



EMPLOYMENT TRIBUNALS

Claimant: MR HAYLEY-BELL

Respondent: ARRIVA LONDON NORTH LIMITED

Heard at: Watford by CVP **On:** 19 October 2020

Before: Employment Judge Skehan

Appearances

For the Claimant: Mr Caferoglu, Union rep

For the Respondent: Ms Royal, Solicitor

JUDGMENT

1. The claimant was not unfairly dismissed and his claim for unfair dismissal fails.

REASONS

1. These reasons were requested by the claimant following the hearing. This was a remote hearing which was not objected to by the parties. The form of remote hearing was Video (fully remote). A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 144 pages, the contents of which I have referred to. The order made is described above.
2. By claim form received at the Employment Tribunal dated 01/07/2019, the claimant claimed unfair dismissal only. The respondent's notice of

appearance dated 15/09/2019 was accepted by the tribunal and the matter was defended.

The Issues

3. At the outset of the hearing, we revisited the list of issues as compiled by EJ McNeil QC at the preliminary hearing held on 06/03/2020. The issues to be determined by the tribunal were:
 - 3.1. The principal reason for the claimant's dismissal is agreed to be a reason relating to the claimant's conduct. The claimant relies upon the following matters in contending that the dismissal was unfair:
 - 3.1.1. The respondent refused to permit the claimant's trade union representative to ask questions of the two drivers who had made statements, relied upon by the respondent in the disciplinary proceedings, alleging that the claimant had used racist language against one of the two drivers;
 - 3.1.2. The respondent relied upon materially amended statements of the two drivers after the disciplinary hearing had been adjourned for two weeks;
 - 3.1.3. The respondent took into account a 2017 matter reported against the claimant which was wrongly classed as involving racist language, and for which the claimant had not been disciplined;
 - 3.1.4. The respondent failed to take into account CCTV footage which was inconsistent with what was alleged against the claimant and was inconsistent with the first statement of one of the drivers;
 - 3.1.5. The respondent refused to transfer the claimant to another garage, as his trade union representative suggested, rather than dismissing him; and
 - 3.1.6. On the claimant's appeal, the respondent did not allow the claimant to call witnesses he wished to call at the appeal, or arrange for the two drivers who had made statements to attend the appeal so that the claimant's trade union representative could ask them questions.
 - 3.2. The claimant accepts that racist language is an offence for which dismissal is a reasonable sanction but contends that the respondent could not reasonably reached the conclusion that he had used racist language.
4. Mr Caferoglu confirmed that the claimant's claim was for unfair dismissal only and there was no claim for wrongful dismissal. It was agreed with the parties that the tribunal would hear evidence in relation to liability only together with evidence in relation to any alleged 'Polkey' reduction (an argument that even if the procedure is found unfair that the claimant would have been dismissed in any event) and any alleged contribution on the claimant's part. Remedy would 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 Fair Employment Rights Act 1996 ("the ERA") as a potentially fair reason. The respondent relies upon 'conduct'. 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.

6. 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.
7. 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.

The Facts

8. I heard evidence from Ms Bishop, who made the decision to dismiss the claimant and Mr Smith who dealt with the appeal behalf of the respondent. I heard evidence from the claimant on his own behalf. I also heard evidence from Mr Caferoglu, who acted as the claimant's representative throughout the internal processes and at the hearing. All witnesses gave evidence under affirmation. Their witness statements were adopted and accepted as evidence-in-chief. All witnesses were cross-examined. 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.
9. The claimant was employed as a bus driver and his continuous employment commenced on 09/10/2001 until his dismissal on 15/04/2019. The allegations that led to the claimant's dismissal arose from an interaction with his colleague, Mr K, on the evening of 16/01/2019. The tribunal was referred to an 'occurrence report' filled in by Mr K, dated 16 /01/2019. The subject matter is 'Hate Crime'. The allegation made by Mr K against the claimant within the occurrence report is that during an altercation with Mr K, the claimant subjected Mr K to racial abuse and in particular, used the words 'you terrorist', 'you Paki' and 'watch what happens later'. Mr K also alleged that the claimant threatened him, following this incident in the canteen. The

claimant denies that he used racist language. The claimant said that he called Mr K 'a prick'. The claimant denies that there was any incident in the canteen.

