



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4114942/2019 (V)

Held in Edinburgh on 22nd – 24th March 2021 by Cloud Video Platform (CVP)

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Employment Judge A Jones

Mr S Beech

**Claimant
In Person**

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Lothian Buses Ltd

**Respondent
Represented by:
Mr W Rollinson -
solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the judgment of the Employment Tribunal that the claimant was not unfairly dismissed and therefore his claim is dismissed.

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REASONS

Introduction

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1. The claimant presented an application to the Tribunal on 23rd December 2019 raising a number of claims arising out of his dismissal on 27th September 2019. Following an Open Preliminary hearing on 13th October 2020 before Employment Judge J G d'Inverno, a number of those claims were dismissed.
2. A final hearing took place to consider the remaining claim of unfair dismissal. The hearing took place on the Cloud Video Platform. The claimant appeared in person and the respondent was represented by Mr Rollinson, solicitor. A

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joint bundle of documents was provided for use at the final hearing and this included CCTV footage. Written witness statements formed the basis of the witnesses' evidence in chief. A list of issues was also provided to the Tribunal.

- 5 3. The Tribunal heard evidence from three witnesses on behalf of the respondent: Mr Ferguson, who had taken the decision to dismiss the claimant, Mr McQueen who chaired the first appeal hearing against the claimant's dismissal, and Mr McCallum who chaired the final appeal hearing.
4. The claimant gave evidence on his own account and did not call any further
10 witnesses.

Findings in fact

5. Having considered the written and oral evidence, the productions before the Tribunal and submissions made by both parties, the Tribunal found the following facts to have been established.
- 15 6. The claimant commenced work as a bus driver with the respondent on 15 September 2008. He undertook training at the commencement of his employment and was required to take part in ongoing training.
7. The claimant had undertaken the Certificate of Professional Competence qualification which is a professional qualification for bus drivers and requires
20 35 hours of classroom training every five years. The training includes how to deal with vulnerable road users such as cyclists.
8. The respondent operates a disciplinary procedure which is agreed with the trades unions.
9. The claimant was during his employment a member of UNITE the union.
- 25 10. During working time, while driving a double decker bus, the claimant was involved in an incident on Leith Walk in Edinburgh with a cyclist at around 20.34 hours on 21st September 2019. As a result of the incident, the cyclist was injured and taken to hospital. The cyclist had not been wearing reflective or protective clothing or cycling helmet at the time of the incident.

11. The cyclist banged the outside wing mirror of the bus being driven by the claimant as the claimant was pulling out of a bus stop. The claimant had not seen the cyclist prior to pulling out of the bus stop. The claimant used his horn.
- 5 12. The cyclist then pulled in front of the claimant's bus, made obscene gestures and used foul language towards the claimant.
13. The bus being driven by the claimant then hit the cyclist who fell off his bike.
14. The claimant called his control room and emergency services. A number of passengers disembarked the bus and at least one of them provided
10 assistance to the cyclist until the emergency services arrived.
15. The claimant remained in his cab for nine minutes after the incident and then disembarked and took pictures of the cyclist's bike before checking on the cyclist's welfare.
16. The cyclist was then taken to hospital and the claimant returned with his bus
15 to his depot. The claimant then went home before the end of his shift.
17. An accident report was completed by a supervisor with input from the claimant (pp108-10). The supervisor, Mr O'Neill, also completed a report as part of this report.
18. An investigatory meeting took place between the claimant and Ms McDowall,
20 Central Staff Manager, on 23rd September. The claimant was advised at the end of that meeting that he was being suspended pending further investigation.
19. The claimant's suspension was confirmed to him in writing by letter dated 23rd September. The letter indicated that he was being suspended for
25 'Careless/reckless Driving 21/09/2019 – 20.34 collision with Cyclist)' (p114)
20. The claimant was then advised by letter dated 24th September that he was required to attend a disciplinary hearing on 27th September which was to be chaired by Mr Ferguson, traffic manager.
21. A disciplinary hearing took place on 27th September 2019. The claimant was
30 accompanied at that meeting by Mr Tams, Unite shop Steward. Ms Murphy,

People Manager was present to assist Mr Ferguson and take notes at the meeting.

