**Case Number:** 3328088/2017

# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| Mr B Mustafa | v | Metroline West Limited |

**Heard at**: Watford **On**: 17, 18, and 19 July 2019

**Before**: Employment Judge Hyams, sitting alone

**Appearances:**

**For the claimant:** Mr I Komusanac, solicitor
**For the respondent:** Mr C Ludlow, of counsel

# JUDGMENT

(1) The claim of detrimental treatment for trade union activity is dismissed on its withdrawal by the claimant.

(2) The claim of unfair dismissal does not succeed. The claimant was not dismissed unfairly.

# REASONS

## Introduction

### (1) The claim and its procedural history

1 This is a claim of unfair dismissal, contrary to sections 94 and 98 of the Employment Rights Act 1996 ("ERA 1996"). The claim (stated in an ET1 claim form which was issued on 25 September 2017) was originally of unfair dismissal

and of detrimental treatment of the claimant because of the claimant's trade union activities, but that part of the claim was withdrawn in a letter to the tribunal dated 25 September 2018. That part of the claim had not, by the start of the hearing, been formally dismissed and the parties accepted that rule 52 of the Employment Tribunals Rules of Procedure 2013 required me in the circumstances to dismiss that part of the claim by a formal judgment.

2 There were several closed preliminary hearings after the ET3 response form was filed. There was a hearing in person before Employment Judge Bedeau on 2 February 2018 (the record of which was at pages 23-27 of the hearing bundle; any reference below to a page is to a page of that bundle), there was a telephone hearing conducted by Employment Judge Henry on 13 September 2018 (the record of which was at pages 28-31), and a further telephone hearing conducted by Employment Judge Henry on 14 November 2018 (the record of which was at pages 32-38).

**(2) The evidence and the issues which I determined**

3 The respondent's claimed reason for dismissing the claimant was his conduct. The claimant did not claim that his dismissal was wrongful. He claimed only that it was unfair. As a result, it was going to be necessary to decide precisely what the claimant had done before his dismissal only if the claim of unfair dismissal succeeded and it was necessary to determine what compensation should be awarded to him. At the outset of the hearing, I agreed with the parties that I would decide the question whether the claimant was dismissed unfairly first, and only if I decided that his dismissal was unfair would I decide whether he had done that for which the respondent claimed it had dismissed him or some other conduct which justified a reduction in the compensation which should be paid to him. Accordingly, the issues which I determined were those stated in paragraphs 2-4 on pages 32-33, namely (reframing them slightly):

3.1 What was the reason for the claimant's dismissal? Was it (as the respondent claimed) the claimant's conduct?

3.2 Did the persons responsible for deciding that the claimant should be dismissed genuinely believe that the claimant had committed misconduct?

3.3 Did the respondent conduct a reasonable investigation into the alleged misconduct of the claimant before deciding that he should be dismissed for that conduct, i.e. was that investigation one which it was within the range of reasonable responses of a reasonable employer to conduct?

3.4 Were there reasonable grounds for the belief of whoever decided that the claimant should be dismissed that the claimant had committed the misconduct for which he was in fact dismissed?

3.5 Was the claimant's dismissal within the range of reasonable responses of a

reasonable employer? In this regard the claimant claimed (among other things) that his dismissal was outside that range of reasonable responses because other employees who had been accused of conduct which was worse than (or at last as culpable as) that for which he was dismissed had not been dismissed. The manner in which it was alleged that the claimant's dismissal was outside the range of reasonable responses of a reasonable employer was refined in the written submissions put before me on his behalf by Mr Komusanac, as described below.

