



EMPLOYMENT TRIBUNALS

Claimant: Mr David Maynard

Respondent: Ancass Limited t/a L J Edwards Coach Hire Company

Heard at: London South

On: 13 November 2019

Before: Employment Judge Fowell

Representation:

Claimant Mr L Harris, instructed by Andrew Board of Cornfield Law LLP

Respondent Ms H Lunny of Backhouse Jones Solicitors

JUDGMENT

The claimant's dismissal was unfair

REASONS

Introduction

1. The claimant, Mr Maynard, was employed by the respondent, Ancass Ltd, as their Transport Manager. They trade as L. J. Edwards Coach Hire. It is a family-run business with 18 staff, seven full-time drivers and three part-time drivers
2. He was dismissed on 31 March 2019 for using a mobile phone while driving. It happened on 1 February 2019 at the end of a trip to Belgium, where he went with a school party visiting Ypres and other First World War battlefields. During a CCTV review on 8 February it was noticed that he had a mobile phone in his hand at the wheel. That led to an investigation meeting, at which he was suspended, and in due course to a disciplinary hearing at which he was dismissed.

3. Mr Maynard says that he was only manoeuvring the vehicle for a few seconds, that he was only going at walking speed, and although he had the phone in his hand he was not using it. Earlier on he had been using it to send some texts, but the coach was stationary.
4. The company says that they have a strict policy against the use of mobile phones by their drivers and that any such use is also against the law; so, despite his 25 years' service they were justified in dismissing him.
5. In considering that question we heard evidence from Mr Maynard; and on behalf of the company from Mr Antony Burkhill, the company's Managing Director, and the one who spotted the infringement on CCTV; his wife Mrs Cassandra Burkhill, who is also a director of the business, and who carried out the investigation; and Mr Mark Burkhill, their Private Hire Manager, also a director, who held the disciplinary hearing.
6. The appeal was held by an independent HR professional, Ms Debra Kerby. She worked at the time for Sussex Human Resources Ltd. Mrs Lynda Goncalves, who manages that company, gave a statement to the effect that she appointed Ms Kerby to hear the appeal in a neutral and professional manner, and her evidence was not challenged.
7. There was also a bundle of about 300 pages. Having considered this evidence and the submissions on each side, we make the following findings.

Findings of Fact

8. L. J. Edwards is a long-established company which was acquired by Ancass Limited about 18 months earlier. It was a management buyout. Mr Anthony Burkhill was already the General Manager, and his wife Cassandra and daughter Chloe were also working there. His brother Mark had been involved previously and rejoined the company in about November 2018, not long before the events in question.
9. The company's disciplinary policy gives, as an example of gross misconduct:

"Use of mobile phone whilst driving (in breach of the company's mobile phone policy)".
10. We were not shown a separate mobile phone policy but his contract of employment provided:

"You are strictly prohibited from using a mobile phone whilst driving in a Company vehicle. Use of a mobile device will lead to disciplinary action being taken against you and may lead to the termination of your employment without notice."
11. In January 2013 Mr Antony Burkhill also sent round a memo to all drivers advising

them that:

“Any driver found guilty of using a mobile phone without headset whilst driving will face disciplinary action. If you touch your phone whilst driving then this is an illegal act - even to press a button unless it is in the cradle and hands-free.”

12. As may be expected from his long service, Mr Maynard is an experienced coach driver, although driving only occupied 20 or 30% of his duties. The rest of his role as Transport Manager was office-based.
13. On 22 January 2019, while he was out driving a coach, he saw Chloe Burkhill coming the other way with her mother, Cassandra, and saw, or thought he saw, that she was using her mobile phone whilst driving. He took her to task for this in the office later on, and although he says that he spoke to her quietly, Antony Burkhill witnessed it and described it as a verbal assault. She went downstairs and her mother Cassandra saw that she was upset. Mr Maynard says that after this incident the family were looking to dismiss him.
14. About a week later, on 1 February, Mr Maynard was driving back from France with the school party. There were two coaches, and each coach had two drivers. At the Eurotunnel entrance they pulled into the parking area and there was a hold-up. He put the handbrake on, and texted the coach behind. He also sent a text to Antony Burkhill in the office to let him know what was happening.
15. All this was recorded on CCTV. The footage showed him a little later moving the vehicle forward with the phone in his hand. Second by second timing is shown on the screen, as well as the speed of the vehicle, so there is no real dispute about the extent of it – he moved up from a stationary start to 3 miles an hour over for a total period of seven seconds. He says this was about half a coach length, pulling in slightly at the request of one of the Eurotunnel staff, and that too was not disputed.
16. This CCTV footage was reviewed by Antony Burkhill on 8 February 2019. He took the view that it revealed a breach of policy and called Mr Maynard in to a meeting on 11 February 2018, at which he suspended him. There is a dispute about what was said at that meeting. According to Mr Maynard, Mr Burkhill said he wanted him out of the business, and that the simplest way out for everyone was for him to “fall on his sword”. Mr Burkhill denies saying any such thing. This is a point to which we will return.
17. An investigation is then carried out by Mrs Cassandra Burkhill. There was an investigation meeting on 8 March 2019 – delayed by Mr Maynard being on holiday for two weeks - and they went through the CCTV footage. He accepted that they showed the use of the phone described above.
18. After that he was invited to a disciplinary hearing. The invitation letter set out