22. Notes of the meeting were taken which were not verbatim, but were an accurate account of the key facts discussed at the hearing.
- 5 23. The claimant did not call any witnesses to the hearing, although he was aware that he could should he wish to do so.
24. During the course of the hearing, the claimant viewed the CCTV footage of the incident. The claimant was also advised that he could view the footage again if he wished to do so, but declined the offer.
- 10 25. The claimant did not raise before or during this hearing that he had raised a grievance against Mr Ferguson.
26. Mr Ferguson adjourned the hearing for just over an hour after which he informed the claimant that he had taken the decision to dismiss him for gross misconduct. During the adjournment, Mr Ferguson viewed the CCTV footage
15 again. The claimant was advised that he had the right to appeal the decision to dismiss him to Mr McQueen.
27. The claimant's dismissal was confirmed to him in writing after the hearing. (pp124-5). The letter included a copy of the notes from the disciplinary hearing and indicated that if the claimant did not agree with the notes, to
20 contact Mr Ferguson. The claimant did not at any stage during the internal procedures challenge the accuracy of the notes of the disciplinary hearing.
28. The claimant appealed against the decision to dismiss him in writing on 4th October. His grounds of appeal were that 'the decision was too harsh and that I should not have lost my job for this incident. I feel that no one has
25 listened to my story and that the cyclist involved did not have any lights on and was under the influence of alcohol. The police also stated that I was not blameworthy for this accident.'" (page 126)
29. The claimant was advised by letter dated 7th October that his appeal would be heard on 14th October.

30. The appeal was chaired by Mr McQueen who was assisted by Ms Livesey, People Officer who also took notes at the hearing. The notes were not verbatim but were an accurate record of the meeting.
31. The claimant was accompanied at the appeal hearing by Mr Pearson who
5 was the Unite Chairman.
32. After a 35 minute adjournment, Mr McQueen advised the claimant that his appeal had not been upheld. Mr McQueen's decision was confirmed in writing to the claimant by letter dated 18 October. A copy of the notes of the hearing were enclosed with the letter which stated that Mr McQueen would 'assume
10 that they are a fair representation of the disciplinary hearing if I do not hear back from you within 5 days.' The claimant did not dispute the minutes.
33. The claimant was also advised that he had a further right of appeal to Mr McCallum. The respondent had agreed with the relevant unions that Mr McCallum would deal with all final appeals involving drivers.
- 15 34. The claimant set out four grounds of appeal to Mr McCallum in a letter dated 30 October. (page 135)
35. The claimant was then invited to a final appeal hearing by letter dated 4 November which was to take place on 8 November.
- 20 36. A final appeal hearing took place on 8 November and the claimant was again accompanied by Mr Pearson. Mr McCallum was assisted at the hearing by Ms Murphy, People Manager, who also took notes of the meeting. After an adjournment of 50 minutes, Mr McCallum asked the claimant if he had anything further to add. He then advised the claimant that he was upholding the original decision to dismiss him. Mr Pearson asked Mr McCallum if he
25 would consider dropping the allegation to misconduct 'Especially at this time of year, when he [the claimant] is strapped for cash.'. Mr McCallum indicated that he would think about it and deal with it in his letter.
37. Mr McCallum then wrote to the claimant by letter dated 13 November, when he stated:
- 30 'In summary it is my view that you should have seen this cyclist and reacted accordingly and that your failure to do this amounts to gross misconduct. On

that basis I do not think it is appropriate to consider dropping the incident to misconduct. As such, it is my decision to deny your appeal and uphold the decision to dismiss you for driving standards that resulted in this accident taking place. As this is the final stage of the process the company's procedure is not exhausted.'

38. The claimant had been being treated by his GP for depression since July 2019 and had been taking medication as a result.

39. The respondent did not receive any grievance raised by the claimant against Mr Ferguson during his employment.

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Observations on the evidence

40. Evidence in chief was given by way of written witness statements. The Tribunal viewed the relevant CCTV evidence during the evidence in chief of Mr Ferguson and again during cross examination of the claimant. All witnesses were cross examined.

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41. The respondent's witnesses were credible and reliable in their evidence. The claimant's evidence was at times contradictory and unclear. In addition, the claimant on occasion was evasive and did not answer questions asked in cross examination. The claimant's position before the Tribunal in relation to the incident which led to his dismissal was also often in conflict with the position he had adopted during the disciplinary and appeals process. For instance, the claimant maintained that the cyclist was 100% to blame for the incident in evidence before the Tribunal. However, during the disciplinary hearing he indicated that he thought the fault for the incident was 50/50 (p122).

