



# EMPLOYMENT TRIBUNALS

***Claimant***

***Respondent***

Mr B Gosling

**AND**

London Underground Ltd

**Heard at:** London Central

**On:** 19, 20 June 2019

**Before:** Employment Judge Davidson (Sitting alone)

## **Representation**

**For the Claimant:** Mr N Toms of Counsel

**For the Respondent:** Miss I Ferber of Counsel

## **RESERVED DECISION - JUDGMENT**

**It is the decision of the tribunal that**

- 1. the Claimant's claim for unfair dismissal fails and is hereby dismissed;**
- 2. the Claimant's claim for wrongful dismissal fails and is hereby dismissed.**

## **REASONS**

### Issues

1. The issues for the hearing were whether:

1.1. the claimant was unfairly dismissed, in particular

1.1.1. whether the respondent carried out a reasonable investigation and

1.1.2. whether dismissal was a fair sanction in the circumstances; and

1.2. whether the claimant was wrongfully dismissed.

Evidence

2. The tribunal heard evidence from the claimant on his own behalf and from Edward Payne (Service Control Manager, formerly Train Operations Manager) and Chris Taggart (Head of Line Operations) on behalf of the respondent. In addition, there was an agreed bundle of documents running to just over 300 pages.

Facts

3. The facts were largely agreed between the parties and are recorded as follows:
  - 3.1. The respondent operates the underground railway system for London. The claimant commenced employment with the respondent in 1994 as a Guard Motor-Man and transferred to be a Train Driver on the Central Line in 1996.
  - 3.2. Train Drivers are responsible to driving the train and operating train doors to allow passengers to alight and board the train at each stop. It is not part of the train driver's responsibility to carry out risk assessments and any incidents should be reported to the line controller by using the train radio and not dealt with by the train driver alone.
  - 3.3. The respondent's health and safety rules and procedures are set out in various company documents, which the claimant had seen and was aware of.
  - 3.4. On 7 February 2018, the claimant was working on the night shift, as he had done regularly since 1999, starting at 9.25pm and finishing at 6.00am. As his train approached Wanstead station, the automatic train operating system failed and the claimant realised that the train was not going to stop at the station. He then applied the emergency brake and the train came to a stop with the front part of the train in the tunnel.
  - 3.5. Inside the tunnel, there are markers to show how far inside the tunnel the front of the train is. The train came to a stop with the front of the train between the markers for 1 and 2 cars length. The claimant took into account that there is a section of platform at Wanstead which is not used for passengers but which is still platform and not tunnel. He therefore calculated that, effectively, only the front car was actually in the tunnel.

- 3.6. He carried out a risk assessment which the train records later showed took place within a 35 second window between the train stopping and the claimant opening the doors.
- 3.7. He opened the 'J-door' between the driver's cab and the passenger area to check if anyone in the first carriage wanted to get off at Wanstead. He found out that nobody did and he asked the two passengers who were standing by the doors to move inside the car. He then checked the train CCTV and reset the train system so that he could open the train doors and then opened the doors. This meant that the cars inside the tunnel had their doors open inside the tunnel, exposed to the live cables.
- 3.8. In the event, some of the second car was also inside the tunnel but the claimant did not realise this.
- 3.9. The claimant then closed the doors and drove on to the next station, Leytonstone, the final station on his route. He admits that he did not contact the line controller or his manager either at the time of the incident, on the journey to Leytonstone or on arrival at Leytonstone.
- 3.10. The explanation given by the claimant for not contacting the line controller at the time was that his priority was to get the customers to Leytonstone on time as many of them catch a connecting train into Central London from Leytonstone and they get cross if they miss the connection. The claimant accepted that he could have contacted the line controller and asked for the Leytonstone train to be held until his train arrived.
- 3.11. During his handover at Leytonstone to the next driver, a member of the public approached him and asked what had happened at Wanstead station. The claimant explained to the customer that the automatic train operation had failed and he had to apply the emergency brake. This was why the train appeared to be travelling too fast and came to a sudden stop.
- 3.12. The claimant says he attempted to call his manager (Christian Haste) before boarding a train from Leytonstone to Liverpool Street, on his way home after his shift had ended. He was unable to get through and spoke to his manager when he arrived at Liverpool Street, by which time his manager was aware of the incident. There was a conflict of evidence during the investigation between the claimant's first and second investigation meetings as to whether he called Mr Haste or whether Mr Haste called him. The investigating officer asked Mr Haste for a statement approximately three weeks after the incident and Mr Haste confirmed that the claimant had phoned him.

