EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Ajaib	**v**	**Arriva London North Ltd**

Heard at: Watford **On**: 9-11 December 2019

Before: Employment Judge R Lewis
Members: Ms M Harris
Ms S Johnstone

Appearances
For the Claimant: In person
For the Respondent: Mr M Noblett, Solicitor

JUDGMENT

The claimant's claims of race discrimination, victimisation, and discrimination because of something arising in consequence of disability all fail and are dismissed.

REASONS

Procedural history

1. The claimant asked for written reasons after the tribunal had given oral judgment.

2. This was the hearing of a claim presented on 16 April 2018. The claimant was said to have been dismissed for gross misconduct. He brought a number of claims.

3. A first preliminary hearing took place on 17 December 2018 (Judge Manley). A second one in public before the same judge on 28 January 2019 (30-38).

4. At the second preliminary hearing the claimant's claim of unfair dismissal was struck out, and the claims under the Equality Act 2010 were allowed to proceed. The present hearing dates were listed. Judge Manley identified the issues (36) and set a case management timetable.

5. At this hearing there was a bundle of some 500 pages. The parties had exchanged witness statements. The claimant was the main witness on his own behalf, and by witness order, he called Mr Christakis Leonti, Engineering Manager. The respondent's witnesses were Mr Michael O'Connor, Operating Manager and Mr Robert Hutchings, Area Manager. There had been no advance statement from Mr Leonti.

6. Before the hearing started we sought to identify any live case management issues, and were advised as follows:

   6.1 The respondent did not concede that the claimant met the s.6 test of disability;

   6.2 The respondent did not concede that there had been a protected act for the purposes of s.27 Equality Act;

   6.3 A County Court claim between the parties remained in being relating to a personal injury suffered by the claimant on 26 December 2016.

   6.4 After reading, the tribunal asked the claimant to confirm that there were no health issues affecting his ability to proceed, and he confirmed;

   6.5 The claimant stated that as a protected act, he relied on an email of 12 December 2017 (289) which was found referred to in an email from Mr Gary Smith of 5 January 2018 (345).

   6.6 The claimant confirmed that he relied on the comparator identified before Judge Manley, Mr Howett;

   6.7 It was appropriate that the claimant's case would be heard first. As the schedule of loss was not fit for purpose, this hearing was limited to decide on liability only. The claimant asked if the respondent could call Mr Hutchings first, which was a matter we left to Mr Noblett;

   6.8 The claimant also applied for the exclusion of Mr Hutchings from the tribunal room if Mr O'Connor were to give evidence first. The tribunal considered the exercise of this unusual power under rule 43 and did not agree to the exclusion. Both witnesses had committed their versions of events to writing, both at the time, and in their witness statements. It was unlikely in the extreme that either would be surprised by the other's evidence. Furthermore, this was a public hearing at which serious allegations were made against Mr O'Connor and it did not seem to us to be in the interests of justice that he should not be permitted to hear the evidence against him.

   6.9 The Judge explained that when Mr Leonti attended (which he had been ordered to do at 10am the next morning) the Judge would introduce his evidence by questions about two letters which he had

written (360-363) and a reference to him at paragraph 29 of Mr O'Connor's witness statement.

7. The claimant was cross examined for just over 1½ hours; Mr Leonti's evidence lasted 20 minutes. Mr O'Connor gave evidence for just over 2 hours, and Mr Hutchings for about 45 minutes. Mr Noblett gave his closing submissions on the afternoon of the second day, and at the claimant's request, we adjourned to hear the claimant's submissions on the morning of the third day. The tribunal then adjourned, and gave judgment.

General approach

8. In this case, as in many others, we were referred to a wide range of issues. Where we make no finding about a matter which was referred to, or where we do so but not to the depth to which the parties went, that is not oversight or omission but a true reflection of the extent to which the point was of assistance to the tribunal.

9. The above observation is common in many of our cases. It was a particular issue in this case, where the claimant focussed, sometimes to the point of fixation, on matters which were not part of the case before us. It was repeatedly necessary to explain to the claimant that the only questions for the tribunal were the issues defined by Judge Manley, and that his wide range of other complaints and grievances were not questions for the tribunal to hear about. In particular, it was not clear to us that the claimant understood that the word "victimisation" in Judge Manley's order referred to a single discrete claim under s.27 Equality Act, and not to his wider grievances.