10. An investigation into the allegation was carried out and the claimant attended an investigatory meeting on 21/03/2019. At this meeting the claimant says:
 - 10.1. he had pulled up the changeover point and was approximately 9 minutes late but he was waiting for a further minute for the docket.
 - 10.2. Mr K let himself onto the bus using the emergency door button. Mr K said to the claimant, 'hurry up what are you fucking waiting for'. As the claimant alighted from the bus, Mr K turned and faced the front door of the bus and shouted to the other colleagues at the bus stop 'one minute' while holding up a finger to elaborate on the one minute. The claimant said to Mr K, 'shut up and just drive your bus, you're a prick'
 - 10.3. the claimant says he saw Mr K following the incident in the canteen. He said to Mr K 'one minute' while signaling with his finger as Mr K had done previously. The claimant says he walked into the games room and no more was said.
11. As part of the investigation, the respondent obtained a statement from Mr V who was also the claimant's colleague and a bus driver, dated 04/03/2019. No reason was provided for the delay in obtaining this statement. This statement says that Mr V heard a disagreement between the claimant and Mr K. He said that when the claimant left the bus he referred to Mr K as 'a fucking paki' and had also used the word 'terrorist'.
12. The respondent obtained the available CCTV in relation to the incident. This was played during the tribunal. The CCTV footage was of limited assistance as the respondent's system does not record audio footage. The footage showed the claimant's bus pulling up and Mr K letting himself on the bus. There appears to be an exchange of word between the drivers. Once the claimant had left the bus Mr K could be seen to go to the bus door on more than one occasion. The parties agree that the incident occurred when the claimant was off the bus out of range of the CCTV. The respondent identified Mr V in the video standing in close proximity to the bus. Passengers were on the bus. An interaction between Mr K and Mr V could be seen after the incident.
13. The claimant was invited to a disciplinary meeting by letter dated 21/03/2019. The allegation was racial and threatening behaviour on 16/01/2019 as referred to in the occurrence report. The claimant was provided with a copy of the documentation generated during the respondent's investigation. This letter also stated 'If you wish to call any Arriva witnesses to the hearing who can contribute to the evidence please complete and hand in a DP2 (enclosed) in no later than 24 hours in advance'. The claimant signed to confirm receipt of this letter on 25/03/2019. It was explained to the tribunal that the DP2 form is the internal

form used within disciplinary procedures where an individual wishes to call witnesses.

