



EMPLOYMENT TRIBUNALS

Claimant: Mr M Thomas

Respondent: Abellio London Limited

Heard at: London South **On:** 11 February 2020

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: in person

For the respondent: Ms Smith, Solicitor

JUDGMENT WITH REASONS

Decision:

The claim for constructive unfair dismissal is not well founded and is dismissed.

Reasons

1. This was a claim for constructive unfair dismissal. The claimant appeared in person and was accompanied by but not represented by a union representative.
2. The respondent was represented by Miss Smith, Solicitor.
3. There was an agreed bundle of documents (76 pages) and some additional documents provided by the claimant which amounted to no more than four documents which the respondent did not object to and which were admitted as evidence (pages 77 to 80).
4. The Tribunal heard from the claimant and from Mr Jackson, Staff manager at the Battersea depot and Mr Moran, Operations Manager for the Battersea depot for the respondent.
5. At the outset of the hearing the Tribunal spent some time exploring with the claimant the precise issues or allegations in support of his complaint of constructive unfair dismissal. Following this discussion, the claimant confirmed

that he was relying on a breach of the implied term of trust and confidence for three reasons:

- First, that the respondent had been dishonest in relation to its assertion that the front CCTV camera in the bus he was operating when he was observed going through a red light, was not working.
- Second, that relying on a rear camera was misleading.
- Third, that his union representative was informed before the disciplinary hearing by Mr Moran that the claimant had already been sacked.

Relevant findings of fact

6. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence and having regard to the above findings on credibility and elsewhere in the judgment.
7. Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant.
8. The Claimant was employed as a PCV driver from 6 April 2000 until 14th of February 2019.
9. The claimant was subject to a live written warning for a period of 52 weeks issued on 26 July 2018 in relation to a customer complaint whereby a passenger had been left behind at a bus stop and for unsatisfactory driving standards - driving whilst eating and drinking and driving one-handed. This warning was issued following a regular disciplinary process. The warning was at Page 63 of the bundle. The minutes of the meeting were at pages 59 to 62 of the bundle. At page 61 of the bundle, the minutes record that the claimant could have been dismissed but instead the decision maker had opted to give the claimant a written warning with corrective training.
10. The claimant was subject to an independent assessment from AA Drive tech. The Tribunal accepted the respondent's evidence that these assessments were carried out periodically for all drivers and are independent. This would be routine having regard to the services provided by the respondent and this evidence was not challenged.

11. The outcome of the claimant's assessment on 3 February 2019 was that he was considered to have driven through a red light when there had been adequate time and space to stop. Further, that for long periods the claimant had been driving with one hand on the wheel only. In relation to both of these, the assessment considered this to be an endangerment or compromise to the safety of passengers and other road users. The claimant was also assessed as travelling inappropriately fast on an approach to a roundabout and where braking was abrupt.
12. The assessment did comment on the claimant's mirror use as being acceptable and his door operation was also good.
13. The assessment was at page 66 of the bundle. Mr Jackson said he cross checked the assessor's report with the CCTV imagery. Whilst the Tribunal noted and found that the timings in the assessor's report did not completely correspond with the period observed/assessed, the Tribunal found that the timings were likely to have been an error but that in any case Mr Jackson said the assessment correlated with what he saw on CCTV.
14. Following receipt of this report the claimant was invited to a fact-finding investigation meeting on 7 February 2019. The minutes of that meeting were at page 70 to 73 of bundle. The minutes of this meeting were agreed save that the claimant said in evidence, for the first time, that he did not agree that he said:
"No I could have stopped but the bus would have went over the yellow box so I was trying to avoid the yellow box but I was too close to it already"
15. The claimant was asked what he believes he said instead but he said he could not recall. The Tribunal had regard to the timing of the assertion that the minutes were not accurate. Whilst the Tribunal accepts that the claimant may not have used the exact words recorded, the Tribunal finds that the gist of what was recorded was sufficiently accurate.
16. The claimant also remarked in this meeting:
"Personally, I am not thinking about anything else but I already know you are going to sack me"
17. The claimant was invited to a disciplinary hearing in relation to 2 charges. First, unsatisfactory driving standards and second, action likely to threaten the health and safety of himself, customers or members of the public. In relation to the second charge, at the conclusion of the investigation meeting, the claimant had been informed that this was a gross misconduct charge.
18. A disciplinary hearing was arranged for 14th of February 2019. The invitation letter dated 8 February 2019 and was at pages 74 and 75 of the bundle.
19. In advance of that hearing, the claimant said he was advised by his union representative 'Judith', that she had had a conversation with Mr Moran as a result of which she had been informed that he had already been sacked and that this was a direction from a director upstairs.