- 3.13. The day after the incident, the claimant attended for work and was informed that he was being stood down from safety critical train operating duties while a fact finding investigation took place. The first fact finding interview was conducted by Shahine Korimbocus on 8 February 2018. During the period until his dismissal, the claimant was on other duties.
- 3.14. A second fact finding interview took place on 12 February 2018, conducted by Wojciech Podjaski. At this meeting, the claimant informed the respondent of his domestic situation in that both his parents had been undergoing cancer treatment and that he was divorced with three children.
- 3.15. After the second fact finding interview, Mr Podjaski concluded that there was a disciplinary case to answer. A Company Disciplinary Interview took place on 30 April 2018 conducted by Mr Payne and Mr Berry. The claimant admitted that he had not followed the correct procedures and apologised for his mistake. The disciplinary panel decided that the appropriate sanction was summary dismissal. His employment ended on 4 June 2018.
- 3.16. The claimant appealed against the decision and the appeal hearing took place on 22 June 2018 conducted by Mr Taggart. The grounds of appeal were that the sanction was too severe, there were comparator cases where the employee was not dismissed, this was a momentary lapse and mitigating factors. Mr Taggart took the decision to reject the appeal.
- 3.17. The claimant had a further right of appeal by way of a Directors Review. Mr Nick Dent (Director of Line Operations) conducted the Directors Review and upheld the dismissal decision.

#### Law

4. The relevant law is set out in section 98 of the Employment Rights Act 1996. As this is a dismissal on the grounds of alleged misconduct, the test in *BHS v Burchell [1978] IRLR 379 EAT* applies so that, in order for the dismissal to be fair:
  - 4.1. the respondent must have a genuine belief that the claimant committed the misconduct;
  - 4.2. there must be reasonable grounds for that belief;

- 4.3. the respondent must have conducted a reasonable investigation into the allegation.
  - 4.4. In addition, the respondent must act reasonably in all the circumstances by following a fair procedure and the sanction must be within the range of reasonable responses.
  - 4.5. It is not for the tribunal to form its own view whether the claimant should have been dismissed, only to assess whether the respondent reached a decision which was within the range of reasonable responses.
5. An employee will be wrongfully dismissed if he is dismissed without receiving the contractual or statutory notice he is entitled to, or payment in lieu of that notice. In cases of gross misconduct, the right to notice is forfeited.

#### Determination of the Issues

6. I determine the issues as follows:
- 6.1. I find that the respondent had a genuine belief that the claimant had committed an act of misconduct. This is based on the claimant's admission that he had breached the safety procedures and it is therefore a reasonable belief.
  - 6.2. I go on to consider whether the investigation was adequate in the circumstances. The claimant alleges that the investigation was defective because the dismissing manager and the appeal manager found Mr Haste's unequivocal statement (that the claimant had called him, not the other way round) unreliable without interviewing him directly. The reason given by the respondent for not accepting Mr Haste's statement is that it referred to events three weeks previously and was therefore unreliable. I find that this reasoning is not sustainable.
  - 6.3. I must then consider what the relevance of this issue is. The respondent concluded that the claimant had not intended to report the incident at all and only did so because the handover driver became aware of the issue from the conversation with the customer at Leytonstone. If the respondent's conclusion had been based solely on its view that Mr Haste's evidence could not be relied on, that would not, in my view, have been a reasonable conclusion. However, I find that the respondent's view is based on a number of factors, in particular the initial comment from the claimant (that he had been called by Mr Haste) before he then amended his evidence (to state he had called Mr Haste). Mr Haste's own evidence supports the claimant's second version of events but there are a number of

other factors which support the claimant's initial version, such as his failure to report the matter at various earlier opportunities. Although he provided an explanation for not reporting it immediately (his focus being to get the customers to Leytonstone for a connecting train), he has not provided any explanation for failing to report once he had arrived at Leytonstone. It is particularly telling that Mr Haste is located at Leytonstone and the respondent concluded that the claimant would have taken one of the various opportunities to report the matter if he had intended to. The respondent also took into account the conversation with the customer which meant that the matter would come to the attention of the manager and the respondent considered that this would explain why the claimant then spoke to his manager, when he had not attempted to do so previously.