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42. The claimant said in his witness statement that he didn't know where the bang on his offside had come from initially, and that he 'thought it came from a shop'. He didn't mention this at all during the internal procedures. The claimant was recorded during the disciplinary hearing as saying 'I seen the cyclist as he goes past and he slapped my wing mirror'.

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43. The claimant also indicated in his written statement that he did not come out of his cab initially because the union had advised drivers not to get out their cabs when there was a potential for aggressive behaviour from someone. He did not however raise this during the internal proceedings.
- 5 44. The claimant indicated that Mr Ferguson ought not to have conducted the disciplinary hearing as a grievance had been raised against him by the claimant. The claimant indicated that his trade union representative told him not to raise this matter. The Tribunal could not accept this evidence. The claimant indicated that, despite his union's advice he did raise the matter at
10 the disciplinary hearing but that this was not minuted. He also said that he was again advised not to raise the issue at his appeal and on this occasion followed that advice. Again the Tribunal could not accept this evidence. While the Tribunal accepted the claimant's evidence that he had fallen out with his trade union, the Tribunal found it very difficult to accept that if a grievance
15 had recently been raised against a decision maker in disciplinary proceedings, a trade union representative would not have raised this issue with the respondent. This was particularly so, given that there was no record of the grievance ever having been received by the respondent, or any mention in any minutes or correspondence of the issue being raised at any
20 stage during the disciplinary or appeals process. The Tribunal concluded that the matter was not raised at any stage because no grievance had ever in fact been submitted by the claimant.
45. The claimant also said that he had raised the matter of Mr McCallum not being sufficiently senior to deal with his appeal prior to the appeal taking
25 place. He indicated he raised it with his trade union. The Tribunal could not accept this evidence. The respondent's witnesses were clear that there had been an agreement with the trades unions that during the absence on maternity leave of the person who would normally deal with final stage appeals. Mr McCallum would deal with these.
- 30 46. The claimant also said that Mr McCallum had commented on the high dosage of the claimant's medication and that this had made the hearing unfair. There was nothing in the minutes to suggest that Mr McCallum had made any comment on medication the claimant was taking or that the claimant had

raised this matter himself. In any event, the Tribunal did not conclude that any discussion about the claimant's medication was likely to have a bearing on whether or not his dismissal was fair.

5 47. The claimant also said that Mr McCallum had raised a number of previous incidents in relation to the claimant's driving history which were not relevant during the appeal hearing. The notes of the hearing, which were consistent with the evidence of Mr McCallum, stated that it was the claimant who raised incidents he had been involved with in the past, not Mr McCallum. Where Mr McCallum's evidence was in conflict with that of the claimant, the Tribunal
10 preferred the evidence of Mr McCallum.

48. The claimant gave evidence that he was under stress during the internal proceedings, and that this would have been why he gave differing accounts of the incidents. The Tribunal accepted that the claimant would have undoubtedly been concerned by the events and that he would have found the
15 internal proceedings stressful. However it was not, in the opinion of the Tribunal, an explanation as to why in a number of material respects the claimant's evidence before the Tribunal differed to that given to the respondent during the disciplinary and appeals process. Therefore the Tribunal regrettably concluded that the claimant's evidence was at times
20 neither credible nor reliable.

Issues to determine

49. An agreed list of issues had been produced for the Tribunal (at pages 34-35) and the Tribunal accepted these as accurate. Essentially, the Tribunal was required to determine;
- 25 - whether the claimant had been dismissed for a potentially fair reason in terms of the Employment Rights Act 1996 ('ERA'), and
- whether the respondent had acted reasonably in terms of section 98(4) of ERA.
50. If the Tribunal found that the claimant had been unfairly dismissed, it would
30 then be required to determine whether, and if so how much, compensation should be awarded to the claimant.

51. In addition, the claimant indicated that if the Tribunal found in his favour, he wished to be reinstated to his role with the respondent.

Relevant law

52. In order to determine whether a dismissal is fair or unfair, it is first necessary to determine whether the reason for the dismissal is one of the potentially fair reasons set out in ERA. Section 98(2) ERA sets out the potentially fair reasons for dismissal. These include conduct (section 98(2)(b)) and some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held (section 98(1)(b)).

53. Where an employer has established a potentially fair reason for dismissal, that is not an end to the matter. Where a Tribunal is satisfied that an employee was dismissed for a potentially fair reason, a Tribunal must then apply its mind to the provisions of section 98(4) ERA which states:

Where the employer has fulfilled the requirements of subsection (1), the determination of the question 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 dismiss the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

This requires the Tribunal to consider whether in all of the circumstances, including the procedure which was followed, the dismissal of an employee was fair.