4 I heard oral evidence from (1) Ms Folahan Olawo-Jerome, a Garage Manager employed by Metroline Travel Limited, (2) Mr Ian Dalby, Deputy Operations Director of Metroline Travel Limited, and (3) Mr Sean O'Shea, the current Chief Executive Officer of the bus and coach subsidiaries in the United Kingdom of ComfortdelGro, which included at the material time (and in fact still include) the respondent and Metroline Travel Limited. I also heard oral evidence from the claimant. The claimant put before me in addition two short, in fact unsigned, witness statements (made by Mr Dalton Burnett and Mr Louis Thomas, who were both former colleagues of the claimant) that were in effect character references, and I was asked to accord them such weight as I thought was appropriate. I was also referred to a number of documents in the 490-page hearing bundle. Having considered that evidence, I made the following findings of fact.

## The facts

### (1) The parties

5 The claimant was employed by the respondent (treating any employment with a transferor under the Transfer of Undertakings (Protection of Employees) Regulations as being employment by the respondent) continuously from 10 June 1999 until 26 June 2017, when he was dismissed summarily from his employment with the respondent.

6 The respondent is a public transport service provider, and the claimant was, when he was dismissed, employed as a bus driver. He had in the past been employed for four years as a service controller and for approximately 12 years he was a representative of Unite, the trade union. At the time of the claimant's dismissal, he was based at the respondent's Willesden Junction Garage.

### (2) The circumstances which led to the dismissal of the claimant

(a) The claimant's back pain

7 On Friday 12 May 2017, the claimant self-certified that he was not well enough to work as a bus driver because of "*back pay*" i.e. back pain, as recorded on the certificate of that date at page 103. (English is not the claimant's first language, and he was, at his request, assisted by an interpreter during his cross-

examination.)

8 On Monday 15 May 2017, Ms Anna Tkaczyk, an Operations Manager employed by the respondent at Willesden Junction Garage, wrote to the claimant the letter at page 104, arranging an interview with him to discuss the absence which had commenced on 12 May 2017. The interview was to take place on 23 May 2017.

9 On 19 May 2017, the claimant was given a statement of fitness for work by his doctor (page 105). That stated that the claimant had "*back pain*" and "*may be fit for work taking account of the following advice*", which included:

> "No driving duties, plz refer your employee to local occupational health to assess further."

10 The planned meeting of 23 May 2017 took place. There were handwritten notes in the bundle at pages 108-111 which purported to have been made on the day of that meeting. The claimant claimed that they were made up after the event and were not a true record of the meeting, but he accepted that a meeting took place with him on that day. The note at pages 108-110 was headed "File note 23.05.17", was signed by Ms J Carter, and recorded that the claimant and Mr B Swann, "TU Convener", were the other persons present at the meeting. The note at page 111 purported to have been made by Ms Tkaczyk and it recorded that she had asked the claimant to attend a meeting at her office but that he had not gone to her office and had instead gone to Ms Carter's office.

11 The claimant claimed that he did not agree, as the file note recorded at page 109, that he would "*drive 1 full rounder Mon-Friday, whilst spending the rest of the day seeing driving staff*". He said that he did not agree to that since one cannot agree to breach health and safety requirements and it was a breach of such requirements in the circumstances described in paragraph 9 above to require him to drive at all without the advice of an occupational health adviser that he was fit to drive. Neither of the note-takers was present to prove them, but Mr Dalby gave evidence that he had seen those notes and taken them into account when (as I describe below) he heard the claimant's appeal against his dismissal. Mr Dalby said that the handwritten notes were not untypical of notes made by managers of an ad hoc meeting for example to discuss an employee's sickness, and that they were of the sort which the respondent advises managers to make so that if there is any disagreement subsequently about what was said, then there is a record of it. The notes had evidently not been given to the claimant at the time, but there was no doubt that the claimant did, after that meeting, after the request made by Ms Tkaczyk on the same day (page 112) to Medigold Health, see an occupational health practitioner on 13 June 2017. The record of the consultation was at page 137, and it stated that the claimant should be "*limited to 4 hrs, as is now*". In addition, there was at pages 135-136 a copy of a letter dated Friday 26 May 2017 from Ms Carter, which consisted principally of this passage:

