



EMPLOYMENT TRIBUNALS

Claimant: Ms M JAISINGH
Respondent: ARRIVA LONDON NORTH LIMITED
Heard at: Watford **On:** 19 November 2019
Before: Employment Judge Skehan

Appearances

For the Claimant: In person
For the Respondent: Mr Noblet Solicitor

RESERVED JUDGMENT

1. The claimant was unfairly dismissed and her claim for unfair dismissal is successful.
2. The claimant's conduct contributed to her dismissal and the basic and compensatory unfair dismissal award is to be reduced by 85%

REASONS

1. By claim form received at the Employment Tribunal dated 13/09/2018, the claimant claimed unfair dismissal only. The respondent's notice of appearance dated 24/01/2019 was accepted by the tribunal and the matter was defended.

The Issues

2. At the outset of the hearing, with the assistance of the parties, I identified a list of issues to be determined by the tribunal.
3. What was the reason for dismissal? The respondent says that the dismissal arose from the claimant's conduct on 13/06/2018. The claimant claims that she was dismissed because of personal animosity on the part of respondent as she had a history of issues with the management within

the respondent and the real reason for her dismissal was unconnected with misconduct.

4. If the reason for the claimant's dismissal related to conduct:
 - 4.1. What was the misconduct for which the claimant was dismissed?
The respondent claims that the misconduct was:
 - 4.1.1. a breach of the respondent's statement policy on discipline paragraph 7 (a) use of a mobile phone whilst driving; and
 - 4.1.2. a breach of the respondent's statement policy on discipline paragraph 7 (a) failure to observe the rules affecting the safety of staff or members of the public whilst in service.
 - 4.2. Did the respondent have a genuine belief that the claimant was guilty of the misconduct for which she was dismissed? Did the respondent have in its mind reasonable grounds upon which to sustain that belief? Was that belief formed after a fair and adequate investigation? The claimant claimed the investigation was inadequate in respect of a failure to properly consider the initial complaint, and the respondent should have searched for further footage. The claimant suspects that the initial complaint was a fabrication
 - 4.3. In reaching the decision to dismiss, did the respondent follow a fair procedure? Did the respondent follow the ACAS code? The claimant confirmed that she raised no issues in respect of procedure.
 - 4.4. Was the dismissal within the band of reasonable responses open to an employer in the circumstances? The claimant says that the decision was unfair, she had never seen the policy documents relating to mobile phone use, this had not been discussed with her and the dismissal was unduly harsh when considering the allegations. The claimant considers that the decision falls outside the band of reasonable responses.
 - 4.5. If there is a finding of unfair dismissal, did the claimant cause or contribute to the dismissal and if so by how much should the basic and/or compensatory award be reduced?
 - 4.6. In the event that the dismissal was unfair due to the respondent following an unfair procedure should the compensatory award be reduced or limited to reflect the chance that the claimant would have been dismissed in any event and that the employer's procedural errors accordingly made no difference to the outcome. This is commonly referred to as a Polkey deduction (or reduction) following the case of Polkey v AE Dayton Services Ltd [1987] IRLR 503.
 - 4.7. It was agreed at the commencement of the hearing that the I would hear evidence on matters concerning liability, Polkey and

contribution only, with remedy to be determined separately if appropriate.

The Law

5. In a claim of unfair dismissal, it is for the respondent to show a genuinely held reason for the dismissal and that it is a reason which is characterised by section 98(1) and (2) of the Employment Rights Act 1996 (“the ERA”) as a potentially fair reason. There are five potentially fair reasons for a dismissal under section 98 of the ERA: conduct, capability, redundancy, breach of statutory restriction and “some other substantial reason of a kind as to justify the dismissal” (SOSR).
6. If the respondent shows such a reason, then the next question where the burden of proof is neutral, is whether the respondent acted reasonably or unreasonably in all the circumstances in treating the reason for dismissal as a sufficient reason for dismissing the claimant, the question having been resolved in accordance with the equity and substantive merits of the case. It is not for the Employment Tribunal to decide whether the respondent employer got it right or wrong. This is not a further stage in an appeal.
7. In a case where the respondent shows the reason for the dismissal was conduct, it is appropriate to have regard to the criteria described in the well-known case of *Burchell v BHS [1978] IRLR 379*. The factors to be taken into account are firstly whether the respondent had reasonable grounds for its finding that the claimant was guilty of the alleged conduct; secondly whether the respondent carried out such an investigation as was reasonable in the circumstances; thirdly whether the respondent adopted a fair procedure in relation to the dismissal and finally whether the sanction of dismissal was a sanction which was appropriate, proportionate and, in a word, fair. In relation to each of these factors, it is important to remember at all times that the test to be applied is the test of reasonable response.
8. A claim for unfair dismissal is a claim to which section 207A applies and the relevant Code of Practice is the ACAS Code of Practice on disciplinary and grievance procedures.
9. Section 123(6) of the ERA provides that: “Where a tribunal finds that a dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.” The contributory conduct must be conduct which is 'culpable or blameworthy' and not simply some matter of personality or disposition or unhelpfulness on the part of the employee in dealing with the disciplinary process in which he or she has become involved. A tribunal may also reduce the basic award under section 122(2) of the ERA if it finds that the claimant's conduct before dismissal was such that it would be just and equitable to reduce it.