14. Ms Bishop dealt with the disciplinary allegation. A disciplinary hearing was held with the claimant on 27/03/2019. Mr Caferoglu, who assisted the claimant throughout the internal process, asked if those who made allegations could be made available to speak at the hearing. Ms Bishop said that if there was further clarification required by those who had already provided statements, she would adjourn the hearing to further investigate.
15. The claimant told Ms Bishop that he was not a racist and would not have used those words. He explained the incident. He was running approximately 9 minutes late and was waiting when he pulled up at his final stop to enable him to claim a 10 minute docket. This was explained to the tribunal as a 10 minute overtime claim, rather than the 9 minute overtime claim that reflected his delay. Mr K, who was waiting to take over as bus driver, opened the bus doors from the outside and said to the claimant, 'what are you fucking waiting for'. Mr K was aggressive towards the claimant during this time. The claimant said that when he left the cabin and the bus, the accusing driver, Mr K, came to the door and started to say repeatedly, 'one minute', whilst waving his hands towards the claimant. The claimant said that he turned around and called Mr K, 'a prick' and told him, 'just drive the bus'.
16. Mr Caferoglu said that it was the accuser who was antagonising the claimant in trying to 'wind him up to get him to respond. Mr Caferoglu submitted that the claimant had worked for many years and there was no incident of this nature previously. Ms Bishop had been provided with a print out of the claimant's 'Performance Record Report' and asked the claimant about an entry relating to 'Armah' described as 'offensive behaviour towards another driver'. There was some discussion as to this incident. The claimant explained that it related to a misunderstanding about a cup of coffee. The other driver took offence but there was no allegation that the claimant used any racist words. The claimant told the tribunal during the course of his evidence that no disciplinary action taken in relation to this issue. The respondent did not produce any evidence of any disciplinary action taken by the respondent against the claimant. Both parties agree that the allegation did not contain any allegation of racist abuse. Ms Bishop says that this was discussed as there was a mention of it within the records however she did not consider it relevant and it played no part in her decision.
17. Mr Caferoglu said that he had issues in relation to the statements as he did not feel they matched up. He said that the driver witness statement implies that the witness, Mr V, knew there was some poor history between the accusing driver, Mr K, and the claimant when it says 'there may have been disagreements.' The claimant referred to the alleged incident in the canteen and told Ms Bishop that he had not said anything to anyone. He was accompanied at the time by his colleague, 'Kas'. Ms Bishop told the claimant she would investigate. Ms Bishop asked the claimant if he was aware of any reason why two individuals would collude and make allegations of racist abuse. The claimant told Ms Bishop that he had no idea why these people

might allege this. The claimant made reference to previous issues relating to his motorbike. The claimant told Ms Bishop that there was not a poor history between him and Mr K and he had not ever spoken to Mr K previously, seeing him only when working later shifts. Mr Caferoglu said that he had known the claimant for a long period of time and never known him to be racist in any way towards others. The disciplinary hearing was adjourned to allow for further investigation.

18. Ms Bishop spoke to 'Kas', who stated that on 16 March 2019 he was going to the games room and bumped into the claimant. He heard the claimant talking to someone but did not hear what was said. Ms Bishop spoke to Mr K and Mr V again and produced further statements. Both Mr K and Mr V were unwilling to attend the disciplinary hearing to be cross-examined as they said they felt threatened. On 09/04/2019 Mr Caferoglu emailed a list of his questions for Mr K and Mr V. Ms Bishop informed Mr Caferoglu that she had already spoken to both men and received clarification on some of the points which give answers to many of the questions raised, and she did not believe there was anything further required from the witnesses. Mr Caferoglu responded with, 'To be honest I just want this to be over and done with. It dragged on for too long now...'
19. The claimant was invited to a reconvened disciplinary hearing by letter dated 10/04/2019. The reconvened meeting was held on Monday, 15/04/2019. The matter was further discussed. The disciplinary hearing was adjourned and reconvened. On reconvening the meeting Ms Bishop concluded that on the basis of the evidence available to her she considered that the charge was proven. She had carefully considered the claimant's version of events. She considered the two statements by Mr K and Mr V. The CCTV footage suggested that the claimant and Mr K had been engaged in a verbal exchange. The claimant conceded that there was an exchange. It appeared from the CCTV that Mr V was in the vicinity and he said that he witnessed the exchange and heard the alleged racial abuse. The claimant has provided no reason why the employees would collude. Ms Bishop concluded on the balance of probability that the racial expressions 'terrorist' and 'paki' were made as alleged. Ms Bishop considered whether a transfer to another garage might be an appropriate sanction but considered that the respondent had a zero tolerance approach to racist abuse and it was never acceptable to use racial language, regardless of what provocation had occurred. For this reason, Ms Bishop decided that dismissal was the appropriate sanction.
20. The claimant submitted an appeal against his dismissal on 30/04/2019 sighting breach of procedure. The appeal process was dealt with by Mr Smith. The claimant filled in an internal 'DP2' form requesting the attendance of his wife, Mrs Hayley Bell, Mr Khattak and Mr Edwards. It was common ground between the parties that these individuals did not witness the altercation with Mr K, the claimant wished for them to act as character references. Ms Bishop informed the claimant that she would contact the character references as requested but advised that character statements should be written and signed by the named individual on his behalf. They could then be taken into consideration at the time of the appeal hearing if

they were unable to attend. Ms Bishop also acknowledged the claimant's request to question the individuals who had made allegations against him. The claimant was asked to provide a final list of questions with the assistance of his representative. Ms Bishop noted that these could be put by the appeal panel to the witnesses to provide a thorough appeal hearing.