Submissions

54. The respondent invited the Tribunal to find that the claimant had been dismissed for conduct or in the alternative for some other substantial reason. The respondent's position was that it had acted reasonably in all the circumstances and that the decision to dismiss the claimant as well as the

conduct of the procedure adopted by the respondent at every stage including the appeals, were all within the band of reasonable responses.

55. The respondent made reference to a number of well-established authorities in order to support its submissions. In particular the respondent made reference to **Scottish Midland Co-operative Association Ltd v Cullion** [1991] IRLR 261

Boys and Girls Welfare Society v Macdonald [1997] I.C.R. 693; **Post Office v Foley**; **HSBC Bank plc (formerly Midland Bank plc) v Madden** [2000] IRLR 827; **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17; **British Homes Stores v Burchell** [1980] I.C.R. 303 and **Sainsbury's Supermarkets v Hitt** [2003] I.C.R. 111.

56. It was submitted that the respondent had followed its own procedure to the letter, and that its procedure was compliant with ACAS guidance.

57. The respondent said that there had been a genuine belief in the misconduct of the claimant, that it had reasonable grounds on which to reach that view and that the investigation was sufficiently thorough and fair.

58. The Tribunal was reminded that it must not substitute its own view of whether or not the claimant ought to have been dismissed, but consider whether the respondent had, at every stage of the process, acted within the band of reasonable responses.

59. In terms of evidence, the respondent submitted that the claimant was not credible and was evasive at various points during his evidence. The Tribunal was invited to accept that the respondent's witnesses had been genuine in their belief of the claimant's misconduct and had been credible witnesses.

60. If the Tribunal were to find the claimant's dismissal unfair, the Tribunal was invited to find that reinstatement would not be practicable, and that any compensation should be reduced to zero on the basis of the claimant's contributory fault. In addition, were the Tribunal to find that there were any procedural irregularities which rendered the claimant's dismissal unfair, the Tribunal should find that the claimant would have been dismissed in any event and therefore any compensation should be reduced to zero.

61. The claimant indicated that he would not make any legal argument in his submissions as he did not have the experience to enable him to do so. However, he submitted that he ought not to have been dismissed for his conduct. He submitted that it was not fair of the respondent not to accept his version of events in particular that he had not been aggressive towards the cyclist, and that there were irregularities in the CCTV footage which might have made Mr McQueen at least come to a different decision.
62. The claimant indicated that had the respondent waited for a police report into the matter, then they may have accepted that the cyclist was under the influence of alcohol. The claimant said that Mr Ferguson was not impartial because a grievance had been raised against him and that Mr McCallum also knew about the grievance. The claimant said that a number of his comments had not been noted in the minutes of the meetings, and that on the evidence before the Tribunal, the Tribunal should find that he had been unfairly dismissed.
63. The claimant asked the Tribunal to accept that he had not lied under oath and that the whole process had been very stressful, which would account for any inconsistencies in his evidence.
64. Although the claimant had indicated that he wished to be reinstated were he found to have been unfair dismissed, he did not address this matter or the respondent's objections to his reinstatement in his submissions. Rather, he addressed the issue of compensation and invited the Tribunal not to reduce any compensation for the reasons which had been suggested by the respondent.

25 **Discussion and decision**

65. The Tribunal had little hesitation in concluding that the claimant had been dismissed on the basis of his conduct. Although in his statement, the claimant suggested that he had a 'target on his back' following an issue in relation to a breach of the respondent's social media policy, and that he was a 'thorn in the side of Mr Ferguson' he did not lead any evidence to suggest that there was any other potential reason for his dismissal other than the incident on 21 September 2019.