> "I am writing to confirm the outcome of our meeting on 23rd May 2017 regarding your period of sickness which had commenced on 12th May 2017. You had been invited in for a sickness review meeting with Operations Manger Anna Tkaczyk, but came in to see me accompanied by Bruce Swann Unite Convener.
>
> During our meeting you advised me that you have been suffering from back pain, and on Friday of last week, you attended A&E due to further discomfort and investigations were carried out on your kidneys, for which you await the results. You presented a medical certificate from your GP which stated that you were not fit for driving duties, but may be fit for amended duties / phased return to work and this would be the case for 1 month. The certificate was signed on the 19th May 2017. You also provided us with a copy of all the prescribed medication that you currently take for our records.
>
> We discussed your current condition in some detail and also how we could best assist in ensuring your return to work, taking into account the recommendation from your GP. I advised you that we do not have light duties available, however, there was currently a need for assistance in education of driving staff regarding the introduction of a new log card and vehicle defect card, which was imminent.
>
> With this in mind, we agreed that you would work Monday to Friday completing 1 full rounder of a duty, spending the rest of your working day seeing driving staff. It was also subsequently agreed that you would be paid rostered earnings in conjunction with the rota line assigned to you on Route 187. The arrangement was to provide assistance to you in returning to your full time duties as well as to allow time for further investigations to take place.
>
> I further advised you that this would be a temporary arrangement and you would therefore be expected to return to your full duties on at the end of your current medical certificate. Both you and your representative ensured me that you wished to return to full duties and fully understood what I had explained to you."

12 I accepted that letter as being an accurate record of what occurred during the meeting of 23 May 2017. Even though I had not heard from Ms Carter, it was consistent with the other contemporaneous documentation, including the document at page 137, to which I refer above.

(b) The events of 14 June 2017 for which the claimant was dismissed

13 On 14 June 2017, the claimant was required by the respondent to go to a bus stop at which he was going to take over the driving of a bus (apparently it was on route 206). The parties referred to that as "duty 406". The claimant said in oral evidence that he was required to wait for 2 hours for the bus, but there was in

the bundle at page 139 an "Official Report" made by Ms Tkaczyk on that day, in which she recorded that on that day, while she had been on duty as Operations Manager, she had received a telephone call from the claimant "*saying that he has been waiting over 50 minutes at changeover point for his bus on duty 406*".

14 Mr Paul Blackford, whose job title was "iBus Controller", was subsequently apparently sent to meet the claimant at the changeover point for duty 406 and to give the claimant instructions as to what to do. In fact, it later became clear, the bus was not late, but had not been sent out on the road at all. That was in all probability because of the disruption to London transport which was caused by the fire at Grenfell Tower, which occurred on that day and was by then blazing away.

15 What happened next was the subject of a major conflict of evidence between the claimant and Mr Blackford. There were in the bundle at pages 138-141 three incident reports of what had happened on 14 June 2017 both when Mr Blackford met the claimant and when they were both back at the Willesden Junction Garage. One of those was made by Ms Tkaczyk purportedly on that day, as noted above. Another was made by Mr Blackford purportedly on that day (pages 140-141). The third was at page 138 and was purportedly made by Ms Violetta Hollanda on 15 June 2017. Ms Hollanda was, like Ms Tkaczyk, an Operations Manager. Mr Blackford's report was to the effect that he had gone to meet the claimant at the changeover point for duty 406 (which was, it was clear, only a few minutes' walk from the Willesden Junction Garage) and that he had met the claimant coming the other way, i.e. having evidently decided for himself to leave the changeover point. Mr Blackford's report was that he had asked the claimant whether he was "*duty 406 on the route 206?*", and that the claimant (whom, it was common ground, he did not know; i.e. neither of them knew the other before this exchange between them) had said "*Yes*". Mr Blackford's report continued in this way:

> 'I asked the above driver if he could show me his duty card. The above driver showed me his duty card so I went to hold the card, the above driver snatched the duty card back so I could not look at it..
>
> I said to the above driver, "what are you doing? you are here with me and I am trying to help you".
>
> Driver responded with a raised voice, "I have been waiting for an hour for my bus", I replied "I know, please follow me to the garage and I will allocate you another bus. Please let me see your duty card".
>
> At this point the driver was getting agitated and responded by telling me to Fuck Off.
> I responded to the driver by saying, "did you just told me to Fuck Off?".
> Driver replied "you are a Bitch Fuck Off".