The Facts

10. I heard evidence from Ms Bishop and Ms Lowery on behalf of the respondent. I heard evidence from the claimant on her own behalf. These witnesses gave evidence under oath or affirmation. Their witness statements were adopted and accepted as evidence-in-chief. All witnesses were cross-examined. For the sake of completeness, I note that at the outset of cross examination of the respondent's witnesses it became apparent that the claimant had not read the respondent's witness statements prior to the hearing. I provided an explanation for the claimant in respect of the usual tribunal process of accepting evidence contained within the witness statements and the process of cross examination and provided an adjournment for the claimant to read the respondent's witness statement and consider her cross examination questions. The claimant was assisted by her friend.
11. As is not unusual in these cases the parties have referred in evidence to a wider range of issues than I deal with in my findings. Where I fail to deal with any issue raised by a party, or deal with it in the detail in which I heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance. I only set out my principal findings of fact. I make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.
12. The claimant was employed as a bus driver and had worked for the respondent since May 2005. The claimant initially worked full-time and more recently reduced hours to part-time working. The claimant said that she raised a number of grievances about the way various managers within the respondent organisation had treated her. She considered that the grievances were not properly addressed. The claimant complains that she was treated with hostility by the managers and felt like every attempt was being made to dismiss her due to being part-time, as she had less flexibility to work and also due to the fact that she had an older style contract with a higher hourly rate than the majority of newer drivers employed. During the course of the hearing the claimant refers to emails that she received as a result of her subject access request as evidence of an ulterior motive on the respondent's part. We do not know who these emails are from or to however on:
 - 12.1. On 16/06/2016 it is stated 'we've got a driver who has raised a grievance and unfortunately [redacted] and [redacted] have all been involved in her alleged grievance. Is there any chance you could take this on? She's a bit of a pain (and that's an understatement!) So was after someone strong!
 - 12.2. On 31/03/2017 an email is sent stating '.... Can you arrange for a grievance to be held over this matter? The response states 'I just spoken to Mark about this, it already been heard, she's just causing trouble. He's going to sort it out

- 12.3. On 17/07/2018 an email was sent stating 'please see attached the notes are letter complete with the details for [the claimant]. Please confirm that you are happy with the attached? Are you doing the honours of sending this and the Nawaz stuff to them in the post?
13. On 16/03/2017 the claimant had been the victim of an assault whilst in service. This resulted in a physical injury to the claimant and also to significant emotional distress and anxiety on her part. She was signed off work for 10 months. The claimant describes the incident as traumatic and says that it still makes her feel fretful. The claimant criticises the respondent's response and support to this incident and claims that it illustrates the fractured relationship she had with the managers at the garage. Ms Bishop was aware of this incident and managed the claimant's return to work.
14. The conduct issues relied upon by the respondent occurred on 13/06/2018. The respondent received a complaint in person at the garage on 13/06/2018. The complaint is handwritten and does not record the name and address of the person who made it. It states:
- "Driver has pulled up abruptly at Tottenham Hale retail Park. Complainant has overtaken the bus. He apologized [SIC] and saw a lady putting her middle finger and pulled down the blind and started recording on her mobile in middle of the road. The driver threatened him by saying 'I will ruin your life'. Car driver was extremely upset and considered going to report to police."*
15. CCTV footage was included within the respondent's evidence. The relevant evidence is short. I viewed the CCTV evidence at the commencement of the hearing, during the cross examination of the claimant and again finally prior to the parties' submissions. For the avoidance of doubt I confirm that my observations relating to the pedestrian crossing noted in square brackets below were made on my final view of the CCTV after hearing the parties' evidence.
16. Mr Monk dealt with the investigation stage. The claimant was accompanied by her union representative. Initially the claimant had no recollection of any event on 13/06/2018. She viewed the CCTV. The claimant said that she did not use her phone while the bus was in motion and believed that she could use her phone if there was an emergency. The claimant told Mr Monk that she took pictures in case there was any public complaints received on a future date.
17. It is common ground between the parties that the claimant was driving her bus on 'route 41'. I was shown footage from two CCTV camera angles being the front facing camera and the camera showing the driver. The front facing CCTV shows a line of traffic overtaking the claimant's bus. The complainant's car is the last car in that line of traffic. The car has tinted windows. The complainant's car overtakes the claimant's bus when there is oncoming traffic. The complainant 'cuts in' in front of or 'cuts up'