10. While the claimant was courteous and cooperative with the tribunal, it was necessary on a number of occasions to intervene to ask him to focus evidence, questions and submission on those issues, so as to ensure that best use was made of the time allocated to this case.

The legal framework

11. This case was brought under the provisions of the Equality Act only. s.13 provides so far as material "A person discriminates against another if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

12. Section 6 applies to a person with disability, described as a person who "has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities".

13. Section 15 provides that there is discrimination against a disabled person if "A treats B unfavourably because of something arising in consequence of B's disability". The question of causation between a disability and the something is an objective one for the tribunal.

14. Section 27 provides that a person "victimises another person if A subjects B to a detriment because B does a protected act." The definition of protected act is broad and loose, and includes "doing any other thing for the purposes of or in connection with this Act."

15. For the purposes of comparison between two persons (in practice between the claimant and his chosen comparators) s.23(1) provides that "There must be no material difference between the circumstances relating to each case."

16. Finally, s.136 deals with burden of proof, and s.136(2) provides as follows:

> "If there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court (which includes employment tribunal) must hold that the contravention occurred."

Summary of the claimant's dismissal

17. The respondent is the well-known provider of bus services in North London. The ET3 states that it had 4,000 employees.

18. The respondent had a number of relevant policies. The Disciplinary Policy gave as an example of gross misconduct (58),

> "Failure to observe rules affecting the safety of other staff or of the public, including a breach of the policy on mobile phones and ear pieces."

The Mobile Phone Policy (60) reminded staff that,

> "It is a specific offence to use a hand-held mobile phone or some other device when driving… Any member of staff who is found to have used a mobile phone whilst driving any of our vehicles will be dealt with under the formal disciplinary procedure."

19. The claimant accepted that using a mobile phone while driving has been a criminal offence since 2003. The claimant was aware that the respondent's busses are fitted with CCTV.

20. The claimant, who was born in 1960, joined the employment of the respondent as a mechanic in December 2015. The bundle contained evidence of poor working relationships between the claimant and a number of colleagues and managers. Mr O'Connor's statement referred to the claimant having at the time of dismissal had "a plethora of disciplinary awards for misconduct" a matter of which there was no other evidence before the tribunal.

21. On 26 December 2016 the claimant suffered an injury at work when the middle finger of his left hand was trapped in a moving shutter. He was off work for several months, and at the time with which we were concerned, he was on restricted duties.

22. The immediate circumstances of his dismissal were that in late 2017 the claimant's restricted duties involved working on the Eminox Project, which was the task of adapting and testing busses with less polluting technology. As part of that task, he was required to test drive busses. On two separate occasions he was reported to have been seen using his mobile phone while driving a bus on the highway.

23. The claimant was called to a disciplinary hearing which after two postponements took place on 22 December 2017 and was conducted by Mr O'Connor. At that hearing, as at this tribunal, the claimant admitted that he had seen CCTV footage; that it was of two separate occasions; that it showed him driving and using his mobile phone; that he knew that his actions were in breach of the criminal law; that he knew that his actions were in breach of the respondent's procedures; and that like any motorist he knew and understood that his actions were a potential source of danger.

24. Mr O'Connor dismissed the claimant that day. Hs appeal, which was on the severity of the sanction only, was subsequently dismissed on 9 January 2018 by Mr Hutchings. The claimant was accompanied at both hearings by a Unite representative.

Unfair dismissal

25. As recorded above, Judge Manley had struck out the claim of unfair dismissal, which had been presented out of time. The claimant raised a number of issues as to the process which had led to his dismissal. We do not need to recite them all, or make any determination of any of them. He complained that the colleagues who had seen and reported his use of mobile phones had done so because of personal animosity, arising out of grievances which he had brought. He was concerned that a number of managers were engaged in a "conspiracy" because the claimant was not passive or compliant as a person to be managed. He complained that his complaints about the poor quality of management had not been addressed, and that managers whom he considered unfit, remained in post. He complained that documents had been forged ("fake" in his word) and that colleagues and managers had lied about him. He was concerned about the appointment of Mr O'Connor as the manager to hear his disciplinary; he complained that while the disciplinary hearing had been twice postponed to enable his union representative to attend, the hearing had proceeded despite the fact that the claimant had shortly beforehand had a bereavement. (The claimant agreed, on the last point, that at the disciplinary hearing neither he nor his representative had asked for an adjournment in consequence of the bereavement). He asserted that at least one of the calls was from his wife, and was at a time of personal emergency.

