EMPLOYMENT TRIBUNALS

Claimant: **Ms Bolanle Odukoya**

Respondent: **London General Transport Services (Go Ahead London Limited)**

Heard at: **East London Hearing Centre**

On: **10 & 11 December 2020**

Before: **Employment Judge Tobin**

Representation
Claimant: Mr L Ogilvy (legal representative)
Respondent: Mr R Bailey (counsel)

JUDGMENT having been sent to the parties on 14 December 2020 and reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, reasons are set out as follows.

REASONS

The Case

1. The claimant issued proceedings on 2 October 2019. In her Claim Form, the claimant claimed unfair dismissal and outstanding notice pay and holiday pay. Respondent contended that the claimant had been dismissed fairly for capability and that the claimant was paid her notice pay in full as well as accrued holiday pay. The claim and the issues to be determined was summarised by Employment Judge Jones on 13 March 2020. By the time that the claim came to this hearing the only matter pursued was the unfair dismissal claim.

2. The hearing proceeded as a remote hearing which was consented to by the claimant and the respondent. The form of remote hearing was by a video hearing through HM Courts and Tribunal Service Cloud Video Platform and all the participants were remote (i.e. no one was physically at the hearing centre). A face-to-face hearing was not held because it was not practical in the light of the coronavirus pandemic and the government's ensuing restrictions. All of the

issues identified by EJ Jones could be determined in this remote hearing.

The law

3. The claimant claims that she was unfairly dismissed, in contravention of section 94 Employment Rights Act 1996 ("ERA").

4. Section 98 ERA sets out how the Tribunal should approach the question of whether a dismissal is fair. First, the employer must show the reason for the dismissal and that this reason was one of the potentially fair reasons set out in s98(1) and s98(2) ERA. If the employer is successful at that first stage, the Tribunal must then determine whether the dismissal was fair under s98(4):

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

5. The s98(4) test can be broken down to two key questions:

   a. Did the employer utilise a fair procedure?

   b. Did the employer's decision to dismiss fall within the range of reasonable responses open to an employer of this size and type?

6. S98(2)(a) ERA provides that an employer may fairly dismiss an employee for a reason that "relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do". Capability is defined in s98(3)(a) ERA as "capability assessed by reference to skill, aptitude, health or any other physical or mental quality".

7. An employee may be fairly dismissed for long-term sickness. The nature and likely duration of the illness and the length of service of the employee are relevant, as are the needs of the employer. A key employee or an employee in a small organisation may need to be replaced by an employer more quickly than a less vital employee or one in a larger organisation. Ultimately, the test is whether the employer could reasonably be expected to wait any longer for the employee: *Spencer v Paragon Wallpapers Limited [1976] IRLR 373*.

8. The employer should consult with the employee concerning the nature and lightly lengths of the illness, seek medical advice relating to the condition of the employee and consider whether suitable alternative employment can be offered.

9. In *Frewin v Consignia plc [2003] All ER (D) 314 (Jul)*, the Employment Appeal Tribunal ("EAT") stated that, when considering the fairness of the dismissal, a Tribunal is entitled to take into account whether the incapacity was caused by the employer:

> The weight to be attached to that factor would depend on all the circumstances of the case. In some instances, the existence of causation could render a decision to dismiss unfair; In other cases it might not. Thus the existence of a causative link would not require the conclusion that the decision to dismiss had been unfair or raised any

presumption of unfairness. It was merely a factor to be considered and weighed in the balance.

10. In *L v M UKEAT/0382/13* the EAT held that if an employer was responsible for an employee's ill-health, such as as an industrial disease or stress caused by bullying or the mishandling of a grievance, this will be a relevant consideration as to whether and when it is reasonable to dismiss for that incapacity.

11. In *West Midlands Cooperative Society Limited v Tipton [1986] ICR 192* the House of Lords determined that the appeals procedure was an integral part of deciding the question of a fair process. Indeed, a properly conducted appeal can properly reinstate an unfairly dismissed employee or remedy some procedural deficiencies in the original hearing.