the claimant's bus. The complainant's car then stops. The vehicle in front of the complainant's car has also stopped. It appears that the traffic has queued up. The vehicle in front of the complainant car moves forward [through what appears to be a, pedestrian crossing further along the road]. The complainant's car moves forward slightly and stops, as does the claimant's bus. [Again the reason appears to be further use of the pedestrian crossing]. The complainant's car then drives away quickly and turns off at the next junction. The complainant's car appears to drive erratically.

18. The claimant said that the driver was driving erratically, cutting in front of her bus, causing her to break and come to a standstill. The driver stopped in front of her bus to prevent the bus from moving forward and blocking the road. The claimant said that she felt scared and threatened. The car had tinted windows and she could not see the driver any passengers in the vehicle. The driver had been driving aggressively and the claimant was unsure as to what his intentions were. The claimant was worried that the car may follow her to the bus station which was only two stops away. The claimant said that she panicked and was frightened, as she was not able to manoeuvre. She used her phone to take a picture of the registration number of the car to be used as evidence in the event that the driver attempted to approach her or escalate the situation. However the driver sped off recklessly moment after and took the next available exit. The claimant said there was no verbal communication between her and the car driver.
19. The claimant says that the respondent has previously provided disposable cameras for drivers to capture evidence of any incidents but they no longer do so. Drivers are instructed by the respondent to use their mobile phones to record incidents. The old paper bus incident report form asks whether the driver took photographs of the scene and if not, why not. The current online form asks for driver photographs to be uploaded too. The claimant says that she thought she was acting correctly by taking a photograph of the incident in case she needed the driver's registration. The claimant was aware that CCTV was installed on the bus but said that it frequently has technical difficulties and failed to record or work as they should.
20. The claimant stresses that she was not aware that the use of a mobile phone camera to obtain photographic evidence in the event of an emergency was not allowed, as the respondent had instructed drivers to do so in the past. She had never been provided with any information no documentation to state otherwise. In 13 years of service she has never used her mobile phone for conversations or messaging while driving. The claimant said that she was aware that this would be prohibited and unlawful and she would never risk her licence to do so. She has never, prior to this incident be disciplined for the use of a mobile phone while driving. The claimant said that she had not received any training or been provided with a copy of the respondent's mobile phone usage policy. The claimant said that she did not see the policy displayed within the workplace.

21. The respondent's evidence was that its policy on the use of mobile phones was well known throughout the business, is displayed in multiple locations. The mobile phone policy includes:

It is an offence to use a handheld mobile phone or similar device when driving. The law applies even if you are stopped at traffic lights or queueing in traffic as your engine is still running.

.....
The Arriva London policy in this matter is very clear. The company's position as one of zero tolerance, fully supported by Unite union.

Any member of staff who was found to have used a mobile telephone while driving any company vehicle, will be dealt with under the formal disciplinary procedure.....

If the charge is proven it may be deemed to be a case of gross misconduct (failure to observe rules affecting the safety of other staff or the public). In such circumstances the employee concerned may be dismissed without notice and in any event the minimum disciplinary award is likely to be a final caution.

22. It is common ground between the parties that the claimant did not contact the police or respondent at the time, nor did she submit an occurrence report following the incident. The claimant says that the occurrence reports were rarely responded to by the respondent. Further, the claimant said that she felt unsupported when involved in a serious incident when assaulted and there was little point in submitting the report after the event.
23. Mr Monk said that as the bus rolled forward, the claimant had her mobile phone in her hand. The claimant says that the bus did not move at any time when her mobile phone was in her hand. Mr monk summarises that the claimant's concerns could have been resolved by putting in an occurrence report when she got back to the garage but the claimant took it upon herself to get her phone out and make a note of the registration number during which time Mr Monk was of the opinion that the bus moved forward. He considered this to be a serious illegal act in which the law states 'it is illegal to hold a phone/satnav while driving. The law still applies if you are stopped at traffic lights or queueing in traffic.
24. I reviewed the available CCTV showing the claimant taking the picture. While the angle does not fully show the claimant, it appears that the claimant drops her mobile phone as the bus moves. The claimant appears to have her mobile phone in her hand momentarily as the bus moves forward.
25. Following the incident with the driver outlined above, the claimant continued in service to the bus station. The respondent alleges that the claimant drove through two set of red lights shortly following the altercation with the driver as outlined above. The claimant says that she crossed two sets of amber traffic lights using her professional judgement and thirteen years of experience and training of the 'point of no return' to navigate lights and avoid injury to passengers or other road users. The claimant said that

the CCTV does not show the vehicles behind her bus that may have collided with it should she break abruptly.