26. The claimant did not allege that any of these matters were related to any of the three discrimination claims which were before the tribunal. They seemed to us potentially relevant to the claim of unfair dismissal which we were not hearing. We made clear to the claimant that those matters and

concerns were not part of this case. Despite direction and guidance, the claimant returned to them on a number of occasions.

27. The claimant did not seem aware of the inescapable logical difficulty which permeated his case, which was that he had admitted twice having committed an act which was both a criminal offence and a gross misconduct offence under the respondent's procedures; the evidence went further than his admission, and included CCTV on which he was identified and seen committing the disciplinary offence; and that irrespective of the history of conflict in the workplace, the respondent was entitled to discipline and dismiss him on that evidence. The claimant did not appear to understand that most, if not all, of his points might be peripheral to that central difficulty.

28. However, considering the claimant's points as matters of common sense, we accept in general terms that the undisputed evidence at the time was that the claimant had committed an act for which he might expect to be dismissed; that there was no doubt that the respondent had identified the perpetrator (by admission and CCTV); that the respondent was entitled to form the view that whether those who reported the claimant's misconduct did so with regret or pleasure was irrelevant; and that whatever the surrounding events or circumstances, at the moments when the claimant answered his phone while driving, he and he alone was responsible for his own actions.

29. The tribunal noted the evidence of Mr O'Connor and Mr Hutchings, which was that each had been involved in well over 100 disciplinary cases, but had not previously been involved in a case involving use of a mobile phone when driving. That seemed to us strong evidence that the respondent's staff, notably drivers, fully understand that using a phone is a threat to their employment, and that the quality of CCTV footage of events in the cab is good.

30. In that setting, we consider the claimant's arguments on each of the three heads of claim defined by Judge Manley.

Direct race discrimination

31. Judge Manley set out the issue as follows:

> "Was the claimant less favourably treated than a white colleague (Mr V Howett) when he was dismissed for allegedly using a mobile phone while driving? If so, can the respondent show that the claimant's race (British Pakistani) played no part in the dismissal?"

32. The tribunal found as follows.

    32.1 Mr Leonti had, in 2017, over 40 years' service.

    32.2 On 17 November 2017 he received a call from a manager, Mr Fake, telling him that Mr Fake had seen Mr Howett drive a company van in a garage and using his mobile phone at the same time.

32.3 About an hour later Mr Howett himself came to see Mr Leonti, who was his line manager. Mr Leonti said that Mr Howett was distressed and said to him "I've been a right cunt." Mr Howett then admitted to having used his mobile phone while driving, and explained that he had been taking a call from Mr Arron, who was Mr Howett's manager and Mr Leonti's direct report. Mr Howett told Mr Leonti that he expected to lose his job.

32.4 On 20 November Mr Leonti sent Mr Howett notice of a disciplinary hearing (360). There was no written record of an allegation or investigation. Mr Leonti considered that there was no need for one, because the disciplinary hearing was based on Mr Howett's clear, voluntary admission.

32.5 Mr Howett attended a disciplinary hearing on 27 November with a union representative, Mr Hamid. Mr Leonti's outcome letter (362) speaks for itself and should be read in full. Mr Howett made a full admission, and apologised. The letter concludes:

> "I explained to you now as the case is proven by your own admission that I need to adjourn to come to a decision. Vic, you and Mr Hamid have said today you understand that this is a dismissal offence and therefore today I should be dismissing you. However, I have listened to what you both have said and you have shown true remorse today and after reviewing your staff record with no live cautions after 37 year's service I have decided to reduce the award on this occasion to a final caution which will stay on your record for 12 months."