12. In judging the reasonableness of the employer's decision to dismiss an Employment Tribunal must be careful to avoid substituting its decision as to what was the right course of action for the employer to adopt for that which the employer did, in fact, chose. Consequently, the question for the Tribunal to determine is whether the respondent's decision to dismiss the claimant fell within the band or range of reasonable responses open to a reasonable employer: see *Foley v Post Office; HSBC Bank plc v Madden 2000 ICR 1283*. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached: *J Sainsbury plc v Hitt 2003 ICR 111 CA* and *Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 669 CA.*

The evidence

13. I (i.e. the Employment Tribunal) heard evidence from the dismissing officer and the appeal officer on behalf of the respondent and from the claimant. Mr John Canning, Operating Manager of the River Road Bus Garage, was the dismissing officer. He submitted 2 witness statements, dated 8 January 2020 and 18 February 2020. Mr Nigel Wood was the Interim General Manager Operations of Go Ahead London and was the appeal officer. He submitted a witness statement dated 9 January 2020. The claimant provided an amended statement dated 21 May 2020. All witnesses confirmed their statements and were asked questions by the representatives. I also ask questions to help clarify matters.

14. I also considered a hearing bundle consisting of 276 pages. At the outset of the hearing, I emphasised to the parties that, as a matter of course, I would not read all of the documents contained in a Hearing Bundle. I stated I would read documents referred to me by a representative or party or which had been cross-referenced in a witness statement. I said I may read additional documents that have not been referred to me and, if so, I would identify those documents; however, I emphasised that if a party thinks a document was relevant and important, then he or she should bring that document to my attention.

15. There was not much evidence in dispute in this case. However, where any dispute occurred, I preferred the evidence of the respondent's witnesses. Both Mr Canning and Mr Wood were clear in their evidence. Their answers to questions were consistent with the contemporaneous documents and both acknowledged their errors, i.e. Mr Canning in not making sure that the claimant had all of the documents prior to the disciplinary hearing and Mr Wood's for his

perfunctory appeal outcome letter. The claimant's evidence was unreliable and untruthful in respect of her injury and illness. She contended that she was fit enough to return to work shortly after her dismissal, when patently this was not the case judging by the medical evidence and the incapacity-related benefits (Employment and Support Allowance or "ESA") she claimed and was awarded following her dismissal.

Findings of fact

16. I made the following findings of fact. I did not resolve all of the disputes between the claimant and the respondent, I merely concentrated on those disputes that would assist me in determining whether or not the claimant had been unfairly dismissed. I have set out how I have arrived at such findings of fact where this is not obviously or where, I determine, this requires further explanation.

17. The claimant was employed as a bus driver by the respondent. Her employment commenced on 6 April 2007 with the East London Bus and Coach Company Limited [see Hearing Bundle pages 38-45]. This employer was a successor company pursuant to the Transfer of Undertakings (Protection of Employment) ("TUPE") Regulations. On 26 August 2017 the claimant's employment transferred to the respondent company from Stagecoach Group plc [HB104-106].

18. In January 2012 the claimant changed from full time work to part time work because of problems with her back and childcare commitments [HB74A-74B]. The claimant was working 5-days per fortnight.

19. On 28 December 2018 the claimant was involved in a tripping accident at work which resulted in her taking substantial time off work. The claimant complained of left hip pain [HB108] and, according to the accident reporting officer, the claimant explained that she had pre-existing pain in her left leg and was awaiting a right knee replacement [HB109].

20. Following her injury, the claimant provided a medical certificate dated 31 December 2019. She was signed off until 18 January 2019 with left knee injury, osteoarthritic changes noted [HB195].

21. On 14 January 2019 the respondent undertook a sickness absence review by telephone [HB113]. The claimant said her left and right legs were bruised, and she advised that she may have arthritis. She said she was struggling with one crutch.

22. On 21 January 2019 the claimant went to the depot to drop off her sick note, she met Brian Norton, Assistant Operations Manager [HB114]. The claimant said she had been referred for physiotherapy, she could not balance and needed 2 walking sticks. Her medical certificate of that date stated musculoskeletal pain, left knee injury following a fall, osteoarthritis. The claimant was signed off until 17 February 2019 [HB196].