26. Mr Monk considered that although the red light issues were not raised by the customer complaint, as manager of the garage he had an obligation and duty of care for both the public and fellow employees and cannot ignore two serious offences. He notes that the claimant believed that she did not have time to stop at the traffic lights however he was of the opinion that there was ample time to adhere to the highway code that clearly states that if you are before the white line when the signal turns red, you must stop. The claimant failed to do this.
27. I viewed the available front facing CCTV in relation to the lights incident. As the claimant approached the first set of traffic lights, the lights, from some way away, can be seen to be green. The traffic lights can then be seen to turn to amber. The lights are amber for a short period of time before turning red. There is no CCTV footage showing what traffic was behind the claimant's bus. The lights turn red just (seconds or fractions of seconds) before the claimant's bus crosses the white line. The second incident relating to a red light, appears from the CCTV to occur very quickly. In contrast to the first set of lights, the CCTV does not obviously show the lights in the distance or time for the claimant to prepare to stop safely. Both of the red light incidents involve lights turning red just before the moment the claimant crosses the white line.
28. The disciplinary matter was dealt with by Ms Bishop. The disciplinary allegations are breach of the respondent's policy on discipline 7 (a) the use of a mobile device while driving and failure to observe rules affecting the safety of staff or members of the public whilst in service with regard to red light offences, constituting gross misconduct. The additional aspects of the driver's complaint relating to the alleged interaction with the claimant did not form part of the disciplinary allegation, nor was it investigated.
29. Ms Bishop is an operating manager for the respondent and also holds a PCV licence. Ms Bishop deals with two to three disciplinary hearings per month as part of her duties. Ms Bishop was aware of the claimant's previous experience of assault. Ms Bishop said that her witness statement that she dealt with the traffic light incidents first before turning to the more serious issue of mobile phone use whilst in control of the bus. Ms Bishop challenged the claimant in respect of her forward planning and in her view there was sufficient time to bring the bus to a halt at the red light. Ms Bishop concluded that the claimant simply did not want to slow down or stop at the lights. She considered it was clear from the footage that the claimant had not even contemplated slowing down when approaching the lights which caused her great concern.
30. When considering the use of mobile phone, Ms Bishop concludes from the CCTV that the claimant did not seem frightened at all. Ms Bishop concludes that the claimant can be seen gesturing towards the vehicle and the claimant then proceeds to pursue the car very closely in an intimidating manner before coming to a stop bumper-to-bumper with the vehicle. Ms

Bishop concluded that the claimant response that she needed to stop that closely to avoid a collision happening was utter nonsense. Ms Bishop considered it clear that the claimant reacted angrily to the third party's manouvers and decided to tailgate the car in order to let him know that she was angry.

31. Ms Bishop noted that the claimant did not reiterate her representatives reasoning for using her mobile phone i.e. for her own safety immediately but explained that she was gathering evidence in case of a public complaint. Ms Bishop considered it strange that had the claimant been concerned about a possible public complaint against her that she did not make a report to cover herself. Ms Bishop considered the possibility of CCTV failing and comments that complete CCTV failure is very rarely seen when incidents are reported correctly and in time for download. There are at least 15 cameras in every London bus recording footage from various angles and the system is designed to withstand collisions.
32. Ms Bishop concluded that the CCTV footage did not support the claimant and her representatives assertion that she feared the complainant driver would be violent and did not believe that this was credible. If anything, the claimant was the aggressor in the way she reacted to the third party overtaking her and cutting her up. Ms Bishop noted that this particular reason was completely different to the reason that she had given before; that she took photos in the anticipation of a public complaint.
33. Ms Bishop asked the claimant if she considered the safety of those around her when using her mobile phone in charge of a large vehicle. The claimant told Ms Bishop that she wasn't texting or speaking on the phone and that what she did was for the company's benefit. Ms Bishop was flabbergasted by the claimant's stance.
34. Ms Bishop reviewed the investigation documents, the CCTV and considered the respondent's internal position with regards to using electric devices to be crystal clear and well published.
35. Ms Bishop found the allegation of jumping to red lights to be borne out. Ms Bishop concluded that there was no way that the claimant was unaware that using a mobile phone while driving would constitute gross misconduct as a PCV licence holder, professional driver, and an employee of the respondent. Ms Bishop said it was her genuine belief that there was no emergency that the claimant had in fact committed gross misconduct by using an electronic device while in control of the bus. Ms Bishop noted that the respondent displays notices in relation to using electronic devices prominently around the garage and it is against the law with fines and custodial sentence being increased year-on-year.
36. The claimant's representative asked Ms Bishop for leniency and noted the claimant's length of service. In light of the seriousness of the offence Ms Bishop did not consider the claimant's past disciplinary record, which was clear. Ms Bishop said the claimant's length of service compounded her sheer astonishment at what the claimant had done in jumping red lights

and using a mobile phone behind the wheel. A driver with her level of experience should be expected to drive with the highest regard for public passenger safety.

