately hit the car and that he had not followed the appropriate reporting procedure. All relevant documents were appended to the report.

24. Mr Shear-Smith was asked to conduct the disciplinary hearing in respect of allegations of gross misconduct against the claimant. He met Mr Wilson who briefed him on his investigation, showed him the CCTV footage and gave him the investigation paperwork. Mr Shear-Smith reviewed all those matters and was satisfied that the allegations would amount to gross misconduct if proven and he wrote to the claimant on 21 December inviting him to a disciplinary hearing on 12 January 2018. He added to the allegations that had been identified by Mr Wilson that he had failed to report the incident to control contrary to the GSR. Mr Shear-Smith enclosed copies of the relevant documents and advised the claimant of his right to be represented at the hearing and that if he was found guilty of misconduct or gross misconduct of the possible penalties that could follow. The suspension was continued.
25. The claimant was also advised that if he wanted to view the CCTV footage he should contact Mr Wilson. The footage was later forwarded to the claimant's union representative together with all the other documents. The claimant watched the footage for the first time with his representative.
26. The disciplinary hearing took place as planned on 12 January and the claimant was accompanied by his representative.
27. At that meeting the claimant said for the first time that there had been a second incident where a car had been hit but not as shown on the CCTV footage and that it had been a black car. His union representative said that this needed to be investigated.
28. The meeting adjourned at 11.35 and reconvened at 13.03. During the adjournment Mr Shear-Smith spoke with Mr Wilson and confirmed that there was no record of any other incident that day nor any involving a black car. He reasonably concluded that the incident referred to by the claimant in his handwritten statement was the same incident that was the subject of the complaint and as seen on the footage.
29. On that basis, on resumption of the meeting the claimant was informed that the charges had been found against him and that he would be dismissed for gross misconduct without notice. He was informed of his right to appeal. A letter dated 16 January from Mr Shear-Smith to the claimant confirmed this outcome.
30. On 21 January the claimant submitted his appeal. He said that he had no knowledge of the incident shown on the CCTV footage and also challenged the severity of the penalty. He requested footage of the crossing from 07.30 to 09.30 on 5 December. That was provided to the union on 26 January.

Further footage for the same day between 06.00 and 07.30 was requested and that was provided on 7 February.

31. Mr Margetts wrote to the claimant on 12 February inviting him to an appeal hearing on 23 February. He was informed of his right to representation and copies of all relevant documents were enclosed. The hearing was subsequently rescheduled at the union representative's request to 7 March. Prior to the appeal meeting Mr Margetts watched all the CCTV footage that had been sent to the claimant (3.5 hrs).
32. At the commencement of the appeal hearing the claimant referred to a statement he had written which in summary said as follows:
- a. When he was asked on the morning of 5 December by control if he had hit a car with the barrier, he had said he had. The car had stopped on the crossing because the traffic was queueing and it was unable to exit. He had stopped the lowering sequence above the car's bonnet and as the back of the car went under the barrier he started the sequence again and caught the back of the car with the straps that hang down under the barrier.
 - b. This was not the incident that he had been asked about by control as that incident concerned a car being hit on the side by the barrier.
 - c. When he had said to the manager that he had hit a car he was referring to the incident above. He had said he had done it on purpose but had no idea why he said that.
 - d. When he saw the CCTV footage he realised that it was not the same car i.e. they were talking about different incidents.
 - e. He had been unable to find the car that he had hit by looking at the CCTV footage between 06.00 and 09.30 and that he must have got it mixed up with another day.
33. During the appeal hearing Mr Margetts fully explored the claimant's case with him and his representative including the contents of the claimant's handwritten statement. During an adjournment of about an hour and a half, Mr Margetts considered the claimant's representations, the evidence and advice from HR and concluded that the claimant had not been talking about a second incident in his discussion with Mr Wilson on 5 December, that he had admitted hitting a driver's car deliberately and therefore the dismissal should be upheld. The claimant was advised of this outcome when the meeting resumed and subsequently on writing on 7 March.

Conclusions

34. I am satisfied that the respondent's reason for the claimant's dismissal was his conduct at about 08.30 on 5 December 2017, namely deliberately hitting a car on the crossing with a boom, failing to report the incident and bringing the respondent into disrepute.
35. I find that the respondent, through its decision makers Mr Wilson and Mr Shear-Smith, had a genuine belief in that misconduct.

36. Further, I find that the respondent had reasonable grounds for that belief. In particular the claimant's statements on 5 December both to operations control and to Mr Wilson and his own handwritten and signed statement to that effect. Further, those statements sufficiently matched the description of the incident in the complaint by the member of the public and the CCTV footage of an incident on 5 December.
37. The investigation carried out by the respondent was reasonable and in particular when the claimant brought up the possible issue of a second incident, that was fully considered at both stages of the process and significant extra footage was obtained and watched. It was reasonable for the respondent not to investigate further when the claimant said that the incident he had been talking about must have been on another day, in particular in view of his own statement on 5 December referring to an incident 'today'.
38. In all the circumstances the sanction of summary dismissal was within the band of reasonable responses to the claimant's conduct. He did have significant length of service and a previously clear conduct record however his role was safety critical and he had demonstrated serious failings in that role.
39. Finally, the process adopted by the respondent was a fair and reasonable one. There was no bias within that process and the outcome was not a foregone conclusion as suggested by the claimant.
40. Accordingly, I find that the claimant was not unfairly dismissed.

Employment Judge K Andrews
Date: 10 May 2019