20. Thereafter in conjunction with 'Judith' and another trade union convener 'Mustapha', the claimant says his letter of resignation was drafted and then handed to Mr Moran. (The Tribunal has referred to these individual by their first names as the Tribunal was not provided with their surnames).
21. The evidence in relation to this part of the case was completely polarised. Mr Moran says that no such conversation took place. In his witness statement he vehemently denied this conversation and he denied this conversation twice in his oral testimony. He also said in evidence that nothing of the sort had ever been asserted against him before. He had conducted between 100 and 140 disciplinary hearings. His relationship with the union was professional and respectful.
22. The Tribunal finds it was not in dispute that there was no arrangement, on either side, for the union official to be there on that day.
23. The claimant alleged for the first time at the beginning of the Tribunal Hearing that the respondent's case about CCTV imagery in relation to the front of the bus being unavailable at the time because it was not working was an untruth i.e. dishonest. The Tribunal heard from Mr Jackson that the CCTV analysts controlled those images and in order for any manipulation of the kind being asserted to happen they would need to be instructed to do so.
24. In relation to the camera that was relied upon, the claimant asserted that reliance on that Camera was misleading as it would not show clearly whether or not the claimant went through a red light. Mr Jackson for the respondent said that it would still give a good view of the length of the bus and you could still see the pavement and traffic lights. The Tribunal noted that the claimant had at the time of the fact-finding meeting stated that he could have stopped but he was trying to avoid the yellow box. This was in response to a question about whether the claimant could have stopped when the lights turned amber. The Tribunal also noted that the respondent's reliance on the camera was only part of the evidence as they were also relying on the assessor's report.
25. Over one month after the claimant's resignation he sought to ask via email if he could retract his resignation and a disciplinary hearing convened. This email was at page 77 of the bundle. He referred in that email to being wrongly advised by his union. Also, he asserted that he was told that if he had gone into his disciplinary hearing he would have been fired. In evidence he said that was not what he said or meant, he said he was a 100% sure that he had been told he had already been sacked.

Applicable Law

26. Under S. 95 Employment Rights Act 1996 ('ERA'), an employer is treated to have dismissed an employee in circumstances where he is entitled to terminate the contract by reason of the employer's conduct.

27. The legal test for determining breach of the implied term of trust and confidence is settled. That is, neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee ***Malik v BCCI 1997 ICR 606.***
28. The correct test for constructive dismissal was set out and established in ***Western Excavating v Sharp 1978 ICR 221*** as follows:
29. Was the employer in fundamental breach of contract?
30. Did the employee resign in response to the breach?
31. Did the employee delay too long in resigning i.e. did he affirm the contract?

Conclusions and analysis

32. In relation to the allegation that the respondent deliberately concealed reliance on the front camera the Tribunal concluded that this allegation was not made out. The burden of proof rests with the claimant. This was a serious allegation and one which was made for the first time on the morning of the hearing. It was categorically denied. The Tribunal finds that there was no evidence before it from which it could conclude that the respondent was motivated to behave in this way. Crucially, it's assessment of the claimant's driving was arranged independently and even without the CCTV evidence, the Tribunal concluded, based on the assessor's observations, the respondent would have been entitled to investigate the claimant's alleged wrongdoing.
33. A case to manipulate CCTV imagery would require the involvement of a senior manager and a CCTV analyst. In the circumstances of this case this was a far-fetched and serious allegation particularly where the claimant said he had always been treated well, including by Mr Moran.
34. In relation to the alleged misleading use of the other camera, the Tribunal concluded that reliance upon it was fair and reasonable in the circumstances. It was not the exclusive evidence being relied upon and the Tribunal accepted Mr Jackson's evidence that it did provide some corroboration in relation to whether the claimant drove through a red light or not. In fact, Mr Jackson was quite candid in his witness statement paragraph 23 when he accepted that the front camera would have provided a clearer picture and he factored this in before deciding if the claimant had a case to answer.
35. In relation to the allegation concerning the conversation before the disciplinary hearing the Tribunal concluded, on a balance of probabilities, that no such conversation took place. The Tribunal reached this conclusion, in particular because of the absence of corroborating evidence from the trade union official with whom the conversation was alleged to have taken place or any evidence from the other trade union official to whom the claimant says the conversation was also relayed. Both parties confirmed there were no arrangements in place

for 'Judith' the TU representative to be present at that time. Whilst the Tribunal notes that the claimant was acting in person, it did not mean that the claimant could not have taken some steps to secure their attendance in Tribunal. He was a member of the union. There was also no evidence before the Tribunal that the claimant had attempted to contact either of the trade union representatives by email. This evidence was crucial to the claimant's case particularly as he has the burden of proof and particularly because the allegation was also extremely serious.

36. The Tribunal also concluded that the respondent was a well-known transport provider and is unionised. The claimant had previously been disciplined and received a written warning following a proper process which at the time might have resulted in the claimant's dismissal but did not. The claimant was also being taken through a regular investigation and disciplinary process in relation to the matters before the Tribunal and therefore it seemed incredible and highly implausible that the respondent would behave in such a way by dismissing the claimant, who had been invited to a disciplinary hearing, without any such hearing taking place. This is different from examples that the Tribunal sometimes hears of where, for example, a trade union official believes that the claimant may be dismissed or where such a 'signal' is given to a trade union representative which may or may not, depending on the words said and context, be a breach of the implied term of trust and confidence. However, in this case the claimant was emphatic in his assertion that he was told he had already been sacked when he turned up for a disciplinary hearing because of a direction from above/a director.
37. As noted above, the claimant had no reason to feel that the respondent was out to get him and indeed even if that was the case it would seem far more plausible for the claimant to be put through a disciplinary hearing and then be sacked if there was such a conspiracy.
38. It appeared to the Tribunal that the claimant used the opportunity at the Tribunal Hearing to essentially attempt to resurrect what would have been a disciplinary hearing and he may well have had legitimate issues to raise in relation to the respondent's case against him, but that was not what was being tested or determined at the Tribunal Hearing.
39. The Tribunal concluded that the claimant resigned on the advice of and/or was influenced by his union representative but not in circumstances where the respondent had breached the implied term of trust and confidence.
40. There was no breach of the implied term of trust and confidence/no repudiatory breach of contract. The claim is dismissed.

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Employment Judge Khalil

11 November 2020