- 5 66. The Tribunal was therefore required to determine whether the respondent had followed a fair procedure in relation to the claimant's dismissal, whether the tests referred to by the respondent and set out in **BHS v Burchell** were satisfied and whether the decision was within the band of reasonable responses.
- 10 67. The Tribunal accepted that the respondent had a genuine belief in the claimant's misconduct. Mr Ferguson concluded in his letter of dismissal to the claimant that the claimant's actions were 'entirely dangerous and unacceptable'. The Tribunal accepted that this was Mr Ferguson's genuine belief. The Tribunal also accepted the evidence of Mr McQueen and Mr McCallum that they were of the view that the claimant's actions amounted to gross misconduct.
- 15 68. The Tribunal did have some concerns regarding the extent of investigation conducted by the respondent prior to the disciplinary hearing of the claimant. Although the respondent indicated that they could not wait until they received a police report on the matter as it could take some time, it did not appear that they even considered this, and the respondent did not interview anyone else in relation to the matter. There was no attempt to contact the police or traffic officers who attended the incident.
- 20 69. The Tribunal understood the respondent's position to be that they did not accept that the cyclist was under the influence of alcohol at the time of the incident and appeared not to believe the claimant's evidence that he was told by multiple people that this was the case. The supervisor's report (at p110) narrated that the cyclist had been under the influence of alcohol so it was not clear why the respondent did not believe the claimant on this point.
- 25 70. However, the respondent did consider the extensive CCTV footage which was available of the incident. While the claimant indicated that there was a time lapse in this footage, the Tribunal accepted the respondent's witnesses' evidence that this would have made no difference to their decisions on what occurred.
- 30 71. In addition, all of the respondent's witnesses made clear that they were of the view that the cyclist's conduct had been entirely unacceptable. However, they

were all of the view that the claimant ought to have responded differently to that conduct by coming to a stop as soon as he was aware that there was a hazard on the road, rather than accelerating towards the hazard.

5 72. Therefore the Tribunal concluded that the investigation conducted by the respondent had been within the band of reasonable responses, and that the respondent had reasonable grounds on which to conclude that the claimant's conduct had amounted to gross misconduct.

10 73. The Tribunal was also satisfied that a fair process had been followed in relation to the claimant's dismissal and his appeals. The Tribunal did not accept that it was inappropriate for Mr Ferguson to have conducted the disciplinary hearing or that the claimant ever suggested that it was inappropriate. The Tribunal also accepted that there had been no breach of the respondent's disciplinary procedure by Mr McCallum dealing with the final appeal of the claimant. The Tribunal did not accept the claimant's criticism
15 that there was no agreement in writing between the respondent and the trade union regarding this, particularly as the claimant was represented by the trade union Chairman at the appeal hearing and he made no mention of anything being untoward in this regard.

20 74. It was clear that the claimant had an issue with the trade union and its representation of him during the process, but he did not lead any evidence on what had caused any issue or in what way he was disadvantaged by this, other than alluding to the trade union having lost his file. He did not suggest that the trade union had behaved in any way inappropriately in representing him.

25 75. The Tribunal then considered whether dismissal of the claimant was within the band of reasonable responses. The Tribunal reminded itself that it must not substitute its own view on whether or not the claimant ought to be dismissed but consider whether a reasonable employer would have dismissed the claimant. The claimant had 11 years' service and there were
30 no live disciplinary sanctions on his file. The claimant suggested that a final written warning would have been a more appropriate sanction. However, the Tribunal concluded that given the respondent had a genuine belief that the

claimant had acted in a dangerous and unacceptable manner, and given the nature of the claimant's duties where he worked unsupervised and was required to ensure the safety of passengers and other road users, the decision to dismiss the claimant was a reasonable one.

5 76. The Tribunal did give consideration to the claimant's evidence that other drivers had not been dismissed for incidents which were similar or more serious in nature and that therefore he had been treated inconsistently.

77. However, the Tribunal was not satisfied that there was sufficient evidence before it to conclude that there had been any inconsistency of treatment. In
10 the first instance, Mr Ferguson was not employed at the time of the incidents referred to by the claimant and had very little knowledge of them. They had taken place some years before the incident for which the claimant was dismissed. Moreover, the claimant did not lead evidence of the incidents he referred to other than some CCTV footage which was used in training
15 scenarios. There was no evidence regarding the wider circumstances of the incidents or the reasoning for any sanction or failure to impose any sanction on the relevant driver. Neither of the scenarios involved a cyclist and the incidents did not seem to the Tribunal to be sufficiently similar to warrant the comparison the claimant invited should be made.

20 78. Therefore, the Tribunal concluded that the claimant had been dismissed solely as a consequence of the incident on 21 September 2019, that the respondent had followed a fair procedure in relation to the claimant's dismissal and that the dismissal had been within the band of reasonable responses. The claimant's claim of unfair dismissal is therefore dismissed.

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Employment Judge: Amanda Jones
Date of Judgment: 29 March 2021
Entered in register: 06 April 2021
30 and copied to parties