23. The claimant returned to work on 21 February 2019 [HB117-118]. She had a driver assessment on 22 February 2019 (which she passed). The claimant then went off work on 26 February 2019 with lower back pain as she was unable to

drive the bus due to her pain [HB122].

24. The claimant was given a further sicknote on 27 February 2019 for low back pain and signed off until 24 March 2019 [HB197]. The claimant received a further medical certificate on 23 March 2019 stating sciatica, low back pain, awaiting physiotherapy. This signed her off until 30 April 2019 [HB198].

25. On 25 March 2019 the claimant had an absence review meeting with Ian Gough, Assistant Operating Manager. The claimant complained of lower back pain, down her hip on left side. Mr Gough said that the respondent would need to refer her to occupational health for assessment and raised the possibility of a "medical dismissal" if she could not return to work [HB122].

26. The claimant was assessed by the respondent's Occupational Health Physician, Dr Hughes, on 16 April 2019 [HB124-126]. Dr Hughes assessed the claimant under a long-term sickness and alternative employment assessment criteria. Dr Hughes confirmed that it was not possible to predict a timescale for the claimant to return to normal duties. He assessed that the claimant it could not undertake either her normal duties with adjustments or some other duties. Dr Hughes' assessment casted an unfavourable picture for the claimant and it is worth quoting his comments in full:

> This lady is having appropriate medication from her GP for ongoing lower back pain and possible left sciatica. She is also awaiting a knee replacement.
> She admits that she was suffering with some back and knee pain before her fall but she alleges things have got substantially worse since the fall.
> She is awaiting a physiotherapy appointment at this time.
> The prescribed medication is causing her to feel sleepy. She tells me she can walk no more than 10 to 15 paces before she gets pain. Sleeping is a problem As you can only sit comfortably for 20 minutes.
> Today it was difficult to examine her but she struggled through she has very restricted movements of her lower back and have a legs. She walked with 2 crutches.
> She is now 3½ months since she has been off work. Her range of movement is extremely restricted both subjectively and objectively. She remains in pain. I am unable to tell you when this lady will be able to return to her normal contractual duties.

27. The claimant received her next medical certificate on 24 April 2019. This signed her off for another month until 31 May 2019 with sciatica, low back pain, awaiting to start physiotherapy [HB199].

28. On 29 April 2019 further consultation meeting was held. The claimant was awaiting physiotherapy and the respondent, which it would try to arrange [HB129]

29. On 29 May 2019 the claimant was signed off work for a little more than 2 months, i.e. until 4 August 2019 with sciatica, low back pain, undergoing physiotherapy [HB200].

30. On 30 May 2019 Mr Gough wrote to the claimant to invite her to a sickness absence review meeting. The letter referred to monitoring the claimant's absence in line with the long-term sick procedure and the outcome of company doctor's appointment. Mr Goff said the Garage General Manager would consider the likelihood of the claimant returning to work but that a possible outcome of this meeting could be that the claimant's employment might be terminated under grounds of capability (i.e. medical grounds) [HB132].

31. The sickness review meeting proceeded on 10 June 2019. The claimant was accompanied by her trade union representative. Mr Canning discussed the claimant's medical situation and reviewed her progress since commencing her absence. Apart from returning to work between 22 to 26 February 2019, the claimant remained off work from 28 December 2018, and she was signed off until 4 August 2019. Mr Canning noted that the claimant's medical condition had not improved the claimant had been waiting for physiotherapy. In evidence Mr Canning said that the claimant was off work for 5½ months, and she was not ready to return to work. He said that he did not see that there was any potential for the claimant to return to work within a reasonable, or even foreseeable, time period. He dismissed the claimant by reason of ill-health capability [HB133-134].

32. The claimant appealed against her dismissal on 23 June 2019 [HB135-136]. The claimant's grounds of appeal were:

    1. Her dismissal was unfair as it was not the claimant's fault that she was absent from work; it was due to an accident at work.

    2. The dismissal officer did not take steps to discover the claimant's medical condition and likely prognosis.

    3. The dismissal did not take into account the claimant's length of service and her conduct which indicated that she was likely to take steps to return to work as soon as she could.