21. During the appeal hearing with Mr Smith, Mr Caferoglu raised the issue of access to the accusers. Discussion turned to the availability of an internal form DP2 but did not progress further. Mr Smith asked why Mr Edwards was present. In his witness statement, Mr Smith states that he considered that Ms Bishop told the claimant that it was against company rely character witnesses... but that he should have witness statements instead. Mr Smith considers the appeal and concludes that the claimant's behaviour was entirely unacceptable regardless of the alleged racial comments. He concludes that it was the appeal panels reasonable belief that the claimant did make the comments and the decision to dismiss was upheld. Mr Smith makes an entirely unexplained comments that are redacted within the final version of the statement. Mr Smith, within his statement, acknowledges that the claimant requested access to the accusers and submitted a list of questions. Mr Smith's response is that the claimant had to follow procedure if he wanted witnesses to attend and he had not been given a 'DP2 form'.
22. Mr Smith notes that Mr Caferoglu complained that the claimant had history of being picked upon, but no examples or supporting evidence was put forward to corroborate that allegation. It was acknowledged during the course of Mr Smith's evidence that the claimant had been a victim of an incident previously that the accused in that case had been transferred to a different garage as a result of that incident. The claimant said that Mr Smith behaved aggressively and without due courtesy during the appeal.
23. The claimant says that he has apologised for calling Mr K, 'a prick'. His body language on the CCTV does not in any way support the accusations made against him by the respondent. Mr V can be seen on the CCTV, laughing with Mr K following the incident. This does not support a serious allegation of racist abuse. Mr K could have used the 'code red' on the bus radio system that is available for emergencies but chose not to. Mr K did not report the matter to the police. The fact that Mr V's statement was not received until 4 March, months after the original incident, is suspicious. Mr V could not have overheard his discussion with Mr K as he was at least 50 feet behind the vehicle and the engine was running. Further, if the incident happened as reported, it would be expected that the passengers that can be seen on the CCTV would react, complain, or even film the incident. None of this happened. He has been extremely harshly punished bearing in mind the mitigating circumstances and provocation from Mr K. The claimant says that he has been a victim of false allegations and collaborated lies. His character witnesses were not taken into account, and his reputation has been unfairly tarnished.
24. Mr Caferoglu told the tribunal that he had in previous disciplinary processes with the respondent been allowed to question accusers. He said that

whether or not a Rep was allowed to question accusers was within the discretion of the individual chairperson dealing with a disciplinary. Mr Caferoglu conceded that such a practise was not commonplace. Mr Caferoglu was informed by Ms Bishop that both Mr K and Mr V were unwilling to attend to be cross-examined as they felt threatened, he doubted this to be the case. Mr Caferoglu accepted that in general terms, bus drivers tended to be reluctant to make complaints against each other and accepted that it may be difficult for a bus driver to raise a complaint of racial harassment.

25. Mr Caferoglu was not able to identify any question that should have been put to either Mr K or Mr V, but had not. His complaint was that the accusers should be present to back up their allegations in person. Mr Caferoglu told me that what was put in writing was very different from what may be said in person and it was only fair that the accusers should have to explain their positions and the entirety of the incident in person. Mr Caferoglu said that he was not accusing the accusers of lying and he was everyone's friend and might be able to persuade Mr K and Mr V to change their minds. He considered Ms Bishop's handling of the disciplinary to be fair and there was no complaint relating to her.