32.6 Emphasis is added to the above. The use of the word 'reduce' seems to us very significant. It is strong evidence that in all the circumstances, Mr Leonti's starting point was that the sanction was dismissal. Mr Howett did not appeal and that was the end of the matter.

32.7 The claimant's submission was straightforward: On 27 November 2017 Mr Howett, a white colleague, had received a final written warning for using his mobile phone while driving. Less than four weeks later, the claimant, a British Pakistani, had been dismissed for the same offence.

32.8 We approach the matter through the steps in the Equality Act and our first question is whether the claimant has been treated less favourably than Mr Howett. We answer that he has: he has been dismissed and Mr Howett has not.

32.9 Our second question is whether the circumstances of the claimant and Mr Howett contained "no material differences" as required by s.23 Equality Act; we defer answering that question below.

32.10 We ask thirdly whether the claimant has proven facts which in the absence of some other explanation are such that the tribunal could

draw an inference of discrimination. We find that the proven facts caused the burden of proof to shift.

32.11 Finally, we consider the respondent's explanation, which also touches on the material differences between the two cases. We look to see whether the respondent's explanation stands free of race, and explains the facts which have been proven, namely that the claimant was dismissed for an offence for which four weeks earlier a white comparator was given a final written warning.

32.12 Not exhaustively or in order of priority, we find that the reasons for the disparity in treatment (ie that leniency was shown to Mr Howett but not the claimant) were the following:

32.12.1 Both managers (Mr Leonti and Mr O'Connor) used language which indicated that they understood dismissal to be the default position, from which they could consider whether to exercise leniency. That was a common approach, and the matter before us was the disparity of treatment upon which the leniency decision was made in the employee's favour in one case but not the other. It was not our task to decide why Mr Howett was not dismissed, or to find if Mr Leonti treated Mr Howett more favourably than any other person.

32.12.2 Mr Leonti found that Mr Howett showed true remorse and distress, and an acknowledgment that his acts were dangerous. Mr O'Connor noted that the claimant by contrast started his disciplinary meeting confrontationally, and had not shown remorse or insight into wrong doing;

32.12.3 Mr Howett received credit for lifetime service (37 years) and a clean record at the time of the disciplinary. The claimant had short service and, according to Mr O'Connor's evidence, did not have a clean disciplinary record.

32.12.4 Mr Leonti gave Mr Howett credit for having made a voluntary confession to him. The claimant submitted that this was a lie, because Mr Fake had reported Mr Howett to Mr Leonti before Mr Howett had made his admission. That argument does not seem to us on point. We find that both were true: Mr Fake made a call to Mr Leonti, after which Mr Howett made his own admission to Mr Leonti.

32.12.5 Mr Howett's wrongdoing was a single event; the claimant admitted two events, some days apart.

32.12.6 Mr Leonti formed the view that there was no risk of Mr Howett reoffending, in light of his show of remorse and upset. Mr O'Connor was unable to form the same view.

33. Taken together, we find that those matters indicate that the comparison between the two cases contained material differences. They therefore do not form the basis of a true comparison for direct discrimination purposes. Alternatively, we find that the respondent has shown the reason why Mr Leonti exercised leniency in favour of Mr Howett.

34. We find that Mr O'Connor by contrast adopted the default position that a dismissal offence had been committed, and that he could find no basis for the exercise of leniency.

35. The tribunal was referred to the dismissal letter of another employee, dismissed in March 2019 for use of a phone while driving. That material did not assist the tribunal.

36. Our finding, which applies equally to Mr O'Connor and Mr Hutchings, is that the claimant's race played no part whatsoever in the decision to dismiss him. We add that but for the evidence about Mr Howett, the allegation of race discrimination would be no more than bare assertion and the burden of proof would not have shifted.

Victimisation

37. Judge Manley defined the issue as follows:

> "Did the claimant carry out a protected act when he presented a grievance in July 2017 and mentioned racism in relation to a white colleague being sent on training courses in October 2017? If so, was he dismissed because he carried out that protected act?"