    4. No reasonable employer would have dismissed the claimant 4 weeks after starting physiotherapy.

    5. There were no reasonable grounds for the dismissing officer to believe that it was unlikely for the claimant to return to work in the foreseeable future.

33. Mr Nigel Wood heard the claimant's appeal on 9 July 2019 [HB140-147]. The claimant was represented by a trade union official from Unite. The claimant confirmed that she was provided with the documents considered at the hearing. Mr Wood upheld the decision to dismiss the claimant [HB162-163]. Mr Wood's appeal outcome letter was lazy in that it did not fully address the claimant's grounds of appeal. He determined that the claimant remained unfit to work or to drive a bus, still was attending physiotherapy and he could have no idea when she might return to work. At the hearing, we went through the minutes of the appeal hearing carefully and I am satisfied that Mr Wood fully addressed the claimant's grounds of appeal.

Determination

<u>What was the reason for the dismissal?</u>

34. The Claim Form contends that that the claimant's employment was terminated because the respondent thought that it could then re-employ her on different less favourable terms and conditions of employment to her pre-existing TUPE-transferred terms. This was supposed to be a conspiracy underpinning the

capability dismissal and was identified in the list of issues.

35. The claimant did not raise this issue at her termination or appeal hearings, so it appears to be an after-the-event argument raised by her representative. Furthermore, the claimant does not point to any particular provision in her contract or terms of employment, which she considered favourable and which she might lose. Both Mr Canning's dismissal letter and Mr Wood's appeal outcome identify the claimant's incapability, i.e. her sickness absence, as the reason for her dismissal. There was not a shred of evidence to support the claimant's counter-factual theory.

36. The claimant's employment was terminated because she could not return to work as a bus driver. Under the circumstances, I am satisfied that the claimant was dismissed for a capability reason, pursuant to s98(2)(a) ERA.

Whether the Respondent had conducted enough reasonable investigation on which to base a conclusion that the Claimant was not capable of performing the duties of her job?

37. Following her accident at work on 28 December 2019, the claimant submitted sicknotes for up to 7 months. The claimant tried to return to work in late February 2019, but she went off sick again for with lower back pain as she could not drive her bus. The sick notes are consistent in identifying lower back pain, possible sciatica, and a pre-existing knee complaint. Indeed, the claimant had previously raised with her employers her back condition (which was possibly a degenerative illness) and her wait for a knee replacement.

38. The respondent referred the claimant for an occupational health assessment from a qualified medical practitioner. Dr Hughes undertook a full assessment. He identified all of the claimant's medical conditions as relevant to her inability to work. In his report of 16 April 2019, Dr Hughes was unable to predict when the claimant might return to work.

39. The claimant contended at the hearing that the respondent utilised the wrong sickness procedure as a former employer's sickness policy ought to have applied. This argument had not been raised by the claimant, or her trade union representative, prior to her dismissal nor had it been raised in her appeal. The claimant could not identify any particular detriment associated with this procedural argument. I am not going to determine which sickness management policy might have been the more appropriate because this is not a TUPE claim nor is there a claim for breach of contract pursued. In an unfair dismissal case, I look to the fairness of the process and the range of reasonable responses test applies to the procedure adopted. Even if an incorrect sickness procedure was followed, which I am not convinced happened in this instance, I find that the respondent adopted a substantially fair procedure or process in managing her sickness absence and in assessing the claimant's fitness to return to work. The respondent met with the claimant or consulted with her at least 5 times and referred her to an occupational health doctor for assessment before dismissing her. The process was thorough and sufficiently detailed for a proper decision to be made.

40. The claimant did not identify any person subject to the respondent's sickness process who was given a lengthier recovery period. The respondent had explored alternative work but, such was the claimant's ongoing condition, she could not have undertaken any other role.

Whether it was reasonable for the Respondent to come to that conclusion at the time that it did.

41. The claimant's case is that the respondent did not allow her to have the 8 physiotherapy sessions with Ascenti before making the decision to dismiss and that this might have made a difference. The respondent offered such physiotherapy benefit to employees, and the claimant sought a referral. Mr Wood noted at the appeal hearing that there had been some form of mix-up or delay in pursuing a physiotherapy referral. There was no contractual obligation on the respondent to provide this treatment nor was there an obligation for the respondent to fund medical treatment for its employees.