> Driver was informed the he was now suspended, as I walked away from the driver he said "I smack you Bitch".
>
> I felt threatened by the drivers actions and walked away.
>
> I walked in to the garage output and told the counter official of the suspension as I was walking into see Operations Manager Anna Tkaczyk, I witnessed the above driver walk into the canteen, I informed Anna of the situation, whilst with Anna the above driver walked into the office and started to inform Anna of his version of the situation, I tried to correct the driver on a couple of occasions and he ignored stating "I don't want to talk to you" this in an aggressive manor raising his voice. I then left the office as requested to from Anna Tkaczyk.'

16 The claimant was invited by a letter dated 15 June 2017 (page 142) to an investigation meeting on the same day, at noon. The claimant attended the meeting. There were notes of the meeting at pages 144-156. They showed that the meeting in fact started at 12:30. Mr G Loughlin (who was employed by Metroline Travel Limited, and not the respondent) was the investigator. The claimant was accompanied by Ms Joan Campbell, a Unite representative. The notes show (and the claimant did not give evidence that they were inaccurate in this respect) that the claimant was given copies of the reports of Mr Blackman, Ms Hollanda and Ms Tkaczyk at pages 138-141. The claimant's evidence given at the hearing before me on 17 July 2019 was that Mr Blackford had snatched his (the claimant's) duty card from the claimant and that he (the claimant) had taken it back. The notes showed (at page 146) that the claimant said to Mr Loughlin that the person whom he by then (15 June 2017) knew was Mr Blackford said "*Are you 406 duty?*", and then, when the claimant acknowledged that he was, "*Come with me*". The claimant then said *"he took my duty card from the hand with force*", that he (the claimant) and Mr Blackford then walked back to the garage and

> 'as we come into the garage I snatched back from him and said "It's my duty who are you?" He said to me, "you are working for me" and I said to him "I am not working for you, I don't know who you are, if you have something to say officially, then go to the garage and report me". He then went in front of me and I didn't see him any more.'

17 The claimant denied using the language that Mr Blackford said he (the claimant) had used.

18 Mr Loughlin also interviewed Mr Blackford, Ms Tkaczyk and Ms Hollanda. The claimant was not present during those interviews (noted at pages 151-155). Mr Loughlin then saw the claimant again and informed him, giving his (Mr Loughlin's) reasons, that he (Mr Loughlin) had decided that the claimant should be the subject of a formal disciplinary hearing on 22 June 2017 to consider the following disciplinary charge (page 155):

> "Conduct - Using Threatening behaviour and foul and abusive language towards a Metroline official on 14/06/17".

19 On the following day, the claimant was sent the letter at pages 158-159 formally requiring him to attend a disciplinary hearing on 22 June 2017 at Holloway Garage, to be chaired by Ms Olawo-Jerome, who (like Mr Loughlin) was an employee of Metroline Travel Limited, and not the respondent. Her involvement was explained by her in paragraph 2 of her witness statement as being

> "to ensure complete impartiality because [the claimant] was not only a bus driver but also a union representative with Metroline West Limited (Respondent) and hence known to its managers; and further he had been involved in an incident previously, the history of which was well-known within the respondent but not within MTL."

20 On 19 June 2017, a grievance was sent to Ms Carter. It was at page 162 and was about several things, including a failure to review the claimant's suspension, and that Mr Loughlin was employed by Metroline Travel Limited, and not the respondent. I record here that the claimant said that he was not aware that that grievance had been sent, but that it was referred to by Ms Olawo-Jerome at the end of the disciplinary hearing, as I record in paragraph 26 below.