38. The bundle contained one grievance of July 2017 (106-107, 10 July 2017) which contained no reference to race or a white colleague or a training course. When this was drawn to the claimant's attention at the start of the hearing, he was asked, while the tribunal was reading, to find the document relied upon. The document described by Judge Manley could not be found, and the tribunal could attach no weight to the claimant's assertions that it had been disclosed and not placed in the bundle.

39. The claimant did however identify an email which he had sent about "further concerns" in the course of the grievance procedure (289). In among many other complaints about management, it stated, "I've gone out of the way to prove various reasons and I'm sure racism/prejudices are also prevalent as I've received no answers to my concerns…" That document was sent on 12 December 2017, the same day as the first invitation from Mr O'Connor to the claimant to attend a disciplinary, so if that were the protected act relied upon, it cannot have been the act which triggered the disciplinary process.

40. Mr O'Connor's evidence, which we accept, was that he had no knowledge of this. He wrote in his evidence,

> "Whilst I was alive to the fact that the claimant had a grievance appeal outstanding at the time I dismissed him, I was completely unaware of the detail of the claimant's complaints. I can firmly state that I had no idea that the claimant phad raised more than one grievance when I made the decision to dismiss him and it is only in preparing this witness statement did I learn of the detail of the grievances".

41. The decision to dismiss was that of Mr O'Connor on behalf of the respondent. We accept that the respondent had received by 12 December at the latest, a complaint which identified racism, and we accept that that falls within the broad definition of protected act in s.27 of the Equality Act. We accept also that that was knowledge of the respondent, even if not at the material time of the individual decision maker.

42. We accept the integrity of Mr O'Connor's evidence. We accept that he dismissed the claimant for his admitted gross misconduct, which was incontrovertible, and in relation to which he could see no basis to depart from the default position of dismissal. We accept that any protected act played no part whatsoever in the respondent's dismissal of the claimant.

43. Mr Hutchings' evidence was that as the appeal was based on severity of the sanction, it was not necessary for him to reopen the evidential process conducted by Mr O'Connor, and he did not do so. We accept that evidence, and we find that the protected act played no part whatsoever in Mr Hutchings' rejection of the claimant's appeal. The victimisation claim therefore fails.

Disability discrimination

44. The issues identified by Judge Manley were,

> "Was the claimant disabled at the material times?
>
> Did the respondent treat the claimant unfavourably when it dismissed him?
>
> If so, was the reason for the treatment that the claimant was working on restricted duties because of any injury?
>
> If so, can the respondent show the treatment was a proportionate means of achieving a legitimate aim?"

45. Judge Manley directed the claimant to "send a short statement which sets out how he says the injured hand affected his normal day-to-day activities in the second half of 2017" (37).

46. The claimant's impact statement was sent on 21 April 2019 (39). It did not comply with Judge Manley's direction. It dealt with causation of the original injury and attached some photographs of the injured hand. It described the impact, but in general terms ("My disability has affected many parts of my social life") but also dealt with injuries at the time it was written, ("I cannot carry heavy weights at the moment") not in 2017.

47. The medical evidence in the bundle consisted in its entirety of a report from Dr Rajpopat, on behalf of the respondent of 23 June 2017 (99) and a second and more useful report of 6 October 2017. In the latter report, Dr Rajpopat wrote (212),

> "He has developed fixed mallet deformity… and paresthesia on the tip of the finger due to injury to digital nerves…. Likely to have permanent deformity of the middle finger. Pins and needles sensations over the tip of the middle finger may take up to two years to improve. He will not be able to use power tools/hand tools for foreseeable future."

48. After the claimant had taken the oath therefore, the Judge with reference to s.6 asked him a number of questions. The claimant's answers, which the tribunal accepts, were the following:

    He suffered an injury at work to his left hand on 26 December 2016. He is right handed.

    Management on the site first tried first aid and then took him to hospital. He was taken to A & E and was admitted overnight. He was treated. He had subsequent appointments and physiotherapy. His hand remined bandaged for several weeks, and he remained off work until the end of May 2017. Two needles which had been inserted in the hand were removed, and he was discharged from hospital care after the second such procedure in about June 2017.

    He said that he takes painkillers, ie over the counter Ibuprofen 200mg, which he takes two at a time.