37. Ms Bishop told the tribunal that the respondent took a zero tolerance approach to breaches of the mobile phone policy. She had dealt with approximately 8 to 12 mobile phone use disciplinary matters in the past year and each and every one had resulted in the employee's dismissal.
38. The claimant told me during the course of the hearing that she was aware that it was not permitted to use her mobile phone while driving however she considered that taking pictures in the case of an emergency was permitted. Ms Bishop told me during the course of her evidence that employees previously had been provided with disposable cameras but this practice has stopped some time ago. Although she was unable to point to any particular policy or document, Ms Bishop made reference to circumstances where drivers could legitimately take pictures with their mobile phones.
39. I heard from Mrs Lowry who was one of the managers appointed to deal with the appeal alongside Mr Parry. It is the respondent's practice for appeal hearings to be dealt with by a panel of two. At the outset of the appeal, the claimant's representative stated that there was no dispute as to the evidence, there had been no breaches procedure and the appeal was put on the basis that the decision to dismiss was too harsh. This is agreed by the claimant. After watching the CCTV footage Mrs Lowry pointed out that she saw the claimant proceed through to red lights shortly after using her phone whilst in service with the engine running.
40. Mr Parry noted that the CCTV footage showed that the light switch to amber, the bus was still 40 to 50 car lengths away and therefore it could not be accepted that the claimant only had a split second to react.
41. The claimant's representative explained that the claimant had been a victim of assault previously and that the claimant was dealing with an emergency situation. It was also the case that the complaint from the member of the public did not 'ring true' because the claimant always drove with the air conditioning on and therefore a window would be closed. He could not have had a verbal fight in the CCTV footage did not show her sticking her middle finger up. In relation to the lights, the claimant elaborated that she had a split second to react to them and her training was to proceed if she was past the point of no return. Mrs Lowry noted Mr Parry's point that the CCTV footage showed that when the lights switch to amber, the bus was still 40 to 50 car lengths away and therefore it could not be accepted that the claimant only had a split second to react. The claimant further explained that she used her phone as she believed that the CCTV did not always work.
42. The claimant said that she would not repeat these mistakes again. However Mr Lowry and Mr Parry concluded that the claimant had not

grasped the magnitude of a conduct and using a mobile phone whilst in charge of the vehicle and flying through red lights when she could have easily stopped in time. The claimant did not seem to grasp the seriousness of her actions. On review Mrs Lowry concludes that the claimant's lack of regard for public safety was astounding. They did not consider that the claimant was in an emergency situation. Mrs Lowry considered it unlikely that the claimant was scared at the claimant had not made any sort of declaration as to there being any incident. The footage shows that she was the party that was acting in a threatening manner. There was no need for the claimant to use a mobile phone and in doing so she endangers public safety not to mention breaking the law the process.

43. Mrs Lowry and Mr Parry were asked to take the claimant's clean disciplinary record into consideration. They checked the claimant's file. Mrs Lowry noted that there were four specific incidents with regard to poor driving practices that had been marked on the claimant's file in 2018. Because the claimant has raised her record, she was given this feedback. Ms Lowry said that even if the claimant's record had been completely clean, it would still not have changed her view that dismissal was reasonable in the circumstances she would not have reached a different decision because the claimant actions was so serious and so dangerous that she would not have felt comfortable reversing the decision to dismiss.
44. During the course of the tribunal the respondent stated that she had a clean driving record and disciplinary record. The respondent did not produce any evidence to substantiate the four specific incidents marked on the claimant's record as referred to by Mrs Lowry during the appeal. There was nothing to suggest that any incident other than the one giving rise to this litigation had been discussed with the claimant or treated as a disciplinary matter in any way.