Conclusions

26. Both parties agree and the tribunal finds that the claimant was dismissed for reason relating to his conduct. The specific conduct allegations relate to the occurrence report raised by Mr K. Ms Bishop's found that the claimant used two racist expressions in his exchange with Mr K on 16/01/2019, calling him 'you terrorist' and 'a Paki'. The remainder of the evidence and allegations are considered background information.
27. 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. Ms Bishop adjourned the initial disciplinary meeting to allow her to carry out further investigation. A further disciplinary meeting was convened and a disciplinary outcome provided.

Did the respondent refuse to permit Mr Caferoglu to ask questions of the two drivers, Mr K and Mr V?

28. Mr Caferoglu raised various queries relating to the evidence of Mr K and Mr V in the initial disciplinary hearing and discussed these queries with Ms Bishop. Ms Bishop, thereafter reverted to both Mr K and Mr V and prepared expanded witness statements addressing the questions raised by Mr Caferoglu. It is unfortunate that these further witness statements were obtained prior to Mr Caferoglu confirming his questions in writing. However, Ms Bishop provided the updated statements to Mr Caferoglu, and considered that the updated statements have addressed the matters raised by him. Neither the claimant nor Mr Caferoglu identified any unanswered questions but concentrated on the lack of in person attendance by the accusers to support their accusations. When looking at the matter in the round I consider that Ms Bishop's dealing with the questions raised by Mr

Caferoglu and the claimant, is a logical, reasonable and sensible approach. Mr Caferoglu was allowed to raise issues in respect of the witnesses evidence as relied upon and this evidence was revisited by the respondent as a result of these questions.

29. The real complaint is that Mr Caferoglu was not permitted to ask questions or cross examine the witnesses in person. The ACAS code at paragraph 12 provides:

..... The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.

The claimant's internal procedure envisages employees calling relevant witnesses and provides an internal form 'DP2' to allow them to do so. There is no express provision within the ACAS code or respondent's internal procedures that requires the employer to provide the employee or their representative with the opportunity to cross-examine complainants. It is accepted the balance of probability that this had happened previously within the respondent organisation, but it was not commonplace. In the circumstances, both Mr K and Mr V were asked if they were willing to attend the hearing but were unwilling to do so as they said they felt threatened. It is common ground between the parties that bus drivers are normally reluctant to make complaints against each other. Mr Caferoglu submission and evidence was that it was only fair that the accusers should have to explain their positions and the entirety of the incident in person. He said that 'he was everyone's friends and might be able to persuade them to change their minds'. His submission that he was not accusing the accusers of lying was difficult to follow as it was the claimant's case that the racist comments were not made, the accusers had lied and collaborated, fabricating a very serious allegation. Taking the entirety of the evidence into account, I conclude that Ms Bishop's decision not to insist on the presence in person of the witnesses or allow cross examination during the internal process, falls within the band of reasonable responses from a reasonable employer.

The respondent relied upon materially amended statements of the two drivers after the disciplinary hearing had been adjourned for 2 weeks.

30. Mr Caferoglu raised additional questions of the two witnesses during the disciplinary hearing. Ms Bishop decided to adjourn the hearing to allow her to carry out further investigation and address those questions. She reverted to the witnesses and provided further statements. I was unable to follow the logic of the claimant's argument of unfairness in this respect. This action on the respondent's part appears to be a sensible and logical step and failure to do so would be a flaw. This falls within the band of reasonable responses of a reasonable employer.
31. I also address the submissions made in relation to the weight placed upon the claimant by the fact that Mr V's statement was not received until 4 March, months after the original incident. Ms Bishop told the tribunal that she had

requested the statement but Mr V had delayed in providing it. No reason for the delay was given. There are a multitude of potential reasons why a statement may be delayed. The gist of Mr Caferoglu's submissions is to invite the tribunal to conclude that a reasonable employer would have disregarded the content of the statement as suspicious due to the delay. In the circumstances Ms Bishop could see from the CCTV that Mr V was in the vicinity at the time of the alleged comments. I consider her decision to accept the statement notwithstanding the delay to be one that falls within the band of a reasonable response from a reasonable employer.