three charges:

- a. use of a mobile telephone while in the driver's seat of a commercial vehicle;
 - b. use of a mobile phone while driving a commercial vehicle; and
 - c. breach of company policy.
19. The last of these does not add a great deal. The first allegation related to sending the texts in the driving seat and the second to the driving with the phone in hand.
20. The hearing took place on 26 March 2019. It was held by Mr Mark Burkhill, and Mr Maynard was accompanied. Since the misconduct was admitted, the main focus from Mr Maynard's point of view was on mitigation. The points he raised included:
- a. his 25 years' service with a clean disciplinary record;
 - b. his clean driving record;
 - c. that this was on private property, in an area covered by Channel Tunnel bylaws, so it was not, he said, illegal;
 - d. that he was only texting another driver in the coach behind to advise him of the delays and he only moved the vehicle because the Eurotunnel staff member asked him to do so;
 - e. that he had a good safety score was under the "Green Road" telematics system which monitors driving style;
 - f. that drivers often walk around the coach to check it before they start, using their mobile phone, and then sit in the driving seat with the phone to make a note of the mileage; and
 - g. that Mr Burkhill said he wanted him out at the suspension meeting.
21. None of this was considered to make any difference, and the dismissal letter found him guilty of all three charges. The wording of the dismissal letter was different from the invitation letter however – instead of describing the charges as "using" a mobile phone, in each case it was changed to "handling". Mr Mark Burkhill, in his evidence at this hearing, took the view that there was no real difference, and that if a police officer had seen Mr Maynard with the phone in his hand, he would have got the same penalty points, whether he was talking on the phone or not.
22. He made some notes of his thoughts after the hearing which are in the bundle. According to these, he dismissed the point about it being on private property,

noting that the claimant had not been accused of breaking the law. Nevertheless he told us that he had done some further research into this after the hearing and had spoken to a friend of his who was a police constable who told him that holding the phone would be enough to get penalty points. This is not something that Mr Maynard was aware of at the time.

23. Mr Maynard appealed, and so had an appeal hearing with the independent HR professional, Ms Kerby. That hearing went over the same points, and in her outcome letter she returned to this point, stating

‘It is very clear that it is a motoring offence for drivers to use a mobile telephone that is not hands-free whilst driving a vehicle or whilst the engine is on. The law states that the vehicle has to be parked, the handbrake must be on and the engine off. The law states that using a mobile phone includes “touching it”’.

24. That outcome letter ran to 16 pages, and the reasons for not upholding the appeal are set out at page 13. The first reason was that the company needed to ensure that its drivers complied with the law. She went on to conclude that he had clearly breached the company’s mobile phone policy, and said that there were serious repercussions for professional drivers who use a mobile phone whilst driving: they can get six points on their licence and a fine of up to £2500; they may be referred to the Traffic Commissioner and lose their PCV licence; it was a condition of his employment that he retained that licence, and it might affect the company’s operator’s licence too, which was critical to the business.
25. As far as the mitigation went, she considered what he said about drivers doing the walk round, but she preferred the view of Mr Mark Burkhill that they did not need to turn on the engine to get the mileage figures. A good deal of her consideration was then given to whether or not there was an agenda by Antony Burkhill to remove him and what had been said at their original meeting. Only at the very end did she make reference to his 25 year service but countered this with the fact that he was in a position of trust with the company.