21 On 20 June 2017, the claimant sent an email to Mr K Thomas and copied it to Mr O'Shea (page 164). It was to the effect that he (the claimant) should not have been asked to drive a bus after he had sent the respondent the medical certificate of 19 May 2017 to which I refer in paragraph 9 above.

22 The claimant attended the disciplinary hearing of 22 June 2017. Notes of it were made, and they were at pages 166-201. The claimant was accompanied at it by Mr Bruce Swann, of Unite. Mr Blackford attended and gave evidence to Ms Olawo-Jerome. So did Ms Tkaczyk and Ms Hollanda. The claimant asked for a witness by the name of Florian Krasnici to attend as a witness, and he did so. His (Mr Krasnici's) evidence (noted at pages 171-172) did not contradict that of any other witness.

23 The hearing started at 10:29 on 22 June 2017 and continued until 16:55 on that day. It was then adjourned to, and resumed on, 26 June 2017, when it resumed at 11:05. It went on until 16:50 on that day.

24 Ms Olawo-Jerome concluded that the disciplinary charge was made out, that is to say that the claimant had committed the misconduct of which he had been accused, namely "Using threatening, foul and abusive language towards an official". She treated it as constituting gross misconduct, apparently because as she understood it the respondent's disciplinary procedure treated it as such. In fact, the respondent's disciplinary procedure at pages 44-45 did not in terms state that "Using threatening, foul and abusive language towards an official" was

gross misconduct, but it did (at page 45) state that "threatening behaviour including verbal harassment" was viewed by the respondent as gross misconduct.

25 Ms Olawo-Jerome concluded that the claimant should be dismissed for "using threatening, foul and abusive language towards an official" (as recorded at the top of page 201). She told me (and I accepted her evidence in this regard) that she had concluded that the claimant had "*used the F word*" twice towards Mr Blackford, and that he had said that he would "*smack*" Mr Blackford, whom he also called a "*bitch*". The decision was recorded in a letter dated 26 June 2017 of which there was a copy at pages 202-203. I accepted Ms Olawo-Jerome's evidence that that letter accurately recorded her real reasons for concluding that the claimant should be dismissed.

26 Ms Olawo-Jerome's conclusions in the notes of the disciplinary hearing (the contents of which notes I also accepted were accurate) ended with this paragraph on page 201:

> "At the end I also explained that the grievance you submitted on 19 June 2017 was not related to this disciplinary hearing. If it was, it would have been in the bundle for me to discuss at the hearing however your medical condition at the time of the incident has no bearing on the allegation of using threatening and foul and abusive language towards an official."

27 It was put by Mr Komusanac to Ms Olawo-Jerome in cross-examination that she had gone (automatically) from the conclusion that the conduct which she had concluded the claimant had committed was gross misconduct to the conclusion that the claimant should be dismissed. She said that a conclusion that conduct of which an employee had been found by her to be guilty was gross misconduct was only the starting point. She was asked about her experience of chairing disciplinary hearings and she had, she said, conducted about 100 disciplinary hearings. She said that she had taken a lot of things into consideration here. They included (it was clear from the notes at page 196 and Ms Olawo-Jerome's oral evidence in this regard, which I accepted) the claimant's length of service, the fact that the day was hot and the claimant was waiting out in the open for an hour before returning to the garage. Ms Olawo-Jerome said that she had taken into account any mitigating circumstances there were. She plainly took into account, in deciding that the claimant should be dismissed for the conduct of which she had found him guilty, the fact that the claimant was issued with a warning in 2016 for using foul and abusive language against a fellow member of Unite. That warning had expired by 14 June 2017. Ms Olawo-Jerome also took into account the fact that there were some inconsistencies in the evidence of Mr Blackford, Ms Tkaczyk and Ms Hollanda.

28 The claimant appealed against the decision that he should be dismissed. Mr Dalby chaired the appeal. The other panel member was Mr L Webley. Notes of the appeal hearing were made and there were copies of them at pages 205-223.