Conclusions

45. I turn first to the reason for dismissal. The claimant claims that the original customer complaint was fabricated in some way. While I noted that the customer details were not contained within the original complaint, it is possible that these were simply redacted at an earlier stage in the proceedings to protect customer confidentiality. The incident referred to within the complaint was subsequently located by the respondent on its CCTV footage. The claimant's reasoning for taking photos at the time included a possibility that the driver could complain. That a driver did complain is not surprising. The customer complains of a rude gesture and interaction with the claimant, however this is not apparent from the CCTV footage and does not give rise to any disciplinary complaint on the respondent's part. When viewing the CCTV footage, the red light incidents happen very shortly after the altercation with the driver who complained. It is unsurprising that they were noted following the initial driver complaint. Taking the evidence as a whole, I conclude that there is no evidence supporting any fabrication of the original allegations. The claimant has shown on the balance of probabilities that she has submitted previous

grievances and had previous issues with her managers. At least one manager considered her 'a pain'. There was no suggestion that Ms Bishop and or Ms Lowry had been involved in any previous complaints. I heard evidence from both Miss Bishop and Mrs Lowry that the previous issues or any other issues other than the alleged conduct played no part in the process. There is no evidence to support any allegation that the claimant's previous grievances or animosity on the part of management towards the claimant played any part in the claimant's dismissal. The respondent has shown on the balance of probability that the reason for the claimant's dismissal related to her conduct as alleged.

46. The conduct allegations related to use of a mobile phone and jumping two sets of red lights. The respondent's investigation consisted of viewing the original complaint, the CCTV available of the incident and a fact-finding interview with the claimant. The claimant claimed the investigation was inadequate in respect of a failure to properly consider the initial complaint, or search for further footage. The obligation upon the employer is to conduct an investigation that falls within the band of reasonable actions of a reasonable employer, the standard of an investigation is not one that 'leaves no stone unturned'. In light of my conclusions in respect of the likelihood of fabrication on the original conclusion I can see no value or advantage to the claimant in the respondent taking any additional steps at this stage. It appears to the tribunal that the respondent's investigation fell within the band of reasonable responses of a reasonable employer.
47. In reaching the decision to dismiss, did the respondent follow a fair procedure? The respondent carried out an investigation, invited the claimant to a disciplinary meeting setting out the allegations and providing information, set out their disciplinary finding and allowed for an appeal. No breach of procedure or breach of the ACAS code on disciplinary matters was highlighted during the hearing or identified by the employment tribunal.
48. Was the dismissal within the band of reasonable responses open to a reasonable employer in the circumstances? This was the main part of the claimant's claim. Ms Bishop said that she considered the mobile phone use to be the more serious allegation. It is common ground that the claimant used her mobile phone to take a photo of a car registration number while the engine of her bus was running. There is a dispute between the parties as to whether or not the claimant had her mobile phone in her hand as the bus was moving. The respondent says that the claimant dropped her mobile phone as the bus began to move and therefore the claimant had her mobile phone in her hand as the bus was moving. This is a matter of seconds or fractions of seconds. The claimant says that she dropped her phone prior to the bus moving away. Having viewed the evidence available to the respondent, being the CCTV footage, I conclude that while the angle does not fully show the claimant, the respondent's conclusion the claimant had her mobile phone in her hand as the bus was moving falls within the band of reasonable responses of a reasonable employer.

49. There was a dispute between the parties as to whether or not the claimant had seen the respondent's policy, said to be physically displayed on notice boards regularly used by all staff. On the balance of probability, I accept that the mobile phone policy was prominently displayed as alleged by the respondent. Therefore, the respondent's conclusion that the claimant had seen and ought to have read its mobile phone policy falls within the band of reasonable responses from a reasonable employer.
50. The claimant during her evidence confirmed that she was aware that the use of a mobile phone while driving was unlawful but believed that her use of the mobile phone to take a picture in what she considered to be emergency circumstances did not breach the rules. The claimant makes a distinction between using a mobile phone for telephone calls/messages and using the camera function on the mobile phone in an emergency situation. The wording of the respondent's mobile phone policy, set out above, does not expressly address use of a camera function on a mobile phone. I was not referred to any policy or documentation which related to the use of a mobile phone for taking pictures by bus drivers but it was apparent from Ms Bishop's evidence that circumstances exist in which drivers would be expected to take pictures with their mobile phones. The claimant claims it was her genuine belief that using her mobile phone to take a photo in the circumstances that she found herself in would not breach the respondent's policy or the legislation.
51. The claimant raised in mitigation the fact that she had been assaulted previously on the same route and she took the picture at least in part for reasons relating to a fear for her personal safety. The claimant told Ms Bishop that the complainant was driving erratically and the complainant's car had blacked out windows. It can be seen from the CCTV that the complainant was driving erratically and the car had blacked out windows. Ms Bishop rejected any link between the claimant's conduct and a perceived threat to her personal safety as 'nonsense'. In assessing this mitigation, Ms Bishop concluded that the claimant was the aggressor in the incident. Ms Bishop concluded that the claimant chose to tailgate the complainant's car in anger. I have considered this matter very carefully. The CCTV of the incident is short and I have described what can be seen in the CCTV above. Shortly after overtaking the claimant's bus, the complainant's car stops in front of the claimant's bus causing the traffic queue up bumper to bumper. The van in front of the complainant's car moves away and the complainant's car again stops. The claimant drives her bus to stop behind the complainant's car. The complainant's car has obviously stopped in the road, with no traffic directly in front of it. When the complainant's car moves, it speeds away and turns off at the next junction. It was obvious from the CCTV and stated by the claimant during the disciplinary hearing that the vehicles are close together because the complainant's car had stopped in front of her bus. In reviewing the entirety of the evidence available to the respondent I am unable to identify any evidence or reasonable basis at all for Ms Bishop's conclusion that the claimant tailgated or sought to pursue the car in an intimidating manner or