Legal Framework

26. Summarising the test at section 98 of the Employment Rights Act 1996, in a case of unfair dismissal it is for the employer to show that there was a fair reason for the dismissal, and that in the circumstances, including their size and administrative resources, they acted reasonably in treating it as a sufficient reason. This was a smaller company and so some leeway has to be allowed, but in fact there was no real issue about the process followed, only about the conclusions reached.
27. The essential question here is not therefore whether Mr Maynard was guilty of the misconduct, but whether the decision to dismiss him was within the “range of reasonable responses” open to an employer in the circumstances?

28. This “range of reasonable responses” test reflects the fact that whereas one employer might reasonably take one view, another might with equal reason take another. Tribunals are cautioned very strictly against substituting their view of the seriousness of an offence for that of the decision maker.¹

Conclusions

29. Our conclusions can be briefly stated. Firstly, we were referred to a recent case which appeared in the Times Law Reports this week, *Director of Public Prosecutions v Barreto* [2019] EWHC 2044 (Admin) (31 July 2019). This concerned the lawfulness of holding a mobile phone while driving. It concerned a motorist who drove past the scene of an accident filming the scene on his mobile phone. The police attending the accident arrested him, and on appeal from the Crown Court it was held that “using” for the purpose of road traffic legislation meant using the phone for the purpose of external communication, not simply holding it, or even filming things. It follows that there was in fact nothing unlawful about what Mr Maynard did, and that finding undercuts a good deal of the reasoning in the appeal letter.
30. The key point however is not whether his actions were illegal, but whether they amounted to a breach of the company’s policy, although it is true to say that the same distinction arises between using and handling there too, and we arrive at the same conclusion. That policy clearly prohibits *using*. Giving that word its plain and ordinary meaning, it seems to us that holding an object is not the same as using it, and so there was no breach of the company’s disciplinary procedure or the contract of employment, quoted above at paragraphs 9 and 10. Even the memo from Mr Burkhill quoted at paragraph 11 starts with a statement to the effect that using a phone is prohibited, and then goes on to say, erroneously as it turns out, that even holding a phone while driving is illegal.
31. That clear distinction between using and holding must also have been clear to the company, given that they switched from one term to the other during the disciplinary process.
32. This is not a question of substituting our view of the seriousness of the offence, it is simply a question of identifying what the company’s policy is, or was. That is set out in the contract and disciplinary policy.
33. It is of course open to an employer to take a zero tolerance approach, to have a policy, say, that even touching a phone while at the wheel is gross misconduct, and that no mitigation, however powerful, will make any difference, but it is not open to a company to do so after the event. It is an essential requirement of fairness that employees knows the rules, and that they are at risk of dismissal if

¹ For example, by the Court of Appeal in *London Ambulance Service NHS Trust v Small* 2009 IRLR 563

they infringe.

34. Even if our conclusion is wrong about the meaning of the word “using”, the disciplinary policy also says that such use *may* result in dismissal, indicating that there is room for discretion, and so for mitigating circumstances to enter into the consideration. Here the mitigation was of the strongest possible kind. None of it was taken into account and the offence was seen, quite wrongly in our view, as an open and shut case, as shown by the remark about the likelihood of getting penalty points. Even if “use” included “hold”, we take the view that dismissal was outside the range of reasonable responses.
35. For completeness, the inflexible approach displayed by the company does give some support to the allegation by Mr Maynard about the remarks made at the suspension meeting. Coming on top of the incident with Chloe, we conclude that his account of that meeting is also likely to be true. And given the close family connections involved, the fact that Mr Antony Burkill, the Managing Director, wanted him out of the business from the outset, it must follow that the resulting decision, following as it did an investigation by his wife and a disciplinary hearing by his brother, is likely to have been unfairly influenced by this view. On that basis too, the dismissal cannot be said to have been the result of fair process.
36. The final aspect is contributory fault. This has to be considered in every case, applying section 126 of the Employment Rights Act 1996. Although the position under the policy is now clear, given the sensitivity around mobile phone use by drivers it was clearly a misjudgement on the part of Mr Maynard. He accepted as much, and as already noted, he focussed on the mitigating factors in the disciplinary hearing. That said, dismissal was in our view outside the range of reasonable responses, for the reasons already given. Balancing those considerations, we make a reduction of 25% reduction to reflect that contributory fault.

Employment Judge Fowell
Date 07 December 2019