The respondent took into account a 2017 matter reported against the claimant which was wrongly classed as involving racist language, and for which the claimant had not been disciplined;

32. it is the case that the coffee incident, as mentioned above was discussed during the disciplinary hearing. A reference to this incident was contained within the claimant's records. Ms Bishop enquired as to the incident. The claimant explained it. Ms Bishop told the tribunal that she did not consider the incident involved a racial element nor did she take the incident into account when making her decision. Ms Bishop was clear in her evidence that she reached the conclusion that the racist expressions were used on the balance of probability and that was the reason for her decision to dismiss. I conclude, on the balance of probability that this incident in 2017 was not relied upon by Ms Bishop in reaching her decision to terminate the claimant's employment.
33. The respondent failed to take into account CCTV footage which was inconsistent with what was alleged against the claimant and was inconsistent with the first statement of one of the drivers.
34. Much was made by the claimant of the CCTV footage. It was viewed twice by the tribunal. There is no audio to the CCTV footage. The particular exchange between the claimant and Mr K happened when the claimant was outside the bus, off-camera. CCTV footage does not show the claimant calling Mr K 'a prick' as he has alleged. In the same vein, the footage does not show the claimant using the two racist expressions as alleged. In this respect the CCTV footage is of limited value. The footage does show that there was some interaction between the claimant and Mr K on the bus that appears to have continued when the claimant got off the bus. The CCTV footage also shows Mr V in the close vicinity at the time of the interaction. This is the information relied upon by Ms Bishop in reaching her decision.
35. There is nothing within the CCTV to suggest that Mr V was 'at least 50 feet away from the vehicle' or may have difficulty hearing the comments made. It is the case that Mr V and Mr K can be seen interacting after the incident. It is not possible to hear what is said. It is the case that passengers on the bus do not react to what is said between the claimant and Mr K outside the bus and no subsequent complaint was received. It is also accepted by the respondent that Mr K did not use the emergency 'code red' on the bus radio system or report the matter to the police. The claimant says that he has been a victim of false allegations and collaborated lies.

36. Ms Bishop weighed these matters against:
- 36.1. The claimant accepted that there was an heated interaction between the drivers on the night in question; the claimant says that he called Mr K, 'a prick'; Mr K says that the claimant called him a 'terrorist' and a 'Paki';
 - 36.2. The CCTV shows Mr V in close proximity to where the interaction took place; Mr V says that he heard the claimant call Mr K a 'terrorist' and a 'Paki'; and
 - 36.3. The claimant could not provide any reason why both drivers would collude and lie.
37. The claimant and Mr Caferoglu did not provide Ms Bishop with any information that would suggest that either Mr K or Mr V had any form of a grudge against the claimant. There was reference to an incident with the claimant's motorbike that happened years previously, but the claimant confirmed that he had worked with Mr K without incident since that time. Ms Bishop weighed the evidence and reached a genuine conclusion, on the balance of probability, that the claimant had used the racist abusive language as alleged.
38. I note the claimant's submission that he considered he had been extremely harshly punished bearing in mind the mitigating circumstances and provocation from Mr K. It was accepted by the respondent that the altercation between the drivers involved swearing on both sides, however the emphasis of the disciplinary allegation related the element of racial abuse. Ms Bishop decided on the balance of probability that the claimant was guilty of racial abuse. She did not consider that provocation as alleged by the claimant could be an excuse or explanation for racial abuse and this was not considered to be a mitigating circumstance. I consider the respondents method of dealing with alleged provocation the circumstances to fall within the band of reasonable responses of a reasonable employer.

The respondent refused to transfer the claimant to another garage, attic trade union representative suggested, rather than dismissing him.