- 6.4. The respondent contends that, in any event, how and when the claimant finally spoke to his manager is not relevant to the issue of dismissal. It is accepted by the claimant that he acted in a way which was a serious breach of the respondent's procedures by opening the train doors while the train was in a tunnel and by failing to report the matter at the time. The purpose of reporting is to allow the respondent to react to the incident immediately in case there has been any harm to customers or damage. By speaking to his manager 20 minutes later, that opportunity had passed. The respondent maintains that the primary reason for dismissal was the claimant's actions in opening the train doors while the train was in a tunnel and failing to follow the reporting protocols.
- 6.5. I accept that the reason for the claimant's dismissal was the way he dealt with the opening of the doors and the delay in reporting the incident. Whether he reported the incident later by calling Mr Haste or whether Mr Haste called him is a subsidiary issue and not a factor in the decision to dismiss. I note that the respondent's conclusion that the claimant did not call Mr Haste is described as an 'aggravating' factor, I accept the respondent's evidence that the dismissal would have been the outcome even if the finding had been that the claimant called Mr Haste from Liverpool Street, 20 minutes after the event.
- 6.6. The claimant also alleges that dismissal was too severe a sanction in the circumstances. The mitigating factors relied on by the claimant is his length of service and the fact that he made one mistake, which he acknowledged and for which he apologised.
- 6.7. I find that an employer should take into account the employee's length of service and assess the likelihood of the employee repeating

the offence. In this case, Mr Payne states that he took into account the claimant's length of service but that served to make the offence worse, not better, in that the claimant knew exactly what he should have done but chose not to. The respondent concluded that this showed complacency.

- 6.8. Even if I consider that the claimant's length of service or his apology and acknowledgement should have counted for more in weighing up the mitigating factors, I must remind myself that I must not substitute my view for that of the employer. Instead, I must consider whether the respondent's sanction was within the range of reasonable responses. I find that it was. Although some employers may have exercised leniency, it was within the range of sanctions to dismiss, bearing in mind the responsibility that drivers have for ensuring the safety of their passengers which, as part of that responsibility, requires them to follow the rules and their training and not to make their own decisions regarding risk.
- 6.9. The claimant has also cited his domestic situation as a mitigating factor. This cannot constitute a valid explanation for breaching safety duties. If a driver is not in a fit state to operate a train, however valid the reason may be, it is not acceptable for that driver to take the responsibility of operating the train. It is possible that the claimant's domestic situation could be relevant in imposing a more lenient sanction such as redeployment to non-safety critical duties on the basis of having sympathy with his situation, but I do not find that the respondent is required to exercise this leniency. The decision to dismiss is within the range of reasonable responses.
- 6.10. The claimant has relied on decisions relating to other employees within the respondent's business as comparators to show that the sanction imposed on him was inconsistent with other cases and unduly harsh. He brought some examples to his disciplinary hearing and has brought other examples to this hearing, including the appeal outcome of a driver in similar circumstances to him whose dismissal for gross misconduct was overturned on appeal. I have reviewed these and I find that they do not evidence any inconsistency on the part of the respondent. The employee who appealed successfully was originally dismissed for gross misconduct for the same offences as were committed by the claimant. His successful appeal did not find that the original decision had been flawed and his appeal was allowed on compassionate grounds. Although it was open for the claimant's appeal to be allowed on compassionate grounds, the respondent was not obliged to do so.

- 6.11. I therefore find that the claimant's dismissal was a fair dismissal. The claimant's complaint of unfair dismissal fails and is hereby dismissed.
  
- 6.12. I find that the claimant committed a fundamental breach of his employment contract by failing to follow the express safety procedures. He was aware of the rules and chose not to follow them. His claim for wrongful dismissal therefore fails and is hereby dismissed.

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Employment Judge Davidson

Dated: 25 June 2019

Judgment and Reasons sent to the parties on:

16<sup>th</sup> July 2019

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For the Tribunal Office