The first part of the appeal hearing (which started at 09:55 on 3 July 2017) consisted of the claimant and Mr Swann making representations to Mr Dalby and Mr Webley. During that part of the hearing it became apparent that, to the surprise of all involved, the CCTV equipment at Willesden Junction Garage made not only video but also audio recordings. There were several relevant recordings. They were listened to during the appeal hearing, and what was heard by the respondent's witnesses was recorded in the notes at pages 212-215. I was given a copy of the recordings, and viewed them on a computer with the sound amplified as much as possible using an external amplifier and headphones, and the notes at pages 212-215 were in all material respects accurate.

29 Mr Dalby's evidence included the statement (in paragraph 16 of his witness statement) that the CCTV footage showed that "first of all, Mr Mustafa did not deny that he had been aggressive and threatening on the road with Mr Blackford." In fact, that was not a fair representation, since the claimant had indicated (in the middle passage on page 213) that he had not said the words alleged by Mr Blackford.

30 The part of the hearing when the Claimant and Mr Swann were present continued until 15:35 on 3 July 2017. The hearing was then adjourned. Mr Dalby and Mr Webley then resumed the hearing without the claimant or Mr Swann present at 07:30 on 6 July 2017 and they then interviewed Ms Tkaczyk, Mr Sohrab Phaiwastoon (who had accompanied Mr Blackford from the Willesden Junction Garage when he walked up to see the claimant), and Ms Hollanda in turn. At 15:00 on that day, Mr Dalby and Mr Webley drew a series of conclusions which were stated in numbered points on pages 217-220, and then set out a series of (unnumbered) considerations, leading to the conclusion (stated on page 223) that the claimant's appeal should not succeed and that he should remain summarily dismissed.

31 That conclusion was communicated to the claimant in a letter dated Friday 7th July 2017 of which there was a copy at pages 236-237. With that letter was enclosed a copy of the notes at pages 205-223. Having heard Mr Dalby give evidence, I accepted that those notes and that letter accurately recorded the real reasons for Mr Dalby's and Mr Webley's dismissal of the claimant's appeal against the decision that he should be dismissed.

32 The claimant then sought to overturn that decision by asking for a Director's Review, for which there was provision in paragraph 3.17 on page 48. That provides for the carrying out of a review "where it is believed that there has been a serious breach in the process described in this procedure." The claimant wrote to Mr Sean O'Shea, who was at that time the Chief Operating Officer of "the ComfortDelGro bus and coach subsidiaries in the UK, including the Respondent, Metroline West Limited". Mr O'Shea told me that "Metroline West Limited and Metroline Travel Limited are sister companies and subsidiaries of Metroline Limited", which is itself is a subsidiary of Braddell Limited, which is a subsidiary

of ComfortDelGro, which is a listed company in Singapore. Mr Dalby told me that he did work for both the respondent and Metroline Travel Limited, and Mr O'Shea clarified in oral evidence that that occurred because the ComfortDelGro subsidiaries have in the contracts of employment of their employees a power to require the employees to work at other locations of the relevant employer and for other companies within the group. I accepted that evidence of Mr O'Shea and Mr Dalby.

33 Mr O'Shea held a meeting with the claimant on 18 July 2017, of which there were notes at pages 243-244. The claimant, in cross-examination, was asked to look at those notes, and said that they were "more or less" correct. Mr O'Shea then concluded that the claimant's appeal to him should be dismissed and informed the claimant of that decision on the telephone on 21 July 2017. Mr O'Shea made a note of what he said to the claimant then. There was a copy at page 245. The claimant accepted that that note was "accurate" as far as it went, but said that it was rather concise.

34 Mr O'Shea wrote but inadvertently did not send the letter of which there was a copy at page 246 (stated in a handwritten note on that page to be a "draft not sent"). I accepted Mr O'Shea's evidence that he had not found there to be any justification for concluding that there had been a serious breach of the disciplinary process and that the draft letter contained an accurate statement of his conclusions.