42. The claimant submitted that she should not have been dismissed because she had a contractual entitlement to 26-weeks full rate pay followed by 26-weeks ½-rate pay based on her original East London Bus contract [HN40-41]. The claimant and her representative had not read her contract properly nor do they understand the law in respect of this argument.

43. The claimant's contract of employment clearly stated (prominently under the table that set the entitlement):

> There is no maximum and no minimum period of sick leave. Each period of sick leave is reviewed regularly. Management are not obliged to grant the maximum duration of sick leave before a decision may be taken, on the merits of an individual's case to terminate employment. Further sick leave will only be granted where there is a reasonable prospect of a return to duty.

The contract is so clear that it does not need any further explanation.

44. In any event the case law provides clarification where the contract is not clear (unlike this instance). *Coulson v Felixstowe Dock & Rly Co [1975] IRLR 11* confirmed that a sick pay scheme is merely a financial arrangement and does not, in itself, indicate the amount of sickness absence to which the employee was entitled. It held that the dismissal of an employee before his sick pay entitlement had run out was fair, since his absence had caused a good deal of inconvenience.

45. Both Mr Canning and Mr Wood were clear in their evidence that it was the respondent's practice to avoid keeping staff "on the books" where there was no indication if they could return to work (either with or without reasonable adjustments). So the *Spencer v Dragon Wallpapers* test is satisfied.

46. In any event, the reality of what happened after the claimant's dismissal is determinative of whether or not the claimant's dismissal was too hasty. The claimant was assessed independently as incapable of undertaking any work and was paid ESA [HB258-261] until February 2020 when she was assessed as fit to do some work [HB236-237 & 242-257].

Whether, taking into account all of the relevant circumstances, including the size of respondent's undertaking and the substantial merits of the case, the respondent acted reasonably in treating her capability issue as a sufficient reason to dismiss the claimant.

47. The claimant contended that her tripping accident was the respondent's fault, irrespective of whether or not this aggravated a pre-existing lower-back or knee condition. She contends therefore that her employer should have afforded her greater latitude before dismissing her. I do not accept this argument. The claimant intimated a personal injury claim though solicitors [HB217-223] in April 2019 to which the respondent's solicitors responded [HB215-216] enclosing evidence which refuted the claim. Whether or not this claim is pursued (the respondent's representative said that the claimant dropped this legal action), the respondent did not accept that it exposed the claimant to risk or that it was responsible for the claimant's injury.

48. Mr Canning terminated the claimant's employment with immediate effect, which was not the correct way to deal with this capability dismissal as the claimant should not have been summarily dismissed. Having heard from Mr Canning, I am satisfied that this was a genuine error and the result of ignorance and/or bad advice. In any event the claimant was paid in lieu of her notice, so she did not suffer any financial detriment by her dismissal not taking effect upon the expiry of her notice period.

49. At the time of her dismissal on 10 June 2019 the claimant had completed 12-years' service. It is a shame that Mr Wood's appeal outcome letter did not formally respond to each point of the claimant's appeal, as after long and good service she deserved a considered and respectful response.

50. Both Mr Canning and Mr Wood offered to re-employ the claimant if or when she got better. Indeed, Mr Wood informed the claimant that she could be re-employed on a fast-stream process.

Was the respondent's decision to dismiss the claimant within the range of reasonable responses of a reasonable employer?

51. Drawing the above threads together, it has never really been a matter of dispute that, at the time of her dismissal (and appeal), the claimant was incapable of working as a bus driver. The real issue is whether the respondent adequately investigated what the prospects were of the claimant returning to work as a bus driver within a reasonable time. At the point of dismissal (and appeal) there was no medical evidence indicating a return date. There was nothing to suggest that Dr Hughes assessment was inaccurate or overtaken by any improvement in the client's condition. The medical evidence indicated an open ended and ongoing problem with no return-to-work date in the foreseeable future. Indeed, the claimant's claim for incapacity-related benefits demonstrated that the decision to dismiss had not been too hasty.

52. I determine that the respondent's dismissal of the claimant was within the range of reasonable responses.

Employment Judge Tobin
Date: 29 March 2021