39. The claimant argues that the dismissal was too severe a sanction and that he should have been moved to another garage. Once Ms Bishop had decided that the claimant was guilty of racial abuse as alleged, this clearly falls into the most serious of conduct categories and all disciplinary sanctions were open to the respondent. The claimant accepted during the course of his evidence that the use of such racist terms would fall foul of the respondent's zero tolerance policy to racial abuse. It is not for the employment tribunal to decide what it would have done. In considering the actions of the respondent in choosing to terminate the claimant's employment, it is clear that the sanction of dismissal falls within the range of reasonable responses of a reasonable employer.

40. Taking the entirety of the evidence into account I conclude that Ms Bishop's decision and her consideration of the available evidence including the CCTV falls within the band of reasonable responses of a reasonable employer.

The Appeal - On the claimant's appeal, the respondent did not allow the claimant to call witnesses you wish to call at the appeal, or arrange for the two drivers who had made statements to attend the appeal so that the claimant's trade union representative and ask them questions.

41. I have identified flaws within the appeal process:
- 41.1. Mr Smith acknowledges that the claimant requested access to the accusers. Ms Bishop dealt with this matter by way of seeking to understand the questions raised of the witnesses and addressing them on paper. Mr Smith's response was that the claimant had to follow procedure and fill in a 'DP2 form'. Mr Smith does not engage with the substance of the request at all.
 - 41.2. The claimant has sought to introduce character references and Mr Smith is dismissive of them. He erroneously states that that the claimant has been informed it was against company policy to rely character witnesses and witness statements should be used instead.
 - 41.3. Mr Smith concludes that the claimant's behaviour was entirely unacceptable regardless of the alleged racial comments. The only disciplinary allegation refer to the alleged racial comments. The other matters raised were considered background information.
 - 41.4. Mr Smith notes that Mr Caferoglu complained that the claimant had history of being picked upon but complains that no examples of supporting evidence was put forward to corroborate that allegation. It was acknowledged during the course of his evidence that the claimant had been a victim of an incident previously, where the accused had been transferred to a different garage as a result of that incident.
 - 41.5. Mr Smith refers erroneously to a previous incident involving racial abuse.

I consider all of the above to be flaws within the appeal process. I also accept on the balance of probability that Mr Smith did behave aggressively and without due courtesy to the claimant as alleged by the claimant. This is likely to have added to the claimant's sense of injustice.

42. However, when viewing the entirety of the flaws identified, I must consider whether they are such to render the original dismissal unfair. The disciplinary allegation that resulted in the claimant's dismissal in this particular circumstance is very narrow. The allegation is that the claimant used two racially abusive terms on one occasion. Mr Smith states that it was the appeal panel's reasonable belief that the claimant did make the comments and the decision to dismiss was upheld. This is the crux of the allegation. The character witnesses were not present and are unlikely to be accepted over evidence from two witnesses who were present. The issue of access to the accusers has not moved from that advanced during the

disciplinary and submitted during the hearing, relating to the requirement for the accusers to address the allegation in person. I do not consider that a failure to allow access in person to the accusers would render the appeal outside the band of reasonable response. Mr Smith engaging with this matter is in reality most unlikely to have advanced the claimant's position. In the circumstances, although I have identified flaws within the appeal process, considering that the original dismissal was deemed to be fair and the appeal covered the crux of the disciplinary allegation I do not consider those flaws sufficient to render the original dismissal unfair.

43. If I am wrong, and the dismissal is deemed unfair by reason of an unfair appeal, in light of the evidence available, the existence of a witness to the alleged comments and the narrowness of the allegations, I conclude on the balance of probabilities that an alternative appeal process avoiding the flaws identified and taking the character evidence into account would not have overturned Ms Bishop's decision.
44. Finally, I would like to stress, that in the absence of a wrongful dismissal claim, the tribunal was not required to make and did not make any finding of fact as to whether the claimant was guilty of the racial abuse as alleged.

For the reasons set out above I conclude that the claimant's allegation of unfair dismissal fails, and his claim is dismissed

Employment Judge Skehan

Date:08/12/2020.....

Sent to the parties on: ..09/12/2020.....
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For the Tribunals Office