**(3) Other situations in which employees of the respondent were accused of abusive and threatening language**

35 The claimant gave oral evidence that he had been involved in defending other employees who had been accused of threatening and abusive language and that in no such case had the employee been dismissed, let alone dismissed for gross misconduct. The claimant claimed that there were two cases which were comparable to his: that of Mr G, the papers relating to whom were at pages 268-279, and that of Mr O, the papers relating to whom were at pages 281-313. The outcomes of those cases were based on findings of fact recorded at pages 278 and 311-312 respectively. At page 278 it was concluded that it "could not be established who had said what", and that "the CCTV evidence did not show you [i.e. Mr G] or the roadside controller behaving in an unprofessional manner". The document at pages 311-312 showed that it was decided by the respondent's decision-maker that Mr O had 'told the controller several times that "You don't know who you are talking to" which in my perception [i.e. that of the decision-maker] is far more threatening than pointing with finger [which is what had been done to Mr O by the controller]".

36 Mr Dalby gave oral evidence that he had, overnight between 16 and 17 July 2019, looked through the respondent's records and found that since 2011 he had chaired 160 appeals, 35 of which had been against decisions to dismiss the

employee summarily, and that of those 35 cases, two had been for foul, abusive and threatening behaviour: one for such behaviour towards a member of the public and one for such behaviour by a driver towards a supervisor. I accepted that of evidence of Mr Dalby.

**The parties' submissions**

37 I received written submissions from both Mr Komusanac and Mr Ludlow. They were supplemented by focused oral submissions, and I was grateful for the conciseness of those oral submissions. Mr Ludlow's submissions were rather more lengthy than those of Mr Komusanac, but since (as will be apparent from what I say below) Mr Ludlow's submissions accorded with my own conclusions, I refer below only to those of Mr Komusanac.

38 Mr Komusanac's submissions were to the effect that

38.1 (relying on the decision of the Employment Appeal Tribunal in *Brito-Babapulle v Ealing Hospital NHS Trust* UKEAT/0358/12/BA) Ms Olawo-Jerome had concluded that the claimant had committed gross misconduct and therefore should (as a matter of course) be dismissed;

38.2 Ms Olawo-Jerome had failed properly to take into account the inconsistencies in the evidence of Mr Blackford and Ms Hollanda about what, precisely, Mr Blackford had said to the claimant about the claimant being suspended and the timings of the events (but in oral submissions Mr Komusanac acknowledged that minor differences of evidence relating to the timings were not significant);

38.3 Ms Olawo-Jerome had failed to take into account the mitigating circumstances that existed, including the claimant's long service, the long wait that he had had to endure in the open on 14 June 2017, which was a hot day, and his medical condition, i.e. his back pain; and

38.4 the circumstances of Mr O and Mr G to which I refer in paragraph 35 above.

39 Mr Komusanac (sensibly) did not assert that it was outside the range of reasonable responses of a reasonable employer to have Ms Olawo-Jerome and Mr Dalby deciding whether or not the claimant should be dismissed: rather than being a problem for the claimant, it seemed to me that their involvement was genuinely and reasonably designed to maximise the chances of the claimant receiving a fair hearing.

**Relevant law**

40 The issues stated in paragraph 3 above reflect the main issues arising in a claim

of unfair dismissal where the dismissal was express (i.e. and therefore not "constructive") and the employer's claimed reason for the dismissal was the employee's conduct.

41 In regard to the question of reliance on a lapsed warning, there is this helpful passage in *Harvey on Industrial Relations and Employment Law*, at paragraph DI[1541]:

> "The outcome of the decisions in *Diosynth Ltd v Thomson* [2006] IRLR 284 and *Airbus UK Ltd v Webb* [2008] EWCA Civ 49, [2008] IRLR 309 (see below) is that it may be reasonable for employers to rely on misconduct that is the subject of an expired warning to justify dismissal if the subsequent misconduct, which is the reason (or principal reason) for dismissal itself, justifies dismissal but not to tip the balance if the subsequent misconduct does not itself justify dismissal. It may in particular be reasonable if the employer is considering not just the particular lapsed warning per se, but as part of the employee's overall disciplinary record over time."