was the aggressor at any time during this incident. For the sake of completeness, I acknowledge the driver's complaint states that he was 'threatened' by the claimant. However, this does not form part of the disciplinary allegation made against the claimant nor was this part of the original complaint investigated.

52. Ms Bishop, during the disciplinary process, considered whether or not the claimant genuinely believed that the circumstances amounted to 'an emergency'. It is common ground that the claimant did not call in a 'code red' or a 'code blue', being circumstances where either the police or the respondent's central command were contacted. Nor did the claimant raise any issue internally on return to the bus depot. This would also have triggered the retention of any CCTV. These matters point to the claimant not considering the event to constitute 'an emergency'. However, at the time when the claimant took the photo, it was possible that the situation may escalate. The claimant's previous negative experience may have made her particularly sensitive to a possible escalation. In the event, the complainant's car sped away and the situation did not escalate and no further action was taken by the claimant. During the initial meetings the claimant cited her reason for taking the photos being that she was gathering evidence in case of a public complaint. Ms Bishop considered this explanation as confirmation that there was not an 'emergency situation'. Further Ms Bishop considered the claimant's explanation that she also had concerns for her own safety not to be genuine as they were raised at a later stage not by the claimant directly but by her trade union representative. The claimant says that when she told her representative of her safety concerns, those concerns were relayed to the respondent on her behalf. It is within the band of reasonable responses from a reasonable employer to consider why an employee may not offer a potential explanation immediately. However, the union rep is representing the employee and part of that function to ensure that the complete picture of the employee's position is properly communicated to the Employer. I cannot in the circumstances identify any evidence that could support any conclusion that the union reps' representations diverted in any way from the claimant's true position I consider the employers decision to discount potential mitigation due to it being raised by/articulated by the union rep and not the employee directly, falls outside the band of reasonable responses of a reasonable employer.
53. In relation to the two instances of 'running a red light', there is a dispute between the parties as to whether the lights were on red when the claimant passed the line. The claimant states they are amber. In reviewing the evidence as a whole I conclude, that the evidence available at the time to the respondent is such that the respondent's conclusion that the lights were on red falls squarely within the band of reasonable responses. The lights just turned red as the claimant passes the line. I have considered the claimant's explanations in relation to her judgement and her reference to 'the point of no return'. As the claimant approached the first set of traffic lights, the lights, from some way away, can be seen to be green. The traffic lights can then be seen to turn to amber. The claimant

is an experienced bus driver. It can be reasonably expected that when approaching a green light that the claimant would be mindful of the possibility of the lights turning amber and slow down. It is the case that there is no CCTV footage showing what traffic was behind the claimant's bus. In the circumstances I conclude that the respondents conclusion that the claimant had sufficient time to stop falls within the band of reasonable responses of a reasonable employer. The second incident relating to a red light, appears from the CCTV to occur very quickly. In contrast to the first set of lights, the CCTV does not obviously show time for the claimant to prepare or stop. Both of the red light incidents involve the claimant when approaching the lights to make a judgement call. The respondents conclusion that the claimant got it wrong on both occasions appears to be a conclusion that falls squarely within the band of reasonable responses of a reasonable employer.

54. In viewing the entirety of the evidence relating to the dismissal I highlight the following matters:

54.1. the claimant's previous recent experience of assault and the possibility that the claimant was genuinely concerned for her safety has been excluded from the respondent's consideration and a conclusion that the claimant was 'the aggressor' in this particular situation was reached for reasons that are not supported by the evidence available to the respondent;

54.2. there appears to be a potential grey area within the respondent's policy and accepted practice relating to the use of mobile telephones to take pictures in certain circumstances. There is no express prohibition or mention of the use of mobile phones for taking pictures within the respondent's mobile phone policy. It is possible that has contributed to genuine confusion on the part of the employee as to the appropriateness of her actions. This does not appear to have been considered by the respondent.