    When asked about day-to-day activities, he said that he does not have full lift power, because of loss of strength in his left hand. He can make a fist.

    He struggles with buttons and he cannot hold a fork in his left hand. He does not have full grip with his left hand. While he can carry shopping, his ability to do so is restricted. He referred to the report of Dr Rajpopat quoted above.

49. The claimant said further that he has difficulty dressing. He had difficulty with any task at work which involved lifting. He is able to drive both manual and automatic cars. He is unable to have intercourse in the missionary position because he cannot bear weight on his left hand. His ability to use his hand is restricted by safety considerations and by the avoidance of pain. He takes Ibuprofen maybe two or three times a week. Cold affects his use of the hand, and therefore he is more inclined to wear gloves, which in turn creates a restriction.

50. The respondent agreed that there was an impairment. We find that it must have been long-term, because we accept that the difficulties and disadvantages described by the claimant have existed since the injury and

persist; and we accept that as the claimant was dismissed 361 days after the injury, the effects were likely to persist for more than one year.

51. Are the effects substantial? We find that taken together they meet the requirement of being more than minor or trivial, and that at the material time the claimant met the s.6 definition of disability. We add that we reach this conclusion with some diffidence.

52. Having found that the claimant was at the material time a person who met the s.6 definition of disability, we accept that he was on light duties in the last quarter of 2017 because of the disability. The claimant's evidence was that difficulties in the manual aspects of his job had led the respondent to offer him light or restricted duties. We therefore find that his presence on restricted duties was something arising in consequence of disability.

53. We note also that the claimant remained at his normal salary while on restricted duties. We accept Mr Hutchings' evidence that the restricted duties were not of themselves unimportant, because the claimant's contribution to the Eminox project was part of a significant and expensive piece of work. We do not dispute that there may have been occasion when the claimant swept the floor (a matter which he clearly resented) but we do not find that his restricted duties were in general menial, trivial, or such that he was working below his salary level.

54. The pleaded case therefore was that the claimant was treated unfavourably (ie dismissed) because he was working on light duties. His assertion was that he was undertaking work which was either work that was not needed at all, or was menial and below his level of pay and experience and skill. We prefer Mr Hutching's evidence. We accept that there may have been occasions when the claimant undertook duties which were below his training and grade and pay level. We do not accept that they represent the substance of his restricted duties.

55. The final question is whether the claimant was treated unfavourably because he was on restricted duties. His case was that he was too expensive for the work he was doing, he was a nuisance and a burden to the respondent, and that that was the reason he was dismissed. There was no evidence whatsoever to support any part of that assertion, and we reject it in full. We find that the reason for the claimant's dismissal was gross misconduct, and the fact that he was on restricted duties played no part whatsoever in that decision.

Observations

56. After giving judgment, we informed the parties of three observations.

    56.1 Throughout this hearing, including in submission, the claimant made allegations against a number of former colleagues which were of the utmost seriousness. We are able to adjudicate only on those allegations against Mr Leonti, Mr O'Connor and Mr Hutchings. The absence of any finding about the claimant's allegations against other

colleagues should not be taken as any form of adjudication. We accept that the claimant may have used language loosely and may not have been aware of the seriousness of what he said. We find for complete avoidance of doubt that none of Mr Leonti, Mr O'Connor or Mr Hutchings has been shown to have lied to the tribunal, or to have produced to the tribunal a document that was falsified or, in the claimant's word "fake".

56.2 The bundle contained a schedule of loss (375). It was not in itemised form and it did not indicate how the sums had been calculated. It placed a valuation of compensation in this claim which was vastly in excess of any compensation which, on the material which we saw, might have been awarded to the claimant if successful.

56.3 Finally, the non-legal members in particular of the tribunal draw to the respondent's attention that the document called " Equal Opportunities Policy" at 54 falls far short of compliance with current equal opportunities practice and may need long overdue reconsideration. The tribunal noted for example that while six protected characteristics covered by the Equality Act are identified in the policy, three are referred to nowhere (age, gender reassignment and pregnancy).

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Employment Judge R Lewis

Date: …19 December 2019………..

Sent to the parties on: ....

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For the Tribunal Office