42 Both parties referred me to (and I already had firmly in mind the principles in) the case of *Paul v East Surrey District Health Authority* [1995] IRLR 305 about the need, where it is claimed that a disparity in treatment was unfair, for the claimed comparable case to be truly comparable with that of the claimant. The importance of bearing in mind that there may be different individual circumstances justifying a different approach was emphasised in that case.

**My conclusions**

43 I came to the conclusion that the claimant's dismissal was not unfair. That is for these reasons.

43.1 As indicated in paragraphs 25 and 31 above, I found that both Ms Olawo-Jerome and Mr Dalby genuinely believed that the claimant had used threatening, foul and abusive language towards Mr Blackford and that the real reason for deciding that the claimant should be dismissed was that conduct.

43.2 I concluded that the respondent had, at the very least by the time of the conclusion of the appeal chaired by Mr Dalby, carried out a reasonable investigation into the matter. In fact, it was a thorough investigation.

43.3 I concluded that there were indeed reasonable grounds for concluding that the claimant had committed the conduct for which he was dismissed. The CCTV footage, with its audio recordings, put that matter beyond doubt.

43.4 I concluded also that the claimant's dismissal was within the range of

reasonable responses of a reasonable employer. I did so both because of my assessment of the gravity of the misconduct of which Ms Olawo-Jerome and Mr Dalby found the claimant guilty, and because the circumstances and outcomes of the cases against Mr O and Mr G were in my judgment not truly comparable. The more obviously comparable case was that of Mr O, but the conclusion of the decision-maker was that Mr O had not (as was alleged at page 282) said to the controller "*you will be punch if you talking to me like that*". In contrast, Ms Olawo-Jerome and Mr Dalby had concluded that the claimant had said that he would "*smack you bitch*" to Mr Blackford and, as I say above, there were reasonable grounds for that conclusion. In addition, I concluded that the circumstances of the two cases (that of the claimant and Mr O) were not truly comparable principally because (1) the claimant had been given a final written warning in 2016, and even though it had expired, it was within the range of reasonable responses of a reasonable employer to take it into account in deciding that the claimant should be dismissed, and (2) there was no sign of such a warning having been given to Mr O before he was disciplined as recorded at pages 311-312.

44 For the avoidance of doubt, I did not accept that Ms Olawo-Jerome had concluded that the claimant had committed gross misconduct and therefore should (as a matter of course) be dismissed. Nor did I accept that Ms Olawo-Jerome had failed properly to take into account either (1) the inconsistencies in the evidence of Mr Blackford and Ms Hollanda about what, precisely, Mr Blackford had said to the claimant about the claimant being suspended and the timings of the events, or (2) any of the mitigating circumstances including the claimant's long service, the long wait that he had had to endure in the open on 14 June 2017, which was a hot day, and his medical condition, i.e. his back pain. She had plainly taken the latter factor into account, but discounted it as a mitigating factor, and in my view it was within the range of reasonable responses of a reasonable employer to do that.

45 Also for the avoidance of doubt, while Mr Dalby's conclusion about what the CCTV footage showed (to which I refer in paragraph 29 above) was in my view mistaken, that did not place the claimant's dismissal outside the range of reasonable responses of a reasonable employer. That is because the CCTV footage showed that Mr Blackford had, just minutes after meeting the claimant for the first time on 14 June 2017, reported the threatening and offensive words which both Ms Olawo-Jerome and Mr Dalby concluded the claimant had said to Mr Blackford. Thus there was much evidence in the CCTV footage which supported strongly the accounts given by Mr Blackford, Ms Tkaczyk and Ms Hollanda in their reports at pages 138-141.

46 For all of the above reasons, the claim of unfair dismissal does not succeed.

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Employment Judge

Date: 19 July 2019

JUDGMENT SENT TO THE PARTIES ON

31/7/2019

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FOR THE TRIBUNAL OFFICE