54.3. No consideration was given to the claimant's length of service other than in a negative sense being that an experienced driver should not act in the way the claimant had acted. No consideration appears to have been given to the claimant's previous good disciplinary record.

55. In light of the above matters, I conclude that the respondent's decision to dismiss the claimant falls outside the band of reasonable responses.

56. The claimant was afforded the opportunity to appeal. However I have identified the following difficulties with the appeal:

56.1. Mrs Lowry's accepts Mr Parry's comments that the claimant was 40/50 car lengths away from the lights when it turned amber. It can be seen from the CCTV that the lights turn amber for a matter of seconds and then quickly turned red. The reference to 40/50 car lengths is clearly a mistake but not checked by Mrs Lowry or Mr Parry. This information is obviously sufficient to give a misleading picture of the red light incidents within the appeal process.

- 56.2. Mrs Lowry accepts Ms Bishop's conclusion that the claimant was the aggressor in the situation. No further evidence of this conclusion is put forward and I repeat the concerns set out above in respect of this conclusion.
- 56.3. Mrs Lowry refers within the appeal process to the claimant's previous disciplinary record and is provided with a misleading picture referring to matters that were not previously discussed with the claimant but appear to be recorded without any form of procedural fairness.
57. I note Mrs Lowry's conclusion that no driver for the respondent can pull out a mobile phone in charge of the service vehicle for any purpose and Ms Lowry could not think of any form of emergency when a driver in control of the bus could use a mobile phone legitimately. However, in light of the issues raised above I do not consider that the appeal held by Mrs Lowry and Mr Parry in the circumstances was sufficient to remedy the issues raised within the original decision.
58. As I have concluded that the claimant's dismissal was unfair, I consider the issue of contribution. I have considered whether the claimant's conduct was blameworthy and/or culpable. On the balance of probability I conclude that:
- 58.1. The claimant was aware of and had seen the respondent's mobile phone policy displayed within the workplace. The claimant was fully aware that making or taking telephone calls/ reading or responding to messages or using an earpiece when in charge of the vehicle is entirely prohibited by law and the respondent.
- 58.2. There is a grey area in the respondent's mobile phone policy and no express clarification of when the camera function of a mobile phone may and may not be used by bus drivers when on duty had been provided to the claimant. It appeared that there were circumstances where drivers were legitimately expected to take photos with mobile phones. It was the claimant's genuine belief that using her mobile phone to take a photo in the circumstances that could be properly considered 'an emergency' would not breach the respondent's policy or the legislation.
- 58.3. Regardless of the grey area relating to using a mobile phone to take pictures, the claimant was fully aware that having her mobile phone in her hand while driving/moving her bus, even momentarily, would be a serious safety risk. The claimant had her phone in her hand (albeit momentarily) as the bus moved forward.
- 58.4. The claimant had been assaulted the previous year and this may have had an effect on the claimant's threshold for the perception of risk to her personal safety. Erratic driving from a driver whose car had blacked out windows raised a concern on the claimant's part for her safety and contributed to her decision to use her mobile phone to take a picture in circumstances where others might not. On an objective basis there was no 'emergency'.

- 58.5. There is no evidence to support any conclusion that the claimant was the aggressor and/or tailgated the driver as alleged by Ms Bishop. The claimant is a long-standing employee having been employed since 2005 and has a clean disciplinary record.
- 58.6. The claimant drove through both traffic lights when they were red. In relation to the first set of traffic lights, they can be clearly seen to be green as the claimant approached. The claimant, as an experienced bus driver had time to prepare for the possibility that the lights may turn amber. The traffic lights can be seen to turn amber and the claimant crosses the line just after the lights turn red. I conclude the claimant had sufficient time to prepare when the lights were green and stop at the amber lights. In the second incident relating to a red light, the CCTV does not obviously show the approaching traffic lights or time for the claimant to prepare or stop. Both of the red light incidents involve a judgement call on the part of the claimant and the claimant getting it wrong albeit by a matter of seconds if not fractions of seconds.
59. Taking the entirety of the above into account, I conclude that the claimant's actions were blameworthy and/or culpable. Her actions created safety risks and even taking into account the mitigation omitted by the respondent, there must be a high level of contribution on the claimant's part. Taking the entirety of the evidence set out above into account, I conclude that the level of contribution attributable to the claimant amounts to 85% and both her basic and compensatory award should be reduced accordingly.
60. This matter will be listed for a remedy hearing to determine the final amount due to the claimant.

Employment Judge Skehan

Date: ...16 December 2019.....

Sent to the parties on:

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For the Tribunals Office